

Phoebe Moffatt, Arizona Attorney & Counselor

Certified Specialist in Estate & Trust Law by the State Bar of Arizona Board of Legal Specialization

ANSWERS to Frequently Asked Questions (page 1 of 4)

WHAT IS A WILL?

A Will is a written legal document with instructions for distributing an individual's assets after his or her death. A Will must be formally executed as required by state law to be legally valid and enforceable.

IF I HAVE A WILL, CAN PROBATE BE AVOIDED?

No. In fact, having a Will assures that your estate will pass through probate. Probate is necessary to ensure that a Will was correctly executed and is legally valid so your assets can pass to those named in the Will.

WHAT IS PROBATE?

Probate, also called proof of Will, is a court-initiated procedure by which a Will's validity is proven to the satisfaction of the court. If the validity of a Will is proven to the satisfaction of the court, the Will's validity cannot subsequently be challenged on the grounds of fraud, testamentary capacity, or undue duress; however, the probate of a Will does not affect an interested party's rights to question the Will's provisions. When a decedent dies without a Will, a probate proceeding can be filed with the probate court for the purpose of determining the rights of the deceased person's legal heirs, and to have the person with legal priority appointed as the personal representative over the decedent's probate estate.

WHAT PROPERTY IS INCLUDED IN AN INDIVIDUAL'S PROBATE ESTATE?

An individual's probate estate (sometimes called probate property) includes only property subject to estate administration after the death of the individual (or after the incapacity of the individual). In general, property owned by an individual at the time of death or acquired by the deceased individual's estate after death is included in the deceased individual's probate estate. The property of the decedent's probate estate passes to the decedent's designated beneficiaries in a Will, or in the absence of a Will, passes according to the intestacy laws of the State of Arizona if such individual resided or died in Arizona. Examples of probate property are houses, cars, furniture, stocks, bonds, and bank accounts titled in an individual's name. Examples of property not typically included in an individual's probate estate (and thus may avoid probate) are assets which pass pursuant to a beneficiary designation form such as with life insurance policies, annuities, and certain retirement accounts, or assets held jointly with others with right of survivorship, or assets titled in the name of the deceased individual's trust.

HOW CAN A PERSON CHANGE HIS OR HER WILL?

A Will is typically valid and effective until it is revoked, destroyed, or invalidated by writing a new Will. Alterations to an existing Will, such as crossing out language or adding a new provision, may not meet the legal requirements for executing a valid Will and may not affect the terms of an existing Will. Changes or additions to an existing Will should be made by a properly executed Codicil or by a subsequent executed Will which properly revokes the prior Will. A Codicil is a document executed in compliance with applicable state law that properly modifies or revokes an existing Will or Codicil.

WHAT IS A TRUST?

A trust is a legal concept for a relationship. It's a "trustee" of a Trust who holds assets for the benefit of an individual or entity. There are many types of trusts that can be used to achieve a person's or entity's estate planning objectives.

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ANSWERS to Frequently Asked Questions (page 2 of 4)

WHAT IS A LIVING TRUST?

A living trust, also called an *inter vivos* trust, is a trust agreement which becomes effective during the lifetime of the person who created the trust. The person who creates the living trust may change or revoke the terms of the trust agreement during his or her lifetime (referred to as a “revocable trust” or a “revocable living trust”). Because a revocable living trust typically contains instructions for managing trust assets during the trust creator’s lifetime as well as instructions for distributing trust assets upon the trust creator’s incapacity or after his or her death, a living trust may eliminate the need for conservatorship or probate proceedings if the person has taken the appropriate steps to title assets in the name of the trust.

WHAT IS A REVOCABLE LIVING TRUST?

A revocable living trust is a trust created by a person during the person’s lifetime, and the creator of the trust reserves the right to change or revoke (terminate) the trust anytime during such person’s life. A revocable living trust is a contract made between the person who creates the trust (sometimes referred to as a “settlor” or “grantor” or “trustor”) and the trustee is responsible for carrying out the terms of the trust agreement and managing the trust property for the benefit of the person named as beneficiary. Most often, a revocable living trust refers to a trust whereby the creator designates himself or herself to act as the original trustee of the trust, designates himself or herself as primary beneficiary of the trust, and titles his or her assets in the name of the revocable living trust. Assets may be transferred in the name of a revocable living trust at or shortly after the trust agreement is signed. The terms of the trust agreement govern the assets held by the trustee of the trust during the lifetime of the person creating the trust. This is different from a Will because a Will can only operate to govern a person’s assets after such person’s death.

WHAT IS AN IRREVOCABLE TRUST?

An irrevocable trust is a trust in which the trust creator irrevocably transfers assets to the trustee of the irrevocable trust for the benefit of certain named beneficiaries, but the creator cannot alter, amend, or revoke the terms of the trust at a later date. To qualify for exclusion from the trust creator’s taxable estate, the creator must not retain any incidents of ownership in the trust. An irrevocable trust may be a vehicle to remove assets from the trust creator’s taxable estate.

WHAT IS AN ESTATE?

For estate tax purposes, a decedent’s estate generally includes all property owned or under decedent’s control immediately prior to death, and includes assets held in revocable trusts, life insurance proceeds if decedent had any ownership interests, and innumerable other assets such as real estate, bank accounts, brokerage accounts, marketable securities, retirement accounts, automobiles, boats, household furniture, artwork, valuable collections, jewelry, etc. Contrast with a decedent’s probate estate generally includes property titled in decedent’s name and property which cannot be titled in decedent’s name but is under decedent’s control immediately prior to death.

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ANSWERS to Frequently Asked Questions (page 3 of 4)

IF I HAVE A REVOCABLE LIVING TRUST, DO I STILL NEED A WILL?

Yes. A Will directs how a deceased person's assets are to be distributed after death. A revocable living trust directs how a person's assets are to be distributed during the person's life, and becomes irrevocable governing how the assets of held by the successor trustee will be distributed after the creator's death. When a revocable living trust is created, assets can be transferred to the trustee shortly after the creation of the trust. When the person's assets are transferred into the name of the trustee of the trust, this is called "funding." Sometimes, assets acquired by an individual or a married couple are not titled in the name of the trust either because they forgot to be titled in the name of the trust or they died before they had a chance to retitle the assets. Having a "pour-over" Will directs that any assets held in a decedent's name will be transferred at death to the decedent's trust. While a decedent's assets (assets held in the decedent's name as opposed to the name of the trust) must pass through the probate process, but the distribution of the assets is according to the terms of the trust agreement because the trust is the primary beneficiary under a "pour-over" Will. A Will also permits a person to nominate a guardian to care for the person's minor children at such person's death.

WHAT IS A BENEFICIARY?

A beneficiary is the person (or persons) you can choose to receive some or all of your assets in the event of your death. Electing beneficiaries (and keeping your choice up to date) allows you to make sure your assets are distributed at your death in the manner you desire. If there is not a living beneficiary named at the time of your death for any life insurance policy, annuity, or retirement account which requires a beneficiary designation, the benefits may become paid to your estate. In that event, a Will, if you have one, or State intestacy laws if you do not have a Will, may determine who becomes the recipient(s) of your assets and benefits. Usually, the beneficiary designation forms for a life insurance policy, an annuity, a retirement account, and certain other bank or brokerage accounts provide for the designation of a primary beneficiary and at least one contingent beneficiary. Contingent beneficiaries are necessary so that if a primary beneficiary does not survive you (or is deemed to have pre-deceased you by disclaimer or operation of law), then the asset will pass to your second choice, the contingent beneficiary. An individual or a trustee of a trust can be named as a primary beneficiary or as a contingent beneficiary on any beneficiary designation form. A beneficiary named in a trust agreement is who is entitled to enforce the terms of the trust agreement regarding distribution of trust assets to be received by the named beneficiary.

WHAT IS THE DIFFERENCE BETWEEN AN HEIR AND A DEVISEE?

Under Arizona law, an heir is entitled to inherit from a decedent who died without a Will. Heirs are generally related to a decedent by blood, adoption, or marriage. By contrast, a devisee can receive property from a decedent simply by being designated in the decedent's Will and does not necessarily have to be related to the decedent.

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[ANSWERS to Frequently Asked Questions \(page 4 of 4\)](#)

WHAT IS A CONSERVATORSHIP?

A conservatorship is a court procedure where the court, after due process, appoints a family member, entity, or private fiduciary as a “conservator” to manage the finances and assets of a minor or an adult who is unable to properly manage his or her own finances. A conservator is generally required to post bond. The conservator has legal obligations to manage assets for the benefit of the minor or an incompetent adult. If a person becomes incapacitated, another person could step in and make decisions for you if you have allowed such person’s name to be listed as an agent on any of your accounts or other assets. The need for a conservatorship may be eliminated with a durable power of attorney, a healthcare power of attorney, or both. These powers of attorney can avoid the costly and time-consuming court procedures that are often required to establish a conservatorship.

WHAT IS A GUARDIANSHIP?

A guardianship is a court procedure where the court, after due process, appoints an individual or private fiduciary as guardian to care for the health needs of a minor or an incapacitated person. The guardian is responsible for providing proper food, health care, medical attention, housing, and other necessities for the minor or incapacitated person who is incapable of providing for themselves on their own accord. The need for a guardianship may be eliminated with a properly executed healthcare power of attorney.

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