

The language of wills

Many professions and disciplines have their own vocabulary. As an example, think about the terminology used in medicine and law. Often this vocabulary defines complex ideas, yet just as often “terms of art” can be defined with relative ease to a layperson.

Such is the case with much of the language associated with wills. Below we provide a few of the key terms that you are likely to come across, defined in a way that should aid in your understanding of the process of drafting the bedrock of estate planning—a will.

Basics in will planning

The individual who establishes a will is known as the *testator*. After the testator’s death he or she is sometimes referred to as the *decedent*. An *executor*, or *personal representative*, is the institution or individual named in a will who is required to carry out the will’s provisions, manage and protect property during the estate settlement process, and distribute the estate’s assets to beneficiaries (*heirs*). The distributions that the heirs receive are often referred to as *bequests*, or *legacies*.

When people fail to create a will, they are considered to have died *intestate*, and state laws (the *intestacy laws*) will determine how assets are distributed. The court will appoint an *administrator* to handle an intestate estate.

A will often requires approval by a probate court. *Probate* is the legal process by which a will is proved or established to be valid. The assets that pass by means of a will are often referred to as *probate property*. Then there are assets for which a beneficiary has been designated in a separate document and that are not subject to the process of probate—*nonprobate property*. Together, for tax purposes, these two elements form the *gross estate* for tax purposes. (Just because property passes outside of a will doesn’t mean that it necessarily escapes taxation.) Nonprobate property includes property that has been taken in joint name and that passes automatically to the other individual joint owner (the family home, bank accounts, etc.). Other common nonprobate property: life insurance policies and retirement plan accounts.

A *pourover provision* in a will refers to the transfer of property from one estate or trust to another when a specified event occurs.

Finally, because life brings change, so changes to your will may be necessary. A whole new will may be drafted, or a *codicil* may be added to the will. A codicil is simply an addition or amendment to a will, made with all the formalities of the will itself.

A bit about taxes

Death taxes is the broad description of the taxes that may need to be paid on what is owned at death or on bequests to heirs.

Transfer taxes refer to the *estate tax*, or the *generation-skipping (GST) transfer tax*. (*Gift taxes* also fall under the umbrella of transfer taxes.) The estate tax is calculated from the total amount of property owned at death, without regard to who will receive that property. An estate tax is payable by the estate before the property is transferred to your heirs. (An *inheritance tax*, in contrast, varies depending upon the identity of the heir.) The GST tax is levied on certain transfers of assets by an individual that bypass the next generation down. The most common generation-skipping transfers are gifts or bequests made to grandchildren.

The gross estate is the starting point for determining any taxes that may be owed. The term *adjusted gross estate* refers to gross estate minus certain adjustments. The *taxable estate* is, as one would expect, the amount to which tax is applied.

Trusts in a will

A will may direct that one or more trusts (*testamentary trusts*) be established. A trust is an arrangement in which the ownership of assets is given to someone else, the *trustee*—usually a financial institution such as ours, but sometimes an individual. The trustee keeps possession of and control over the assets in the trust and is said to have *legal title* to these assets, which allows the trustee to exercise most property rights. The trustee's responsibilities and duties with regard to the trust's assets are delineated in the *trust agreement*.

The trustee manages the assets in the trust for the *trust beneficiaries*, the recipients of the trust's income and principal (sometimes referred to as the *corpus* of the trust). The beneficiaries are considered to have *equitable title* to the trust's assets, meaning that they have the right to benefit from the assets managed by the trustee.

Specific kinds of trusts

Wills often include a *marital trust* or *marital deduction trust*. These trusts allow for the transfers of property from husband to wife or wife to husband and are designed to take advantage of the federal estate tax deduction available to them. A *bypass trust* (over the years, referred to sometimes as an *exemption equivalent*, *credit shelter* or *unified credit trust*) is a trust for the benefit of a surviving spouse, created to avoid estate taxes at a first spouse's death and which takes advantage of the available federal estate tax credit.

There are two variations on the basic marital deduction trust. One is the *qualified terminable interest property* (or *QTIP trust*), a special form of property ownership that qualifies for the marital deduction. Although the surviving spouse does not have an absolute right to the trust's assets, he or she does have an income interest in the trust's assets and a right to direct to whom the assets will pass. A *qualified domestic trust* (QDT) is established when a surviving spouse is not a U.S. citizen and is designed to allow the assets in the trust to qualify for the marital deduction.

Charitable trusts often are established by will. A *charitable remainder trust* is a trust established to allow the grantor or someone whom he or she designates to receive the income from the trust for the beneficiary's lifetime or for a period of years. When the income beneficiary's interest ends, the trust's assets pass to the designated beneficiary. With a *charitable lead trust*, the charity receives the income from the trust, and the trust assets later pass to the beneficiaries named by the grantor. In order to take advantage of the charitable deductions associated with the gifts made, charitable trusts are required to adhere rigorously to a set format.

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Any developments occurring after January 1, 2009, are not reflected in this article.