THE RAYMON B. HARVEY LAW FIRM
Arkansas Elder Law & Special Needs Trusts

650 South Shackleford Road, Suite 400
Little Rock, AR 72215-6212
501-221-3416
www.ArkansasElderLaw.com
E-Mail: info@ArkansasElderLaw.com

ESTATE PLANNING: WILLS AND TRUSTS

WHERE DO YOU WANT YOUR ASSETS TO GO?

When you die, your property will pass on one of several ways.

First, any joint owner or designated beneficiary will automatically be owner. No Will or Trust will change that. Joint ownership or designating a beneficiary (such as on a life insurance policy or paid-on-death designation) will only go to that owner or beneficiary. So, for example, you name your two children to your bank account both have children of their own. One child pre-deceases you. At your death, that account will only go to the living child. Your decease child's children will receive nothing. The child that does get the account, does so without consideration of age or disability.

Joint ownership can bring unanticipated consequences. If your child is on your bank account or a joint owner on the deed to your home, their financial problems become your financial problems. Consider the situation where you put your child's name on your home and the child later pre-deceases you. Now the joint owner is their spouse or children.

Second, if you do not have a Will, your property will pass according to Arkansas law.

- *If you are survived by a spouse*: all "community property" goes to the spouse; all "separate property" is shared by the spouse with surviving children, or grandchildren (or parents, siblings, cousins, or other relatives of yours). In general, "community property" includes assets accumulated by a married person during the person's marriage while living in Arkansas. "Separate property" is often assets inherited by a married spouse or owned by the married person before the marriage—so long as the assets have been kept separate (not commingled with community assets.)

- *If you are not survived by a spouse*: your surviving children (and grandchildren, in the case of your children who have died before you) share. For example, unmarried Pearl dies without a will, leaving one surviving child and one deceased child. Pearl's deceased child had four children, each of whom survives Pearl. Without a will, 50% will go to Pearl's surviving child, and 12.5% will go to each of her four surviving grandchildren (they share her deceased child's 50%). If no children or grandchildren survive, the closet surviving relatives of the intestate person (parents, siblings, cousins or other relatives) are designated.

Third, you have a Will or Trust, your property will pass according to your designations under those documents. If you wish distribution of your probate estate in a way that you want, you need a Will or a Trust. A few examples:

- John is married to Mary, and they have one child. John will have both separate property (an inheritance from his mother) and community property in his probate estate. John wants all of his property to go to Mary when he dies. If John dies without a will, Mary will receive the community property, but Mary will need to share the separate property with their child. To create the result he wants, John should have a will stating that Mary is to receive all his property (community or separate.)

- Joyce is married to Jerry, and they have one child. Joyce will have both separate property (an inheritance from her father) and community property in her probate estate. Joyce wants her community property to go to Jerry when she dies but wants her separate property to go to their child. If Joyce dies without a will, Jerry will receive community property, and will share the separate property with their child. To create the result she wants, Joyce should have a will stating that Jerry is to receive the separate property.

- Gretchen is a surviving spouse, with three adult children. Gretchen wants 50% of her probate estate to go to one of the children, with the others sharing 25% and 25%. If Gretchen dies without a will, her probate estate will be shared equally (one-third each) by her three children. To create the result she wants, Gretchen should have a will spelling out the 50%-25%-25% sharing.

Transferring your property as you wish is the focus of this booklet. Here is discussed wills and revocable living trusts (also called “living trusts”), focusing on what they do and don’t do, and comparing them.

ABOUT WILLS

Three important things to remember about wills:

1. A will can name who will receive assets when the owner dies. A will can name an executor (or personal representative)-the person who will handle assets subject to the will, the debts. And, a will can name a guardian (for minor children). Without a will, Arkansas law directs where property goes.

2. A will impacts assets included in the “probate estate.” It has no impact on an asset for which there is a designated beneficiary such as a life insurance policy or joint bank account.

3. A will does not result in avoiding probate. In fact, wills are a central document in many probate proceedings.

CREATING A VALID WILL

Even a clearly written will, created by an obviously clear-headed person, won't be "valid" (stand in court) unless certain signing formalities are followed.

Arkansas also recognizes "holograph wills" - where all material provisions are in the testator's handwriting—without the need for witnesses. The will still should be signed and dated by the testator.

ABOUT LIVING TRUSTS

A living trust is also a "naming document". It names who will receive assets owned by the trust. It also names a trustee (the person in charge of the assets) and successor trustees.

Why create a living trust?

- The primary reason to create a living trust is to avoid probate. Assets transferred before death to a living trust are removed from the probate estate.
- Living trusts can also provide for lifetime asset management.

DO I NEED A LIVING TRUST?

A living trust can be a valuable tool for one person, and a waste of money for another. No one (not even your neighbor who seems to have all the right answers) can tell you what to do—what you should do depends on your own situation and feelings on several subjects.

The main reason to use a trust is that the property that it controls does not go through a Probate Court process. This simplifies the process for your heirs and reduces the overall cost of passing on your estate.

YOUR SITUATION

- Make a list of your assets. The identity and types of assets that you own have an important impact on your decision.
- Which assets have designated beneficiaries? There are free and low-cost probate avoiders for many assets (bank accounts, insurance, IRAs, etc.) Remember that beneficiary designations only go to the named beneficiary and not to their children or grandchildren.
- Where are your assets located? If you own real estate in several states, without a living trust, multiple probate proceedings may be needed.
- How will your assets be managed if you become incapacitated? Assets owned by a living trust have the benefit of the trust's asset management provisions (your successor

trustee steps in to manage trust assets on your behalf). But, if the asset isn't owned by your trust, a financial power of attorney can provide similar asset management protection (by the agent under the power of attorney.)

YOUR THOUGHTS

- How do you feel about avoiding probate? The primary reason to create a living trust is to avoid probate. If you are not concerned about probate, the living trust approach loses much of its appeal for you.
- What are your feelings about dealing with formalities? A living trust only helps avoid probate if you transfer assets to it during your lifetime. Transferring assets (your home, bank accounts, etc.) requires formalities (paperwork). Accounts held by the trust will then follow different signing formalities. For some, this is not a significant issue; for others, it's an annoyance they'd rather not deal with.
- How do you feel about the cost to set up a trust? A trust has a greater up-front cost than a will. It involves spending more dollars today.

CONCLUDING THOUGHTS

- A will and/or living trust are part of an overall planning package. In general, such a package should also include a power of attorney for health care, a financial power of attorney, a living will, and a HIPAA privacy release.

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Nothing in this material should be taken as legal advice. Everyone's situation is different. You should consult a competent Elder Law attorney for legal advice and long term care planning.