



Do You Need a Will or Trust?

Preface regarding terminology: Terminology used in the legal profession can be confusing. Some of the terms used in this article are described as follows, with explanation:

“Beneficiary” and “beneficiaries” are persons entitled to receive property, including money, under the terms of a trust or insurance policy. In this brochure, those terms include “legatees” and “devises,” being those persons entitled to receive property under the terms of a will, and include the term “heirs” when referring to those persons entitled to receive property from a deceased person’s estate.

“Personal representative” is the person appointed by the court to oversee a deceased person’s estate. This term is interchangeable with “executor,” being a male personal representative, and “executrix,” being a female personal representative.

Q: What is a will?

A: A will is a written instrument by which you provide for the disposition of your property after your death. In Oklahoma, if you are of sound mind and 18 years or older, you may dispose of your property by will.

Q: Should I have a will or a trust?

A: A person does not have to be wealthy or elderly to do some serious thinking regarding an estate plan. If you own a home or a car or have a checking or savings account, you have an estate. Often a person with a small or modest estate is most in need of a plan to provide for the proper transfer of that property at death.

There are several reasons to have a will or trust. Most importantly, having a will or trust allows you to decide who will receive your property rather than leaving that choice to state law.

Having a will allows you to choose your personal representative. Without a will, the court could appoint someone as personal representation other than a person you would choose.

Having a trust allows you to avoid the probate court system altogether if your trust is created and funded properly.

Equally important, if you have minor children, you can name their guardian in your will or trust. Your selection of a guardian is not binding on the court, but the court will give strong consideration to your selection. Without a will or trust, the court may appoint a guardian other than the person you would have chosen.

Q: What if I die without a will or a trust?

A: Oklahoma law provides for distribution of your estate to your heirs. The general rules for how your estate will be distributed if you die without a will or trust are described as follows:

- If you die leaving a surviving spouse and children, your spouse takes one-half of your estate, and your children split the remaining one-half into equal shares. If you die leaving a surviving spouse and no children, your spouse takes one-half of your estate, and your parents share the remaining one-half.
- If you die single but have children, your children take your entire estate in equal shares. If you die single with no children, your parents take your entire estate. Oklahoma law provides for distribution of your estate in additional situations, all depending on the identity of your legal heirs. Special rules apply if you have children from a prior marriage and you have property acquired during your last marriage, as well as separate property.
- If your children are minors, your surviving spouse, in order to use their portion of your estate for their support or education, would either have to be appointed guardian of the children by the court or have someone else appointed, give a bond, make annual accountings to the court and obtain the court’s permission for many routine transactions. This will result in considerable expenses as well as legal difficulty.

A common misconception is the state of Oklahoma will take your estate if you do not have a will. That is untrue in most cases. Your estate will go to the state of Oklahoma for the support of public schools only if you die without leaving a spouse, lineal descendant (child, grandchild, great-grandchild, etc.), parent, brother or sister or lineal descendant of either, grandparent, lineal descendant of a grandparent (aunt, uncle, cousin, etc.) or another relative.

Q: May I dispose of my property as I wish with a will or a trust?

A: Under Oklahoma law, a married person may not completely exclude the surviving spouse. Oklahoma law allows the spouse to elect to take a certain portion of the estate despite the will. If your will does not name a child, or in some cases a grandchild, or indicates the child or grandchild has been considered, the child or grandchild may have certain rights to take a portion of your estate. Your lawyer can explain these restrictions and show you how to accomplish your desires.

Q: May I change my will or trust?

A: You may modify or revoke your will or revocable trust at any time. You should take steps to revise your will or trust whenever changes in the size or circumstances of your family or estate mean that your old will or trust no longer disposes of your property as you want. All changes, to be effective, must be made in strict conformity with the law. Any change made in a will or trust by erasure, in your handwriting or typed as an insertion is likely to be invalid.

Q: Does it cost more to administer an estate with or without a will?

A: Unfortunately, "it depends" is the appropriate answer. You could have the cost of having an attorney prepare your will, but you may also have costs for talking to an attorney for help with estate planning, even if you do not prepare a will. With a will, you can include cost-saving provisions, such as waiving the bond requirement for your personal representative, as well as authorizing your personal representative to sell property and perform other functions without first obtaining permission from the court. However, other procedures exist that may allow the same results or more favorable results, whether or not you have a will.

If you have a will, your estate will be "probated" in court. If you do not have a will, your estate will be "administered" in court. Both procedures are governed by the Oklahoma Probate Code (Okla. Stat. title 58), and many of the procedures apply equally to probate and estate administration. The Probate Code provides several methods to probate or administer an estate, some of which can reduce costs if used appropriately.

An attorney with a working knowledge of wills, inheritance, probate and estate administration can provide guidance on minimizing probate or estate administration costs and achieving the desired results for the distribution of your estate.

Q: How do I make a will or a trust?

A: Using a will or trust form or computer program for estate planning is not recommended. A will or trust must be prepared within the legal technicalities prescribed by the law. These technicalities are for the protection of you and your heirs, and they must be observed. The proper drafting of a will or trust requires the professional knowledge, skill and experience of a practicing lawyer. Some attorneys charge on the basis of time spent in preparation of a will or trust while others have a flat fee. A few hours of an attorney's time now can save your beneficiaries not only the costs of litigation over a poorly drawn will or trust but also the additional expense of a guardianship of your minor children. Your attorney will be glad to discuss the charge for services with you.

Q: Is a handwritten will valid?

A: Under Oklahoma law, a will that is entirely written, dated and signed in your own handwriting and that contains no typed or printed portion is valid. The problems resulting from this type of will are not so much in what the person writing the will says as in what the person fails to say. Without the advice of an attorney, most people who prepare handwritten wills fail to include provisions that address the issue of a beneficiary who dies before the will maker, the naming of a personal representative and waiver of their bond, the source for payment of costs and debts of the estate and the specific powers the personal representative will have, as well as the problem of the simultaneous death of the will maker and a will beneficiary.

Your lawyer can explain these matters and show you how to simplify the administration of your estate, as well as accomplish your desires with the best tax consequences.

Q: What is a living will?

A: A living will is part of a document called an Advance Directive for Health Care. In the living will portion of such document, if you 1) have a terminal condition, 2) become persistently unconscious or 3) have an end-stage condition, you may direct that your life not be extended by life-sustaining treatment. Your directions go into effect if your attending physician and another physician determine you are no longer able to make decisions regarding your medical treatment. As part of this living will, you may also make an election whether you desire the artificial administration of food and water under these circumstances if you are unable to take food and water by mouth.

Q: What is a revocable or living trust, and what are its advantages over a will?

A: A revocable or living trust is a written document providing for the management of your property that becomes effective while you are living, unlike a will, which takes effect after your death. A trust is set up for a trustee to manage your property for your benefit during your lifetime or in the event of your incapacity. Ordinarily, you serve as the sole trustee until you die or become incapacitated. After your death, the trust document will provide for your successor trustee to distribute any remaining property to those persons or entities you have chosen (just as in a will) or provide for the continued management of your property by that successor trustee for many years, with the ultimate distribution as you direct. The primary advantage of a revocable trust over a will is that upon your death, the administration of your estate in probate court is avoided, and the distribution of your property is governed by your trust outside of the probate court system.

This normally results in a quicker and less costly distribution of your property to the people you have selected. In addition, a revocable trust is a private document that is not recorded at the courthouse or anywhere else. In this regard, a trust is unlike a will, which, if probated, normally requires a list of your property and its value to be public record at the courthouse. When a revocable trust is fully funded by conveying all of your property into your trust during your lifetime, no probate of your estate is required.

Another advantage is a trust can continue after your death, holding property for the benefit of a spouse, child or another named beneficiary. This is especially useful in the event the spouse, child or other beneficiary is disabled or receiving assistance from other sources. The trust cannot be continued indefinitely but can be continued long enough to achieve many desired purposes. The same results can also be achieved by adding trust provisions to a will but normally results in a delay in providing for the beneficiary since the will must first be probated.

Q: What are the advantages of having a will instead of a trust?

A: Generally, the cost to prepare a will is less than the cost of preparing a revocable or living trust. That is because a will requires no action on your part after it is signed and is simpler to create than a trust. On the other hand, a revocable trust is more complicated than a will because it involves the management of your property during your lifetime, as well as its distribution after your death. In addition, a trust must be funded during your lifetime, and this can require significant effort and paperwork. If you fail to transfer all property into your trust or you subsequently acquire property in your own name instead of the trust name, your estate will still have to be probated. Your attorney will assist you by explaining the steps necessary to put your property into the trust. Basically, wills and trusts are two separate approaches to estate planning. You should consult with an attorney who works extensively in estate planning for an explanation of the advantages and disadvantages of wills, trusts and joint tenancies. Keep in mind that you can include in will provisions to establish a trust. However, such a will is usually no longer a simple will, and the costs could approach what a revocable trust would have cost. Either a will or a trust can be used to transfer your property following your death.

Q: Do other alternatives to a will or trust exist?

A: Oklahoma provides several methods of transferring property upon your death. One option is a "Transfer-on-Death Deed," which provides for the transfer of real property to a named beneficiary upon the death of the owner, with the owner retaining full ownership during their lifetime. Oklahoma also provides for "Transfer on Death" or "Payable on Death" for other types of property, including bank accounts, corporate stock and other types of personal property. Oklahoma recognizes the division of real property between a life estate and a remainder interest, with certain persons owning the real property during the lifetime of one or more named persons, with the property becoming fully owned by the designated remainder interest owner upon the death of the named persons. Trusts other than revocable trusts also exist that are useful in appropriate circumstances. All of these are useful planning methods and can be used separately or in conjunction with a will or trust to achieve your desired estate plan.

Q: Is joint tenancy a substitute for a will or a trust?

A: No. Joint tenancy is a useful estate planning tool, but to rely solely on joint tenancy ownership for estate planning is generally a poor idea. Usually, home and bank accounts are owned by married couples as joint tenants. Upon the death of the first joint tenant, the property passes to the survivor by law. The survivor becomes the sole owner of the property and should make additional provisions for distribution upon their death. Furthermore, if both joint tenants die simultaneously, both of their estates will require probate, although, in some instances, both estates can be probated or administered through one court action.

Holding property in joint tenancy is useful but is not a substitute for a will or a trust in many cases. Your attorney can advise you as to whether the use of joint tenancy is appropriate.

Q: I own real property in another state. What do I need to do?

A: Each state has its own laws but can also have laws in common with other states. As long as every state in which you hold property recognizes the validity of holding property in trust, a trust helps avoid having to probate your estate in every one of those states. Whether you use a will, trust, joint tenancy or another planning device, you will need to comply with the laws of each state in which you hold property. Often, you or your local attorney will consult with an attorney licensed to practice law in the state where the property is located to make sure the method used is handled properly according to that state's laws.

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