What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

John Narron is a Board Certified Family Law Specialist and has been practicing law in North Carolina since 1977, with a practice concentration in all manner of civil disputes that frequently involve complex equitable distribution proceedings, alimony trials, will caveats, employment disputes, personal injury trials and negotiations, and a wide variety of commercial business disputes. John has served as a mediator in more than 200 family law disputes in Wake County, Franklin County, Johnston County, Wayne County, Guilford County, Forsyth County, and Pender County.

A Last Will and Testament Can Always Be Changed (Before Death)

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It is a fundamental principle of law that a Last Will and Testament duly signed and witnessed is binding on no one until the person who signed the Will dies. That is to say that a person who signs a Will in say January of 2010 is entirely free to change that Will in October of 2017 provided of course that person has the mental capacity to sign a Will.

A recent Court of Appeals case from October 3, 2017, illustrates how this basic rule can sometimes cause family conflict. In the recent case of *Moore v. McKenzie*, the Court of Appeals was called upon to decide the outcome of a dispute between a brother and sister over their step-father's Will. The seeds of this dispute originated in August of 2003 when a married couple named Bobby and Doris hired an attorney to help them prepare their Last Wills and Testaments. The Wills were executed in the proper format, and by the terms of each Will, all of their property would go to the surviving spouse. However, in the event one spouse had predeceased the other, all of the property would go to Ronnie, the son of Doris and stepson of Bobby. A few years later, Doris died, and all of her property by the terms of her Will were devised to her husband, Bobby. At some point after the death of Doris, Bobby went to a lawyer and executed a new Will which left all of his property to his step-daughter, leaving nothing to his stepson Ronnie. Bobby also signed a deed conveying real estate that he owned in Harnett County to his step-daughter. Not long after executing the deed, Bobby passed away, and his new Will was probated making his step-daughter the sole beneficiary of his Estate in addition to the real estate that he had previously conveyed to her while he was alive.

When Ronnie realized that the plans that had been made by his mother and step-father in 2003 when they signed their first set of Wills had been changed unilaterally by his step-father with the new Will, Ronnie was upset. In Ronnie's mind, the 2003 Wills signed by his mother and step-father were mirror images of each other and amounted to a contract between his mother and step-father to devise their property at their deaths precisely as they had done so in 2003. Ronnie felt like his mother had carried out her end of the bargain by passing her property to her husband when she died and now her husband (Ronnie's step-father) had changed the way they had planned to devise their Estate by leaving everything to Ronnie's sister and nothing to Ronnie.

Apparently, Ronnie convinced a lawyer that his theory was sound and a lawsuit was filed in Harnett County alleging that the joint Wills signed by Doris and Bobby on August 20, 2003, constituted a contract between the two of them that could not be altered after one of them died. The lawyer for Ronnie's sister filed a Motion for Summary Judgment. The Trial Court after hearing the Motion ruled that the 2003 joint Wills were not a contract between Bobby and Doris and therefore Bobby was completely free to change the Will as he did after Doris died.

Being unhappy with that decision Ronnie appealed the result to the North Carolina Court of Appeals. He was no more successful at the Court of Appeals than he was at the Trial Court because the Court of Appeals agreed that the 2003 Wills were not a contract between the couple. The Court held that in the absence of contractual language in the Wills and without a separate contract or agreement incorporated into a Will, a testator is not contractually bound to bequeath property by the terms of that Will. That rule of law was applied in a prior North Carolina Court of Appeals case when the Court at that time even expanded on its ruling by saying "in the absence of a valid contract,...the mere concurrent execution of the Will, with full knowledge of its contents by both testators, is not enough to establish a legal obligation to forbear revocation" *Collins v. Estate of Collins*, 173 N.C. App. 626, 619 S.E.2d 531 (2005). To finally emphasize this point for good the Court of Appeals quoted from another prior decision when it said: "the mere fact that the provisions of the Wills are reciprocal and identical in language, except for the name of the maker, is not sufficient to create a binding contract." *Godwin v. Wachovia Bank and Trust Company*, 259 N.C. 520; 131 S.E.2d 456 (1963).

As a result of these prior rulings, the Court of Appeals quickly affirmed the Trial Court's decision in this case and concluded that the Trial Court was correct in denying Ronnie's request to alter the Estate of his step-father and disallow the contents of his step-father's final Will.

The lesson here is that a Will can be changed at any time before a testator's death. If you desire a Will that cannot be subsequently amended or revoked, then careful attention must be paid to a contract executed by the parties setting forth the reasons that the Will cannot be changed and setting forth the consideration for making that provision.

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