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Unintended consequences may occur in absence of a will

BIZ BRAIN

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Q. My mother refuses to do a will. She doesn't have much, but I think she still needs one. Does she?
— Trying to help

A. Pretty much everyone should have a will, regardless of the size of their estate.

It's not unusual for people to be reluctant to prepare a will because of the discomfort of confronting one's mortality, said Richard Miller, an attorney and chair of the elder law department at Mandelbaum Salsburg in Roseland.

However, he said, by not preparing a will, a number of unintended consequences may occur.

"When someone passes away without a will, his or her estate passes under the laws of intestacy, which essentially distributes the probate estate among decedent's next of kin," Miller said. "If an individual is married and has children from another relationship, the surviving spouse receives the first 25 percent of the intestate estate, but not less than \$50,000 nor more than \$200,000, plus one-half the balance of the intestate estate."

Miller said in many cases, the intestacy laws result in assets being distributed to individuals the decedent does not intend.

For example, if an unmarried decedent is estranged from one or more of his or her children and dies without a will, the assets will be divided equally among all the children regardless of the estrangement, he said. Consequently, by failing to name beneficiaries in a will, an individual unwittingly relies on the intestacy laws to select beneficiaries for them.

In addition, Miller said, a will provides the opportunity to designate an executor to manage the estate and funeral agent to handle one's final affairs.

"Absent a will, the decedent's next of kin have an equal right to be appointed personal representative," he said. "If all next of kin get along and agree, this is not a problem. However, if the next of kin disagree and do not consent to the appointment of a personal representative, court intervention will likely be required leading to avoidable and unnecessary costs and delays."

Wills also provide an opportunity to waive a surety bond for an executor and trustee.

"If there is no will, a surety bond is generally required prior to the appointment of the personal representative," Miller said. "This could lead to further complications if the personal representative is unable to secure a bond, also leading to otherwise avoidable and unnecessary expense to the estate."

Wills also allow you to address various contingencies.

For example, if a beneficiary is a minor, it is advisable to establish a trust to hold funds until the beneficiary attains a certain age or series of ages, Miller said. However, if a trust is not established in the will, assets earmarked for beneficiaries under age 18 could be withheld by a financial institution or deposited with the County Surrogate, thereby restricting access to the funds unless court approval is obtained, he said.

Even if an individual prepares a will that accurately reflects his or her testamentary wishes, it is critical to realize that a will does not control the disposition of all assets.

"A will only controls the disposition of assets that are in a decedent's individual name without a beneficiary designation," he said. "A will, however, does not control assets jointly owned with another person or that pass by beneficiary designation, such as life insurance policies, annuities, retirement accounts or payable on death accounts."

As a result, it is imperative that individuals review how their assets are titled to ensure they are distributed as intended, Miller said.

The key to a successful estate plan is forethought and communication, he said.

"A will is a core component in this process and should be encouraged for everyone — even those with a modest estate, such as your mother," he said.

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