

# Is a Will or Trust Better for Your Farm Transition Plan?

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# Is a Will or Trust Better for Your Farm Transition Plan?



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A common question when starting the farm transition planning process is: which is better, a will or trust? Before an answer can be provided to this question, an understanding of the similarities and differences between wills and trusts must be understood. Also, different factors must be considered to determine which legal instrument is best suited to your particular farm transition plan. This publication will discuss wills and trusts and identify some factors to consider when deciding which to use.

## What is a Will?

A will is the most common and well-known instrument to direct your assets after your death. A will includes instructions for decisions after your death, such as appointing a guardian for your minor children, appointing an executor of your estate, and distribution of your assets to heirs and beneficiaries. A will must be signed and witnessed.<sup>1</sup> To administer the will after death, it must be filed with a probate court, which makes the will a public document. The directives in the will are carried out by the executor. The probate court oversees the administration of the will and settles any disputes that arise from the will. A will should be drafted in consultation with an attorney.

For a more thorough discussion on wills, see *Wills and Will-Based Farm Transition Plans* available at [farmoffice.osu.edu](http://farmoffice.osu.edu).

## What is a Trust?

A trust is another legal instrument to direct your assets after your death. A trust transfers assets from the grantor to the beneficiaries and can include guidelines or conditions on how the assets can be utilized. A trust generally provides the grantor with more control after the grantor's passing than a will provides. A trust should be prepared by an attorney due to the complex nature of a trust. A trust avoids the probate process and keeps the information in the trust private. Trusts allow the transfer of property more quickly and without involving courts.

Trusts allow for more complexity and flexibility and reduce the cumbersome and slow administrative process compared to a will. However, a trust-based farm transition plan will likely incur more legal fees upon setup. For most people, the additional costs and complexities of a trust are not needed. However, for many farm families, the attributes that a trust allows outweighs its larger setup costs.

For a thorough discussion on trusts, see *Using Trusts in Farm Transition Planning* available at [farmoffice.osu.edu](http://farmoffice.osu.edu).

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<sup>1</sup> Witnesses are required in Ohio but execution requirements vary by state.

## What is a Pour-Over Will?

If the decision is made to use a trust as the primary estate planning instrument, a document called a “pour-over will” must still be executed. The pour-over will has three primary purposes: 1) direct any probate assets to the trust; 2) identify an executor to administer the probate assets; and 3) name a guardian for minor children. A pour-over will is made up mostly of standard, boilerplate terms. Thus, a pour-over will adds little to the cost of establishing a trust-based transition plan. If a will is the primary estate planning document, a pour-over will is not needed.

## What is a Testamentary Trust?

A testamentary trust is a trust that is set up by express language in a will. These types of trusts are most often used when the potential beneficiaries of the will are minors. In the event the parents die, and the children are minors, the children’s inheritance can be held in trust and managed for them until they become of majority age. For example, a will might say “if any of my children are under the age of 18, a testamentary trust shall be established for them until they reach the age of 18”. Testamentary trusts can also be used for other types of legal incompetence or if the beneficiary will not be able to adequately manage their inheritance.

A testamentary trust has a trustee but is also subject to oversight by the probate court. Testamentary trusts are usually not used in farm transition plans. If a trust is needed, it is better to establish a trust outside of the will and have it be a separate entity, independent of probate.

## What Happens if You Don’t Have a Will or Trust?

If a person dies without a will or trust, their estate is referred to as “intestate.” Their assets will be distributed according to their state’s intestacy laws. Most states’ intestacy laws assume the deceased person would want family members to inherit their property. If there are no family members, the state will usually receive the deceased’s assets. Dying intestate can lead to lengthy court battles, delay property distributions, and result in substantial expenses for heirs and beneficiaries. Intestate laws vary by state but tend to distribute assets to the spouse and/or next of kin.

## How are Wills and Trusts Similar?

Wills and trusts are both important estate planning tools that allow individuals to outline their wishes for the distribution of their assets upon their passing. These two types of legal instruments share a fundamental similarity in that they enable individuals to dictate who should inherit their property and assets. In essence, both wills and trusts empower individuals to maintain control over their estate's destiny, ensuring that their assets are distributed in accordance with their intentions, and minimizing the potential for disputes among heirs.

## How are Wills and Trusts Different?

The main difference between a will and a trust is that a trust creates a legal entity that contains the property and assets to be passed on while a will shows the intent of the deceased but does not legally transfer the property. A will requires the involvement of a probate court to legally transfer the property. A trust avoids the probate process because the legal entity is already established as the owner of the property and the beneficiary is established as the recipient of the assets.

## What is an Executor and Trustee?

An executor is a person appointed by the probate court to carry out the terms of a will. Typically, a will identifies an executor and the probate court will usually appoint the designated executor. However, it is ultimately at the discretion of the probate court as to whom is appointed executor. A designated executor is not required to serve, someone who is named as executor in the will can decline. The executor is essentially the representative of the estate to the probate court and ensures that the estate administration is carried out in accordance with the will. Multiple people can serve simultaneously as co-executors.

A trustee has a similar role to an executor. The trust document identifies who is to serve as trustee. The trustee carries out the terms and conditions of the trust but is not subject to probate court jurisdiction. Instead, the trustee is responsible to the beneficiaries and is required to provide inventories and accountings to the beneficiaries to ensure that all assets are accounted for and properly managed and distributed. Multiple people can serve simultaneously as co-trustees.

## Factors to Consider When Deciding Between a Will or Trust

Wills and trusts have different attributes and therefore different roles in farm transition planning. When deciding between a will and trust, you need to assess your situation, your goals, and your needs and consider the following nine factors:

1. Legal fees
2. Complexity of the plan
3. Probate
4. Concerns about heirs
5. Second marriages
6. Transition of farming operation
7. Taxes
8. Privacy
9. Control

Only after considering these factors can you decide whether a will or trust is the better option. The following is a discussion of each factor and the implications of each.

## 1. Legal Fees

Legal fees are an important consideration when deciding between a will or trust. A will tends to cost less during the estate planning process but might cost the beneficiaries more during the probate process. A trust tends to cost more when established but may be more cost effective for beneficiaries in the estate administration process. A trust tends to cost more at the outset because it is a more complex legal document than a will and some initial legal work may be needed to transfer assets to the trust to avoid probate. The cost difference between a will and trust can be significant, a trust can often cost several thousand dollars more in legal fees than a will.

When considering legal fees, ask the attorney for an estimate of fees for a will-based plan and fees for a trust-based plan. An experienced attorney should be able to provide a good estimate of their fees prior to starting the legal project. The extra costs of a trust can often be justified due to the various advantages of a trust as discussed below.

## 2. Complexity of the Plan

The complexity of the estate plan is often the most important factor to consider when deciding if you need a will or trust. A will is usually better for simpler plans, while a trust is better for more complex plans.

The primary reason that a trust is better for complex plans has to do with probate. Remember that all assets directed by a will must go through probate. Probate is designed more for simple plans with typical assets. For most people, a will is adequate because administering a financial account, car, and house-typical assets for most people-is routine and not overly burdensome. However, many farmers do not have simple plans nor simple assets. Trying to administer a complicated farm transition plan through probate can be problematic, expensive and create unnecessary conflict. The flexibility of trust is usually more appropriate for complex transition plans.

Some examples of legal techniques that increase the complexity of a farm transition plan include:

- Holding assets in trust
- Long-term leases
- Rights of first refusal
- Purchase options
- Unique valuation methods
- Balancing inheritance
- Creating LLCs
- Beneficiary option to select assets
- Divide/survey land
- Purchase financing

Consider this example trust provision:

*“Upon my death, my Trustee shall survey off 5 acres from the Smith Farm and distribute to Daughter subject to a Right of First Refusal in favor of Son. The remainder of the Smith Farm and my other real estate shall be transferred to an LLC with Son as Managing Member. The LLC terms shall not permit ownership transfers outside of my lineal descendants. Prior to distributing the LLC in equal shares to my children, my Trustee shall offer to lease the land in the LLC to Son for 20 years provided Son is actively farming. The initial lease rate shall be the county cash rent average and the lease rate shall be renegotiated or established by an independent third-party every three years thereafter.”*

While this trust provision could possibly be administered through a will and probate, it would be very cumbersome and burdensome to do so. It would be much more efficient and practical to include these terms in a trust. The trustee of the trust likely understands the situation and assets better than a probate court and can act independently and quickly to implement the required terms and conditions. The more complexity included in a farm transition plan, the more likely that a trust will be needed.

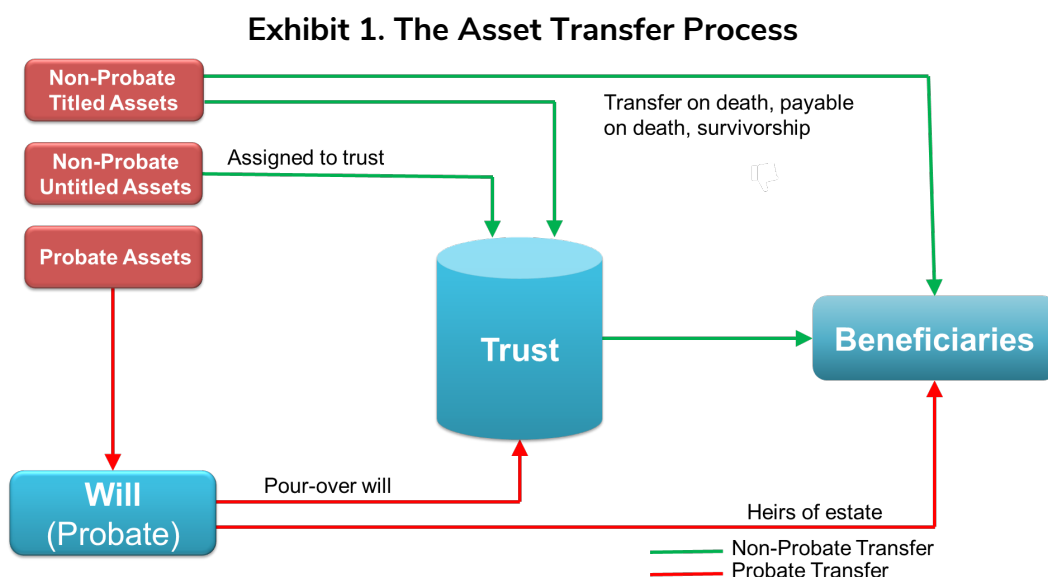
### 3. Probate

Probate avoidance is an important factor when deciding between a will or trust. Remember that any asset controlled by the will must go through probate. Probate is generally cumbersome and can be expensive, so it is best avoided if possible.

Any titled asset can be made non-probate.<sup>2</sup> For example, real estate can be titled survivorship or transfer on death, financial accounts can have payable on death beneficiaries, and vehicles can identify transfer on death beneficiaries. It is relatively easy to make titled assets non-probate.

Some common farm assets that are not titled and cannot be made non-probate are crops, grain, livestock, machinery, and equipment. The only way to make these assets non-probate is to establish a trust and assign the non-titled assets to the trust. The assignment makes the trust the legal owner of the assets and thus avoids probate. If there are only one or two assets that are non-probate, the additional cost of a trust may not be justified. Weighing the additional cost of a trust versus avoiding probate should be done on a case-by-case basis.

Exhibit 1 on the following page illustrates how assets can flow to the beneficiaries with and without using probate. Any titled assets can be titled to either a trust or directly to the beneficiaries to avoid probate. Untitled assets can be assigned to a trust to avoid probate. Any assets that are untitled or do not have beneficiary designations will be controlled by the will and probate. Depending on the terms of the will, the assets may be transferred to a trust or directly to beneficiaries after probate.



<sup>2</sup> Ohio allows any titled asset to be made non-probate. May vary by state, be sure to check probate and titling laws in your state.

The following example illustrates probate avoidance:

Farmer has titled his assets as follows:

- Farming LLC with crops, grain and machinery transfer on death to daughter Andy.
- Land LLC transfer on death to children Andy, Bill and Chris.
- Personal financial accounts payable on death to Bill and Chris.
- Life insurance payable on death to Andy, Bill and Chris.

In this example, Farmer's transition plan is able to be accomplished through titling assets. He would still want a will as a contingency in the event an issue arose with the titling, but he does not need a trust to avoid probate. Also note, the plan is simpler and does not have much complexity. The additional cost of a trust may not be warranted in this situation.

Sometimes, when a farm transition plan includes no or few probate assets and little complexity, titling the assets with beneficiaries may be the primary estate plan. For a thorough discussion on avoiding probate, see the bulletin *Legal Tools for Avoiding Probate* available at [farmoffice.osu.edu](http://farmoffice.osu.edu).

#### 4. Concerns About Heirs

One of the primary goals of estate planning is to provide for the next generation. Many people accumulate assets and wealth during their life so that those assets can be passed along and help the next generation. Sometimes, there may be concerns about the heirs and how they will manage or use inherited assets. No one wants to see the assets they have worked for their whole lives mismanaged or wasted by the next generation. Strategies to protect assets from various concerns related to heirs can be implemented in both wills and trusts but trusts are typically the better option.

As stated previously, a will is generally just instructions to the probate court as to how assets should be provided to heirs. The will is not a separate entity that can hold assets for a long period of time. In order for a will to protect assets for heirs, the will must direct a testamentary trust to be established through the probate court which is held and overseen by the probate court. While this testamentary trust can be effective, it is usually more burdensome than a trust initially created by the grantor.

If someone has concerns about their heirs and wants to implement strategies in their farm transition plan to help protect those assets, a trust is usually the better option. The trust can be established by the grantor and include terms and provisions that will help protect assets from being wasted. Upon death, the assets are transferred to the trust without probate.

Some concerns about heirs which may need more protection that can be provided through a trust include:

- |                    |                           |
|--------------------|---------------------------|
| • Drug abuse       | • Bankruptcies            |
| • Alcohol abuse    | • Spending problems       |
| • Gambling         | • Money management        |
| • Creditors        | • Selling the inheritance |
| • Pending lawsuits | • Marriage problems       |

Consider this example:

Farmer wants to divide his farmland between his four children – Andy, Bill, Chris, and Devin. Andy is 20 years old and can be immature at times, especially in regard to spending money. Bill is 25 years old and recently filed bankruptcy. Chris is 30 years old and eager to sell Farmer's land as soon as he inherits it. Devin is 35 years old and is very responsible and good with money. Farmer has concerns about how Andy, Bill and Chris will manage their inheritances.

To address his concerns, Farmer establishes a trust and appoints Devin as the trustee. Upon Farmer's death, all of his land will transfer to the trust, outside of probate. Farmer's trust includes the following provisions:

*I leave the Smith Farm to my Andy. Until Andy reaches the age of 30 years old, the Smith Farm shall be held in trust. While held in trust, my trustee shall distribute all income to Andy. No principal may be distributed to Andy until they are 30 years old.*

*I leave the Jones Farm to my son Bill. The Jones farm shall remain in trust until Bill is released from his bankruptcy and so long as the Jones Farm is not subject to the bankruptcy or creditors. My trustee shall have the sole discretion to hold the Jones Farm until he is confident that the Jones Farm will be protected from all creditors. While the farm is held in trust, my trustee may distribute the income to Bill.*

*I leave the Johnson farm to my son Chris. The Johnson farm shall be held in trust for the remainder of Chris' life. While held in trust, Chris shall be distributed all income from the farm. At Chris' death, the farm shall be distributed to Chris' children.*

*I leave the Brown farm to Devin outright and free of trust.*

At Farmer's death, Devin will manage the land on behalf of all the siblings. She will immediately transfer the Brown farm to herself, hold the Smith Farm until Andy is 30 years old, hold the Jones farm until Bill is out of financial difficulties and hold the Johnson farm for the remainder of Chris' life.

This example illustrates how a trust can be used to address perceived concerns with heirs. Without the trust provisions, Andy may have wasted his inheritance due to immaturity, creditors may have taken the Jones Farm and Chris would have sold the Johnson farm as soon as he received it. By using a trust, Farmer was able to address the issues with each of his children. A trust can address almost any concern with an heir.

## 5. Second Marriages

Second marriages can bring special challenges to farm transition planning. This is especially true when the marriage happens later in life and each spouse brings assets to the marriage and have children from previous marriages. Usually, the goal of good planning is to provide for the surviving spouse while also ensuring that the children of the spouse who passed away receives the bulk of the assets.

A trust tends to be more beneficial when second marriages are involved because a trust can retain the assets of the spouse who has passed away, guaranteeing an income for the surviving spouse throughout their lifetime. Upon the passing of the surviving spouse, the assets are allocated to the children of the deceased spouse. Importantly, the surviving spouse does not assume ownership of the assets held in the trust, eliminating risk of these assets being inherited by the surviving spouse's children. This approach can effectively preserve control over farmland and other farm assets.

Consider this example:

Farmer is married to Second Wife. Farmer has two children from a previous marriage, Andy and Bill, who are taking over the farming operation. Farmer has three primary goals for his estate plan:

1. Not interfere with the transition of the farming operation to Andy and Bill;
2. Provide Second Wife with sufficient income for the remainder of her life;
3. Have all of Farmer's assets to eventually be owned by Andy and Bill.

Farmer establishes a trust with the following provision:

*Upon my death, all farm operating assets including machinery, equipment, crops and livestock shall be distributed to Andy and Bill outright and free of trust. My farmland shall be held in trust for the remainder of Wife's life. While held in trust, all net income from the farmland shall be distributed to Wife. Upon Wife's death, the farmland shall be distributed to Andy and Bill. While held in trust, Andy and Bill shall have the option to lease the farmland at 80% of the county average cash rent.*

Farmer's trust immediately distributes operating assets to Andy and Bill so that they can seamlessly continue the farming operation, accomplishing the first goal. The land is held in trust and will provide income to Wife for the remainder of her life, accomplishing the second goal. While the land is held in trust, the land can be farmed by Andy and Bill at a reasonable rental rate, helping to meet the first goal. Upon Wife's death, the assets will transfer to Andy and Bill, achieving the third goal.

A plan similar to the example would be challenging to be carried out through probate. A trust is the much better option in a situation involving second marriages where income is provided to the spouse but the assets are ultimately inherited by the deceased spouse's children.

For a more detailed discussion of remarriage implications to farm transition planning, see the *Farm Transition Planning Strategies for Second Marriages* bulletin available at [farmoffice.osu.edu](http://farmoffice.osu.edu).

## 6. Transition of Farming Operation

One of the primary purposes of having a will or a trust is to help with the transition of the farming operation. A trust tends to transfer the farming operation to the next generation farmer more smoothly and quickly. A will can transfer the farming operation but will likely take longer due to the probate process. This can cause interruption of the farm business, potentially resulting in financial and other losses.

Consider this example:

Farmer operates a grain operation and owns considerable machinery. Farmer has a simple will that leaves all of his farm machinery to Andy who is taking over the farming operation. Farmer's son Bill is the executor.

Farmer dies in August. Before his death, Farmer had ordered a new combine that was to be delivered in September. Before the farm machinery can be distributed to Andy, the farm machinery must be inventoried and appraised. While the farm machinery is in the estate, Bill, as executor, is responsible for managing the farm machinery. Bill is reluctant to go through with the purchase of the new \$600,000 combine because he does not want the responsibility for such a large purchase. Andy needs the combine now to prepare it for harvest next week.

Alternatively, Farmer established a trust prior to his death which provided the farm machinery to Andy and made Bill the trustee. Farmer had assigned the farm machinery to his trust. Immediately upon his death, without needing to wait on an appraisal, Bill distributes the farm machinery to Andy. Andy can trade in the combine and complete the purchase of the new combine that her father started.

As the example shows, all assets directed by a will must go through the probate administration process. Probate can be problematic for making timely management decisions such as buying, selling, and trading equipment. On the other hand, assets in a trust can be distributed immediately at the trustee's discretion to avoid delaying management decisions. Trusts are usually the better option if significant non-titled assets such as machinery, crops and livestock are being transferred.

## 7. Taxes

Estate tax is another important consideration when deciding between a trust or a will. With the federal estate tax exemption steadily increasing over the last twenty years, federal estate taxes have become less of a problem for farmers. A detailed discussion of federal estate taxes and the interaction with wills and trusts is highly technical and beyond the scope of this bulletin. However, for people who are near or over the federal estate tax exemption,<sup>3</sup> trusts can provide some advantages in managing estate taxes, particularly for married couples. Trusts can freeze the value of assets at the first spouse's death rather than those assets increasing in value over time with the appreciation in value included in the surviving spouse's estate.

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<sup>3</sup> The federal estate tax exemption is \$12,900,000 per person for 2023.

Because Ohio abolished state estate taxes in 2013, trusts have no benefits over wills regarding Ohio estate taxes. However, some states do have an estate or inheritance tax. In those states that do have estate taxes, trusts may provide some benefit to minimizing estate taxes. Be sure to consult with an attorney familiar with a state's particular estate tax laws to determine if a trust might be appropriate.

Generally, farming operations who are likely facing estate taxes should consider trusts. If estate taxes are not a concern, a will may be adequate. Whether using a will or trust, the deceased person's assets will likely receive a stepped-up tax basis equal to the fair market value at date of death.

## 8. Privacy

A trust does not need to be filed with a court<sup>4</sup> and the probate court is not involved in supervising the appointed trustee. Therefore, the trust does not become a public record which promotes privacy. As a trust is a confidential document, only the trustee and beneficiaries have the right to access it, ensuring that an individual's assets, beneficiaries, and distribution strategy remain entirely confidential.

Due to probate being a public process, the inventory and value of all probate assets can be viewed by any interested party. Additionally, a copy of the will can be obtained. For those individuals seeking to maintain the privacy of their estate details, a trust offers a superior choice compared to a will.

Consider this example:

Farmer has an antique tractor that he would like to leave to a special nephew. He does not want other nieces and nephews to find out about the tractor for fear of them being upset at being left out of inheritance. Farmer establishes a trust which provides that the antique tractor will go to the nephew. None of the other nieces and nephews are entitled to see the trust because they are not beneficiaries and do not find out about the gift to the special nephew.

Conversely, Farmer implements a will-based plan which leaves the antique tractor to his nephew. Any of the other nieces and nephews can obtain an inventory of the assets in Farmer's estate and read the will to determine who received various assets. It would be easy for the other nieces and nephews to find out that the special nephew received the tractor.

For some people, privacy after death is not a big issue. For others, keeping the assets and beneficiaries private is very important. For those who value privacy, a trust is the better option.

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<sup>4</sup> A testamentary trust is public record.

## 9. Control

Typically, a will does not do much more than identify the asset and who is to receive it. Conditions on inheritance in a will is not as prevalent as with a trust. After the assets are distributed to the heirs, the will has no further purpose and becomes obsolete. A trust, on the other hand, can include provisions which limit the control of the assets by the beneficiaries and continue the trust for many years. This is sometimes called “controlling from the grave.” If a goal is to include some restrictions or requirements of the assets after death, a trust is probably the better option. The only way a will can control assets long-term is to establish a testamentary trust overseen by the probate court.

Consider this example:

Farmer wants to guarantee that his farmland will be inherited by his grandchildren someday. He would like his children to benefit from the farmland during their lifetimes, but he does not want them to have the power to sell the land. Farmer establishes a trust with the following provision:

*My farmland shall be held in trust for the lives of my children. During their lives, they shall receive the net income from the land. My trustee may not sell the farmland while held in trust. Upon the death of my last child, the farmland shall be distributed to my grandchildren.*

Farmer’s trust will likely hold the farmland for many years during the children’s lives. A trust is well suited to hold the land long-term, managed by the trustee. Implementing this plan via a will can be much more challenging and will likely require the establishment of a testamentary trust by the probate court. Plans that include some control over assets after death are usually more suitable for trusts.

### Conclusion – Is a Will or Trust Better for Your Farm Transition Plan?

Like most answers to legal questions – it depends. All the factors discussed previously should be taken into consideration when deciding between a will or trust. For most people, a will is adequate. However, for many farmers who have more assets and more complicated plans, a trust is the better option. Be sure to understand the advantages and disadvantages of both a will and trust, then weigh these advantages against the disadvantages to determine which is the better option for you. An experienced farm transition attorney can provide valuable guidance on this decision.