

Estate Planning

Chapter

8

Your estate includes the assets and liabilities you will leave after you pass away. It is important to plan for how you want to pass your estate, including what you want to give away and who will receive it. You may also want to decide which method is the least expensive and which will reduce any estate taxes.

Each person's situation is unique. The information in this chapter will give you an overview to help you seek appropriate legal advice about the choices that would benefit you and your family the most.

In This Chapter

SECTION 8-1 **Intestate Succession**

SECTION 8-2 **Wills**

SECTION 8-3 **Probate**

SECTION 8-4 **Will Alternatives**

- **Survivorship Interests**
- **Payment on Death Accounts**
- **Trusts**
- **Life Insurance**

SECTION 8-5 **Estate taxes**



Find definitions for these terms (indicated in bold) in the glossary:

Conservatorship
Payee
Personal property
Personal representative
Principal (def. #2)
Probate
Small estate probate
Survivorship interest
Testamentary trust
Trust
Trustee
Trustor

The law recognizes two types of property: real property and personal property. **Real property** includes land, buildings, and structures placed on land, such as houses, commercial buildings, and agricultural buildings. **Personal property** includes all property other than real property such as cars, boats, furniture, clothing, bank accounts, stocks, bonds, and personal items.

8-1 Intestate Succession

If you have not done any estate planning at your death, your property will be disposed of through a process called **intestate succession**. Oregon law outlines who will receive your property as follows:

TABLE 8.1

Situation	Property goes to
Married with no children or all children born to you and current spouse	Entire estate will pass to your spouse
Married with children from former spouse	½ to surviving spouse and ½ to children in equal shares
Unmarried with children	Entire estate will pass to your children in equal shares.
No spouse and no children	Entire estate will pass to your parents
No spouse, no children and no parents	Entire estate will pass to your brothers and sisters
No spouse, children, parents, or siblings.	Entire estate will pass to the children of your siblings
No spouse, children, parents, siblings, or children of siblings	Entire estate will pass to your grandparents

If you die without any family and have not done any estate planning, your property will pass to the State of Oregon.

8-2 Wills

A **will** is a formal statement signed by you and witnessed by at least two other people describing how your estate will be divided after you die. You can use a will to give anything you own—including real estate, cars, business holdings, money, and personal property—to anyone you want after payment of your estate debts. A will may also state whom you want as a guardian for your minor or disabled adult children. You can appoint a **personal representative** to complete your affairs after your death.

To make a will, you must meet these minimum legal requirements:

1. You must be at least 18 years old;
2. You must be “of sound mind;” meaning you must understand what property you have to give and to whom you are giving this property after your death;
3. The will must be in writing with the date that it was signed. It should be typed if possible;
4. The will must be signed by you or someone acting under your supervision and in your presence if you are physically not able to sign for yourself;
5. The will must be signed by two witnesses. They must sign in your presence and certify that you were of sound mind when the will was signed and certify that they saw you sign it or you acknowledged your signature. At least one person must not stand to inherit from your estate; and
6. You must be acting on your own free will and making the will in the way you want.

Preparing your own will is not recommended because any errors can have serious consequences. A lawyer can tell you why you need a will and what to dispose of through a will. You may not be able to dispose of some of your property. The lawyer can make sure that the will reflects your wishes about



For more information on the role and duty of personal representatives, see Section 8-3, Probate, in this chapter and Chapter 13.



See Chapter 6 on transfer of real property.

your property. Be sure to let the lawyer know if any of your intended heirs receives SSI benefits or relies on Medicaid—a gift of even limited value may raise their income or assets above eligibility levels and thus make the person ineligible for needed medical assistance.

If you have a will, you should review it periodically to make any needed changes in the amount or kind of property you have, changes to family such as births, deaths, and divorces among relatives; changes in tax laws; or relocation to a new state or country. Subsequent wills that meet all the above criteria will take precedence over prior made wills. Revisions to the will must also meet the above criteria to be valid.

8-3 Probate

Probate is a process that takes place after your death where your property is distributed either according to your will or through intestate succession. A **personal representative** manages your property, pays the expenses and debts, and then distributes the property to your heirs as specified in your will or through intestate succession. You can appoint a personal representative in your will. If you do not have a personal representative or a will and your property passes by intestate succession, the court will appoint a personal representative for you. The probate court supervises the personal representative.

Probate clears the titles to stocks, bonds, other securities, and cars; officially transfers real estate into the name of the person who inherited it; and stops others, including creditors, from claiming any of the property after the probate ends.



For more information on the role of a personal representative, see Chapter 13.

Small Estate or Regular Probate

If at the time of your death you have an interest in property that does not automatically pass to another through a survivorship estate or trust, then your will must be probated to pass your property on to your heirs.

If you have an estate with a value of no more than \$275,000 (no more than \$200,000 in real property and \$75,000 in personal property), you have what Oregon defines as a small estate and can file an affidavit for a **small estate proceeding**. This type of probate takes about four to six months and can be handled informally. It is fairly inexpensive. It requires the filing of an affidavit that the estate meets the criteria.

If you have real property valued at more than \$200,000, personal property valued at more than \$75,000, or both, then the estate must go through **regular probate**. Regular probate usually takes a minimum of nine months. It may take longer depending on the size and complexity of the estate. Probating a large and complex estate can be expensive. If you have a large estate, you should contact an attorney to discuss the merits of estate planning.



See Chapter 6 for information on survivorship accounts.

8-4 Will Alternatives

Survivorship Interests

Holding property with a **survivorship interest** can be an inexpensive alternative to a will. It applies to both real and personal property.

(See Chapter 6 for more information on survivorship interests.)

Payment on Death (POD Accounts)

A POD account is treated like a normal bank account during the lifetime of the person putting the money into the account (the **payer**). On the payer's death, any funds remaining in the account belong to the people named on the account by the payer (the **payees**). The payees have no control over the account during the payer's lifetime. If you wish to set up a POD account, contact your local bank or financial institution. Be aware that gift taxes apply.

Trusts

A **trust** is a document giving rights to property, real or personal, held by one person for the benefit of another.

Trusts can also be set up to avoid a power of attorney, to transfer specific types of property at death, to set up education funds for minor children, to manage assets or specific assets, or assets for a particular person (such as a child), and to avoid probate.

A trust is a complex legal document that can serve various purposes for various people. It is important to determine - on an individual basis - whether a trust is an appropriate estate plan. The information provided here is general in nature, provided to help you understand basic legal terms; not all trusts are outlined here. To learn more about trusts and probate and estate planning, contact an attorney who is knowledgeable on trust and estate planning matters.

While there are different kinds of trusts, certain terms remain the same for all of them:

A settlor is the person who creates the trust.

A trustee is the person who manages the trust assets.

A "beneficiary" is the person for whom the benefit of the trust is intended.

There are basically two ways to set up trusts: testamentary trusts and living trusts.

A **testamentary trust** is established in your will. It takes effect only after your death and after your estate has been probated.

A **living trust** may avoid probate for the items in the trust if properly established. In a living trust, one or more persons (**trustors**) put property or money for themselves and others (**beneficiaries**) into the trust. Instead of giving the property and its income directly to the beneficiaries, the trustor places it under the control of a person called the **trustee**.

Typically, the trustee will invest the property (called the **principal**) and pay the beneficiaries any interest earned on the principal. When the trust expires, the trustee will distribute the property to the beneficiaries. Most people who can handle their financial affairs can also be the trustees of the trusts they set up. The trustors can name their children, relatives, friends, or financial institutions to assume those responsibilities if the trustee becomes disabled or dies.

A living trust can be revocable (subject to amendment) or irrevocable (cannot be changed or cancelled). Irrevocable trusts have special tax treatment and can be used to shelter assets for Medicaid planning.

A living trust has several important advantages if it is set up properly and is **fully funded**, meaning all the trustor's assets are placed in the trust. First, a fully funded trust will avoid the need to probate the estate of the trustor. If it is a joint trust, it will also avoid probate upon the death of the joint trustor spouse. Second, a living trust may avoid the need for a **conservatorship** for the trustor if he or she becomes legally disabled. Third, a living trust may offer tax advantages for persons with large amounts of assets. Fourth, it can allow for a smooth transition of your estate after your death with no interruption for your beneficiaries.

There are downsides to trusts; preparing, funding, and managing the trust can be expensive. They are generally more expensive to prepare than wills. They also require that you maintain information about the assets in the trust. Finally, they may be confusing especially if you want to borrow against any of the assets in the trust.

There are many trusts that can be established for any valid purpose. Some include:

Pet Trust

A pet trust can be established for the continuing care of a designated domestic pet after your death. The person who is designated to care for the pet(s) will receive compensation from the assets of the trust. Upon the death of the designated pet(s), the remainder will go to whoever the will/trust designates or by intestate succession.



See Chapter 7
for more
information on
conservatorship
and
guardianship.

Income Cap Trust

An income cap trust is created with the beneficiary's income for the purpose of qualifying for Medicaid.

Special Needs Trust

A special needs trust may be set up for children who have developmental or physical needs that may interfere with their ability to work. The trust helps them to receive public benefits by restricting distributions from basic needs.

Note: Living trusts are complex legal documents that require the use of competent and experienced estate planning attorneys. If trusts are not drafted correctly, the trustor's wishes may not be carried out and the estate taxes may be higher. You should not attempt to create your own trust, rather speak to an attorney about the pros and cons first.

Life Insurance

Life insurance benefits usually pass to whomever you have named on the policy to receive those benefits (called the beneficiary). You have to name the beneficiary in writing when you purchase your policy. The insurance company will have a record of the beneficiary you chose.

The designated beneficiary may be changed at any time by informing your insurance company in writing. Most insurance companies provide a form to change the beneficiary. If your named beneficiary is alive when you die, the insurance company will pay the money due under the policy to the beneficiary, even if your will says something different. It is wise to name another person as an alternate beneficiary in case your first beneficiary dies before you do. This will keep the insurance proceeds from being paid to your estate and potentially increasing the cost of your probate proceeding.

Irrevocable Life Insurance Trust

An irrevocable life insurance trust is used to allow life insurance proceeds to pass free of inheritance taxes.

8-5 Estate Taxes

In 2012, no Oregon state estate taxes are payable on estates valued at less than \$1,000,000 in total assets. For estates valued over \$1,000,000 there is a 16% tax. If you meet this filing threshold, you need to file Oregon Form IT-1. The exempt amount under federal tax law is even higher at \$5,120,000 for 2012; this amount will be adjusted each year for inflation. If the combined value of your estate and your spouse's estate is close to these amounts, consult a tax lawyer about potential estate taxes. There may be ways to decrease your taxable estate through gifting and credit shelter trusts. Consult an attorney about the ramifications of both.

For tax purposes, your estate includes all property in which you have an interest. This includes the proceeds of life insurance, property held with a survivorship interest, and certain life estates. The value of your property for estate tax purposes is its fair market value on the date of your death.

General Advice

Keep an up-to-date itemized list of all your debts and property. This includes insurance policies, securities, bank accounts, safe deposit boxes, real estate, jewelry, artwork, and pension plans. You also should record where you put your will or trust. Give a copy of this list to someone you trust and to your lawyer or financial adviser.
