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# Why You Need a Will



NEW YORK STATE BAR ASSOCIATION

## Why you need a Will

During life you manage your assets. At death, assets that have no named beneficiary or are not owned jointly still need to be managed. A Will appoints a person (“Executor”) to continue asset management and directs distribution of your assets to persons or organizations you have named.

Many people think that a Will is only for those who want to establish trusts or reduce estate taxes. Indeed, those benefits may be important for some. But the primary reasons to make a Will include: (1) to leave your property to your loved ones in the manner and proportions you choose; (2) to select who should handle the administration of your estate; (3) to avoid the cost of an administration bond; and (4) to allocate any estate taxes which may be due among your beneficiaries according to your wishes, rather than by statutory rules.

## If you die without a Will

In the absence of a Will, a court will appoint an administrator to collect and distribute your assets. Depending on the circumstances of your estate, the administrator could be a family member or a public official.

In addition, without a Will, New York statutes dictate the distribution of your assets depending on the makeup of your family.

These rules, known as the “Distribution Rules of Intestacy,” reflect what the New York State Legislature deems is preferable in most situations. You must consult with your attorney to determine how these statutes might apply to a specific situation, but generally in New York 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;

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- 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; or
- one or more grandparents or their descendants, but none of the closer relatives: half goes to the maternal side and half to the paternal;

Generally, where “descendants” include a mix of generations, living children take a full equal share, and the children of predeceased children then divide equally the 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**

If you have young children, it is especially important that you have a Will. If any of your children are under age 18 at your death, a court-appointed guardian may 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 likely will be required to post a bond, the premium of which will be paid from the child’s assets. Moreover, if any portion of your assets is needed to pay for your child’s education, clothing or living costs, prior court approval will be necessary. A court-appointed guardian must formally account for all income and expenses, the preparation and filing costs of which will be paid from the child’s assets. In addition, the range of investments available for funds held by the guardian may be limited. Thus, if the guardianship lasts for a period of

years, 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 leaving any child under age 18, you should provide not only for a guardian of the property of your minor child, but also, and perhaps more importantly, you should name a guardian of the person for the minor child. A guardian of the person is given custody of the child during minority. While the designation in your Will is subject to court review and confirmation, courts usually will give deference to the wishes of the deceased parent(s). Thus, with a properly drafted Will, you can provide the court with valuable guidance on who should be appointed as guardian of your minor children.

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

Your Will names an Executor (or Executors) as the legal representative(s) of your estate to administer and distribute your property. Unless you specify otherwise in your Will, Executors will receive compensation in accordance with New York statutes. An Executor can be a relative, a friend, your lawyer, or a bank or trust company that specializes in the handling of estates.

The choices of one or more Executor(s) are yours **only** if you make a Will. Having qualified people help with your affairs can be just as valuable after death as during your life.

## **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 online? 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. New York State has very specific rules regarding the execution of Wills. If the rules are not followed, you will not have a document which a court can recognize as your Will. An invalid will can result a court-appointed administrator and application of the Distribution Rules of Intestacy summarized previously. 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 is not distributed by Will? Or that life insurance is not distributed by Will unless your estate is named as 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 your car and other personal property, as well as to a large share of your assets despite 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, so it is important to stay informed of the latest developments. Also, you may be unaware that you can choose which of your beneficiaries will pay estate taxes. If you do not make a choice, 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 consider these and other complex issues, and prepare a Will and a suitable estate plan. 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 fees with your lawyer in advance

You should discuss fees 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 without unusual problems and where a Will contains no complicated provisions, 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 Trusts & Estates Law and Elder Law and Special Needs Sections.*



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