NEW YORK STATE BAR ASSOCIATION

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Why You Need a Will

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Why you need a will

Many people think that a will is only for people who want to set up trusts or save on estate taxes. Those may indeed be important benefits for some people. The primary reasons for making a will, however, are: (1) to leave your property to those about whom you care in the manner and proportions you choose; (2) to choose the person(s) you want to handle your estate; (3) so that the estate will not have to incur the cost of an administration bond to insure the faithful performance of the person chosen by the Court to administer the estate; and (4) to have any estate taxes which may be due on your estate allocated among your beneficiaries according to your wishes, not by statutory rules.

If you die without a will

If you die without a will, the Court will appoint an administrator, who may be a family member or a public official, to distribute your assets among your family members in a manner fixed by law. These rules, known as the "Distribution Rules of Intestacy," reflect what the New York State Legislature decided would likely be preferable in most situations. For example, if you are survived by:

- a spouse and descendants: your spouse takes the first $50,000 and one-half the balance of the property, and your descendants share the rest.
- a spouse but no descendants: spouse takes all.
- descendants, no spouse: descendants take all.
- a parent or parents, no spouse, no descendants: your parent or parents take all.
- descendants of either parent but none of the closer relatives: the descendants of your parents take all.

- one or more grandparents or their descendants, but none of the closer relatives: half goes to the maternal side and half to the paternal (but not including second cousins if you have any first cousins on either side).
- where "descendants" include a mix of generations, living children take a full equal share, and children of a predeceased child then divide equally the combined share of their deceased parent.

This allocation may very well differ from the distribution you desire. A properly drafted will can enable you to direct the distribution of your assets in accordance with your wishes.

If you die without a will and leave young children

Here's something else to consider: If any of your children is under 18 years of age at your death, a court-appointed guardian will be required to manage your minor child's share of your assets. Although the court probably would appoint your spouse as guardian of the property for your minor children, this is not guaranteed. Also, the guardian may have to post a bond. Payment of the bond premiums will cost money. Moreover, if any portion of your assets is needed to pay for your child's education, clothing or living costs, prior approval of the court is necessary. The court also requires guardians to file annual accountings of income and expenses. In addition, the range of investments available for the funds held by the guardian may be limited. Thus, if the guardianship lasts for any length of time, the child's funds may not grow at an acceptable pace. These problems can be avoided with a properly drafted will.

If you and your spouse die at or about the same time, it is important that you make

a provision not only for a guardian of the property of any child under age 18, but also and perhaps more importantly that you name a guardian of the person for each minor child. A guardian of the person is given custody of the child during minority. While the designation in your will is subject to the review and confirmation by the court, the court will usually give deference to your wishes. Thus, with a properly drafted will you can provide guidance to the court on who you desire to be the guardian of your minor children.

A will determines who will oversee the administration and distribution of your estate assets

You name as the legal representative(s) ("Executor(s)") of your estate who you want to administer and distribute your property. An Executor can be a relative, a friend, your lawyer or a bank or trust company that specializes in the handling of estates.

The choice of an Executor is yours **only** if you make a will. You realize the value of having qualified people help with your affairs during life. Such people are just as valuable after you die.

What is the best way to make a will?

How do you go about making a will? Can you pick up some printed forms and fill them out in your own handwriting? Perhaps you're interested in buying a book that tells you how to write your own will. Can you download a form will from the Internet? These options are all available, but you very well might create a will that is not the best will for your personal plan. You might miss an essential element of a comprehensive estate plan or any number

of opportunities to maximize the efficient distribution of your assets to your chosen beneficiaries. Moreover, you may not end up with a valid will, as wills have formalities of execution that are fixed by state law. An invalid will can result in your assets being administered under the Distribution Rules of Intestacy. Securing the professional guidance of an attorney can resolve these issues.

Making the best plan and the best will takes knowledge and expert advice

Making the best plan and the best will takes knowledge and expert advice. For example, do you know that property held jointly with another may not be distributed by will? Or that life insurance may or may not be distributed by will depending on who is named as a beneficiary? Or that the same can be said of individual retirement accounts, pension plans and other assets? Or that a spouse has a right to a car and certain other items, as well as to a large share of your property no matter what your will may direct? The best estate plan recognizes that your will is only part of your total plan for the distribution of your property. To create the best will and estate plan for you, make an appointment with your attorney to discuss preparing your will as well as your overall estate planning wishes.

If you plan properly and have your plan reviewed periodically, you may lower or eliminate the tax burden on your estate and leave more to your beneficiaries

Before you make a will, you should also know how estate and income taxes affect you and your assets. The federal and New York tax laws change often as a result of various tax reform acts. So you may not be up-to-date with these complex and frequently changing laws. Also, you may be unaware that you can choose which

of your beneficiaries pay the estate taxes. If you do not choose how your estate taxes will be allocated, the tax burden will be allocated among your beneficiaries according to statutory rules that may not be in accordance with your wishes. An attorney can help you draft a will and create an estate plan that addresses these issues. If you plan properly and have your plan reviewed periodically by an attorney, you may be able to reduce or eliminate the tax burden on your estate and leave more to your beneficiaries.

Discuss the question of a fee with your lawyer in advance

You may and should discuss the question of a fee with your attorney **in advance.** The cost of preparing a will depends on the amount of time your attorney spends on the matter, the complexity of your assets, and your dispositive wishes. In small estates, when a will contains no complicated provisions and need not address any unusual problems, the fees may be very modest. Remember, the advice of an expert may prove invaluable. Making a will is one of the wisest and potentially most important investments of your life.

This pamphlet, which is based on New York law, is intended to inform, not to advise. No one should attempt to interpret or apply any law without the aid of an attorney. This is particularly true of trusts and estates law. You should consult an attorney before making decisions in this area. This pamphlet is produced by the New York State Bar Association in cooperation with the Elder Law and Trusts & Estates Law Sections.

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