

# Will Substitutes – An Alternative to Probate

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# WILL SUBSTITUTES – AN ALTERNATIVE TO PROBATE

## Abstract

Will substitutes provide an alternative to the traditional probate process for transferring assets upon death. These legal mechanisms allow property owners to designate beneficiaries in advance, ensuring a seamless transition of ownership while bypassing court involvement. This white paper explores the various forms of will substitutes, their benefits and limitations, and best practices for their implementation in estate planning.

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## Introduction

Estate planning seeks to facilitate the efficient and cost-effective transfer of assets upon an individual's death. The probate process, though legally structured, can be costly, time-consuming, and subject to public scrutiny. Will substitutes offer a practical alternative by enabling direct asset transfers to beneficiaries without probate. These instruments include rights of survivorship, beneficiary designations, and trusts, each with unique features and considerations.

## Types of Will Substitutes

### 1. Right of Survivorship

Certain property ownership structures allow automatic transfer of ownership to surviving co-owners upon death. These include:

#### Joint Tenancy with Right of Survivorship (JTWROS)

- Applicable to both real and personal property.
- Allows multiple individuals to own property jointly, with ownership passing to survivors automatically upon death.
- Probate is avoided, and transfer occurs by operation of law.
- May have gift tax implications if ownership is created unequally.

#### Tenancy by the Entirety (TBE)

- A specialized form of JTWROS available only to married couples.
- Provides additional creditor protections in some states.

### 2. Beneficiary Designation (By Contract)

Assets can also pass directly to designated beneficiaries through various contractual agreements, including:

#### Government Savings Bonds

- Issued in beneficiary designation format (e.g., "A payable on death to B").
- Allows ownership to transfer automatically upon the bondholder's death.
- Payable on Death (P.O.D.) Accounts
- Bank accounts structured to transfer funds to a named beneficiary upon the account holder's death.
- Ensures liquidity for beneficiaries while avoiding probate.

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### **Transfer on Death (T.O.D.) Accounts**

- Used for publicly traded securities and investment accounts.
- Ownership transfers directly to designated beneficiaries upon death.

### **Beneficiary Deeds**

- Applicable to real estate, enabling direct transfer upon the owner's death.
- Can be revoked or amended before death.

### **Totten Trusts (Bank Account Trusts)**

- An account held in trust for a named beneficiary, revocable by the owner.
- Similar to P.O.D. accounts but not universally recognized across states.

### **Contractual Provisions**

- Life insurance policies, retirement accounts, IRAs, annuities, and pension benefits often include beneficiary designations.
- These designations supersede any provisions in a will.

## **3. Trusts as Will Substitutes**

### **Revocable Living Trusts**

- Created during the grantor's lifetime, allowing assets to be managed and distributed according to trust terms.
- Avoids probate but remains within the grantor's taxable estate.
- The grantor retains the ability to revoke or modify the trust at any time.

### **Irrevocable Living Trusts**

- Assets placed in an irrevocable trust are removed from the grantor's estate, potentially offering tax benefits.
- Unlike revocable trusts, these cannot be altered once established.

### **Advantages of Will Substitutes**

- **Avoidance of Probate:** Direct asset transfer without court intervention.
- **Privacy Protection:** Probate records are public, while will substitutes maintain confidentiality.
- **Reduced Costs and Delays:** Avoids legal fees and prolonged probate proceedings.
- **Owner Control:** Many will substitutes, particularly revocable ones, allow the owner to maintain full control until death.

## Disadvantages of Will Substitutes

- **Initial Setup Costs:** Some will substitutes, such as trusts, may require significant legal and administrative expenses.
- **Potential Gift Tax Implications:** Transfers to joint tenancy or irrevocable trusts may trigger gift tax liability.
- **Limited Asset Protection:** Certain will substitutes, like JTWRORS, may expose assets to creditors of the co-owners.
- **Complexity of State Laws:** Recognition and treatment of will substitutes vary by jurisdiction.

## Selecting the Appropriate Will Substitute

The choice of a will substitute depends on the specific asset, estate planning goals, and individual preferences. Considerations include:

- **Maintaining Control:** A revocable living trust is preferable if the owner wants to retain control over assets.
- **Tax Implications:** JTWRORS can reduce the taxable estate for spouses, while irrevocable trusts offer long-term estate tax benefits.
- **Ease of Transfer:** P.O.D. and T.O.D. accounts provide simple, low-cost solutions for transferring cash and securities.
- **Flexibility:** Revocable instruments allow modifications, while irrevocable options provide asset protection.

## Conclusion

Will substitutes serve as essential tools in estate planning, offering streamlined asset transfers while avoiding probate. The selection of an appropriate mechanism depends on the individual's financial situation, tax considerations, and personal preferences. By understanding the advantages and limitations of each option, individuals can ensure an efficient and effective estate plan that meets their long-term objectives.

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