# Wills, Trusts, and Estates

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Usually title to real estate is transferred by deed. However, there are a variety of other ways to transfer title to real estate, such as by wills, trusts, and estates.

## I. Wills, Estates, and Probate Court

What is a will? Often referred to as a "last will and testament," a will is a written legal document that expresses a person's intentions as to how his or her property is to be distributed after his or her death.

A will involves a number of people, with different roles and titles:

Testator – the person who makes the will

Executor – after the Testator is deceased, the Executor executes the Testator's directions or intentions, as expressed in the will, and files the will, death certificate, petition, inventory, accounting, and other required forms with the probate court, and distributes the Testator's property (for example, if real estate is to be sold, it would the executor who signs the deed)

Beneficiary – a person who receives something from the Testator

Trustee – if a Beneficiary is under 18, the trustee holds the asset or property in trust until the Beneficiary is 18 or older (depending on the instructions in the will)

Guardian – if the Testator has minor children, and if the other parent is deceased, then the Guardian will act as the children's parent until the children are 18

Estate – the estate is not a person, but a number of things. In a will, the estate is everything the testator owned at death. In a trust, the estate, or corpus, is what the grantor gives the trustee, pursuant to the trust agreement.

Any one person can perform any number of roles. For example, you could have one person who is the executor, trustee, guardian, and primary beneficiary. In fact, it is common for a person to name his or her spouse as his or her executor, guardian, trustee, and beneficiary. Alternatively, you can split up the roles, for example, have one person be the guardian, and another the executor and trustee, and then have different people be the beneficiaries.

Before meeting with an attorney to make your will, you should consider who you want to be the executor, trustee, guardian, and beneficiaries. It is also good to have at least one back-up for the executor, trustee, guardian, and beneficiaries, in case they are deceased before you. The will should state the relationship between these people and the testator. Additionally, it can be helpful if you can provide the addresses (or at least town, county, and state) for the people named in the will. Providing the relationships and addresses will help future executors identify and locate the people named in the will.

If you would like to disinherit a relative, or anyone else who might expect you to leave something to him or her, that intention must be expressly stated in the will. Simply not mentioning the person allows for that person to argue that a mistake was made, and he or she was accidentally forgotten, and not intentionally omitted.

You should also consider how you would like your property, or estate, to be distributed. The "estate" is everything a person owned at the time of death. Excluded from the estate are certain things that transfer automatically, for example, real estate held as joint tenants.

To be valid and enforceable, a will must be:

In writing,
Signed by the testator,
Signed by two witnesses, and
Signed by a notary public or justice of the peace (who attests to all of the above signatures).

Additionally, the person who makes the will must be:

18,
Of sound mind,
Know he/she is making a will, and intend to do so, and be
Free from fraud, coercion or duress.

With some people, it can be difficult to determine whether or not they are of sound mind (#2 above). Such people should make their wills during a lucid interval. When in doubt, have a doctor examine the person just before the person makes a will, and have the doctor sign an affidavit (stating that the doctor is a doctor, and he or she examined the testator on this date, at this time, and he or should is of the opinion that the testator was of sound mind at that time).

The document should clearly state that it is a last will and testament, and it should clearly express the intention of the testator. Ideally, the document will also name an executor, trustee, guardian, and beneficiaries, and describe what property each beneficiary is to get, or how much each beneficiary is to get.

For miscellaneous items that are of sentimental value but little marketable value, you may want to reference a separate letter or memorandum in the will, and then draft a separate letter or memorandum that references the will. This letter or memo will list how these miscellaneous items are to be distributed. For example: "…My bowling trophy from 1996, to my friend Stan…My favorite golf glove, to my daughter Abigail…My favorite UVA stadium seat cushion, to my son Dan…" etc, etc.

After death, your executor will file your will, death certificate, and a petition with the probate court. After several days or weeks, a probate court judge will then review the will and petition. The judge will then appoint an executor (based on the instructions or intent expressed in the will). The court often requires the executor to get a bond. An inventory must be filed with the court. Usually, there is also a notice to the spouse, heirs, and devisees and legatees. There is a waiting period, usually about six months, for creditors to make claims. Then, after a motion, the executor distributes the deceased's property, pursuant to the directions or intent of the deceased, as stated in the will, and the creditors' claims. The executor then files an accounting (showing how the deceased's property was distributed), and then probate is closed.

If you become deceased without a will, the probate court will distribute your property pursuant to the state intestacy statute. In general, the statute directs everything to the deceased's spouse and children, if there are a spouse and children, and they are alive, or, if not, then to the deceased's parents, if they are alive, or, if not, then to the deceased's siblings, if they are alive, or, if not, then to the deceased's grandparents, if they are live, and if not, then to the deceased's uncles, aunts, and cousins. If no one is alive, then everything goes to the state (or, as lawyers say, the deceased's property escheats to the state).

If you would like your property to be distributed in some other fashion, then you need to make a will.

Wills are particularly important for people who have remarried. Without a will, most of the deceased's estate will go to the second or current spouse and his or her family, rather than to the deceased's family. For example, let's say George and Lucille get married and have two kids, Lindsey and Buster. Later, George and Lucille get divorced. George then remarries, this time to Sally. It is a second marriage for Sally as well, and she has two kids of her own from her first marriage. Later, George dies. He had substantial assets at the time of his death. Lindsey and Buster expect to receive George's assets, as does Lindsey's daughter Maeby. However, George did not make a will. Therefore, under the intestacy statute, most of his assets go to Sally. Later, when Sally dies, the assets then go to her children. Lindsey and Buster only receive a portion of George's assets, and Maeby is left out in the cold entirely. This result is not what George would have wanted; George would have liked to give more to his own children and grandchildren. In order to avoid this scenario, and in order for his children to get what he wanted them to get, George should have made a will.

Wills are also particularly important for people who have minor children. If you have minor children, and if the both parents are deceased, and you are deceased without a will, the probate court judge will choose someone and appoint that person to be the guardian of your children. If you would prefer to choose your children's guardian, you need to do so in a will.

## II. Trust Agreements

As an alternative to a will, and the probate court process, you can create a trust. A trust is a written agreement between two parties (the grantor and trustee) for the benefit of a third party (the beneficiary). The grantor and the trustee form an agreement, and the grantor gives property to the trustee to hold in trust, and the trustee holds or manages that property for the benefit of the beneficiary, pursuant to the instructions in the trust agreement. At a certain time, the trustee gives the property to the beneficiary. The trustee has fiduciary duties to the beneficiary. A trust can either be revocable or irrevocable.

Creating a trust is a two-step process. First, the trust agreement is formed. Second, assets are transferred from the grantor to the trustee (also referred to as "funding" the trust). For example, to place real estate in trust, first one creates a trust agreement, and then one signs a deed for the real estate, from the grantor to the trustee as trustee of the trust.

If there is a trust, the probate court is not involved. The trustee has the property, and the trustee distributes that property pursuant to the terms of the trust agreement. Here, the trust agreement replaces the will and probate court, and the trustee replaces the executor.

Avoiding probate is desirable because probate is long and costly. Also, probate court files are public, so there is more privacy with a trust.

A trust is required when a beneficiary is under eighteen. Eighteen is the youngest age a person can own real estate, stocks, bonds, accounts, and other assets. Even though one can own real estate at eighteen, often grantors want the beneficiary to be older. Common ages for distribution to beneficiaries are:

21;
25;
One half at 21, the remainder at 25;
One third at 21, half of the remainder at 25, and the remainder at 30;
One third at 25, half of the remainder at 30, and the remainder at 35.

The ages listed above are only suggestions. The grantor can choose any age, or ages, for distribution.

While the trustee holds the assets for the benefit of the beneficiary, the trustee may use the asset, and the income from the asset, for the beneficiary's health, education, maintenance, and support. When the beneficiary attains the age specified in the trust agreement, the trustee disburses the trust estate to the beneficiary, free of trust, and the trust terminates.

III. Deed with a reservation of a life estate, or as joint tenants

A deed can also serve the same function as a will or trust agreement. For example, let's say you own a piece of real estate referred to as Black Acre. You have a long-time girlfriend,

Suzy, no kids, and you don't wish to leave anything to your family. You could draft a will, instructing your executor to give Black Acre to Suzy. Or, you could form a trust agreement to this effect, with you as grantor, trustee, and primary beneficiary, and Suzy as the successor trustee and beneficiary, and then execute a deed from you as an individual to you as trustee of the trust. Or, you draft a deed, conveying Black Acre to Suzy, and reserving a life estate for yourself. What this means is that while you are alive you own Black Acre, but once you are dead, Suzy owns it. Alternatively, you could draft a deed from you to you and Suzy as joint tenants with rights of survivorship. What this means is that you and Suzy both own Black Acre while you are alive, and then when one of you dies, the other is the sole owner of Black Acre.

Similar to a trust, the end result is the same as with a will (Suzy gets Black Acre), but you have avoided probate court.

Please note, there is a big difference between a deed and a will or a revocable trust. A deed cannot be undone. Once it is signed, notarized, and recorded, it is done. The transfer is complete. Wills can be revoked, re-written, modified, and amended. Revocable trusts can also be revoked, modified, and amended. Not so with a deed. Therefore, exercise extreme caution before going down this path.

IV. Life Insurance

Let's say you have savings and investments of $300,000, and you have three kids, and you want each of them to get a third. You could draft a will, leaving each child one third of your estate. Or, you could create a trust agreement, with three shares, with each

child to receive one share. Or, you could purchase three life insurance policies, with each child as the beneficiary of one policy, and each policy would pay $100,000 after you die. Or you have one policy for $300,000 and all three kids each get a third of the payout of the policy. Here, the effect is the same (each child receives $100,000), but again, you avoid probate.

There is a vast array of insurance products on the market today. Consult with an insurance agent or investment advisor for more information.

V. Accounts and Shares

Many banks, corporations, mutual funds, and investment firms will give you several options as to how an account or share is held. For example, often, you can hold an account or share as an individual. Or the account or share can be owned jointly with another person or persons, as joint tenants with rights of survivorship. In this case, when you die, the other owner or owners still own the account or share. Or, there is often the option of having ownership "transfer on death," also called a "TOD" clause, to a named beneficiary. In this case, when you die, the account or share automatically transfers to the beneficiary. Again, any of these options would avoid probate as well.

Please do not hesitate to contact us with any questions. We can be reached at:

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