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What Is Estate Planning?

This issue of Dollars & Sense tackles several key elements of estate planning, including writing a will, deciding who gets what, and creating a trust.

First off, what is estate planning? In a nutshell it's the process by which an individual or family arranges the transfer of assets in anticipation of death. An estate is the total property, real and personal, owned by an individual prior to distribution through a trust or will. Real property is real estate and personal property includes everything else, for example, cars, household items, and bank accounts. Estate planning enables you to distribute the real and personal property to your heirs according to your wishes and desires. An estate plan aims to preserve the maximum amount of wealth possible for your intended beneficiaries and flexibility for you prior to your death. ■

Creating a Trust

As explained by the Oregon State Bar, in simple terms a trust is a relationship in which a person, called a trustor, transfers something of value, called an asset, to another person, called a trustee. The trustee then manages and controls this asset for the benefit of a third person, called a beneficiary. An asset is any kind of property.

Because a trust can be set up before your death, there is no need for court approval of the trust or the trustee, thus saving the time and expense of court proceedings. One of the uses of a trust is to provide flexible control of assets for the benefit of minor children. Children cannot legally handle their own financial affairs before they reach the age of 18 or 21 depending on which state they live in.

One purpose of creating a trust for a child is to assure the trustor that the child will be benefited but will not have control of the trust assets until the child is older. In establishing a trust, the trustor selects a trustee and specifically instructs the trustee how the assets will be used for the beneficiary. A trust for the benefit of minors often takes effect when both parents have died. It is usually set up to provide for the support, care, and education of the children until they have reached the age set by their parents to actually receive the assets being held by the trustee.

Another use of a trust, known as a "revocable living trust", is as an alternative to a will. This type of trust is revocable and amendable meaning it can be terminated or changed by the trustor anytime during the trustor's life. However, it may not be changed after the trustor's death. Like a will, a revocable living trust gives instructions as to how the trustor's assets are to be distributed at the trustor's death.

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Writing Your Will

Do you already have a will? If not, should you go to the trouble of writing one? As explained by the American Bar Association's Division of Public Education and the Maine State Bar Association, a will is a document that allows you to direct the distribution of your assets—your money, real estate, and personal property—after your death. Or stated another way, a will lets you control what happens to your property. If you have minor children, a will enables you to designate who will care for them after your death. Through a will you can nominate a legal guardian for your children and name an executor to handle the distribution of your estate to your designated beneficiaries. Anyone age 18 or older who is of sound mind may make a will.

So what happens if you die without a will? Since your property must still be distributed, the probate court in your area will appoint someone as the administrator of your estate to distribute the property according to the intestate laws of the state. The costs associated with this are usually more expensive than having an executor named by you in advance and must be paid out of your estate before any property is distributed.

Generally, a will directs the distribution of anything that you own individually, and is specified in the will. When you legally own something with someone else—such as a house, or a savings account that is under both your name and that of your spouse under tenants in common—the property generally remains the property of the other person when you die. On the other hand, living trusts and life insurance policies are governed by their own terms, and will go to the beneficiaries named as part of those documents, and not included in a will.

Getting Ready to Write Your Will

There are three essential steps to writing a will:

- First, list your assets. These will be both the things you personally own that have monetary value, like a house or car or antiques; and things that may be of little monetary value, but are important to you or the people or institution to whom you want to give them, such as mementos, family heirlooms, or personal treasures.

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Deciding Who Gets What

Most people make a will so they can give their money and possessions to people they care for, or institutions they believe in, after they die. In effect, a will becomes the essential document governing how the courts understand your intent and ensures that your wishes are followed. In general, you can pick the people you want your property to go to and leave it to them in whatever proportions you want, but there are some exceptions. For example, a surviving husband or wife may have the right to a fixed share of the estate regardless of the will. Some states limit how much you can leave to a charity if you have a surviving spouse or children, or if you die soon after making the provision.

The first step in deciding how you want your property distributed is gathering information. You'll need the following:

- Names, addresses, and birth dates for you, your spouse, your children, proposed guardians, and executor of your estate.
- Amounts of all debts, including mortgages, car loans, student loans, business loans, and credit card accounts.
- Copies of existing wills, trusts, divorce decrees, prenuptial agreements and any other legal documents that might affect a will.
- A list of assets, including detailed information about the following: real estate, savings (bank accounts, CDs, money markets), investments (stocks, bonds, mutual funds, CDs), life insurance policies, 401(k), IRA, pension/retirement accounts, life insurance policies and annuities, ownership interest in a business, cars, boats, planes, and other vehicles, jewelry, collectibles, artwork, antiques, furniture, and other personal property.

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- Next, list the people and institutions to whom you want to leave your assets. Use their full legal names, and note their relationships to you—son, niece, friend, caretaker, teacher, school, etc.
- Finally, name a Personal Representative. Someone will need to take legal responsibility for attending to your affairs when you die, including making sure that your will and estate are handled according to law. This person is called the Personal Representative, and can be a family member, a friend, or an attorney. You want to make sure that the person you name will have the time and ability to do what is required. It is also recommended that a Successor Personal Representative be named in the event that your named Personal Representative is unable to serve. An attorney can explain the duties of a personal representative, and help you consider who would be best.

Making Your Will Legally Valid

After you've drawn up your will, you must take the formal legal step of executing the will. This requires having at least two witnesses who have no potential conflict of interest. As a general rule, the witnesses watch you sign, and each witness then signs in the presence of the other. If your will is executed in a lawyer's office, two other attorneys or support staff might serve as witnesses.

A valid will also requires that:

- you are of legal age, 18 in most states;
- you are mentally competent, i.e., that you know you are executing your will and know the general nature and extent of your property and your descendants or other relatives who would be expected to share in your estate;
- the will must have a substantive provision that disposes of your property and must indicate your intent to make the document your final word on what happens to your property;
- with rare exceptions, such as imminent death, the will must be written;
- you must sign the will unless illness, accident, or illiteracy prevents it, in which case you can designate someone to sign for you in your presence;
- your signature must be witnessed by at least two adults who understand that they are witnessing a will and are competent to testify in court.

If your will doesn't meet all of these conditions, it might be disallowed by a court, and your estate might be distributed according to state law instead.

Writing a Will without the Help of a Lawyer

Of course it's legal to write a will without the services of an attorney, but there are three reasons why it makes sense to seriously consider using one:

1. To make sure the court accepts your will as the legal document in charge of your estate, a will must be signed in a particular way, with witnesses, and under oath. Other types of wills (such as holographic, or handwritten) may be accepted by the court, but even these are subject to certain requirements that can be explained by an attorney.

2. If you have minor children, or need to provide for an incapacitated adult, such as an adult child with special needs, or an ailing spouse, an attorney can help you set up arrangements for guardianship and/or special trusts to help care for them after you are gone. These may include legal arrangements beyond the will itself, as well as appropriate language within the will.

3. Inheriting money or property from you may create unintended legal or financial problems for your heirs. An attorney can anticipate these problems, and can often find better ways to help you accomplish what you intend.

Making Changes to Your Will

Is it permissible for you to make changes to your will? Yes, not only may you change your will as many times, and at any time, as you like, you should plan on it. Your will should be reviewed periodically to keep up with changes in your assets, your wishes, and the law. The will you made when you had your first job and one child will not be sufficient later, when you have several children, more property, and live in a different state under different laws—or the same state, and different laws. Similarly, as your children become self-sufficient, you may want to distribute your assets according to different priorities. Wills can be rewritten entirely, or changed by additional notes, or "codicils," depending upon the complexity of the changes.

What Is a Video Will?

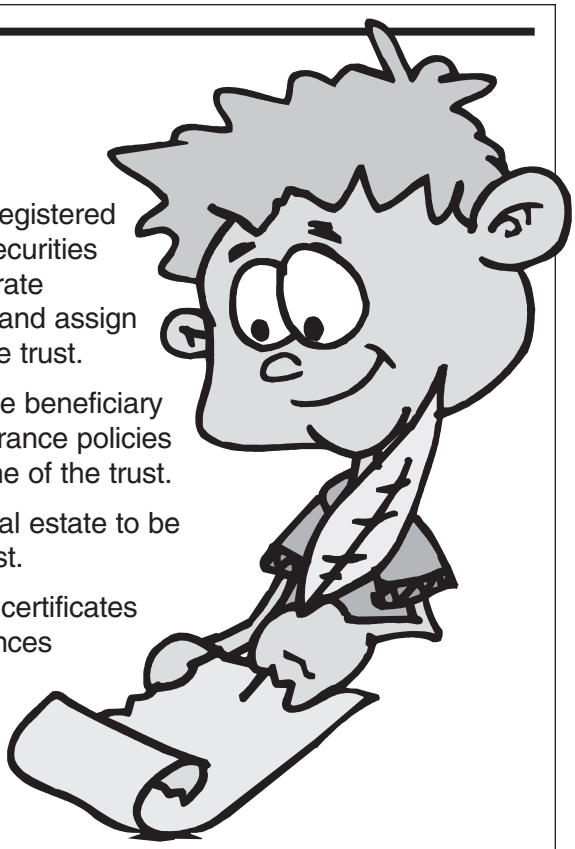
More and more people are preparing a video in which they read the will and explain why certain gifts were made and others not made. The video recording might also show the execution of the will. Should a disgruntled relative decide to challenge the will, the video can provide compelling proof that the person making the will was mentally competent and observed the formalities of execution.

Keep in mind that videos do not last forever and are subject to damage. You should consult a lawyer before making such a video to find out about your state's laws on video wills. Generally, such a video would supplement, not substitute, a properly prepared written will. ■

Creating a Trust

Your tax advisor, attorney, or estate planning professional can guide you through the various tasks associated with each step in creating a trust. Suggested steps for creating a trust include:

- **Identifying Assets—**Decide which assets you wish to place in trust and how you wish the assets to be managed during your lifetime.
- **Specifying Beneficiaries and Distribution—** Identify the individuals and charities the trust is to make distributions to after your death.
- **Selecting a Trustee—**Your trustee will be responsible for administering your assets during and beyond your lifetime. If you decide to name an individual, you should also name a successor trustee in the event of the original trustee's resignation, unsuitability, incapacity, or death.
- **Drafting Your Trust Agreement—**Work with your attorney to draft a document that achieves your estate-planning objectives and reflects your personal intentions. File a copy with your trustee and successor trustee. A typical revocable trust agreement would cover, among others, the following points.
    - o Designation of the trustee
    - o A statement of the investment powers granted to the trustee
    - o Instructions for payment of income and principal during the grantor's lifetime and for distribution of assets thereafter
    - o Instructions for the trustee to maintain records of the trust's income, disbursements, and principal transactions
    - o Specification of any additional responsibilities assigned to the trustee
    - o A statement of the terms under which the trust agreement may be amended or revoked
    - o Designation of a successor trustee
- **Funding Your Trust—**Change the legal title of your specified assets from your name to that of your trust. Your attorney will help ensure that all assets are properly re-registered. If applicable, remember to:
    - o List all unregistered (bearer) securities on a separate schedule, and assign them to the trust.
    - o Change the beneficiary of life insurance policies to the name of the trust.
    - o Convey real estate to be held in trust.
    - o Deliver all certificates and evidences of ownership to the trustee.
    - o Attach a schedule of assets to the trust agreement. ■



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If you decide to write your will yourself using a software program such as Quicken Willmaker®, sit down in front of your computer with all of the above information and in a few hours you can produce a will that is legal in your state. Be sure to follow the software's instructions on having your will signed and witnessed. If you feel more comfortable having a lawyer do it, you'll need to take the above information with you to your appointment.

You may also want to take a look at LegalZoom (www.legalzoom.com) which is a low-cost alternative to pricey attorney services for some of the simpler legal tasks such as wills, living wills and living trusts.

Finally, remember that the best of wills won't be any good if nobody knows how to find it. Make sure your family members and your executor know where your will is kept. ■

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