

one to make health care decisions if you are unable to do so for yourself.

**What powers and obligations does the agent have?**

The agent has the powers listed in the POA, as well as additional powers that are implied by law. An agent also has duties, which may or may not be spelled out in the document. If an agent acts under a POA, the agent must act according to the principal's wishes or according to what the principal would have wanted. If the agent doesn't know what the principal wants, then the agent must act in the principal's best interest. The agent's responsibility is to the principal, not the principal's family. The agent may not act to benefit herself or others, except as specifically authorized in the POA. Sometimes a Financial Power of Attorney has a power that allows the agent to make gifts of the principal's property. It is wise to consult with a knowledgeable attorney prior to making gifts because there may be federal or state gift tax issues and/or penalties imposed on the principal for Medicaid eligibility purposes.

**When is a POA effective?** A POA is effective immediately when it is signed unless stated otherwise in the POA. For example, a Health Care Power of Attorney may take effect only when a doctor determines that the principal is unable to make or communicate his medical decisions. A Financial Power of Attorney is in effect only while the principal is alive and competent unless it is "springing," which means it does not become effective until the maker is determined to be incapable of making financial decisions, or the POA states that it is "durable" and survives the incapacity of the principal. Most POAs are "durable" so that the POA can be used when the principal is not capable of making his or her own decisions. If the principal dies or revokes the POA, the POA is terminated.

**Additional Resources**

To learn more about wills, trusts, powers of attorney and general estate planning, please consult the following resources:

- Estate Planning Fiduciary Law Section of the North Carolina Bar Association (<http://estateplanningandfiduciarylaw.ncbar.org/>)
- Estate Planning: Understanding the Basics, a publication of the North Carolina Cooperative Extension, N.C. State University (<http://www.ces.ncsu.edu/depts/fcs/pdfs/FCS522%20estate%20planning%20final.pdf>)
- List of attorneys certified by the N.C. State Bar Board of Legal Specialization as specialists in Estate Planning and Probate Law ([www.nclawspecialists.org](http://www.nclawspecialists.org))
- "Living Wills and Health Care Powers of Attorney" published in the *This Is The Law* series by the NCBA.
- Internal Revenue Service ([www.irs.gov](http://www.irs.gov))
- "North Carolina Estate Procedure" published by the North Carolina Administrative Office of the Courts ([www.nccourts.org/Forms/Documents/735.pdf](http://www.nccourts.org/Forms/Documents/735.pdf))

## Protecting Your Assets: Wills, Trusts and Powers of Attorney

*Protecting your assets and caring for your family are important issues during life and after death. Wills, trusts and powers of attorney are strategic documents to accomplish this goal. To be certain that your needs and desires are met, always consult an experienced attorney for the planning and drafting of these documents.*



*This pamphlet was prepared as a public service by the Communications Committee and is not intended to be a comprehensive statement of the law. North Carolina laws change frequently and could affect the information in this pamphlet. If you have specific questions with regard to any matters contained in this pamphlet, you are encouraged to consult an attorney. If you need an attorney, please contact the North Carolina Lawyer Referral Service, a nonprofit public service project of the North Carolina Bar Association, via phone (1-800-662-7660; local 677-8574) or online ([www.ncfindalawyer.org](http://www.ncfindalawyer.org)).*

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# PROTECTING YOUR ASSETS



## Protecting Your Assets: Wills, Trusts and Powers of Attorney

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## Wills

Having a will makes the emotional time after your passing easier for your family. You can lessen the burden on your family by planning for their care and financial well-being, by naming a guardian to take care of your minor children, by creating a trust for the benefit of your spouse and/or children, and by planning to save taxes.

**What is a will?** A will is a legal document that allows you to control how and to whom certain assets owned by you pass at your death. Your will can provide for the disposition of your home and other real estate, as well as personal property such as cars and bank accounts, to loved ones. There are formal requirements established by N.C. law that must be met for a will to be valid.

**Who may have a will?** Anyone 18 years of age or older may have a will. Without a will, N.C. law determines how and to whom your money, property, and personal belongings will pass. If you already have a will and circumstances in your life have changed, review it to be certain that it still expresses your wishes and desires. If you have a will from another state, you should have your will reviewed by a North Carolina attorney to ensure that it meets the requirements of N.C. law.

## The Probate Process in North Carolina

**What is probate?** Probate is the administration of a person's estate that is overseen by the Clerk of Superior Court. A person who has died is called the "decedent." The person who settles the decedent's estate is called the "executor" or "personal representative." An "executor" is typically nominated under the terms of the decedent's will although the Court must approve the appointment of the nominated person or financial institution. When a person dies owning assets in his or her name alone, the probate process must be started by a personal representative to handle the decedent's assets and take care of settling the decedent's affairs.

**What happens after probate is started?** The personal representative's job is to "settle the decedent's estate." This includes notifying beneficiaries, gathering assets, paying debts, accounting for all property that comes into and goes out of the estate, and properly distributing the decedent's property. The Clerk of Superior Court's job is to make sure that the personal representative carries out its duties. The personal representative is the only person legally authorized to deal with the assets of the estate and handle matters of estate administration.

**Do all of a decedent's assets go through probate?** No. Assets held with rights of survivorship pass automatically to the survivor and are not subject to probate. Assets

with designated beneficiaries such as life insurance policies, annuities, IRAs, and various retirement plans pass to named beneficiaries and are usually not subject to probate. The assets held in trust are governed by the terms of the trust and usually pass outside the probate process as well.

**How does the probate process end?** The probate process ends when the decedent's debts, taxes and administrative expenses have been paid, all of the remaining assets of the estate have been distributed, and the Clerk of Superior Court releases the personal representative from further responsibility for the administration of the estate.

## Minor Children

As a parent you want your child to be loved and nurtured, even after your death. Under the terms of your will, you may nominate a guardian for your child and set aside funds for his or her care and well-being.

**What are the considerations in choosing a guardian?** Often it is best to choose a family member or a close friend you and your child know well, and who shares your values and beliefs. It is also important to consider the personal circumstances of the guardian. Where the guardian lives, as well as his or her financial, physical and emotional well-being, will affect your child. The Clerk of Superior Court will consider your recommendation (see N.C.G.S. 35A-1225) as a strong guide in appointing a guardian, but the Clerk is not bound by your recommendation if the Clerk finds that a different appointment is in the child's best interest. You may recommend a successor guardian in your will in the event your first choice is unable to be the guardian. Ask the guardian if he or she is willing to serve in this role before naming him or her in your will. If the person you recommended as guardian is no longer the person you wish to care for your child, you should change your will.

**How can I leave property to my minor children?** You can make financial arrangements for your minor children's care in your will. If you do not arrange for the management of property inherited by your minor children, N.C. law provides a statutory method for the management of the property for the child's benefit. Your will can provide that your child's inheritance will pass into a trust for the child's benefit. The trust can ensure that the funds are used for the child's education, health, and general well-being. You can determine when the child will receive those funds. For example, instead of an 18 year old inheriting a large sum of money, you can require that the child be older before he or she can own the inheritance outside of the trust. Regardless of the age you determine to be a responsible age for your child to inherit your estate, you can be assured that the child's needs will be paid for by the person, or financial institution, you appoint to manage those funds for your child. This person is called a "Trustee." The trustee and

guardian may be the same person, but they don't have to be.

## Trusts

**What is a Revocable Living Trust?** A revocable living trust (RLT) is an agreement between its maker (sometimes called the grantor or settlor) and a trustee. Under that agreement, the maker transfers assets to the trustee and gives instructions to the trustee concerning the management of the assets while held in the trust. The instructions specify how the assets are to be held and used during the maker's lifetime, as well as how the assets are to be distributed following the maker's death. A person can be both the maker and the trustee of a RLT. The term "revocable" refers to the fact that the maker has the power to change or do away with the trust. The maker also has the power to add or remove assets from the trust and control and direct all payments from the trust. If the maker is also the trustee, he or she can make all decisions concerning the assets in the trust. The assets titled in a RLT will avoid probate at the maker's death. Unlike wills, RLTs can provide a way to manage your assets during periods of disability.

**Will a revocable living trust help me avoid taxes?** RLTs are tax neutral. Both wills and trusts can help avoid estate taxes, but must include specific provisions to do so. If you require tax planning, you should make sure that an experienced estate planning attorney handles your planning, whether you choose to do so by will or RLT.

**Why do I hear so much about revocable living trusts?** Groups or individuals who are not attorneys, and are not bound by professional licensing boards or ethical rules, sometimes market living trusts. Sometimes, exaggerated statements of costs and delays in the administration of estates are used as part of high-pressure sales tactics to convince the public to "buy" these trusts, even though the trust documents may not be suitable for a particular person. Always consult an attorney before agreeing to "buy" documents. A licensed attorney is the only professional who is authorized to draft documents pursuant to N.C. law, and he or she is bound by ethical requirements to help a client determine if a trust is a suitable estate planning tool for the client's particular situation.

## Abusive Trust Arrangements

**What is an "abusive trust arrangement?"** "Pay no income tax!" "Pass your property to your children free of federal estate tax!" "We can help you shelter your income and your property from state and federal taxes forever!" These are examples of claims made by promoters of abusive trust arrangements, who usually promise tax benefits with no meaningful change in the taxpayer's control or use of his or her income or assets. Abusive trust arrangements are trust arrangements that claim to reduce or eliminate federal taxes in ways that are not permitted by federal tax laws.

**How will I know if a trust is an abusive trust?** Abusive trust arrangements may be marketed under the following names: Pure Trust, Constitutional Trust, Contractual Trust, Patriot Trust, Freedom Trust, Unincorporated Business Trust, Complex Trust, and by any other names referring to constitutional issues, fairness, equity, or patriotic themes. The promoters of abusive trusts may claim that "The wealthy have been doing this for years" or "Your attorney wouldn't understand it."

**What can I do to protect myself?** Remember, if it sounds too good to be true, it probably is. Ask an attorney to review the materials provided by the promoter.

## Estate Taxes

**What is the estate tax?** The estate tax is a tax on the right to pass property to others at your death. Both the federal and the state departments of revenue assess an estate tax when a person dies.

**Who is affected by the estate tax?** Fortunately, most people are not affected by the estate tax. A person who dies in 2011 or 2012 can pass \$5 million to his or her heirs or other beneficiaries. In 2013, this exemption amount will be reduced to \$1 per person. It is important to note that the law may change at any point in time, resulting in a larger or smaller state tax exemption.

**Is it true that life insurance isn't taxed at death?** Generally, life insurance is not subject to income tax when the proceeds are received by your beneficiaries; however, any assets that you own or control, including life insurance, IRAs, houses, bank accounts, and other property are part of your estate for estate tax purposes, and may be subject to estate tax depending on the size of your estate.

**What should I do if I think my estate may be worth over \$1 million?** You should see an attorney who regularly works with clients who have taxable estates. The attorney will be able to help you plan your estate to minimize or eliminate estate taxes.

## Powers of Attorney

**What is a power of attorney?** A power of attorney ("POA") is a legal document in which a person, called the "principal," gives authority to an agent to act for the principal.

**What is a POA used for?** There are two common POAs, the one for financial matters, (sometimes called a "General" or "Financial Power of Attorney") and the one for health care decisions (usually referred to as a "Health Care Power of Attorney"). The Financial Power of Attorney allows you to name someone to pay bills and handle business or property transactions for you. The Health Care Power of Attorney allows you to name some-