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TEN COMMON QUESTIONS WITH WILLS AND TRUSTS
An Attorney's View on Estate Planning Questions

As a will and trust attorney, I often get asked the question "what would you do in my situation?" People really want to do the right thing, but knowing what that is for a particular situation is often difficult.

While everyone must decide for themselves what is best, I offer the following to aid in the decision-making process of deciding what is best for you and your family. These are questions that I get asked, and I answer them with principles that may be evaluated when doing thorough planning for your situation.*

**Legal Disclaimer – Yes, I am an attorney, but these principles should not be relied on as legal advice for your specific situation. I wrote this in hopes that the guide is helpful in evaluating your potential options and understanding some basics of how the law works so that you can know what options or limitations may exist in some situations. Nearly all principles of law have an exception to them though, and this guide is simply not long enough to discuss all possible exceptions or other considerations, so treat it as basic information that does not relay all possible scenarios and confirm any information before using or relying on it in your situation. This was written in 2025, and is more of a guide on making decisions related to what you do with your assets than it is for what legal options to pursue.*

1. Will or Trust?

One of the most common questions asked is whether to do a will or a trust. In Utah, both a will and a trust pass property to your heirs or those you choose to receive your property.

If you own real estate and you use a will, or you have more than $100,000 at your passing, then you have to file in probate court to have a personal representative appointed who can carry out the terms of the will. In addition, a will passes everything immediately to those you select, and you generally cannot place many restrictions on what a person can do with the property after you pass away.

A trust is not required to go to probate court to be effective, so if you set up a trust before you pass away, you can avoid courts and lawyers later if there are no legal disputes between your children or heirs. In addition, a trust can put stipulations on property so that heirs have to follow certain requirements or restrictions, and a trust can continue to control property for many years after your death (if you are super ambitious, you can put items in trust for hundreds of years).

Due to the fact that most people own a home (even if there is a mortgage on it still), a trust usually works better for the average Utah citizen. A lawyer will usually prepare a will with the trust though, as the will can 'catch' anything that may not get put into the trust. It is often surprising to me as an attorney how many people do not do the little bit of homework they have to put an asset into the trust. Trusts do require updating beneficiaries and title documents, and so there is some homework after getting a trust

created. Often, it is homework that the attorney does not do for you as it requires access to all of your personal accounts, and so you need to plan on doing some work after the trust is created.

Trusts though are good to account for contingencies that may arise later. For example, if an heir ends up being addicted to drugs when you pass away, you can direct that the money be held in trust until the heir cleans things up.

A will, while it is more work when you pass away, is less work now, as you do not have to do anything other than make and sign the will. It does require more work of your heirs though, and it makes a legal dispute more likely as all heirs are notified of things in probate court and they can object to the petition in probate court and create legal proceedings with a very basic filing that says, in essence, "I object". Since a trust does not have to go to probate court though, it usually helps to avoid some of the more basic legal disputes that might otherwise arise.

Ultimately, most people want to avoid probate court if possible (trying to help avoid situations that make it easy for family members to have legal battles), and so the trust option tends to be the most heavily used for the clients I have interacted with in my time as an attorney.

2. **Attorney Vs. Online?**

"Do I need an attorney?" This is a great question to ask, but it is hard for a person to get a straight answer. The online service providers say no, you do not need an attorney, while the attorneys say yes, you need an attorney. As is often the case, the answer for you probably requires consideration of a variety of factors.

With wills and trusts, most, if not all, attorneys now use some type of software to assist them in drafting the wills and trusts. This is good as it helps ensure that the document templates are as up to date as possible. This also means though that software and computers do a lot of the heavy lifting, and, in all honesty, some attorneys do not have to customize anything as the software is getting to be so good with drafting.

So, there are times when an online will or trust preparer could work well for you. Some online software may be able to provide you with a decent will or trust in the following situation:

- You have only had one marriage or are single and not married;
- You have only one piece of real estate;

- You are leaving everything equally to your children with the instructions to sell all of your assets, or, if you do not have children, are leaving your things to certain individuals; and
- You do not anticipate any problems among the kids or those receiving your assets.

Of course, there is a wide variety in quality among various software providers, and I do not have a great way of evaluating quality of any particular provider prior to actually having the documents in hand, which usually requires payment for those documents. I have seen the full range of quality in online documents, ranging from high quality documents to documents that are short and miss a lot of important points. One way to help judge quality is to check if the online software you plan to use has a dynamic question set that changes based on your answers. The more dynamic the question set is, the more likely it is that the software is customizing the document to your situation.

If you create a trust online (or through an attorney), you will need to ensure you transfer your home to the trust. In Utah, this requires a deed, and you will need to ensure you get the deed notarized and recorded for your home to be in the trust.

However, in general, you will want to use an attorney still if you:

- Are divorced with children;
- Are remarried;
- Are leaving differing amounts to children;
- Have a disabled child;
- Are disinheriting a child;
- Need to deal with multiple trustees and/or children working together;
- Have property that needs special considerations (guns, assets that secure a debt, timeshares, etc.);
- Need tax planning (the Federal estate tax applies if you have a certain net worth of assets (this amount changes at times, so always check to see the current level));
- Need asset protection assistance or help with assets (besides your personal residence) that are mortgaged;
- Need help addressing debt situations (including where heirs owe you money);
- Want to keep an asset in the family (such as a family cabin);
- Own more than one piece of real estate, especially if there is a mortgage on something besides your primary residence;
- Have business ownership to transfer or address; or

- Want to set up any type of ongoing legacy, such as a scholarship fund or foundation that is funded from your estate.

These situations often require personalized planning and strategy, and it can be very difficult to tell the software what you need if you do not understand all of the legal intricacies associated with the situation. As there are a lot of factors that impact what is best, it is often best to work with an attorney in addressing these types of situations.

3. Do I Leave Everything to My Kids?

Many parents establish a trust when they are in their 70's. By this time, their children are often well off and doing fine. Others know that their children will just blow the money, but they often say "well, it doesn't matter because I won't be here, so I won't care then."

I personally believe that we should each consider where our money, assets, and other things of value will do the most good. It is certainly a tradition to pass assets to children, but there are many things that can be done for our world if we were intentional about how our money was used. There are many opportunities to utilize it to help leave a legacy, even if only for your family.

For example, if you value education, you could set up a fund that provides scholarship amounts to grandchildren or great-grandchildren or even others that cannot afford a good education. Perhaps they have to get certain grades and take certain courses to qualify for the funds. This enables them to be taught things that are of value to you.

Or, perhaps you value marriage, and you want to help any of your posterity that gets married. You could have money set aside for those who marry, who need to buy a first home, etc.

Or, maybe you value family time. You could set aside money in a fund that helps to pay for family vacations. Or that pays to rent a cabin together, pays for a cruise, flights, etc.

Perhaps you value preserving the wilderness. You could donate money for hours that your posterity volunteers in efforts related to preserving the wilderness.

The options are endless, and by thinking things through, you can help instill values, responsibility, and good conduct in those who follow after you. When you just leave money to your kids though, it is often spent and often does not promote values, responsibility, or good conduct.

Of course, there are situations where it is very important to leave money to children. Some of those are:

- You have a disabled or special needs child that needs ongoing care;
- You have a child or multiple children that have had a rough go in life and could use some help financially (though you may want to consider requiring that the money be used to pay off their mortgage, for example, to ensure the money is used to help the child);
- You have minor children that will need to be cared for if you were to pass away;
- Your children helped to work and sacrifice to build a family business; or
- Other situations where money would benefit a child receiving it or compensate them for their efforts and work in your behalf.

Your assets are a gift that can be used to do good. You have the ability to shape a part of this world by touching the life of another. Even picking a charity to donate to is an incredible way to help ensure that you are giving something back to a world that gave you so much.

You have the power to help another, and while family is a very important consideration, there are many things that will benefit your posterity and others more than money alone if you use the funds to help build or create something longer lasting than money itself.

4. Who Should I Put in Charge?

Parents often stress deciding who to put in charge of an estate plan. Many default to the oldest child. Others default to the child that they feel have the most professional training with finances. Others select the child that they feel will follow their wishes regardless of what the other kids think, or they select a child that works well with the other kids in reaching consensus on things.

To decide who to put in charge, you need to decide what you are trying to accomplish. Goals often include:

- Preserve family harmony – This goal would mean you want to select a trustee or representative who can handle conflict in the family and work through that in a good way. This type of person is usually somewhat sensitive to the way people feel, but they may bend your wishes some with what happens with the assets to preserve peace.
- Follow your stated wishes – If you want the responsible person to do just what you say in your will or trust, you generally want to select one that does not care as much about what people feel, especially if you are not giving things to children equally or have disinherited a child.

- Good with money – If you need your responsible person to invest or manage funds for a time, you may want to select one that is good with finances.
- Taking care of you – You may need to select a responsible person who can help care for you as you age. This child needs to not care as much about the money they might be left and be more focused on your wellbeing and care, meaning they are willing to spend the money as necessary to help you be comfortable and cared for as you age.
- Managing long-term wishes – If you set up ongoing funds (such as a scholarship fund) or set up restrictions on the use of assets, you will want to ensure that the responsible party can manage things for the time period necessary. Often, it is necessary to pay a responsible party to manage things for a longer period of time, so you should consider paying your responsible party if you are setting up this type of fund or ongoing plan.

Additionally, if you have minor children, you will likely want to appoint a guardian for your children in the event you and your spouse pass away. You will need to consider who is best suited to be able to provide for the needs your kids will face. Could a family member move to your house to keep the kids in school? Is someone close enough to let them see their friends still if the kids have to move? Will the guardians you select honor your religious beliefs and the things you were teaching your children? Do they match your parenting style, at least to some extent?

It is important to remember that there is usually not a perfect fit for a guardian to step in and care for your children if you and your spouse pass away. If you both pass away, things will be difficult for your children, and they will grow up with different strengths and weaknesses than if you had not passed away.

However, with some thoughtful planning, this does not have to be a bad thing. Your children will not forget you, but they will be able to incorporate the good that others have to contribute as well. Planning ahead allows you to tell them about who will be responsible for them and help them feel secure that something is in place if you were to pass away.

Overall though, in determining the right person to select to be responsible for or in charge of things for you, you have to determine what your highest priorities are and then select individuals that match those priorities.

5. What If I Can't Divide My Assets Equally?

Some assets do not lend themselves well to an equal division. For example, if a parent has three antique cars and two children, there is no good way to divide the three cars among the two children.

Other examples include land that a child will continue to farm that may be worth significantly more than amounts the other children will receive. Collections, antiques, etc. often become difficult to evenly divide.

In these situations, it is important that you proactively establish how you want things to be divided. Often, simply naming a child that is to get the collectible car, for example, will significantly help to reduce family disputes when you pass away if you let all of your children know what you decided *prior* to your passing.

When you let everyone know what you decided, it makes it so that they know it was your decision, and if they are angry about it, their anger will have time to settle by the time you pass away. When they are expecting something to happen, even if they do not feel it is fair, they are less likely to hire attorneys to fight it later. Children often fight or hire attorneys when something happens that is a surprise to them or that they were not expecting.

While it may not be fun for you to tell your children who gets what, imagine how unpleasant it would be for your trustee to have to tell them and deal with their anger then. If you take responsibility for your decisions and communicate those to your kids, it greatly helps reduce legal disputes later.

However, there may be some ways to help mitigate some feelings of something being unfair if a child receives something that another does not. Some ideas include:

- Leave each child something that is valuable with a personal note explaining why you chose them. For example, "John, I gave you the stamp collection as you would spend hours with me going through it together. Mary, I gave you the doll collection because these were so important to your mother and you have three girls and it would make mom so happy for them to carry on her tradition."
- Consider giving a child less money if they receive a valuable asset. For example, if a child receives farmland, or an antique vehicle that is valuable, perhaps they could get less money to offset the value of what they received.
- Pay for something special for the other kids that do not get things equally. If you have a valuable gun or a valuable painting that is going to just one child, you could direct, for example, that the others be given season passes to their favorite entertainment park from the funds you have left.
- Some parents choose to avoid fights altogether and direct that all assets be sold. If a child really wants something, they can outbid the others (including people outside the family that may want to buy it) and pay for that item directly. This method only works if you are comfortable with nothing remaining in the family, and it may make a number of your children sad that they do not get to keep something that is important to them. This method can also come across as unfair

if there is a child that is much wealthier than the others, as that child can always outbid the others.

Again, it is important to remember that it is impossible to be completely fair in this world. The biggest thing that every child needs to know is that you thought of them and loved them. Your assets are simply a tool to help with that, and it is okay to give one child the farm if none of the other kids are interested in it. Just be sure to be thoughtful and take time to let each child know they were loved, whether that is through a note, a gift of an asset that you selected specifically for them, or through something else that communicates that to them.

6. Is There a Difference Between Giving Them Everything Now Versus Waiting Until I Pass Away?

One thing that I often encourage clients to do is to consider spending some of their money while they are still alive. If you worked for it, you can enjoy the blessing of being able to see how your money and funds can help others. You could pay a mortgage for a child that is struggling, take your family on some memorable trips, buy season tickets to their favorite sports team, etc. They will likely value these memories with you far more than the money they would have received.

But, there are some potential drawbacks to this as well. Some of those include:

- With real estate, if you transfer ownership to a child while you are living, they will owe more in capital gains on the real estate when they sell it later than if you had transferred it to them when you passed away. At passing, the IRS states that the "basis" in real estate "steps up" to the then current fair market value. This eliminates capital gains taxes that may otherwise be owing if the property is sold. However, if a child was added to the deed prior to your passing, there would be no basis step-up and capital gains would be calculated from the original purchase price instead of the fair market value when you pass away.
- When a child receives ownership, they can sell the asset, their creditors can seize the asset, and you generally lose a lot of say in what happens with it. It is often sad to see something you worked hard for be lost to creditors or bad habits of a child (such as gambling), and so keeping possession of things until your passing helps ensure that at least you will not have to watch any of those things take place.
- If you need an asset for your wellbeing, such as your home or bank account, placing a child on ownership gives them the ability to take the asset and use it for whatever they want. It is not uncommon for attorneys to receive a call that a child took all of a parent's assets at some point after the child is placed on the bank account.

In general, you have far more control and protection by putting things in a trust to help avoid the above issues, but, if you have excess funds or assets, utilizing these to help create memories or experiences are a great way to live as a family as well. These choices should be made with some thought and planning and an understanding of the various risks or benefits associated with each option.

7. **I Have a Business and None of My Children Want to Take It Over, What Should I Do?**

It is not uncommon for a parent to have something meaningful to them that is not valued by the children. Family farms, family businesses, or family heirlooms sometimes meet a generation that are not interested in continuing the family legacy.

While these situations can be disappointing, it is also useful to remember that your legacy and hard work helped to shape your children and the good they can do in the world. Even if they are not interested in being a farmer, or running the same business that you did, they will be interested in doing something else of value to the world.

In the situation where family does not want a business or family farm, these assets usually have to be shut down or sold unless you put together a plan of another person that could take the business or farm over. If your business has employees, you will want to identify one or more of them that could take it over. You can create a transition plan where they earn or acquire equity in the business, and you can place a buy-sell agreement in place that enables them to purchase the business if you pass away.

Often, these agreements need to provide incentives for the employees to stay around, and they need to provide flexibility in payment options as employees often cannot afford to purchase an entire business outright. So, for example, you could allow for the employee to pay out a percentage of earnings to the family trust for a number of years as the purchase price for the business.

Additionally, you can take the legacy associated with your business and create a plan to carry that legacy on, even if the business does not. For example, if a core component of your business was serving others, you could create plans to award children or grandchildren for living a life of service by setting up a fund that helps enable your children and grandchildren to provide service to others, regardless of what professions or pursuits they choose. This way, your hard work continues to fulfill its legacy, even if the family does not take over the business itself.

8. **Should My Power of Attorney Be Effective Immediately?**

Often, estate planning focuses on what happens when you pass away, but it is also important to focus some on what happens if you lose the ability, while alive, to take care

of yourself or your things. In these scenarios, a power of attorney is an invaluable tool for your spouse or children to be able to take care of everything necessary.

A power of attorney that is effective immediately gives your named agent the ability to transact all items as if they were you. They can sign for you, sell your assets, or spend your money. Of course, they are duty-bound to do so on your behalf, but that does not mean that your agent will always do so. Sometimes, children get their parents to sign a power of attorney so that the child can start to take the parent's money or other assets.

However, there is the option to create a "springing" power of attorney that only comes into effect if a doctor signs a letter certifying that you are not able to care for yourself. In this way, you can keep full control of things while you have capacity, and only have the power of attorney become effective once you can no longer care for yourself.

In addition, providing your other children with a copy of your planning documents, in addition to any wishes or desires you have, helps the other children to know if your appointed agent is following what you want. Generally, when everyone knows what you want, it helps to keep everyone honest.

If your options for agent are not as trustworthy as you would hope, some options to help protect yourself and your assets include requiring two signatures on things (meaning that you appoint two agents, both of which have to sign), or placing express limits in the power of attorney that they cannot do certain things (such as sell your residence) or amend your trust.

In situations though where you are getting older and need assistance, it may be helpful to make your power of attorney effective immediately to save on the doctor's visit and evaluation. Otherwise, it is often advisable to leave the power of attorney as a springing power that only comes into effect with the doctor's certification.

9. Does a Trust Protect My Assets from Creditors?

Many people believe that having a trust will protect their assets from creditors, and there is information online that discusses trusts and asset protection. The short answer to this question is that some trusts do provide creditor protection while other trusts do not. In other words, there are different types of trusts, and the type of trust impacts whether there is any asset protection involved or not.

Typically, most people create what is known as a "revocable" or a "living" trust. These trusts can be amended and changed over time by the people who made the trust (such as parents). When a trust is revocable, it usually does not provide asset protection, even for assets in the trust, and a creditor of the person making the revocable trust can usually access the assets the same as if they were still owned by the individual.

However, it is also possible to create an irrevocable trust, or a trust that cannot be changed. Many states treat irrevocable trusts as being completely separate from the individual that made the irrevocable trust, and so if assets are transferred to an irrevocable trust, the individual no longer owns the assets and the individual's creditors might not be able to reach them any longer if certain other steps have been met.

Irrevocable trusts have to file their own tax returns and usually are taxed at a high tax bracket. If your life situations change too, the trust cannot be changed (with some limited exceptions), and so irrevocable trusts are not ideal for every person. Generally, irrevocable trusts are used by individuals with a fair number of assets when estate tax and other planning strategies are needed.

So, while the standard revocable trust is useful for helping with estate planning, it is not a standard tool for asset protection purposes. If asset protection is needed, irrevocable trusts or entities (such as LLC's or corporations) need to be added into the planning mix, and it is usually advisable to discuss those plans with an attorney and tax advisor.

10. Are There Assets That Cannot Be Placed In My Trust?

Yes. While a trust can technically hold title to any type of property, there are some restrictions on certain types of assets.

For example, if an individual is the owner of an entity taxed as an S-Corp (a very common thing for many small business owners), the individual's ownership cannot be placed into their standard trust or else the entity will lose its S-Corp tax status. There is one specific type of trust that can hold S-Corp ownership, but that trust does not work for everyone. For S-Corp ownership, it is usually necessary to have buy-sell agreements in place to take care of transferring ownership at death.

Additionally, if you have a mortgage on investment properties, transferring those to a trust may result in the bank accelerating the loan payments and calling the note due (loans typically have a "due on sale" clause that allows them to call the note due if the property changes ownership). Federal law prohibits a bank from calling a loan due on a personal residence that is transferred to a revocable trust, but for other properties, mortgages can present some additional planning complexities.

IRA's and 401(k)'s should also not be titled in the name of a trust, as there can be tax consequences for doing so. Instead, the person's spouse (if they have one) should be the primary beneficiary, with the trust as a secondary beneficiary. This allows the money to flow to the trust when account owner had the spouse have passed away, but it helps to avoid the tax consequences of changing ownership before passing.

Property that has multiple owners may require special planning, as all owners would have to sign for the property to be placed in the trust. While it is possible for just a share of

property to exist in a trust, multiple ownership often presents some planning complexities as well.

Finally, if you have minor children, you generally cannot have your trust appoint guardians for them as you cannot place them in a trust. Guardians often have to be appointed through separate documents (such as a will), and you usually have to go to probate court for guardianship to be finalized. Because of this, in situations where you have minor children, you cannot fully avoid probate if both you and your spouse were to pass away.

The above are some examples of property that cannot be placed in trust or situations that cannot be handled through a trust, but this is not an exhaustive list and there may be others as well.

Conclusion

I hope that this planning guide was useful for you as you make decisions about your situation and what you need to do. Please remember that any information in here should not be relied on as being applicable to any specific situation, and it is not legal advice to you as I do not know your individual situation. Since this packet is informational only, please feel free to reach out to me with any questions or concerns or confirm with your own legal counsel. You should confirm that all information is up to date with current laws and tax regulations and that there are no exceptions or other situations that would impact the applicability of any of these concepts or principles.

Sincerely,

/s/ Austin Hepworth
Austin Hepworth
BELIEVE FIRST, LLC