

CHAPTER 5

Estate Planning

Various options are available to you when planning how to pass on your **estate**. To plan the distribution of your assets, you must decide what to give away, when to give it and who will receive it. You may also want to decide which method is the least expensive and which will reduce any estate taxes.

This chapter addresses important estate planning issues such as making a will, distributing property when there is no will, the probate process, bank account options, trusts, life insurance and estate taxes.

Wills, trusts or documents of ownership that transfer property are very complex at times. This chapter tries to explain the basics of each of these choices, and the advantages and disadvantages they present. From this information, you will be better able to seek legal advice about the choices that would benefit you and your family the most.

Passing on Property

The law recognizes two types of property: real property and personal property. **Real property** includes land, buildings and structures placed on land, such as houses, commercial buildings and agricultural buildings. **Personal property** includes all property other than real property, such as cars, boats, furniture, clothing, bank accounts, stocks, bonds and personal items.

Intestate Succession

If you do not have a will, your property will be disposed of through a process called **intestate succession**. Oregon law explains who will receive your property if you die without a will. For example, if you are married when you die, your spouse will receive all your estate. This happens either if you had no children or if all of your children belong to both of you. Different rules apply if you die leaving a spouse and children who do not belong to your surviving spouse. In this case, the surviving spouse receives one half of your net estate and your children receive the other half. If you are not married at the time of your death, any children will receive all of your property in equal shares. If you have no spouse or children, your parents will receive your property. If your parents have died, your brothers and sisters will receive your property. The State of Oregon will get your property only if you have no family and you do not dispose of the property in your will or trust.

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Wills, trusts, or documents of ownership that transfer property are very complex at times, and usually require further legal advice.

Wills

A **will** is a formal statement signed by you and witnessed by at least two other people. It describes how your estate will be divided after you die. You can use a will to give anything you own—including real estate, cars, business holdings, money and personal property—to anyone you want after payment of your estate debts. A will also may state whom you want as a guardian for your minor or disabled adult children. You can appoint a personal representative to complete your affairs after your death. (Listen to Tel-Law topics 1116, “Your Will,” and 1121, “Estate Planning for Parents of the Disabled,” for more information on wills and other estate planning issues.)

To make a will, you must meet these minimum legal requirements:

1. You must be at least 18 years old;
2. You must be “of sound mind.” This means you must understand what property you have to give and to whom you are giving this property after your death;
3. The will must be in writing and dated. It should be typed if possible;
4. If you are making a will, you or another person acting under your supervision must sign it. If another person is signing for you because you are not physically able to sign, he or she must sign the will at your request and in your presence;
5. Two witnesses must sign the will. They must sign in your presence and certify that you were of sound mind when the will was signed; and
6. You must be making the will the way you are because you want to, and not because someone else is making you do it.

Preparing your own will is not recommended because any errors can have serious consequences. A lawyer can tell you why you need a will and what to dispose of through a will. You may not be able to dispose of some of your property. (See Chapter 6 on transfer of real property.) The lawyer can make sure that the will reflects your wishes about your property. Be sure to let the lawyer know if any of your intended heirs receives SSI benefits or relies on Medicaid—a gift of even limited value may raise their income or assets above eligibility levels and thus make the person ineligible for needed medical assistance.

If you have a will, you should review it periodically to make any needed changes in the amount or kind of property you have, new family members or deaths and divorces among relatives, changes in tax laws, or a move to a new state or country.

Probate

Probate is a process that takes place after your death. During this process, your property is distributed either according to your will or through intestate succession. A **personal representative** manages your property, pays the expenses and debts, and then distributes the property to your heirs. The probate court supervises the personal representative. You can appoint a personal representative in your will. If you do not have a personal representative or a will and your property passes by intestate

succession, the court will appoint a personal representative for you.

Probate clears the titles to stocks, bonds, other securities and cars; officially puts real estate into the name of the person who inherited it; and stops others, including creditors, from claiming any of the property after the probate ends.

Small Estate or Regular Probate

If at the time of your death you have an interest in property that does not automatically pass to another through a survivorship estate or trust, then your will must be probated to pass your property on to your heirs. (See Chapter 6 for information on survivorship estates.) If the value of your interest in the property is under the limits set by Oregon law, the probate may be done through a **small estate proceeding**. A small estate proceeding usually takes less time and requires less paperwork and expense.

A small estate is defined as real property with a fair market value of no more than \$150,000 and personal property valued at no more than \$50,000. This type of probate takes about four to six months and can be handled informally. It is fairly inexpensive.

However, if you have real property valued at more than \$150,000, personal property valued at more than \$50,000, or both, then the estate must go through **regular probate**. Regular probate usually takes a minimum of about nine months. It may take a longer time depending on the size and complexity of the estate. Probating a large and complex estate can be expensive. If you have a large estate, you should contact an attorney to discuss the merits of estate planning. (Listen to Tel-Law topic 1117, "What is Probate?" for more information.)

Survivorship Interests

Holding property with a **survivorship interest** can be an inexpensive alternative to a will. It applies to both real and personal property. (See Chapter 6 for more information on survivorship interests.)

Payment on Death (POD Accounts)

POD accounts are another alternative to wills and intestate succession. A POD account is treated like a normal bank account during the lifetime of the person putting the money into the account (the **payer**). On the payer's death, any funds remaining in the account belong to the people named on the account by the payer (the **payees**). The payees have no control over the account during the payer's lifetime. If you wish to set up a POD account, contact your local bank or financial institution.

Trusts

A **trust** is a right to property, real or personal, held by one person for the benefit of another. There are basically two types of trusts: testamentary trusts and living trusts. A **testamentary trust** is set up in your will. It takes effect only after your death and after your estate has been probated. (Listen to Tel-Law topic 1119, "What is a Trust?" for more information.)

Living Trusts

A **living trust** is an increasingly popular alternative to a will and probate. A living trust may be revocable or irrevocable. In a living trust, one or more persons (**trustors**) put property or money for themselves and others (**beneficiaries**) into the trust. Instead of giving the property and its income directly to the beneficiaries, the trustor places it under the control of a person called the **trustee**.

Typically, the trustee will invest the property (called the **principal**) and pay the beneficiaries any interest earned on the principal. When the trust expires, the trustee will distribute the property to the beneficiaries. Most people who can handle their financial affairs can also be the trustees of the trusts they set up. The trustors can name their children, relatives, friends or bank to assume those responsibilities if the trustee becomes disabled or dies.

A living trust has several important advantages if it is set up properly and is **fully funded**, meaning all the trustor's assets are placed in the trust.

First, a fully funded trust will avoid the need to probate the estate of the trustor. If it is a joint trust, it will also avoid probate upon the death of the joint trustor spouse. Second, a living trust may avoid the need for a **conservatorship** for the trustor if he or she becomes legally disabled. (See Chapter 4 for more information on conservatorship and **guardianship**.) Third, a living trust can offer tax advantages for persons with large amounts of assets. For example, for a married couple, a proper trust will increase the federal estate tax exemption to \$1,000,000. The trust can save the surviving spouse a significant sum in federal estate taxes. However, a properly drafted complex will can also achieve the same estate tax savings.

Initially, trusts are more expensive to prepare than wills. However, they may save you thousands of dollars if you have a large estate or if you use a trust to avoid a conservatorship. Upon your death or at any other time established by the terms of the trust, the property held in the trust can be distributed immediately by the trustee, without a court probate. One disadvantage of avoiding probate is that with probate, creditors of the deceased have a brief time in which to make a claim against the estate. If there is only a trust, creditors may have a much longer time to assert their claims.

Living trusts are complex legal documents that require the use of competent and experienced estate planning attorneys. Preparing, funding and managing the trust can be expensive. If trusts are not drafted correctly, the trustor's wishes may not be carried out and the estate taxes may be higher. You should not try to create your own trust.

Life Insurance

Life insurance benefits usually pass to whomever you have named to receive those benefits. The beneficiary is the person who receives the benefits. You have to name the beneficiary in writing when you purchase your policy. The insurance company will have a record of the beneficiary you chose. (See Chapter 12 for more information on insurance.)

You do have the option to change the beneficiary you chose. You must tell your insurance company in writing if you wish to do this. Most insurance companies provide a form to change the beneficiary. If your

named beneficiary is alive when you die, the insurance company will pay the money due under the policy to the beneficiary, even if your will says something different. It is wise to name another person as an alternate beneficiary in case your first beneficiary dies before you do. This kind of planning will keep the insurance proceeds from being paid to your estate and potentially increasing the cost of your probate proceeding.

Estate Taxes

In 2006, no state estate taxes are payable on estates valued at less than \$1,000,000 in total assets. The exempt amount under federal tax law is even higher. With proper planning, a married couple in Oregon can transfer up to \$2,000,000 or more to their children without paying any federal estate tax. If the combined value of your estate and your spouse's estate is close to these amounts, consult a tax lawyer about estate taxes under state law. For tax purposes, your estate includes all property in which you have an interest. This includes the proceeds of life insurance, property held with a survivorship interest and certain life estates. (See Chapter 6 for more information on life estates.) The value of your property for estate tax purposes is its fair market value on the date of your death. (Listen to Tel-Law topic 1118, "What Taxes Have to be Paid When Someone Dies?" for more information.)

Keep an up-to-date itemized list of all your debts and property, including:

- Insurance policies
- Securities
- Bank accounts
- Safe deposit boxes
- Real estate
- Jewelry
- Artwork
- Pension plans

General Advice

Keep an up-to-date itemized list of all your debts and property. This includes insurance policies, securities, bank accounts, safe deposit boxes, real estate, jewelry, artwork and pension plans. You also should record where you put your will or trust. Give a copy of this list to someone you trust and to your lawyer or financial adviser.

Resources

See **General Resource List** for AAA/SPD offices, legal aid offices, OSB Tel-Law service and more.

Oregon State Bar Tel-Law Topics:

- 1116 - Your Will
- 1117 - What Is Probate?
- 1118 - What Taxes Have to Be Paid When Someone Dies?
- 1119 - What Is a Trust?
- 1120 - What Is a Living Will?
- 1121 - Estate Planning for Parents of the Disabled
- 1122 - Powers of Attorney and Other Decision-making Tools
- 1123 - Financial Planning for Health Care (For more information on Medicare/Medicaid, refer to Chapter 2.)

503-620-3000 or **800-452-4776**
www.osbar.org

Glossary of Terms

Beneficiaries: *People who receive money or property from a trust or life insurance policy.*

Conservatorship: *See Chapter 4.*

Estate: *All personal and real property.*

Fully Funded: *All of the trustor's assets are placed in a trust.*

Guardianship: *See Chapter 4.*

Intestate Succession: *A process in which Oregon law decides how your property will be distributed upon your death if the property is not disposed of through your will.*

Living Trust: *A type of trust in which one party puts property or money into a trust for themselves and others during their lifetime. The property is under the control of a trustee and is distributed according to the terms of the trust.*

Payee(s): *The people who receive the money from a Payment on Death (POD) Account after the payer's death.*

Payer: *The person who sets up a POD Account.*

Payment on Death (POD) Account: *A bank account that belongs to people named by the account holder upon the account holder's death.*

Personal Property: *All property other than real property, such as cars, boats, clothing, stocks, bonds and personal items.*

Personal Representative: *The person who handles your affairs after your death. This person is either appointed by you in your will or by a court.*

Principal: *Typically, a trustee will invest the property (called the principal) and pay the beneficiaries any interest earned on the principal. When the trust expires, the trustee will distribute the property to the beneficiaries.*

Probate: *The legal process by which your property is collected and distributed according to your will or by intestate succession.*

Real Property: *Land and buildings or structures placed on land, such as houses, commercial buildings and agricultural buildings.*

Regular Probate: *A formal probate process that is required if your real property is valued at no less than \$150,000 and/or your personal property is more than \$50,000.*

Small Estate Probate: *An informal probate process that takes about four to six months. It applies if your real property is valued at less than \$150,000 and your personal property is less than \$50,000.*

Survivorship Interest: *See Chapter 6.*

Testamentary Trust: *A type of trust that is set up in your will. It takes effect only after your death.*

Trust: *An arrangement in which one person (trustee) holds property for the benefit and use of another (beneficiary).*

Trustee: *The person who manages and distributes the property held in a trust.*

Trustor: *A person or persons who put money or property into a trust.*

Will: *A signed, written legal document that shows how you want your estate to be divided after you die.*

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