

Is a revocable living trust a substitute for a will?

Yes, but there are advantages and disadvantages.

Advantages: Revocable living trusts are a means of avoiding probate because the trust owns the decedent's assets. Consequently, such assets are generally not governed by the probate process. Following death, the trust acts in the same manner as a will, i.e., directing the management of trust property and the manner in which trust assets are to be disposed. Avoiding probate saves costs and provides privacy in keeping the nature and extent of your property and its disposition from being a matter of public record. A revocable living trust is also advantageous during your lifetime. If you become incapacitated, you may not change your will. However, during incapacity, your agent under a general durable power of attorney can be given the power to change your trust. This can be important if tax laws or other laws affecting trusts and estates change after you become incapacitated.

Disadvantages: Revocable living trusts are not appropriate in many circumstances, because they are initially more expensive, and there is some inconvenience in having to retitle assets in the trust.

But you still need a will. Even if one utilizes a revocable living trust as a primary instrument for disposing of property at death, a "pour over" will should also be executed in the event that all assets are not properly titled in the trust during the decedent's lifetime. A "pour over" will provides for disposition to the trust with respect to any assets that must go through probate because the decedent owned the property at the time of his or her death. A more thorough discussion of the advantages and disadvantages of revocable living trusts is found in another pamphlet published by the Kansas Bar Association, "Is a Living Trust For You?"

How long is a will valid?

A will is valid until it is amended or revoked by you in the manner provided by law or as provided by law in certain other circumstances.

For example, if you marry and have children, a prior will is automatically revoked by operation of law. In a similar manner, if you divorce, any provisions in a prior will for your spouse are considered revoked.

I have a will now. Should it be reviewed?

Changes in your family, your finances, your state of residence, certain state and tax laws or your intentions with respect to your property may make it advisable to change your will from time to time. It is recommended that you have your attorney review your will periodically or in the event of any such change in circumstances.

Is a will expensive?

Wills can be quite inexpensive and costs vary depending on the complexity of the will and the extent of your assets. The expense is normally minimal compared to the benefits that you and your beneficiaries receive from having a well devised estate plan.



This pamphlet is based on Kansas law and is published to provide general public information, not specific legal advice. The facts involved in a specific case determine the application of the law.

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- What is Probate?
- What is so Important About a Will?



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WHAT IS SO IMPORTANT ABOUT A WILL?

**What is it?
Does it save probate expenses?
How long is it valid?**

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What's so Important About a Will?

What is a will?

A will is a written instrument (in proper legal form) specifying the disposition of your probate assets after death. You must sign a will before two qualified witnesses. A self-proving affidavit should be included in the will.

What property does a will govern?

A will only governs disposition of property passing through probate. Probate property consists of property owned by a decedent at death. It does not include property owned in joint tenancy with another person or property having a beneficiary designation (such as life insurance, individual retirement accounts, retirement plans, and “payable on death” designations on financial institution accounts, and “transfer on death” designations for real estate, vehicles and securities). Joint tenancy property and property having beneficiary designations will pass to the surviving joint tenants and beneficiaries at death outside of the probate process. As such, property will not be governed by a will.

What happens if I don't have a will?

Your probate assets will pass to your heirs by a statutory process known as “intestate succession.” For example, if you are married and have no children, your spouse is your sole heir. If you have children and no spouse, your children are your sole heirs. If you are married and have children, your spouse is heir to half of your assets, and your children are the heirs to the other half. If you have no surviving spouse or children, the Kansas statutes provide for other more remote relatives to receive your property. If you have no heirs and no will, your assets will “revert” to the state. In addition, in the absence of a will, the court will decide who is to serve as administrator of your estate and who is to be guardian and/or conservator should you have any minor children.

Who needs a will?

Most persons need a will. If you own a home, a car, items of sentimental or financial value, or maintain a bank account you have an estate. While the intestate succession law provides for distribution of your property in the absence of a will, this distribution may not reflect your wishes. Further, you can provide for special circumstances in your will that would go unheeded otherwise, such as naming a guardian and/or conservator for your minor children, naming your executor (who need not be a Kansas resident) to manage your estate; establishing trusts for minor children or incapacitated persons; protecting those who have trouble handling money from their creditors or even from themselves; making provisions for your children in a remarriage situation; passing property to friends who are not heirs; avoiding disruption and loss of your business after your death; helping to reduce or eliminate death taxes; and the list goes on. An attorney experienced in estate planning can help you provide not only for the expected but will help you address situations you may not have considered.

Does a will create increased probate expense?

No, and it may even save probate expense because typically less court involvement is required. If there are probate assets, a court must either rule on the validity of the will or, if there is no will, determine who are the legal heirs and distribute the property accordingly. There are generally costs incurred either way, but careful estate planning through a will may save your estate and beneficiaries substantial administrative costs and taxes.

Can a person leave property any way he or she wishes in a will?

Normally yes, except that you may not exclude your spouse without his or her consent. You may exclude your children if you wish.

Is joint tenancy a substitute for a will?

No, although joint tenancy may be an alternative means of disposing of particular assets at death. Upon a joint tenant's death, the surviving joint tenant or tenants automatically own the joint tenancy property. Assets owned in joint tenancy are not probate assets and are not governed by a will. During your lifetime, your control over the property is complicated by the fact that other joint tenants also have a present ownership interest in your property.

Transfers of the property normally require the approval of the other joint tenants. The property may also become subject to claims of the creditors and spouses of other joint tenants, such as in a divorce. It also can cause adverse gift or income tax consequences. Further, because the property passes outright to surviving joint tenants at death, it is not appropriate in circumstances where it is more advisable to place the property in trust to protect beneficiaries. It may also be inappropriate if the surviving joint tenant is incapacitated, in a nursing home or otherwise would qualify for government assistance.

Moreover, joint tenancy property does not escape estate taxes, and the opportunity for estate planning to minimize these taxes can be lost. Owning property in joint tenancy is a device for passing property at death, but should not be relied upon without expert legal discussion of the advantages and disadvantages of joint tenancy. Information on joint tenancy is found in another pamphlet published by the Kansas Bar Association, “Joint Tenancy.”



Is a beneficiary designation a substitute for a will?

No, although beneficiary designations, like joint tenancy, are alternative means of disposing of particular assets at death, they are not substitutes for a will. Beneficiary designations typically may be made for life insurance, individual retirement accounts, and retirement plans.

In addition, certain assets, such as bank accounts, can be made “payable on death” (POD) to a named beneficiary. Also, certain property, like real estate, can be subject to a “transfer on death” (TOD) designation. Beneficiary designations do not give any present ownership interest to the beneficiary, and can be changed without the consent of the beneficiary, unless you are married and the beneficiary designation relates to retirement benefits. Although these are advantages compared to joint tenancy, beneficiary designations have most of the other problems associated with joint tenancy ownership.