

THIS IS THE LAW

By Robert E. Lee

Need of a Will

What is a will?

A will is a written document in which you state who is to own your property after your death. By it you name the persons whom you wish to benefit or protect. An executor is named in it to collect your assets, pay your creditors and funeral expenses, and in general to wind up and settle your estate.

If you make a will, you may to a very large extent designate just how your property is to be used after your death. You may, for example, give the use or income of property to your wife for the term of her life and upon her death the absolute ownership to any one or all of your children.

What is the difference between an executor or administrator?

An executor is the person a testator has named in his will as the one he wants to administer his estate. An executor is not generally required to give a bond. This is because the testator must have had confidence in the honesty and integrity of the person or else he would not have selected and named him.

An administrator is a person appointed by the clerk of the superior court to administer the estate of a decedent when there is no will. He may also be a person appointed by the clerk of the superior court when there is no executor named in the will or the person named in the will has died, resigned, or is incompetent. An administrator is required to give a bond.

Both an executor and an administrator receive a commission for services rendered.

What happens to the property of a person who dies without a will?

After the debts and funeral expenses of the decedent are paid, the balance is distributed in accordance with a rigid formula prescribed by the General Assembly. In other words, if you have not seen fit to make a will, the law will dispose of your property for you. This disposition may not be in accordance with your desires.

The failure to make a will may bring hardships and added expense for your immediate family or those that are closest to you. Occasionally a portion or all that a person owns will go to a distant relative that never knew the decedent.

The "intestate laws," which provides for the disposition of the property of persons who have not left a will, are not the same in all states. They are changed from time to time in North Carolina.

Is it cheaper to die without a will?

No. The administrator of an estate without a will has limited powers of action, whereas an executor may be given broad powers of action which will effect a substantial saving to the estate. A carefully drawn will can and often does reduce taxes and other expenses.

What is a codicil?

A codicil is a written document that amends or changes an existing valid will. It must be executed with all of the formality required of a will.

A will is not made public until after the maker's death. It may be changed or revoked at any time.

Contributory Negligence

Tom and Joe ran into each other with their automobiles. Both were at fault. The accident would not have occurred if either had been driving carefully. Joe was, however, far more negligent than Tom. Tom's car was damaged to the extent of \$300 and Joe's car was not damaged at all. Both are insured. What, if anything, may Tom recover from Joe?

Tom will not be permitted to recover anything from Joe. Joe's attorney who will usually be one employed by his insurance company, will plead as a defense "contributory negligence" on the part of Tom.

If both parties to an accident

are at fault, under the doctrine of contributory negligence neither can recover from the other. This is true even though one was 90 per cent at fault and the other was only ten per cent at fault. Tom's contributory fault or negligence is a complete bar to his right of recovery from Joe. Tom did not come into court with "clean hands." He is denied recovery for the purpose of punishing him for his own misconduct.

The doctrine of "contributory negligence" has been severely criticized. A small number of states have by statute abolished it, and have substituted instead the doctrine of "comparative negligence." Under the doctrine of "comparative negligence" there is an apportionment of damages according to fault. For example, if Tom had been ten per cent at fault, he could have recovered from Joe under the doctrine of "comparative negligence" \$300 less \$30, or \$270.

If Tom carries collision insurance, he could recover from his own insurance company the allowable damages of the policy.

Dan Bailey was an employee of Walter Gallant. During the course of his employment, and while driving Gallant's automobile, Bailey had a collision with an automobile owned and driven by John Young. Both Bailey and Young were at fault. May Gallant recover from Young money for the damages done to his automobile?

No. Bailey at the time of the collision was driving the car as an agent of Gallant. The negligence of an agent is imputed to his principal. It is the same as if Gallant himself had been driving the car. Since both drivers were at fault, Young may plead in bar of the action the doctrine of "contributory negligence."

If Bailey had not been at fault, Gallant could have recovered the full amount of any damages to his car resulting from the negligence of Young.

Walter Campbell lent his automobile to James Gardner one evening. Gardner paid Campbell \$5 for the use of the automobile. The automobile was badly damaged as the result of a collision between Gardner and Herbert Wilson. Both Gardner and Wilson were at fault. The accident would not have occurred if either had been driving carefully. May Campbell recover from Wilson money for damages done to his automobile.

Yes. Whenever personal property is loaned or rented to another, there is created a bailment. In this case, Campbell was the bailor and Gardner was the bailee.

The negligence of the bailee is not imputed to the bailor as in cases of agency. The bailor may recover from a third person whose negligent act has damaged the bailed property, even though the bailee's negligence contributed to the loss. As against Campbell, the bailor, Wilson cannot use the defense of "contributory negligence."

Who is a "testator"?

The person making a will is referred to as the "testator." In the case of females, the expression "testatrix" is often used.

How many witnesses are required to sign an attested written will in North Carolina?

Two. Lawyers frequently insist upon three, because there are a number of states that require this number of witnesses and the lawyers want their clients to leave wills that will be valid in all states.

Must the attesting witnesses read the will or know its contents?

No.

Must the testator sign his name in the presence of the attesting witnesses?

No. In North Carolina it is not necessary that the testator sign his will in the presence of the at-

testing witnesses, but if he does not do so, he must acknowledge to them his signature previously affixed thereto. In certain instances the acknowledgment has been held sufficient by acts or conduct on the part of the testator, but an express statement by the testator to the witnesses that he has signed is the safest method. There must be a signature to

attest before there can be an attestation. In other words, the attesting witnesses sign after the testator has signed.

Must the attesting witnesses sign in the presence of each other?

No. The attesting witnesses must sign the will in the presence of the testator, but they need not sign in the presence of each other.

May a beneficiary in an attested written will be an attesting witness to the will?

The simplest and best advice to a testator is that he should get someone other than a beneficiary,

or the spouse of a beneficiary, to witness the will. A beneficiary, or the spouse of a beneficiary, is what the law calls an "interested witness."

A beneficiary or his spouse may be a competent witness to a will; but, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and anyone claiming under him take nothing under the will. The will is void only so far as their interests are concerned. Therefore, no beneficiary or his spouse should be requested to sign as an attesting witness.

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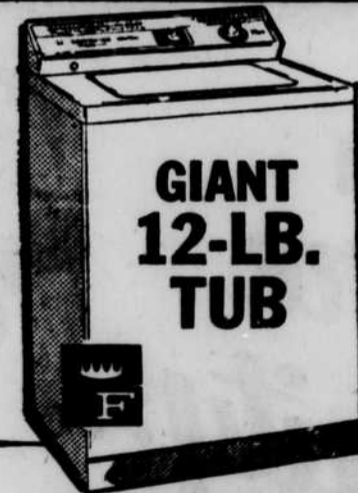
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