

Does absolutely everyone need a will? Everyone should do some planning, and everyone should be aware how his or her property would pass without a will. In legal parlance, whatever you own is your estate, and a will simply directs how the estate should be distributed. A will may be all you need; or it may be a backstop to other means of passing assets. Either way, it is a good idea to have one and to understand what a will can and cannot do.

A WILL:

Does not dispose of all types of property. Wills affect only probate property, which is property that you, the person making the testament, individually own. Jointly held assets are not probate property. Possessions held in a trust are not probate property. Accounts with beneficiary designations, such as life insurance policies or your 401(k), are not probate property.

Wills, in short, are just one way to make a bequest. Some types of property may be transferred by a will and some by the way it is titled. With your bank or brokerage you can have pay-on-death (POD) or transfer-on-death (TOD) accounts that name a beneficiary. You can have your house in a trust that names you as the primary beneficiary and someone else as the beneficiary after your death. You do not need a will to distribute these types of assets.

A WILL:

Governs some transfers of real estate but not others. If you and your spouse own a home together, you likely have “joint tenancy with right of survivorship” or “tenancy by the entirety”. That means when one of you dies, the house passes directly to the surviving spouse. If, however, you share ownership in investment property with, say, some cousins as “tenants in common”, you can use a will to indicate who gets your stake in the property.

For the joint tenant who survives a spouse, would it be a clever idea to add a child’s name to the home’s deed so the house can pass automatically at your death? No, not at all. What happens if the child goes bankrupt, gets sued, gets divorced, or ends up needing government assistance? They will take all, or part, of your house.

There can also be significant tax disadvantages to a child who gets a house by gift, which is what adding their name to a deed would be considered, rather than having them inherit it.

A WILL:

Does not alter provisions in other documents. Life insurance proceeds go to the beneficiary named on the policy no matter what a will asserts.

If the beneficiary is an ex-wife or an ex-husband, the “ex” gets the money in most states. So make sure your beneficiary designations on your accounts are current.

A WILL:

Does not keep itself up to date. No matter how specific the instructions you leave, and for your heirs' sake be as precise as possible, with time you will need to revisit your will to be sure the provisions are still apt. You cannot bequeath an armoire you junked years ago.

Likewise, make sure that those you named to carry out the Will, who are called your executors or personal representatives, are still willing and able to take on the responsibility. And, yes, you will need to name more than one person, so you always have a backup.

It is generally inadvisable to name co-executors because if they disagree, no decision is made and they may end up in Court. But do set up a line of succession. Fairly often we see wills where there is no executor because the only person who was named has passed away. In that case the executor is Court appointed and may be a family member or, if your heirs are at odds, an attorney.

A Will:

Does not allow you to avoid probate. Probate is a state court procedure that oversees the administration of your estate, or at least the probate property in your estate. Horror stories about the bureaucracy, delays and attorney's fees associated with probating a will have inspired untold thousands of Americans to establish trusts. This is done in an effort to hold their assets out of probate, along with "pour-over" wills that move any overlooked property into the trust when they die. Would everyone be better off with a trust that keeps their will an empty vessel?

Absolutely not, the fear of probate and its costs is way overblown.

In some states, California and Florida in particular, probate can be an expensive and complicated process, and that has given it a bad name. But for most people in most states, the advantages of living trusts have been overstated and probate is no big deal, just a little bit of paperwork.

A Will:

Costs less than a trust. Trusts are most appropriate in special circumstances, such as if you have a family business to pass on, far-flung real estate that would mean probating the will in more than one state, or a large amount of wealth that needs oversight during a period of disability. When funded with properly-titled assets, a trust can provide for beneficiaries with special needs or help minimize estate taxes.

But few of us need to even consider these options. People with seven figure estates ought to see a lawyer about trusts. A simple will might cost \$300.00 while a so-called living trust typically runs from about \$1,500.00 to \$2,500.00.

Probated estates guided by a will also provide closure that eludes some trusts. Probate allows a reasonable amount of time for creditors to come forward; then there is a definite cutoff and their claims are barred.

A Will:

Does not take effect before you die. Sounds obvious, but it is good to remember that a will does not provide instructions for when you are disabled or unconscious or otherwise unable to manage your affairs. That said, the role of any good lawyer in estate planning is not just to draft a will but also to talk through all your concerns and evaluate which documents are necessary, including financial and medical powers of attorney. In addition, a lawyer should review how property is titled and whether beneficiary designations are up to date.

A Will:

Does not compel good behavior among your heirs. Conflicts often follow a death, especially when couples blend families, bringing children from previous marriages to the union. Most commonly, although the husband and wife want their assets to provide for the basic needs of their current spouse, they want their own children ultimately to be their heirs. In such cases establishing trusts to benefit the children to keep strings attached to the money can be a good idea. A will merely enables you to have the last word about how your assets are distributed and then they cease to be your assets.

A Will:

Is more effective if its contents and whereabouts are known. A practical help in tamping down family conflict is to air your plans with all involved. Not that it is going to be easy. A lot of people just do not want to talk about death. We try to emphasize that you are not just planning an estate matter; you are really planning for life because it is the lives of those you care about that are impacted.

Having something in place gives you greater peace of mind.