

# BOOTH HARRINGTON & JOHNS LLP

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## THE ELDER LAW VOICE

## FIRST QUARTER 2005

### The Challenges of Grandparents Raising Grandchildren



As Elder Law attorneys, our consultation frequently involves an in-depth look into our clients' families. Through the years, the structure of those families has been changing to include more grandparents as heads of households.

Almost 7% of all North Carolina children are living in grandparent-headed households. Nearly 80,000 North Carolina grandparents reported that they are responsible for their grandchildren living with them. Grandparent headed households are represented throughout all of the racial groups: 47% of grandparent headed households are African American; 2% are Hispanic/Latino; 2% are American Indian or Alaskan Native; and 47% are White.

Making plans for themselves and for their families increases in complexity when our clients are caring for minor grandchildren. In these situations, a true multi-disciplinary approach must be taken to help our clients secure their futures, as well as provide continuing security for their grandchildren. The way we advise grandparents to structure assets and estate planning documents may vary significantly depending on the legal status of the grandparent/grandchild relationship. A discussion of the legal effect of adoption, guardianship and custody becomes important as grandparents attempt to secure their legal rights to make decisions on behalf of their grandchildren securing the future for all.

### ADOPTION

In North Carolina, subsidies are available to grandparents if they choose to adopt a grandchild with special needs. North Carolina considers a child to have special needs for the purposes of adoption if a specific factor or condition exists which supports a reasonable conclusion that the child cannot be placed with adoptive parents without providing adoption assistance or medical assistance. Examples of special needs include: a known mental or physical handicap; situational needs such as to be placed with a member of a family group or ethnicity; need for placement with a known and approved family. Adopted children with special needs that have income below Medicaid's income requirements are eligible for Medicaid benefits to defer the cost of their healthcare. The grandparent also may receive reimbursement for non-reoccurring adoption costs, including court costs, attorney fees and adoption fees, as well as, basic monthly adoption assistance payments with a maximum of \$415. These benefits are available regardless of the adoptive grandparents' income or resources.

Adoption can have significant effects on Estate Planning. When a grandparent adopts a grandchild, the grandchild becomes a legal child of the grandparent which means that the adopted grandchild is entitled to the same inheritance rights as all children (natural or adopted), if the grandparent dies without a Will.

### GUARDIANSHIP

Unlike the subsidies offered through adoption, North Carolina does not offer any cost subsidies under its guardianship program. However, Medicaid assistance is available to the grandchildren if the household income is below the Medicaid income requirements. A grandparent appointed guardian is given the right to direct the grandchild's

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medical treatment, living arrangements, education, and general welfare, but also has extensive accounting and reporting responsibilities to the court.

Unlike adoption, under a guardianship, a grandchild does not become a legal child of the grandparent. Guardianship does not alter or change the grandchild's inheritance rights should the grandparent die without a valid Will including the grandchild, or a trust naming the grandchild as a beneficiary.

**CUSTODY**

In North Carolina, a grandparent may seek custody when the parents are unfit, have abandoned or neglected the child. In a custody action, the Court has the power to order various remedies, including some, or all, of the rights the grandparent would obtain through a guardianship proceeding. Like guardianship, if the grandparent is only awarded custody of a grandchild, that does not alter or change the grandchild's inheritance rights as stated above.

***Almost 7% of all North Carolina children are living in grandparent-headed households. Nearly 80,000 North Carolina grandparents reported that they are responsible for their grandchildren living with them.***

Grandparents raising grandchildren may face a number of difficulties that normally are not faced in younger households. Grandparents frequently have the challenges of a fixed income, limited health insurance options, physical limitations, limited support from others, and issues surrounding legal decisions on behalf of their grandchildren. An Elder Law attorney can be a very important advisor in assisting grandparents who are making decisions on how to overcome the challenges of raising grandchildren.

**BOOTH HARRINGTON AND JOHNS WELCOMES HARBOUR PARTESOTTI**

Booth Harrington and Johns, LLP is pleased to announce that R. Harbour Partesotti has joined the firm as an associate attorney. Harbour is a native of the Gulf Coast of Mississippi and attended the University of Alabama as a Presidential Scholar for her Bachelors degree in Health Care Management. She was selected as the Most Outstanding Junior, Most Outstanding Senior, and the female recipient of the Algernon Sydney Sullivan Award winner for out-

We are out and about!		
Date/	Topic/Time	Location/ Audience
THURS. JAN. 13,  ANDREW ATHERTON	ADVANCE DIRECTIVES—  WHAT YOU NEED TO KNOW, WHEN YOU NEED TO KNOW	GREENSBORO PLACE  4400 LAWNDALE DRIVE  OPEN TO THE PUBLIC
THURS. JAN. 20  ANDREW ATHERTON	ADVANCE DIRECTIVES—  WHAT YOU NEED TO KNOW, WHEN YOU NEED TO KNOW	GREENSBORO MANOR  5809 OLD OAK RIDGE RD, GREENSBORO  OPEN TO THE PUBLIC
THURS. JAN. 27,  JACK HARRINGTON	ADVANCE DIRECTIVES—  COVERING THE BASICS	CALVARY CHURCH ASSEMBLY OF GOD AFFILIATED  1665 PLEASANT RIDGE ROAD, GREENSBORO  OPEN TO THE PUBLIC
THURSDAYS FEB. 3, 10, 17 AND 24.  MARCH 10 AND 17.  JACK HARRINGTON	SIX WEEK SERIES "FOCUSING ON PROTECTING LIFE SAVINGS AND DIGNITY AS PEOPLE AGE"  POWERS OF ATTORNEY, LIVING WILLS, LONG TERM CARE.	SHEPHERD'S CENTER CHRIST UNITED METHODIST CHURCH  410 N. HOLDEN RD. GREENSBORO  OPEN TO THE PUBLIC ~ NOMINAL FEE ~  PLEASE CALL 378-0766



standing scholarship, service, and leadership during her tenure at the university. Harbour received her Juris Doctor, Masters of Public Health, and Certificate in Aging at the University of North Carolina at Chapel Hill. During her studies, she was chosen as a Borchard Foundation fellow in

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# UNDERSTANDING THE BASICS OF TRUSTS

Written trusts can be useful in a variety of circumstances as people plan for the future. Sometimes a trust relationship arises out of the conduct of the parties, and sometimes law implies a trust; however, this article deals with only express trusts that are in writing. An express trust is created when a person sets aside assets to be held and used for a person who is to receive benefit from the trust as spelled out in the trust document.

**General Terms of Trusts.** The person creating the trust is usually called the Grantor, or occasionally, the Settlor. The person receiving benefit from the trust is called the Grantee or Beneficiary. Some trusts provide that the grantor of the trust is also a beneficiary. The person or corporation (such as a bank) who receives the property and then manages and administers the trust assets for the beneficiary is the Trustee. In certain kinds of trusts, the Grantor who establishes the trust can also serve as Trustee in managing the trust.



Some common types of trusts include: Revocable and Irrevocable Trusts, Living and Testamentary Trusts, Charitable Trusts, and Special Needs Trusts.

**Revocable and Irrevocable Trusts.** If the trust instrument provides that the Grantor can amend or abolish the trust, then the trust is **revocable**. Transfers of property and assets into a revocable trust do not generally provide any estate planning tax advantages on the theory that the assets are still fully accessible through amendment or revocation. On the other hand, if the terms of the trust establish that it cannot be abolished or amended after it is set up, then the trust is **irrevocable**. Asset transfers into an irrevocable trust become completed transactions that cannot be reversed. This can result in removing assets from a person's taxable estate. For example, sometimes a person owning a life insurance policy will change the beneficiary to make the policy payable to an irrevocable trust, and then assign all ownership

rights in the policy to the trust. Properly done, this can successfully remove the life insurance policy proceeds paid at death from the taxable estate of the original policy owner.

Revocable or Irrevocable Living trusts appeal to some people who want to avoid probate at death because there are no probate fees, no public record of estate assets, and no public identification of those receiving assets. In North Carolina, avoiding probate fees is less an issue than in some other states where court costs alone may be tens of thousands of dollars. Still, many North Carolinians believe probate fees of up to \$3,000, the lengthy probate process and the legal expenses of probate are worth avoiding.

However, these same people often do not realize that living trusts created to avoid probate must be funded with assets while the person creating the trust is alive. This may require deeding a home and other real estate into the trust, as well as transferring stock portfolios, bank accounts, car titles, etc. into the trust so that the trust, not a person, becomes the legal owner. Many find these the extra requirements to be burdensome; even more do not realize that when the funding of the living trust does not occur, it leaves remaining family members with the time and expense of probate anyway, wondering what was the value and use of the living trust to their loved one in the first place.

**Living and Testamentary Trusts.** As stated, a **living trust** is simply a trust created during the life of the grantor. A **testamentary trust** may be created in a person's Will or by a separate document to be funded with assets transferred to the trust at the death of the Grantor. These trusts frequently provide for assets to be held and managed for the benefit of a surviving spouse to pay periodically the income that is generated by the trust assets and, as the Trustee may decide, even to make distributions of principal to the surviving spouse. These trusts usually provide that at the death of the surviving spouse, the assets still remaining in the trust are distributed to designated family members, friends, charities, etc. Testamentary trust provisions are very frequently included in Wills to hold money for the support, maintenance, welfare and post high school education of minor

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children or grandchildren. In the trust, their inheritance can be managed and preserved for them by the Trustee for useful purposes until they have reached a designated age (chosen by the Grantor) to receive their inheritance with no strings attached.



**Charitable Trusts.** When a trust has some charitable end and a charitable entity as its beneficiary, then it is a **charitable trust**. In order to qualify as a charitable trust, the trust must have as its goal or object certain recognized purposes such as alleviating poverty, providing education, carrying out some religious purpose or protecting impoverished and vulnerable elderly Americans in nursing homes. While authorized goals or

objects are generally set out in federal or state laws and regulations, other charitable purposes may qualify even though not explicitly set out and identified in those rules. Charitable trusts are entitled to special treatment under trust and tax laws.

Two of the many kinds of **charitable trusts** are: **Charitable Remainder Trusts**, which provide an income stream to beneficiaries with principal assets passing at death to a designated charity, and **charitable lead trusts** which provide income to a charitable organization for a period of years before the remainder is distributed to family members or some other ultimate beneficiary.

**Support/Special Needs Trusts.** When a trust is created for a beneficiary who has a disability that impacts his or her life experiences, the trust may be either a **support trust** or a **special needs trust**. The **support trust** usually directs that the trustee must provide for things like food, education, clothing and shelter to the beneficiary; the special needs trusts mandates that the trustee only supplement, rather than replace, what is being provided by the government or other sources. While there are many different kinds of **special needs trusts**, they have the same primary purpose of preserving government assistance or benefits while providing a source of supplemental funds for countless services and products not covered by the government programs. Special need trusts can serve disabled people of any age, even those over 65 with the nonprofit pooled trust.

Trusts can be extremely useful in certain situations, but they can also be legal overkill in other circumstances. Trusts are yet another circumstance in the complexity of a law practice, especially elder law, in which one size does not fit all.

## CONGRATULATIONS TO DONNA ELMORE

It is rare these days to find staff members with the kind of dedication, loyalty and longevity as we have at Booth Harrington and Johns. Rarer still to find someone with 30 years of devoted service. Let us introduce Donna Elmore, Intake Specialist and Marketing Coordinator for our firm.



Donna joined Booth Harrington and Johns in 1974. Today, she is the first contact for many of our clients and is frequently spotted at our outreach events in the community and throughout the region. Donna is very active in her church, Life Community Church of Hunter Hills in Greensboro, where she is a Sunday School Teacher and Secretary to the Board of Directors and team member for the Baptist Lay Witness.

Donna and her husband Harold have three children: Jason, Kristen and Jennifer. Jason and his wife, Julie, have extended the family for another generation with their children Jessica and Jordan and have provided Donna with the opportunity to be a doting grandmother.

Our thanks go to Donna for all her efforts and hard work on our behalf.

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Law and Aging and as a Nancy K. Rhoden Scholar in Health Law. She served as a Carolina Law Pro Bono Coordinator and a teaching assistant at the School of Public Health. She was a member of the Holderness Moot Court Client Counseling Team, Delta Omega Public Health Honor Society, Health Law and Policy Association, and Phi Alpha Delta Legal Fraternity. Harbour interned at the American Bar Association's Commission on Law and Aging, the North Carolina Division of Aging, and in large and small law firms in the Triad. She was admitted to practice in North Carolina in the fall of 2003. Harbour and her husband, Adam Smart—also an attorney - now live in Greensboro.