

Advance Planning: Wills and Trusts

Planning is essential to ensure that your wishes are carried out, even if you think that your loved ones know what you want.

What is the first step to advance planning for a will or trust?

For both a will and a trust, it is important to consider the property and interests in property that make up your estate. Property interests refer to the extent of a person's rights to property. It deals with the percentage of ownership, the time period of ownership, and other aspects of property law that vary based on the law in your state. Your estate includes all property or interests in property which you own. Your estate can include bank accounts, real estate, stocks and bonds, furniture, furnishings, and jewelry, among other things.

To make the process of thinking about your estate easier, the CLRC has created the following two forms: "Taking Care of Business" and the "Estate Planning Personal Records File." Both forms are for your personal use. They are meant to help you get organized and to get you thinking about your property and interests in property for the purposes of creating a will or trust.

After figuring out what property makes up my estate, what happens next?

When thinking about your property, it is important to understand how that property is owned in order to determine whether you can transfer it to someone else. You can only transfer something that is entirely owned by you. So, if you own a share in some property, you can only transfer your share. Two or more people can decide that they want to jointly own something, or the law can require joint ownership. One example where the law enforces joint ownership is in certain states where the property obtained by two spouses during a marriage is jointly owned by both spouses.

However, there are different types of joint ownership, and property laws vary by state. It is important to talk with an attorney to find out more about the property laws in your state.

Once you have an idea of what property you own and what shares in property you have, you are ready to begin thinking about who you would like to give your property to. What follows is a brief explanation of wills, trusts, and the differences between them.

Wills

What is a will and how do I make one?

A will is a document that lays out who you want your property to go to when you die. Like property laws, the specific requirements for creating a valid will vary from state to state. However, there are generally three ways in which a will can be made. One way is to create a holographic will, which is created by writing down who you want to leave your property to in your own

handwriting. Usually, holographic wills do not require a witness, but they are not legally binding in every state. You can also create a will by hiring an estate planning attorney who is familiar with the property laws in your state. This generally must be signed by you and two disinterested witnesses (people who will not receive any of your property when you die). A third way to create a will is through your state's statutory will form, if your state has one. A statutory will is a will form created by a state legislature and written into state law. Residents of the state may use these form wills at no cost; however, you must use them exactly as they are written, filling in the blanks with your own information. Statutory wills usually require witnesses, just as if you had an attorney draft the will for you.

How can I change my will?

You can change a will through a codicil. A codicil is a legal document that must be drafted and executed in accordance with the same state laws which apply to creating a valid will. You should not change your will by crossing out words or sentences, or making written notes. Additionally, you should review your will periodically to see if any changes need to be made. Often, this will need to be done when there are changes in your family (births or deaths), when the value of your assets significantly increases or decreases, or when you purchase or sell a piece of real estate.

Lastly, if you move to another state, you will want to check with the laws of that state to make sure your will complies with them.

What happens if I do not have a will?

If you die without a will, which is called dying intestate, then state laws will determine who gets your property. For this reason, it is important to make a will so that your estate is distributed the way you want it to be.

What happens to my will and property after I am gone?

The provisions in your will are carried out following your death in a process called probate. A probate proceeding ensures that the executor of your estate (the person in charge of carrying out the provisions in your will) correctly distributes all property to the people named in the will, and determines whether any claims by creditors against your assets or property at your death are valid.

When considering whether you want to create a will or trust, keep in mind that there are some disadvantages to probate proceedings, and trusts do not have to go through probate. One of these disadvantages is probate's public nature, since the provisions of your will and the value of your assets become public record. Another is the attorney's fees and executor's commission, which may be enforced by law. There may also be filing costs to open the estate in court, and other costs associated with notifying those named in the will and determining the value of certain assets. As a result, the expenses for probate proceedings may be more than the cost of a comparable estate managed and distributed under a living trust. However, some states do not require smaller estates to go through the probate process, so it is a good idea to talk to an estate planning attorney about which option is best for you.

Trusts

What is a living trust?

There are many different types of trusts, but the most common is the living trust. This is a written agreement where you name beneficiaries (people who will receive your property) and include instructions on how you want your property distributed upon your death. As the creator of the trust, you are the trustor. The person you name to be in charge of managing the trust is known as the trustee. The trustee is responsible for distributing the property in the trust directly to the beneficiaries. You can be the trustee of the trust until your death. Once you pass away, the terms of the trust cannot be altered.

Once created, the trust must also be “funded.” This simply means that you must transfer assets from your name to the name of the trust.

Do trusts have probate proceedings like wills?

Unlike with wills, there is no required court supervision of the distribution of the assets within the trust. This means that distribution of the assets can be quicker and less costly than with a will. On the other hand, a living trust is more expensive to have drafted than a will, and requires more effort to set up. There are costs you have to pay upfront; however, when you compare these costs to the costs involved with probate, they may be less in the long run. For these reasons, it is important to consult with an attorney or accountant when thinking about creating a trust.

Pour-Over Will

Even if you have a trust, you may still want something called a pour over will. A pour over will directs that any property that is not already in your trust be put in the trust at your death.

Resources

For more information, or help with creating a will or trust, we suggest you contact your state bar association for referrals to lawyers who specialize in estate planning.

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