

Answers to Some Common Questions

1. Do I need a lawyer to make my will?

No. Any person who meets the requirements of Arkansas law dealing with age and competency may make his or her own will. There are also requirements on witnesses, etc. to prove a will after death. The most common mistakes people make when they prepare their own will are (a) failure to follow rules dealing with the execution of the will, (b) leaving out children ("pretermitted heirs"), and (c) being unclear in the wording of the will.

2. Can I make a hand-written will?

Yes. A will prepared in your own handwriting is called a "holographic" will.

3. What makes a will legal?

I am not sure what the word "legal" means. However, a will prepared in accordance with Arkansas law, and once admitted to probate, is a valid will.

Contests to wills are made in the context of a probate proceeding. Such "will contests" generally involve one or both of the following issues: (i) lack of testamentary capacity (i.e. incompetency) on the part of the deceased when the will was executed or (ii) undue influence by someone.

4. Do I need to file my will with a court or in the public records somewhere?

Not while you are alive (although Arkansas does have a process for you to probate your will before you die). Once you pass away, then your family (generally the named executor or personal representative) files the original will with the County Clerk of the county of your residence at date of death, along with a petition to admit the will to probate. This is then heard by a judge of that circuit.

5. Can someone change my will after I die?

No. However, your will could be declared invalid for the reasons set forth in the answer to question 3, if there is a will contest.

Answers to Some Common Questions (continued)

6. What happens if I die without a will?

You die "intestate." In this case, there are laws in every state which provide how your estate (whether real property or personal property) is distributed. It varies from state-to-state.

7. What is probate and how do I avoid it?

See the description earlier in the handout. Common ways to avoid probate are by setting up a revocable trust, or adding persons names to assets (beneficiary designations).

8. Where can I find a generic will to fill out?

I do not know. Possibly on the Internet. Also, some bookstores in the legal section may have them.

A word of caution here: In my opinion, this is not a good idea. The reason is that when you prepare your own will, many times you make mistakes. It might not be witnessed properly, you may "leave" out certain heirs, who must be mentioned; and you may not draft it clearly enough. In addition, each state's laws are different so you have to be very careful.

9. What is a durable power of attorney and do I need it?

A "durable" power of attorney is a power of attorney, which survives the disability or incapacity of the principal (the person granting the power).

In my opinion, even if you decide you do not need a will, or do not want a will or trust, EVERYONE should have a power of attorney. It avoids time and expense associated with a guardianship proceeding.

10. Does the University provide this service for its employees?

No.

UCA Physical Plant Mission

--Support campus departments in achieving their objectives by focusing on customer service and teamwork;

--Operate and maintain campus facilities that are safe, healthy, and comfortable for students, faculty, staff, and visitors;

--Create an environment where our employees can learn and grow personally and professionally, emphasizing respect for the individual, honesty, integrity, and competent performance of duty.

WILLS, ESTATES AND POWERS OF ATTORNEY

(Taking the Mystery out of these documents and process)

Presented April 24, 2003

3:00 P.M.

to

University of Central Arkansas

Physical Plant - Safety Meeting

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University Counsel



NOTE

The information contained in this overview is presented for discussion and informational purposes only. It is not intended to be legal advice, nor should it be relied upon as such. Each person receiving this material is encouraged to consult with his or her own legal advisor concerning particular issues facing the individual and their family, and any of the issues presented in this material.

I. Overview

This memo has been prepared in order to engage in a discussion of matters relevant to the subjects of wills, powers of attorney, estates and other matters in the area of probate law and elder law.

As stated on the cover page, however, this is not legal advice to the person receiving this information. Rather, this is for informational purposes only. Each person receiving this information is encouraged to seek his or her own legal (or other) advice.

The first part of this material is a description of certain comment topics and documents. I have tried to make it simple and understandable.

After that, I have answered some questions submitted to me by Mr. Lee McQueen. He provided them so that I could answer some "general" questions, and then discuss any issues of important to you.

II. Estate Planning Concepts and Document

Will. A Will is legal document, executed with the formalities required by law, which serves to pass your estate at death. This is accomplished after your death by admitting your will to probate. Your "executor" collects your assets, pays any debts or claims, and then distributes your assets as you have directed in your will.

Dying Without a Will. If you die without a will, you die "intestate." In Arkansas, we have several statutes, which make allowances for the surviving spouse, provide for dower and curtesy, and then contain a table of "descent and distribution." This table provides for the disposition of your "heritable" estate to your "heirs."

Probate. Our probate system serves two primary purposes:

1. wind up the business and affairs of the deceased (including paying any debts or claims); and
2. passing the deceased's property to the beneficiaries named in the will, or to the "heirs" if the person died without a will.

Probate vs. Non-Probate Assets (Know How Your Assets are Titled). One of the most common areas of confusion is what assets "go through probate" and which

ones do not. Examples of "non-probate" assets are (i) life insurance policies where a beneficiary is named, (ii) property, such as retirement accounts, where beneficiaries are named, (iii) jointly-owned property (either as JTROS or husband and wife) where one person survives.

It is very important for each person to know (a) how their assets are titled and (b) the legal effect of the titling of those assets in that manner. This is true not only for death situations, but also in the event of divorce when you have inherited property.

Trust. A Trust is a document in which a person (the settlor) transfers property to a trustee to invest, manage and distribute according to the terms of the trust. A trust can be funded and be effective during your life (called an "inter vivos" trust) or be funded and take effect at your death (called a "testamentary" trust).

A popular alternative to wills has become the "living" or "revocable" trust. This type of trust is an inter vivos trust; it can be amended or revoked by the settlor; and it then passes property in the trust to the beneficiaries without the need for a probate proceeding at death (assuming all property is either placed into it, or the appropriate beneficiary designations are made). This type of trust, by itself, does not "save" you any estate taxes. Its primary purpose is to avoid probate, and thereby save the family time and money in administering the assets of the decedent.

Powers of Attorney. These are documents, which authorize someone else to act for you. Powers of Attorney can authorize someone to act for you with regard to your assets as well as make decisions regarding your health care.

They can be effective immediately, or can be prepared so that the other person only acts in the event of your subsequent disability or incapacity. The reason powers of attorney are important is that they avoid the necessity for a guardianship. If they go beyond your disability or incapacity they are called "durable" powers of attorney.

Living Will. A "Living Will" is a declaration concerning withholding life-sustaining treatments in the event you become terminally ill, or permanently unconscious, and your death will result in a very short period of time. In essence, you are stating that you do not wish to be kept alive on life-support systems or by artificial means. A recent law in

Arkansas (passed this year) provides that even if you execute one of these documents, if you request nutrition and/or hydration it must be provided to you.

Estate Tax. This is a transfer tax (also called an "inheritance tax" or a "death tax") which is levied on the value of property owned by the decedent at death (or which the decedent had certain rights or control over). Property is included at its fair market value as of date of death. For purposes of this tax, all of your real estate, investments, annuities, the death benefits of your life insurance (if you owned the policy) and also the value of your retirement accounts (IRAs, 401 (k), etc.) are included. **Please note that benefits from retirement accounts are subject to the estate tax AND the income tax when withdrawn by the beneficiaries.**

Any amounts passing to your spouse are free from this tax. Gifts to charity are fully deductible, and therefore, not taxed. Each person can also leave an amount free from the tax.

Due to changes in this law a few years ago, the following table shows the exemption amounts for persons dying in the following years (unless changed by Congress):

2001 - \$675,000
2002 and 2003 - \$1,000,000
2004 and 2005 - \$1,500,000
2006, 2007 and 2008 - \$2,000,000
2009 - \$3,500,000
2010 - complete repeal of the estate tax
2011 - tax reinstated (\$1 million exemption at that time)

Please note that if Congress does not act, the repeal is only for persons dying in 2010. Beginning in 2011, the tax is re-instated.

Gift Tax. There is also a federal gift tax, which applies to lifetime transfers for less than full consideration. During lifetime, a person may gift (free of gift tax) up to \$10,000 in money and/or property in each **calendar year** to as many individual donees as the donor desires to benefit. If the gifts are at that level, no return is required. If the amount in any calendar year to a donee exceeds that amount, then a gift tax return is filed, but no tax is owed until the amount given in your lifetime exceeds the exemption amount under the estate tax. Lifetime gifts above the \$10,000 per year have the effect of reducing the amount you can leave tax-free at death.