

PRO BONO LIFE PLANNING DOCUMENT CLINICS

OVERVIEW:

- Provides the eligible client with a basic will, durable power of attorney and advance medical directive.
- Limited to individuals over 18 who are Virginia residents.
- Specifically designed to be staffed by volunteer lawyers with no trust or estate experience.
- All forms and procedures are basic and simple.
- No tax, estate or business succession planning.
- No custom drafting.
- In spite of its simplicity, the program accommodates the needs of 99% of the scheduled clients.

HOSTS:

All hosts are nonprofit organizations serving the needs of various low income communities such as veterans, senior citizens, recovering addicts, nursing home residents and cancer patients.

The host is solely responsible for the selection, screening and scheduling of clients.

CLIENTS:

All clients will have been screened and scheduled by the host organization. Each client will have completed a Questionnaire expressing the clients wishes. Eligibility for pro bono service is determined by the host. While HUD income guidelines are the most common standard, the host may also use different criteria. Volunteers do not look behind a host's determination of eligibility.

LOCATION AND DURATION OF CLINICS:

The date and location of a clinic are selected by the host to best serve the needs of the clients. Volunteer attorneys are asked to arrive at the clinic site fifteen (15) minutes before the clinic begins to receive basic instructions. A clinic generally last three hours. A volunteer attorney will meet with 2-5 clients. When all enrolled clients have been served, the clinic ends.

DOCUMENTS PROVIDED BY CLINIC:

Will:

- Self-proving.

- Provides for payment of debts and funeral expenses.
- Honors memorandum disposing of tangible personal property
- Offer four dispositive provisions:
 - All to spouse, equally to children, per stirpes, if spouse does not survive.
 - Equally to children, per stirpes
 - All to named person or charity with an alternate
 - Divided equally among designated persons who survive
- Special language is provided to omit a child, name a guardian and deal with separated spouses.
- Surety is waived on executor's bond and the executor is given the powers granted by Virginia Code §64.2-105.
- Any person who fails to survive the testator by 30 days shall be deemed to have predeceased the testator.
- A minor's share is distributed to a custodian selected by the executor pursuant to the Virginia Uniform Transfer to Minor's Act.

Power of Attorney:

- Durable, does not terminate on disability of principal.
- Provides general authority including all authority granted by the Uniform Power of Attorney Act as set forth in Virginia Code §§64.2-1625 through 1638.
- Does not grant medical powers.

Advance Medical Directive:

- Grants full power and authority to make all healthcare decisions pursuant to Virginia Code §54.1-2894.
- Powers "activate" when principal is determined to be incapable of making informed decisions.
- Contains HIPPA waiver authorizing health care providers to provide medical information to agent.
- Contains optional provision to provide comfort and not to use artificial life-prolonging procedures in the event of a terminal condition.

PROCEDURE:

Consultation:

- Each client will have a completed questionnaire that provides basic information and expresses the client's wishes.
- Review the questionnaire with the client to fully understand the client's wishes; verify the status, relationship and correct spelling of the names of the persons named in the documents.
- If husbands and wives request joint representation, each must affirmatively consent with a notation of the consent noted on their questionnaires.
- Request assistance if there are questions of competency, undue influence or on any other matter of concern. Assistance will always be available.

Marital Status:

Confirm marital status. In spite of years of separation, a person remains married until either death or the entry of a final divorce decree. If a person claims to be divorced, ask whether the client has "papers" dissolving the marriage. The will form contains special language that may be used when a client is separated.

Children:

Determine the legal status of all "children". Step children and God children are not considered descendants. An adopted child is considered to be the child of the adopting parent and not the child of the biological parent. To avoid problems, it is important to name each child who is to inherit. The will form contains special language that may be used when it is intended that a child not inherit.

Asset Information:

It is important for the client to understand that certain assets will pass outside of the will.

Examples:

- Real estate owned with survivorship
- Life insurance proceeds paid to a named beneficiary
- A bank account with a payable on death ("POD") designation
- Stock registered with a transfer on death ("TOD") designation
- IRA accounts having an individual beneficiary

LIMITATIONS:

- Each client must be a Virginia resident over 18 and have a current government issued photo ID.
- The forms meet the needs of 99% of all clients and cannot be changed.
- If a form as written does not meet a client's needs, simply decline to provide the document.
- There can be only one executor or agent with an alternate. To avoid disputes, the program does not permit co-executors or co-agents.
- There are no specific devises of either money or property. Disposition of items of tangible personal property is handled through a form conforming to Virginia Code §64.2-400. The form is given to each client as a part of a "departure kit".
- Funeral directions are not a part of a will. A will may never be probated or probated months after death. A client may either make pre-need arrangements with a funeral home or write a separate letter to the client's family or executor.
- The clinic does not include review of documents, drafting of codicils or providing general legal advice. If a client's legal needs are beyond the scope of the clinic, suggest that the client contact the Virginia State Bar Lawyer Referral Service at (804) 775-0500.
- The clinic does not retain copies of documents or make multiple copies of the documents for clients.
- If desired, a volunteer lawyer may make document copies for the lawyer's personal file.

FORMS AND EQUIPMENT:

- Each workstation is provided with a laptop computer and a flash drive containing the master form of will, power of attorney and advance medical directive.
- Copy and save the form in the name of the client. **Do Not** use the master form to complete the client's documents.
- The dates and notary blocks on all forms will have been completed.
- Each form contains instructions highlighted in yellow.
- Remove all highlighted instructions before printing a completed form.
- Client documents are printed by inserting the flash drive into the laptop connected to a common printer. Print only one copy of each document.

DOCUMENT EXECUTION:

- Review the completed documents with the client. After the client has approved the documents, a notary will be provided.
- Each client is provided with an envelope labeled “Important Life Planning Documents” for the executed instruments.
- A client receives a “Departure Kit” consisting of a short explanation of each document executed and a form for disposing of tangible personal property.
- Each client must execute the provided termination letter indicating that all representation has ended, that the clinic does not retain copies of any documents and that there is no continuing attorney-client relationships.

ETHICAL ISSUES:

The Virginia Supreme Court has adopted Rules of Professional Conduct, which follow the Model Rules of Professional Conduct of the American Bar Association.

Communication: Rule 1.4 provides that “a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions...” In fulfilling the communication obligation, briefly and simplicity are encouraged. Long, technical explanations can be confusing.

Simple explanations could include:

- A will allows you on your death to give what you have to others as you choose rather than having the State decide who receives your property if you die without a will.
- A power of attorney lets the person that you name as an agent do your business for you.
- An advance medical directive allows the person that you name to make medical decisions for you when you can no longer speak for yourself.

Conflicts:

- **Direct Conflict.** Rule 1.7. A lawyer should not represent a client when there is a conflict of interest. If your representation is directly adverse to another client or if there is a significant risk that your representation will be materially limited due to your responsibilities to another client, a former client, or a third person or by your personal interest, then you have a conflict of interest and must decline representation.
- **Limited Legal Service Programs.** Rule 6.5. A lawyer who, under the auspices of a program sponsored by a non-profit, provides short-term limited legal services to a client without expectation by either lawyer or client of providing

continuing representation is subject to Rule 1.7 only if the lawyer actually knows of a conflict.

Confidentiality: Rule 1.6. Lawyers are expected to keep client discussions confidential, even if the person is not retaining you as his/her attorney. The information given by the client at a clinic is protected by the lawyer-client privilege.

Dual Representation: Frequently, husbands and wives request to have the same volunteer lawyer prepare the offered documents. Rule 1.7 dealing with conflicts of interest permits joint representation “if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client...[and] the consent of the client is memorialized in writing.”

Before proceeding with drafting documents for both husband and wife, each should be given substantially the following information:

- That each has the absolute right to have separate lawyers.
- That what one of you may tell me is not protected by the attorney-client privilege toward the other.
- That if you want to speak to me in confidence or if your wishes are not the same, then you need to have separate lawyers.

If both husband and wife consent to dual representation, note that consent has been granted on each questionnaire.

Capacity: A person is capable of making a will unless the person is either “of unsound mind” or an un-emancipated minor (VA Code §64.2-401). The Virginia Supreme Court has held that a testator must be capable of recollecting his property, the natural objects of his bounty, and the business about which he was engaged and how he wished to dispose of his property. Fields v. Fields, 255 VA 546, 499 S.E. 2d 826 (1998). Old age and eccentricity alone do not invalidate capacity, Wood v. Wood, 109 VA 470, 63 S.E. 994 (1909). Also, neither sickness nor impaired intellect, standing alone, is sufficient to invalidate a will Thomason v. Carlton, 221 VA 845, 276 SE 2d 171 (1981).

- An individual executing a will only needs to have the mental capacity to:
 - Understand the nature of the business the individual is doing
 - Recollect the property of which the individual disposes
 - Know the objects of the individual’s bounty; and
 - Hold these things in an individual’s mind for enough time to observe their relations to each other and form a rational judgment in relation to them

Virginia Code §§ 64.2-401(B) and 64.2-750; Lester v. Simpkins 83 SE 1062, 1066 (VA 1915) Spencer v. Moore ___ VA 423 (1798)

- The host is primarily responsible for screening clients as to mental capacity. However, each volunteer attorney must make an independent judgment of competency based upon the facts and circumstances presented.

Representation of an Impaired Client: Rule 1.14. All clients participating in the life planning document program will have been screened and scheduled by the host. However, from time to time a client may appear to have capacity issues.

- A client is presumed competent.
- Health or sensory problems should not be confused with lack of capacity. Many clients have auditory, mobility and speech issues. However, Rule 1.14 provides that when a client's ability to make adequately considered decisions in connection with the representation is impaired because of mental disability, or other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- It is important to remember that impaired clients may have good days and bad days, and good and bad times of day.
- Paragraph (b) of Rule 1.14 provides that if the client with diminished capacity is "at risk of substantial physical, financial or other harm" unless action is taken and the client is unable to act in the client's own interest then the lawyer may take "reasonably necessary protective action" and pursuant to paragraph (c) of Rule 1.14 disclose confidential interest as reasonably necessary to protect the client's interests.
- Frequently there are family members and social workers present that may offer insight as to how best proceed. According to the Rules, a lawyer should decline to draft documents only when the lawyer believes, based on all facts and circumstances, that the client cannot adequately act in the client's own best interest.

Drafting Lawyer as Fiduciary: If a client asks you to be the client's fiduciary, you are strongly urged to decline. Continuing representation is not a part of the program. Before agreeing to serve as a fiduciary, you should review Legal Ethics Opinion 1515.

- A lawyer must provide full disclosure to the client of the potential fees the lawyer may charge for serving as a fiduciary. This disclosure is to be made before the client executes the instrument creating the fiduciary relationship.
- The disclosure must be in writing and signed by the client. The writing may either be the will, trust, or other instrument creating the relationship, or it may be a separate writing.
- The disclosure must also address any tax, investment fees, or fees for other services that will be charged over and above the basic fees for service as a fiduciary.

Future Legal Services:

- The possible retention by a lawyer or the lawyer's firm to provide separate legal services is treated as a separate conflict of interest requiring consent after disclosure.
- Consent after disclosure may be obtained either from the client when the applicable instrument is prepared, by consent after disclosure of all remainder beneficiaries of an estate, or by the consent of all income and vested remainder beneficiaries of a trust.
- Just Say No

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