Legal Matters®

Estate Planning
fall 2022

How to handle guns in estate planning

If you're a hunter, you enjoy recreational shooting, or have family heirloom guns in your collection, you should consider whether your estate plan includes adequate measures for passing on your guns.

Without proper planning, your executor or beneficiaries could unintentionally break the law.

The first thing to consider is who can legally inherit a firearm. Under the Gun Control Act, several categories of people are federally prohibited from owning guns, including felons and people with mental illnesses, dishonorable discharges, domestic violence convictions, and domestic restraining orders.

It's possible that you may not be aware of what's going on in your beneficiary's life at the time you make the bequest. Likewise, your executor may not know whether the recipient falls into one of these prohibited categories. In that case, both the transfer and receipt of a firearm could constitute criminal behavior.

Other complications arise when you wish to pass your firearms on to a minor child. An individual must be 18 to take possession of a rifle and 21 to own a pistol.

Here are some other factors:

- **The nature of the firearm:** The National Firearm Act puts additional restrictions on certain types of guns, including short-barreled rifles and shotguns, suppressors, machine guns, and large caliber weapons. These items cannot be transported or handled by another individual unless the registered owner is present, which presents a complicated challenge when the owner has passed away.
- **When the beneficiary lives in another state:** State laws may require additional background checks, permits, and notifications to transport a firearm across state lines.
- **Risk of incompetence:** If you are deemed incompetent before your death, your firearms may be subject to immediate confiscation.

These complications can be addressed using a gun trust. A trust, for example, allows you to add additional protections to the gift, such as requiring that your children reach a certain age, complete a safety

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Are handwritten notes on a will enforceable?

This is a common scenario: Family members have a copy of a loved one's will that's been edited with handwritten scratch outs and addendums. Is it legal? Will a court enforce it? The answer is that it depends.

First of all, it isn't recommended to make handwritten notes on estate planning documents. Those notes can create a mess for heirs down the road. They can open the will to challenge and complicate the probate process.

To make a legally enforceable change, you have two options: 1) Replace the prior will with an entirely new document, explicitly stating that all prior wills are revoked, or 2) Add a codicil that makes clear which parts of the old will are being changed.

But let's say someone has gone ahead and made handwritten changes anyway. The next question is whether the courts will accept those changes.

Here are some scenarios:

Holographic wills: A holographic will is a document that has been written in the decedent's own hand and signed and dated. (No witness or notary required.) Some states will accept holographic wills, to varying degrees. But even when they are accepted, they won't qualify for informal or expedited probate.

Under the principles of a holographic will, handwritten addendums may be judged valid if each individual edit is signed and dated.

The issue of intent: In interpreting handwritten changes, the courts need to determine whether those edits actually met the drafter's intent. It's possible, for example, that someone may simply have been mulling or brainstorming possible changes.

Heir agreement: When handwritten notes have been made, the best possible scenario is that all the interested parties agree that the handwritten notes match the decedent's intent. If they collectively agree and sign a statement to that effect, the court will generally honor that agreement. The issue, of course, is when an interested party challenges the validity of edits.

If you wish to modify your documents, speak to an attorney to ensure your will remains legally enforceable and matches your intent. An attorney can also help you review a family member's will and evaluate any concerns you have over handwritten changes.

The challenges of death bed estate planning

When a client walks into our office and tells us they only have a short time to live, our planning options are limited. In some tragic cases, we're called to the client's bedside because they're simply too weak or injured to travel.

No matter what the circumstances, these "death bed" planning sessions are always emotionally taxing, placing an incredible emotional burden on the person who's dying.

Here's what you should know about last-minute planning before you find yourself, or a loved one, in this situation:

1. **Key documents:** Your attorney will likely help you put some basic documents in place, including a last will and testament, power of attorney, and healthcare proxy. They may also help you update beneficiary designation forms for certain assets that can avoid probate.

2. **Will, not a trust:** If death is expected within weeks, it's likely no longer possible to execute a trust in order to save probate costs, direct the use of an asset after you're gone, or provide other benefits, such as protecting an heir from debt collectors or claims in a divorce.

3. **Tax planning:** It's also difficult to do much tax planning at this stage. The Internal Revenue Code has a three-year claw back period designed to prevent someone from making tax advantaged gifts right before they die. The one notable exception to this rule is annual exclusion gifts. The per gift limit in 2022 is $16,000, and you can make gifts to as many individuals as you like in order to draw down your estate to within the lifetime exemption of $12 million. (Note the lifetime exemption is slated to drop to $6.2 million at the end of 2025.)

4. **State of mind:** A person making death bed estate plans is often in a fraught, emotional state of mind. It may be difficult for you to think clearly enough to provide a detailed asset list and engage in a thoughtful discussion of family gifts

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How to handle guns in estate planning

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course, or meet other requirements you deem appropriate. Trusts also provide a way to avoid probate, allowing you to keep your gun collection private and out of the public record.

Likewise, trusts can relieve pressure on your executor. You can name a trustee who knows federal and state gun law and is comfortable managing these assets. (Alternately, your representative can hire the services of a Federal Firearm Licensee, such as a licensed gun dealer, to hold the items and manage the required forms and background checks.)

Trusts can also provide a system for sharing the firearm among multiple beneficiaries, such as two children using the gun in alternating years. Trusts can provide a mechanism for keeping the items in the family for future generations, and they can protect your collection from confiscation if you're found incompetent.

Finally, in the case of NFA-restricted firearms, a trust can simplify the transfer, registration, and approval process. A gun trust also provides a mechanism by which your trustee can legally possess NFA-restricted items before they are distributed to your heirs.

The challenges of death bed estate planning

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and dynamics. You may remember something (or someone) hours or days later and want another rapid change to your plans.

5. **Undue influence:** Your advisor will need to ask family members to leave the room to avoid future claims of undue influence. If death is near, any temporary separation can be a source of trauma for your loved ones.

6. **Potential challenges:** Last minute estate plans are targets for probate challenges. An heir or interested party unhappy with your will may claim you were ill, under the influence of medications or of unsound mind. An experienced attorney will work to take the necessary precautions to avoid such claims, but any last minute plan can introduce this element of risk.

7. **Pandemic restrictions:** COVID-19 presents a potential challenge to death bed planning as isolation and social distancing requirements may prevent you from having a document witnessed and notarized. Fortunately, many states relaxed these rules and now allow electronic and/or remote witnessing and notarizing.

Creating a last-minute plan requires responsiveness and speed. Additionally, it is important to anticipate potential challenges and put mechanisms in place to demonstrate that the testator was of sound mind when creating their last will.

That said, as challenging as it is to draft a will on your death bed, it is still better than dying intestate (without a will). A rushed effort is preferable to nothing.

Nonetheless, last-minute planning can open the door to hurt feelings and family disputes. Your best course of action is to complete your will early, well before you need it. When that's not possible, look for an estate planning attorney who can be empathetic about the emotional challenges while helping avoid future challenges in probate.

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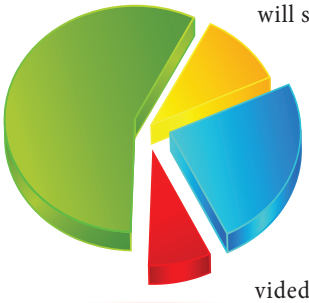
Know the difference between 'per stirpes' and 'per capita'

When making a will or designating beneficiaries, you can make bequests to your heirs on a "per stirpes" or "per capita" basis.

Per capita (by head) means your gifts will be divided evenly among your surviving beneficiaries. But if one of your beneficiaries dies, a per stirpes (by branch) designation means their inheritance will be passed on to their heirs.

Let's assume you have two kids, John and Paul. John has one child and Paul has two. For easy math, let's assume you have a $1 million estate.

Per stirpes. In your will, you stipulate your estate should be distributed to your "descendants, per stirpes." If both John and Paul survive you, they will each receive half of the estate, or $500,000. But if Paul passes away before you do, Paul's children will split his half of the estate.



Per stirpes is convenient in estate planning because you don't have to update your will each time a child is born, or a beneficiary dies. Note that spouses of beneficiaries do not inherit under a per stirpes designation, unless specifically noted in the will.

Per capita. A per capita distribution is divided among surviving beneficiaries of the same generation. So, if you stipulate your estate should be distributed "per capita," and John predeceases you, Paul will receive the entirety of your estate and John's children would receive nothing.

However if both John and Paul predecease you, then their children would each receive an equal part. Since there are five grandchildren, each one would inherit 1/5th of the estate or $200,000.

A per capita distribution is a way to ensure that only the people you designate as beneficiaries receive shares of your estate. People may choose per capita when they want to limit which of their family members will benefit. However, you will likely need to update your plan more regularly to keep it current and consistent with your intent.

Designations for other accounts. You can (and should) make a per stirpes or per capita designation when naming beneficiaries for your life insurance, IRA, or other retirement accounts. If you don't indicate your wishes, the account custodian will use their default option.

There is no one "right way" to distribute your estate. Choosing per stirpes or per capita can be complicated, especially if an heir predeceases you, an heir is a minor child, or there's conflict down the family line. To be sure your wishes are honored as you intend, it's important to speak with an estate planning attorney.