



Estate Planning Considerations for Ohio Families

Section 4

Wills, Trusts, Powers of Attorney, and Related Information

by Paul Wright, Jim Polson, and Russell Cunningham*

Methods Used to Transfer Property

Transfer of property takes place at death by direction of a will, by direction of the Statute of Descent and Distribution of the state of residence of the deceased, by method of ownership, or by beneficiary designation.

The transfer can take place during the life of the owner by sale or gift. Also, the transferor in a sale or gift can retain a life estate; however, this causes the value to be included in the transferor's estate.

Wills

Why Have a Will?

There are several important reasons for preparing a will:

1. Appoint an executor and successor executor.
2. Appoint guardians for minor children and successor guardians.
3. Appoint guardians for property management (need not be the same individuals as guardians of persons).
4. Provide for property distribution.
5. Provide for a trust or life estate.
6. Plan for payment of debts.
7. Provide a waiver of the executor posting bond.
8. Designate order of death in the event of simultaneous death of parties.
9. Provide for distribution of property in case of potential disclaimer by a beneficiary under the will.
10. Designate the powers granted to the executor.
11. Provide for allocation of estate taxes.
12. Provide clauses to reduce risk of will contests.

If no will is found, the courts will appoint an administrator to administer the estate and distribute property according to law. Often the provisions of the law are not what the deceased would have wanted.

Making a will is sound business and should not be neglected. Anyone who owns property, real or personal, even though the amount may seem small, should have a will. The individual making the will can name the executor of his or her choice, rather than having the court name an administrator. Your legal advisor can help you with this important task.

Legal Requirements and Limitations for a Valid Will in Ohio

The testator (person making the will) must be over eighteen years of age. The will must be in writing and signed at the end by the testator. It must be signed in the presence of at least two competent witnesses who must not be beneficiaries under the will and must also sign in the presence of each other. The testator must, in the presence of the witnesses, declare the instrument to be his or her last will and testament.

Can a Will Be Changed?

Your will should be reviewed periodically, as children are born and grow up, as you desire to change beneficiaries, or as your property situation changes. A testator may change or revoke their will as often as they desire unless they become insane or of unsound mind or are under undue influence. The will may be rewritten, or an amendment called a codicil may be attached at the end of a will. Today, with attorneys commonly storing wills on a computer, it is often easier to re-execute an entirely new will than to make changes by codicil. If a codicil is used, it must be executed with the same formalities as the will. The witnesses do not have to be the same persons who witnessed the previously drawn will. Every will should state at the outset that it is the last will of the testator. Never mark up a will; you may invalidate it.

May Persons Will Their Property Any Way They Wish?

The law protects the legal share of the surviving spouse. If the will leaves the surviving spouse less than the share of the property to which he or she would have been entitled had there been no will, he or she has the privilege of choosing whether to accept the will's provisions or to take the share allotted by law. No such protection is accorded to children even if disinherited in the will. This same restriction may not apply for those funding a trust during their lifetime. Even though you have the right to leave your assets any way you wish, it is often prudent to take other actions to protect against will contest actions by disgruntled heirs. For example, you can file your will for approval by the probate court prior to your death. If approved by the judge, it cannot be contested after your death.

It is recommended that every person have a will, even if they think they have all property owned in non-probate form. Something may have been missed, or there could be claims by the estate, like accidental death, which cause probate property.

For additional information on administering an estate without a will, go to the following links at the Ohio State Bar Association website:

<http://www.ohiobar.org/conres/pamphlets/article.asp?bhjs=1&bhsw=800&bhsh=600&bhswi=796&bhshi=445&bhflver=-1&bhdir=-1&bhje=1&bhcold=16&bhrl=-1&bhq=-1&bhmp=-1&bhab=-1&ID=1&bhcd2=1013025958>

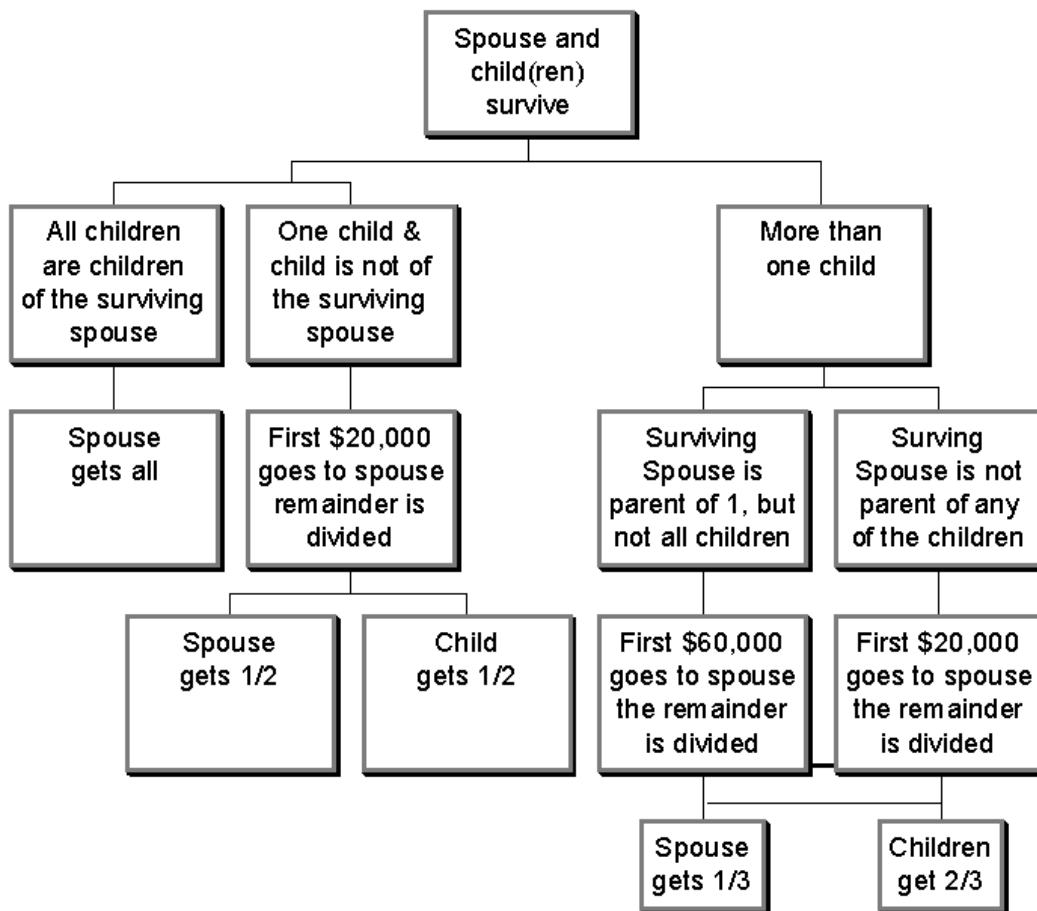
The Ohio State Bar Association website contains additional information on wills at this site: <http://www.ohiobar.org/conres/pamphlets/article.asp?ID=19>

More information on guardianships and alternatives can be found at the Cuyahoga County Probate Court:

Statute of Descent and Distribution

As in every state, there are laws in Ohio which direct how the property of a deceased person who dies intestate (having made no valid will) is to be distributed. If a person without a valid will dies with a spouse and no children, the spouse receives all the property. If a person dies and there is no surviving spouse, the property goes to the children or their lineal descendants, per stirpes (see note 6 to Figures 1 and 2). Otherwise, probate property descends and is distributed as shown in Figures 1 and 2. In Figure 1 we see how property is distributed if a person dies with a surviving spouse and children.

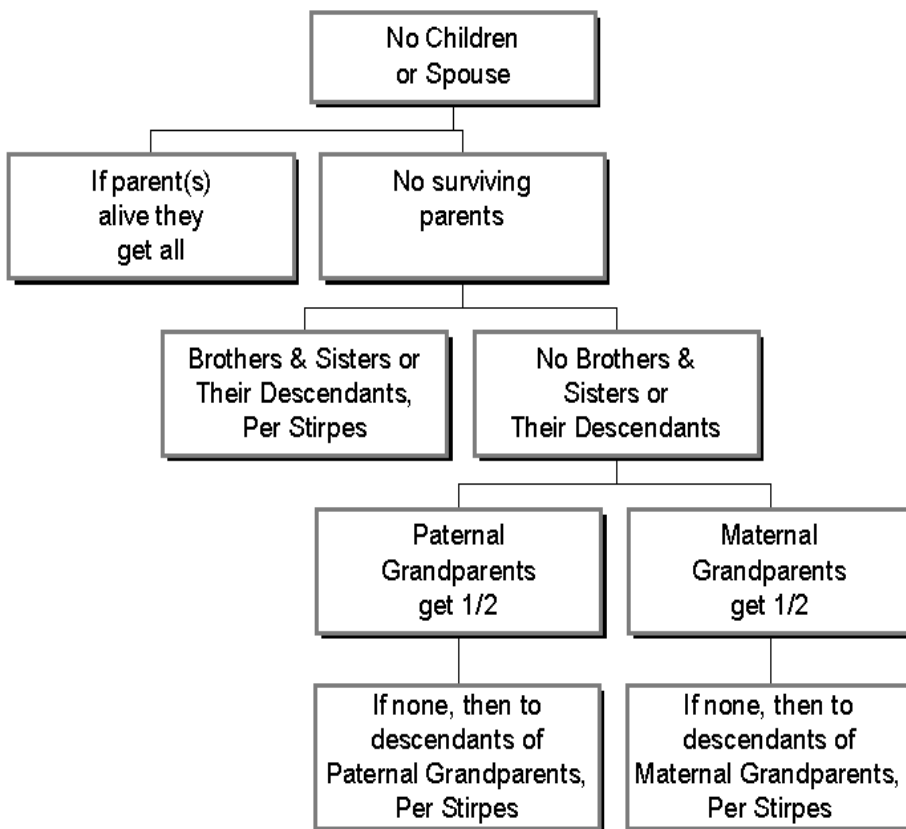
Figure 1. Basic Provisions of the Ohio Statute of Descent and Distribution when a Spouse and Child(ren) Survive



Notes to Figures 1 and 2

1. Spouse refers to widow or widower.
2. Children includes natural and adoptive.
3. Brothers and sisters include full and half blood.
4. If a child, brother, sister, or stepchild is deceased, their descendants take their share.
5. If one parent or grandparent is deceased, entire share is taken by surviving parent or grandparent.
6. Per Stirpes means by representation; that is, when some are living and others are deceased in a line of descent, the descendants of those deceased take equally their parent's share.

Figure 2. Basic Provisions of the Ohio Statute of Descent and Distribution When a Person Dies With No Spouse and No Children



In Figure 2 we see how property is divided if a person dies without a valid will and has no surviving spouse or children.

If no grandparents or their descendants on one side, then all to grandparents or their descendants on other side, Per Stirpes.

If no grandparents or their descendants, all to next of kin of decedent, however remote in relationship.

If none, all to stepchildren, or their descendants, Per Stirpes.

If none, all to State of Ohio.

Please note, the preceding is a general description of the Statute in layperson's language and does not include precise legal terms, which are necessary for a complete understanding of the law. Additional information on the Statute of Descent and Distribution can be found on the Ohio State Bar Association

website at:

<http://www.ohioabar.org/conres/pamphlets/article.asp?bhjs=1&bhsw=800&bhsh=600&bhswi=796&bhshi=445&bhflver=-1&bhdir=-1&bhje=1&bhcold=16&bhrl=-1&bhqt=-1&bhmp=-1&bhab=-1&ID=1&bhed2=1013025958>

Trusts

A trust is a useful device to manage property. This could be land, stocks, bonds, cash, etc. Of all of the tools of estate planning, it is probably the least understood and appreciated. Persons may do an excellent job of managing their assets when they are active and alert. When their health fails or they get too old and worried, they may need assistance. A trust can provide for others to step in and assist with, or fully assume, the management of your assets should you become incapable of handling your affairs. It is a flexible and practical tool that can be used to carry out one's objectives. A trust is an instrument through which the owner (the settlor) transfers property to a custodian, called the trustee. The trustee manages the property for someone named in the instrument as the beneficiary. The trustee may be an individual or an institution, such as the trust department of a bank. The beneficiary may receive current income or future income. The same or a different beneficiary may receive the remainder of the trust at some future date.

If there is a large estate, especially if it is made up largely of cash and life insurance proceeds, and the surviving spouse is elderly or inexperienced in investing and managing money, a trust may be the most desirable method of meeting the heir's needs.

Trusts are special, versatile instruments. A trust that is part of a will and is subject to probate is called a testamentary trust. A trust created and operating during one's life is called "inter vivos" (living). There are revocable and irrevocable living trusts. A revocable trust gives the settlor (or creator) of the trust the power to revoke and/or alter the trust during the settlor's lifetime.

Property placed into a revocable living trust while living will not be subject to probate, but will still be included in the decedent's taxable estate as control and/or other rights were retained. Since any assets transferred to the trust during your life are not subject to probate, it is a more private instrument than a will.

For a detailed explanation of "Living Trusts" visit the Ohio State Bar Association website: <http://www.ohioabar.org/conres/pamphlets/article.asp?ID=12>.

The Cuyahoga County (Ohio) Bar Association addresses the following questions about Living Trusts at the following site: <http://www.cuyahoga.oh.us/probate/living.htm>.

- Is Use of a Living Trust the Only Way to Avoid Probate?
- Will I Save Estate Taxes with a Living Trust, Compared with a Will?
- Will Having My Assets in a Living Trust Avoid Challenges by My Beneficiaries or Heirs?
- What Are the Advantages of a Living Trust Compared to Probate?
- What Are the Disadvantages of a Living Trust Compared to Probate?
- Will a Living Trust Help Me While I Am Living?
- Will a Living Trust Save Income Taxes?
- Will a Living Trust Protect My Assets Against Creditors?
- Can I Preserve Assets in a Living Trust and Still Qualify for Medicaid?
- If I Decide a Living Trust May Be Right for Me, How Should I Go About Setting One Up?

An irrevocable trust arises when, during your lifetime, you completely dispose of your power to control the property in the trust and the income from it. Gift tax liability may result from the transfer of property into an irrevocable trust. If the value of property transferred exceeds the applicable exclusion amount

available under the unified credit for gift tax purposes, gift tax is due and payable. There are many types of irrevocable trusts used for more aggressive estate planning.

A potentially powerful use of a trust in many estate planning situations is the combination of a living trust funded by a very minimal amount, say \$25, and a pour-over will, which directs property into the trust at the death of the trust's creator or settlor. Between husbands and wives, property placed into such a trust upon first death can provide income and limited rights to principal to the surviving spouse, but the property in the trust is not in the surviving spouse's estate. This is the way to use the \$1,000,000 (or subsequent amount) applicable exclusion amount in both the husband's and wife's estate and to permit \$2 million (or more) combined to pass federal estate tax-free for the couple.

Another very effective use of an irrevocable trust today is as the owner and beneficiary of life insurance, to keep the proceeds out of the taxable estate. This may reduce federal estate taxes.

Charitable Remainder Trusts

Charitable remainder trusts are irrevocable trusts that can create significant income tax, gift tax, and estate tax savings for taxpayers who are charitably inclined. They are particularly beneficial for taxpayers who donate significantly appreciated property, such as farmland, to a charity. The charitable remainder trust allows the taxpayer to make a charitable contribution and receive income over their lifetime.

Major advantages of giving land or other assets to a charity via a charitable remainder trust are:

- the property is removed from the donor's estate;
- the donor can receive annual income equal to 5% or more of the value of the property for their lifetime;
- the donor can avoid capital gain taxes on the sale;
- the income is generally more than they would receive if the property was sold and the after-tax proceeds invested;
- income may be annuitized or may be structured to increase over time; and
- a current charitable gift is allowed for the actuarial value of the remainder interest.

The charitable gifts are deductible as a percent of adjusted gross income and unused amounts can be carried forward up to 5 years.

Major disadvantages are:

- the property is sold by the charity;
- annuity income could decrease over time;
- donor must pay for title work, appraisal, and legal fees prior to the charity accepting the gift; and
- heirs have less property to inherit.

Insurance trusts are often used in conjunction with a charitable remainder trust to provide cash to the heirs to replace the value given to charity.

The donation must be to a charitable organization as designated by the Internal Revenue Code. Examples are churches, hospitals, colleges, universities, and certain private foundations. Work with an attorney and accountant, as well as representatives of the charitable organization to be sure the charity qualifies and the gift is properly made.

Living Will and Durable Power of Attorney for Health Care Decisions

Ohio enacted legislation in 1991 regarding living wills and durable power of attorney for health care decisions. A living will permits Ohio residents to declare their intentions regarding withholding or withdrawal of life-sustaining treatment when they are no longer competent and to have their declaration recognized by Ohio law. The statute requires that in order for the living will to be valid, the individual must be a competent adult and voluntarily execute the living will. The living will must be dated and either properly witnessed or properly notarized.

A living will becomes very useful when a patient is no longer capable of making informed decisions. It is the patient's voice if it is communicated to the attending physician. The living will activates when the attending physician and one other physician determine that the patient is in a terminal condition and is incapable of making informed decisions.

The living will must specifically authorize withdrawal or withholding of hydration and nutrition. However, the living will does not affect "comfort care" unless the patient can no longer feel pain. Then comfort care is no longer necessary. A living will may be revoked at any time and in any manner.

The physician has a duty to inform the patient if the facility or the physician cannot or will not comply with the patient's choices set forth in the living will. The physician or medical facility cannot interfere with transferring the patient to a facility which will comply with the patient's wishes. The attending physician must note in the patient's medical record that there is a living will.

If an individual does not have a living will, the statute sets out a priority of persons who can sign a consent to withdraw or withhold life sustaining treatment. The decision which is made for the patient must be consistent with that individual's previously expressed intentions or that which can be inferred from the person's life-style or character. The statute permits the use of preprinted forms for living wills. However, a layperson should be cautious about using those forms without advice from an attorney. In 2001, the state standard form was revised to incorporate a standing "Do Not Resuscitate" order. A living will does not apply if a patient can make informed decisions, or if nutrition and hydration lend comfort to the patient. A living will has limited application if the individual is pregnant.

The Durable Power of Attorney for Health Care designates an Attorney in Fact to make health care decisions when the principal is unable to communicate his or her wishes. This document can relate to life termination and to life-time health care decisions. The provisions regarding withdrawal or withholding of life support systems are the same as a living will. If there should be both a living will and a health care power of attorney, then the living will takes precedence for life termination decisions. In such cases, the health care power of attorney allows the attorney in fact to make life-time decisions like having access to and releasing medical records, employing and terminating health care personnel, and selecting health care facilities.

For more information see the Ohio State Bar Association website "Living Wills and Health Care Power of Attorneys" at <http://www.ohiobar.org/conres/pamphlets/article.asp?ID=13>.

Members of the public can obtain copies of Ohio's living will/durable power of attorney for health care forms from Hospice of Ohio by calling (800) 776-9513. The forms are available for \$3 each, or you can download one free copy from Hospice of Ohio's website at <http://www.ohpco.org/>. Contact an attorney with questions and to tailor these standard forms to meet your needs.

Power of Attorney for Business

A financial power of attorney is where you designate an attorney-in-fact of your choosing to enter into financial transactions on your behalf. Often, this is a spouse or other family member. The attorney-in-fact may then sign checks, tax returns, deeds, or any other financial transactions that you have authorized. There are several different types of financial powers of attorney such as Durable vs. Non-Durable, General vs. Special, and Current vs. Springing. These powers are separate and distinct from Health Care Powers of Attorney.

A durable power of attorney is one that specifically states that it remains valid even after the person granting the power becomes incapacitated. This is what most people want because it helps avoid the necessity of having your family request the appointment of a guardian by the probate court. If the power of attorney does not include this language, the authority of the attorney-in-fact terminates upon your incapacity. This also makes it hard for the attorney-in-fact to use the power while you are still competent because the attorney-in-fact often will need to prove that you are still competent.

General powers of attorney need to be distinguished from special powers of attorney. Special powers of attorney relate to powers granted to someone to transact specific and identified business for you. For example, a special power of attorney may be granted for dealing with the IRS, to participate in a real estate closing, or for other specified business transactions. In contrast, a general power of attorney is granted to someone to conduct any and all business for you. As a practical matter, it is generally beneficial to include an all encompassing listing of powers granted to the attorney-in-fact due to certain court decisions. For example, if you are regularly making annual exclusion gifts to your children or regular charitable gifts and you want your attorney-in-fact to be able to continue the gifts on your behalf, you should know that the IRS has been successful in pulling gifts made by the attorney-in-fact back into the taxable estate of the decedent for estate tax purposes unless the gifting power was expressly stated in the power of attorney.

The power may be effective as soon as the power is signed or it may not become effective until some later date, when it “springs” into effect. It can be specified to become effective when a child attains a certain age or on a specified date such as May 10, 2050. Most commonly, a springing power of attorney becomes effective when you are no longer able to make the decisions yourself. This is used in situations where you are not comfortable giving someone the power currently, but want to be covered in case you become incapacitated. The attorney-in-fact that you name will likely need to prove that you are incapacitated. In some cases, a bank or other financial institution may not want to accept this kind of power even though it is authorized by state statute. In case this would occur, it is usually good to specify in the power of attorney that you want your attorney-in-fact to be your guardian if one is needed.

Letter of Instruction

Anyone may be asked at some time to take over the affairs of another individual because of a death or an illness. This responsibility would be much easier if a letter of instruction has been prepared. Such a letter would save much time, trouble, and probably expense. As estate plans are completed, it is recommended that such a letter be developed.

Unlike a will, there are no legal requirements for a letter of instruction. Therefore, it can be handwritten or typed. It need not be witnessed and can say whatever you wish. Because a letter of instruction is not a binding legal document, it cannot be a substitute for a properly executed will. A will is essential to direct the disposition of your property. A letter of instruction gives survivors and those you have named to act for you helpful guidelines to facilitate your wishes.

Those you want to act in your place should know that the letter is to be opened immediately if you are incapacitated, or upon death. It would be wise to give copies to your attorney, named executor, spouse, grown child, or friend who could step in and handle your affairs. At a minimum, these persons should know where the letter of instruction is located. It may also be wise to attach a copy of the letter to your will and keep it with your important papers. It should be periodically reviewed and updated.

The content of the letter will differ from individual to individual. The following is a list of typical subjects to be addressed:

- the names of family and friends to contact, their telephone numbers and addresses;
- your attorney;
- preferred funeral director;
- social security number and location of the card;
- information on checking accounts, savings accounts, certificates of deposit, and credit cards;
- information on stocks, bonds, and real estate;
- information regarding property and liability insurance;
- military service information;
- arrangements for after your death, including location of burial lot, instructions if you wish to have your body donated for anatomical gifts, and funeral instructions.

It should also include employer, business associates, clergy, and insurance agents; the location of important papers, including will, birth certificate, marriage certificate, income tax returns, insurance policies, and deeds; location of safety deposit box and inventory of its contents; information regarding medical, accident, and income disability insurance; information regarding debts; and any other items you feel will help those charged with the responsibility of carrying out your business and personal affairs.

Many attorneys, trust officers, and insurance companies have forms and a list which will help prepare a letter of instruction.

* Extension Economist, Agricultural Law, (Attorney At Law) (Emeritus), Department of Agricultural, Environmental and Development Economics, District Specialist, Farm Management (CPA, inactive), Northeast District, The Ohio State University (Emeritus) and Attorney, Barrett, Easterday, Cunningham, Eselgroth & Waterman LLP, *OSBA Certified Specialist in Estate Planning, Trust and Probate Law*, Dublin, Ohio

November 2003

All educational programs conducted by Ohio State University Extension are available to clientele on a nondiscriminatory basis without regard to race, color, creed, religion, sexual orientation, national origin, gender, age, disability or Vietnam-era veteran status.

Keith L. Smith, Associate Vice President for Ag. Adm. and Director, OSU Extension.

TDD No. 800-589-8292 (Ohio only) or 614-292-1868