



Chapter  
8

# ORGANIZING YOUR ASSETS: ESTATE PLANNING

## **In This Chapter, Learn:**

- Whether You Should Have a Will or Trust
- What Happens if You Don't Have a Will
- Whether You Need an Attorney to Create a Will
- About Probate
- What are the Benefits of a Trust
- About the Dangers of Joint Accounts
- About Much More

# WILLS

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## What is a will and what does it do?

A will is a document that states how you would like your property distributed after your death.

In a will, you typically:

- Appoint a person, called a personal representative, who carries out the instructions in your will.
- Identify the people or charities that are to inherit your assets.
- Make special provisions, such as naming a person you would like to act as guardian for your minor children or adult children with a disability.

## Do I need a will or a trust?



It depends. Your estate plan should be customized to fit your needs and objectives. A will, a trust, or both can be designed for many purposes, such as property management, assistance in the event of incapacity (lack of mental or physical capacity), and disposition of property after death. Discuss your needs and objectives with an attorney.



## What if I don't have a will when I die?

This is called dying “intestate.” If this happens, your assets will go to your heirs according to state law. Generally under Utah law, if your spouse survives you, he or she will inherit everything. However, if you have children who aren't your surviving spouse's

children, then your surviving spouse receives \$75,000 plus half of the remainder of your estate. The rest of your estate is divided equally among all your children. If you have no surviving spouse, your assets are divided among your heirs (i.e., children); if you have no children, the assets go to the surviving parents. If you have no surviving parents, your property goes to your siblings or their children.

## Do I need an attorney to create a will?



You are strongly encouraged to hire an attorney to create a will. A skilled attorney will ensure that your will clearly states your desires in a way that complies with the law. That said, you can handwrite your will, as discussed below.

## I recently moved to Utah. Do I need a new will?

No. It is wise, however, to have an attorney in Utah review your will. They can look to see whether Utah laws will affect your will and suggest changes, if necessary.

## Should I write my own will?



Some people use computer software, a pre-printed form, or handwrite their own will. However, this is risky. These methods often produce a will that is unclear or does not comply with Utah law and that can result in a fight between your heirs over who gets what. This type of litigation is often very expensive and time consuming and can permanently tear families apart. We do not recommend that you

write your own will. Start the right way and hire an attorney to draft your will.

## What if I still want to draft my own will without an attorney?



Despite knowing the risks, some people still want to draft their will without an attorney. While not advisable, Utah law does recognize a holographic (handwritten) will.

For a holographic will to be valid in Utah, (1) the entire will must be in your handwriting (not typed on a computer), and (2) you must sign and date the will.

If you are determined to draft a holographic will, here are some suggestions of what to include. These suggestions might not fit your particular circumstances, but they will give you a starting point for creating a holographic will.

- State that you intend this to be your will and you are revoking all prior wills.
- State your name and address.
- Name a personal representative.
- Identify your spouse and all your children.
- Describe all your property and assets.
- Clearly state which person gets what assets.
- Number the pages of the will.
- State that you are waiving the requirements of a bond for the personal representative.
- Sign and date the will.

## Who should I choose as a personal representative?



Your personal representative is responsible for gathering, managing, and distributing your assets under your will. Choose someone you trust to follow your wishes and who is willing to act as your representative. Beneficiaries (those who receive or are to receive something of value) can become emotional regarding the property distribution, so it's important to choose a personal representative who will follow your instructions regardless of the pressure the beneficiaries try to put on them.

# PROBATE

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## What is probate?

Probate is a process by which the court determines the validity of the will and officially empowers the personal representative to act. The personal representative:

- Gathers the assets of the decedent.
- Applies the assets to pay debts, taxes, and expenses of administration.
- Transfers the remaining assets to the beneficiaries named in the will.

## What assets don't go through probate?

The following is a partial list of property that may pass outside your probate estate unless you make the estate the beneficiary:

- Retirement accounts such as IRAs and 401Ks, life insurance proceeds, and employee death benefits go to the beneficiaries you have designated in those accounts or policies.
- Assets held in “joint tenancy.”
- Assets held in a trust.
- Accounts that are “payable on death” go to the designated person.
- Certain small estates (see below).

## Should I try to avoid probate?



Probate is not as cumbersome and costly as it once was. The average time it takes to probate a will is between four months and one year, depending on the size of the estate, the complexity of transferring the assets, and whether the will is contested. The average cost of probating a simple, uncontested estate when an attorney is involved is between \$1,500 to \$2,500. Be careful of those over-exaggerating the costs of probate.

## What if I don't have a lot of assets, do I have to go through probate?

A small estate affidavit may be an option. In Utah, if an estate is worth \$100,000 or less and does not include real estate, probate may not be necessary. In this case, the successor of the estate can use an

affidavit (a written statement made under oath) to collect the deceased person's property. The affidavit must state that (1) the value of the estate subject to probate does not exceed \$100,000; (2) thirty days have elapsed since the deceased's passing; (3) no application of a personal representative is pending or has been granted in any jurisdiction; and (4) the claiming successor is entitled to payment or delivery of the property.

## TRUST

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### What is a trust?

A trust is a document in which you appoint someone to manage assets for you and any designated beneficiaries.

In a trust you appoint a trustee to manage the assets. You can appoint yourself or another person. If you name yourself, you should also name a successor trustee to take over upon your death or if you don't have mental capacity.

### What are the benefits of having a trust?

There are benefits to creating a trust (so long as all your assets are in the trust).

Assets held in a trust:

- Don't go through probate.

- Avoid the need to appoint a conservator.
- Allow you to state the circumstances under which your beneficiaries will receive the trust assets.

## Shouldn't everyone have a trust?



While trusts are a valuable estate planning tool, they are not for everyone. For instance, it is not always a good option for those with a small estate. Despite this, there are salespeople who use scare tactics to get seniors to create trusts. They may state that a trust will save you thousands of dollars, guarantee that the government won't take your property, ensure that your heirs receive your estate, and avoid costly probate. These statements are not true for everyone. Some salespeople are not qualified to create a trust but may draft your trust anyway, or they may neglect to transfer your property into the trust.



Even if your estate is modest, there are many estate planning options that will ensure that your assets are distributed as you wish. Before determining which estate plan is best for you, examine all estate planning options with an experienced estate planning attorney.

# UPDATING ESTATE PLANNING

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## When should I update my estate planning?



You should update your estate planning when you experience a life change. This could include a new marriage, birth, adoption, or divorce. To help you think about the potential impact on your finances and the changes you need to make, answer the following questions:

- Do you want to change the beneficiaries to your will or trust, such as including a new spouse or child?
- Do you want to revise the assets and properties that you are leaving to your beneficiaries?
- If you are getting married, do you want to protect your assets for your children's inheritance and at the same time provide for your new spouse after your death?
- Do you want to change the name of your executor, agent, or personal representative?
- If your assets have increased or decreased since the last review, do you want to change how those assets are distributed?

# TAXES

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## Should I worry about estate taxes?



If your estate will be worth \$1 million dollars or more when you die, you should talk to an estate planning or tax attorney about your estate tax liability (debt or legal responsibility). Tax planning is very complicated, and tax laws change frequently.

## When do I have to pay a gift tax?



Generally, any time you make gifts worth more than \$12,000 to one person (other than your spouse) in any given year, you must file a gift tax return. You can give as many gifts as you would like as long as the total amount of the gifts don't exceed \$12,000 per person per year. There are a few other exemptions, such as payments for medical care or education. If you plan to make gifts of more than \$12,000 to any one person in a year, talk to an estate planning or tax attorney first.

# PROPERTY

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Should I deed my house to my kids now to avoid probate costs later?



We strongly advise against deeding your house for several reasons. You will no longer own it, your heirs may have to pay more in taxes if you deed it over, and it may make you ineligible later for Medicaid.

If you transfer your house to your children, they will own the house. This transfer can have unforeseen consequences. For example, if your child defaults on a loan, the creditor could force the sale of the home since your child holds the deed to the house. Also, your child, as owner of the house, could decide to evict you. Second, there may be gift tax issues. If you deed the house over to your children, they will have to pay capital gains on the home's original value. So if you bought your home for \$100,000 and it is now worth \$300,000, and you deed it to your children, they would have to pay capital gains taxes on \$200,000 (the difference between the original value and the current value). However, if you gave them the house through your will and they then sold it for its current value of \$300,000, they would not have to pay capital gains tax. Third, transferring your house for less than its value may make you ineligible for Medicaid. There are better ways to transfer your house to your child. Talk to an attorney for more details.

## What is a life estate?

A life estate is ownership of property that terminates on your death. Here is an example of how a life estate works. Paul owns a cabin in the Uinta mountains. He marries Jenessa. Later, he dies. In his will he gives Jenessa a life estate to the cabin and the future interest of the cabin to their children, Hugo and Nola. This means that Jenessa can live in the cabin until she dies. Upon Jenessa's death, Hugo and Nola inherit the cabin.

If Jenessa decides that she wants to sell the cabin, she cannot sell the property completely because she only owns the cabin until she dies. After that, Hugo and Nola own it. If Jenessa sells her life estate to Lyman, Lyman can use the cabin while Jenessa is living. Once Jenessa dies, the property goes to Hugo and Nola.

If you hold a life estate, you cannot damage or devalue the property. However, you can make improvements as long it does not devalue the property.

## What about owning property together?

When buying property with another person, be sure to identify whether you are holding the property as joint tenants or as tenants in common.

In joint tenancy, when one joint tenant dies, the property passes to the surviving joint tenant automatically. For example, if Paul and Jenessa own a house in joint tenancy, and Paul dies, Jenessa now owns the entire house. Married couples typically

choose to own property in joint tenancy because it is easier to pass property to the surviving spouse.

In tenancy in common, each owner has a share of the property that he or she may sell without the other's consent. The share of each tenant in common passes as provided in a will and is subject to probate.

## My son is helping me pay my bills. Should I put his name on my checking account?



Probably not. When you add someone to your checking account, you are creating a joint account. There are some advantages to setting up a joint account, as it permits a second person to help out with paying bills and managing your money. However, as a result, two people can withdraw money even if only one of them is depositing money into the account. This may lead to unexpected and unwanted results. For instance, let's say that you have a joint account with your son. If your son defaults on his car loan, the creditor can seize the money in the joint account. While you can sue your son for the money taken from the joint account, this situation can be difficult to resolve.

## What is the best way to leave my bank account to someone upon my death?

The best way to leave your checking account to someone after your death is by creating a "payable upon death" account. This form, available from your bank, allows you to name a person who is to inherit the money upon your death.

# MORE INFORMATION

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## ESTATE PLANNING

### **Information on estate planning**

Utah State Bar  
[www.utahbar.org](http://www.utahbar.org)

American Bar Association  
[www.abanet.org](http://www.abanet.org)