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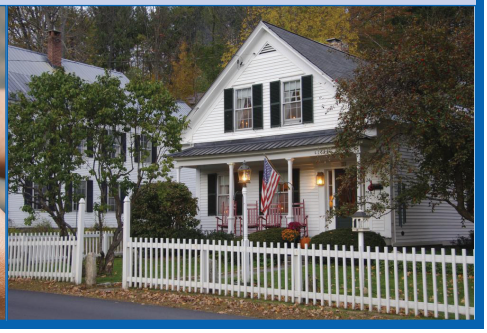
ESTATE PLANNING:

What You Need To Know and Do To Protect Your Loved Ones

2015



Last Will and Testament

If you have children, own a home or have anything of value, you likely need a Will. Yet according to polls done by *Forbes Magazine & USA TODAY* only 35% of Americans have a Will. Your Will explains in writing what you want to have happen to your assets when you pass away. It helps determine such things as who receives your property and other belongings, who you would like to raise your children, who you want to be responsible for managing money left to your under-age children until they are old enough to receive it, where you want to be buried and much more.

Every Will should deal with the following:

1. ***Who will serve as your executor?*** Your "executor" is the person (or persons) who are responsible for making sure that your Will is properly administered in Surrogate Court and that your assets are given to who you named. An executor can be almost anyone you want – your spouse, a friend, your lawyer or even a bank. It is important that you choose someone you trust, who will follow through with your wishes and who can handle and help resolve any disputes that may come up among your loved ones and other beneficiaries. In addition to the original executor, you will need to name a successor executor in case your first choice can't serve for any reason.

2. ***Who gets specific items?*** For example, many women wish to give their engagement ring to their daughter and many men wish to give their tools, guns or sports memorabilia to their son. If you don't specifically put in writing that someone is to receive your English China, then it becomes part of the "residual estate" and that person may or may not receive it. Furthermore, if you know that your children are going to fight over a family heirloom or something that is one of a kind or you promised something specific to someone, then it should be written into your Will. (Many estate fights are over sentimental things or family heirlooms as opposed to money.)

3. ***Do you wish to make any specific cash distributions?*** For example, do you want to give specific amounts to your grandkids or leave a donation to your favorite charity or church? When it comes to specific cash bequests, it is important to note that they will only be made if the money is actually available. For example, if you leave $100,000 to someone and you don't have $100,000 that will be a problem. Therefore, it's critical to make sure that any amounts you specify are realistic and are likely to be in existence when you pass away. Furthermore, if you specifically give a cash bequest, then it will likely be paid out first before other bequests, which can cause problems if the amount of the cash bequest represents a significant portion of your estate assets.

4. ***Who gets your "residual" estate?*** That is everything that is left over and not specifically mentioned in the Will. This is often done on a percentage basis. For example, if you have three children, you could state that they would each get one-third of your estate. Or for many people, they state that "I leave everything to my spouse" often called a "Sweet-Heart" Will. However, if you do this, you need to state what happens if your spouse pre-deceases you or dies in the same car accident or plane crash. For example, you might leave everything to your spouse, but if he pre-deceases you then to your children in equal shares. It will then be up to your executor to decide how best to handle the eventual distribution of your residuary estate. In many cases, people will go through personal belongings and take turns picking out what they want. Things like stocks or cash can be divided more easily, while real estate will usually be sold and the proceeds divided.

You will also want to think about what happens in the unfortunate event that someone named in your will pre-deceases you. Should their share go to their children or should it be split only among the survivors of those you

specifically named? Unquestionably, people want to be fair to their children and loved ones when it comes to their estate, but as the saying goes "fair isn't always equal and equal isn't always fair." There are many circumstances where it is completely appropriate to give one child more than another. For example, if a local child is a primary care-giver and other children are located out of town. Other common situations are when one child has already received significant financial assistance or there is a wide financial discrepancy in the personal lives of your children.

5. ***Who will raise your children and look after their finances?*** If you have under-age children (below the age of 18), you will want to mention in your Will who you would like to see raise them and who should manage their money. The person you name will likely become the legal guardian who will be responsible for raising your children, therefore you want to make sure you not only pick someone you trust, but who is also willing to accept the job which means you should directly ask that person if they are willing to serve in this important position. I say "likely" because the court is always going to do what is in the "best interests of the child" so if the person you name turns out to be irresponsible, then the court wouldn't neccesarily follow your wishes – but there has to be a very good reason for the court to do this.

If your children are under 18 years of age, any money they receive can be placed "in trust" until they turn 18 or some later age you list in the Will. In many cases, people are afraid that their kids would blow through the money if they were given it all at age 18, so they put restrictions in their Will. For example, their children might receive a third of their inheritance at 18, another third at 21 or 25 and the rest at age 30. The trustee would have the authority to provide money to the child earlier if needed for such things as education, medical expenses or perhaps a major life event like a wedding. The guardian and trustee can be the same person or different people if you want a separation of powers and oversight.

While a Will can determine how almost all of your assets are handled, it is important to know that under federal law certain items will not be controlled by your Will such as life insurance, certain bank accounts and many individual retirement accounts such as IRA's and 401Ks. Only if you list your estate as the "beneficiary" on the forms controlling these accounts will your Will handle these accounts. However, if you do name someone specifically on the beneficiary form, then that form will legally control who gets that asset and not your Will. Therefore, it is important that you regularly review and update these forms to make sure that they properly express your wishes.

Many people want to know how much a Will costs? In many cases it can be done for just a couple hundred dollars. However, there are many factors that could make it more complex and costly such as children with special needs, adopted or out of wedlock children, divorces and of course tax planning issues if you are fortunate enough to have assets greater than three million dollars. The estate tax currently doesn't kick in until you have at least three million dollars for New York State (the top tax rate is 16%) and over five million dollars at the federal level (the top tax rate is 40%). Truth be told, the estate tax is something people fear, but in reality affects very few. According to the *Wall Street Journal* it is estimated that less than 4,000 estates across the United States will owe federal estate taxes in 2014.

Furthermore, when thinking about estate planning, you also need to consider something that has long been overlooked – your digital assets – things such as iTunes or Snapfish photo accounts, Facebook, frequent flyer or credit card reward accounts and even blogs – which can have significant sentimental value as well as financial. The law is evolving with technology, but right now it is best that you make sure your loved ones know your passwords to such accounts, so they can easily access and transfer them upon death because some "terms of service" agreements do not allow them to be inherited. Accounts are sometimes even terminated or "locked" when a service provider is notified that the account holder has passed away.

A final note on Wills: It is a good idea to write down and store in a safe place a full listing of all your important information and let your executor know where this list is kept. Things to be listed should include bank account information, life insurance, retirement accounts, social security benefits, veterans benefits, real estate holdings, name of your accountant for tax returns, your lawyer and so forth. This will make the job of your executor much easier. There is no central database of bank accounts, and I can't tell you how many times people thought their parents did all their banking at one paticular bank and then their parents happened to have several other bank accounts around town. Both Erie and Niagara Surrogate Court allow for the FREE storage of Wills in their vault, which is a great service that prevents your Will from being lost, stolen or destroyed helping to ensure that your wishes will eventually be followed.

But What Happens If I Die Without A Will?

A court would then determine how your estate is handled – which for many people is NOT the way they would want. For example:

1. In New York State the court will follow what is known as the "laws of intestacy" which may mean that some distant relative or someone you don't like or trust could receive part of your estate or even be named as the guardian of your children.

2. Many people falsely assume that if they are married and die without a Will that everything will go to their spouse. Unfortunately, under New York State law that is not the case. Without a Will, if you have children, then your spouse is only entitled to certain monetary amounts and household items as set by law and then the rest is divided between your spouse and children. If you are divorced or have children with different partners, then this can cause numerous headaches for your loved ones and often less than desired consequences.

3. Without a Will, the court will appoint someone to serve as the "administrator" of your estate. This can be very costly as the person may have to post a surety bond and there can be court fights and challenges over who gets various items in your estate. It may seem silly, but as previously mentioned many times the fight isn't over money, but instead over things such as who gets the Christmas ornaments or who gets mom's engagement ring. Furthermore, the costs of an administration can be quite high when children are involved because annual reports and accountings may have to be filed with the court until your children turn 18 and court permission may be needed to pay for the things your child needs.

What About Trusts?

As the death of long-time Buffalo Bills owner Ralph Wilson demonstrated, trusts get lots of attention in the news media and by some financial planners such as Suze Orman. The biggest benefits to trusts tend to be privacy and the ability to control assets "from the grave" for an extended period of time. While common in some states such as California, trusts are not widely used in WNY. Trusts can be much more expensive than a Will to set-up and most importantly unlike a Will which can control all your assets (both those you presently have as well as those you may have in the future), trusts only manage those assets you specifically put into the trust, so they constantly need to be updated and changed.

However, there are certain situations where trusts can be quite useful. For example, if you have a loved one who has special needs or disabilities, a trust can help ensure that the trust beneficiary continues to be eligible for government benefits, while also still being able to receive monies from the estate to enhance his or her quality of life.

Trusts can also be useful in "blended" families (or second marriages) by ensuring that a surviving spouse or partner is taken care of while alive, but at the same time ensuring that children from a first marriage or other relationship later receive an inheritance. There have been horror stories of unintended consequences, where someone leaves everything to the other spouse and then that spouse remarries leaving everything to their "new" spouse and the children see nothing. Or the last surviving spouse leaves everything to his or her own children alone instead of including the step-children.

What Is a Life Estate?

A life estate is often used when dealing with real estate and allows the owner to remain in the property while that person is alive and as long as the taxes are paid and general maintenance on the property is continued so it doesn't fall into disrepair. Then when the owner dies, those named as a beneficiary (called a "grantee" on the life estate deed) inherit the property by presenting the death certificate to the county clerk. One of the key benefits of a life estate is that it can possibly help protect your heirs from Medicaid liens. (Given that your home is likely one of your largest assets that you worked a lifetime to pay off, many people hope to be able to leave it as part of their estate as opposed to being subject to nursing home bills.) However, the life estate is currently subject to a 60 month look-back period where Medicaid can "claw-back" part of the value of the home. So in order for this to work, you need to do it as part of your long-range planning and when you are still healthy and the prospect of needing nursing home care is slim. If you seek Medicaid assistance during the 60 month look-back period, Medicaid will assume that you made the transfer solely to qualify for Medicaid and it will trigger a time period of ineligibility, which can potentially have devastating consequences on both the quality of care and finances.

There are significant drawbacks to a life estate, including giving up control over the property as well as possible tax consequences to the beneficiaries. When you create a life estate you are in essence "co-owning" the property with your named beneficiaries and therefore, you will require their permission if you decide to make changes. For example, if you need to take out a mortgage or home-equity loan they would also have to sign off on it. Even more alarming, if one of your named beneficiaries was to get divorced, since they have a future ownership in the property, the ex-spouse may be able to make a claim on the property. In addition, the creditors of beneficiaries may also be able to lay claim to the property if a beneficiary is sued or defaults on a loan. While unlikely, these are serious risks that need to be carefully considered.

One of the most important considerations when doing a life estate is to be 100% positive that you want to remain in that particular home for the rest of your life. Say you want to later downsize or move to Florida, you will need those you named as beneficiaries to agree to the sale – and there are times where for whatever reason they don't want to see Mom or Dad move and then it's potentially an expensive legal battle to try to unwind the life estate. Furthermore, selling a home that has a life estate can have significant tax consequences for those involved. Typically the sale of a primary residence is free from capital gains taxes for the first $250,000 in gain (profit) per individual or $500,000 for a married couple – which in WNY where property values rise at a slow and steady pace makes almost all primary residences exempt from this tax. If the house is sold following the death of the owner as part of an estate through a Will, then there would be a stepped-up basis in valuing the property, resulting in little to no taxes due. However, if the property is sold while the life estate is still in effect, then IRS actuary tables (based on age and life expectancy) would determine how much of the sales price goes to the person holding the life estate and how much goes to the beneficiaries. While the life tenant would likely not be subject to capital gains taxes, the beneficiary possibly would be – and based on the difference between what the owner originally paid for the property and what it sold for – which if the property has been held for a long time can add up.

Health Care Proxies and Living Wills:

The health care proxy allows your agent to make health care decisions on your behalf when you can't make those decisions yourself. You can only name one person as your health care proxy in order to avoid disputes – though you can name a back-up in case that person isn't available or can't make the decision. The person you name as your health care agent can only make decisions on your behalf after your attending physician and a second doctor agree that you lack decision making capacity.

In its most simple, straightforward terms, a health care proxy allows someone to "pull the plug" on your life. Therefore, it is critical that you pick someone to serve as your health care agent that you trust and can talk to about your personal beliefs regarding medical issues including life and death decisions. You want to pick someone who you know will follow your wishes and beliefs and not their own.

If you find yourself in a bleak medical situation such as a horrific accident, major stroke or heart attack, you need to clearly let this person know whether you want no extraordinary measures to be taken to keep you alive or for the doctors to do everything humanly possible to keep you alive. This is an extremely personal decision based on your own personal religious and moral beliefs. Given the advances that medicine is making every day, this decision cannot be made lightly. For example, this person should know if you want to be "hooked up to tubes" or kept on life support or if you want to die at home if possible. In addition, they should know your feelings on organ donation, which can help save or improve the quality of life for someone else.

A living will goes hand in hand with your health care proxy and spells out what your personal desires are regarding health care decisions. By creating a living will, you will help make sure that your wishes are continued even if you can no longer communicate them. It states what kinds of treatment you want or are opposed to and serves as evidence of these wishes in case there is disagreement or a legal challenge. If your agent doesn't have specific knowledge of your wishes, your agent may be prevented from making decisions regarding certain medical procedures. You should be as specific as possible with your views, especially when it comes to such things as the administration of artificial feeding – food and water – or if you authorize a "do not resuscitate" order. Furthermore, what do you want to happen if you are in a terminal condition, in a "vegetative" state or are conscious, but suffer irreversible brain damage? It has been long accepted by the New York State courts and the US Supreme Court agrees that a competent adult has the right to determine what happens to their body, which includes accepting or declining medical treatment – even if it will result in death.

Without a health care proxy, a guardian might have to be appointed by a court to make your health care decisions. You may remember from news reports the sad and tragic case from a decade ago in Florida involving Terri Schiavo and the court battle between her parents and her husband on whether or not to withdraw her life support. Demonstrating that one can never be too young to start thinking about estate planning and end of life decisions, Ms. Schiavo was struck by her unfortunate medical condition when she was less than thirty years old. You can help avoid your family going through a similar battle that is both emotionally heart wrenching and expensive by creating your health care proxy and living will.

Appointing an agent to handle your last remains: In New York State an individual can name someone who upon their death will be responsible for handling their last remains. Under the law it is clear that a surviving spouse controls the last remains of the deceased. However, fighting can occur when there is no surviving spouse and surviving children (or other relatives) have differing wishes. The classic example is hall of fame baseball player Ted Williams whose children battled in court on whether or not have to him cremated or have his body cryogenically frozen. Most people appoint their health care proxy to also serve in this role and include the appointment and brief description of whether they wish to be buried or cremated (and where) with the health care proxy paperwork. It's a good idea to take the time to do this because even if you include your wishes concerning your last remains in your Will, it may take some time to locate your Will or file it with the Surrogate Court for probate.

Power of Attorney:

In New York State the standard power of attorney has been pre-crafted by the legislature, though it can be amended with your specific instructions to fit your unique circumstances. It is a very powerful document that allows someone else (your agent) to do things on your behalf as if they were in your shoes. You can have your power of attorney come into effect as soon as you sign it (known as a "durable" power of attorney) or you can make it "springing" so that it only comes into effect when you are incapacitated and can no longer handle your own affairs according to a doctor who has been treating you.

The powers available to an agent under a power of attorney can be as broad or as specific as you wish. For example, you can restrict it to only banking matters or to sell your house or you can have it allow the agent do estate planning, give gifts and much more. You can also designate if you want the agent to be compensated for the work done on your behalf or if you want someone to monitor your agent. An important change in the law was created in 2009, which requires that whoever you appoint as your agent to accept the job by signing the document as well and agree to only serve in your best interest. The agent is also required to keep detailed records and receipts of what she does on your behalf. Therefore, it is once again important that you not only pick someone who you trust, but who is also willing to help you if the need arises. Just like a Will, each power of attorney is unique and can be crafted according to your personal wishes.

If you do not have a power of attorney and you were to become incapacitated because you suffer a stroke, are in a car accident or have Alzheimer's, your loved ones would likely have to petition the court to have someone appointed to serve as your "guardian" to handle your legal affairs. This can be a very costly and time consuming process, whereas this simple, yet powerful document is usually inexpensive to have created.

The Paradise Law Office

Gerald E. Paradise III is a graduate of the University at Buffalo Law School. He also received his masters in urban planning from the School of Architecture and Planning at the University at Buffalo. He graduated summa cum laude from the All-College Honors Program at Canisius College with a degree in political science and urban studies. He is a graduate of East Aurora High School and served during his junior year as a Congressional Page for former Congressman Jack Quinn.

Mr. Paradise is a member of the Erie County Bar Association as well as the New York State Bar Association. He is admitted to practice in New York and concentrates his practice to the eight counties of western New York. In 2013, Mr. Paradise was named by *Business First* and *Buffalo Law Journal* as one of only 124 lawyers to be members of the "Legal Elite of Western New York."

The Paradise Law Office is a general practice law office that focuses on customer service by providing high quality legal representation at a price its clients can afford. Unlike many law firms, the Paradise Law Office does not bill by the hour, but instead charges under a "flat fee" system or percentage basis so that its clients always know ahead of time how much something will cost so they don't have to worry about being billed for every phone call, email or meeting.

When you hire the Paradise Law Office you will always work directly with an attorney and not a paralegal or assistant. The Paradise Law Office understands that you want quick, accessible and easy to understand answers to your legal questions and that's why phone calls and emails made during regular business hours are generally returned on the same day. In addition, Mr. Paradise is willing to hold non-traditional work hours by meeting with clients in the evening and weekends.

The Paradise Law Office firmly believes that the legal situation for each client is unique and deserves specific attention. That is why Mr. Paradise will take the time to meet with you personally to become familiar with not only your particular legal issue, but also with your individual circumstances and background. The Paradise Law Office wants its clients to feel comfortable before entering into a formal relationship and is willing to meet with anyone for a free, one hour, no obligation consultation to discuss their legal needs and concerns.

~ Gerald E. Paradise III

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