I. Methods of Transferring Property at Death

There are several ways to transfer property at death, and the owner of the property can decide which method(s) he will use. Ownership (or title) of property is determined by the deed, certificate, bill of sale, contract, will, or other document, such as automobile title, receipt, or bank records. The first way to transfer property is to own the property with another as joint ownership with right of survivorship. At the death of one owner, the property passes by operation of law to the surviving owner(s). A second way to transfer property at death is by the provisions of a will (called testate succession). Third, if someone dies without a will, the state law decides who will receive the property (called intestate succession). Fourth, property can be owned by a trust, and the provisions of the trust control how the property will be distributed. Last, property can pass pursuant to the “beneficiary designations” in life insurance policies, retirement benefits, etc. These methods of transfer are mutually exclusive (e.g., property which is subject to a beneficiary designation and property held as survivorship property will not be affected by a contrary provision in a will).

II. Survivorship Property

When more than one person owns the property the ownership rights of each are limited by the rights of the other owner(s). These rights are created by the document of ownership.

If a married couple owns real property or a mobile home, the ownership is called “tenants by the entirety.” Based on the common law theory that husband and wife are one unit, the law considers that the spouses together hold title to the entire interest in the property, and neither one can sell, lease or mortgage it without the written consent of the other. Creditors cannot take property held as tenants by the entirety for a debt owed by only one spouse. The property automatically passes to the surviving spouse at the death of the first spouse. It is not subject to probate or the provisions of the first spouse’s will, so transfer of ownership is simplified at the first death. Joint owners of real property who are not married to each other hold the property as “joint tenants,” with each owning an undivided interest in the whole property. It is similar to tenants by the entirety for married couples, but it must be created by an express agreement for the right of survivorship (rather than being created automatically by marital relationship as in tenants by the entirety).

Personal property, such as bank accounts, certificates of deposit, or stock certificates, can also be owned by joint tenants. The right to survivorship must be specified in the document of ownership (it is never assumed). At the death of the first joint owner, the property passes automatically to the surviving owner(s), and it is not subject to probate.
III. Testate Succession

A will is a legally enforceable declaration of how the testator (the person making the will) wants his property to be distributed. There are attested written wills (witnessed), holographic wills (handwritten and unwitnessed), and nuncupative wills (oral and made on the deathbed). In order to have a valid will, the testator must be at least 18 years of age and of sound mind. He does not have to be competent for all purposes, but he must understand who he is and what his assets are, who are the natural objects of his bounty, and the consequences of his desired distribution.

In addition to directing how property will be distributed, a will also serves the purpose of allowing the testator to choose a person or corporation to administer his estate (called an executor). In his will, the testator may also provide a guardian for his minor children and provide for the management of his assets for his young children.

In order for a written will to be valid, it must be signed by at least two witnesses (three are preferred in case one is disqualified for some reason and also in case the testator at death lives in one of the few states that require three witnesses). A gift by a will to a witness is void, so witnesses should never be beneficiaries. North Carolina law allows for “self-proved” wills. This means that if the witnesses sign an affidavit at the end of the will and those signatures are notarized, the witnesses do not have to appear in person before the court to verify their signatures when the will is probated.

Once a will has been executed, it can still be changed up until the time of death. One way to make changes is by means of a codicil, which is an addendum executed with the same formality as the will. Handwritten changes to a will are usually ineffective for lack of proper execution.

Instead of changing only part of a will by codicil, a testator may decide to revoke the entire will. He can do this by properly executing a new will or by destroying his will with the intent to revoke. Divorce will act as a partial revocation by causing certain provisions regarding the divorced spouse to be invalid.

In general, the owner of property has the right to determine who will receive his property under his will. However, an exception to this, under North Carolina law, is a spouse’s right to dissent from the will of the deceased spouse. In order to prohibit one spouse from disinheriting the other, North Carolina law gives the surviving spouse the right to take a portion of the deceased spouse’s property, whether or not it passes through probate. Survivorship property, property passing by beneficiary designation, and property owned by a trust are now subject to this right. (The General Assembly changed the law to create this right, effective January 1, 2001). The personal representative of the decedent is authorized to bring suit to recover sufficient assets to pay the spouse’s share if he or she dissents from the will.

Probate is the supervision by the Clerk of Superior Court of the distribution of a decedent’s assets, either pursuant to his will or to the intestate succession laws. The
personal representative of the estate (executor if testate or administrator if intestate) is responsible for gathering and valuing the assets, paying all debts and claims against the estate, filing all required inventories and accountings with the court, filing all necessary tax returns, and distributing the property to the beneficiaries.

Funeral instructions should not be part of a will. The will may not be located quickly enough, or the testator may change his mind several times about his wishes. Rather, they should be put in a letter of instruction to the personal representative.

IV. Intestate Succession

If someone dies without a will, the state law determines how his property is divided and to whom it is passed (this does not apply to survivorship property or to property subject to a beneficiary designation, such as life insurance or an IRA).

If the decedent is survived by a spouse, the following rules apply:

1. 100% to spouse if no children or parents survive the decedent
2. 1st $50,000 of personal property plus 50% of the remainder (the rest of the personal property and all of the real property) to the spouse if a parent survives the decedent
3. 1st $30,000 of personal property plus 50% of the remainder to the spouse if one child survives the decedent
4. 1st $30,000 of personal property plus 1/3 of the remainder to the spouse if two or more children survive the decedent

If there is no surviving spouse, the order of inheritance is as follows:

1. children or their descendants
2. parents (if there is no child or his descendants)
3. siblings (if there are no children, their descendants, or parents)
4. ½ to father’s parents (if not living, then to father’s brothers and sisters, or to their children)
5. ½ to mother’s parents (if not living, then to mother’s brothers and sisters, or to their children)
6. State of North Carolina (if no living relatives) for certain college scholarships

V. Trusts

A trust is a legal arrangement where the grantor (the one who creates the trust) transfers the legal interest in certain property to the trustee(s) who will hold and manage the property for the benefit of the named beneficiaries.

If a trust is created by a living person (as opposed to being created by his will), that person may reserve the right to revoke it. (A living person may also create a trust without reserving the right to revoke it.) This type of trust is called a revocable trust (also called a living trust) and may be created for the management of the funds for the grantor
or for another beneficiary or to avoid probate and insure privacy. Since the grantor has
the right to revoke the trust, the trust assets are considered part of the grantor’s estate for
estate tax purposes and the trust assets are subject to the grantor’s creditors.

An irrevocable trust can be set up by a living person or by his will. The grantor
gives up the right to revoke the trust and to ownership of the assets put into the trust. An
irrevocable trust is a separate tax entity which is generally removed from the grantor’s
estate for estate tax purposes.

Creation of an irrevocable trust by a living person (called an inter vivos trust) may
result in gift tax liability. It is the responsibility of the person who created the trust to pay
any gift tax due. If the beneficiary is the grantor or his wife, there is no gift (and thus no
gift tax). However, if the beneficiary is someone else, the grantor may be liable for gift
taxes unless the gift is subject to the annual gift tax exclusion.