



# **Wills & Trusts in Alabama**

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## DO I NEED A WILL OR TRUST?

This should be a goal-oriented question answered by identifying what you are trying to accomplish, and what is the most effective way to do that.

### **Some questions to ask:**

Do you want to save money and time for yourself or are you more concerned about saving money and time for your heirs?

How willing are you to do the leg work of funding a trust and keeping it updated over your life?

What property do you own and where is it located? Do you own property in multiple states? Is the property mortgaged or debt free?

What is the value of your estate (over or under 25.84 million if married/12.92 million if single in 2023 there are estate tax considerations)?

Do you have disabled relatives?

How important is privacy in the passing of your estate?

## PROPERTY CONTROLLED BY A WILL

Wills only control probate property

### **Probate property includes**

- assets titled to the deceased person (decedent) alone
- assets the decedent owned as a tenant in common with one or more other persons where the deed does not specify that the property is held with right of survivorship
- assets with the estate designated as beneficiary or with no beneficiary named or no payable on death designation made
- money owed to the deceased person that will be paid after death (e.g. lawsuit proceeds, last paycheck, refunded deposits, etc.)

### **Non-probate property includes**

- property with beneficiary designations (e.g. insurance, payable on death accounts, IRAs, investment accounts, Transfer on Death securities)
- property in accounts with a joint owner
- real property titled to multiple owners as joint tenants with right of survivorship
- Property held in a life estate deed where the decedent's interest is the life estate

## UNPROBATED WILLS HAVE NO POWER

Wills have no effect until accepted by the probate court within five years of death. With no will or one not filed timely property passes by intestate succession.

### **Alabama's intestate succession law provides the following direction:**

- If there are no children and no parents, all to the spouse;
- If there are no children, but there is a spouse and there are parents, the first \$100,000 plus 1/2 of balance over \$100,000 to the spouse and 1/2 of the balance over \$100,000 to the parent or parents;
- If there is a spouse and a child or children by a previous relationship, 1/2 to the spouse and 1/2 to the child or children by the previous relationship (note that children of the marriage existing at the time of death take nothing);
- If there is a spouse and a child or children by the surviving spouse, the first \$50,000 to the spouse plus 1/2 of the balance over \$50,000 to the spouse and 1/2 of the balance over \$50,000 to the child or children by the surviving spouse.

if there is no surviving spouse, then distribution will be in the following order:

- all to the child or children;
- all to the parent or parents;
- all to the siblings;
- all to the grandparents;
- all to the aunts and uncles;
- all to the cousins.

## NOT ALL WILLS NEED TO BE PROBATED

There are estates where a person signed a will but it does not need to be probated.

Often this happens with spouses who jointly own all assets and property as joint tenants with right of survivorship.

Automobile only can be transferred by affidavit known as Affidavit for Assignment of Title for a Vehicle from a Deceased Owner Whose Estate Does Not Require Probate (Alabama Department of Revenue MVT 5-6). Title can be transferred by filing the affidavit at the tag and title office of the local probate court.

Look at what property needs to be transferred.

**It is critical to get legal advice because after five years the will cannot be probated, and with administration of an estate where property passes by intestacy there may be unanticipated problems.**



## WILLS REQUIRE COURT INTERVENTION

All wills name a **personal representative** (formerly known as the **executor**), but the probate court must accept the will and appoint the personal representative to handle the estate within five years of the death of the person who made the will (the **testator**). You can name an out-of-state person to be the personal representative, but if you die without a will, and your estate has to be administered, the administrator must be an Alabama resident.

If you die with property that needs to be transferred, your heirs will have to hire an attorney, and the court process is required. Property cannot be transferred until six months pass to give potential creditors time to file claims against the estate.

## STEPS IN THE PROBATE PROCESS

Every probate estate is unique, but most involve the following steps:

- Filing of a petition with the proper probate court
- Notice to heirs under the will and to statutory heirs
- Petition to appoint Personal Representative in the case of a will, or
- Petition to appoint Administrator for the estate if there is no will
- Inventory and appraisal of estate assets by Personal Representative/Administrator if not waived
- Posting bond by Administrator if there is no will or the will does not waive bond
- Place assets in an estate account (EIN required)
- Notice to known creditors and advertising for unknown creditors
- Notice to Alabama Medicaid Agency
- Payment of estate debt to rightful creditors after six months
- Sale of estate assets
- Payment of estate taxes, if applicable
- Final distribution of assets to heirs





## **ADDITIONAL EXPENSES WHEN A BENEFICIARY IS A MINOR OR INCOMPETENT**

If a beneficiary or next of kin due to receive notice cannot sign a waiver due to incompetency or being under the age of 19, then there will be a hearing, and the court is required to appoint an attorney to serve as guardian ad litem to represent the incompetent person or minor. The estate will be required to pay the fee of the guardian ad litem which will usually be no more than \$400 – 500.

Some probate courts will not let an agent appointed in a power of attorney sign a waiver for an incompetent person, and a hearing will be required.

## TITLING ASSETS AND BENEFICIARY DESIGNATIONS

Even if an item is listed for a particular beneficiary in a will, that gift will be overridden by a designated beneficiary on a particular account.

If property is listed in a will, the deed will override the will if the property is titled to multiple people as joint tenants with right of survivorship.

If an account is jointly owned, the co-owner will take property in that account without probate.

If a person wants the property in a particular account to pass through a will, he must designate his estate as the beneficiary or have no beneficiary designated as POD (and own the account alone). This happens when someone want to leave cash to specific persons.

Note that there is no Transfer on Death (TOD) deed allowed by Alabama law.

It is important to review how accounts are titled and beneficiary designations to determine how property in those accounts will pass at death and to determine if they need to be included in a will or should be routed through a will.

## Common Mistakes

Failure to recognize debt (to include Medicaid Estate Recovery) resulting in unforeseen consequences, even insolvent estates

Failure to coordinate probate with non-probate property

Failure to determine where cash will come from for a bequest

Failure to timely probate a will resulting in an administration of the estate

Failure to list real property to provide a roadmap for heirs

Failure to recognize that a power of attorney has no authority to conduct business once a principal dies

Failure to recognize that not all wills need to be probated and a review of all property owned by the deceased is necessary to make that determination



## **OTHER WAYS TO PASS PROPERTY**

Vehicle by affidavit (Alabama Department of Revenue MVT 5-6)

Automatic transfer by joint tenancy with right of survivorship

Automatic transfer by life estate deed



## MISCELLANEOUS PROBATE CONCEPTS

Per stirpes vs per capita

Uniform Transfers to Minors Act vs. testamentary trust

Need to make specific omissions

Finding next of kin

Rest Residue and Remainder

## WHAT TO BRING WHEN PREPARING A WILL

All next of kin information (names, dates of birth, whether they have children)

All assets (how titled and beneficiary designations)

Deeds to all property

Consider:

Beneficiaries/alternates

Personal Rep/alternate

Guardians for children/Trustees for Testamentary Trust for the benefit of children

Whether the personal representative should sell property during probate

Any next of kin to omit

Whether to include no-contest clause

## **ALL TRUSTS FALL INTO TWO CATEGORIES**

### **Living or Testamentary**

- A living trust is created during the lifetime of the person making the trust (known as the **Grantor, Settlor, or Trustor**)
- A testamentary trust is created in the will of the person making the will (known as the **Testator**)

### **Revocable or Irrevocable**

- A revocable trust can be amended or eliminated at any time during the life of the Grantor/Settlor/Trustor (note that revocable trusts become irrevocable after the death of the grantor)
- An irrevocable trust cannot be amended or eliminated (except in unusual circumstances)



## TRUST PARTICIPANTS

The **Grantor/Settlor/Trustor** creates and funds the Trust

The **Trustee** manages Trust property

The **Beneficiaries** benefit from the Trust





## **MOST COMMON TRUST MISTAKE IS FAILURE TO FUND**

A trust only controls property titled to the trust. The Grantor/Settlor/Trustor must remain vigilant in keeping property titled to the trust over the years (keep schedule of trust property up to date)

The Trustor can title bank accounts, cars, real estate, personal property, almost any property to the trust (caveat mortgaged property)

Many people do not keep their trusts properly funded, so when creating a trust it is common to create a pour over will to pass any probate assets outside the trust into the trust on the death of the decedent. This accomplishes the obvious but requires probate to get those assets into the trust



## **COORDINATE TRUST PROVISIONS WITH ADVANCE DIRECTIVES**

A trust controls property and who can exercise that control. For this reason it is important to be sure there are no conflicting provisions between the trust and a power of attorney.

Example: If you want John to handle your finances and health care, do not title your long-term care insurance to a trust over which Mary is the trustee because Mary will handle those insurance claims that will need to be made by trust property.

Example: If John is your financial and health care agent under a power of attorney, but all your money is in the trust, that could work if John and Mary can work together. If they cannot, John could make arrangements for care and end up fighting with Mary over how to pay for that care. It would make more sense to have the same person named in both documents. And you do want a power of attorney because you do not want to have to bring a lengthy document like a trust to a health care setting.



## **TRUSTS IN DISABILITY PLANNING**

REVOCABLE LIVING TRUST

MEDICAID ASSET PROTECTION TRUST (MAPT)

MEDICAID QUALIFYING INCOME TRUST (MQIT) for income over \$2742 in 2023

SPECIAL NEEDS TRUST (SNT)

## REVOCABLE LIVING TRUST AS WILL ALTERNATIVE

The most common will alternative is the Revocable Living Trust.

Grantor makes and funds a trust and names himself as the Trustee for as long as he is living and competent to manage trust property, thus retaining control over the property (trust taxed under Grantor's SSN).

Grantor names an alternate trustee to take over should he become incompetent to administer the trust or if he should die.

Grantor designates to whom the property passes at his death.

When Grantor dies the trust becomes irrevocable, and his alternate Trustee takes over and administers the trust (trust taxed under EIN).

## WILLS PROS AND CONS

### WILLS PROS

- Generally less expensive to prepare
- No administrative work to keep it up to date (but should be reviewed every few years)
- May or may not need to be probated

### WILL CONS

- Original will needs to be located
- If beneficiary designation or joint ownership is not in place, accounts are frozen until court appoints personal representative
- If will needs to be probated must hire an attorney and have the will accepted by the probate court
- Probate process takes six months to give creditors time to file claims in court

## TRUST PROS AND CONS

### TRUST PROS

- Avoid attorney and court participation (with exception)
- Increased privacy
- avoids “ancillary probate” for out of state property

### TRUST CONS

- Useless if not properly funded (may end up needing to probate anyway)
- Generally more expensive to prepare and more administrative work needed to keep the document up to date
- Does not shield assets from Medicaid as a countable resource, and does not shield assets from creditors

## CAUTION WHEN USING ONLINE ESTATE PLANNING SERVICES

The danger in online document services is the fact that you don't know what you don't know, and filling in blanks may not address your estate issues. You may generally know how you want to dispose of your assets after you die, but what you may not know are the specific legal issues surrounding dispositions in your state that could affect your plan.

- Failure to waive bond and inventory
- Failure to explain how to identify, integrate and balance probate and non-probate property (providing a false sense of security)
- Failure to consider planning for disabled children/grandchildren/spouse or other disabled relatives
- Failure to adequately explain funding a trust
- Failure to take debt of the estate into consideration (to include Medicaid Estate Recovery)
- Failure to explain next of kin to omit from a will if distribution is to someone else
- Potential signing and self proving affidavit issues
- Failure to properly pass burial plots
- Failure to include provisions for institutionalized spouse



## **PRESENTATION AVAILABILITY**

This presentation will be made available at the Jan Neal Law Firm, LLC, Slideshare account, Facebook page and web site at [www.janneallaw.com](http://www.janneallaw.com)