

Types of Wills and Trusts for a Donor to Consider

NOTE: This information is for educational purposes. It is not intended to be, nor should it be taken as, legal advice. You are strongly encouraged to consult your own legal advisors about all estate and gift matters, and the information herein should not be considered as a substitute for their advice.

I. Wills

- A. *Simple Wills* - They are most often used when all that is needed is direction on how to distribute simple assets from the estate to the beneficiaries. As long as the nature of the assets is relatively uncomplicated, a simple will is more than likely sufficient to do the job. The best, simple wills should be prepared by an estate planning attorney, dated, typed, signed, and witnessed as required by applicable law. In some states, notarization may be required as well. Some states also permit handwritten wills (holographic). They are often better than no will at all but may contain ambiguities compared to formally prepared wills.

The general elements of a will are the testator's name, address, marital status, and instructions for the distribution of property to beneficiaries. But wills are far more than just distributing property. You may also name the executor or personal representative for your estate, a guardian for any minor children, establish trusts for others, such as for special needs individuals, and name trustees for those trusts.

In terms of updating or changing a will, it is often simpler than many people think. A codicil is a simple amendment to the will. It may not be any more than a paragraph or a page long. To be valid, it needs to be executed just like the will itself, but a codicil makes it easy to change a will.

- B. *Testamentary Trust Will* – This will is different because it includes provisions that direct some or all of your estate into a trust. Based on the terms of the testamentary trust, your assets are not distributed directly to your beneficiaries, but through a trustee who controls those assets.

The most common type is a spendthrift trust, often used in cases where a beneficiary is considered (by the testator) to be financially irresponsible. The spendthrift provision, if properly drafted, can also protect trust assets from the beneficiary's creditors. A spendthrift trust allows the trustee to distribute the trust assets gradually and under certain conditions.

The format of a testamentary will is often similar to that of a simple will. There is also what is referred to as a "pour over will" which at death directs some of the property into an existing trust created at during the testator's life. Even if a person wants to place all of his or her assets into a trust prior to death, it is still good idea to have a simple will. People almost always forget about some assets. A simple will can be a "crumb catcher" for any forgotten assets, and it can greatly reduce possible probate costs.

- C. *Joint/Contractual Will* – Joint wills are often used by spouses who intend to leave their property to one another, and also want wills to mirror images of one another. When one spouse passes away, with a joint will, the surviving spouse may decide to amend his or her current will, especially if there have been changes in family situations, or other beneficiaries have already predeceased the surviving spouse.

A contractual will is a joint will that contains a contractual agreement that the surviving spouse may not change or revoke his or her will after the death of the first spouse – it must remain as it was originally executed. Attorneys often advise against contractual wills because it takes away the flexibility to address changes in personal and family circumstances, including Medicaid planning.

- D. *Living Will* – Its purpose is different from the other three. The purpose of a living will is to provide detailed instructions about the type of medical treatment or lifesaving measures you want (or don't want) if for some reason you are no longer to communicate those wishes for yourself. For instance, if you become terminally ill or unconscious, your living will could specify that you do not wish to be put on a feeding tube or a ventilator, even if you would die without those measures.

II. Trusts

A. *Revocable Trust*

- 1) *Definition* - A revocable trust is a trust whereby provisions can be altered or canceled as the grantor desires. During the life of the trust, income earned and other assets may be distributed to the grantor; only after death does property transfer to the beneficiaries. Normally the trust is for the benefit of the grantor during the grantor's life but could benefit others chosen by the grantor.
- 2) *Why Use It?* - Revocable trusts, commonly called "living trusts," are an effective estate-planning tool to avoid the costs and hassles of probate, preserve privacy and prepare your estate for ease of transition after you die. Unlike in a will, living trust assets generally will bypass probate and pass to beneficiaries sooner. In some states, such as Texas, probate is both simple and inexpensive. But in many states, probate may be time-consuming cumbersome, and expensive.
- 3) *Why do you need it?* - Anyone who is single with assets titled in their sole name should consider a Revocable Living Trust. People with real property in more than one state can also benefit from these trusts; it can avoid ancillary probate proceedings. These trusts can keep you and your assets out of a court-supervised guardianship and allow your beneficiaries to avoid the costs and hassles of probate.

B. *Irrevocable Trust*

- 1) *Definition* - An irrevocable trust cannot be modified or terminated without the beneficiary's permission. The grantor places assets into the trust, and effectively gives up all rights of ownership to those assets. The grantor may not change that once the trust is established. This is the opposite of a revocable trust.
- 2) *Why Use It?* – It is a good tool for a grantor who has multiple charities. A charitable trust is an irrevocable trust established for charitable purposes.
- 3) *Why Do You Need It?* - It provides substantial protection from creditors. Once assets are transferred to the trust, they no longer belong to the grantor - they become the legal property of the trustee to hold for the beneficiaries.

III. General Issues with Wills and Trusts

- A. *Having a Trust versus a Will* – In states where probate proceedings have been simplified in recent years, a will may sufficiently serve a person's estate needs. Once a will is filed for probate, it becomes a public document. If a person wants more privacy in his or her estate plans, or has assets that need to be distributed to heirs very shortly after death, the trust may be preferable, at least for some of the estate assets. .
- B. *More Information on Wills and Trusts* – See file F2-c, "Bequests and Revocable Gifts," under Financial Instruments in the BSA Foundation folder.
- C. *Other Types of Trusts* – To learn about other forms of trusts, refer to "Income and Producing Gifts," file F2-b, under Financial Instruments in the BSA Foundation folder.
- D. *States Vary* – As with most areas of law, laws relating to estate planning are different from state to state, but there are many common themes in the law across state borders. You must get proper advice about the laws in your State regarding these matters.
- E. *Power of Attorney* – Some states allow an attorney-in-fact or agent to make changes to the testator's estate plan, but only if the testator has specifically given them these rights in a validly executed Power of Attorney.
- F. *Inheritance Taxes* – Seventeen states currently have an estate tax or inheritance tax with varying exemption amounts. The federal tax exemption is periodically updated, and a person should review the current maximum allowed and not subject to estate taxes.