

# Estate Planning: Getting Started

*Wills and Other  
Dispositive Techniques*

Preview Only.  
for Distribution or Dup



SECTION OF REAL PROPERTY | TRUST & ESTATE LAW



# Estate Planning: Getting Started

## *Wills and Other Dispositive Techniques*

**E**state planning is a process involving the counsel of a lawyer who is familiar with your goals and concerns, your assets and how they are owned, and your family structure. It can involve the services of other professionals, such as your accountant, financial planner, life insurance advisor, banker, or broker.

Estate planning covers the transfer of property at death as well as a variety of other personal matters and may or may not involve tax planning. The core document most often associated with this process is the *will*. It is important to understand what happens to your property at death in order to understand the role and value of the will in estate planning.

### **The Estate with No Will**

If you die *intestate* (without a will), your state's laws of descent and distribution will determine who receives your property by default. These laws vary from state to state, but typically the distribution of your *probate estate* (assets held in your individual name at your death) would be to your spouse and children, or if none, to other family members. The state's plan reflects the legislature's guess as to how most people would dispose of their estate and builds in protections for beneficiaries, particularly minor children. That plan may or may not reflect your actual wishes, and some of the built-in protections may not be necessary in a harmonious family

For Review Only.

Not for Distribution or Duplication.

setting. A will allows you to alter the state's default plan to suit your personal preferences.

It may be possible to work out a plan whereby all of your property will be distributed after your death without the necessity of a will or trust. This is not to say, however, that this is desirable. All of the other forms of property disposition discussed below *should supplement rather than replace a carefully drawn will*.

### Disposition of Property by Will

If you die *testate* (with a will), you may provide for the distribution of all property owned by you in your name alone at the time of your death in any manner you choose (subject to the forced heirship laws of some states that prevent disinheriting a spouse and, in some cases, children). Your will cannot, however, govern the disposition of properties that pass outside your probate estate (such as joint property, life insurance, employee death benefits) unless they are payable to your estate.

Wills can be of various degrees of complexity and can be utilized to achieve a wide range of family and tax objectives. If a will provides for the outright distribution of assets, it is sometimes characterized as a simple will. If the will establishes one or more trusts, it is often called a testamentary trust will. Alternatively, the will may leave probate assets to a preexisting inter vivos trust, in which case it is called a pour over will. In either case, the purpose of the trust arrangement (as opposed to outright distribution) is to ensure continued property management and creditor protection for the surviving family members, to provide for charities, and sometimes to minimize taxes.

Wills are signed in the presence of witnesses and certain formalities must be observed. A later amendment to a will is called a *codicil* and must be signed with the same formalities. In some states, the will may refer to a memorandum disposing of tangible personal property, such as furniture, jewelry, auto-

mobiles, etc., which may be changed from time to time without the formalities of a will. In many states, a will that is formally executed with the signatures notarized is deemed to be self-proved and may be admitted to probate without testimony of witnesses or other additional proof.

At death, your will goes through *probate*. Narrowly defined, probate (that is, probate of the will or admitting the will to probate) simply means the process by which your last will is determined to be your final dispositive statement and which confirms the appointment of the person or institution you have named to administer your estate. The term *probate* is also used in the larger sense of probating your estate. In this sense, probate means the process by which assets are gathered, applied to pay debts, taxes and expenses of administration, and distributed to those designated as beneficiaries in the will. The *executor* or *personal representative* named in the will is in charge of this process, and probate provides an orderly method for administration of the estate. The executor is held accountable by the beneficiaries (and sometimes is supervised formally by a probate court). The executor is entitled to a reasonable fee or commission. Probate law generally encourages or provides for partial distribution during the period of administration; assets may generally be distributed in kind rather than sold during this time. The tax laws generally focus the responsibility for death tax filings and payments on the executor under a will. Thus, the choice of an executor is an important one.

---

**Probate means the process by which assets are gathered, applied to pay debts, taxes, and expenses of administration, and distributed to those designated as beneficiaries in the will.**

---

The basic job of administration and accounting for assets must be done whether the estate is handled by an executor in probate or probate is avoided. In the recent past, lawyers and other professionals have advocated the use of probate avoidance techniques (including revocable trusts) in states where the probate process was perceived as being too slow and too costly. Many states have simplified or streamlined their probate processes over the years. In such states there is now less reason to employ such probate avoidance techniques.

Your lawyer can advise you of the probate system in your state (and in any state in which you may own property that is subject to probate).

Aside from providing for the intended disposition of your property to spouse, children, and other beneficiaries, there are a number of other important objectives that may be accomplished in your will.

- › You may designate a guardian for your minor child or children if you have survived the other parent—and, by judicious use of a trust and appointment of a trustee, eliminate the need for bonds and supervision by the court regarding the care of each minor child's estate.
- › You may designate an executor of your estate in your will and eliminate the need for a bond; in some states the designation of an independent executor will eliminate the need for court supervision of the settlement of your estate.
- › You may choose to acknowledge or otherwise provide for a child (e.g., stepchild, godchild) in whom you have an interest, an elderly parent, or other individuals.
- › If you are acting as custodian for the assets of a child or grandchild under the Uniform Gift (or Transfers) to Minors Act, you may designate your successor custodian and avoid the expense of a court appointment.

- › You may enhance your support of religious, educational, and other charitable causes.

### Trusts

The term *trust* describes the holding of property by a *trustee* (which may be one or more persons or a corporate trust company or bank) in accordance with the provisions of a written trust instrument for the benefit of one or more persons called *beneficiaries*. A person may be both a trustee and a beneficiary of the same trust. A trust created by your will is called a *testamentary trust* and the trust provisions are contained in your will.

If you create a trust during your lifetime, you are described as the trust's *grantor* or *settlor*, the trust is called a *revocable* or *living* or *inter vivos* trust, and the trust provisions are contained in the *trust agreement* or *declaration*. The provisions of that trust document will usually determine what happens to the property in the trust upon your death.

The living trust may be *revocable* (subject to change and terminated by the settlor) or *irrevocable*. Either type of trust may be designed to accomplish the purposes of property management, assistance to the settlor in the event of physical or mental incapacity, and disposition of property after the death of the settlor of the trust.

Trusts are not only for the wealthy. Many young parents with limited assets choose to create trusts either during life or in their wills for the benefit of their children in case both parents die before all their children have reached an age deemed by them to indicate sufficient maturity to handle property. This permits the trust estate to be held as a single undivided fund to be

---

**It is important to understand that the transfer of your property after death may be determined by something other than your will, trust or even the laws of intestacy.**

---

used for the support and education of minor children according to their respective needs, with eventual division of the trust among the children when the youngest has reached a specified age. This type of arrangement has an obvious advantage over an inflexible division of property among children of different ages without regard to their level of maturity or individual needs at the time of such distribution.

In most plans, as indicated above, the living trust is coordinated with the will (sometimes called a *pour over will*) to receive any assets not already in the trust at the settlor's death.

### Disposition Outside the Will or Trust

It is important to understand that the transfer of your property after death may be determined by something other than your will, trust, or even the laws of intestacy. For example, title to certain categories of property you may have enjoyed during your life may pass by title, by contract, or by operation of state law.

### Jointly Owned Property

If you own property with another person as *joint tenants with right of survivorship*, that is, not as tenants in common, the property will pass directly to the remaining joint tenant upon your death and will not be a part of your probate estate. Frequently, people will cause bank accounts or securities to be placed in the name of the owner with one or more children or friends as joint tenants with right of survivorship. This is sometimes done as a matter of convenience to give the joint tenant continuing access to accounts to pay bills.

It is important to realize that the unplanned transfer of ownership of property in this fashion often leads to unexpected or unwanted results and even litigation. For example, the value of the proper-

ty may be included in the taxable estate of the joint tenant who never really "owned" the property and perhaps did not even know that he or she had been designated as a joint owner with the right of survivorship. Disputes, including litigation, are common between the estate of the original owner and the surviving joint tenant as to whether the survivor's name was added as a matter of convenience and/or management or whether a gift was intended. The planning built into a well-drawn will or trust may be partially or completely thwarted by an inadvertently created joint tenancy that passes property to a beneficiary by operation of law, rather than under the terms of a tax-saving trust.

Many of these problems are also applicable to *pay on death* and other contractual forms of ownership of bank, broker, and mutual fund accounts and savings bonds. Effective planning requires knowledge of the consequences of each property interest and technique.

### Community Property

The laws of several western states (as well as Louisiana and Wisconsin) provide that property acquired during a marriage by either spouse (other than through inheritance, devise, or gift) is held equally by husband and wife as *community property*. Thus, upon the death of one spouse, his or her half of the community property belongs presumptively to the surviving spouse. Spouses can agree to override community property treatment with respect to some or all of their property. In a community property state, property may nevertheless be included in the estate of a spouse who never had an interest in the property depending on how title to the property was held. The first step is to determine what is community property and what is separate property. This is not always easy and the rules vary from state to state.

---

**If you own life insurance on your own life, you may either (a) designate one or more beneficiaries to receive the insurance proceeds upon your death or (b) make the proceeds payable to a testamentary trust, living trust or your probate estate.**

---

### **Retirement Benefits**

You may be entitled to receive some type of retirement benefit under an employee benefit plan offered by your employer or have an Individual Retirement Account (IRA). Typically, a deferred compensation or retirement benefit plan will provide for the payment of certain benefits to beneficiaries designated by the employee in the event of the employee's death before retirement age. After retirement, the employee may elect a benefit option that will continue payments after

his or her death to one or more of the designated beneficiaries. Certain spousal annuities are now mandated by law and may be waived only with the spouse's properly witnessed signed consent. The various payment options will be treated differently for tax purposes. Any person entitled to retirement benefits should seek competent advice as to the payment options available under his or her retirement plan and the tax consequences of each.

### **Life Insurance**

If you own life insurance on your own life, you may either (a) designate one or more beneficiaries to receive the insurance proceeds upon your death, or (b) make the proceeds payable to a testamentary trust, living trust or your probate estate.

If the insurance proceeds are payable to your estate, they will be distributed as part of the general estate in accordance with the terms of your will or

applicable laws of intestate succession. If the proceeds are payable to a trust, they will be held and distributed in the same manner as other trust assets and may also be free of creditors' claims. If the proceeds are payable directly to beneficiaries they pass pursuant to that beneficiary designation and free of the provisions of your will and trust. Insurance proceeds that are payable directly to a minor child will generally necessitate the court appointment of a legal guardian or conservator. This can be avoided by having a trust designated as beneficiary or a custodial account under the state-transfers-to-minors law.

- › **Revocable Living Trusts**—These trusts are sometimes called revocable, lifetime, living, or inter vivos trusts to describe their operation during the lifetime of the person ("settlor" or "grantor") who creates them. You may eliminate the need for probate proceedings or avoid the appointment of a conservator or guardian in the event of your incapacity by using a revocable trust; whether this is a desirable result is a decision to be reached with advice of a competent attorney.
- › **Anatomical Wills**—Some states allow you to provide in advance for the disposition of your remains or the gift of organs or entire body. Some organs may be donated by checking a box when you get your driver's license. Whole body gifts to medical institutions may require more extensive documentation and the consent of your spouse or family.

Insurance plays an important role in estate planning and should be coordinated with all other aspects of your estate plan. The laws pertaining to the taxability of insurance proceeds are complex, however, so it is important that all matters pertaining to life insurance be carefully reviewed with your attorney and insurance advisor.

### **The Role of the Lawyer**

It is easy to be lured by advertisements claiming you can save time and money by retitling assets, naming pay-on-death beneficiaries, or drafting your own will using do-it-yourself software or fill-in-the-blank will kits. It is unlikely that these systems will generate a suitable plan that accomplishes all your objectives. Only a qualified lawyer can interpret the maze of laws bearing on property rights, taxes, wills, probate, and trusts.

On the other hand, you can save time and money by preparing thoroughly for a meeting with your estate planning lawyer. You can organize your information regarding your assets, liabilities, and title arrangements and discuss your feelings about providing for various family members. You should gather important documents such as previous wills or trusts, powers-of-attorney, life insurance policies, employment benefits, and prenuptial agreements or divorce decrees.

Not every state has a program requiring or allowing attorneys to designate a specialty area of practice, so you should inquire about the level of experience and qualifications in the specific estate planning area when selecting an attorney. Membership in certain bar associations or estate planning organizations often indicates a level of dedication to the estate planning field and a commitment to keeping abreast of the law. Most important, you should choose an attorney in whom you have confidence, either through recommendations

from friends or your other professional advisors. You may wish to interview more than one attorney. Remember: the advice and direction of your attorney will be essential to implementing an estate plan that both disposes of your assets according to your wishes and meets your other personal objectives. ■

## Related Documents

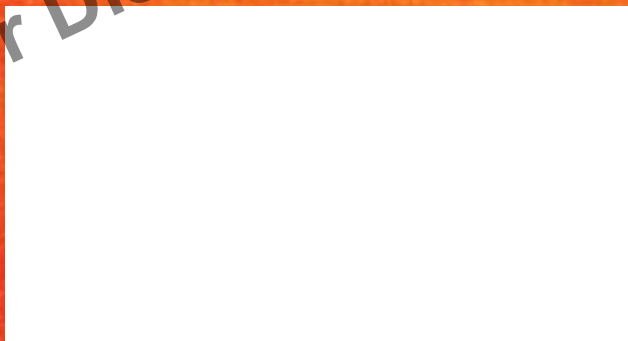
While you are planning for disposition of your property at death, you may want to consider a number of other personal objectives that can be accomplished through related documents.

- › **Powers-of-Attorney**—You may designate a friend or relative to act on your behalf under a power-of-attorney, which can be specific and limited to a certain task or transaction or may be broad and general and allow the power holder to do almost anything. All states provide that a properly drafted power-of-attorney will be effective even after the disability or incapacity of the person who gave the power, and indeed that has become a primary reason to create powers-of-attorney. The power-of-attorney can also prevent problems that arise when the name of another person is added as a joint tenant (or other form of co-owner) to a bank account or other asset as a matter of convenience.
- › **Health Care Power-of-Attorney**—Many states now provide for the delegation of health care decisions under a written instrument covering a broad range of health care issues. However, it is extremely important to get advice specific to your state, as the laws differ greatly from state to state.
- › **Living Wills**—Living wills, also called declarations, are allowed in many states and usually provide for the avoidance or elimination of extraordinary measures if you are in a terminal condition. Individuals who wish to donate organs or tissues for transplant should coordinate living wills carefully to fit their wishes.



iew Only.

for Distribution or Dupl



SECTION OF REAL | TRUST &  
PROPERTY | ESTATE LAW

