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1. 1-11 LN Practice Guide: FL Estate & Probate Practice § 11.44

Client/matter: -None-
Will of Married Client with Children; Small Estate

LAST WILL OF ____________________ [name of testator]

I, ____________________ [name of testator], a citizen of the United States and a resident of the ______________ [City or Town] of ______________ [name of city or town], County of ______________ [name of county], State of Florida, declare this to be my Will. I revoke any and all Wills and Codicils that I have previously made.

[1]—ARTICLE 1. FAMILY

Identification of Family

1.01. I declare that I am married to ____________________ [name of spouse] and that there are ____________________ [number] children of this marriage, whose names and birthdates are: ____________________ [name and birth date of each child, e.g., Jonathan James, born November 14, 1985].

Definitions of Family Terms

1.02. As used in this Will, the term “my spouse” shall mean only ____________________ [name of spouse], who is also a citizen of the United States. As used in this Will, the term “my children” refers to all my natural children and my adopted children, including any that may subsequently be born or adopted by me. My “natural children” _________ [include or exclude] those born outside of lawful marriage and _________ [include or exclude] any with regard to whom my parental rights have been terminated. The term “my children” excludes all other persons, including ____________________ [describe, e.g., any stepchildren or foster children who reside with me or who may subsequently reside with me]. As used in this Will, the term “issue” refers to all lineal descendants of the indicated person of all generations, with the relationship of parent and child at each generation determined by the definition of “children” set forth in this Paragraph 1.02.

[2]—ARTICLE 2. PAYMENT OF BURIAL EXPENSES

Description of Expenses

2.01. I authorize my personal representative to pay all the expenses of (1) a funeral or memorial service, (2) the interment of my remains, including the costs of a gravesite, if necessary, and (3) the installation and inscription of a suitable marker at, and perpetual care of, the gravesite.

[3]—ARTICLE 3. DISPOSITION OF TANGIBLE PERSONAL PROPERTY

Disposition by Separate Writing

3.01. I give to those persons designated in a signed separate writing the items referred to therein. In the event of more than one such separate writing, the last dated separate writing shall control, and all others shall be void.

Disposition to Spouse

3.02. To the extent not effectively disposed of under paragraph 3.01 above, I give and devise all my aforesaid tangible personal property to my spouse, if my spouse shall survive me.

Alternate Disposition to Children

3.03. If my spouse does not survive me, and to the extent not disposed of under paragraph 3.01 above, I then give and devise all such tangible personal property to my children who shall have survived me in as nearly equal shares as is possible, share and share alike (with no provisions for the descendants of a deceased child).
[Alternative Disposition]

3.03. If my spouse does not survive me, and any child of mine survives me, I direct my personal representative to divide my tangible personal property into two parts. The first part shall contain all items that my personal representative determines, after consulting with my children, to be of no present or future value or use to my children. The second part shall contain the balance of the property. My personal representative shall dispose of the first part by sale, abandonment, destruction, or gift to any charity or person. The proceeds of any sale shall be added to my residuary estate. All property in the second part I give to my children who survive me, in substantially equal shares, to be divided among them as they shall agree. If any child is a minor, the guardian of the person appointed for that child must agree to the division. If no agreement is reached within ____________________ [period of time, e.g., ninety days] after my death, all property in the second part shall be divided among all my surviving children in such manner as my personal representative shall direct. The decision of my personal representative shall be conclusive and binding on all persons interested in my estate.

[Note: Time period used in this paragraph must be coordinated with time period in Paragraph 10.02.]

[4]—ARTICLE 4. DISPOSITION OF RESIDUARY ESTATE

Disposition to Spouse

4.01. All of the rest, residue, and remainder of the property that I own at the time of my death, both real and personal, and of every kind and description, wherever situated, to which I may be legally or equitably entitled at the time of my death, including lapsed devises, but expressly excluding any property over which I may have a power to appoint (my “residuary estate”), I give outright and absolutely to my spouse.

Alternative Disposition to Children

4.02. If my spouse does not survive me, I give my residuary estate to those of my children who survive me, and to those who predecease me leaving issue who survive me, in equal shares. The share of any child of mine who predeceases me leaving issue who survive me shall pass to such issue per stirpes by right of representation.

Further Alternative Disposition

4.03. If I am not survived by my spouse, children, or children’s issue, as described in Paragraphs 4.01 and 4.02 above, I give my residuary estate as follows: ____________________ [describe alternative disposition].

Final Alternative Disposition

4.04. If any part of my residuary estate is not completely disposed of by the provisions of Paragraphs 4.01, 4.02, and 4.03 above, I give that part of my residuary estate to the persons who would receive it under the intestacy statutes of the State of Florida in effect at the time of my death if I had died intestate.

[5]—ARTICLE 5. APPOINTMENT OF PERSONAL REPRESENTATIVE

Appointment

5.01. I appoint my spouse as personal representative of my estate. If my spouse does not survive me, refuses or fails to serve as personal representative for any reason, or ceases to serve as personal representative for any reason after having been appointed, ____________________ [name of successor personal representative] shall act as personal representative. If ____________________ [name of successor personal representative] does not survive me, refuses or fails to serve as personal representative for any reason, or ceases to serve as personal representative for any reason after having been appointed, then ____________________ [name of second successor personal representative] shall act as personal representative.

Bond Not Required

5.02. None of the individuals named in Paragraph 5.01 shall be required to furnish a bond for the faithful performance of his or her duties as personal representative.
[6]—ARTICLE 6. POWERS OF ADMINISTRATION

Grant of Powers

6.01. In the administration of my estate, my personal representative shall have the powers and authority set forth in this Article. These powers may be exercised by my personal representative in his or her sole and absolute discretion, without the permission or order of any court. These powers shall be supplementary to the powers conferred by law.

Retention of Assets

6.02. My personal representative shall have the power to retain any or all property of my estate, however received or acquired, for so long as my personal representative deems appropriate. This power may be exercised even though the property may not be of the type authorized by law for investment, and even though retention may leave a disproportionately large amount of the value of my estate invested in one type of property.

Transfer of Assets

6.03. My personal representative shall have the power to sell, transfer, and convey any property, of whatever nature, including real property, and wherever situated, that I may own at the time of my death or that may come into my estate at or after my death without court order. The sale, transfer, or conveyance may be by public or private sale, at such time, on such terms and conditions, including selling price and credit, in such manner, and for any reason that my personal representative deems appropriate, including, but not limited to, the purpose of obtaining net proceeds to be distributed to my residuary beneficiaries.

Investment

6.04. My personal representative shall have the power to invest and reinvest in preferred and common stocks, bonds, notes, common trust funds (including any managed by any corporate personal representative), interests in investments, trusts, mutual funds, leases, mortgages on property wherever located, and, generally, in any property and in proportions of property as my personal representative deems advisable, even though such investments are not of the character or proportions authorized by applicable law for the investment of such funds.

Power to Borrow

6.05. My personal representative shall have the power to borrow money for any purpose for any periods of time and on any terms and conditions as my personal representative deems advisable (including the power to borrow from any corporate personal representative), and to pledge, mortgage, or otherwise encumber any property to secure repayment of any loan, as well as the power to renew existing loans either as maker or endorser.

Distribution in Cash or in Kind

6.06. My personal representative shall have the power to make distributions in cash or in kind, or partly in each, in divided or undivided interests, and the power to determine which assets shall be sold and which shall be distributed in kind, without notice to or consent by any beneficiary.

Distribution to Minors and Persons Under Disability

6.07. My personal representative shall have the power to make distributions or payments to or for the benefit of any beneficiary who is a minor, an incapacitated person under Florida law, or who, in the personal representative’s judgment, is otherwise incapacitated. The distributions or payments shall be made in any one or more of the following ways: (1) directly to the beneficiary; (2) directly to the creditor in payment of the debts or expenses of the beneficiary; (3) to the guardian of the person or estate of the beneficiary; (4) to any custodial parent of a minor beneficiary; (5) to a custodian for the beneficiary under any law related to gifts to minors, including to my personal representative in that capacity; or (6) to any other person who shall have the care and custody of the person of the beneficiary. There shall be no duty to see to the application of funds so paid, provided due care was exercised in the selection of the person to whom the funds were paid, and the receipt of the person shall be full acquittance of the personal representative.
Disposition of Business Interests

6.08. My personal representative shall have the power to continue or to permit the continuation of any business, incorporated or unincorporated, in which I may have any interest at the time of my death for any period of time, or to liquidate the business on any terms, as my personal representative deems appropriate. This power includes, but is not limited to (1) the power to invest additional sums in any business, even to the extent that my estate may be invested largely or entirely in the business, without liability for any loss resulting from lack of diversification; (2) the power to act as or to select other persons to act as directors, officers, or employees of any business, to be compensated without regard to being an personal representative under this Will; and (3) the power to make any other arrangements concerning any business interest as my personal representative shall deem proper.

Employment of Agents

6.09. My personal representative shall have the power to employ and pay the compensation of any and all attorneys, agents, custodians, attorneys-in-fact, experts, investment counsel, accountants, bookkeepers, or other agents or providers of services as my personal representative deems advisable in the administration of my estate.

Commissions

6.10. My personal representative shall have the power to take reasonable commissions on account at any time during the administration of my estate without the approval of any beneficiary or of the court, but subject to allowance or disallowance on the settlement of the final account of my personal representative.

Third-Party Reliance

6.11. No person or corporation dealing with my personal representative shall be required to see to the application of any property paid or delivered to my personal representative, or to inquire into either the authority of my personal representative to enter into any transaction or the expediency or propriety of any transaction entered into by my personal representative.

[7]—ARTICLE 7. PAYMENT OF DEATH TAXES

[Delete this Article 7 if the testator wants to have any estate tax apportioned in accordance with federal law and Fla. Stat. § 733.817]

Death Taxes

7.01. I direct that any estate, inheritance, or other death taxes payable as a result of my death, not limited to taxes assessed on property passing under this Will, shall be ____________________ [describe testator’s intention, e.g., paid out of ____________________(specify source, e.g., my residuary estate) and shall not be deducted or collected from any beneficiary under this Will or any other transferee].

[8]—ARTICLE 8. LIABILITY OF PERSONAL REPRESENTATIVE

[Delete this Article 8 if the testator wants the personal representative to be liable for any breach of fiduciary duty]

Liability Limited to Actual Fraud or Willful Misconduct

8.01. My personal representative shall not at any time be liable for any mistake of law or fact or both, for any error of judgment, or for any loss coming to any beneficiary under this Will or to any other person, unless the loss was caused by actual fraud or willful misconduct on the part of the personal representative. My personal representative may, from time to time, consult with counsel with respect to the meaning, construction, and operation of this Will, particularly with respect to the apportionments, allocations, and disbursements, and may act on the advice of counsel in all matters without incurring liability on account of ____________________ [his or her] actions.

[9]—ARTICLE 9. APPOINTMENT OF TESTAMENTARY GUARDIAN

Appointment

9.01. Should I predecease my spouse leaving unmarried minor children, my spouse shall have all rights of legal and physical custody and control of our minor children without the need of the appointment of any guardian of the person or property for any minor child. However, should my spouse predecease me and, at the time of my death, any child
of mine is unmarried and still under the age of eighteen years, I appoint ____________________ [name and relationship of guardian, e.g., Joseph Jones, my brother], who resides at ____________________ ____________________ [address], to be guardian of the property and of the person of each minor child. If ____________________ [name of first appointee] is unable or unwilling to serve as guardian, I appoint ____________________ [name and relationship of alternate guardian], who resides at ____________________ ____________________ [address], to be guardian of the property and of the person of the minor children.

No Bond Required

9.02. No bond shall be required of any guardian of the person or property of my minor children who is appointed under this Will.

Guardianship Estate for Guardian of Property

9.03. Any property given by this Will to any child of mine who is still a minor at the time of my death shall be included in the guardianship estate. The guardian of the estate appointed in this Will shall have full authority to control and administer all property in the guardianship estate for the benefit of any minor child. On any child’s attaining the age of eighteen years, the guardianship shall be terminated and the entirety of the guardianship estate shall be transferred to that child absolutely, without limitation or restriction of any kind.

[10]—ARTICLE 10. INTERPRETATION

[Choose one of the following paragraphs:]

Will Not Contractual

10.01. My spouse and I are executing wills at approximately the same time, in which each of us is the primary beneficiary of the will of the other. These wills are not being executed pursuant to any contract to make a will or any contract not to revoke a will. The will of each of us is revocable at any time, whether before or after the death of the other spouse, at the sole discretion of the spouse making the will.

[OR:]

Will Pursuant to Contract

10.01. This Will is made pursuant to a written contract between myself and ____________________ [name of other party], dated ____________________ ____________________ [date]. This contract is attached to this Will and is incorporated by reference.

[ Continue with the following: ]

Meaning of “Survive”

10.02. No beneficiary of this Will shall be deemed to have survived me if the beneficiary dies within ____________________ [state time period not to exceed estimated period of estate administration and not to exceed six months for spouse, e.g. sixty days of the date of my death].

Successors

10.03. All pronouns referring to a personal representative and the term “personal representative” shall be construed to mean any person acting as my personal representative or curator, as the case may be.

Number and Gender

10.04. If required by the context of this Will, singular language shall be construed as plural, plural language shall be construed as singular, and the gender of personal pronouns shall be construed as either masculine, feminine, or neuter.

Headings

10.05. All headings used in this Will to describe the contents of each article, paragraph, or other division are provided for convenience only and shall not be construed to be a part of this Will.
Governing Law

10.06. This Will shall be construed in conformity with the law of the State of Florida.

Dated: ____________________

[Select either:]

[If testator signs in presence of the witnesses:]

Signed and declared by ____________________ [name of testator] as ____________________ [his or her] last Will.

____________________ [signature of testator]

____________________ [typed or printed name]

[OR:]

[If another person signs on testator’s behalf at testator’s request, use signature clause and attestation clause in 11.42.]

[Continue as follows:]

[If will is to be made self-proving, add acknowledgment. For form, see 11.50.]

 Authorities:

Fla. Stat. § 732.603(2) (If a beneficiary of a will is not protected by the anti-lapse statute, and fails to survive the testator, the gift given to that beneficiary will become part of the residue of the estate unless the will provides for an alternative disposition.)

Fla. Stat. § 732.512(1) (A document may be effectively incorporated by reference if it is in existence at the time the will is executed and is clearly identified in the will.)

Fla. Stat. § 732.502 (Formal execution requires that the will be signed at the end by the testator, or by some person in the testator’s presence and at the testator’s direction, and that the testator sign or acknowledge signing or directing another to sign in the present of at least two attesting witnesses and that the witnesses sign in the presence of the testator and each other.)

See Sharps v. Sharps, 219 So. 2d 735 (Fla. 3d DCA 1969) (While a will executed pursuant to a contract may be revoked by a testator during his life, a contract to make a will remains enforceable and may be a claim against the promisor’s estate.)

Note:

This form may be used as a will for a married client with children who desires to leave all of his or her estate to the surviving spouse outright or; if the spouse does not survive the client, to their children in equal shares.