Everybody Has an Estate (Really!)
Which is Why Everybody Needs an Estate Plan

by Michael Bond, Esq.

The most common misperception I encounter when talking to friends, family, and potential clients about estate planning is that they don't think they have an estate in the first place.

For many, the word "estate" has come to be associated only with manor houses and trust funds, but the reality is that your estate is anything you leave behind at death, be it a mansion or mobile home; a billion dollars or a dime.

Since it has now been established that you do indeed have an estate, it is important that you engage in some estate planning with the guidance of an attorney.

For starters, if you don't take steps to make sure your estate passes to those you want it to pass to, a judge will decide who gets what based on your state's intestacy laws, which are triggered when you die without a Will.* Intestacy laws attempt to mirror what the average person would want done with their property had they prepared a Will but, as you will see, such statutes can fall far short of the mark.

Next, if you have minor children, part of your estate plan will include designating who you would like to serve as guardian for them should they be orphaned. If there is no Will containing a guardianship designation, then a judge will need to make the designation based on what he or she decides is in the best interests of your child.

More still, a well-designed estate plan includes, at a minimum, a health care proxy designation and "living will", as well as a power of attorney.

This article first provides an overview of New Jersey and New York's intestacy laws to give you an idea of what might become of your estate in the absence of a Will. Next, it explains what might happen if guardianship for minor children is not designated in a Will. Finally, it briefly discusses the purpose and benefits of health care proxies/"living wills" and powers of attorney.

The Effects of Intestacy

As mentioned at the beginning of this article, each state has a law that dictates what happens to the estate of a deceased person (known as the "decedent") in the event the decedent dies without a Will. These laws are called intestacy statutes, and they *also* apply when a person creates a Will that is not drafted or executed with the required formalities.

Although intestacy statutes aim to reflect what the majority of people would want done with their estates upon their deaths, they are by necessity one-size-fits-all solutions. Intestacy statutes know nothing about your particular family structure or dynamic; they know nothing about how many assets you have or what those assets consist of.

* For brevity's sake, only the term "Will" is used in this article even though there are other estate planning instruments, such as Trusts, that can accomplish the same objectives, depending on your particular circumstances.

For example, under New Jersey's (and to a large extent, New York's) intestacy laws, the only time a surviving spouse or domestic partner will receive the entirety of the decedent's estate is if the decedent dies with no surviving parents or surviving descendants (children, grandchildren, etc.). If there are surviving descendants and/or parents, they all receive a percentage of the estate, as determined by the statute. Although most people who create Wills leave their entire estate to their surviving spouse or partner, it might not seem unreasonable on first glance for the intestacy statutes to provide for the decedent's children, grandchildren, and/or parents in the absence of a Will.

But what if the surviving spouse or partner has minor children to take care of, yet has to hold a portion of the decedent's estate in trust for those children until they reach adulthood, and as a result doesn't have enough assets to raise those children to adulthood in the first place? What if there are adult children (or even the decedent's grandchildren or parents) who are all entitled to a share of the estate, thus forcing the surviving spouse or partner to sell the family home in order to liquidate enough assets to give everyone their share?

Intestacy laws are not concerned with whether you want to provide different gifts to different children, based upon their special needs or other factors. Intestacy laws are not concerned with whether your surviving spouse or partner needs your estate's assets in order to provide for his or her basic needs, while your surviving parents have no need for your money whatsoever. In fact, intestacy statutes don't care whether you even have a relationship with your parents or children at all. Intestacy laws also don't care about distributing your estate in a way that provides the maximum tax benefit to those who inherit your estate.

As you can imagine, there are numerous scenarios that might play out in the absence of a Will that can lead to entirely unwanted, even tragic, outcomes. Finally, it is important to remember that, even with a Will, you will be deemed to have died without one if your Will was not drafted properly and executed with the necessary formalities. It is, therefore, very important to see an estate planning attorney to help ensure that all the t's are crossed and all the i's dotted.

<u>"Best Interests of the Child"?</u>

A Will that is drafted by a competent attorney will designate who is to raise your minor child (or children) in the event both parents die before the child reaches age 18. Making the guardianship designation is often the hardest decision people face when planning their estate. However, it is also arguably the most important decision. (For more information, please see "Choosing a Guardian for Your Minor Children", available under the Articles tab at www.michaelbondlaw.com.)

Your estate planning attorney can and should discuss with you the issues to consider when making a guardianship designation, and should also see to it that the designation is not only included in your Will, but also in a separate document designed to govern if both parents are alive but incapacitated. This is important because the provisions of a Will only take effect upon a person's death, and thus your wishes for your child's guardianship, as stated in your Will, will have no effect if you are alive but unable to care for the child.

So, what happens if you and your child's other parent die while the child is a minor, and you have not designated a guardian in your Will? The answer is that a judge will decide who raises your child, based on a "best interests of the child" standard. But, as you can imagine, the "best interests of the child" standard is very subjective. Should the child's grandparents raise the child? What if they are financially or physically unable to do so? Or, what if there are two sets of grandparents, both of whom want to raise the child? Even if both sets of grandparents are perfectly fit to raise the child, is it in the child's best interests to be shuttled between both sets of grandparents? If not, which set should the judge choose? And how should the judge choose? Based on financial means? The emotional attachment between grandparents and child? The wishes of the child? The age of the grandparents?

Or maybe someone entirely different wants to raise your child. Perhaps your brother or sister or best friend. Regardless of who is seeking the responsibility, the judge will have to hold lengthy hearings to make the determination. Evidence will need to be gathered and presented to the judge. Oftentimes, investigations and interviews must be conducted, audits of the potential guardian's assets must be undertaken, etc. These things can be very expensive and lead to hurt feelings and bad blood between family members and other loved ones. It is also a time-consuming process—and in the meantime the judge will have to appoint someone to temporarily look after your child while a permanent decision is being made. This will delay your child's adjustment to his or her new home and will be a time of great uncertainty and insecurity for the child while he or she is also trying to cope with your loss.

Having a Will is the best way to avoid the heartache, time, and expense that can stem from a judge deciding who will raise your child. Far better is for you to make the decision and have it memorialized in your Will. This will give you peace of mind that, should the unthinkable come to pass, your children will be raised by the people *you* want raising them and not by whoever a judge decides should raise them.

Other Elements of a Sound Estate Plan

In addition to a Will, every estate plan should include a health care proxy and "living will", as well as a power of attorney.

A "living will" (or advanced directive) is a written statement of your wishes regarding medical treatment, including what life-sustaining measures you do or do not want provided on your behalf, as well as at what point those measures should or should not be taken. The statement is to be followed if you are unable to give instructions at the time such medical decisions need to be made.

A health care proxy, on the other hand, empowers another person of your choosing (your "health care agent") to make health care decisions for you if you cannot do so yourself. The health care proxy defines your agent's scope of authority, and can also limit that scope if you desire.

The health care proxy and living will are often combined into a single document that can also express your wishes on organ donation, autopsy, and disposition of remains.

Next, a Power of Attorney is an authorization granted by you to a person of your choosing to act as your agent and

to make binding legal and financial decisions on your behalf, either under all circumstances or under specifically designated circumstances. The power usually comes into effect immediately upon the signing of the document, so it is important that you choose a person who you truly trust. Although a power of attorney can also be drafted to take effect only upon your incapacity, taking that approach raises the issue of what constitutes incapacity, and who can make that determination.

Determining incapacity can be a time-consuming process and, in the meantime, there will be no one who is able to take care of your affairs, such as paying your bills, maintaining your home, running your business, etc. Until a determination of your capacity is made, those tasks will go unattended to.

If you have questions or concerns about which type of power of attorney to grant, your estate planning attorney can walk you through the various considerations.

However modest your estate may be, you *do* have one, and you should develop a plan for it so that what you've worked for all your life will be passed down to those you want to have it after you're gone. If you have minor children, the person or persons who will raise them and shape their futures must be designated. And you need to look after yourself, too, by making known your wishes with regard to end of life medical treatment, while also giving someone you trust the ability to make health care decisions for you—and to take care of your other affairs, too—should you become incapable of doing so.

Otherwise, the state can and will do it for you.

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