

The logo for the City Bar Justice Center, featuring the text "CITY BAR JUSTICE CENTER" in a serif font, enclosed within a white rectangular border with a slight shadow effect.

CITY BAR
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A Beginner's Guide to Estate
Planning:

WILLS & ADVANCE DIRECTIVES

JUNE 2021

Publication of the Cancer Advocacy Project of the City Bar Justice Center

**This booklet was created and produced with support from
Judges & Lawyers Breast Cancer Alert (JALBCA).**

The Cancer Advocacy Project is a legal services program of the City Bar Justice Center. The project provides cancer patients and survivors with no-cost legal information and advice in three areas: life (estate) planning, coverage denials by private health insurers, and cancer-related employment discrimination.

The purpose of this booklet is to provide a general overview of estate planning topics. It contains basic information that can be used as a starting point to help you formulate your estate planning objectives and identify potential issues to discuss with your family and your attorney. It is not intended to substitute for legal advice.



What is estate planning?

Estate planning describes the process of developing a complete personal and financial plan for you and your loved ones that is intended to take effect upon incapacity or death. This would include plans for the distribution of financial and personal property. Also consider:

- Who will you entrust to assume legal responsibility for your property and affairs, also known as an Executor or Fiduciary
- Who will make healthcare decisions on your behalf
- Who will handle your financial affairs
- Who will care for your minor children
- Who will take care of your funeral and burial arrangements

THE TIME FOR ESTATE PLANNING IS NOW

You may have specific objectives that can only be achieved if you document your wishes, such as providing for specific family members or friends, or disinheriting a family member. By planning ahead, your wishes will be honored, and perhaps your loved ones will be spared some added distress.

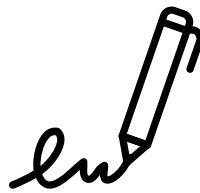


WHAT IS A VALID WILL?

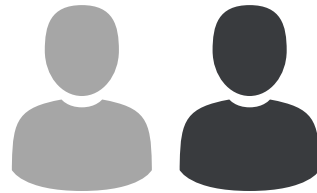
In order for a Will to be valid, certain formalities are required in New York State. The Will must be:



In written form



Signed by a competent person over the age of 18



Witnessed by two disinterested individuals who are not named as beneficiaries or executor

If your circumstances later change, you may choose to revoke (cancel) your Will and create a new one that is more suitable for your new situation. An experienced attorney will be familiar with the necessary formalities.

WHERE DO I BEGIN?

First, compile an inventory of the property and assets that you own. Make a note of whether you own the property by yourself or with others. Some types of jointly owned property may pass directly to the other joint owner. An inventory is important to determine which assets will be governed by your Will and which, if any, will be disposed of by other means. A list of properties to consider include:

- Bank accounts
- Life insurance
- Retirement assets
- Houses or land
- Cars
- Jewelry
- Furniture



WILL PREPARATION

The Last Will and Testament, often shortened to 'Will', is the document that most people associate with estate planning.

A Will is a written document that disposes of your property after your death. Depending on your intentions, a Will can be simple or complex. If you have a Will at the time of your death, some or all of your property and assets will go through 'probate', which is the process of determining if you have left a valid Will and admitting that Will to the Surrogate's Court. If you die without a valid Will, you will have died 'Intestate' and your property and assets will be disposed of in accordance with State law. The table below shows New York State laws governing the distribution of property and assets if there is no Will.

If you are survived by:	Here's what happens:
A living spouse and no children	All property passes to the spouse.
Children and no spouse	All property is divided among the children equally.
Living spouse and children	The surviving spouse will inherit the first \$50,000 plus 50% of the estate and the children divide the balance.
Neither a living spouse or children	Property will pass equally to surviving parent(s) or, if none, to living siblings or, if none, to living nieces/nephews; and so on.

Are there assets that are not covered by my Will?

There are assets called 'non-probate assets' that are not covered by your Will and would pass in a particular way regardless of what your Will states, or of New York's intestacy law. These are typically assets that are jointly owned or assets where you have named a beneficiary to receive that property upon your death. For example, a house owned by spouses or owned jointly with 'right of survivorship' will pass to the surviving spouse or owner and cannot be passed by you through your Will (unless the co-owner dies before you.) This is different from property owned jointly as 'tenants in common' where your share can be passed through your Will.

Some assets that typically have designated beneficiaries and are not affected by a Will include:

- Totten Trust - a bank account on which you have named someone as beneficiary
- life insurance
- retirement assets, such as IRAs, 401(k) accounts and pension plans
- custodial accounts for children and educational accounts, such as 529 plans

When naming a beneficiary for these assets, it is important to consider whether you should also name successor owners and custodians. Similarly, it is important to review your beneficiary designations from time to time to be certain they reflect your current wishes as these designations cannot be changed through your Will.

What if my beneficiary has special needs?

Special consideration should be given when providing an inheritance for a child or other family member with special needs. An inheritance may cause a special needs beneficiary to lose eligibility for government benefits such as Medicaid. New York law provides a mechanism called a "Supplemental Needs Trust," also known as a "Special Needs Trust," which allows parents to create a fund to supplement their disabled child's finances while not, as a consequence, causing the child to be disqualified from government aid. This type of Trust can be established under your Will with the guidance of an experienced attorney.

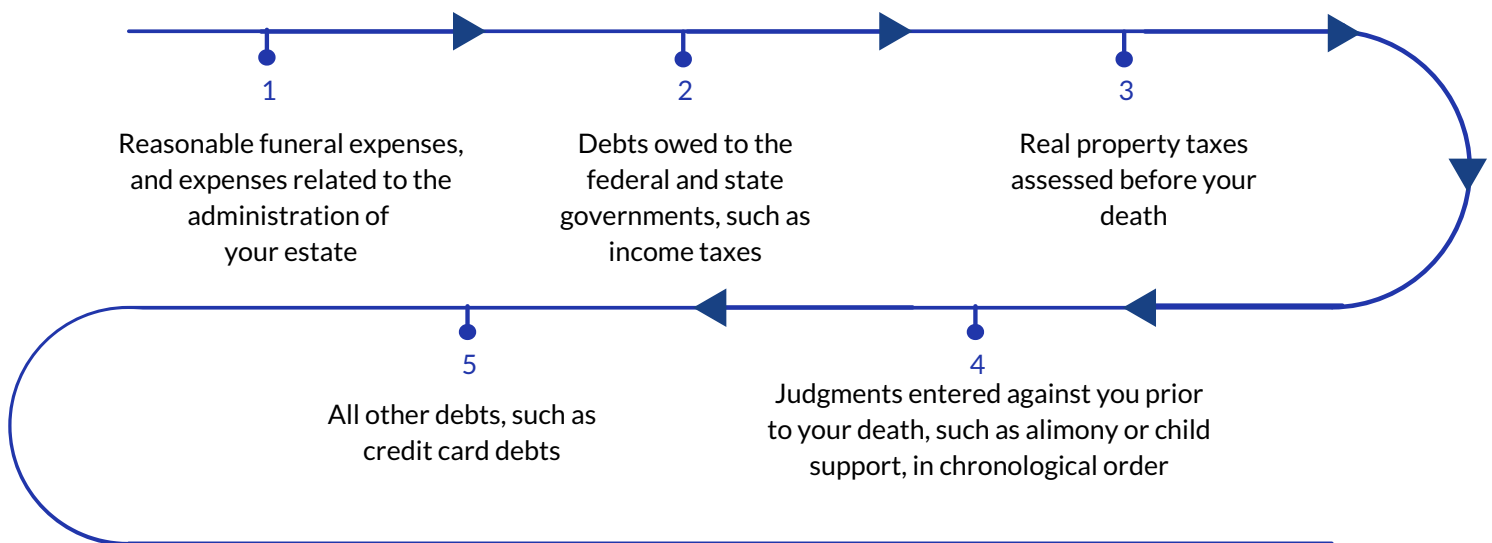


WHAT HAPPENS TO DEBTS?

After compiling an inventory of assets, consider how any debts you leave at the time of your death will be paid. Your beneficiaries cannot inherit from your estate until your debts have been paid. However, if you do not have enough assets in your estate to pay your debts, family members would not generally become liable to pay them unless that person has agreed to cover the debt, i.e. as a guarantor.

Creditors, except for the federal government, cannot seize your life insurance, social security death benefits, or most qualified retirement plans, unless your estate is named as a beneficiary.

Debts and expenses are paid out of an estate in the following order:





ADDITIONAL CONSIDERATIONS FOR WILL PREPERATION

ARE THERE SPECIAL RULES FOR MY SPOUSE?

You may not be able to effectively disinherit your spouse through your Will. In New York, if your spouse is alive, even if you are estranged and living apart, he or she may still 'elect' to receive a minimum share of your estate unless you provide for that minimum share by some other method.

Generally, a surviving spouse has a right of election unless:

- the marriage has been legally terminated, annulled, or was otherwise void
- the parties have legally separated; or
- the surviving spouse abandoned or refused to support the deceased spouse.

If you are estranged from your spouse, your Executor will be required to prove that your estranged spouse abandoned or failed to support you. It is also important to prevent your spouse from serving in a fiduciary role if you do not wish them to.

CAN I LEAVE MY PROPERTY TO A MINOR?

Property passing to a minor may be subject to court supervision if the appropriate arrangements are not made in the Will. To avoid the restrictions of court supervision, you can establish a custodial account for a child, referred to as an "UTMA" (Uniform Transfers to Minors Act), which may be managed by your Executor or another individual of your choosing. Distributions (payments) may be made from the account at any time for the benefit of the child and the child has full rights to the account upon reaching the age of majority, usually 21 (or 18 if that is your preference.)

WHAT IS AN EXECUTOR?

Another requirement when preparing a Will is to appoint someone to be the 'Executor' of your estate. Your Executor will collect the assets mentioned in the Will, pay the debts owed by your estate and distribute the balance to your beneficiaries. You may choose one or more trusted individuals over the age of 18 to serve as Executor(s). If you do not have a Will, under New York law, certain surviving family members will have the authority to perform the same function as an Executor.

GUARDIANSHIP FOR MINOR CHILDREN

If you have a minor child or children, you can name a Guardian to take care of the child and/or their property. Usually, a Guardian is appointed only if there is no surviving parent. Anyone seeking to be appointed as Guardian in place of a surviving parent must provide evidence of “extraordinary circumstances” to show that it would not be in the child’s best interests for that parent to be appointed as Guardian, such as substance abuse or physical or emotional abuse of the child.

You can name a Guardian for your minor children in your Will; however, this designation will become effective only upon death and after the Will has been probated, which could take several months. To avoid the delay in guardianship, consider preparing a ‘Standby Guardianship’ document which is available if you have a serious illness or are at risk of sudden removal by immigration services. The Standby Guardian takes immediate custody of the minor upon the designated triggering event (such as a decline in your health). If there is a surviving parent who seeks custody, the burden would be on the Standby Guardian to show that the surviving parent is not fit for guardianship of the minor.

WHAT IS A LIVING TRUST?

A Living Trust (also called a Revocable Intervivos Trust) is a Trust created during your lifetime, and is usually intended to avoid the expenses and delays that may be associated with probating a Will. Unless all of your individually owned assets are transferred to the Trust, probate may still be required. A Living Trust holds your assets during your lifetime, and includes instructions for distributing those assets after your death, similar to a Will. You may serve as the Trustee during your lifetime, and name a successor Trustee to manage the property if you become incapacitated, or to dispose of the property after your death.

Preparing a Living Trust, rather than a Will, does not ensure that the contents will remain private from everyone else. While not a public record like a Will, a copy may be obtained by a person challenging the Trust contents in a court proceeding.





ADVANCE HEALTH CARE DIRECTIVES AND POWER OF ATTORNEY

Health care directives, such as a health care proxy and a living will, are used to document and protect your health care wishes in the event you are unable to communicate them.

HEALTH CARE PROXY

A Health Care Proxy enables you to appoint someone of your choice (your 'agent') to make health care decisions on your behalf in future, if needed. They can only do so if you become unable to speak for yourself. You may also name an alternate agent who can step in to act if your first choice of agent is unavailable. Your agent(s) must be over the age of eighteen.

LIVING WILL

A Living Will allows you to document your end-of-life wishes. If you have strong feelings

about the type of treatment you would prefer to continue with, or to refuse, if your condition deteriorates with no reasonable chance of recovery, a Living Will is a useful document. These instructions can be incorporated within a Health Care Proxy document, but in New York, is more usually a separate document.

DO NOT RESUSCITATE (DNR) ORDERS:

Many health care facilities use DNRs, which instruct medical professionals not to perform CPR when your heartbeat or breathing stops. Under New York law, your health care agent may consent to a DNR on your behalf.



POWER OF ATTORNEY

A Power of Attorney enables you to appoint someone as your agent to make financial and other non-medical decisions on your behalf. Your agent must be over the age of eighteen and trustworthy. You can appoint more than one agent and allow them to act separately, or require them to act together. You can give your agent broad or very limited powers, as you wish. For example, you might authorize your agent to do any or all of the following:

- buy and sell property, e.g. your house or land
- manage your banking transactions
- invest your money
- make legal claims on your behalf
- attend to your retirement and tax matters
- make gifts on your behalf

A Power of Attorney becomes effective as soon as both you and your agent (or agents) have signed and notarized the form, and remains effective even if you later become incapacitated, unless you instruct otherwise. It is possible to modify the power of attorney so that it does not become effective until a specified event happens, usually upon incapacity.

DISPOSITION OF REMAINS

Under New York law you can designate an agent to carry out your burial or cremation wishes and make related decisions after death. If you have not prepared a Disposition of Remains document, the law designates the order in which certain persons have the right to take care of those matters. In order of authority:

- Surviving spouse,
- Surviving children over 18 years of age,
- Surviving parents, and
- Surviving siblings

If the decedent (deceased person) has not arranged to cover the cost of their burial or cremation costs, under New York law the agent is financially responsible to pay those expenses and is entitled to be reimbursed out of the decedent's estate.

GLOSSARY

Administrator: the person or financial institution that is appointed to take care of the estate of a deceased person who died without a Will.

Beneficiary: a person or entity that is entitled to receive something from the deceased person's estate.

Codicil: a written amendment to a Will.

Executor or Executrix: the person or financial institution that is appointed to administer the estate of a deceased person who died with a Will.

Fiduciary: a person to whom property or power is entrusted for the benefit of someone else.

Guardian: an adult appointed by a surviving parent in his/her Will or by a court, who is responsible for a minor or incapacitated person.

Intestate: refers to dying without a Will.

Probate: the process of determining if the deceased person left a valid Will and admitting that Will to the Surrogate's Court.

Testate: refers to dying with a Will.

Trust: an arrangement, usually established by a written document, to provide for the management and disposition of assets.

Trustee: an adult individual or financial institution that is designated to be responsible for the administration of a Trust.

Will: a written document that disposes of one's property at death.

The life (estate) planning basics covered by this booklet are intended to educate and inform, but not substitute for legal advice. The Cancer Advocacy Project provides free legal assistance to financially eligible cancer patients and survivors wanting to document their estate planning wishes with the aid of a qualified attorney. For further information please contact the Cancer Advocacy Project:

Cancer Advocacy Project, City Bar Justice Center

42 West 44th Street
New York, NY 10036-6689

Phone: (212)-382-4785

Email: cap@nycbar.org

Website: www.citybarjusticecenter.org