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A STRATEGY SPOTLIGHT

Importance of a Will

A will may be the most overlooked document in a person's estate plan, but it may also be the most important. This becomes clear when you examine the issues of property distribution and the probate process. Once you decide that you need a will, you'll need to understand will requirements and proper storage of this record.

A will (also known as Last Will and Testament) is an instrument executed by you that complies with the formalities of state statutes, in order for you to make a disposition of your property (both real and personal) after your death. A will is also important in regard to appointing the guardians (and successors) for any minor children. It can be amended or revoked any time during your lifetime, allowing you the right to dispose of your solely owned property in accordance with your wishes. The need for a will is best demonstrated by the following example: A mother intends to leave her daughter a wedding band that has been passed down from generation to generation, but the mother does not have a will. Without a will detailing such a bequest, that asset could end up in someone else's possession.

Upon your death, if you do not have a will or have failed to effectively execute a valid one, then you are deemed to have died "intestate" (without a will). This is important because without it, any property that you owned will be distributed in accordance with state law, which is based on who survives you. Many states[1] distribute property in different ways. Here are some examples:

- If the decedent is survived by a spouse and children, then the spouse takes all of the assets.
- If the decedent is survived by a spouse and children, the spouse receives an allowance ($25,000 to $250,000) of half of the personal property and half of the real property, with the remainder being distributed to the children.[2]
- If the decedent is survived by their parents, a spouse, and no children, the surviving spouse receives an allowance amount (such as $200,000) and half the remaining property, and the parents get the other half.
- If the decedent is survived by only children, then the property passes in equal shares to the living children and to issue of a deceased child by the right of representation.
- If the decedent is survived by parents, but no children and spouse, then the property will pass to the parents in equal shares or in its entirety to the survivor of them.
- If the decedent dies with no spouse, children, parents, or siblings, but is survived by other family relations (i.e., nephew or niece), then the property will pass to the nearest blood relations, "kindred."
- If the decedent leaves none of the above referenced family members or blood-related persons, then the property passes to the state in which the decedent passed away.

Aside from the distribution issues mentioned above, the probate process must be considered. One common misconception is that having a will avoids the probate process. This is not true. In fact, the probate process is designed to oversee the division of the property stated in your will. Therefore, if you have a valid will, the probate court will admit it into the record and divide your property in accordance with your wishes. This process ensures that all debts (including funeral costs and taxes) are paid before making final distribution of assets to your named beneficiaries. Because of this, the distribution of the property can be delayed until the court determines that all matters have been addressed. Probate costs are essentially the fees you pay to ensure your will is followed accordingly.

In order to have a valid will, the law in all states requires that you be at least 18 years old and of sound mind. This means that you understand what you own at the time the will is made and that you understand what you are giving to the named beneficiaries. There are certain requirements that must be met in order for a probate court to treat the will as valid. The basic requirements are:

- The will must be in writing (except in certain situations, which are beyond the scope of this article).
- It must be signed by the person making the will.
- It must be witnessed by at least two people (disinterested – meaning they will receive NO benefits from your assets) who sign the will in the presence of the will maker and state that they witnessed the maker's intention to make the will.
- The witnesses also certify that it is their belief that the maker was of sound mind, over the age of 18, and not under any undue influence when making and signing the will.

A will can also be used to address estate tax considerations, and once it has been made, it remains in full force until you revoke it. Due to the legalities involved in making a will and the risk of an ambiguity in its drafting, it is better to have an attorney assist you.

Finally, when storing your will, remember to put it in a secure place, which should be accessible by your spouse, other trusted family members, or attorney upon your passing. Sometimes people look to place their wills and other important documents in a safety deposit box, which seems like a great idea. However, if you are the sole party listed on the deposit box, then your representative will not be able to access the box without you in the event of your death. Thus, they would have to go to court to get court approval/authorization to allow your spouse or representative to access the deposit box, an unnecessary, troublesome, and expensive process.

Talk to your personal tax or legal counsel today to discuss drawing up a new will or changing an existing one. This document may help your family handle your estate in the way that you intend at a difficult time and provide you peace of mind.

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