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New York Law Journal

The Importance of an Estate Plan that Reflects Current Family Structure

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July 26, 2024

Having an estate plan in place that addresses one's current family circumstances is imperative. The consequences could be dire if a client does not have a will in place or if his existing will does not address his current specific family structure and dispositive intentions. Intestate succession statutes (which determine who receives the assets of an individual who dies without a will) generally provide for assets to be distributed according to a family tree, but families can be disparate, e.g., blended families with children from previous marriages.

It is very possible that intestate succession will not reflect a person's family situation, resulting in unintended consequences. Problems are also likely if a client does not adapt an existing will to significant changes in family structure, especially in the context of divorce, remarriage or a domestic partnership outside of marriage.

This article will discuss the pitfalls of intestate succession, the effect of divorce on an estate plan under New York law specifically, and the need to address changes in a client's family structure with careful planning customized for the client's specific situation and testamentary intent.

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Pitfalls of Intestate Succession

If an individual dies without a will, state intestate succession rules set out a framework to distribute that person's assets.

In New York, the New York Estates, Powers and Trusts Law (EPTL) §4-1.1 provides that if a decedent has no will, his assets are distributed as follows: if an intestate decedent has a spouse and no children, his spouse receives everything. If he has a spouse and children, the spouse receives the first $50,000 and half of the remainder, and the children share the other half equally. If he has no spouse or children, the decedent's parents inherit equally, and if the parents are deceased, his siblings inherit equally (if a sibling has predeceased, that share goes to the deceased sibling's children).

One example of a family structure which is not reflected in the New York intestacy model is a blended family. Imagine, for example, an individual who is divorced with two children from his first marriage. He marries a woman who is widowed and who has a 5 year-old child from her first marriage. The man raises this

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child as his own although he does not adopt him. If this individual dies without a will, the intestacy statute provides that his spouse will receive the first $50,000 of his estate and half of the remainder. His two children from his first marriage will split the other half. The stepchild will not receive any assets. The definition of "child" in the EPTL includes biological and adopted children, but not stepchildren.

A second example in which a personal situation could diverge from the state intestacy family tree is an unmarried domestic couple. Take the case of an unmarried individual with no children who lives in a committed relationship with a partner in a house she owns individually. If the individual dies without a will, according to the intestacy statute, since she had no spouse or children at death, her assets would be distributed to her parents, if they are living, and if they are not, to her siblings. The live-in partner is not entitled to anything; nor is he entitled to stay in the house since it was owned by the individual and at her death will pass to her next of kin.

Effect of Divorce on Testamentary Dispositions to Spouse

Even for a client who has a will, keeping the dispositive terms up to date is essential. One trigger to create a new will is divorce. Legislation does exist that addresses testamentary dispositions to a spouse after a divorce. EPTL §5-1.4 provides that, unless the governing document expressly states otherwise, divorce or annulment revokes a disposition to the ex-spouse under a will, revocable trust, and as beneficiary of a retirement account or other beneficiary designation. Provisions for the spouse in the governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation.

As an illustration of the effect of divorce on dispositions in a will, if a client's will says, "all my assets to my spouse, or, if she predeceases me, to my children," and he subsequently divorces, pursuant to EPTL §5-1.4, the disposition to his ex-spouse is revoked, and his children will receive his assets as contingent beneficiaries.

However, that result does not always provide the ideal outcome.

First, the client will have to revisit his chosen contingent beneficiaries to make sure they are still as intended—and make sure his current, new situation is clearly reflected. For example, if he has remarried, he may want to benefit his new spouse as well as his children, a disposition not reflected in the previous will. Second, regarding the players named in the will, if the client planned to leave assets in trust to his minor children at his death, for example, he may have named a relative of his ex-spouse to act as trustee, a choice he will probably want to reconsider.

The effect of divorce on dispositions to a spouse under irrevocable trusts is less settled. Absent express language in the trust agreement, it is often unclear if an ex-spouse will remain a beneficiary of the irrevocable trust after divorce. The answer depends on the express language of the trust instrument. Case law is divided on interpreting trust instruments that are silent regarding the definition of "spouse" and the effect of divorce. Clarifying the couple's understanding during the creation of an irrevocable trust, and memorializing such understanding, although potentially awkward, could prevent expensive disputes in the future.

One more caveat to the practical effect of EPTL §5-1.4 relates to retirement benefits. The Employee Retirement Income Security Act of 1974 (ERISA) rules can preempt state law with respect to a retirement account, as ERISA establishes federal rules for retirement benefits. It is therefore always essential for a client to address specific plan requirements for beneficiary-designated assets and to keep beneficiary designations current.

Effect of Divorce on Fiduciary Roles in Estate Planning Documents

In addition to its effect on testamentary dispositions to ex-spouses, EPTL §5-1.4 further provides that upon divorce or annulment, the nomination of a spouse in any fiduciary role is revoked. This would affect the role of executor, and trustee(s), if any, in an individual's will.

EPTL §5-1.4 also affects the named fiduciaries in the other stalwarts of an estate plan—the power of attorney and the health care proxy. Pursuant to EPTL §5-1.4, divorce would also revoke the ex-spouse's nomination as agent in a power of attorney and health care proxy. Although it may be some relief to a client to know her ex-spouse is not in charge, for example, of deciding whether she is put on life support when she is incapacitated, she must check that her successor agent (if she has in fact appointed one) is the person she would like in charge of these decisions.

Alternatively, if an individual does not have a health care proxy in place at all, the New York Family Health Care Decisions Act (NY PHL Article 29-CC effective June 1, 2010) establishes priority of certain family members to make health care decisions for that individual.

Again, the law makes an assumption based on a family tree: guardian, if any; spouse or domestic partner; child; parent; sibling. If this framework does not reflect a client's "family of the heart"—for example, a friend he would like to fill this important role—his intended decision maker has no power to act.

Planning for Blended Families

Divorce and remarriage are both triggers to create or revisit an estate plan to ensure that beneficiaries and fiduciaries match your client's intentions. Without a will, or with an outdated will, the distribution of assets could be adverse and contrary to your client's wishes.

When preparing a will, what is the best way to plan for the blended family described above, with a second marriage, one stepchild, and children from a previous marriage? As with most estate planning decisions, the right answer depends on the specifics of each client's family.

Many individuals want their will to provide for their surviving spouse, yet they also want to benefit the children from their first marriage. In such a case, leaving everything to the surviving spouse, with the children as contingents—often the default for many married couples—may not be wise. That plan creates the possibility that the surviving spouse inherits everything outright and then creates a new will, leaving the assets to her child alone, excluding the decedent's children, or, potentially, to a new spouse if the surviving spouse remarries.

One planning strategy to benefit a surviving spouse and also protect a disposition to the client's children is to create a testamentary trust to be formed at his death for the benefit of the surviving spouse during her life. At the surviving spouse's death, the trust assets would then be distributed to the testator's children (including his stepchild if he so chose). The surviving spouse cannot change the trust, avoiding the risk that the surviving spouse leaves the assets to different beneficiaries, and the plan ensures distribution to the children at her death.

However, although this plan might work for many, it may not be appealing to all blended families.

Imagine, for example, children in their 40s whose father has died at 75, leaving everything in trust to his 55-year-old wife for her benefit during her life. The children may find themselves contemplating the trust assets, critiquing distributions to the surviving spouse and estimating how much will be left when the surviving spouse passes away. To address this potential conflict among heirs, another option would be to leave a percentage to the surviving spouse and a percentage to the adult children. These testamentary terms are very case-specific and should reflect the client's personal family situation and intentions.

Incidentally, this illustration envisions one monied spouse, but equal attention, and potentially a very different plan, is advisable where spouses have each accumulated wealth individually and would like to keep their assets segregated to benefit each of their children, and not the other spouse.

It is important to note that any provision in a will that limits the disposition to the spouse must address the spouse's "right of election." In New York, a spouse cannot be completely disinherited in a will. Under EPTL §5-1.1, a spouse has a "right of election" to a share equal to the greater of $50,000 or one-third of the deceased spouse's net estate. Even if a client's will allocates a portion of the estate's assets in a testamentary trust to the spouse, since it is in trust and not outright, it will run afoul of the spouse's right of elective share.

Therefore, even with a well-contemplated plan that benefits the spouse in part and the children in part, depending on the terms, it may be necessary to ask the spouse to sign a waiver of the statutory right of election to make sure the plan is effective under state law.

Intestacy is not an estate plan. By definition, it is the absence of an estate plan and, as such, is poorly suited to properly serve one's individual testamentary wishes, especially where one's family situation differs from the intestacy family tree. Similarly, an outdated estate plan can lead to unforeseen and disadvantageous results.

Individuals must ensure that their assets will pass to their desired beneficiaries—and not let intestacy or an outdated plan result in unintended consequences.