

5 Types of People You Should Gift to Using Your Will



[Delaware Trust? You May Want to Consider Nevada Instead](#)

However, if you do not have the time or funds to create a living trust, there is an alternative: Have the assets pass by a “testamentary trust” created by your will.

Certain Accounts Avoid Probate by Naming Beneficiaries

While wills have been transferring property for hundreds of years, there are now many types of accounts that completely avoid probate: Jointly owned accounts and real estate, retirement plans, life insurance policies, Transfer on Death [“TOD”] and In Trust For [“ITF”] accounts all transfer outright to your beneficiary at the time of your death. The beneficiary to these accounts merely needs to provide the financial company with a death certificate, so no lengthy probate is necessary. These types of accounts are often called “Testamentary Substitutes” (since they transfer funds in an alternative way from your last will and testament).

The Problem With Testamentary Substitutes

Some people should not, or cannot, receive money outright:

1. Minors. A child cannot receive property without an adult named as a financial guardian or conservator by a court, meaning the legal expenses you minimized by avoiding probate now have to be spent on a different legal process.

2. Disabled individuals. People with disabilities who are receiving Medicaid or some other government program could be disqualified from these programs if they acquire too much money in their own names.

3. Spendthrifts. Funds transferred to people with creditor issues are often not protected when they receive money outright.

4. Substance abusers. Clearly, people who are addicted to drugs should not receive funds directly, lest their habits consume the gifts.

5. People in rocky marriages. Finally, beneficiaries who may be nearing divorce can sometimes make rash decisions with testamentary substitutes they receive outright.

Solution: A ‘Testamentary Trust’ Using a Will

The best suggestion is to utilize a trust created by your will, often called a “testamentary trust.” Unlike a living trust, which is a separate document immediately effective the moment you sign it, a testamentary trust goes into effect only once your will is admitted to probate. In addition, while a living trust does avoid probate, you also have to change the title to any property you want passed by the trust to the trust as owner or beneficiary: deeds, investment and bank accounts, co-op shares, life insurance and retirement plan beneficiary forms, and other property that is not left to the living trust do not pass by the trust, meaning the assets are transferred by your will anyway. People with multiple accounts and properties often forget to change all of their property to the living trust due to time, expense and the sheer volume of work required on their part.

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A testamentary trust can offer all of the same provisions as a living trust, such as avoiding transferring funds to a beneficiary with substance-abuse issues, maximizing creditor protection, and giving guideline ages or life events when a beneficiary may receive trust funds.

A will can also give the executor the ability to create a supplemental needs trust that can protect beneficiaries who become disabled, thereby allowing the beneficiary to receive government benefits and still have indirect access to the funds.

Transferring accounts by your will instead of outright can also allow the executor to create a Uniform Gifts to Minors Act (UTMA) account for a minor beneficiary who is receiving a smaller sum that does not justify the creation of a testamentary trust.

Perhaps the greatest benefit of using a will is to allow a set percentage of total funds to be received by your

choice of beneficiaries while also taking advantage of certain tax efficiencies. Remember that testamentary substitutes may change in value at a different rate than your probate assets: Your IRA (a testamentary substitute) may decrease as you age due to required minimum distributions, but your house (which may pass by probate) will likely increase in value; if you leave your currently equally valued IRA and house to two beneficiaries with the hope of them receiving equal benefits, one beneficiary will almost certainly get short-changed over the course of time.

Leaving testamentary substitutes by your will also makes it easy to figure out who the contingent beneficiaries are: If you have one beneficiary on an IRA account who has died, you may need to change several forms, but if the trust in your will is the beneficiary of the account you have probably created a number of contingent beneficiaries, since a will's beneficiary designations — written in plain English and elastic in nature — are more flexible and dynamic than a beneficiary designation form, which only names specific people instead of including specific circumstances.

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How to Designate the Testamentary Trust, and How Not to

Correctly naming your testamentary trust on your beneficiary form is incredibly important. Remember that some forms are more testamentary-trust friendly than others, since some actually ask whether you are leaving funds to a trust created by your will, while others don't look like they allow it. You should have your beneficiary form state:

“To the Trustee of the Trust Created for my Children by Article V of My Will Dated 01/23/2015.”

Do NOT name the beneficiary as your “Estate,” particularly for retirement plans, as the funds will have to be distributed over the span of five years, thus negating the ability to “stretch” your IRA distributions.

Using a testamentary trust is often more desirable than leaving assets directly to a person: Minor children, disabled family members, spendthrifts, substance abusers and people in shaky marriages are sometimes hurt more by receiving the money than they would by not receiving it at all. When you do not have the time, money or patience for creating and funding a living trust, naming a testamentary trust as the beneficiary of testamentary substitutes may be a feasible alternative.

[A Trust Can Protect Your Adult Child's Assets from a Failed Marriage](#)

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