

# WILLS, TRUSTS, AND ESTATE PLANNING

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- I. The ideal estate plan for you may consist of several different documents.
  - A. A **will** fulfills several necessary functions.
    1. Of course, a will directs the distribution of the property owned at the time of death.
    2. A will nominates a **personal representative** to handle post-mortem legal matters.
      - a. The **probate** of the will gives the personal representative the power to act with respect to the deceased person's affairs.
      - b. The personal representative, once appointed by the probate court, has as much authority to act as the person who died would have had if he or she were still alive.
    3. A will alters the **intestate** scheme of property distribution.
      - a. Arizona intestacy law governs what happens to the property of a person who dies without a will.
      - b. Many Arizonans would *not* want their property to pass according to the intestacy laws upon their death.
      - c. Anyone can avoid the operation of the intestacy laws.
        - (1) Make a will.
        - (2) Hold title to property in trust.
        - (3) Hold title to property in **joint tenancy**.
        - (4) Utilize a **beneficiary deed**.
    4. A will names in advance choice for a **guardian** of any minor children.
      - a. Parents of minor children can set forth in a will their wishes about who should take care of the children in the event of death.
      - b. A parent who wants to confer parental, guardianship, or visitation rights with respect to his or her minor children to another person who is not related can follow certain formal written procedures, including designating a guardian in a will.
    5. A will can set forth arrangements for memorial observances.
      - a. Arizona law now requires funeral directors to honor the wishes of the deceased as set forth in a will.
      - b. As a practical matter, however, you may need to reflect your wishes regarding funeral or memorial arrangements *in advance*.
        - (1) It is a good idea to make funeral and memorial service directions in a will; these directions are legally enforceable.
        - (2) It is a *better* idea to make prepaid arrangements in order to avoid problems.

- (3) Executors have the legal authority to carry out funeral, memorial, or burial instructions, even before the will is probated, *if* the will grants them the authority to do so.
- B. A **living trust** can perform some (*but not all*) of the tasks of a will, with some additional advantages.
1. Living trusts are often marketed as **probate** avoidance tools.
    - a. A living trust (often called a *revocable trust*) can easily avoid the time and expense of multiple probate proceedings for those who own property in different states.
    - b. Transferring all titled assets into a living trust can avoid all probate, even in Arizona, after death.
      - (1) A trust will *not* avoid probate unless all titled assets of any consequential value are owned by the trust at the time of death.
      - (2) The estates of most persons who form trusts during their lifetimes end up being probated upon death, because the asset transfers were incomplete or were incorrectly done.
  2. You may appreciate that living trusts are more difficult for disgruntled relatives to challenge.
    - a. In a probate context, if someone wants to contest a will, he simply files a petition with the probate court. The will and its contents become a matter of public record as a result of the probate process.
    - b. If all assets are held in trust, there is no court involvement. The dispositive arrangement is *completely private*. Nobody (other than the beneficiaries entitled to receive distributions from the trust) is entitled to have access to the information unless the trustee of trust wants to cooperate.
  3. Importantly, living trusts can provide for trusted persons to handle the financial affairs of someone who becomes incapacitated or disabled to the extent that he or she cannot handle his or her own financial affairs.
    - a. In the event of disability, a trust is a less precarious arrangement than a **durable power of attorney** for the handling of the disabled person's financial affairs.
      - (1) In Arizona, trusts are recognized by banks, title companies, mortgage companies, and creditors with a minimum of hassle.
      - (2) By contrast, durable powers of attorney are viewed with skepticism by most Arizona banks, other lenders, and *especially* title companies, and often are not specific enough to permit the powerholder to take any action.
    - b. By contrast, the effect of a will is not triggered by disability, because a will cannot take effect until after death.
  4. Any tax advantages of living trusts are available only to married couples; the exemption from estate tax is \$11.2 *million*.
  5. Trusts can provide for delayed distribution schemes, or they can allow distributions to be made based on the worthiness of the beneficiaries.

- a. For instance, provisions for children (for example) can be based on need, or on whether the nieces and nephews attain prescribed educational or financial goals.
    - b. Trusts can also make it easier to limit distributions to particular purposes, such as education.
    - c. Trusts can protect the inheritance from the claims of the beneficiaries' creditors such as ex-spouses, child support enforcement, bankruptcy, tax claims, student loan debt, etc.
  - C. A **health care power of attorney and living will** permits a person to make directions *now* regarding catastrophic medical situations that may arise in the future, when the person may be unable to make his or her own medical directives.
    - 1. Under a health care power of attorney, a person appoints someone to make medical decisions in the event he or she cannot do so.
    - 2. The living will memorializes the person's medical decisions in advance in anticipation of future inability to do so.
- II. A few things to do *before* your appointment to discuss your estate plan with your attorney, accountant, financial planner, or other advisers.
- A. If your private advisers are charging you by the hour, you will *save money* by being as organized as possible about providing information to them.
  - B. Before you decide what to do with your estate upon your death, first determine your situation and your goals.
    - 1. Whom do you wish to remember in your will?
    - 2. Is there anyone who may disagree with your dispositive plan and want to challenge it?
    - 3. Who is dependent on you for financial support?
  - C. Gather your vital statistics.
    - 1. Compile a list of the names, addresses, and telephone numbers of yourself and of your significant other, your family members, and close friends who will be part of your estate plan.
    - 2. You should prepare a summary (written or from memory) of information about your parents, significant other, ex-spouses, children, stepchildren, and siblings and the nature of your relationship with each of them.
  - D. Determine your assets and liabilities.
    - 1. Typical assets include life insurance, real estate, automobiles, qualified plan interests.
      - a. Assets such as your pension plan at your place of employment, your IRA, and your life insurance are important to mention to your advisers.
        - (1) Estate planning and income tax planning for **pension, profit-sharing, and 401(k) plan benefits** is important.
        - (2) When considering your life insurance coverage, don't forget employer-provided life insurance.
      - b. Be very candid with your advisers about your assets. Advisers can't plan for you if you don't tell them what you own.
    - 2. Typical liabilities include mortgages, car loans, and personal loans.

- III. What will your estate planning documents look like?
- A. Your Last Will and Testament.
1. At a minimum, the will should contain the following recitals.
    - a. Your legal name and your county and state of residence
    - b. A clause stating that any former wills and codicils you made in the past are revoked
    - c. Your family status
      - (1) It is important to set forth in your will the names of your relatives, *even if* you don't intend to provide for them.
      - (2) You can also state the names of the beneficiaries of your will, *especially* if they are not related to you.
  2. We recommend a number of clauses and features.
    - a. Your will should incorporate by reference a separate document known as a **devise of personal property**.
      - (1) A devise of personal property is a "dresser drawer deed." You use it to list your keepsakes, mementoes, and other personal property and the persons to whom you want such items to be distributed after you die.
      - (2) Thus, you can change your mind about these personal items as many times as you like, without having to consult your advisers about changing your will.
    - b. You will want to include **specific bequests** and **general bequests**.
    - c. Every will needs a **residuary clause** which provides to whom all remaining property in your estate will be distributed.
    - d. As discussed above, you can include instructions regarding burial, funeral, and memorial services in your will.
    - e. Every will should provide for the appointment of a personal representative and waiver of bond.
    - f. If you have minor children, you should provide for the appointment of guardian of minor children and waiver of bond.
    - g. The **in terrorem clause** is intended to discourage will contests by eliminating any bequest in the will for any person who challenges the will or interferes with the personal representative.
    - h. You must have a signature block for yourself and the witnesses, and a **self-proving affidavit**.
      - (1) It is very common for persons who prepare their own wills or use "do-it-yourself" wills to bungle these requirements.
      - (2) Of course, you must sign the will.
      - (3) Two **witnesses** must be present when you sign the will. The witnesses themselves are also required to sign.
      - (4) If you and the witnesses do not sign a self-proving affidavit, then upon your death, the witnesses will have to testify in court in order for your will to be admitted to probate, or if they are unavailable, other evidence will have to be introduced to show that you in fact signed the will.

- h. The signatures should be acknowledged before a notary public.
          - (1) Of course, the self-proving affidavit won't qualify as an affidavit unless it is notarized.
          - (2) The notary public needs to be present at the time you and the witnesses sign the will.
  - 3. There are many features in common form wills which are unnecessary for most people.
    - a. A tax apportionment clause is unnecessary unless your estate is likely to be subject to **federal estate tax** (basically, net worth in excess of \$11,200,000 for decedents dying in 2018).
    - b. A tax elections clause may also be overkill, although it is relevant to income tax as well as estate tax issues.
  - 4. As noted above, certain formalities must be observed with respect to the execution of a will.
    - a. Two witnesses and a notary public are required by law.
      - (1) Witnesses should not be related to testator or have an interest under the will, although the use of interested witnesses no longer invalidates the will.
      - (2) If possible, witnesses should be selected with an eye toward whether they could give believable testimony in the event of a will contest.
    - b. You must also meet certain requirements for the execution of your will.
      - (1) You must be aware of the natural objects of your bounty, *i.e.*, your relatives, loved ones, and friends.
      - (2) You must be aware of the extent of your property, *i.e.*, you must know what you own.
      - (3) You must not be under any undue influence.
        - (a) Undue influence is a common basis for will contests.
        - (b) Those who want to battle your will in court may claim that someone was twisting your arm when you signed it.
      - (4) You must be above eighteen years of age.
- B. Here's what you should know about the Devise of Personal Property.
- 1. Arizona law permits you, from time to time or at any time, to make subsequent specific bequests of keepsakes and other personal property without executing a **codicil** (amendment) to your will.
  - 2. Your advisers may prepare and attach this form to your will for your later use, or you can use a spreadsheet printout or a blank sheet of paper.
- C. Health Care Powers of Attorney and Living Wills can be important.
- 1. Your medical directive is grandfathered (*i.e.*, still valid) under the law even if it was executed prior to September 30, 1992.
    - a. However, it could probably stand to be updated.
    - b. New health care powers of attorney and living wills must comply with the new Arizona law.

2. A well-drafted health care power of attorney contains several recommended clauses and features.
  - a. First, you nominate an agent to make medical decisions for you.
    - (1) If and when you are unable to make or communicate those decisions, your agent can make the decisions.
    - (2) You need to include the addresses and telephone numbers where your agent can be reached in an emergency.
  - b. You can also nominate an alternate agent and set forth her addresses and telephone numbers.
  - c. You can define the scope of authority granted to your agent.
  - d. You can include general guidelines on your agent's medical decision-making authority in the event of emergency.
  - e. You can revoke existing medical directives you previously made.
  - f. You can release third parties from liability for recognizing your health care agent's authority.
  - g. You can authorize your agent to sue third parties who refuse to recognize your agent's medical decision-making authority.
3. The living will also can contain various recommended features.
  - a. First and foremost is your advance guidance as to specific medical decisions that you would want or would not want.
    - (1) Artificial life support
    - (2) Cardiopulmonary resuscitation
    - (3) Artificial nutrition and hydration
    - (4) Particular medications
    - (5) Autopsy and organ donation instructions
    - (6) Hospitalization and other health care
4. A health care power of attorney and living will can be incorporated into a single document or can be in separate documents.
5. Notarization requirements.
  - a. Must be signed by a notary *or* by an adult witness or witnesses.
    - (1) After July 13, 1995, a new Arizona law regarding powers of attorney arguably requires a notary *and* one witness.
  - b. The notary and/or witness statement *must* say the following:
    - (1) You appeared to be of sound mind and free from duress.
    - (2) The notary or witness is not responsible for paying for your health care.
    - (3) The notary or witness is not related to you or to any potential beneficiary of your estate after your death.
  - c. Finally, the notary or witness cannot be the same person whom you named as your powerholder for health care.
6. You can make your Health Care Powers of Attorney and Living Wills accessible to Arizona medical care providers via the Internet.
  - a. You can register them on the Arizona Secretary of State's website
  - b. For information, go to <http://azsos.gov/ad/Register.htm>.

- D. Another important tool in planning for incapacity is the General Durable Power of Attorney.
1. Arizona law authorizes powers of attorney that remain in effect even upon the disability of the principal.
    - a. A power of attorney creates an agency relationship between you and your powerholder.
    - b. A power of attorney is useful when they want a friend or adviser to handle their affairs, rather than allowing family members to do so.
    - c. An appointment of an agent can take effect immediately or upon the disability of the client.
  2. You should first determine whether a power of attorney is appropriate for your situation and goals.
    - a. Powers of attorney are usually used to ensure orderly handling of a disabled person's financial matters.
    - b. A power of attorney may facilitate communications with insurance companies, banks, and landlords, for example.
  3. There are, of course, recommended provisions for powers of attorney.
    - a. The document should be as specific as possible--Arizona courts and institutions are likely to be suspicious of powers of attorney.
    - b. The power to make health care decisions should *not* be included if you have a health care power of attorney in place.
  4. Naming *one* individual agent is usually appropriate, rather than naming co-powerholders to cooperate with each other in making decisions.
    - a. Multiple agents acting jointly are cumbersome.
    - b. A corporate fiduciary (*e.g.*, a bank) can also be named as powerholder if cost is no object.
    - c. Because the power of attorney could become crucial at the time of your incapacity, you may wish to name an agent whom you perceive as capable of making decisions in stressful situations.
  5. Unmarried couples should be careful to set forth specifically the powers that each of them can exercise with respect to the other's property.
    - a. Arizona law requires that a person executing a power of attorney must *separately initial* any language that would permit the powerholder to exercise any power to benefit himself or herself.
    - b. This is especially important for couples who share a home and living expenses.