

PLANNING FOR THE FUTURE OF YOUR FARM

Legal tools and strategies for farm transition and estate planning



WILLS AND WILL-BASED FARM TRANSITION PLANS

Your will, or “last will and testament,” is one way for you to determine what happens to your property after your death. A will is a necessary part of a farm transition or estate plan, but how it is used can vary widely. Some plans may need only a will in conjunction with a few simple tools—we refer to these as “will-based plans.” Other plans, however, may be more complex and require additional legal tools. We explain wills and their role in farm transition planning in this bulletin.

WILLS SERVE MANY PURPOSES

The “reading of the will” after someone dies can be a dramatic event, with family members wondering what the will says and who gets what. Distributing property is just one purpose of a will, however. A will can have several helpful purposes, explained here.

Determining where property goes. A will transfers property after death according to a person’s wishes. The terms of a will can be quite specific about how property passes. It can include restrictions and conditions tailored to the deceased person’s wishes and can “disinherit” heirs that otherwise would receive property if the person did not have a will. A will can also include alternative plans in the event of changed conditions and circumstances.

Minimizing the probate process. A will sends clear directions to the probate court. Without a will, the court would otherwise have to determine how property should pass according to law. And as we explain later, a will can direct property to an existing trust and reduce the need to transfer it through the probate process. Both actions can reduce the time spent in probate, as well as the costs.

Choosing who administers the estate. A person can appoint an **administrator** to help settle the person’s estate. The administrator, also called an executor or personal representative, will help resolve the deceased person’s financial affairs and carry out the directives in the will. It is an important role, so it’s critical to choose an executor carefully.



Naming guardians. One critical role a will can play is to address who will care for dependents such as minor children and incompetent adults upon the death of their caretakers. Parents or other persons with dependents may nominate a guardian in the will, and the court will review that nomination when appointing a legal guardian. The will may also specify whether the guardian is to manage the dependent's personal needs, property, or both.

WHAT IF YOU DON'T HAVE A WILL?

Every state in the U.S. has an "intestacy law" or "statute of descent and distribution" that steps in when a person dies without a will and directs distribution of the person's property. As with other states, Ohio's intestacy law makes assumptions that the deceased would choose to give property to family members. The law establishes an order of preference that gives a surviving spouse first priority, then children of the deceased and their children. If there is no spouse or children, the law looks next to parents, then to other family members. The State of Ohio receives the property if there are no family members. Ohio law also gives the probate court authority to appoint an administrator to assist with settling the estate of a person who dies without a will.

THE FORMALITIES OF MAKING A WILL

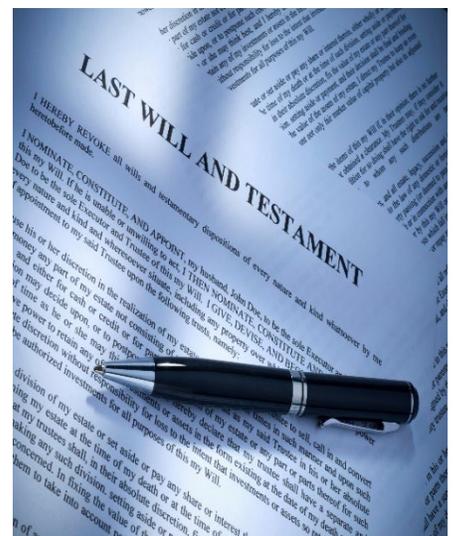
Requirements for making a will are straightforward but failing to meet them can result in a will being declared invalid. A person must be 18 years or older to make a will and be of "sound mind and memory" and "not under restraint." These terms mean that a person must know what he or she is doing and that making the will is a free and voluntary act. A will must be in writing, although it need not be typed, and the person making the will must sign it or if unable to do so, direct someone else to sign in their presence. Two or more witnesses must acknowledge that the person made and signed the will and must also sign the will in the presence of the person making the will.

Many "fill-in-the-blank" wills are freely available, but we advise working with an attorney to develop a will. Doing so will ensure not only that the legal requirements for making the will are satisfied, but more importantly that the will properly fits with the farm transition plan.

DIFFERENT TYPES OF WILLS

How a will distributes property can vary. A will can direct property to an identified party, send property to an established trust, or order a trust to be set up to receive the property. Here's an explanation of these three different types of wills:

A **simple will** directs all property to a surviving spouse or if the spouse is pre-deceased, then to the children. A simple will might also make specific bequests of property, name an executor, and appoint a guardian for minor children. The "simple" name for this type of will means that it does not involve a trust, making it less complex than wills that do. Some call this type of will a "sweetheart" will, because the plan is to leave all or most of the property to the deceased's sweetheart. The sweetheart then determines the fate of the property at his or her death.



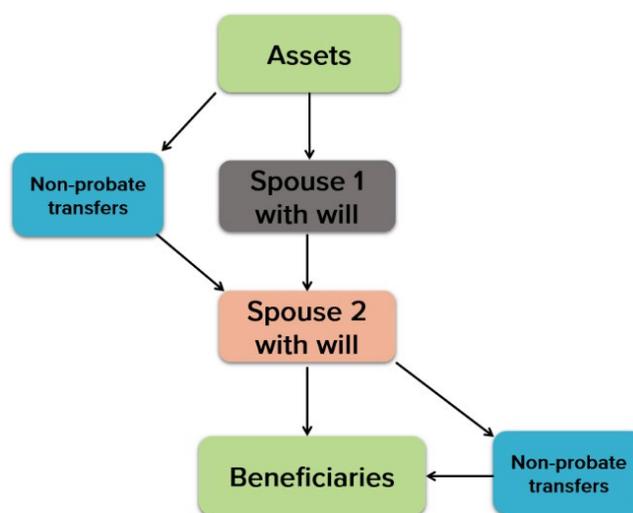
A **pour over will** transfers property to a “living trust” that was created prior to death. The assets “pour over” into the trust at death and the trust provisions then control what happens to the assets. This type of will is an important part of a trust-based plan and ensures that all property goes directly into the pre-existing trust rather than through the probate process.

A **complex will** directs the creation of a trust after death, referred to as a “testamentary trust.” A testamentary trust might be simpler than a “living trust” and might only arise if certain conditions exist at death. For example, a simple testamentary trust could direct assets into a trust to support minor children if both parents pass. The trust only arises if the children are minors and both parents are deceased. Because a will creates the trust, the probate court would oversee administration of the trust by the trustee named in the will.

A WILL-BASED FARM TRANSITION PLAN

A plan can use a simple will to pass assets from one spouse to the next and then on to heirs. Other tools might be involved in the plan, such as transfer on death accounts, which we explain in our bulletin *Legal Tools for Avoiding Probate*. But the plan doesn’t require the use of a trust. We refer to this approach as a “**will-based plan.**” The illustration to the right shows how a will-based plan combined with non-probate tools can transfer farm assets to the intended beneficiaries. This approach can be sufficient for many people, but most often doesn’t work well to address the complexities and assets of farm families and transitioning farm businesses.

A simple will-based plan



DO YOU ALSO NEED A TRUST?

Can you accomplish your plans for the future with a will-based plan? Or do you need a trust-based plan that uses a trust to help carry out the transition of your farm and assets? Those are “it depends” questions, as several factors come into play. The complexity of your situation is probably the critical factor that could lead you to a trust-based plan rather than a will-based plan. For example, if you have heirs with special needs, want to place certain conditions on heirs receiving property, need to address details ensuring transition of the farm to a specific heir, or are worried about federal estate taxes, a will-based plan may not be able to address your needs.

Likewise, you might prefer a trust because you want to avoid probate court involvement and have a trustee in charge of administering your affairs. You may also prefer to place details in a trust because of the privacy it offers in comparison to a will, which becomes an accessible public record when it goes through probate. Finally, legal fees are a factor. While a trust-based plan will likely cost more to create at the outset, it can keep assets out of probate and save on probate fees. A will-based plan is probably less expensive to create but could result in higher costs if assets must transfer through the probate process.

In the chart below, we outline how different factors play out in will-based versus trust-based plans. Discussing the factors with family and an attorney can be helpful. To learn more about trusts and using a trust-based plan in farm transition planning, see our other bulletin in this series, *Using Trusts in Farm Transition Planning*.

Comparing a will-based plan with a trust-based plan

Factor	Will-based plan	Trust-based Plan
Complexity of situation	Simple	Complex
Concerns about heirs	Little or none	Some or significant
Remarriage concerns	Little or none	Some or significant
Transition of operation	Little or none	Some or significant
Estate taxes	Little or none	Need to maximize savings
Probate	Don't mind; judge is in charge	Want to avoid; trustee is in charge
Privacy	Not important	Important
Cost	Less at outset; maybe more later	More at outset; maybe less later

UPDATING A WILL

How often should you update your will? It's important to be aware of circumstances that can trigger the need to review and update your will. Major life events are the most common triggers, including:

- Marriage, remarriage, or divorce in the family
- Birth of a child or grandchild
- Death of a spouse or beneficiary
- Change in health status
- Inheritance or other income that affects the value of your estate
- Moving to a different state
- Estate or tax law changes

WORKING WITH AN ATTORNEY

Many "fill-in-the-blank" wills exist but be wary of the one-size-fits-all approach they offer. An attorney plays an important role in developing a will that not only expresses your wishes but also addresses contingencies, considers the estate and tax laws that govern your estate, and fits the will into the overall farm transition plan. See our resources on choosing an attorney and talk with friends and family to find an attorney who will help you with the important task of creating a will that can carry out your plans for the future.

REFERENCES

Ohio Revised Code Section 2105.06, Descent and distribution
<https://codes.ohio.gov/ohio-revised-code/chapter-2105>
Ohio Revised Code Chapter 2107, Wills
<https://codes.ohio.gov/ohio-revised-code/chapter-2107>

AUTHORS OF THE PLANNING FOR THE FUTURE OF YOUR FARM SERIES

Peggy Kirk Hall and Robert Moore, Attorneys
OSU Agricultural & Resource Law Program
Ohio State University Extension

Evin Bachelor and Kelly Moore, Attorneys
Wright & Moore Law Co. LPA
Delaware, Ohio

Find all our **Planning for the Future of Your Farm** resources at
<https://go.osu.edu/farmplanning>

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farmoffice.osu.edu



@OhioAgLaw



aglaw@osu.edu



@OhioAgLaw



614.688.0466



farmoffice.osu.edu/blog



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