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Do I Need An Estate Plan?

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- Do you care who will receive your assets upon your death?
- Do you have a minor child or children and want to have a say in who takes care of them if something happens to you?
- Do you care who will take care of you if you become incapacitated?
- Are you interested in minimizing taxes and other expenses for your family?

If the answer to any of these questions is "Yes," then YOU NEED AN ESTATE PLAN.

Estate planning generally involves putting a plan in place that is triggered when you die or if you become incapacitated due to accident, illness, or otherwise. The law does not require that you make an estate plan. The majority of people never do. However, it is important to recognize that if you do not create your own estate plan, then you are leaving it to politicians to make important decisions for you.

What Do You Mean the Politicians Will Decide?

For residents of North Carolina, our General Assembly in Raleigh has passed laws to provide default rules that apply if someone dies or becomes incapacitated without an estate plan. These default rules are often not what you expect and may be contrary to your intentions.

Default Rules At Death

If you are a North Carolina resident and die without an estate plan, the "intestate succession" laws determine the individual(s) entitled to your assets. A common misconception is that if you are married and if your spouse survives you, then your spouse will receive all of your assets. This is not always true because if you are survived by children or by your parents, then it is quite likely that your spouse would only receive a portion of your assets and your children or your parents, as the case may be, would receive the other portion.

If your children are minors, relying on the default rules can lead to an administrative nightmare. Someone under age 18 cannot receive property directly from an estate. Instead, a guardian must be appointed to hold the property for the minor. A court process is needed to appoint the guardian, and after appointment, the guardian must prepare and file accountings with the court each year until the minor reaches age 18. Typically, substantial time and expense is associated with having a guardian appointed and preparing and filing the annual accountings.

If you rely upon the default rules this also means that your children will receive their inheritance immediately

upon your death (or if they are minors, upon their reaching the age of majority). Your children will have full control over what they receive and can spend it however they want. Were you responsible enough at age 18 to manage a large sum? Are you comfortable risking your child's financial foundation on his or her whims as a young adult? If not, then you should make your own estate plan.

Default Rules Upon Incapacity

If disaster strikes so that you become unable to act for yourself and you have not made an estate plan, then the only way to have someone legally authorized to act for you is to petition the court to seek the appointment of a guardian. This process involves obtaining a legal declaration that you are incompetent, which is rarely something that someone wants to publicize, and then having a guardian appointed to manage your affairs. Similar to a guardian's responsibility if you die and are survived by a minor child, if you are incapacitated, your guardian would be required to prepare and file annual accountings with the court as long as you are alive and incapacitated. Substantial costs are associated with going through this process, all of which will be paid from your assets. Moreover, it is left to the court, not you, to decide who is given the authority to act for you. Unfortunately, the legal books are full of cases where someone has become incapacitated without an estate plan and then the family fights over the choice of guardian.

You Have The Power To Avoid The Default Rules

You do not have to accept the default rules. You can make an estate plan so that your wishes will be respected upon your death or incapacity.

Estate planning for death generally involves putting in place a Last Will and possibly one or more trusts. These documents identify your beneficiaries—the person or people you want to receive your assets at death. If any of your named beneficiaries are not responsible enough to manage their inheritance (for instance, due to being too young), then these documents could provide a structure for the inheritance to be managed for the beneficiary in such a way as to avoid the involvement of the court and the associated trouble and expense. These documents also identify the executor of your estate (the person you want to be responsible for wrapping up your affairs) and the person you want to serve as the guardian for any surviving minor children.

Estate planning for your incapacity generally involves putting in place a Durable Financial Power of Attorney, which allows someone of your choosing to act for you without having to involve the court. Health care documents are also typically put in place. Such documents include a Health Care Power of Attorney, which allows someone to make health care decisions for you in the event you cannot communicate your own desire, a Living Will, which expresses your wishes concerning end of life care if there is no hope for your recovery, and a HIPAA Authorization, which authorizes your medical providers to release your protected health care information to the persons you name in the document.

When done correctly, estate planning also involves evaluating your personal financial situation to project what taxes and other expenses may come into play upon your death or incapacity. The details of such planning are beyond the scope of this article, but suffice it to say that it is the rare circumstance where estate planning does not reduce the taxes and expenses that would be incurred in the absence of estate planning. Reducing those costs preserves more assets for you and your beneficiaries.

Take Control

If this article persuades you that having an estate plan is beneficial to both you and your family, and if you do not have an estate plan or if you have an old one that no longer suits your desires, take control. Contact an estate planning attorney to help you begin the process. Any competent attorney will discuss with you the

various circumstances of your particular situation and the available planning options, but if you want to get a jump start on the process, you can consider the following questions:

1. Who do you want to manage your finances if you become incapacitated? (For this question and the next three questions, it would be helpful to consider one or two backup persons to name in case the first person you name is unavailable.)
2. Who do you want to make health care decisions for you if you cannot make your own decisions?
3. Upon your death, who do you want to serve as the executor of your estate and wrap up your affairs?
4. If you have minor children, who do you want to serve as their guardian if you die while they are still minors?
5. What are your assets? Preparing a personal financial statement that identifies all of your assets, including life insurance, will help guide you and your attorney through the process.
6. Who do you want to receive your assets?
7. Will any of your beneficiaries need help in managing their inheritance?

Act now. Only you can put your estate plan in place and take control over what happens to you and your assets.

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