

THREE CRUCIAL STEPS IN NEW YORK ESTATE PLANNING

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Introduction

So we all know that we are going to die eventually. Why then, does it not surprise us that more than 60% of Americans die without a will?

Well, the answer to that is easy: none of us like to think about the possibility of our own death. Even more so, we especially don't want to think about the possibility of dying *unexpectedly* or *suddenly*.

However, the reality is that we all die sooner or later and unfortunately some people will die much sooner than they could have ever expected. Failing to carefully plan what will become of your estate may result in the people you love losing out on property that you want to pass to them upon your death. In addition, failing to take the time to plan may result in extra administration and tax costs for your loved ones.

Taking the time to carefully plan your estate will allow you to have control over what will become of your assets after you die. It is important to have a well thought out estate plan regardless of the size of your estate in order to make sure you have full control over your assets and who they will pass to. In addition, proper planning will allow you to minimize taxes and attorneys fees. For these reasons, your estate plan should include a durable Power of Attorney, a Validly Executed Last Will & Testament, and Medical Directives.

Last Will & Testament

The most important estate planning tool and first step you should take when developing your estate plan is to execute a last will and testament, with the help of an experienced estate attorney.

A Last Will & Testament is a legally binding document which directs your Executor to distribute your property as specified by your will. The will must be executed properly and stored in safe place. Hiring an estate attorney to ensure your will is validly executed is crucial to your estate plan. A validly executed Last Will & Testament is vital to your estate plan because without it, your property will pass according to the laws of intestacy.

Under New York Intestacy Law, property passes in the following order, depending on whether the decedent is survived by:

- (1) Spouse and Children - first \$50,000 and 1/2 of residue to spouse, remaining to children;
- (2) Spouse and No Children (entirely to spouse)
- (3) Children and No Spouse - whole to children
- (4) One or both parents, No Spouse or Children- whole to parent or parents
- (5) Children of Parents, No Spouse, Children, or Parent - whole to children of parent
- (6) One or more grandparents or Children of Grandparents, No Spouse, Children, Parent or Children of Parents - 1/2 to surviving paternal grandparents

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(or their children if grandparent is deceased) and ½ to surviving maternal grandparents (or their children if grandparent is deceased))
(7) Great grandchildren of grandparents, No Spouse, Children, Parent, Children of Parents, Grandparents, Children of Grandparents or Grandchildren of Grandparents - 1/2 to the great grandchildren of the paternal grandparents and ½ to the great grandchildren of the maternal grandparents

Having your property pass by intestacy may not reflect how you want your property to be distributed. For one thing, the laws of intestacy do not include nonmarital children, partners to whom you are not married, or friends. In addition, up until recently, a surviving same-sex partner in New York would not have qualified to take under the laws of intestacy. Unfortunately, without a validly executed will, many a time, a "laughing heir" will inherit your property simply because they are a blood relative. This laughing heir will take, even if you would have preferred a close friend inherit your property because that is what the law mandates. For these reasons, it is very important you make specific dispositions to those persons whom you want to leave some legacy to.

More importantly, having a validly executed will does more than just give away the things you own. A will is fundamental to making certain your children are properly taken care of when you die.

The most important asset a person has is her or her children. Not having a will

could prove disastrous in the event that you, your spouse or both of you should die leaving behind minor children. Many parents put off writing a will because they cannot agree on a guardian. Still, you need to sit down and come to an agreement. Without a will, your children may be forced to live with a relative you don't want them to live with, or a relative who doesn't want them. If more than one person comes forward to seek custody of your child, your family may have to spend tens of thousands of dollars fighting for custody in court. If no one comes forward, your children may be put into foster care. A simple will can eliminate these problems and ensure that your children are taken care of by someone you trust.

A validly executed will also gives you the choice to nominate an Executor for your estate. Choosing someone you trust as executor of your estate is not something to take lightly. An executor is responsible for maintaining and taking care of your estate from the moment you die until your estate is closed. This is a position that requires careful attention and comes with many responsibilities. The executor is responsible for paying taxes, paying off creditors, notifying companies of your death, maintaining property until the estate is closed, making court appearances on behalf of the estate, taking an inventory of the estates assets, and finally distributing the assets. If you don't have a will naming an executor, the court will appoint someone for you, and this is usually the person who first petitions the court. This person may not necessarily be the person you would want to carry on this role.

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Finally, a well planned will may help minimize estate taxes. It is important to discuss how to best reduce estate taxes with an experienced estate attorney who is thoroughly informed about gift and estate tax.

Durable Power of Attorney

The second step in developing your estate plan is to execute a Durable Power of Attorney.

A durable power of attorney allows someone to make financial decisions for you when you are not able to do it yourself. The way we set those up is that they usually kick in when your doctor issues a written opinion that you are no longer capable of making your own financial decisions.

A durable power of attorney creates a legal relationship between you (the principal) and the person you designate to make financial decisions for you in the future (your agent). The agent is the person you, as principal, appoint to make financial decisions on your behalf, if and when you should become incapacitated. By signing the power of attorney, you agent agrees to act in accordance with your instructions. If there are no instructions, the agent agrees to act in your best interest. Once again, the agent will be able to make financial decisions only if you become unable to do so yourself.

The durable power of attorney is such an important estate planning tool for any person because it allows you to choose a person you trust to act on your behalf. In addition, having a durable power of

attorney will save time and money for your loved ones.

If there is no durable power of attorney and you become incapacitated, the court will have to appoint a guardian to represent you. As most any court proceeding, having a guardian appointed is time consuming and costs money. In addition, the judge can choose whoever he wants as guardian and may not necessarily choose the person you would have chosen if you executed a durable power of attorney. Court appointed guardians usually have to seek court approval before taking any action and therefore this causes further delays, whereas an agent appointed in a durable power of attorney would immediately be able to act on your behalf.

You might opt for a different type of power of attorney for your estate plan – a regular power of attorney that takes effect right away, or a springing power of attorney that takes effect based on a condition.

A New York estate attorney will discuss with you which power of attorney is best suited for you and your particular situation. In addition, the estate attorney will carefully tailor the document to specify when the power of attorney will become effective.

Advance Directives

The third and final step you should take when planning your estate is to execute medical directives.

These documents allow you to communicate your decisions regarding end of life care. The New York Health

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Care Proxy Law calls for the appointment of an agent to make health care decisions on your behalf in the event that you become incapacitated.

It is important that you pick a person whom you trust completely and someone who knows your wishes regarding end of life care.

The health care proxy can be as general or as limited as you like.

Having a health care proxy is crucial because hospitals and doctors must follow the agents decisions as if you were making those decisions yourself.

The health care proxy will only go into effect upon your incapacity to make your own medical decisions and communicate on your own behalf.

In addition to the Health Care Proxy, a living will should also be executed. A living will is a document which expresses a persons wishes regarding future medical care, including but not limited to, their feelings on prolonging the process of dying and end of life decisions.

New York does not have a specific statute regarding living wills, but the Courts have used living wills as clear and convincing proof of a patient's wishes. Therefore, a properly executed health care proxy, along with a living will, will ensure your wishes regarding medical care are followed.

In addition, having both documents will provide substantial proof of your wishes if someone should challenge decisions made by your agent.

Consider Hiring an Estate Planning Attorney

Estate planning can be complicated, but with the help of a experienced New York estate attorney, you can have a working estate plan. In addition, an estate attorney will be able to advise you on how best to minimize estate taxes and ensure that all your estate planning documents are properly executed and will be valid before a Court of law.

Conclusion

In today's day and age it is very important to carefully plan for the future of your loved ones. A carefully crafted estate plan will ensure your wishes are followed and significantly reduce the possibility that your wishes will be challenged after your death. A validly executed , last will & testament, durable power of attorney and health care proxy will cover most aspects of your estate.

Hiring an experienced New York estate attorney will make certain that nothing goes wrong – that your wishes are followed and provide you comfort in knowing that all documents are executed in accordance with the formalities required by law.

An attorney will be able to alert you as to assets which pass outside of probate and have no relation to property which passes by will. Your attorney will be able to make sure your estate is covered in all respects, with regard to probate and nonprobate property, and provide you with the comfort and security you deserve as you grow older.

Three Crucial Steps in the Estate Planning Process

While following the three crucial steps in the estate planning process as outlined in this article will put you well ahead of the 60% of Americans who do not properly plan for the future. Start making your estate plan today!

Albert Goodwin, Esq. is a New York City lawyer focusing on estate planning, estate litigation, and estate administration.

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