# Basic Estate Planning

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## And

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# Q&A

## What is a will?

A will is a written (typed or handwritten) document that directs the disposition of a person's property after death.

## Does everyone need a will?

Almost everyone needs a will, even if they don't have money or own much property. In addition to determining how your property should be distributed, wills allow you to name a "personal representative" (the person who administers your estate) and nominate guardians for your spouse, if your spouse is disabled, or your minor children, upon your death.

## What happens when someone dies without a will?

If you die without a will (intestate), your property passes according to the laws of Idaho. In general, a surviving spouse receives all of the community property and the spouse and children share the decedent's separate property. If there is no surviving spouse, the decedent's property is equally divided among the decedent's children, with special rules for deceased children. This may require selling assets of the estate in order to create equal shares.

## What are the advantages of having a will?

First of all, you decide who the beneficiaries will be, not the state. Secondly, you can name the personal representative (a person or bank to manage and settle your estate).

## How do I make my will?

It is best to secure the advice of an attorney. Something as important as your will should be done with great care, in a document tailored to your needs. Besides, an attorney supervises the signing and witnessing of your will. Without the proper formalities, your will could be invalid.

In Idaho, two people need to witness you signing your will. Preferably the witnesses should not be beneficiaries under the will. Idaho law allows for a "self-proved" will, which requires a notary public. This means your witnesses won't have to testify as to your proper signing of the will at probate proceedings. You can have your attorney draw up your will to be self-proved.

You can prepare what is known as a holographic will. A holographic will is an instrument, whether or not witnessed, in which the signature and the material provisions are in the handwriting of the testator. Caution should be used since the testator typically does not seek the advice of a competent attorney.

**How much does a will cost?**

Attorneys usually charge on an hourly basis at rates that vary from attorney to attorney. The estate planning needs of each person will be different; therefore, the cost of a will is affected by the amount of time it takes to review your personal and financial affairs and to prepare the will.

**Can anyone make a will?**

Anyone who is at least 18 years of age and of sound mind can make a will.

**Is a will that has been executed in another state valid in Idaho?**

A will that is valid in the state where it was executed will be valid in Idaho. However, if your will was prepared in another state it should be reviewed to ensure that the language used in the other state will be given the same interpretation under Idaho law. In addition, death tax and probate laws vary from state to state; therefore, your will should reflect the laws that would apply to your estate when you die. If you move to another state, your Idaho will should be reviewed by an attorney in the new state in order to determine if any changes are necessary or desirable under that state's laws.

**Do I have to list all of my personal property in my will?**

No. In Idaho, one is allowed to make a separate written statement or list, outside of a will, to dispose of items of tangible personal property (Idaho Code 15-2-513). This written statement must be in the handwriting of the person wishing to give the property at death or signed by him/her, and must describe the property with reasonable detail. Often, this type of personal property list is attached to a person's will for the convenience of the personal representative. To be effective, reference must be made to the personal property list itself within the person's will.

**Can a will provide for anatomical gifts?**

A will may include specific directions for the disposition of your body and funeral. Because your will may not be reviewed immediately after death, such directions should be communicated to family members so they are aware of your wishes at the time of your death. Additionally, you can prearrange the disposition of your body and funeral with a funeral home. However, you should review carefully any prepaid arrangements offered to you by a funeral home. Idaho has adopted the Uniform Anatomical Gift Act which requires certain formalities regarding any anatomical gift. If you wish to donate your body for research or transplantation, you should also notify family members and carry an organ donor card or note your wishes on your Idaho driver's license.



**When are the contents of a will made known to relatives?**

You do not have to reveal the contents of your will to anyone while you are alive. After your death, the person who had custody of the will may disclose its contents to family members. The original will must be filed with the appropriate court where it will be admitted to probate. All beneficiaries named in the will and family members who would receive probate assets, if no will existed, will be notified of the opening of the estate upon your death.

**Who should be the personal representative?**

A personal representative is the person who will act to settle the estate and distribute the assets to your heirs through a probate (See the question below entitled "What is probate?" for a brief description of the probate process). Many people appoint their spouse or an adult child to be the personal representative. Consider your selection of a personal representative carefully.

**Can a will be changed?**

If you are competent, you can change your will at any time by signing a document called a "codicil" or by having a new will prepared. Either a codicil or a new will must be executed with the same formal requirements as the original will. You should not attempt to change your existing will by writing on it.

**When should a will be changed?**

Review your will periodically. A significant change in personal or financial circumstances may mean that your will should be revised or replaced. For example, births, deaths or a change in marital status warrant a review of your will. Changes in federal or state tax laws may necessitate revisions in your will.

**How is a will affected by subsequent marriage or divorce?**

In Idaho, a will is not affected by a subsequent marriage; however, a spouse, and children born after the will is executed, may have some rights under Idaho's law regarding an omitted spouse and pretermitted children. A divorce automatically revokes the provisions of the will that pertain to your former spouse, but does not affect other provisions of the will. Thus, provisions benefitting family members of your former spouse would remain in force. However, a former spouse may still receive property under a beneficiary designation that was never changed after a divorce. For example, a former spouse named as the primary beneficiary of a life insurance policy, and never changed after a divorce, may still receive the death benefit proceeds from the policy.

**Where should a will be kept?**

A will should be kept in a safe place to avoid accidental loss or destruction. Executed wills may be kept in a safe deposit box or in any other secure location. However, it is important that another person, such as the personal representative named in the will, be authorized to enter the safe deposit box and knows where the key to the safe deposit box is located. Some law firms and banks retain clients' executed wills in their vaults.

**What about joint ownership as a will substitute?**

Some people have tried "joint ownership with right of survivorship" as a will substitute in order to avoid probate. There are problems, however, with this method of transfer in Idaho. You should consult with an attorney before deciding to title property as "joint property with rights of survivorship."

Another type of account is a P.O.D. (payable on death) account. If it is a joint P.O.D. account, the account belongs to the original owners during their lifetime in proportion to the net contributions by each. Transfer of ownership to the P.O.D. beneficiaries occurs only after death of all original (lifetime) owners.

**Can this type of transfer be made with other types of property interests?**

Yes, non-probate transfers to designated beneficiaries can be achieved with other agreements such as life insurance policies, bonds, mortgages, promissory notes, pension plans, or other written contracts.

These types of transfers have a place in estate planning. Prior to making these decisions, check with an attorney to make sure that you have properly considered the gift and estate tax consequences, and that you have not included property that can only be passed by use of a will.

**What is probate?**

Probate is not a taxation process. Probate is simply the process of transferring the ownership of your property. In probate, a court determines the validity of your will, if you have one, and is informed of the distribution of the probate assets (property that passes under the terms of the will, as opposed to assets that pass by beneficiary designation upon death, such as life insurance proceeds and retirement plan proceeds).

During probate, a complete inventory of your estate is made, heirs are located, creditors are identified and paid, tax returns are filed, and title to the property in your estate is formally transferred. Depending on the circumstance, an accounting may be required before a disbursement can be made.



**When is probate necessary?**

Probate is generally necessary in Idaho when title to property must be transferred.

**Is the probate process always the same?**

No. The probate of an estate can be done either formally or informally. If the spouse is the beneficiary of your estate, a summary administration may be done. The Uniform Probate Code, which has been adopted in Idaho, simplifies the probate process as compared to states that have not modernized their probate codes

With an informal probate, sometimes the court can handle this proceeding without any court hearings. An informal probate may have the advantage of speed and simplicity.

In a formal probate, the estate will receive the full attention of the court including judicial determination of the existence of a will (testacy), determination of heirship, and full notice to all interested parties. A formal probate is recommended when there are disputes concerning the validity of a will or the appointment of a personal representative, questions concerning potential heirs, or challenges to distribution of estate property. The disadvantages of a formal probate include the time it takes for the estate to close and legal and other costs.

In addition, whether an estate is probated formally or informally, it can be supervised by the courts (where conflicts or problems with the estate exist) or unsupervised (no court direction or protection for the personal representative.)

In a summary administration, all the assets are transferred to the surviving spouse on an expedited basis. Its disadvantages include liability of the surviving spouse for any debts of the decedent after the date of death.

**What advantages are there for the probate process?**

Probate provides certain benefits that are unavailable with living trusts. The probate process (i) allows supervision of estate administration by the probate court, (ii) provides notices to beneficiaries who are given an opportunity to object, (iii) provides an opportunity to finalize the determination and amount of the decedent's debts. In contrast, a beneficiary of a living trust may have to sue a trustee to challenge his or her actions; and, certain benefits, such as the homestead and family allowances, and certain property tax exemptions, may be lost with the use of a trust.

**Is a will the only way to dispose of my property?**

Not necessarily. For some estates, a will is the best way to make your wishes known. However, there are other methods you might want to consider. If your estate is sizable or if you have special needs, you should consider a trust. There are several kinds of trusts, including testamentary trusts, living trusts, and custodial trusts.

**What is a trust?**

A trust is a legal arrangement whereby property interests are held by one person for the benefit of others. The trust will be managed by a trustee, either an individual, trust company or bank trust department, who holds, administers, and distributes the income and principal of the trust as directed in the trust document. A trust might be entered into for tax advantages, to train your beneficiaries in the management of your property, or as a will substitute.

A trust can be either a testamentary trust or an intervivos trust (also known as a living trust). A testamentary trust is one created under an individual's will. A testamentary trust has no effect until death and the admission of the will to probate. A testamentary trust is generally used when your beneficiaries are minors, or when you do not want your beneficiaries to inherit your estate (or portions thereof) outright. An intervivos (living) trust is a form of contract entered into during the lifetime of the person making the trust. An intervivos trust may also have provisions that only take affect at the death of the grantor.

A living trust can be either revocable or irrevocable. If the trust is irrevocable, the party creating the trust relinquishes all control over the disposition of the property placed in the trust and the income from it. However, in a revocable trust, the person creating the trust retains the right to use the property and reserves the power to revoke or change the terms of the trust.

**Will a living trust avoid federal and state estate tax?**

Generally, no. The decedent is considered the owner of the assets in a living trust. Therefore, the assets in the living trust will be included in the taxable estate of the decedent. However, a properly drafted will or trust can minimize the amount of federal and state taxes owing.



**Are there simpler types of trusts?**

Yes. A trust created under the Uniform Custodial Trust Act (UCTA) is helpful for people whose estate does not require extensive estate and tax planning under traditional trust law. It allows for the creation, administration, and termination of a trust without complicated documents.

Under this type of trust, an adult beneficiary who is not incapacitated may execute a simple statement that certain property is being placed in trust under the UCTA. Once your trustee accepts the trust property or an event designated in the statement occurs, the trust is created. The UCTA itself governs all aspects of the trust relationship (thus avoiding elaborate trust documents). You make basic decisions about the trust. For example, you decide whether payments of income go to you or others, how to invest and manage trust property, etc.

Should you become incapacitated, a court supervised conservatorship may be avoided because the trust continues on with the trustee acting as your fiduciary. If you want the trust to continue after your death, you can instruct your trustee how to distribute your property, and thus avoid probate.

This type of trust is designed for persons who want to make sure they control who manages their property should they become incapacitated. It also may be used for people who go on long trips to assure proper management while they are gone or who want protection if they become incapacitated while traveling.

**Why would I use a trust?**

Generally, trusts are used for control or protection of assets, for convenience, or for tax and financial planning purposes. For example, you may want one person to have the income from your property during his or her lifetime and another person to have the property itself at a later date. Other means are available, however, to accomplish this purpose; for example, the use of a life estate.

In addition, you may want to protect your beneficiary from his or her own inexperience with money management by giving only the income from the investment and not the property itself until the beneficiary reaches a certain age. You can even arrange to have a trust continue after the death of your first beneficiary.

**If I have a living trust do I need a will or any other documents?**

Even if someone sets up a living trust, he or she still should have a will to transfer any assets that have not been transferred to the trust before death. In addition, he or she still should have a durable general power of attorney. In the event of incapacity, the durable general power of attorney would allow someone else to manage assets that have not been transferred to the trust before the incapacity. Some living trust proponents argue that a living trust saves the cost and time involved in getting a conservator appointed. Nevertheless, a durable general power of attorney can be used to manage the financial affairs of an incompetent person in lieu of a living trust or a conservatorship.

**Is a living trust more private than a will?**

Probate may result in the terms of a will, as well as the decedent's assets, becoming public knowledge. This is not necessarily the case, however, in states that permit unsupervised probate. Furthermore, living trusts do not always guarantee that a person's assets will remain free from public scrutiny. For example, to open an account for the trust, a bank or brokerage firm may require that the grantor provide a copy of the trust agreement.

**Who becomes the trustee?**

You determine who will be the trustee. You can designate yourself (for a living trust), a third party, or a professional trustee (the trust department of a bank or other professional trustee).

**Why would I choose a professional trustee?**

Many people do not want the responsibility of management. That is the reason for considering a professional trustee, such as a bank. Professional trustees are in the business of trust management. They afford the advantage of the expert over the amateur.

Professional trustees can protect trust securities from fire, theft, and accidental loss. Details of buying and selling are clearly recorded with comprehensive reports sent to you. Should the terms of the trust allow, a professional trustee could draw on the trust fund for your benefit to pay household bills and taxes. This is a great benefit to those who wish to travel extensively and it can become an even greater benefit if one has a prolonged illness and cannot cope with personal business.

**Is my estate subject to estate or inheritance taxes?**

The exemption from the Federal estate tax for 2013 is 5.25 million dollars, under the American Taxpayer Relief Act of 2012 (enacted at the beginning of January, 2013). The exemption is now indexed to inflation, and so should increase in the future. Idaho itself does not now have an estate or inheritance tax.

**My spouse has a serious debilitating illness, is there anything I can do to protect our interests?**

In addition to a custodial trust, another very simple option to consider is a durable general power of attorney. A durable general power of attorney is a document by which one person gives legal authority to another to act on his or her behalf. The word "durable" means that this power shall continue after the onset of incapacity. A durable power of attorney for health care and a living will (declaration as to end of life medical care) should also be considered.

CAUTION: A person must have the requisite mental capacity to execute those documents. The same requirements apply to the making of a will. Time is of the essence. If you wait too long, a guardian (of the person) or a conservator (of the funds) will have to be appointed by the court.

**I am concerned that serious illness of one of us will use all our assets and there will be nothing left for me or our heirs.**

You should learn about both state and federal legislation to prevent spousal impoverishment. Legislation exists that protects income and resources of a couple when one of them has been found eligible for medical assistance.

The valuation, the exemptions, and the formulas should be carefully worked out with an experienced professional. Use of this legislation can go a long way toward preventing catastrophic medical costs from depleting your financial resources.

# Getting Help...

An attorney who is familiar with the retirement planning, estate planning or planning for incapacity will be your best resource.

One way to find an attorney is to seek referrals from friends and relatives with firsthand experience, senior centers, or community organizations that deal with planning for retirement and incapacity.

The Idaho State Bar operates a Lawyer Referral Service for the public. They will refer you to an attorney in your town, who practices the kind of law you need, including estate planning. The service referral is free, but if you consult an attorney you will be charged a reduced fee for the first half-hour, and will need to discuss additional fees with the attorney if you require further services. You can call (208) 334-4500 or access it online at www.idaho.gov/isb.

If your income is extremely limited, you may contact your Area Agency on Aging, The Idaho Volunteer Lawyers Program or Idaho Legal Aid Services for information and referral. In addition, the trust department of your bank may provide useful assistance.


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