{ Legal }

WHY YOU NEED A WILL

Take control of your assets before someone else does |

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There are a countless number of reasons why you should have a will—the most widely known reason being that if you don't make a will, the government will make one for you.

By default, your property will be distributed at death according to the intestacy laws of the state in which you reside at the time of your death. Under New Jersey intestacy laws, this means that your property will be divided among your spouse or civil union or domestic partner, descendants, parents, and other next of kin. State law determines who gets what and in what proportions.

The most basic reason you should have a will is to control how your assets will be distributed. In this article, we review some of the less obvious, and often more important, reasons why you should make a will and keep it up to date.

Deciding who should serve as guardian for minor children is, for many parents, the single most difficult decision to be made in a will, as well as the most important reason to have one.

DIRECT WHO MANAGES YOUR ESTATE

Following your death, someone must serve as personal representative of your estate—to take responsibility for gathering your assets, paying debts and expenses of administering your estate, and distributing your property. If you have a will, you can nominate a personal representative, and you can waive the requirement that your personal representative post a surety bond (the cost of which is otherwise borne by your estate). If you do not have a will, state law determines which of your family members (or others) can be appointed and in what order.

Sometimes state law gets it right—as to who gets a decedent's property and who manages the estate—but the result is just as likely to be inconsistent with what you would have wanted. For example, if a divorced parent dies without a will, state intestacy laws say her property will pass to her children—the outcome she likely would have intended. But state law also dictates that if the children are minors, their surviving parent (the decedent's former spouse) has the right to administer her estate. What if the breakdown of the marriage was a consequence of the former spouse's financial irresponsibility? His appointment to manage funds for the children may be the last thing the decedent would have wanted. She could have nominated her parents or a trusted family member or friend to manage her estate, but if she failed to do so, the legal presumption is that the children's father is the appropriate person to handle the job. It still may be possible for the decedent's family to overcome that presumption, but a judge will have to decide. The expense, delay, and hard feelings engendered by the litigation could have been avoided had the decedent appointed an executor.

DESIGNATE WHO WILL CARE FOR YOUR CHILDREN

Deciding who should serve as guardian for minor children is, for many parents, the single most difficult decision to be made in a will, as well as the most important reason to have one. Should both parents die without appointing a guardian for their minor children, a court will choose one based on what the court discerns to be in the children's best interests. Apart from the fact that the judge's assessment of your children's best interests may not coincide with yours, failing to appoint guardians in a will leaves your family members in the unenviable position of trying to divine what you would have wanted and, in the worst case, fighting over who should be appointed.

PROTECT ASSETS FOR YOUR FAMILY

There are many reasons to create trusts for beneficiaries: to protect assets from claims of creditors, from a spouse in the event of divorce, or from the beneficiary's own unwise choices; to manage assets for children or grandchildren until they reach an age or stage in life at which they are mature enough to handle their inheritance; to preserve assets for a disabled or incapacitated beneficiary without jeopardizing qualification for Medicaid, Social Security Disability Insurance, or other means tested programs. The list of reasons for creating a trust, and the types of trusts that may be created in response to those needs, is long and beyond the scope of this article. Suffice it to say that whether creation of a trust is warranted, and the types of trusts that can be created to meet a particular need, is something that you should discuss with your legal advisor.

PROTECT YOUR PARTNER

In New Jersey, a spouse or domestic or civil union partner has certain rights to all or a portion of a deceased spouse's or partner's estate. In the absence of a marriage or civil union relationship, and without a will, your long-term partner will not benefit from your estate. Your partner may also be excluded from making decisions regarding your health and medical care and funeral arrangements. Furthermore, even though the rights of a domestic or civil union partner are protected under New Jersey law, those rights will not necessarily follow the couple if it moves to another state that does not recognize these relationships.

LIMIT EXPOSURE TO ESTATE AND INHERITANCE TAXES

A carefully drawn estate plan can minimize federal and state death taxes. It is often possible to reduce or eliminate estate tax on the first spouse's death and to reduce the tax on assets passing to children or other beneficiaries after both spouses have died.

Proper planning to minimize or avoid estate and inheritance taxes is even more critical for same-sex spouses or partners, who, at the time of this writing, are not provided the benefit of the federal estate tax marital deduction nor the benefit of a state estate tax marital deduction in the many states that do not recognize same-sex marriages or civil unions.

CONTRIBUTE TO CHARITIES NEAR AND DEAR TO YOUR HEART

Under state intestacy laws, your property will be distributed to your spouse and other family members—but not to charitable beneficiaries or friends. You can make a difference to your community and the world by leaving a gift to charity in your will, and there are ways that the impact of your gift can be leveraged through proper planning and use of charitable giving strategies.

MAKE A DIFFICULT TIME LESS DIFFICULT FOR THOSE YOU LOVE

The death of a loved one is incredibly difficult, and the grieving period is only made worse when grieving relatives are left to argue about what the decedent would have wanted. Leaving a will does not guarantee there will not be conflict, but clearly spelling out in a will how your estate is to be managed and distributed minimizes the potential for conflict. MJB

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EXTRA STEPS

A WILL IS ONLY PART OF THE PLAN

Be sure to also include these important documents

Your estate plan should include a will, but it should also include documents to provide for managing your affairs if you become incapacitated or disabled, for making decisions about your health and medical care if you are unable to make those decisions for yourself, and for distributing assets that pass outside of your will. A comprehensive estate plan includes these additional documents:

- Beneficiary designation forms for life insurance, annuities, TOD or POD accounts, IRAs and other qualified retirement plan accounts. These assets pass outside of your will in accordance with governing contract provisions. Appropriate beneficiary designations are critical to coordinating payment of these assets with the rest of your estate plan. For example, if you name a child as beneficiary of your IRA, the account documents may not allow the account to be distributed to a minor. Someone would then have to seek court approval prior to releasing funds to or on behalf of your child.
- A general durable power of attorney or a lifetime trust is a useful vehicle by which you can name an agent or trustee to manage your assets and affairs during your lifetime. Either of these documents may be made effective upon signing or upon your disability or incapacity.
- An advance directive for healthcare can include both a proxy directive giving someone the power to make healthcare decisions for you if you can't make those decisions for yourself, and an instruction directive expressing your wishes about how healthcare decisions should be made on your behalf, typically in end-of-life situations.