

Professional Notes

SPRING 2020

TAX & ESTATE PLANNING

Consequences of Dying Without a Will in New York State

It is estimated that more than half of American adults do not have wills, and while it is easy to understand why the typical 20-year old doesn't, it's harder to understand for a 50- or 60-year old. Death and taxes are surely no less certain than they were in the era of Benjamin Franklin's famous dictum. Is it that some people think they don't have enough property to need a will? Is it simple avoidance because they're not planning on dying anytime soon? Is it the superstitious belief that the making of a will might accelerate the inevitable? Whatever the "reason," it is almost always insufficient to justify the result, which is to die intestate (i.e., without a will).

A will, at its most basic level, is a set of instructions stipulating who gets what and who manages the testator's property immediately after the testator's death. For those with adequate wealth, it is also one of several documents that, taken together, create an estate plan designed to minimize estate taxes and ensure an orderly administration of property following the testator's death. A will also is used to appoint a guardian if there are minor children.

Written by Jane L. Wilton, General Counsel, The New York Community Trust

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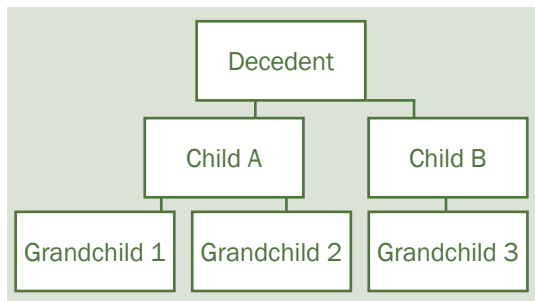
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Distribution of assets if there is no will

A will ensures assets go to the people and charities your client chooses. Otherwise, assets will pass in accordance with state intestacy laws, except to the extent the assets pass directly to named beneficiaries by operation of law—as may be the case with retirement accounts or life insurance proceeds or property held in joint and survivor name. Assets that pass under the terms of the will—or, in the absence of a will, by intestacy—are referred to as the probate estate.

For a New York resident without a will, a surviving spouse inherits the entire probate estate if there are no children or other descendants. If there are descendants, the surviving spouse gets the first \$50,000 and the balance is divided one-half to the spouse and one-half to the decedent's descendants.

If there is no surviving spouse but there are descendants, the entire probate estate in an intestacy will pass to the deceased person's descendants.



These children, grandchildren, or even great-grandchildren will take *by representation*. For example, if the descendants' distributable portion of the estate were \$100,000, and if Child A, in the diagram above, predeceased the decedent but Child B survived, Child's A's surviving children (Grandchildren 1 and 2 in the

diagram) would share their deceased parent's share equally (\$25,000 each) and Child B would receive \$50,000. However, if Child B had also predeceased the decedent, all three grandchildren (1, 2, and 3) would share the distributable amount equally (\$33,333 each). (This scheme is different from a so-called *per stirpes* division, which appears in many wills; in a *per stirpes* distribution, Grandchildren 1 and 2 would each receive \$25,000, and Grandchild 3 would receive \$50,000 if Child B predeceased).

If there are no descendants and no spouse, the probate estate instead passes to the decedent's parents, equally, or all goes to the surviving parent. If no parents survive, the estate passes to the deceased person's siblings (or children of a deceased sibling). Half siblings count the same as whole siblings.

In the absence of a surviving spouse, parent, sibling, or descendants of siblings, the probate estate generally will pass one-half to the deceased person's mother's relatives, and one-half to the father's relatives, according to a specified order that begins with grandparents on each side and continues with collateral relatives as distant as the decedent's first cousins once removed (great-grandchildren of the decedent's grandparents). If the closest surviving relative is a second cousin (a great-great grandchild of the decedent's grandparents) or more remote relative, the estate passes ("escheats") to the State of New York. The absence of a will raises the possibility that the decedent might benefit distant family members with whom the decedent had no close relationship, or that the decedent's property might pass to the state, rather than favored charitable causes such as The New York Community Trust. Intestacy rules vary from state to state.

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KATHERINE

Katherine died without children, and her husband predeceased her, as did her siblings. She provided bequests in her will to her brother's three children (i.e., her nieces and nephews), to whom she had grown very close, and she left nothing to the three children of her other sibling. She left her residuary estate to The New York Community Trust to benefit elders in her community, a cause she cared about deeply. In the absence of a will, all of her estate would have gone to her nieces and nephews—and would have been divided among them equally.

JOE

Joe was a prominent LGBTQ activist. During his lifetime, he gave generously to LGBTQ causes and served on the board of several organizations providing assistance to LGBTQ youth in New York City. He spoke to each organization about making a bequest, but he was reluctant to choose one—and he was superstitious about making a will. He died unexpectedly at 62, without a will, and his estate passed to his sole intestate heir, a half-brother, Eric, in another state. Joe had not spoken to Eric since a dispute over Thanksgiving dinner in 2011 when New York had legalized same-sex marriage, which Eric opposed. By dying intestate, Joe missed an opportunity to establish a fund at the New York Community Trust to help LGBTQ youth in the New York area.

If there are no surviving family members, the probate estate will escheat to the State of New York.

FRANK

Frank provided for his estate to go to a trust for his wife, who was French, and at her death any amount remaining was to pass to The New York Community Trust; the wife was able to withdraw the trust principal. At the time of her death in France, that trust was fully expended. Many years after her death, an asset passed under a relative's will to Frank, who had died many years earlier. New York State took the position that the asset passed outright to the wife, and because she was dead and no living heirs could be identified, that it should escheat to the state. We took the position that the asset passed to the original trust, with the remainder to us. The matter was settled, and despite Frank's apparent intent to provide for The New York Community Trust, part of the asset did get paid to the state.

For an individual who owns a business, has unusual assets, wants to provide for charity, such as by creating a charitable fund at The New York Community Trust to carry out a charitable interest, or has a family member with special needs, a properly executed estate plan including a will is a must.

Updating a will

A will should be updated if there is a major life change. While this can be done by codicil, it is usually recommended that a new will be signed, so that anyone who had had an interest under the original instrument but has been omitted does not necessarily have to receive notice of the probate process.

Major life events that call for updating one's will include:

- Marriage, divorce, or remarriage
- Birth/adoption of children
- Death of a person named in a prior will
- Retirement

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- Change of financial circumstances—either an increase, such as through an inheritance or sale of business, or a loss, such as a bankruptcy or significant decrease in value of major assets

Finding a lawyer

The best way to find a lawyer to prepare a will probably is to ask friends for a referral. Alternatively, the local bar association may have a referral service. If finances and ownership of assets are fairly straightforward, an online free will may be better than nothing. But it is strongly recommended that even this be reviewed by an experienced lawyer.

Many lawyers have a checklist to help a prospective client identify their assets, including insurance and retirement accounts; family members; and others—including charity—that they want to benefit. Beneficiary designations on any accounts also must be taken into consideration. Periodically, it is a good exercise to ask insurers and custodians of pension assets to confirm who is on file as the beneficiary of life insurance and plan assets. Because the formalities for changing these designations are so limited, it is a very easy thing to update to align with current wishes.

Identifying an executor

The executor generally submits the will for probate and marshals the estate's assets. As a practical matter this may mean supervising cleaning out a home or apartment, and locating financial and other assets. When a lawyer drafts a will, he or she normally will ask the client for a list of all assets, which will be used to help the executor.

Identifying an executor is often a stumbling block to finalizing a will. For a person without a spouse or children, the most obvious person is a trusted friend. But if one's friends are the same

age or older, there is a good chance they won't survive—or won't have the desire to handle the estate administration—in which case naming a potential successor is good practice. Another option is to name a bank or other institutional executor, although the bank should be consulted on its willingness to serve. In some cases, a lawyer who drafts the will may be willing to serve. In New York, the client will be asked to execute a disclosure, separate from the will, acknowledging that the attorney may receive a full statutory commission as executor and be paid reasonable compensation for providing legal services to the estate. This must be witnessed by someone other than the designated executor.

Who submits a will for probate?

Individuals are often reluctant to tell family members that they have a will and where the original is, but that is of critical importance. Commonly, the original will is stored safely in an attorney's safe or vault, but it is incumbent upon the client to leave instructions for the executor or next of kin about locating that original document. It should not be kept in a safety deposit box, which will be sealed upon the owner's death.

JEAN

Jean had provided for a substantial bequest to The New York Community Trust and had shared a copy of her will with us. She was estranged from her family and family members took the position that she had died intestate—which would have meant the assets were to pass to them under intestacy rules. Because we had a copy of the will, we were able to locate the attorney who had drafted it; the original will was in the attorney's former law firm's vault. The institution named as executor declined to serve and declined to submit the will for probate, leaving The New York Community Trust as the only party in a position to protect her wishes; the public administrator stepped in as executor. It is fortunate Jean had shared the will with us.

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Conclusion

A will ensures assets go to the people and charities your client chooses. In the absence of a will, assets will pass in accordance with state intestacy laws, except to the extent the assets, such as IRA accounts, may pass directly to named beneficiaries by operation of law. A will should be updated if there is a major life change that may affect intended beneficiaries.

For further information, see:

EPTL §4-1.1

SCP §2307-A

nycourts.gov/courthelp/WhenSomeoneDies/intestacy.shtml

New York City Bar Association legal referral service at nycbar.org/get-legal-help/

Majority in U.S. Do Not Have a Will, news.gallup.com/poll/191651/majority-not.aspx

Creating a charitable fund at death:

nycommunitytrust.org/information-for-professional-advisors/forms/

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Contact:

Jane L. Wilton, General Counsel

(212) 686-2563

janewilton@nyct-cfi.org

nycommunitytrust.org/advisors



909 Third Avenue, 22nd Floor
New York, NY 10022
(212) 686-0010
nycommunitytrust.org



900 Walt Whitman Road, Ste. 205
Melville, NY 11747
(631) 991-8800
licf.org



210 North Central Avenue, Ste. 310
Hartsdale, NY 10530
(914) 948-5166
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