PacificCPE

COURSE
40652A

Wills and Living Trusts Explained

Wills and living trusts are two of the most fundamental tools in any estate plan, but knowing when to use each—and how they work—is key to giving clients sound guidance. This course covers the essentials of drafting and understanding wills, then moves into the structure and advantages of living trusts. Tax and financial professionals will come away with a clearer picture of how these documents function together to transfer assets efficiently and according to a client's wishes.

CREDIT HOURS 2 | FIELD OF STUDY BUSINESS | EXAM QUESTIONS 10

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LEARNING ASSIGNMENTS AND OBJECTIVES

Assignment

- Study the full course materials included here.
- Complete the review questions after each chapter.
- Answer 10 final exam questions.
- Final exam is scored immediately, 70% or better passes.
- Certificate of completion is available in your account.
- Failed exams can be retaken free of charge.

Course Objectives

- Recall the characteristics of a legally enforceable will.
- Recognize the types of assets that get transferred into a trust.

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Chapter 1: WILLS

Chapter Objective

After completing this chapter, you should be able to:

- Recall the characteristics of a legally enforceable will.

You might have concluded, after reading Chapter 1 of course 40651B, that a will makes the most sense for you. Reading this chapter will help you through the basic decisions you'll need to make for a simple one:

- **What do you own and how do you want to give it away?** The first step in creating any estate plan is determining what you've got to give away. The Family Inventory included in this book (and discussed in Chapter 2 of course 40651B) will help you sort that out. Your next step is to use that information to fill out the Will Worksheet included here and put a plan in place to distribute those assets. You'll need to think about all of your assets, not just the ones that your will controls after you die.
- **Whom do you want to settle your estate?** You'll need to choose someone to serve as your executor (also called your personal representative). This is the person who will put your plan into action.
- **Whom do you want to take care of your kids?** If you have minor children, choosing guardians for those kids is often the hardest part of making your will. Chapter 2 of course 40653B covers naming guardians for minor children and offers a few ways of getting past being stuck if you can't figure out whom to name. You'll want to read Chapter 2 of course 40653B before filling out the Will Worksheet in this chapter.
- **How do you want to leave money to children?** If you want to leave money to children (yours or those of others), you'll need to think about how to make sure that the money is managed for those children until they're old enough in your view to manage it for themselves (which could be later than age 18 or 21). Chapter 1 of course 40654B discusses how to manage money for children by using custodial accounts or trusts. Read Chapter 1 of course 40654B before filling out the Will Worksheet in this chapter.

Before you can fill out the Will Worksheet, you might need to skip ahead to read chapters about certain matters that either confuse you or are relevant to your life. These issues might include planning for a blended family (Chapter 1 of course 40655B), owning international assets, making gifts to noncitizens, naming noncitizens as trustees or guardians (Chapter 2 of course 40656B), or understanding estate or income taxes (Chapter 2 of course 40655B). That's a lot of potential reading,

but welcome to estate planning, where everything is connected and it can be hard to know where to start.

What a Simple Will Can Do

A simple will can accomplish a lot of your estate planning goals. For example, it can:

- Leave all property to someone—often your spouse or partner (or, if you're single, to your children or to relatives, friends, or charities)
- Say what to do if that person dies first or at the same time as you do
- Nominate your executor and an alternate
- Nominate a personal guardian and a property guardian (and an alternate) for minor children
- Set up a trust or custodial accounts for children, in case they inherit money from you while still young, and
- Leave money for the care of a pet and name a caretaker for that pet.

Tip

Consider a trust, too. If, after reading Chapter 1 of course 40651B, you decide that it makes more sense to create a living trust, that's just fine. You can, if you want to, go ahead and fill out the Will Worksheet below, but then use it to help you fill in the Trust Worksheet that comes with Chapter 2. Almost all of the decisions you're making for the Will Worksheet apply to trusts as well: You still need to know what you own, to whom you want to distribute those assets, and who you want to name as your representative to implement your estate plan after you die.

MAKING YOUR WILL LEGAL AND ENFORCEABLE

There are really just a few formal requirements for a will to be legal. Courts want to make it relatively easy because they want to honor the wishes of the deceased without requiring a lot of legal "magic words." Will execution details differ slightly according to state law, but in general the basic requirements are:

- You must be an adult, as that term is defined by law, and mentally competent.
- Your will should be typed or printed from a computer. A handwritten will (called a "holographic will") is legal in 28 states, but it is much better to type a will so people can't add things to it later.
- You must sign and date your will in front of two witnesses who don't inherit anything under the document. The witnesses must also sign the will.

- For practical reasons, you should also have your witnesses sign what's called a "self-proving" affidavit—a statement made under penalty of perjury that says that the witnesses saw you sign the document of your own free will and that you appeared to know what you were doing and why.

This affidavit is optional, but it is allowed in all states except Ohio and Washington, D.C. Getting the affidavit when you sign your will is useful because if you ever have to submit the will to a probate court, you are going to need it—and tracking down witnesses many years later is difficult. I once had to track down a witness to a will signed more than 40 years before in a state 3,000 miles away. Much easier to simply get the affidavit while everyone is still in the same room. Some states require that this affidavit be notarized; some don't.

If you want to make a will on your own, there are many online tools to help you do just that. And they'll make sure that the will you create will be executed properly in your state, so don't stress about the details of valid execution. Focus on what you've got, who you want to leave it to, and how you want those assets to be managed.

A WILL IS JUST ONE PART OF YOUR ESTATE PLAN

You've decided to make a will. But is it all you need? The truth is that even though a will is the key legal document in your estate plan, it is only part of it. You probably own significant assets—perhaps the most valuable things you own—that aren't governed by your will at all. You need to take them into account, too. You'll also need to create a durable power of attorney and an advance health care directive so that your loved ones can manage financial affairs and take care of your health if you are incapacitated. (See Chapter 1 of course 40657B for advice on preparing those documents.)

Houses, retirement accounts, proceeds from life insurance policies, and even some brokerage and bank accounts aren't usually subject to what your will says. If that surprises you, you're not alone. Many people have no idea that their wills don't control what happens to some of their most important assets.

In Chapter 1 of course 40651B, I listed the assets that don't go through probate—remember the Two Kinds of Assets diagram with the Probate/Not Probate line down the middle? Assets that don't go through probate include assets with beneficiary designations, such as retirement assets, life insurance proceeds, and assets that you own with others with a right of survivorship, like joint tenancy, community property with right of survivorship, and tenancy by the entirety. Assets held in a living trust also avoid probate, but for a different reason (see Chapter 2). Guess what? These are the very same assets that are not subject to your will. And this makes sense: Probate governs only assets that pass by will or intestacy (intestacy laws dictate who inherits when there is no will).

When you open up a retirement account, purchase a life insurance policy, or own a house with a right of survivorship, you name a beneficiary or a joint owner. That creates a legally binding

contract—the named beneficiary gets that account, or owns that property regardless of what your will says.

For your estate plan to work the way you want it to, you have to coordinate your will with assets that pass outside of that will. Here's how I explained it to my clients: Your nonprobate assets are on one train track, carrying assets to the named beneficiaries or surviving owners, and your probate assets are on another, parallel train track, carrying assets to the named beneficiaries of your will or trust. If you don't coordinate the two tracks, you could have a train wreck on your hands.

Example 1

In your will, you leave everything to your partner. But years ago, you named your sister as the beneficiary for your retirement plan and forgot to change it when you got involved in your current relationship. When you die, your sister, not your partner, will get the money from the retirement plan.

Example 2

In your will, you leave everything in equal shares to your three children. But your life insurance policy, which you bought when you had your first child, names only him as the beneficiary. You never got around to updating the beneficiaries of the policy. When you die, your three children split the assets held in your bank accounts and investment accounts and the proceeds from the sale of your home, but only your first child gets the $1 million life insurance proceeds.

Example 3

In your will, you leave your estate to your favorite charity. You own your home as a joint tenant with your brother. When you die, your brother gets the house. The charity inherits your checking account, your savings account, and the furniture and furnishings inside of the house.

In Chapter 1 of course 40656B, I'll go into detail on how to integrate your retirement accounts, life insurance policies, and other beneficiary-designated accounts into your estate plan. One of the things you'll do then is to make sure you've named the right people as beneficiaries on those plans. Sometimes this is as simple as remembering who you've already named—and making sure that these beneficiaries still reflect your current wishes. The Current Beneficiaries List that you (hopefully) filled out in Chapter 1 of course 40656B can help: If you don't remember whom you've named, you need to contact the companies directly and ask them for a current beneficiary list.

RIGHT OF SURVIVORSHIP: PROPERTY YOU OWN WITH OTHERS

Your will doesn't affect certain property that you own with others, because that property will automatically go to the surviving property owners when you die, regardless of what your will says. For example, if the deed to your house shows that you and your spouse or partner own it "as joint tenants with right of survivorship," then when one of you dies, the survivor will automatically own the whole house.

The legal term for this automatic inheritance is a "right of survivorship," and property owned this way is often called "survivorship property." Joint tenancy is the most common form of property ownership with the right of survivorship, but several states also allow married couples to own property as community property with right of survivorship and others allow married couples to own property as tenants by the entirety. See "Forms of Ownership" in Chapter 2 of course 40651B for more on these ways of owning property.

The bottom line is that you need to know how you own property when doing your estate plan. If you don't, your plan might not accomplish your goals. And, of course, if the way you own property doesn't reflect your wishes for it, you should change it. Now.

Example

Aileen owned her home in joint tenancy with her partner, Simon. Aileen's will left her estate to her daughter, Janet. When Aileen died, Simon became the owner of the home and Janet inherited Aileen's investment account and bank accounts. That's not quite what Aileen had in mind—she wanted to give her one-half interest in the home to Janet, so that Simon would have to buy Janet out in order to own the whole home, but she never got around to changing the ownership in the home from joint tenancy with Simon to a tenancy in common. Consequently, Simon owned the whole house when she died, by operation of law.

What could have been done to accomplish Aileen's wishes? To successfully give her daughter one-half of the house, Aileen needed to get out from under the automatic survivor-gets-all rule of the joint tenancy. She could have done one of two things:

- Severed the joint tenancy by transferring her half-interest to her living trust. After Aileen's death, Simon would have continued to own one-half of the house. The other half (Aileen's half, which she had placed in the trust) would go to the beneficiary whom Aileen named (Janet).
- Retitled her one-half interest as a tenant in common. Upon her death, she could have left her one-half interest to Janet by either a will or a trust. The big difference is that her half would not have gone automatically to Simon as it would have if the house had been

owned in joint tenancy. Simon would still own his half of the house as a tenant in common, too, which means that he could leave his half to whomever he wanted to leave it to upon his death.

Each one of these options involves a substantial, practical problem for Simon. If he outlives Aileen, he'll be living in a house that is owned partially by Janet, which could be really awkward. To deal with this issue (which can come up more often than you might think), Aileen could have left her one-half of the house in trust for Simon, so he wouldn't have to move out, and Janet would inherit her one-half interest only when Simon moved out, died, or was ready to sell the house.

Houses are often owned in joint tenancy, but brokerage accounts, bank accounts, and vehicles can also be owned that way. Unmarried partners also use joint tenancy to own property and money together in this way, as do older parents and caretaking children.

You can't override the right of survivorship in your will. If, for example, your will leaves "everything to my spouse" but you own an apartment building in joint tenancy with your sister, she, not your spouse, would own the building after your death.

Example

Andrea and her sister, Caitlin, inherited a beach house as joint tenants when their mother died. They used it as a vacation rental. Andrea's will left her estate to her spouse, Alan. When Andrea died, Caitlin became the sole owner of the beach house because she was the surviving joint tenant. Alan inherited Andrea's remaining assets, but had counted on a share of the rental income from the beach house to fund his retirement. If Andrea had changed the way that she held title to the beach house from joint tenancy to tenants in common, or placed her one-half interest into a living trust, she could have left her one-half interest to Alan. And guess what? Andrea would not have needed Caitlin's consent to these changes in title. As a joint tenant, Andrea has the unilateral right to make changes. Caitlin still owns her one-half interest just like she did before, and she too can control where it goes upon her death.

CHOOSING AN EXECUTOR

A key task in preparing your will is to pick someone who will serve as the executor of your estate. The executor's job is to gather all the deceased person's property, pay debts, expenses, and taxes, and distribute what's left to the right people (your beneficiaries). To do all of this, the executor follows both state law and the instructions left in the will. And although technically it's not the executor's job, many also make sure that beneficiaries receive all life insurance and retirement plan benefits that they're entitled to (remember, these assets pass by designation, not by will).

If your estate plan consists of just a will, your executor will probably need to take the estate through a probate court proceeding (described in Chapter 1 of course 40651B) or hire an attorney to help do

it. If your estate plan includes a living trust (see Chapter 2), and the trust holds the majority of your assets, your estate won't go through probate, and your executor won't have that part of the job, unless, of course, you've also named that person as your successor trustee, which is often the case. But your executor will still have some important things to do: They'll have to step in and, essentially, represent you personally. As your executor it is their job to deal with all the things you've left behind. Executors' duties include canceling your credit cards and subscriptions, dealing with your frequent flyer miles, returning your library books, cleaning out your house, and filing your last tax returns.

What to Look For in an Executor

So, whom do you pick for the job? My advice is to pick the person you trust most to do a thorough and fair job of settling your affairs. The most well-thought-out estate plan means nothing if the person you've chosen to execute that plan doesn't do a good job of it or manages to make everyone who benefits from it suspicious, irritated, or downright hostile.

Ready, Able, and Willing

Your executor doesn't have to be a financial genius. Just pick someone who is organized, trustworthy, and willing to get the job done. Executors can hire experts—lawyers or tax preparers, for example—to help them and can use estate funds to pay these experts.

Good Communicator and Affable

It also helps to choose an executor who generally gets along with everyone who inherits under your plan. Settling an estate doesn't always bring out the best in people. Often, in fact, it brings out the worst in them, as otherwise mature people find themselves in heated fights over who should get the prized collection of onyx bears or the vintage vinyl collection. A good executor will be a good mediator— someone who can listen well, crack a joke when humor can help, and stand firm when the situation clearly requires it.

Lives Where You Do

An executor who lives outside of your state might not be the right choice. It might be too expensive or complicated for people who live far away to administer an estate, and it will almost certainly require that they spend some time where you lived to put things in order. If you know a responsible person who lives closer, consider naming that person for the job.

Although state laws do not prohibit out-of-state executors from serving, if the estate requires a probate proceeding, most judges place restrictions on out-of-state executors. Each local probate court issues its own local rules on such things. Out-of-state executors will usually be required to post a bond in order to be appointed by the court, based on the size of the probate estate—it's a kind of insurance policy to protect the will's beneficiaries. Executors who live abroad can be nominated in a will to serve, but will also have to post a bond, and, because part of being an executor is signing