WHY DO I NEED A WILL?

As illustrated by the foregoing, many persons need a will for a number of reasons: (1) to insure that their estate will pass to the intended persons, (2) to eliminate the possible need for a guardianship of property, (3) to nominate a guardian of the person of any minor children, (4) to nominate the preferred person or bank to serve as the executor and contingent trustee, and (5) to provide the executor with additional administrative powers in order to enable him to administer the estate as quickly and economically as possible. It is clear that not all of these reasons will be applicable in every case but it is submitted that (i) several of these reasons will be applicable to everyone, and (ii) any one of these reasons provides sufficient cause to have a will written.

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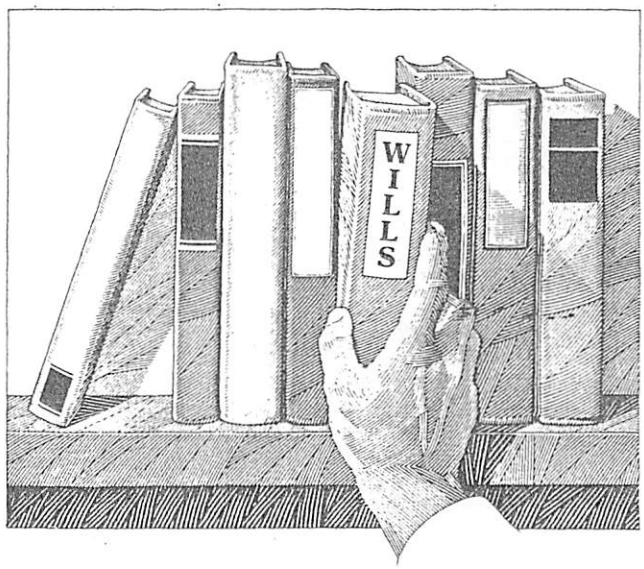

WHY YOU NEED A WILL

By J. Rodney Johnson

There are a number of reasons why you need a will. Perhaps you think that you do not have enough money or property to need a will. However, regardless of how much you have (or don't have), your family can very easily face the expenditure of more time and money in the settlement of your estate than should be required and, on occasion, they may also face far more serious complications if you die without a will. The purpose of this brochure is to help you understand the importance of wills and personal estate planning by (i) discussing five major reasons for having a will written, and (ii) responding to the twenty questions that are most often asked in connection with the writing of wills. The reference point for the following discussion is the law of Virginia, as of January 1, 1994.

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WHERE DOES MY PROPERTY GO IF I HAVE NO WILL?

Sometimes it is necessary to write a will in order to accomplish the most obvious objective—to make sure that your property will pass to the person or persons you wish to receive it. Since July 1, 1982, when a Virginian dies without a will all of his property passes to his surviving spouse.* If there is no surviving spouse the entire estate will pass to his children (with the descendants of any deceased child taking that child's share). If a person leaves neither a spouse nor any descendants, his estate will pass to his parents (or to the survivor of them) or, in the absence of any parents, to his brothers and sisters (and to the descendants of deceased brothers and sisters). If there are no brothers or sisters (or descendants of deceased ones), Virginia law provides for one-half of a person's estate to pass to his nearest relatives on his mother's side of the family and for the other one-half of his estate to pass to his nearest relatives on his father's side of the family.

It might appear that this relatively new Virginia law eliminates the need for most husbands and wives to have wills. After all, it does provide that when the first one dies all of his property will pass to the survivor and then, when the survivor dies, all of the survivor's property will pass to their children (and to the descendants of any deceased children)—and this, in fact, is what most couples desire. However, any belief that present law eliminates the need for husbands and wives to have wills is erroneous for several reasons. First of all, it will be the law in force at the time of a person's death that will determine who takes his property, and that law might be different from present law. Secondly, upon the death of both husband and wife (or anyone else for that matter), a person must be concerned with more than "who" will be the beneficiaries of his estate; he must also take into account "how" and "when" the property will pass to the beneficiaries in some cases.

HOW (AND WHEN) DOES MY PROPERTY GO IF I HAVE NO WILL?

The Problem of a Guardianship of Property. Any person under the age of eighteen years is considered legally incompetent under Virginia law, and thus such a person is unable to deal with or manage any property that he might inherit. The possibility of a minor person receiving an inheritance can arise (i) in the case of a married couple with young children, if both parents die prematurely; (ii) in the case of an older married couple whose children are all adults where, due to the premature death of an adult child, that child's share passes to his minor children (the decedent's grandchildren); or (iii) in any other case where a minor receives property, whether it be as a direct beneficiary or as an indirect beneficiary taking the share of his deceased parents. If, in any of these cases, a minor does become entitled to any property, the standard procedure provided by the law for the management of his property is a court-supervised guardianship.

A guardianship of a minor's property is a cumbersome and expensive form of property management because of the undue emphasis that is placed on the protection of the minor's property, and the continuing supervision by the court that is required in order to provide this protection. Although a guardian may spend the income from a minor's inheritance for the minor's support, sometimes the income alone is not sufficient. If it becomes necessary to consume or sell any of the property itself, the guardian must first retain an attorney to institute legal proceedings in order to obtain the court's permission. The first step that the court takes in such a proceeding is to appoint another attorney to represent the minor in order to insure that the proposed consumption or sale is, in fact, in the minor's best interest. All of the costs associated with this proceeding, including the fees of both attorneys, are paid out of the minor's inheritance. When one adds to this cost factor (i) the time lag that is necessarily involved in any legal proceeding (i.e., the period of time from that point when a personal determination is made that certain action is required up to the point when a court decree is entered authorizing that action to be taken), and (ii) the rule that the guardianship must come to an end when the minor child reaches the age of eighteen (regardless of the amount of money involved or the child's maturity or ability to handle this amount of money), it becomes clear that the guardianship of a minor's property is not a satisfactory arrangement in the typical cases. And, although there has been some movement towards a statutory alternative to the guardianship of property with the enactment of the Uniform Transfers to Minors Act in 1988, no existing or proposed statutes provide a sufficient response to the problem.

A Solution to the Guardianship Problem—A Contingent Trust. The problems associated with the guardianship of property may be easily avoided by providing for a contingent child's trust in one's will. The word "contingent" means that this trust will come into operation only if there actually is a child under the age specified by the person writing the will. In that event, the trust will be a very efficient, flexible and economical form of property management, especially when contrasted with a guardianship of property. By way of illustration—

*NOTE: There is one exception to this rule that the surviving spouse inherits the entire estate. If the deceased person is survived by children (or descendants of deceased children) who are not also the children (or descendants of deceased children) of the surviving spouse, the surviving spouse will receive only one-third of his estate and the other two-thirds will pass to his children (or descendants of deceased children).

Husband may provide in his will that (i) if Wife survives, she receives everything, but (ii) if Wife fails to survive, everything shall be divided equally among the children (with the children of any deceased child to receive that child's share). Then comes the contingent trust, providing as follows:

> If any such beneficiary is under the age of A, his share shall be paid over to T to hold for his benefit until he reaches the age of A. During the course of this trust, T shall pay over whatever income may be required (as well as principal, if the income is not sufficient) in order to provide for the support, maintenance and education (including college) of the beneficiary until he reaches the age of A, at which time the trust will come to an end and the balance on hand will be paid over to him.

In the above example, "A" is an age to be chosen by the person writing the will (e.g., 21, 22, 25, etc.), and "T" is the trustee (an individual or a bank) who will also be chosen by the person writing the will. As can easily be seen, this trust is a very simple, straight-forward device for holding and using a young person's property for his benefit. If and when there is a need, the Trustee can promptly respond to this need by the simple act of writing a check or, if it is necessary to sell property, by simply signing the same documents that any owner of property would sign. The problems necessarily involved in the guardianship of property—the time delay involved in obtaining a court's permission to sell property, the legal fees and costs incident to obtaining this permission and the required turnover of all property and money when the child reaches the age of eighteen—have been totally eliminated.

A person may appreciate the concept of a child's trust but believes that it has no application in his situation (i) because all of his children are grown, or (ii) because he has no children and is leaving his estate to relatives and friends, all of whom are adults. These are common misconceptions. What this person is overlooking is the possibility that one or more of his intended beneficiaries may die before (or along with) him, and that these beneficiaries may leave young children who will take the share of the estate that was intended for their parent. Due to this possibility, a contingent child's trust or some equivalent should be included in every will.

Separate Trusts or a Single Family Trust? The child's trust illustrated above is referred to as a separate-share trust. It provides for the division of the surviving parent's estate into equal shares for the children and then holding the shares of the under-age children in trust until they reach a specified age. The disadvantage of this separate-share trust is the possibility that an under-age child may have a need larger than the size of his share. For example, a $75,000 estate left to three under-age children will give each one a separate-share trust of $25,000. What will happen if one of the children develops a medical problem that requires the expenditure of $45,000? Obviously the child does not have enough in his trust fund and, if his brothers or sisters are minors, they will not be permitted to give or loan him a portion of their trust funds because, as minors, they are legally incompetent to do so. Where will the necessary money come from? It may come from a family member, from a public assistance program, or it may not come at all.

Some parents of young children may choose to eliminate this potential problem by creating one family trust for the benefit of all their children instead of a separate-share trust for each child. Whereas the separate-share trust provides for a division into shares upon the death of the surviving parent, the family trust does not provide for a division of the estate until the youngest child has reached a specific age. Thus, under the family trust approach, the entire estate remains available to meet the needs of every child in order to insure that they all have whatever funds may be required for their support, maintenance and education until each one has reached the specific age. When the youngest child reaches this specified age, the family trust comes to an end and the amount then remaining is divided equally among the children. In addition to providing this form of "insurance" for each of the children, one family trust will also be simpler and more economical to operate than would multiple separate-share trusts.

WHO WILL RAISE MY CHILDREN?

The word "guardian" has been used several times thus far and each time with a negative connotation because it was being used in connection with the property of a minor. However, putting property matters aside for a moment, what about the most precious possession of parents—the children themselves? If both parents die prematurely, who is to take charge of any minor children and become their substitute parents? Virginia law gives the last surviving parent the right to nominate a guardian of the person of any minor children and this right is typically exercised in a person's will. Sometimes the selection of a substitute parent is very difficult, but parents need to specify someone instead of hoping that the right person will volunteer if the need arises. Doing nothing can create serious problems because (i) the first person who steps forward might not be the best person, or (ii) more than one person may step forward and the result might be a bitter fight to gain custody of the children. The children, who have just experienced the traumatic loss of their parents, are thus faced with the possible additional trauma of a custody battle, or perhaps they are faced with feelings of rejection because no one steps forward immediately to serve as their guardian. Accordingly, it is imperative that parents provide for

a guardian of the person of any minor children in order to minimize the possibility of any problems in this important area and to insure that the children will be raised by persons who possess the appropriate parental philosophy and character values, as well as the desired religious background.

WHO WILL SETTLE MY ESTATE?

The generic name for the person who settles a decedent's estate is "personal representative." When someone dies without a will, the personal representative appointed by the court is referred to as an "administrator." Virginia law provides a preference for appointment of the surviving spouse as administrator and, thereafter, it provides that administration may be granted to the first competent beneficiary who requests it. If neither the spouse nor any beneficiary applies for administration within thirty days from a person's death, his creditors or any other person that the court finds competent becomes eligible for appointment as administrator.

When one writes a will, he has the privilege of nominating the person or bank he wishes to serve as his personal representative (who is now referred to as an "executor" because a will is involved). Although the actual appointment of a personal representative is always made by the court, a person can rest assured that the one he has nominated to serve as his executor will be appointed by the court unless, for some reason, that person is found to be incompetent.

HOW LONG (AND HOW MUCH) WILL IT TAKE TO SETTLE MY ESTATE?

It is impossible to estimate the length of time or the costs that will be involved in the settlement of a decedent's estate because they are both a function of (i) the composition of the estate, (ii) the claims against the estate, and (iii) the takers of the estate. One thing that can be said with certainty, however, is that the Virginia laws dealing with the administration of a decedent's estate are in part incomplete and in part obsolete. Thus the administrator of an intestate decedent's estate will not always have all of the administrative powers that are necessary to fulfill the duties of his office. In such a case the administrator will have to apply to the court for assistance in resolving these matters. This court involvement always means additional time spent and greater expense incurred than would otherwise have been necessary. However, if one obtains a professionally drawn will, his attorney can completely eliminate or at least reduce these problems by providing in the will for the executor to have additional administrative powers. This grant of powers usually simplifies the administration of an estate and thereby reduces the time and cost factors.

FREQUENTLY ASKED QUESTIONS

1. ***If a couple owns everything with survivorship, do they still need a will?*** Yes. Even in the highly unlikely case of everything being owned with survivorship, this would respond to only one of their needs—passing everything to the survivor upon the death of the first. They still need wills to determine who will receive their property upon the survivor's death, regardless of which one happens to be the survivor (and also to say when and how this property will pass to their ultimate beneficiaries). It is no answer to say that the survivor can write a will after the death of the first, because the survivor may be unable to write a will at that time for a number of reasons.

2. ***Who should be the executor, trustee or guardian of the person?*** Although an executor serves as a short-term liquidator, and a trustee serves as a long-term manager, the characteristics desirable for both are basically the same—business ability, fairness and diplomacy. Sometimes a different person is chosen to fill each role. However, often the one selected to serve as executor (or alternate executor where a spouse is serving as primary executor) may also be the preferred choice for trustee. The personal requirements for a guardian of the person of a minor child become apparent when one thinks of this role as that of a substitue parent.

3. ***May non-residents serve as executor, trustee or guardian of the person?*** For many years Virginia law prohibited any non-resident from serving as executor or trustee under a will, although a non-resident individual could serve as co-executor or co-trustee along with a resident. Changes in the law now make it possible for some non-residents (spouse, parent, child, child's spouse, brother, sister, descendant, and certain others in special cases) to serve as sole executor or as sole testamentary trustee. In these cases the non-resident must (i) appoint a resident as statutory agent to receive service of process in any legal action concerning the estate or trust, and (ii) give surety (non-waivable) on his bond. Nevertheless, many persons will continue to nominate a resident as executor to avoid the practical problems presented by a non-resident's absence from the decedent's locality during the period of the estate's administration. There are no residency requirements for a guardian of the person of a minor child.

4. ***Should I nominate alternates for the executor, trustee or guardian of the person?*** It is possible that a person nominated to serve in any of these roles may (i) predecease you, (ii) be unable to serve for a variety of reasons, or (iii) begin to serve but be unable to complete the term of office. Thus, it is desirable to nominate alternates to serve if any of these problems occur.

5. ***What is meant by waiver of surety?*** The person who serves as your executor must give his bond (promise) to the clerk of court (i) to faithfully carry out the duties of

his office, and (ii) to be personally responsible to the beneficiaries for any losses caused by his fault. In order to guarantee that your beneficiaries will be paid if there is such a loss in excess of your executor's own assets, the law normally requires that there be surety on your executor's bond. The executor usually satisfies this requirement by purchasing a surety policy from an insurance company with estate funds. You may waive the surety requirement in most cases and eliminate this cost, but you will also be eliminating the protection that the surety bond provides. The same surety considerations are applicable to a trustee named in a will.

6. ***What is meant by waiver of accountings?*** Virginia law requires the trustee of a trust created in a will to file an annual accounting of all trust receipts and disbursements with the commissioner of accounts. The commissioner's review of these accountings is intended to protect the beneficiaries by determining that the trustee has (i) carried out the instructions in the will, (ii) invested correctly, (iii) handled trust property appropriately, and (iv) not charged an unreasonable fee. The costs of these accountings are paid from the trust. You may waive the accounting requirement and eliminate these costs, but you will also be eliminating the protection that the accountings provide.

7. ***How do adopted persons and illegitimate persons take under my will?*** When you identify beneficiaries in your will by terms of relationship (grandchildren, nieces and nephews, etc.), the law presumes that adopted persons and illegitimate persons are intended to be included in such terms unless the will states to the contrary. However, the only way you can be sure that either or both of these classes of persons will take (or will not take) is for your will to specifically state your wishes.

8. ***What is a self-proving will?*** This is an optional procedure in which a notary public places you and the witnesses under oath at the time of your will's execution, and then asks questions similar to those that the clerk of court would ordinarily ask the witnesses at the time of probate. The answers to these questions are put in an affidavit which you, the witnesses and the notary then sign. This affidavit serves as the witnesses' testimony when the will is offered for probate and thereby eliminates any need for them to be present. Thus, problems that might arise at the time of probate because of a witness' absence due to illness, death, etc. are avoided.

9. ***Can I change my will in the future?*** Yes. Unless your will is executed pursuant to a contract that prohibits future changes, it can be altered or completely revoked at any time you wish.

10. ***How long does my will last?*** There is no set life-span for a will but it is believed that a standard will (not involving any tax planning) should be reviewed at least every five years in order to insure that it continues to reflect your wishes in the light of possible changes in the law since its execution. If you move to another state, or if there is a significant change in your assets or beneficiaries, your will should be reviewed immediately.

11. ***Does the law prohibit me from writing my own will?*** No. However, it should be obvious that (i) a layperson cannot reasonably expect to duplicate the work of a competent will lawyer, and (ii) when a will is not drawn correctly, the decedent's family often suffers for it (i.e., delay or excess cost in the settlement of the estate, or the loss of a part or all of an intended inheritance).

12. ***How much does a will cost?*** In most cases an attorney will not be able to quote a fee before meeting with the client. Even though the will is to be a "simple" one, insofar as its general plan is concerned, it will not be possible to estimate the professional time that may be required until the attorney has an understanding of (i) the specifics of the dispositive plan, (ii) the relationships between the parties, (iii) the potential for any under-age beneficiaries, (iv) the nature and extent of the property involved, and (v) the desire for any supplemental documents (general power of attorney, living will, medical power of attorney, etc.). An attorney will ordinarily be able to quote a fee at the end of the will interview.

13. ***Where should I keep my will?*** Where you keep your will is not of great importance as long as it is a safe place. What is most important is that you do not hide your will. Several persons should know the will's location so that it can be produced without any undue delay when it is needed. Virginia law provides that a bank may permit a decedent's spouse, next of kin, and certain others to enter a decedent's safety deposit box to look for a will and to remove it for transmission to the appropriate clerk of court.

14. ***What is a living trust?*** A living trust is one created while you are alive. A testamentary trust is created in your will and does not become effective until your death. Unlike property passing under a will, property passing from a living trust at your death does not go through the probate process.

15. ***Is a revocable living trust better than a will?*** The January 1994 issue of the *Virginia Lawyer* contains an article comparing a revocable living trust with a will. In that article, this author concludes that "although there will be a number of situations in which knowledgeable attorneys will correctly recommend a trust for specific reasons, most Virginians will be better and more economically served by using professionally-drawn wills instead of revocable living trusts to transfer their estate at death."

16. ***What is a living will?*** A living will is a legal document in which you may provide that your dying is not to be artificially prolonged by the application of life-prolonging procedures if your attending physician has determined that (i) you have a condition caused by

injury, disease, or illness from which you cannot recover, and (ii) your death is imminent or you are in a persistent vegetative state.

17. ***What about funeral instructions?*** A will is not a satisfactory place to state your funeral instructions because it might not be available in the hours immediately following death when decisions must be made. You may legally designate the person to make the arrangements for your burial, or the disposition of your remains, by a signed and notarized writing which is accepted in writing by the designated person. However, in most cases a simple letter to your family or religious leader will be sufficient.

18. ***How much do I need to worry about death taxes?*** Somewhat similar to the personal exemption that the federal government allows you on your income taxes, it also allows your estate an "exemption equivalent" of $600,000 against the federal death tax. Virginia repealed its separate inheritance tax in 1980. Thus, death taxes are no longer a consideration for most Virginians.

Those persons who expect that their estate will exceed the $600,000 exemption equivalent will find that there are a variety of deductions and legitimate estate planning devices available to minimize the impact of federal estate taxation. By way of illustration, if a husband and wife with total assets of $1,200,000 write simple wills in which each leaves everything to the survivor or, if there is no survivor, to their children, no estate tax will be payable when the first one dies because of the unlimited marital deduction. But, upon the death of the survivor, an estate tax of $235,000 will be imposed when the $1,200,000 estate (or $965,000 after taxes) goes to the children. However, with proper tax planning, this couple can completely avoid payment of any estate taxes at both deaths and still provide that, upon the death of the first, the survivor will have the full benefit and protection of the entire estate until death (when it goes to the children).

19. ***Should my life insurance be made out in any special way?*** Many a person has provided for his life insurance to be payable to his spouse or, in the event that the spouse predeceases him, to his children (or descendants of deceased children). If these secondary beneficiaries are minors, their receipt of insurance proceeds creates the same undesirable guardianship problems that arise when minor beneficiaries receive money or property from a decedent's estate. To eliminate these problems, and also provide for complete flexibility in the disposition of the insurance proceeds, you may specify that if your spouse predeceases you the proceeds will be payable either (i) "to my estate" or (ii) "to the trustee named in my will." (The estate designation can be used in any will, but the trustee designation should ordinarily be used only if the will creates a family trust).

Either of these beneficiary designations will eliminate the possible need for a guardianship of property. The use of the proper designation will also enable you to integrate your insurance proceeds into the estate plan created by your will and thereby dispose of these proceeds in the same way as your other property.

The use of the estate designation can cause the executor's fee to be higher because your estate will be larger, and it will result in a greater exposure of these insurance proceeds to the claims of your creditors. The trustee designation can cause a delay in the receipt of the insurance proceeds if no family trust is actually created in your will (because the youngest child is above the age specified in the will for the creation of a family trust). Your attorney can help with the choice if you are unsure.

20. ***Do I need a power of attorney?*** Although incapacity is regularly thought of in connection with the elderly, it is not confined to this group. Incapacity can come at any age due to illness or accidental injury. And, like death, it can come without any warning. When an adult becomes incapacitated the standard procedure provided by the law for the management of his property and business affairs is a court-supervised guardianship. This guardianship of an incapacitated adult's property presents problems similar to those previously discussed in connection with the guardianship of a minor's property.

To prevent these problems from arising, you may choose to give a durable general power of attorney to another (who is called your "agent"). Generally speaking, such a power authorizes your agent to sign your name to anything and to have the same powers in all matters relating to your property and business affairs that you had before becoming incapacitated. In addition, a power of attorney is ordinarily drafted to become effective immediately upon delivery to your agent instead of becoming effective "if and when" you become incapacitated. And, on a cautionary note, just as a handgun or a narcotic drug can be abused instead of being used only for its intended purpose, so also can a power of attorney. Consequently, you should not give a power of attorney to another as a casual matter; it should be a thoughtful, deliberate act.

You may also execute a durable medical power of attorney. This will enable another to make health-care decisions for you if, due to illness or injury, you become incapable of making an informed decision about providing, withholding or withdrawing medical treatment. A medical power (sometimes called an advance directive) can be very broad or be limited to specific matters.

If you decide to give a general or medical power to another, you should also consider naming a successor to him. Otherwise, if he becomes incapacitated, dies, etc., after you become incapacitated, there will be no one to act on your behalf. The court can appoint a successor to an executor, a trustee, or a guardian of the person of a minor, but not to an agent. Thus, if you need a legal representative and your agent is unable to act for any reason, the only remedy available from the court will be the appointment of a guardian for you.