Wills and Trusts

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Estate planning involves making important decisions for the people you love. If you do not plan, you will die "intestate," which means the inheritance laws of your state, and not your wishes, will determine how your property will pass to your heirs. Putting an estate plan in place now means you keep control over what happens after your death. You cannot control fate, but you can plan for it. Planning ahead can really put your mind at ease.

In this fact sheet, you will learn about:

- wills.
- trusts, including the difference between revocable and irrevocable trusts.
- other ways to leave assets outside of a will.

Wills

A will is not just a document that lets you tell the world whom you want to get your assets. A will allows you to name important people (an executor or personal representative) who will carry out your wishes. It is also very important for people with young children because in a will you can name guardians of your minor children. A judge will give the people you name priority over anyone else, but he/she will still investigate whether this person is likely to be a good choice. Make sure you discuss the responsibilities of guardianship with the potential guardian(s) before you write your will. You also need to decide if and when you should tell your children about this decision. You are free to change guardians later on if, say, your chosen guardian gets divorced or remarried and moves to a different state.

To have a valid will, you must be considered to have the mental and legal capacity to understand what you are doing. You also must be considered free of undue influence, fraud, and duress.

Most wills are called attested wills. This is a will that is witnessed and attested to by at least two witnesses and signed by you in their presence. You can also write a holographic will. This is a will that is written and signed in your own handwriting. There is no witness requirement, but your handwriting must be verified. Under current Oklahoma law, oral and video-only wills are invalid.

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http://osufacts.okstate.edu

At the start of your estate planning process, it is a good idea to complete a Family Inventory (Worksheet 1). This inventory should state what the asset/property is, where it is located, who owns it, the beneficiaries, how much is it worth, and how to access it. This includes listing account numbers, usernames and passwords. This inventory will give you a better idea of what property to list in your will. There are ways to leave some of your assets and property to others outside of your will. These will be discussed later.

Why is it important to leave as many assets as you can to others outside of your will? Because your will must go through the probate process to be considered legally valid unless your estate is very small so formal probate is not required under state law.

The probate process is the legal process through which your property is properly transferred to other parties. It is a public process. The process can involve having to prove the will is valid, notifying all creditors and potential heirs, and resolving any contests to the will. Probate can take anywhere from weeks to years, and can be very costly. According to the National Association of Financial and Estate Planning (NAFEP), the national average cost of probate can run between 4 percent and 10 percent of your estate.

> Oklahoma does not have an exempt amount below which probate is not required. However, estates less than $150,000 can be submitted for summary administration, an expedited probate process. If the value of your estate is more than $150,000, you may want to consider transferring assets out of your estate to make it eligible for summary administration.

Family Inventory

Worksheet 1

Item	*Location*	*Owner (Beneficiary)*	*Value*	*Access Information*
Bank Accounts and CDs				
Safe Deposit Boxes				
College Savings Plans and Custodial Accounts				
House and other Real Estate				
Retirement Plans (Pensions, 401k, IRAs)				
Life Insurance and Annuities				
Other Investments				
Automobiles				
Other Valuable Personal Property				

Trusts

Trust Basics

One way to leave assets to others outside of your will is to use a trust. A trust is a legal agreement between two parties, the grantor (you) and the trustee (the manager of the trust), for the benefit of a third party known as the beneficiary. According to the National Association of Financial and Estate Planning (NAFEP), if you have a net worth of at least $100,000 and meet one of the following conditions, then a trust may be a useful estate planning tool:

- A sizeable amount of your assets is in real estate.
- You want to leave your estate to your heirs in a way not directly and immediately payable to them upon your death.
- You want to support your surviving spouse, but also want to ensure the remainder of your estate goes to your chosen heirs after your spouse dies.
- You and your spouse want to maximize your estate-tax exemptions.
- You have a disabled relative for whom you would like to provide for without disqualifying him or her from Medicaid or other government assistance.
- You have a business you wish to keep as an ongoing concern with as little disruption as possible while the estate is being settled.

Advantages of Trusts:

- You can put conditions on how and when your assets are distributed after your death.
- They can reduce estate and gift taxes.
- Trusts distribute assets to heirs efficiently without the cost, delay, and publicity of probate court.
- They can better protect your assets from creditors and lawsuits.
- They are harder to challenge than wills.

Trusts are flexible, varied, and complex. They can be customized to fit your situation. However, attorneys may charge more for trusts than for wills. According to the NAFEP, a basic trust plan may run anywhere from $1,600 to $3,000 or more, depending on the complexity of the trust. *Assets you want protected by the trust must be retitled in the name of the trust*. Anything not so titled when you die will have to be probated and may not go to the heir you intended. It is a good idea to name your trust something simple like the "Jones Family Trust" versus the "Edward P. and Barbara K. Jones Family Trust."

Revocable vs. Irrevocable Trusts

There are many different types of trusts. Each type has its own advantages and disadvantages, so discuss them thoroughly with your estate lawyer before setting up one. Two classifications of trusts are revocable or irrevocable. A revocable trust can be changed or revoked by you at any time, provided you are not mentally incapacitated. With an irrevocable trust, the terms of the trust cannot be changed until the terms or purposes of the trust have been completed. As with any trust, you will still need what is called a "pour-over will" to include any assets or property accidentally omitted when the trust was enacted.

Revocable trusts are one of the most frequently used estate planning tools. Many revocable trusts share the following characteristics:

- You retain the right to change or cancel the trust agreement at any time before your death. This also means you retain control of the assets in the trust.
- You are responsible for reporting the trust's income on your income tax returns.
- While you can choose someone else, such as a bank, to be the trustee, most people choose to manage the trust themselves, and then appoint a "successor trustee" (often a family member) to do so after death.
- As the trustee, you are responsible for making sure the assets get properly transferred into the trust and retitled.
- At the time of your death (or disability), your trust has specific instructions of how to manage and distribute the assets in the trust.

On the other hand, an irrevocable trust is considered an independent legal entity.

- You (the grantor) will need to choose an independent trustee to manage your trust. You will have to pay the trustee a management fee (usually between 0.75 percent and 1.25 percent of the assets being managed), unless he/she chooses to not to be compensated.
- The trustee will have to file tax returns on the trust's behalf. Thus, the income from the trust will not appear on your income tax returns.
- Make sure the trustee has properly transferred and retitled your assets.
- All of the property in the irrevocable trust, plus all future appreciation on the property, is transferred out of your taxable estate. This reduces your ultimate estate tax liability.
- Your property is better protected from creditors than with a revocable living trust.
- One of the key benefits of this type of trust is that you can avoid Medicaid spend-down provisions by transferring assets out of the estate (but you need to do this at least five years before applying for Medicaid).
- The downside to this type of trust is that you will lose control over the assets in the trust.

Other Ways to Leave Assets Outside of a Will

Remember, for a will to have any legal effect, it must be submitted for probate. Probate is generally required when someone dies with any property not handled by a trust or other will substitute.

Whether or not real estate and other financial assets such as mutual funds, go through probate depends on how the property is owned. Property owned with the right of survivorship is not subject to probate. Property owned this way cannot be left to others in a will or trust. Most couples own their houses in joint tenancy with the right of survivorship. The house would pass to the surviving spouse without going through probate. The house will go through probate after the surviving spouse dies unless the property deed is retitled and/or the property is placed into a trust.

Another way to avoid probate and pass along assets outside of a will is by naming beneficiaries to certain types of asset accounts. Examples of accounts where you can name beneficiaries are:

- life insurance policies,
- annuities,
- retirement plans,
- brokerage accounts,
- bank accounts.

Do not name minor children as direct beneficiaries; they cannot own assets until they turn 18. Instead, name a trust (for the child) as a beneficiary or have the money put into a custodial account. Try not to name a charity, business, or some other organization as a beneficiary for a retirement plan. The IRS will require the money to be taken out after five years. If you name “designated” beneficiaries for your retirement plans (i.e., your spouse and/or adult children), then the IRS will allow your heirs to keep the money in the account and let it continue growing tax-deferred. If you have already started taking distributions, your beneficiaries can continue using your distribution plan. Be sure to discuss the options with your plan administrator and your tax advisor.

To avoid probate, brokerage accounts should be designated as transfer-on-death (TOD). Likewise, bank accounts can be designated as payable-on-death (POD) to skip the probate process. POD accounts get the FDIC insurance limit for each qualifying beneficiary. TOD and POD are not quite as flexible as wills and trusts. Only primary beneficiaries can be named. If primary beneficiaries die before (or with) you, the money will go through probate.

Summary

Writing your will and considering trust arrangements are important parts of an estate plan. You also need to determine who will conduct your affairs if you become disabled, incapacitated, or incompetent. Consider adding the following to your estate plan:

- Living will and advanced health care directives,
- Durable power of attorney,
- Health care power of attorney (also referred to as a health care proxy).

More information on these documents and the estate planning process can be found by downloading the *Prepare Your Estate Plan* lesson at http://www.extension.org or OCES Circular E-726, *Estate Planning – A Simplified Guide for Farm and Ranch Families*.

Resources

eXtension.org. (2008). Prepare Your Estate Plan. Retrieved May 13, 2010 from http://www.extension.org/pages/Prepare_Your_Estate_Plan

Hanks, L. W. (2007). *The Busy Family's Guide to Estate Planning: 10 Steps to Peace of Mind.* Berkeley, California: Nolo.

National Association of Financial and Estate Planning: http://www.nafep.com

Oklahoma Cooperative Extension Service. (2007, June). *Estate Planning – A Simplified Guide for Oklahoma Farm and Ranch Families.* (Circular E-726). Stillwater, OK: Author.

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