



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 54 | Number 3

Article 1

2-1-1976

The Draftsman Views Wills for a Young Family

John H. Martin

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

John H. Martin, *The Draftsman Views Wills for a Young Family*, 54 N.C. L. REV. 277 (1976).

Available at: <http://scholarship.law.unc.edu/nclr/vol54/iss3/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE DRAFTSMAN VIEWS WILLS FOR A YOUNG FAMILY

JOHN H. MARTIN†

Most articles, institutes and books about estate planning or drafting testamentary instruments focus on substantial accumulations of wealth.¹ Principal concerns are tax consequences and tax minimization. Very little attention is paid to planning and drafting for the smaller, modest estate—the one with less than \$60,000 in value.² Nevertheless, the average testator falls into this neglected category.³ While the small amount of wealth presents few tax problems, this typical client has other unique and perplexing problems. Unfortunately, he or she is usually unable to afford much attorney time for planning the estate⁴ and solving these difficulties. The lawyer, knowing that the client cannot afford (or

† Associate Professor of Law, University of North Carolina School of Law. A.B. 1962, J.D. 1966, University of Michigan. Member of bars of Michigan and North Carolina.

This article was prepared with the assistance of a grant from the North Carolina Law Center. Portions were presented as the Second Marvin K. and Florence T. Blount Lecture on Estate Planning and Taxes at the University of North Carolina School of Law, October 31, 1975.

1. One textbook, T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* (1972), does examine the small, almost illusory wealth of the young family but makes the same observation about the paucity of discussion about this category of client. *Id.* at 59.

2. When a client's assets exceed \$60,000 his death will require the filing of a federal estate tax return. INT. REV. CODE OF 1954, § 6018(a). As the size of the gross estate climbs above that figure, the significance of tax consequences increases and tax considerations begin to influence the shape of the estate plan although, due to the availability of the marital deduction, *id.* § 2056, a married person's estate generally will not pay estate tax until its value is something in excess of \$120,000. Since the necessity of filing a return provokes some notice of tax ramifications and the smaller estate on which this article will focus does not present federal tax problems, it seems appropriate to define the smaller estate as one under \$60,000 in value.

3. In the latest year for which statistics are available, 1972, estate tax returns were required for about nine percent of all deaths. The comparable figure for 1969 was seven percent. *Wall Street Journal*, July 9, 1975, at 1, col. 5. A recent study of probate court records in Minnesota for the year 1969 disclosed that eighty-five percent of the probate estates in a metropolitan county and ninety-four percent in three rural counties were under \$60,000 or less. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP., PROB. & TRUST J. 596, 598 (1974).

4. This article will persist in calling the average person's collection of property interests an estate. Moreover, the term "estate planning" will be used because it communicates effectively the idea of developing comprehensive, thoughtful arrangements for the devolution of property at death. In that regard the term is superior to the phrase "drafting wills," for the effective reach of a will is much too narrow in this era of multiple testamentary devices. Estate planning may be a highfalutin term to some, but so long as it communicates basic meaning, it is not evasive. *But cf.* T. SHAFFER, *supra* note 1, at 1.

will not tolerate) much more than a nominal fee, often feels he cannot put the time into the matter that he knows it ought to have. He is tempted to reach for the published form books for a simple, stock approach. But the rare consideration of this client's problems means the attorney will find little guidance from that source.

This article deals with this large but neglected category of clients and the problems that the attorney should face in preparing their wills. In order to provide opportunity for a focused discussion, the coverage is further refined to clients that are parents in a young family just getting a start in life. The purpose here is to think through the difficult problems and choices involved in counseling these persons about wills and to reach some conclusions about the design their wills typically might take. The analysis is intended to give the attorney a framework which he might use as a standard approach for this type of client. The discussion will examine the concerns of such persons, look at some possible patterns of distribution for them, and, after analysis, suggest that one particular pattern is better than others for use as a standard approach. A prototype employing that suggested pattern will then be presented. In the course of this examination a hypothetical family will be used and the legal framework for the analysis will be current North Carolina law.

Several caveats are appropriate at the outset. The observations made here and solutions advocated are deemed appropriate generalizations for the young family with modest assets. Advocacy of a standard approach to persons in this category does not, however, relieve the attorney from the obligation to investigate thoroughly the facts and circumstances of the unique individuals before him and to tailor the standard approach to their situation. While generalizations, standard approaches and forms are necessary to enable the attorney to turn out a quality product economically, the attorney must question the validity of any approach or form—his own or from a form book—each time it is used.⁵

A TYPICAL CLIENT COUPLE

Presented first are the essential facts about our representative clients, R. Michael Wilson, wife Harriet Jones Wilson and their family.⁶

5. The admonition cannot be stated better than done by Professor Leach: "No clause should appear in any will drawn by you unless you individually know precisely what it means, what object it is designed to accomplish, what doctrine (if any) of the law it grows out of, and how it furthers the testamentary intentions of this particular client." Leach, *Planning and Drafting a Will*, 27 B.U.L. REV. 157, 158 (1947) (emphasis in original).

6. A harmonious relationship and common goals for husband and wife are

This information is in summary form as it might be compiled during the course of a conference between the attorney and Mr. and Mrs. Wilson.⁷

Personal Data:

Client: R. Michael Wilson, born 4-26-43 (age 32)
 Spouse: Harriet Jones Wilson, born 8-2-44 (age 31)
 Address: 1234 South Boulevard
 Raleigh, North Carolina
 Occupation: Assistant branch manager
 Fidelity Savings Bank
 Children: Joseph Paul Wilson, born 3-15-68 (age 7)
 Christine Ann Wilson, born 7-7-70 (age 5)

Assets and Liabilities:

Jointly Held Assets: ⁸	Cost ⁹	Market Value
Home (acquired 1969) ¹⁰	\$31,000	\$36,000 (Mortgage Balance: \$25,000)

assumed. Needless to say, this is not always the case. The attorney must be sensitive to signs of divergent opinion and talk with each of the parties separately if necessary, to explore differences in desires. If the interests of the spouses differ or are in potential conflict, the attorney faces a problem of professional responsibility. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON No. 5 & EC 5-15, -16 & -19. See *Panel Discussion: Professional Ethics*, U. MIAMI 8th INST. ON ESTATE PLANNING ¶ 74.700, at 7-3 to -9, -17 to -21 (1974).

7. The information here is indeed in summary form. The attorney usually will have more extensive notes and will need to see documents to verify property facts about which the client is unsure. In practice every attorney must develop a system (including forms) for eliciting and recording these essential facts and develop the habit of impressing on the client the importance of full disclosure. Being a good listener and showing empathy are essential to this foundational stage of planning. See generally J. FARR, AN ESTATE PLANNER'S HANDBOOK 34-38 (3d ed. 1966); T. SHAFFER, *supra* note 1, at 1-27. For the possibilities of using nonlawyer personnel in estate planning see Mucklestone, *The Legal Assistant in Estate Planning*, 10 REAL PROP., PROB. & TRUST J. 263 (1975).

8. The title to assets held jointly is deemed to contain the right of survivorship feature which in North Carolina was abolished in 1784 as an automatic incident of the joint tenancy. However, the right of survivorship can be created by agreement between the parties. *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964); *Bunting v. Cobb*, 234 N.C. 132, 66 S.E.2d 661 (1951); *Taylor v. Smith*, 116 N.C. 531, 21 S.E. 202 (1895).

9. Cost basis figures should be obtained even though there likely will be few suggestions for transfers of property with the smaller value estates. The cost basis figures may disclose an unusual situation and may provide valuable information for counseling in later years.

10. The gift tax consequences of the acquisition of real property by one spouse where title is taken as joint tenants with right of survivorship or as tenants by the entirety changed in 1955. Prior to that year, the gift, if any, took place on acquisition. Since 1954 there is no gift until termination of the tenancy unless the parties elect to have the gift recognized at the outset. INT. REV. CODE OF 1954, § 2515. While the young family will not have real property acquired by husband and wife before 1955, the attorney should be in the habit of asking the date of acquisition of real estate held by clients.

Household goods ¹¹	5,000	1,500
Savings account (Fidelity Bank) ¹²		2,300
Checking account		400
Series E bonds		800
	Total ¹³	<u>\$16,000</u>

Michael has made all contributions to the joint assets.¹⁴

Separate Property—Michael:

Resort property (unimproved) in Watauga County	\$ 4,200	6,500
1972 Ford automobile		1,800
	Total	<u>\$8,300</u>

Separate Property—Harriet:

Diamond ring		600
--------------	--	-----

Life Insurance:

All policies insure Michael and presently are payable in a lump sum to Harriet if she survives; Michael's estate is alternate beneficiary.

<u>Face</u>	<u>Company</u>	<u>Type</u>
\$10,000	Mutual Help Life Ins. Co.	Ordinary life
\$20,000	Gibraltar Life Assurance Co.	Group term at Bank

Other Financial Information:

Salary: \$11,800

Retirement Plan: Participant in Fidelity Savings Bank Pension Plan (qualified under § 401 of Internal Revenue Code). Harriet is beneficiary of death benefits.

Expected Inheritances: None.

Significant Liabilities: None other than home mortgage, noted above.

Accident Insurance: None.

Safety Deposit Box: #1278 at Beach Road Branch of Fidelity Savings Bank.

11. Household goods are listed as joint property although there is no document of title involved. In order for the right of survivorship to exist in personal property, there must be a verbal contract to that effect. *Cf.* Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895). The author feels that if questioned, most couples would indicate such an agreement or understanding existed between them. Therefore, treatment as joint assets with right of survivorship is the most logical manner to handle household goods. It is far more reasonable than arbitrarily to state all of them belong to one spouse to the exclusion of the other. *Cf.* WACHOVIA BANK & TRUST CO., NORTH CAROLINA WILL MANUAL SERVICE IV-3 (N. Wiggins ed.) [hereinafter cited as WACHOVIA WILL MANUAL].

12. This savings account is one which was established in accordance with N.C. GEN. STAT. § 41-2.1(a) (1966) and thus contains a right of survivorship and the incidents described in *id.* § 41-2.1(b) (Cum. Supp. 1975).

13. Only the net equity is shown.

14. The source of the contribution is relevant to North Carolina inheritance tax, N.C. GEN. STAT. § 105-2(9) (1972), and to the spouse's right to dissent from the decedent's will, *id.* § 30-1(b) (1966).

*Desires and Objectives:*¹⁵

1. Distribution of Property:

Each wants the other to have everything; then to the children equally. Children should not have possession until age 25.

Wife's ring to Christine.

Each wants to leave \$250 to Suburban Community Church. Husband wants to leave \$250 to Red Cross preferably for disaster relief.

2. Guardians for Children:

First Choice: Wife's brother James R. Jones and his wife Gertrude E. Jones of Alexandria, Virginia. Second Choice: Husband's sister Norma W. Thornberry and her husband Robert J. Thornberry of Asheville, North Carolina.

3. Fiduciaries:

Each other as personal representative; then Worthy Bank & Trust Company. Also Bank as trustee.

ALTERNATIVE PATTERNS OF DISTRIBUTION

The desires and objectives of the clients dictate the ultimate choice of a dispositive scheme. However, the desires outlined above and those of most clients can be fulfilled with varying degrees of success in a number of different ways. Examination will be made of several patterns of distribution that should be considered. As this is done the strengths and weaknesses of each alternative will be mentioned.

A. No Will—Rights of Survivorship and Intestate Succession

A threshold question must be whether the Wilsons need to execute wills. The vast bulk of their property is in some form of joint tenancy with right of survivorship. Thus, the survivor will automatically succeed to this property at the death of the first to die. On that point the presence or absence of a will is irrelevant.¹⁶ Moreover, if the surviving spouse should die intestate shortly thereafter, the property would pass in

15. Some of the desires are stated in an ambiguous form, much as a client might do. This will allow discussion *infra* about alternative solutions. Much of the information in this section is obtained from the client very slowly. Indeed, the clients do not think of many of the problems, *e.g.*, time to give possession and testamentary guardians, until they are suggested by the attorney.

16. A will could affect the joint tenancy property if the will forced an election. When the decedent in his will gives the joint tenancy property to a third person and gives other, separately owned property to the surviving joint tenant, the survivor must elect to take under the will (and accept the transfer of the joint property to the third party) or to take the joint property by right of survivorship (and turn down the gift in the will of the separate property). *Wachovia Bank & Trust Co. v. Burus*, 230 N.C. 592, 55 S.E.2d 183 (1949).

equal shares to the children.¹⁷ This distribution (all to the other, then to the children) conforms exactly to the primary desire of the clients. However, there appear to be some client objectives that are not met. One desire is that the children not obtain possession of any property until attaining age twenty-five. If the surviving parent should die before a child is eighteen, there must be a guardian appointed to receive the share of any child who is under that age.¹⁸ Moreover, if both parents were dead, each child would receive his or her full share outright at age eighteen.¹⁹ The Wilsons, like many other parents, harbor the idea that this age is not an ideal one for turning over to a child a significant amount of property. Without a will the desired holdback to age twenty-five cannot be achieved.

Another weakness of the *status quo* is found in the treatment of the separate property owned by Michael. His unimproved resort lot and his automobile would pass by intestacy. The small estate proceedings are

17. N.C. GEN. STAT. §§ 29-15(2), -16(1) (1966).

18. It would appear that a guardian would not be required if *id.* § 32-27(28) is incorporated into the will by appropriate reference. That section authorizes a fiduciary to make payments directly to a minor or to another who has care and custody of the minor. Taken literally the entire share due a minor could be paid to him or her without appointment of a legal guardian. The statutory power stipulates the fiduciary is protected against liability so long as "the fiduciary exercised due care in the selection of the [recipient]." In addition, even a minor's receipt is full acquittance. On the other hand, it is possible this statutory power was intended only to obviate the necessity of a legal guardian when modest periodic payments are due a minor. This restrictive interpretation would be more compatible with the public policy expressed in *id.* § 33-1 (that a guardian should be appointed), the common law approach that a third party may not weaken the rights of an infant (here his right to disaffirm his receipt) unless authorized by law to do so (the statutory power possibly could be read as such an authorization), and the new provision of *id.* § 28A-22-7 (Cum. Supp. 1975) (authorizing payment to a parent or guardian of bequests up to \$1,500 made to a minor).

If the clients do not execute wills, the statutory powers, of course, are not incorporated into their testamentary plans. Since the powers of the personal representative under *id.* § 28A-13-3 (Cum. Supp. 1975) do not include power to distribute to or for the benefit of a minor, appointment of a guardian of the minor's estate would be required in order to effect distribution unless (1) the sum is less than \$2,000 in which case the recipient may be the public guardian or clerk of superior court on behalf of the minor, *id.* § 7A-111 (Cum. Supp. 1975) or (2) the sum is less than \$1,500 in which case *id.* § 28A-22-7 (Cum. Supp. 1975) would be applicable. The same situation would exist if a will is executed but the power of *id.* § 32-27(28) (1966) is not incorporated into the will. This author believes that a guardian is necessary where that statutory power is not incorporated and the statutory facility of payment provisions are not applicable even if the testator stipulates "it shall not be necessary for my executor at any time to have a guardian appointed for any beneficiary with respect to the disbursement of income or principal or other property to or for such beneficiary." See NORTH CAROLINA NAT'L BANK, WILL & TRUST MANUAL C-3 (1975) for such a provision. That provision attempts to take from a minor the protection conferred by the whole concept of disability and does so without statutory authority.

19. N.C. GEN. STAT. § 33-41 (1966); *id.* § 48A-2 (Cum. Supp. 1975).

not available to transfer real estate²⁰ and the necessity for probate of the realty probably deprives the beneficiaries of the direct, noncourt transfer of the automobile.²¹ Additionally, the necessary application of the Intestate Succession Act²² to Michael's separate property results in an undesirable fragmentation of ownership.²³ His spouse, Harriet, will receive an undivided one-third interest in the net estate,²⁴ and each child will receive a one-third fractional interest.²⁵ The result is declared undesirable because it contradicts the expressed objective of these clients that the surviving spouse receive all the property.²⁶ Another unattractive result is the difficult problems created by multiple ownership of the property. Since this is a modest estate, it is almost certain that the wife would need to sell the lot and use the proceeds for the support of herself and the children. That disposition may be thwarted by the split ownership; certainly use and transfer is made more complicated, particularly since two of the owners could act until age eighteen only through a court-appointed guardian.²⁷

20. *Id.* § 28A-25-1(a). The statute seems to indicate that the affidavit procedure could be used to collect personal property having less than \$5,000 total value even where the intestate decedent also owned real estate. Nevertheless, it is clear these proceedings would not clear title to real estate. The unfortunate reference to real estate in section 28A-25-1(a) apparently resulted when the legislature chose to disregard the recommendation of the General Statutes Commission that the small estates procedure cover both personal and real property. See Lee, *The Administration of Decedents' Estates in North Carolina—Article 25—Small Estates*, 11 WAKE FOREST L. REV. 67, 70 (1975).

21. N.C. GEN. STAT. § 20-77(b) (Cum. Supp. 1975). Read literally, the statute permits assignment of the automobile before an administrator qualifies. However, the special transfer provisions should apply only when administration has not been undertaken and is unnecessary.

22. *Id.* §§ 29-13 to -15 (1966).

23. When only a small amount of property is involved, often the fragmentation can be avoided through assignment of the entire value to the spouse as her year's allowance. *Id.* § 30-15 (Cum. Supp. 1975). However, personal property alone is subject to assignment as the allowance, *id.* § 30-18 (1966).

24. *Id.* § 29-14(2).

25. *Id.* §§ 29-15(2), -16(1).

26. This objective is not based upon an arbitrary assumption but upon studies which disclose that the "all to the spouse" pattern is a common desire in a small estate. M. SUSSMAN, J. CATES, & D. SMITH, *THE FAMILY AND INHERITANCE* 83-95 (1970); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252 (1962); Stein, *supra* note 3, at 602-03. The UNIFORM PROBATE CODE § 2-102 contains an intestate succession provision which conforms to this general intent that the spouse receive all of a small estate.

27. A sale or mortgage of the ward's estate can be effected only upon approval, after petition and hearing, by the judge of the superior court of the county in which the property is situated. N.C. GEN. STAT. § 33-31 (Cum. Supp. 1975); see *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968). If the real estate is in a county other than the county of the guardian's residence, application must be made both to the clerk of the court of the guardian's residence and to the superior court of the county where the real estate is located. N.C. GEN. STAT. § 33-31.1 (1966).

At this point the attorney may be tempted to advise Michael to put his resort lot into joint tenancy, let everything go to the surviving spouse by operation of law,²⁸ and thereby avoid the laws of intestacy. That nicely takes care of the disposition of the property on the death of the first to die. But offsetting that advantage is the realization that the children might still obtain their shares before age twenty-five and that a guardianship could be required for the children's property. Both possibilities are dependent on the time the surviving parent dies. Moreover, such a tempting suggestion does not cure a third defect in the *status quo*—the uncertain care and custody of the children should both parents die while their offspring are still minors. If both parents are dead, a guardian of the person should be appointed for any child who is a minor.²⁹ While the clerk of the superior court has the power and authority to make the official appointment,³⁰ the legislature has given the father,³¹ and in some cases the mother,³² the right to nominate³³ a

28. The automobile could be transferred by affidavit executed by all heirs and filed with the Department of Motor Vehicles. N.C. GEN. STAT. § 20-77(b) (Cum. Supp. 1975). The wife could execute the affidavit on behalf of the minor children. *Id.*

29. *Id.* §§ 33-1, -6 (1966) recognizes there are two types of guardians for a minor: the guardian of the estate and the guardian of the person. The same individual or entity could serve in both capacities although the dual service is not required. While a corporate fiduciary likely would not agree to act as guardian of the person, the statutory authorization for a bank to act as a fiduciary does not preclude a bank from serving as guardian of the person. *Id.* § 53-159 (1975).

30. *Id.* § 33-1 (1966).

31. *Id.* § 33-2 (Cum. Supp. 1975).

32. The statute, in pertinent part, provides: "Any father . . . may, by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children. . . . Or in case the father is dead and has not exercised his said right of appointment, or has wilfully abandoned his wife, then the mother . . . may do so." *Id.* Arguably, the intent is that the surviving parent is to have the right to appoint a testamentary guardian. However, the mother's right literally is conditioned on nonexercise by the father as well as the father's prior death. This seems to preclude an appointment by the mother if the father made an appointment in his will but died first. There does not appear to have been any consideration whether the statute is to be read literally. As a practical matter, if the mother made a nomination in her will, the clerk of the superior court almost certainly would consider it before making the official appointment.

33. The nomination in the will probably is not a conclusive appointment. While N.C. GEN. STAT. § 33-2 (Cum. Supp. 1975) speaks of the parent's ability to "dispose of the custody and tuition," the clerk of the superior court has jurisdiction over the appointment of guardians, *id.* § 33-1 (1966), and over the probate of the will (in which the parent's selection appears), *id.* § 28A-2-1 (Cum. Supp. 1975). North Carolina has not decided whether the guardian obtains his authority from the nomination in the will or the designation by the clerk. Nevertheless, the great majority of the jurisdictions that have considered this question have decided the guardian's authority comes from designation by the judicial officer, the designation in the will being a mere nomination. The welfare of the child should control the appointment; thus, the court could select another person if that were in the best interest of the child. *See, e.g.,* *Rotter v. Rotter*, 93 Idaho 462, 463 P.2d 928 (1970); *In re Kosmicki*, 468 P.2d 818 (Wyo. 1970); *Annot.*, 67 A.L.R.2d 803 (1959).

testamentary guardian for the minor child or children. The nomination by the parent must be in a will.³⁴ Thus, there exists a strong incentive to make wills for a couple (or a surviving single parent)³⁵ who wish to designate a particular person as guardian and thereby, in a practical sense, forestall any family battle over custody of orphaned children. This incentive is present even though it is clear that the will of the first parent to die is expected to have minimal or no effect on the transfer of property to the surviving spouse.

In summary, the *status quo*—no will, joint property to pass by the survivorship feature and separate property to pass by intestacy—does not appear to be the alternative of choice for our clients. While most of their assets would pass to the survivor, some portions would go to the children and likely precipitate the need for a guardian of the estate for each; the distribution to the children on the death of the survivor would be outright, potentially at too young an age; and the *status quo* would not take care of naming a guardian of the person for a child who is a minor when both parents are dead.³⁶

B. Simple Will: Outright Gifts to Spouse or to Children

The classic simple will gives outright gifts and has no complex provisions creating future interests or establishing trusts. Such a pattern

34. See note 32 *supra*. The statute permits no other device by which a parent can make a nomination. This creates a problem for a parent under the age of eighteen. While this statute permits a father "though he be a minor" or a mother "whether of full age or a minor" to make the appointment, a person under age eighteen cannot make a will. N.C. GEN. STAT. § 31.1 (Cum. Supp. 1975).

35. Other problems arise for the client who is a divorced parent of minor children. One of the situations in which the mother is given the right to appoint arises from "wilfull abandonment" of the wife by the father of the children. *Id.* § 33-2, see note 32 *supra*. It is not clear whether a separation or divorce decree based on wilfull abandonment is necessary. In addition, the effect of a divorce on other grounds upon the right of either parent to appoint a guardian is not mentioned in the statute or considered in any North Carolina case. It is possible that divorce on grounds other than abandonment has no effect on the right to appoint and the father retains the primary privilege. Since it is most likely the clerk has the final say in making the appointment, see note 33 *supra*, the practical approach would be to insert an appointment in the will of the client whether the client is the divorced mother or father.

36. It is appropriate to note that the scheme of intestate distribution under the Uniform Probate Code (UPC) might lead us, if we were in a state that had adopted the UPC, to advise the Wilsons that wills are not necessary for their situation. The UPC provides that the surviving spouse takes the first \$50,000 plus one-half the balance of the estate. UNIFORM PROBATE CODE § 2-102. Additionally, the testamentary guardian seems to take his authority from the appointment in the will. *Id.* § 5-202. While many features of the UPC are found in North Carolina already (particularly informal estate settlement), other portions of the UPC (specifically guardianship) might be attractive for this state.

of disposition would be better than intestacy for the Wilsons. The outright gift to the spouse would avoid the problems of split ownership in the resort lot, and the testamentary guardian for the children could be named in the will of each parent.

While some of the weaknesses of the *status quo* are cured by the simple, outright gift to the surviving spouse, other deficiencies remain. The transfer of property to the children which will occur on the death of the second parent to die is not yet in an acceptable form. If the children are minors when the transfer to them takes effect, the awkwardness and expense of a guardian for their property will be required. Even if they then are adults, they might be under age twenty-five, which is the first point at which the parents feel it is appropriate for them to control property. Consequently, it appears the simple will with outright transfer to the surviving spouse or, if there is none, to the children, is an unacceptable dispositive scheme. Something more is required to meet the clients' objectives.

C. *Successive Estates—Legal or Equitable—In Spouse and Children*

Our clients seem content to let the survivor have complete control of all the assets. Each appears to have full confidence that the other will use wisely the property for his or her own needs and those of the children,³⁷ leaving to the children or more remote descendants anything that might be left. However, it is possible that discussion with the clients would reveal that one or both would actually like not only to care for the survivor's needs but also to control the transfer of property at the death of the second to die.³⁸ A device for trying to reconcile both objectives is the creation of a legal life estate coupled with some type of power in the life tenant to consume or dispose followed by legal future interests in children or issue.³⁹ However, should exploration with the client reveal these twin desires, not only should the depth and strength of this desire be ascertained, but, in addition, there should be emphasized the shortcomings of such a division of legal title.

37. The surviving parent regardless of sex does, of course, owe the duty of support to any minor children. *See* *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E.2d 113 (1962); N.C. GEN. STAT. § 33-3 (1966).

38. Most young couples realize the likelihood the survivor will remarry. Thus, there is reason to suspect the new mate will be given the property or that children of the second marriage would be additional beneficiaries. Another reason for avoiding outright disposition to the survivor is the fear that he or she will be unable to manage and invest wisely. However, beneficial interests may be better vehicles than legal interests for resolving this concern. *See* text accompanying notes 40-47 *infra*.

39. O. BROWDER, L. WAGGONER, & R. WELLMAN, *FAMILY PROPERTY SETTLEMENTS—FUTURE INTERESTS* 491 (2d ed. 1973) [hereinafter cited as BROWDER].

A primary problem with division of legal title lies in the classification of the interests created. A general devise or bequest is said to transmit absolute ownership even though there may be an inconsistent, subsequent limitation over.⁴⁰ On the other hand, a clear intent to give a lesser estate will be recognized, and the life estate will not be enlarged to a fee absolute even when coupled with an unrestricted power of disposition in the life tenant.⁴¹ Although clear expression of intent should yield the anticipated result, there is obvious potential for both unexpected classification and a challenge by someone who perceives correctly that the variations in decisions gives any challenge a particular nuisance value.⁴² Even when the classification of estates is clear, and the surviving spouse winds up with the intended life estate and power of use and disposition, a second problem is to define the scope of those powers.⁴³ Examples of problems that plague such interests include doubt about the purposes for which the property may be used⁴⁴ and the division of and restrictions upon proceeds of sale.⁴⁵

The uncertainty in classification and interpretation are sufficient reasons for avoiding creation of legal future interests. However, for clients such as the Wilsons, other reasons also exist. Since the will of the first to die has no direct effect on the property passing by right of survivorship, a plan to give the survivor only a life estate can be implemented effectively only by severing the joint tenancies and tenancies by the entirety. Such a severance is not likely to meet the emotional or psychological needs of the young couple.⁴⁶ Yet another

40. *Quickel v. Quickel*, 261 N.C. 696, 136 S.E.2d 52 (1964); *Clark v. Connor*, 253 N.C. 515, 117 S.E.2d 465 (1960) (both applying N.C. GEN. STAT. § 31-38 (1966)).

41. *E.g.*, *Rudisill v. Hoyle*, 254 N.C. 33, 118 S.E.2d 145 (1961); *Howell v. Alexander*, 3 N.C. App. 371, 165 S.E.2d 256 (1969); 1 AMERICAN LAW OF PROPERTY § 2.15 (A. Casner ed. 1952).

42. The frequent necessity for litigation to determine whether the language used meant to transfer an interest absolutely or for a limited period gives pause for contemplation. So too is the fact that prior constructions of words and phrases have little precedential value. *See Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960).

43. *BROWDER*, *supra* note 39, at 492.

44. *See Hill v. Hill*, 19 N.C. App. 42, 197 S.E.2d 886 (1973); *Annot.*, 31 A.L.R.3d 169 (1970).

45. *E.g.*, *Langston v. Barfield*, 231 N.C. 594, 58 S.E.2d 361 (1950); *Darden v. Matthews*, 173 N.C. 186, 91 S.E. 835 (1917).

46. While today's concept of a married couple is not the same as under the common law, nevertheless, many couples see themselves as a unit and consider each as having identical rights in all their property. Joint ownership facilitates and confirms this image of themselves. A sense of loss and insecurity can result from termination of joint tenancies and tenancies by the entirety. Of course, tax considerations may compel terminations. But on these occasions the attorney needs to be sensitive to the emotional feelings of the clients.

reason for rejecting successive legal estates is the availability of a better vehicle to accomplish the same objectives, viz., a trust. Problems of classification and interpretation are more easily avoided with a trust, and it is a more flexible vehicle for meeting the needs of the spouse. Moreover, the presence of a third party trustee means not only better protection of the remaindermen's interests but also independent management and investment service for the spouse-life tenant. In addition, a trust permits the coordination of life insurance proceeds with the other property interests. All types of property thus can be managed as one unit. If successive legal estates were used the life insurance proceeds would necessarily be handled separately either through lump sum payment to the wife (giving her absolute ownership which is contrary to the express reason for selecting a life estate for her in the other property) or one of the policy settlement options (a generally inflexible arrangement).⁴⁷ Thus, if there is a desire to give the surviving spouse less than full and absolute control over the assets, the trust is a device superior to successive legal estates.

Despite its significant comparative advantages, the use of a trust upon the death of the first spouse to die is questionable for most young families with modest assets. Joint tenancy arrangements appeal to them and provide inexpensive, quick transfers. Each spouse wants the other to have complete freedom to use and consume the property and has confidence the balance will ultimately pass to the issue of the marriage. Unless a spouse has a particular need for protection or management services, any management or investment problems that can be foreseen with respect to the life insurance proceeds do not usually compel the selection of a trust. The marriage partner is viewed as capable of making the choices for investment or can be depended upon to seek help as it is needed.⁴⁸

D. *Outright to Spouse; Contingent Trust for Children*

The foregoing discussion has emphasized the desire of the clients for the survivor of them to have absolute ownership of all property but has shown that several modes for achieving this objective conflict with other client goals, particularly the desire to postpone ultimate possession

47. The characteristics of common life insurance policy options are discussed in J. FARR, *supra* note 7, at 43-54.

48. The survivor, of course, could establish a trust to provide management and investment services plus the assistance of a third party in making decisions about the use of both income and corpus for the survivor's needs.

by the children until age twenty-five, the desire for avoiding a guardian of the property for minor children, the preference for nominating a guardian of the person, and the hope for certainty in result. Several possible patterns of distribution have been rejected because they contain significant weaknesses.

Next, a look is taken at a plan which is more complex but which is geared to the different objectives sought on the contingency of the spouse surviving or failing to survive. Specifically, this calls for a will providing for outright distribution to the spouse, if the spouse survives; if the spouse fails to survive, the property is to go to the children (and issue of deceased children) with a provision for establishment of a trust *only* in the event a taker has not attained age twenty-five. With this dispositive scheme, the survivor obtains full ownership of all property that was in the separate name of the first to die and, of course, automatically receives the same in all property held in joint ownership with right of survivorship. Also, the life insurance proceeds would be paid outright to the surviving spouse. In the event the spouse failed to survive, children and issue of deceased children take outright if age twenty-five or older, while the shares for those who are younger pass into trust. If the husband is the last parent to die so the insurance proceeds on his life are not available until the time has come for the children to take, the trustee would be the recipient of the proceeds and would make allocation of them. This contingency can be anticipated by now naming the issue and the trustee as contingent beneficiaries on the insurance policies (the wife being the primary beneficiary).⁴⁹ Since the

49. Some difficulties could be encountered in naming a testamentary trustee as contingent beneficiary of insurance proceeds. Since a will speaks from death, its provisions including those establishing a testamentary trust have no effect until the client dies. It follows, of course, that the trust under the will is not in existence and the named trustee has no authority at the time the policy beneficiary designation is made or at the time the insured dies. Indeed, the trust may not exist until the clerk of the superior court appoints the trustee and thereby constitutes the trust. Consequently, there is no beneficiary to take under the designation. However, it could be argued that the clerk's appointment of the testamentary trustee should be viewed as relating back to the moment of the insured's death. The rights of the testamentary trustee to take the property designated for it come into fruition at the moment of death to the same extent as do rights of other beneficiaries. If this view is accepted the trust does exist at moment of death and there should be a proper beneficiary under the insurance policy. Moreover, the fact that policy proceeds are not payable until the insured's death does not make the beneficiary designation a purely testamentary action that is void for failure to comply with formalities required for execution of a will. A beneficiary designation should be viewed as the exercise of a contractual right given by the insurance policy and not a testamentary disposition. Nevertheless, it must be noted that N.C. GEN. STAT. § 31-47 (Supp. 1975), which authorizes a devise or bequest to a trust, stipulates that the trust must exist at the time of testator's death. It is not at all certain that this authority to pour-over from a will to an existing *inter vivos* trust impliedly prohibits an *inter*

order of death is fortuitous and the survivor could die before there is an opportunity to execute a new estate plan, both husband and wife should have separate wills that give absolute ownership to the survivor and es-

vivos designation of a testamentary trustee as recipient of nonprobate property. However, due to the technical challenges that may be made, commentators have indicated that designation of testamentary trustees should not be attempted without legislative sanction. T. SHAFFER, *supra* note 1, at 245-46; Link, *Problems of Minors in Estate Planning*, in N.C. BAR ASS'N INST. ON ESTATE PLANNING AND DRAFTING VII-19 (1972).

Before such a negative conclusion is reached, the ramifications of the designation of the testamentary trustee ought to be explored in the context of the facts facing the attorney. If the next alternative beneficiary after the testamentary trustee is the insured's estate, the proceeds still will wind up where they are meant to be—in the testamentary trust. In the meantime those proceeds may be exposed to the spouse's elective rights and claims of creditors but that fact is of no consequence in the vast majority of the estates because the spouse is pleased with the distribution under the will and the estate is solvent. When the payment to the trustee will occur, as here, only in the event there is no surviving spouse, there are no elective rights existent. The chief disadvantage then to an unexpected payment to the personal representative is the loss of the inheritance tax exemption for insurance paid directly to Class A takers, N.C. GEN. STAT. §§ 105-3(4), -4(a) (Cum. Supp. 1975), and the commissions payable to the personal representative. Moreover, proceeds of group policies will be exposed to creditors' claims if paid to the insured's estate. *Id.* § 58-213 (1975). Very likely, however, additional expense is the worst that will happen. And that will come to pass only if the life insurance company balks at payment to the testamentary trustee, the North Carolina Department of Revenue takes up the matter, or the executor decides to challenge the arrangement. This observer contends that an executor determined to carry out testator's clear intent will immediately have the trustee appointed and have the proceeds paid directly to the trustee notwithstanding its acknowledgement that a theoretical problem exists. However, even the draftsman with eternal optimism needs to anticipate the worst. The beneficiary designation filed with the insurance company can anticipate that the company might raise a question then or later at the insured's death. A provision might also be inserted into the will to give the executor guidance in case there is a successful challenge. The following forms are offered as possibilities to be used in and with a will having a residuary clause and a trust of the same design as in Articles III and IV *infra*:

Beneficiary designation: Primary beneficiary—Spouse of the insured if he or she survives. *Secondary beneficiary*—"Issue of the insured who survive him, per stirpes, provided that if any has not attained the age of twenty-five years his share shall be paid to the trustee under the insured's will; provided, further, that if the trust under insured's will is not established within six months after insured's death or if, for any reason, the company or a court concludes payment cannot be made to the testamentary trustee, payment of such share shall be made to insured's estate."

Provision for will (under Miscellaneous article): "*Insurance*: Certain policies of insurance on my life name my wife as primary beneficiary and my surviving issue, per stirpes, as contingent beneficiaries with a proviso that the share of any taker under the age of twenty-five be paid to the trustee under this will. A further proviso permits payment to my estate if the trust is not established within six months of my death or the insurer concludes payment cannot be made to the trustee."

Notwithstanding any provision to the contrary relative to the distribution of my property, if insurance proceeds are paid to my estate pursuant to the contingent beneficiary designation, they shall be allocated to the testamentary trust established under Article IV without further subdivision."

The same problems may be presented by the payment of employee death benefits to a testamentary trustee.

establish a trust if the children are under the chosen age when the survivor dies.

There are a number of problems that arise in the course of drafting a will of this type. In order to highlight these, and some drafting problems common to wills generally, the various portions of the will should be examined seriatim. This discussion will be done in narrative form following each provision of a prototype will, using the husband's as the example.

PROTOTYPE WILL AND TRUST WITH COMMENTARY

LAST WILL OF ROY MICHAEL WILSON

I, Roy Michael Wilson (also known as R. Michael Wilson), a domiciliary of the City of Raleigh, Wake County, North Carolina, declare this is my will and revoke all my previous wills and codicils.

Comment on Preamble

The opening paragraph should identify the testator with his full legal name and the name(s) in which he has taken title to property. Stating the place of his domicile will assist in establishing that fact should a dispute arise.⁵⁰ That statement may also determine proper

50. Domicile is a question of intent. The statement in the will is not conclusive, but is one factor to be considered along with others such as location of voter registration, automobile registration, driver's license, and address used for filing tax returns. Domicile may become particularly important when each of two or more jurisdictions asserts decedent was one of its domiciliaries and levies an inheritance tax accordingly. Two Uniform Acts aid in settling multijurisdictional disputes over domicile. One is the Uniform Act on Interstate Arbitration of Death Taxes adopted in fourteen states: California, CAL. REV. & TAX CODE §§ 14197-14197.13 (West 1970); Colorado, COLO. REV. STAT. ANN. §§ 39-24-101 to -114 (1973); Connecticut, CONN. GEN. STAT. ANN. §§ 12-372, -374 (1972); Maine, ME. REV. STAT. ANN. tit. 36, §§ 3911-24 (1964); Maryland, MD. ANN. CODE 81, §§ 177-89 (1975); Massachusetts, MASS. ANN. LAWS ch. 65B, §§ 1-7 (1971); Michigan, MICH. STAT. ANN. §§ 7.592(1)-(7) (1971); Minnesota, MINN. STAT. ANN. §§ 291.41-.42, .45 (1972); Pennsylvania, PA. STAT. ANN. tit. 72, §§ 2490.1-.15 (1964); Tennessee, TENN. CODE ANN. §§ 30-1638 to -1643 (1955); Vermont, VT. STAT. ANN. tit. 32, §§ 7101-11 (1970); Virginia, VA. CODE ANN. §§ 58.217.1-.14 (1971); Washington, WASH. REV. CODE ANN. §§ 83.14.010-.070 (1961); and West Virginia, W. VA. CODE ANN. §§ 11-11B-1 to -14 (1974). The other is the Uniform Interstate Compromise of Death Taxes Act adopted in eighteen states: California, CAL. REV. & TAX CODE §§ 14195-14195.4 (West 1970); Colorado, COLO. REV. STAT. ANN. §§ 39-24-101 to -114 (1973); Connecticut, CONN. GEN. STAT. ANN. §§ 12-372 to -373 (1972); Illinois, ILL. ANN. STAT. ch. 120, § 399a (Smith-Hurd 1974); Maine, ME. REV. STAT. ANN. tit. 36, §§ 3981-85 (1964); Maryland, MD. ANN. CODE art. 81, §§ 190-93 (1975); Massa-

venue for probate purposes.⁵¹

The revocation clause should be inserted routinely in all new wills. The clause will negate any possible effect of a long forgotten will such as one executed when inducted into military service and will avoid assertions that a prior dispositive plan should be given partial effect by integration with the new will.

I

SPECIFIC BEQUESTS

I bequeath Two Hundred Fifty Dollars (\$250) to the Trustees of Suburban Community Church of Raleigh, North Carolina.

I bequeath Two Hundred Fifty Dollars (\$250) to the Wake County Chapter of The American Red Cross and express my desire (which is precatory only) that this be used for disaster relief.

Comment on Article I

Small gifts for benevolent purposes can create large problems. At common law and in some jurisdictions today, an unincorporated association lacks capacity to hold title.⁵² If the recipient in North Carolina is a nonprofit unincorporated association, the transfer may be directly into the common name of the entity.⁵³ However, if there exists a parent organization legally capable of taking title, a bequest may be treated as a gift in trust to the parent for the benefit of the unincorporated association.⁵⁴ Religious societies, even though unincorporated, may receive, hold and convey property through elected trustees.⁵⁵ But if the church is part of a denomination which authorizes a bishop or other ecclesiasti-

chusetts, MASS. ANN. LAWS ch. 65B, §§ 1-7 (1971); Michigan, MICH. STAT. ANN. §§ 7.592(1)-(7) (1971); Minnesota, MINN. STAT. ANN. §§ 291.41-.42, .45 (1972); New Hampshire, N.H. REV. STAT. ANN. § 86.71 (1955); New Jersey, N.J. STAT. ANN. §§ 54.38A-1 to -2 (1960); New York, N.Y. TAX. LAW § 249-o (McKinney 1966); Pennsylvania, PA. STAT. ANN. tit. 72, §§ 2490.1-15 (1964); Tennessee, TENN. CODE ANN. §§ 30-1638 to -1640 (1955); Vermont, VT. STAT. ANN. tit. 32, §§ 7201-03 (1970); Virginia, VA. CODE ANN. §§ 58-217.1-14 (1971); Washington, WASH. REV. CODE ANN. §§ 83.14.010-.070 (1961); and West Virginia, W. VA. CODE ANN. §§ 11-11A-1 to -5 (1974).

51. The county of domicile is proper venue for probate if the decedent was domiciled in North Carolina; for a nondomiciliary who left property in North Carolina proper venue is in any county in which his property is located. N.C. GEN. STAT. § 28A-3-1 (Cum. Supp. 1975).

52. See 1 R. POWELL, REAL PROPERTY §§ 130-135 (rev. ed. 1973).

53. N.C. GEN. STAT. §§ 39-24 to -26 (1966).

54. Wachovia Bank & Trust Co. v. Board of Nat'l Missions, 226 N.C. 546, 39 S.E.2d 621 (1946).

55. N.C. GEN. STAT. §§ 61-1 to -4 (1975).

cal officer to hold title to its assets, that official should be designated as recipient.⁵⁶ These variations indicate that the draftsman must exercise diligence in ascertaining the nature and status of the organization the client wishes to benefit. Similar care must be taken in naming the entity so that no dispute arises with regard to the identity of the client's choice.⁵⁷

The second specific bequest deserves two comments. The designation of a local branch of a parent national charity clearly obviates any question of an exemption for North Carolina inheritance tax purposes, although a gift to the national organization would yield the same result when it is clear the parent carries on religious, educational or charitable activities in this state.⁵⁸ An expression of hope or desire together with a clear indication of precatory intent should be made to negate the inference a trust is intended.⁵⁹

II

WIFE SURVIVING

If my wife Harriet J. Wilson survives me, I devise, bequeath and

56. *Id.* § 61-5.

57. *See* *Redd v. Taylor*, 270 N.C. 14, 153 S.E.2d 761 (1967).

58. Testamentary transfers for religious, educational or charitable purposes are exempt from North Carolina inheritance tax if the recipient organization is within the state and is nonprofit. N.C. GEN. STAT. § 105-3(2) (1972). The exemption for transfers to foreign nonprofit organizations is more restrictive. The foreign recipient must be a corporation, foundation or trust and either (1) the other jurisdiction must give a reciprocal exemption for transfers in the foreign state to North Carolina charitable entities, or (2) the entity must be "one receiving and disbursing funds donated in this State for religious, educational or charitable purposes." *Id.* § 105-3(3). The quoted phrase is not free from interpretive difficulty. It may state a requirement that the foreign charity be one which engages in charitable work in North Carolina. *A Survey of Statutory Changes in North Carolina in 1939*, 17 N.C.L. REV. 327, 382 (1939). An exemption for transfers to foreign charities conditioned upon benefits receivable in the granting jurisdiction does not violate the equal protection clause of the fourteenth amendment to the United States Constitution. *Board of Educ. v. Illinois*, 203 U.S. 553 (1906). However, if the foreign charitable entity has qualified to do business within the state it cannot be discriminated against solely because of its foreign establishment. *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968).

59. Language of request rather than direct command can be interpreted as a polite direction that a trust be created. The modern tendency, however, is to treat language of hope and desire as nonbinding expressions of motive. *See* 1 A. SCOTT, TRUSTS §§ 25-25.2 (3d ed. 1967). While the North Carolina cases repeatedly state that precatory words will not be construed to establish a trust unless the circumstances indicate they were used in an imperative sense, the draftsman must ascertain the client's exact intent and state it beyond question. Decisions finding no intent to create a trust include *YWCA v. Morgan*, 281 N.C. 485, 189 S.E.2d 169 (1972); *Quickel v. Quickel*, 261 N.C. 696, 136 S.E.2d 52 (1964); *Carter v. Strickland*, 165 N.C. 69, 80 S.E. 961 (1914); and *St. James v. Bagley*, 138 N.C. 384, 50 S.E. 841 (1905). However, a devise on a stated purpose was determined to create a trust in *Wilson v. First Presbyterian Church*, 284 N.C. 284, 200 S.E.2d 769 (1973).

appoint to her all property which I own,⁶⁰ or over which I have a testamentary power of appointment.

Comment on Article II

A so-called "blind exercise" of any power of appointment held by the testator has been added to the transfer of all property to the surviving spouse. This is designed to exercise powers of which the testator is unaware when executing the will. While some respected commentators advise against blind exercises,⁶¹ the reasons they give, both tax and nontax, for nonexercise⁶² seem outweighed by the testator's desire to leave everything to the maximum extent of his ability to the takers of his choice.⁶³ In North Carolina a residuary clause silent on this point will act as an exercise of all general powers of appointment unless a contrary intent appears elsewhere in the will.⁶⁴ Thus, the explicit exercise here confirms the statutory directive as to general powers and exercises all unknown special powers.

III

WIFE FAILING TO SURVIVE

If my said wife does not survive me:

Tangible Personal Property: I bequeath in equal shares to my children who survive me such of my tangible personal property as shall, in the opinion of my Executor, be appropriate for distribution to them either at the time my estate is distributed or at a later date. If an item is appropriate for distribution at a later date, it shall be distributed as part of the residue of my estate and be held by my Trustee until the time appropriate for distribution arrives.

60. There is no need to describe the property as owned at the time of testator's death since it is clear under statutory law that property acquired after the will's execution is included in the dispositive provisions. N.C. GEN. STAT. § 31-41 (1966).

61. See, e.g., W. LEACH & J. LOGAN, *FUTURE INTERESTS AND ESTATE PLANNING* 961 (1961); Casner, *Estate Planning—Powers of Appointment*, 64 HARV. L. REV. 185, 202-03 (1950).

62. Arguments against exercise of unknown powers include (1) increase in federal estate tax caused by the exercise of a general power created prior to October 21, 1942, see INT. REV. CODE OF 1954, § 2041; (2) exposure of the appointive property to testator's creditors; and (3) possibility the blind exercise may be ineffective.

63. A good discussion of the problem of blind exercise is found in Rabin, *Blind Exercises of Powers of Appointment*, 51 CORNELL L.Q. 1 (1965).

64. *Wachovia Bank & Trust Co. v. Hunt*, 267 N.C. 173, 148 S.E.2d 41 (1966); N.C. GEN. STAT. § 31-43 (1966) (which has been interpreted to apply only to general powers of appointment).

In the interest of family harmony, I state that I have not promised any particular thing to any person. Therefore, if some or all of my tangible personalty is appropriate for division among my children and there is dispute as to which items each should receive, I recommend but do not require that all such items of tangible personalty be appraised and that the children then select in rotation (my personal representative selecting for any person unable to act for himself), items at the appraised value, the order of choice to be determined by lot.

Residue: I devise, bequeath and appoint all other property which I own, or over which I have a testamentary power of appointment, to and for the benefit of my issue, me surviving, as follows:

To each who has attained the age of twenty-five (25) years,⁶⁵ the share which he would take if all such property then were being distributed to my issue, me surviving, per stirpes.⁶⁶

To my Trustee hereinafter named, the balance of such property, to be held, administered and distributed as provided in the article of this will entitled Trust For Issue.

Comment on Article III

Tangible Personal Property. The words "personal property" are unclear in meaning.⁶⁷ The phrase "tangible personal property" should be free from ambiguity although if the client normally has a significant amount of cash on hand or uses tangible personalty in a profession or

65. It may be a small point but birthday or birthdate can be ambiguous (and illustrative nevertheless is the problem language causes). Birthday or birthdate can mean both the date of birth and the anniversary of that date. Thus, the term "twenty-fifth birthdate" could mean the date on which a person becomes twenty-four years old. Since our culture dates the age of a person by the number of full years he or she has lived, the phrase "the age of twenty-five years" should not be ambiguous.

66. It is possible (however most unlikely in our situation) that all of testator's children would have predeceased him leaving only more remote descendants as members of the class labeled issue. Although the traditional notion of per stirpital distribution indicates no generation is to be skipped (even a generation in which there are no living persons) in making an allocation, the level at which the stirpes or stocks are determined should be specified and not be left for resolution through a construction suit. Classic cases with this problem are *Maud v. Catherwood*, 67 Cal. App. 2d 636, 155 P.2d 111 (1945); and *Balch v. Stone*, 149 Mass. 39, 20 N.E. 322 (1889). Under former law, realty in North Carolina always descended per stirpes, *Ellis v. Harrison*, 140 N.C. 444, 53 S.E. 299 (1906), *Clement v. Cauble*, 55 N.C. 82 (1854); but see *Crump v. Faucett*, 70 N.C. 345 (1874); and apparently a generation with no living members was counted, *McCall & Langston, A New Intestate Succession Statute for North Carolina*, 11 N.C.L. REV. 266, 291 (1933).

67. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

business, the clause should be altered to specify whether the cash⁶⁸ or business property is encompassed by the phrase.⁶⁹

The disposition of tangible personalty is separated from the disposition of all other property for several reasons. Quite often these items can be distributed and enjoyed by the distributee prior to the age at which the balance of the estate should be transferred to him. Moreover, these items often are not particularly suitable for a trust. Here only the children are takers of tangible personal property while issue (that is, both children and descendants of deceased children) are the beneficiaries of the contingent trust provisions. The type of property dictates this distinction in most cases. The monetary value generally is small, not justifying retention for grandchildren or more remote descendants. The principal value is emotional and the sentiment inhering in the property is important primarily to the children.

Since we are drafting a plan for a young family that will take effect, if at all, within five to ten years, the children, if they take, probably will be minors. Some items of tangible personalty should be held until the recipients are of a suitable age and discretion. The mechanism used is distribution to the trustee (following decision by the personal representative that the items should be retained rather than sold). An equally good alternative would be distribution to the guardian of the minor's person to be held by him for the child.

If all the children are minors it is unlikely that disputes will arise between them as to which person takes what items. However, since one or more could be of age and since distribution of family heirlooms and the like seems to precipitate controversies, a "family harmony" clause has been inserted. The mere presence of this clause should encourage the recipients to compromise their differences. An alternative is to stipulate that the personal representative allocate the items to the takers in equal shares, the decision of the personal representative being final.

68. One commentator opines that "cash on hand" would be considered to be tangible personal property, *WACHOVIA WILL MANUAL*, *supra* note 11, § IV-2, n.2; but other authority indicates that cash is not normally thought of as tangible personal property, *In re Pergament's Estate*, 204 Misc. 384, 388, 123 N.Y.S.2d 150, 154 (Sur. Ct. 1953).

69. Since testator's intent controls the content and meaning of the terms he uses, there are many decisions finding particular items are within or outside the scope of phrases like "household goods" or "personal effects," *e.g.*, in *Jones v. Callahan*, 242 N.C. 566, 89 S.E.2d 111 (1955), the court determined that an automobile was not included in a disposition of "all my household and kitchen furniture, jewelry, clothing and other articles of personal property used in and around my home." The existence of such decisions, however, does not imply a need to enumerate a list of inclusions so long as the label is the broad phrase "tangible personal property" and not a restricted term such as "personal effects" or "property used in and around the home."

Some clients will want to make specific bequests of certain items. Then the disposition here would refer to "such of the balance of my tangible personal property." A few specific bequests present no significant problem,⁷⁰ but longer, itemized lists are awkward in the will and frequently must be redrafted in a codicil as the client has a change of mind. A separate listing outside the will of property and recipients that can be changed from time to time appeals to many clients. If change after execution of the will is to be made, such a revised list, of course, cannot be incorporated by reference.⁷¹ Even though the outside list may not legally be controlling, there is no reason to shy away from it if the clients are ones who want the freedom to make frequent changes of this kind, so long as they realize that such a list is not binding on anyone and that realization is reflected in the will.⁷² The mere presence of a list, while not legally binding, may act as a deterrent to family disputes over tangible personalty.

Although income earned during probate administration by an estate of this size will be minimal and, therefore, the income tax consequences are not significant planning factors, it should be noted that specific bequests of tangible personal property and even the bequest of all tangible personalty separate from the residuary bequests have the advantage of not carrying out estate taxable income when distribution of this property is made.⁷³

Residue. The balance of the estate goes to issue⁷⁴ rather than to

70. One drafting problem is to remember the alternative events which may come to pass. For example, if the wife wishes to leave her diamond ring to her daughter, we must first determine whether this should go to the daughter even if the husband survives. If the husband is to take and then the daughter from him, the husband's will must contain a provision along these lines: "If I survive my wife and at the time of my death own the diamond ring which presently belongs to her, I bequeath that ring to my daughter Christine if she survives me."

71. The list as it exists at the time of execution of the will could be incorporated validly by appropriate reference in the will. However, the list must be in existence when the will is executed, *Watson v. Hinson*, 162 N.C. 72, 82, 77 S.E. 1089, 1093 (1913), and later modifications would have no effect. If modifications were made, it could be difficult to prove which portions of the list existed on date of execution of the will and which were modifications.

72. Language the draftsman might consider is: "I have made a list of various items of tangible personal property which I would like distributed to particular persons. I shall probably change such list from time to time. While I realize this is not legally binding, it is my hope that whoever takes such items under this will will respect my wishes and voluntarily will give them to the persons indicated on the list."

73. INT. REV. CODE OF 1954, § 663(a)(1); Treas. Reg. § 1.663(a)-1 (1956). Since the bequest to the Wilson children consists of items to be selected by the personal representative as appropriate for distribution to them, the bequest may not qualify under the regulation as "[s]pecific property . . . ascertainable under the terms of a testator's will as of the date of his death." Treas. Reg. § 1.663(a)-1(b) (1956).

74. Issue is defined under Article V, see text accompanying note 98 *infra*, but, of

children. Issue who have attained the stipulated age for outright distribution receive their shares directly from the probate estate so that the expense and delay of channeling them through the trustee are avoided. Shares for all under age twenty-five are kept in a common fund and delivered to the named trustee.

IV

TRUST FOR ISSUE

This trust is established for the benefit of my issue⁷⁵ from time to time living who have not attained twenty-five (25) years of age and who do not have a parent who received either a part of the residue outright at my death under Article III or a portion of the corpus of this trust subsequently at age twenty-five (25).

Income: The net income shall be accumulated and thereafter treated as corpus.⁷⁶

Corpus: From the corpus of the trust, Trustee shall pay from time to time to or for the benefit⁷⁷ of such one or more beneficiaries such variable amounts (even to the exhaustion of the trust) as are appropriate, in the discretion of the Trustee, for

course, the definition is modified by the added stipulation that those who take free of trust have their shares determined according to a per stirpital scheme of distribution. It is insufficient to indicate the takers (issue) without further stipulating the shares for each taker (per stirpes) inasmuch as takers might be intended to share per capita, per stirpes, or in the same manner as under the jurisdiction's law of intestate succession. 2 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 743-46 (2d ed. 1956). In this regard it is important to note that the North Carolina intestate succession law utilizes the concept of representation to ascertain the number of shares to allocate to members of more remote generations but distributes per capita at the level of each generation. N.C. GEN. STAT. §§ 29-1 to -30 (1966, Cum. Supp. 1975); McCall, *North Carolina's New Intestate Succession Act: Its History and Philosophy*, 39 N.C.L. REV. 1 (1960). Therefore, the scheme in the will departs from the concept in the Intestate Succession Act.

75. See notes 74 *supra*, 98 *infra*.

76. If income is accumulated and not distributed before the end of the trust's taxable year (or, at trustee's election, within sixty-five days after the close of its taxable year), the trust has undistributed net income for fiduciary income tax purposes. INT. REV. CODE OF 1954, §§ 663(b), 665. When this undistributed net income later is distributed, it will be taxed to the recipient as if it had been received by that person in the year in which the trust received it. *Id.* §§ 665-68. It is most unlikely that the trustee of the trust under consideration will have an excess of income over the needs of the beneficiaries. Consequently, it will, in fact, distribute income through invasions of corpus and not be subject to the special tax rules concerning accumulations of income.

77. N.C. GEN. STAT. § 32-27(28) (1966), which specifies one of the powers incorporated by reference in Article V of the will, authorizes the trustee to pay directly to third parties for support, education and medical care of a minor or incompetent. However, since some of the beneficiaries will be over age eighteen, the phrase "or for the benefit of" is necessary to permit such direct payment on behalf of adult beneficiaries.

support and care where the beneficiary is not self-supporting through no fault of his own,⁷⁸ for education (defined as four years of college,⁷⁹ or equivalent preparation in business, technical or trade training) if the beneficiary strives therefor in good faith⁸⁰ and for extraordinary requirements occasioned by illness or other misfortune. Amounts of corpus so distributed shall not be taken into account in making the division of the trust when a beneficiary attains the age for distribution to him provided below.⁸¹ It is my expectation and intention that if guardians of the person are appointed for a minor child, Trustee will exercise the foregoing power in order to supply funds to the guardians adequate to maintain and support the minor child and to protect the guardians, to the extent possible, from suffering any significant financial burden by reason of their appointment.⁸²

When each beneficiary attains the age of twenty-five (25) years, Trustee shall pay to him the share to which he would be entitled if the then existing trust fund were distributed to my issue then living, per stirpes, on the hypothesis that my only issue then

78. The beneficiary of a small trust is not likely to look to the trust for his support. Nevertheless, this phrase discourages any such ideas and gives the trustee authority to cut off any beneficiary it believes is shirking work. Many clients will find the language appealing.

79. A limited definition is placed on education so that the eldest child does not claim a disproportionate share of the funds. Four years of college is not necessarily the same as an undergraduate college education. If the latter term were used, a beneficiary might be tempted to stretch out the time required for him to obtain a degree.

80. "Striving in good faith" may be a difficult standard to administer. Nevertheless, testator is giving leverage and authority to the trustee and clearly indicating his basic intent.

81. This sentence furthers testator's basic intent that the respective uneven needs of the beneficiaries be the trustee's guide to intermediate distributions and it ties into the direction to give varying amounts to the beneficiaries if appropriate. If strict equality were a basic goal, the trustee could be directed to record all invasions of corpus and, each time a beneficiary attains age twenty-five, to take the invasions for him into account in determining the amount then to be distributed. Such a direction likely would encourage the trustee to make invasions in roughly equal amounts and not to deviate from uniform treatment of all beneficiaries, thus defeating testator's intent in part. See note 91 *infra*.

82. If a guardianship were involved, the general guardian or guardian of the estate would be entitled to use the income from the ward's estate for education and maintenance. N.C. GEN. STAT. § 33-42 (1966). Here testator's intent is clearly that the trustee use both income and corpus for the specified needs of the children. While a guardian who is not a parent of the ward should not be personally responsible for the ward's support, the guardian could feel awkward in requesting funds; and the trustee might question the extent to which funds could be advanced to the guardian which might benefit guardian's family as well as the ward. This sentence acknowledges the problem area, states intent and thereby facilitates the resolution of difficulties.

living are such beneficiary and all younger beneficiaries of this trust.

This trust shall terminate when the youngest beneficiary attains the age of twenty-five (25) years.⁸³ If this last beneficiary dies before attaining that age, then upon his death Trustee shall distribute the fund to my issue then living, per stirpes.⁸⁴

If, at the end of any accounting period, the current market value of the corpus of the trust does not exceed Ten Thousand Dollars (\$10,000), the corpus shall forthwith be paid to the beneficiaries of the trust then living,⁸⁵ per stirpes (my children to be the stocks); provided that if a distributee is a minor, his share

83. The language describing time of trust termination must be precise. If the time were stated to be "when the youngest beneficiary attains twenty-five" without a further disposition in the event of death under that age, and, say, the youngest died at age twenty when another beneficiary was age twenty-four, it would be unclear whether testator intended termination (1) when the youngest died (without having attained the specified age), (2) when there is no beneficiary living who is under age twenty-five, or (3) when the youngest would have attained twenty-five had he lived. See *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960); *Green v. Green*, 9 Ohio Misc. 15, 221 N.E.2d 388 (P. Ct. 1966); RESTATEMENT OF PROPERTY, Explanatory Notes § 295, comment k, at 1593-94 (1940); 2 L. SIMES & A. SMITH, *supra* note 74, § 646. Since the first sentence of Article IV defines beneficiaries as living issue, it should be clear this provision means a living person attaining twenty-five.

84. The class of testator's issue obviously will have a different composition if living refers to time of trust termination than to testator's death. Thus, in order to avoid ambiguity, phrases like "my living issue" or "my surviving issue" cannot be used unless there is a clear indication of the point in time to which "living" or "surviving" refers. In the absence of such an indication rules of construction are employed. Generally (always subject to testator's intention, to the extent it can be determined), when the word "surviving" or "living" applies to the members of a class receiving an outright gift, the test is applied at testator's death, but when the class takes after a prior particular estate, the test of survivorship is applied to the termination of the particular estate, which is to say that the terms "surviving" or "living" are taken to refer to the time of distribution and not to the death of testator. *Kale v. Forrest*, 278 N.C. 1, 178 S.E.2d 622 (1971); RESTATEMENT OF PROPERTY § 251 (1940); 2 L. SIMES & A. SMITH, *supra* note 74, § 577; cf. *Roberts v. Northwestern Bank*, 271 N.C. 292, 156 S.E.2d 229 (1967). Within the term "per stirpes" there is the condition a taker survive to the point of distribution. 5 AMERICAN LAW OF PROPERTY § 21.13 (A.J. Casner ed. 1952). Thus, the phrase "then living, per stirpes" is partially redundant. However, in *Roberts v. Northwestern Bank*, *supra*, the gift to those who took upon the death of testator's daughter (the life tenant of a trust) was expressed as: "in equal shares, per stirpes, to my other children and my stepdaughter." The court described this language as "the indiscriminate use of the term *per stirpes* by the draftsman of testator's will." 271 N.C. at 295, 156 S.E.2d at 232. No doubt, the language was inconsistent, at best. Nevertheless, it may be wise not to rely solely on the term *per stirpes* to express a condition of survival.

85. This provision for early termination in the event the value of the trust falls below a stipulated minimum recognizes that there is a point where the expense of the trust outweighs its advantages. Choosing the minimum amount calls for comparing the value to the client of expert management and postponed distribution with the size of the trustee's fee. Thus, the \$10,000 minimum used here is only illustrative and, if anything, is a relatively low amount to use.

shall be paid to, and held, administered and distributed by, Trustee as Custodian for said minor under the North Carolina Gifts to Minors Act as that Act exists at the execution of this will and, for this purpose, that Act is incorporated by reference.⁸⁶

If this trust is still in existence on the date that is twenty-one (21) years after the death of the last to die of my issue living at my death, Trustee shall divide the fund, per stirpes, among the then beneficiaries of the trust (my children to be the stocks).⁸⁷ The share of each beneficiary shall be paid to him, provided that Trustee shall hold, administer and distribute the share of any distributee who then is a minor as Custodian in accordance with the proviso in the last preceding paragraph.⁸⁸

Comment on Article IV

The trust, consisting of the residue determined by Article III, is kept in one common fund for the benefit of all children under age

86. In order to avoid guardianship proceedings for the share of any beneficiary who is a minor when the trust terminates under the clause (which proceedings could be as expensive as continuation of the trust), the trustee will retain a minor's portion acting as a custodian under the North Carolina Uniform Gifts to Minors Act. N.C. GEN. STAT. §§ 33-68 to -77 (1966, Cum. Supp. 1975). The Act authorizes gifts by will to a custodian so long as the intent is expressed in the will to incorporate by reference the provisions of the Act as they exist at the time the will is executed. *Id.* § 33-69.1 (Cum. Supp. 1975). The gift upon termination of the trust should qualify under this statutory authority.

87. The last beneficiary of the trust could be a grandchild or more remote descendant of testator who was not alive at testator's death. Such a beneficiary would not be a measuring life for purposes of the Rule against Perpetuities and he or she might not attain the age of twenty-five years before the expiration of twenty-one years after the death of the last to die of all beneficiaries living at testator's death. Thus, there is a violation of the Rule against Perpetuities but for this so-called savings clause. A disposition is void if there is any possibility of a violation of the Rule regardless of its probability. 6 AMERICAN LAW OF PROPERTY, *supra* note 84, § 24.21.

88. The common law Rule against Perpetuities requires vesting in interest (or failure to vest) within the perpetuity period. It does not require vesting in possession and enjoyment. Thus, a private trust is not void solely because it might continue in existence for more than lives in being plus twenty-one years, and a beneficial interest which becomes indefeasible within the permitted period complies with the Rule. N.C. GEN. STAT. § 33-71(d) (Cum. Supp. 1975) requires the custodian to pay the property to the minor upon his reaching age eighteen or to his estate if he dies before reaching that age. Hence the minor's interest is indefeasibly vested. Commentators have suggested that there is or should be a separate doctrine limiting the duration of a private trust of even an indefeasible interest, *see, e.g.*, 3 L. SIMES & A. SMITH, *supra* note 74, § 1391, at 240: "The policy . . . would seem to be expressed by the following proposition: A private trust cannot be made in destructible, by its terms, for a longer period than a life or lives in being and twenty-one years beyond." Several decisions in North Carolina appeared to accept such a separate doctrine, *Mercer v. Mercer*, 230 N.C. 101, 52 S.E.2d 229 (1949); *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E.2d 104 (1948); but these cases, insofar as they cast doubt on trusts of vested interests, were repudiated

twenty-five and also for more remote descendants under that age if their parent did not receive a final distribution of his or her share. Issue has been defined carefully in Article V so that, for example, both a grandchild of testator, age two, and his or her parent, age twenty-three (a child of testator), would be beneficiaries. The trustee could benefit either or both as the trustee determined appropriate after measuring the needs of each along with the needs of other beneficiaries under the standards provided. In this example, the grandchild would cease being a beneficiary when the parent attained twenty-five and received his or her per stirpital share.⁸⁹

This is a multiple purpose fund that is available not only for education, but also for ordinary care and support, extraordinary health care and other emergency needs.⁹⁰ The trustee clearly is directed to sprinkle the corpus among the beneficiaries according to their needs. Equality of treatment is eschewed specifically.⁹¹ Final distributions to each beneficiary of his share of testator's estate are made when the beneficiary attains the age of twenty-five years. Thus, the common fund will decrease as beneficiaries attain that age, eventually leaving only the share of the youngest to satisfy that person's needs.

The creation and size of the common fund reflect a compromise between alternatives. To illustrate the variety of designs available to the draftsman, brief mention is made of seven different ways of creating trust(s) to protect minors and provide essential needs when both parents are deceased.

(1). Testator's entire estate is allocated into separate shares at his death, by per stirpital distribution. Each child thereby is treated equally, but each recipient's portion is the maximum available for him or her regardless of differing needs. The separate shares can be held in trust

in *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 743, 68 S.E.2d 831, 836 (1952) and the repudiation has been confirmed, *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 378, 128 S.E.2d 867, 873 (1963).

89. If the child died before attaining age twenty-five, the grandchild, of course, would continue to be a trust beneficiary and (along with any siblings) would be entitled to an outright share by representation upon attaining age twenty-five.

90. The standards actually are quite restrictive. If more funds were available, the draftsman might authorize the trustee to make distributions for the general welfare or even happiness of beneficiaries. Moreover, the purposes and objectives could be more broadly stated to allow, for example, invasions to provide a beneficiary with funds to purchase a home or to embark upon a business venture.

91. Absent a clear indication of the purposes for which distributions are to be made and that inequality is both permissible and required if circumstances dictate, a trustee likely will revert to the traditional and presumptively safe approach of equal distributions of income alone. See *Bush, The Utility of Discretionary Trusts in Estate Planning*, N.Y.U. 26th INST. ON FED. TAX. 1305, 1325 (1967).

until the recipients respectively attain the age set for outright distribution.

(2). A separate educational trust is carved out of testator's assets and funded according to a formula, *e.g.*, an amount determined by multiplying the total number of years of college education remaining for all children (maximum per child being four years) times \$2,500.⁹² The balance of the testator's assets at death are allocated, per stirpes, to all recipients, and the share of each who has not attained the age stipulated for outright distribution is held in trust until such age is attained.

(3). Same as (2) except that the shares for all who are under the age for outright distribution are aggregated and held in a common trust from which distributions can be made in varying amounts based upon need. The testator must choose when the common fund is to be allocated into separate shares, *e.g.*, (a) when the oldest attains the stipulated age, or (b) when the youngest reaches that age, or (c) when the needs of all have been satisfied.⁹³

(4). No separate educational trust; allocation into shares at testator's death with those over the stipulated age taking outright and those under that age becoming beneficiaries of one common trust. Each time a beneficiary of the trust reaches the age which entitles him or her to take free of trust, a share is peeled off and distributed outright to that person.

(5). Same design as (4) except that as each beneficiary of the trust becomes entitled to an outright share, he or she takes a reduced amount (such as one-half) in order to give more assurance that an adequate fund is left for the needs of the youngest beneficiaries. When the trust terminates the balance remaining, if any, is distributed among all who took reduced shares.

(6). Testator's entire estate is held in trust until the *needs* of the youngest child have been satisfied at which point the trust corpus is allocated. The shares of the recipients who then are still under the age for outright distribution are held in separate trusts until the date for each is attained.

92. The formula can use any number of years and any amount per year. Quite often the figure will be inadequate even at the time the will is executed. However, potential assets available simply may not be sufficient to pay all education expenses and, moreover, clients may desire their children to contribute to their own education through scholarships, loans or part-time employment.

93. The choice of the alternative fixing the time for outright distribution will depend upon the client's assessment of several different factors such as age disparity and strength of desire for strict equality. For a discussion of the latter factor, see note 97 and accompanying text *infra*.

(7). Same as (6) except there is no allocation into separate shares until the youngest child has attained the *age* at which he or she is entitled to receive a share free of trust. The trust is allocated, distributed and completely terminated at that point.

This smorgasbord of alternative designs is only illustrative. Many variations are possible. Common and often desirable modifications that could be incorporated into any of the foregoing examples include: making the outright distribution on an installment basis at different ages, *e.g.*, twenty-five and thirty, or twenty-five, thirty and thirty-five;⁹⁴ broadening or narrowing the purposes for which invasions of corpus can be made, *e.g.*, education could be defined to include postgraduate education plus camp, travel and other informal training; and providing trust arrangements, including age distribution requirements, for issue of deceased children.

While there are factors that influence the ultimate choice between alternative designs of the trust, it is difficult, in the abstract, to indicate compelling reasons for the choice of one over the others since the evaluation of the different patterns rests upon hopes, desires and attitudes of individual clients faced with the uniqueness of their families. Nevertheless, some considerations deserve attention since they do enter both into the attorney's initial decision to present a design to the client for consideration and into the discussion that must occur between attorney and client prior to the client's selection of his or her preference.

A significant *age disparity* between the oldest and youngest children points toward the selection of a scheme that will give the older children something immediately at testator's death or as soon as the children attain the age the parent decides is appropriate for outright distribution. Somehow it seems unfair to make some wait many years, until the very youngest has all needs satisfied, for a share of the parent's wealth. Thus, the presence of a broad range in ages makes more attractive the foregoing designs numbered (1) through (4).

Size of estate is another important consideration. The greater the value of assets the easier it is to believe that the needs of younger family

94. Installments generally would be equal fractions at the different dates, *i.e.* one-third at twenty-five, one-third at thirty and one-third at thirty-five (probably better expressed as one-third at twenty-five, one-half the balance at thirty, and the remaining fund at thirty-five). However, the periodic partial distributions could be made unequal for several reasons. The amounts in the early installments could be larger in order to provide extra funds for needs like purchasing a home. Alternatively, the early installments might be smaller in order to maintain a larger trust corpus and thereby to provide greater security to the younger beneficiaries while still providing something free of trust for the older ones.

members can be satisfied out of his or her equal share. Also, a larger estate is more susceptible to division simultaneously between an educational trust and separate shares for individuals. Thus, designs (1) through (3) are more likely used when ample funds are present. On the other hand, as the value of assets available diminishes, there is concern whether those funds are sufficient to meet the needs of younger children let alone yield a share for the older ones. In these situations designs (5) through (7) are more attractive.

Identity of *trustee* and *trustee fees* are considerations that interact with the size of the estate. Where a corporate fiduciary is used, its fee schedule likely stipulates a minimum fee for each separate trust.⁹⁵ Where assets are small or modest this means it is prohibitively expensive to establish separate trusts for each recipient and perhaps even too expensive to set up a separate educational trust. Costs can be reduced and the advantage of a corporate trustee obtained through use of a single trust as suggested in designs (4) through (7).⁹⁶ Some or all of the expense can be avoided if an individual, particularly a family member, is named trustee. While this may permit creation of multiple trusts, the savings, of course could be illusory if the individual named lacks the expertise necessary for proper administration of the assets involved.

Testator's *feelings about equality* between children must be considered and explored in some depth. Several of the alternatives [(1) and (4) particularly and (2), (3) and (5) to a lesser extent] allocate a share to older children who, because of their age at testator's death have received many benefits not yet obtained by the younger ones. The younger children must pay for these benefits out of their separate shares. In (6) and (7), on the other hand, the needs of all are met before any excess is distributed. Absolute equality can never be assured if the focus is on needs since requirements will vary, but the holdback until certain basic requirements have been met for everyone has a connotation of greater fairness. If equality is an overriding concern and a single

95. The fee is generally computed as a percentage of the fair market value of the assets with an annual minimum. See, e.g., WACHOVIA WILL MANUAL, *supra* note 11, at xvi (Schedule of Compensation).

96. Invariably the trustee fee will also be less when the fund is fully invested in a common trust fund rather than invested separately. The Wachovia Bank & Trust Company fee schedule, see note 95 *supra*, prescribes a minimum of \$250 per year fee for a trust invested in a common trust fund and \$800 per year for a trust that is separately invested. N.C. GEN. STAT. § 32-27(3) (1966), which is incorporated into the will by the reference under *Powers* in Article V, specifically authorizes the trustee to invest in common trust funds.

trust for multiple beneficiaries is used, the trustee could be directed to take into account the invasions made for each beneficiary when trustee allocates to separate shares at the termination of the trust,⁹⁷ although this involves significant accounting problems for trustee.

As a gloss on all the factors there could be *special, uncommon needs* of some beneficiaries that require radical departure from typical arrangements. A child with a mental handicap may require a trust for his or her share to last during lifetime. The same or a different disability could present such a need for funds that a large proportion of testator's wealth is allocated for the benefit of one person. Testator may want to meet these demands and skew the distribution to achieve that result or, alternatively, he or she may decide equality or some other concern is an equally important goal, thus neutralizing the special need. Here as elsewhere there is no scale for weighing the factors—the balance must be struck by the client after pertinent advice and consultation with the attorney.

The will for R. Michael Wilson utilizes the design referred to above as (4). The assets are modest so that the single fund is more attractive than separate individual trusts or a separate educational trust. There is no significant age disparity between the Wilson children so that there would be little hardship in making the elder wait for distribution of his share until the needs of his sister have been satisfied. The small difference in age also means it is unlikely that carving off the elder's share when he is twenty-five will give him much more than the amount his sister has or will receive. Thus, the design chosen is a fair compromise. An additional feature of the trust is coverage for issue of children who are under age twenty-five or who die before attaining that age. If the clients' situation changes through birth or adoption of additional children by the time the will is revised, perhaps five years after execution, a design different than (4) might then be selected to take account of problems created by the new age disparity.

V

MISCELLANEOUS

Powers: I give my fiduciaries, including successor fiduciaries, all

97. Trustee would have to keep a record of all discretionary distributions for each beneficiary. When a person became entitled to his or her outright share, trustee would compute an augmented fund consisting of the trust fund as then constituted plus all distributions to then beneficiaries (such transfers taken at their values when distributed). The fractional share would be computed on the augmented fund and the beneficiary charged with all prior distributions to him.

the powers contained in North Carolina General Statutes, Section 32-27 at the time of the execution of this will, and those powers are incorporated by reference.

Survival Defined: No person shall be deemed to have survived me or to be living at my death if he shall die within ninety (90) days after my death.

Issue Defined: The term issue means all my lineal descendants, immediate and remote, living on the date the persons who comprise that class must be ascertained.⁹⁸ When distribution is to issue, per stirpes, distribution shall be by right of representation, my children to be the stocks.⁹⁹

Adoption: Where a person has been adopted prior to attaining the age of eighteen (18) years, such person shall be treated for all purposes of this will as the natural child of the adopting parents.

Taxes and Other Charges: All taxes imposed by reason of my death shall be paid by my Executor as an expense of administration. My Executor shall not attempt to have any part of such taxes apportioned among the recipients of property includible in determining the amount of such taxes. Proceeds of insurance on my life up to the maximum allowable as an exemption from North Carolina inheritance tax and distributions from pension and profit-sharing plans exempt from federal estate tax, all of which are payable to my Trustee or any beneficiary (other than my estate), shall not be used to pay debts, taxes, expenses of administration or other charges against my estate.

Testamentary Guardian: In the event my wife fails to survive me, I nominate and appoint her brother and his wife, James R. and Gertrude E. Jones of Alexandria, Virginia, as testamentary guardians of the person and Worthy Bank & Trust Company as guardian of the estate of any of my children who is a minor at the time of my death. If either of my wife's brother and his wife is unable or unwilling so to act, I nominate and appoint my sister and her husband, Norma W. and Robert J. Thornberry of Asheville, North Carolina, as testamentary guardians of the person of any of said children.

98. For comment on the possible difficulties with using the word "issue" without definition, see note 74 *supra* and Phillips, *Some Suggestions To Will Draftsmen: Complex Dispositive Plans in General, Class Gift Provisions in Particular*, 40 N.C.L. REV. 23, 34-35 & n.18 (1961).

99. See note 66 *supra*.

Insurance: Certain policies of insurance on my life name my wife as primary beneficiary and my surviving issue, per stirpes, as contingent beneficiaries with a proviso that the share of any taker under the age of twenty-five (25) be paid to the Trustee under this will.¹⁰⁰ A further proviso permits payment to my estate if the trust is not established within six months of my death or the insurer concludes payment cannot be made to the Trustee. Notwithstanding any provision to the contrary relative to the distribution of my property, if insurance proceeds are paid to my estate pursuant to the contingent beneficiary designation, they shall be allocated to the testamentary trust established under Article IV without further subdivision.

Ultimate Takers: If, at any time, there is no one to take under the terms of this will or the trust described in Article IV, my fiduciary shall pay over half the fund to those persons who would take my estate if I had then died intestate, unmarried, domiciled in North Carolina, under the laws of North Carolina then in effect, the shares and proportions to be determined by said laws and the balance to those persons who would take my wife's estate if she had then died intestate, unmarried, domiciled in North Carolina, under the laws of North Carolina then in effect, the shares and proportions to be determined by said laws.

No Implied Contract: This will is being executed on the same date as is the will of my wife; but in no event shall our wills be considered joint or mutual,¹⁰¹ it being our express intention that the survivor shall in no way be restricted in the use, management, enjoyment or disposition of his separate estate or property received under the other's will.

Comment on Article V

Powers. The statutory powers are broad and adequate. There is no reason to go to the expense of creating alternative provisions.¹⁰² Client

100. A suggested beneficiary designation is given in note 49 *supra*.

101. A will is joint when two persons execute a single instrument intending it be the will of each. Wills are mutual when each person executes a separate instrument containing reciprocal provisions. A joint and mutual will would be a single instrument containing reciprocal provisions executed by two or more persons. Courts tend to stray from these definitions and to refer to separate wills with reciprocal provisions as either joint or mutual.

102. Nor should the statutory powers be incorporated and the substance of the same powers be stated in different language in the will. Although some form books use this double statement of powers (*e.g.*, NORTH CAROLINA NAT'L BANK, WILL AND TRUST

relations can be strengthened by appending a copy of the powers to the client's copy of the will. Moreover, the attorney's file must reflect the language of the statute on the date of execution since later amendments to the statute do not modify the provisions incorporated by reference.

Survival Defined. A beneficiary who dies within ninety days of the decedent certainly will not have an opportunity to receive and enjoy the property given to him or her. Therefore, a survivorship period is required in order to reduce the expense and inconvenience that would result from a double probate.¹⁰³

Adoption. By statute an adopted person comes within the scope of such words as child, grandchild, heir, issue or descendant unless a contrary intent appears in the will, deed, or other writing.¹⁰⁴ Nevertheless, there are good reasons for inserting this provision into the will. It emphasizes the statutory treatment thereby assuring that testator focuses on a question which he might otherwise overlook. Perhaps more importantly this paragraph addresses the problem of adoption of an adult, often done for the sole purpose of qualifying the adoptee for inheritance or succession benefits.¹⁰⁵ This provision excludes a person adopted after

MANUAL C-2, -3 (1975), it would seem that the difference in language invites dispute over the scope of the powers.

103. If the testator's gross estate for federal estate tax purposes will exceed \$60,000 and qualification for the marital deduction is deemed advantageous, this definition of survival should not apply to the spouse. In those circumstances there should be added a presumption of the spouse's survival in the event it is difficult or impossible to determine the order of survivorship. If a requirement of survival for a period up to six months is imposed on the surviving spouse and the spouse actually survives that period, the presence of the survivorship condition (which did not occur in fact) will not adversely affect the allowance of a marital deduction, INT. REV. CODE OF 1954, § 2056(b)(3).

104. N.C. GEN. STAT. § 48-23(3) (1966); see *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973). A prior decision, *Bradford v. Johnson*, 237 N.C. 572, 75 S.E.2d 632 (1953), had indicated that the word "issue" connoted a biological relationship. Under the present statute, if that is the testator's intent he must clearly state it.

105. See generally Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566 (1969). Kentucky has struggled mightily with the question whether an adult adoptee is eligible for membership within a class described by a testator who predeceased the adoption by many years. The court went full circle from *Woods v. Crump*, 283 Ky. 675, 142 S.W.2d 680 (1940) (denying an adoptee the status as heir or child of the adoptor), through *Bedinger v. Graybill's Executor & Trustee*, 302 S.W.2d 594 (Ky. 1957) (permitting the wife who was adopted by her husband to qualify as rightful taker under the language "heirs at law of [husband]"), and *Wilson v. Johnson*, 389 S.W.2d 634 (Ky. 1965) (finding a distinction between "heir" and "children" so that an adoption of an adult qualifies that person as a taker when the label is the former but not the latter) to *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340 (Ky. 1967) (recognizing that the adoption laws were being used to thwart testators' intentions and stating, therefore, that "[a]doption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered should not be permitted . . .," *id.* at 344). Testator's intent should control on the question whether an adopted person is a rightful taker. Therefore, his intent must be stated.

becoming an adult;¹⁰⁶ age eighteen is chosen because it coincides with the age of majority.

Taxes. In North Carolina, absent a contrary direction, death taxes are a charge against property passing by intestacy first and then against the probate assets¹⁰⁷ and, apparently, taxes will come from the probate assets according to the normal rules of abatement.¹⁰⁸ This rule means the dispositive pattern of the will can be distorted materially if nonprobate assets are substantial and go to persons other than the beneficiaries under the will (or go to the same persons but in substantially different proportions).¹⁰⁹ Therefore, the draftsman should consider the problem for every will he or she prepares and include a tax clause specifying the fund(s) from which death duties are to be paid. Here taxes are to be paid as an expense of administration and not apportioned among the beneficiaries. The effect is to place the burden on the residue (trust) to the relief of the takers of tangible personal property. Life insurance and retirement plan benefits payable to the testamentary trustee are relieved of liability for debts, taxes and expenses of administration in order to preserve tax exemptions for those assets.¹¹⁰

106. N.C. GEN. STAT. § 48-36(a) (Cum. Supp. 1975) permits adoption of an adult person by a married couple or a single person, and *id.* § 48-36(b) states, "the rights, duties and obligations of the adoptive parents and the person adopted shall be, in relation to each other, and in relation to all other persons, the same . . . as if the adoption had taken place immediately before the person adopted became 18 years of age . . ." *Id.* § 48-36(c) states that other provisions of the adoption statutes do not apply to adoption of adults except as provided in subsection (b) (and other subsections not relevant here). A rather convincing argument can be made that subsection (b) and both the apparent legislative intent and broad language of the statute which brings "any adopted person" within the class of child, heir, issue, etc., sanction adoption of an adult solely for the purpose of affecting preexisting testamentary arrangements absent a contrary expression by the creator of the arrangements. *See id.* § 48-23(3) (1966) (emphasis added).

107. *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946) ("The ruling of the trial judge that the federal estate tax should be paid out of the general funds of the estate is affirmed. . . . The general rule, in the absence of a contrary testamentary provision, is that the ultimate burden of an estate tax falls on the residuary estate," *id.* at 322, 38 S.E.2d at 228-29 (citations omitted)). Since normal rules of abatement require property passing on partial intestacy to be used to pay estate obligations before property passing under the will, the residuary estate is really the second fund available. In the ordinary testate situation, of course, there is no property passing by intestacy and the residue bears the burden of death taxes unless a contrary direction is given by testator.

108. The abatement provisions were changed effective October 1, 1975, so that both personal property and real estate in the same classification abate ratably. N.C. GEN. STAT. § 28A-15-5 (Cum. Supp. 1975).

109. For discussion of the problems created by the requirement that the probate assets bear the tax burden, see Comment, *Apportionment of the Federal Estate Tax—Should North Carolina Adopt An Apportionment Statute?*, 52 N.C.L. REV. 737 (1974).

110. Life insurance proceeds to a maximum of \$20,000 are exempt if paid to Class A beneficiaries. N.C. GEN. STAT. §§ 105-3(4), -4(a) (Cum. Supp. 1975). Proceeds paid to a trust for the benefit of a Class A beneficiary qualify for this exemption. 34

*Testamentary Guardian.*¹¹¹ Testator appoints a married couple to serve as guardians of the person and substitutes another married couple in the event either of the first nominees cannot serve.¹¹² The first couple are nonresidents, but that status does not disqualify them for the position.¹¹³ Because the will establishes the trust for minors, it is unlikely that a guardian of a minor's estate will be necessary. Nevertheless, in case a guardianship of the estate is needed, and on the theory that it is better to have an experienced corporate fiduciary manage the minor's assets than to place that added burden on the relatives charged with care of his or her person, testator has designated the bank as guardian of the estate.¹¹⁴

Insurance. The provision explains the manner in which the beneficiary designations and the dispositive provisions of the will have been coordinated. The direction in the last sentence operates only if some or all of the policy proceeds are paid to the personal representative.¹¹⁵

Ultimate Takers. Testator realizes the possibility that none of his beneficiaries will survive him. Quite likely this would result from a common disaster such as fire or automobile accident. This clause leaves equal amounts to testator's family and his wife's family. A similar provision, of course, appears in the wife's will so that the proportions going to each family do not depend upon the fortuitous order of death.¹¹⁶ The paragraph also provides alternative takers if at any time

N.C. ATT'Y GEN. REP. 172 (1957). The designation of a testamentary trustee as beneficiary of life insurance proceeds may be troublesome. See note 49 *supra*. Distributions from certain pension and profit-sharing plans received by a beneficiary other than the personal representative are exempt from federal estate tax to the extent attributable to employer contributions. INT. REV. CODE OF 1954, § 2039(c). The exempt status is retained where the recipient is a testamentary trustee so long as the distributions cannot be used to satisfy estate obligations. Rev. Rul. 73-404, 1973-2 CUM. BULL. 319.

111. See notes 29-35 and accompanying text *supra*.

112. There appears to be no bar against two persons occupying the office of guardian. While N.C. GEN. STAT. § 33-2 (Cum. Supp. 1975) uses guardian in the singular, there is no indication that only one person at a time may be guardian, and at least one decision suggests multiple guardians would be acceptable. See *Peyton v. Smith*, 22 N.C. 325 (1839).

113. N.C. GEN. STAT. § 33-9 (1966) requires the clerk of superior court to remove any guardian who "would be legally disqualified to be appointed administrator." Under *id.* § 28A-4-2 (Cum. Supp. 1975) a nonresident is disqualified from acting as personal representative when such a person has not appointed a resident agent. Combining these provisions yields the conclusion that a nonresident is eligible so long as he or she appoints a resident agent and files that appointment with the court.

114. It is not necessary that the same person or entity serve as both types of guardian. See note 29 *supra*.

115. The problems which may thwart payment to the testamentary trustee and require payment to the insured's estate are described in note 49 *supra*.

116. If the order of death could not be determined, the Uniform Simultaneous Death Act, N.C. GEN. STAT. §§ 28A-24-1 to -7 (Cum. Supp. 1975), applies except to the extent

there is no one to take the trust fund. Good planning requires a provision to cover this possibility, however remote it appears. If the will is silent, the result would be partial intestacy, the takers being those identified by the Intestate Succession Act applied as of testator's death—a result not particularly satisfactory, if the contingency occurs many years after his death.¹¹⁷ The paragraph illustrates one solution. Quite clearly the testator may prefer different takers such as charity, always a popular choice.

No Implied Contract. Some decisions have found contractual obligations implied in reciprocal testamentary provisions.¹¹⁸ It seems unlikely that a young married couple would want and intend to impose restrictions on the other's use of the assets. Indeed they should be counselled against binding obligations which may be unsuitable for changed conditions of the future. If restrictions are intended, however, they should be expressed, preferably in a separate contract, and the wills should articulate their contractual nature.¹¹⁹ Restrictions by implication must be avoided. Certainly litigation would be necessary to establish the contract,¹²⁰ and the exact nature of the restrictions in contract and property law terms could be difficult to articulate and prove. In addition, if the estate were sufficiently large, adverse estate tax consequences could result from the implication of restrictions on the survivor's use of the property.¹²¹

the will, trust or other document of title provides differently. Since survival is defined in this article to mean survivorship of decedent for ninety days, the spouse and children could fail to qualify as takers under that definition and the Uniform Act would not provide an alternative scheme of distribution.

117. The dispositive language used indicates that the shares as well as takers are to be ascertained by reference to the laws of intestacy in effect at the time the reference to them is required. A reference to takers "under the laws of North Carolina then in effect" would not necessarily indicate the method of computing the share of each taker. The uncertainty of method is heightened here because a per stirpes distribution is used in this will, while the present North Carolina Intestate Succession Act, N.C. GEN. STAT. §§ 29-1 to -30 (1966), prescribes a division into stocks with a further allocation per capita at each generation. See 2 L. SIMES & A. SMITH, *supra* note 74, § 747.

118. In *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 131 S.E.2d 456 (1963), the court was asked whether separate wills of husband and wife were contractual in nature where the wills contained reciprocal provisions and incorporated by reference an *inter vivos* trust. Although the wills had no express statement of contractual obligation, the court held "the wills themselves establish the existence of the contract." *Id.* at 530, 131 S.E.2d at 463.

119. See generally Taylor, *Estate Planning For Husband and Wife—Coordination of Estate Plans*, in N.C. BAR ASS'N, *supra* note 49, V-11 to -15.

120. Recent litigation has included *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970), and *Olive v. Biggs*, 276 N.C. 445, 173 S.E.2d 301 (1970), both of which are discussed in Taylor, *supra* note 119.

121. *Estate of Robert Abruzzino*, 61 T.C. 306 (1973); *Estate of Opal v. Commissioner*, 450 F.2d 1085 (2d Cir. 1971), *aff'g* 54 T.C. 154 (1970); *cf.* *United States v.*

VI FIDUCIARIES

I nominate my wife Harriet J. Wilson as Executrix of this will to serve without bond.¹²² If she predeceases me, declines to act or, having qualified, resigns, dies or is removed, I nominate Worthy Bank & Trust Company as Executor or Administrator with the will annexed de bonis non.

I nominate Worthy Bank & Trust Company as Trustee. My Trustee shall not be required to file an inventory or accountings with the clerk or the court having jurisdiction over this will.

I direct that Worthy Bank & Trust Company receive as compensation for its services (as Trustee and as personal representative, if it serves in that capacity) such amounts as it customarily charges for similar services at the time those services are performed.

Comment on Article VI

The bank is named personal representative if the spouse fails to survive.¹²³ Trustee is relieved from filing an inventory and annual accounts primarily to reduce expenses in trust administration.¹²⁴ The relief also gives additional privacy to the beneficiaries. The last sentence removes the corporate fiduciary from the strictures of any statutory fee schedule and permits it to adjust its fees through the years.¹²⁵

Additional Comments

There is no provision in the will directing payment of debts. Even

Ford, 377 F.2d 93 (8th Cir. 1967) (contractual joint and mutual will does not disqualify from marital deduction assets held in joint tenancy with rights of survivorship).

122. This provision is superfluous for a resident since N.C. GEN. STAT. § 28A-8-1(b)(1) (Cum. Supp. 1975) stipulates "[n]o bond shall be required of . . . a resident executor, unless the express terms of the will require him to give bond." However, a nonresident executor (including a resident who moves outside the state after appointment by the court) who qualifies as executor by appointing a resident agent must give bond unless excused by the express terms of the will. *Id.* § 28A-8-1(b)(2). A corporate personal representative with its principal office in North Carolina is excused from giving bond. *Id.* § 28A-8-1(b)(5).

123. The bank is trustee, of course, only if the spouse fails to survive.

124. N.C. GEN. STAT. § 36-67 (Cum. Supp. 1975) is authority for granting this relief.

125. *Id.* § 28A-23-3(a) limits compensation of the fiduciary (including personal representative and testamentary trustee) to a maximum of five percent of receipts and expenditures. *Id.* § 28A-23-3(b) stipulates real estate is subject to commission only to the extent it is sold to pay debts and legacies. A testator may provide in his will for a different scheme of compensation which will be binding upon the fiduciary after acceptance of the office and upon all interested parties. *Wachovia Bank & Trust Co. v.*

without it the estate is obligated to pay.¹²⁶ If a direction to pay claims is desired, the draftsman must recognize that new rules exist in North Carolina regarding exoneration of encumbered property.¹²⁷ There is no exoneration unless otherwise directed and a simple direction to pay debts is not an exoneration provision.¹²⁸ A simple direction to pay debts and expenses should be inserted in the wife's will; otherwise, her surviving husband rather than her estate is liable.¹²⁹

After the wills of both husband and wife are executed, several more steps may be necessary in order to implement the estate plan. The spouse of the insured should be named primary beneficiary of life insurance. The secondary beneficiaries should be the insured's issue, per stirpes, the share of any taker under [the age stipulated in the will for distribution outright] to be paid to the trustee under the will of the insured.¹³⁰ Designations should be made in similar fashion for death benefits under any retirement plans.

The turgid phraseology of all too many form books obscures intent and makes comprehension difficult. Therefore, as the prototype will and testamentary trust were drafted, a conscious effort was made to use direct, precise language. To this end, favorite "trinity clauses" such as "give, devise and bequeath" and "all property, real, personal and mixed" have been shortened or eliminated.¹³¹ In addition, the will has been designed so that it could serve as a form with very little modifica-

Waddell, 237 N.C. 342, 75 S.E.2d 151 (1953); *Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942).

126. This is an inescapable conclusion from the provisions protecting creditors and establishing procedures for payment of claims. N.C. GEN. STAT. §§ 28A-14-1 to -3; 28A-15-1, -5, -10; 28A-19-1 to -18 (Cum. Supp. 1975).

127. *Id.* §§ 28A-15-3 to -4.

128. *Id.* § 28A-15-3. Care must be taken in drafting a direction to pay debts so that a right of exoneration is not created inadvertently.

129. The husband is primarily liable for claims against the wife's estate that represent debts for necessities furnished her. See *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915), which also held the husband primarily liable for the wife's funeral expense. The wife's estate now is primarily liable for such expense. N.C. GEN. STAT. § 28A-19-8 (Cum. Supp. 1975). A provision in the wife's will directing that her estate be primarily liable for amounts which otherwise would fall upon the husband for discharge will be given effect. *Brown v. Brown*, 199 N.C. 473, 154 S.E. 731 (1930). If the husband is liable for the wife's debts and expense of administering her estate, those items cannot be taken as deductions in computing death taxes against her estate.

130. The practicality of this beneficiary designation and some difficulties that might be encountered are discussed in note 49 *supra*.

131. There seems to be some mystical attraction to groupings of three. Some other common examples are "make, publish and declare" and "rest, residue and remainder." (These two examples suffice to make the point notwithstanding the temptation to add a third!) Though the following has not appeared, surely it will come along if present drafting habits are not reformed: "At my death, demise or decease whichever shall first occur"

tion for the next client with a similar situation and similar desires. Since names of children are not used and the name of the wife is used but once, there are very few changes to be made in the body of the will to adapt the form to the next application.¹³² To the charge that the will is depersonalized, the answer is yes, but the deficiency is not serious and is entirely justifiable. Forms are an absolute necessity. They enable the attorney to supply a top quality product at modest expense. Lawyers must be able to reuse over and over the fruits of in-depth and time-consuming research and drafting. Documents have greater utility if they can be prepared for broader application than the immediate task (but, of course, without sacrificing any present objectives) or can be modified into a general approach.

The foregoing discussion reveals that adequate, complete planning for the client family with modest assets involves a critical examination of alternative dispositive patterns, careful selection of a design appropriate to the needs of the specific family, and sophistication in drafting the testamentary instrument. Even the oft-neglected smaller estate requires marshalling the many and varied lawyering skills. The planning solution for the hypothetical young family provides a format for transposition into other fact patterns¹³³ and a guide to drafting similar wills and trusts.

132. The "standard" portions can be stored on magnetic cards or tape for ease and speed in retrieval and reproduction. See Allen, *Law-Office Typing with the IBM MT/ST*, 16 PRAC. LAW., Apr. 1970 at 13; Sternin, *Magnetic Cards—A New Medium for Automatic Typing*, 16 PRAC. LAW., Oct. 1970, at 49.

133. In the transposition, of course, the format must be tailored and refined to meet the exact and unique needs of each client. Moreover, the use of this format is subject to the admonition quoted in note 5 *supra*.

