

Your will probably doesn't meet your objectives

As an estate planning attorney, I often meet people or run into old friends who learn what I do and immediately recall aloud in the course of conversation that they've been needing a will, or my personal favorite is when they say they need a "simple will." Just last week I received a text message from a good friend's father inquiring about me preparing simple wills for him and his wife.

This may be a novel concept, but what you really need is probably not a will (or at least, not just a will). What you need is an estate plan. Quick disclaimer (I am a lawyer after all). The contents of this column are not intended to be legal advice; everyone's circumstances are different, you are not advised to rely on the information in this article and independent legal advice regarding your personal circumstances should be sought.



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If you want it done right, you need good legal advice when developing your estate plan. A good estate plan should address not only the disposition of your assets upon your death, but also end-of-life care and decision making (medical and financial), protecting an inheritance from your heirs' creditors or divorcing spouses, provisions for any minor or young adult beneficiaries (primary or contingent), and the most fun (to me) and sometimes very important, taxes! There is nothing more satisfying to me than to tell an heir that the estate planning mom or dad put in place will save them a lot of time, money and headaches.

A good estate plan can also address events that occur before death. For example, it can mean the difference between whether or not the family needs to sell the family lake house to pay for mom or dad's care.

"There's so much that a good estate plan does, and so little of that is found in the will."

Most estate plans do include a will, but it can be the least important part of an estate plan, and oftentimes, the will is not even needed. How can this be?

The answer to this question first requires an understanding of the words "will" and "probate."

Many of my friends who tell me they just need a "simple will" believe that having a will somehow means their estate will magically avoid probate, but this is a common misconception. To the contrary, a will is a "probate" document. In other words, a will is only used if an estate goes through probate (but many estates do not go through probate).

And what is probate? Probate is a court proceeding in which a judge grants someone powers to control a deceased person's assets and distribute them to the heirs as described in the will. This is all done under the supervision of the probate court. Because probate is a court proceeding, which can add time and expense to the administration of an estate, many estate plans are designed to avoid probate. That's not to say that our Ozaukee County Probate Court is not doing a fantastic job, thanks in great part to our Clerk of Courts/Register of Probate, Mary Lou Mueller, and a great team of personnel and judges at the courthouse. However, if there is no need for a particular estate to go through probate, many people choose to structure their estate plan in a manner that does not require probate. And if there is no probate proceeding, the will is not even used.

There are various reasons that an estate would not require probate and as a result, the will would not be used. For example, joint ownership with rights of survivorship, beneficiary designations, and Transfer on Death ("TOD") or Pay on Death ("POD") designations and trust ownership are all examples of ways to title property such that it transfers automatically at death, without probate.

However, using these techniques should still be done with legal advice and be incorporated into your overall estate plan, because here is an example of how things can go wrong: if you name your oldest child as the co-owner of your bank accounts with the "understanding" that they will distribute everything equally to all of your children upon your death, they could instead take everything for themselves. When your other children try to pay your bills and get their share of the assets, they would be forced to go to court to try to recover the assets, which may not be easy to do. This whole situation can often be avoided by using a trust (which in itself is a subject for a whole other column - so stay tuned!).

If the will is not the most important document, then what other important documents should be included in an estate plan? There are many different answers to this question depending upon the details of any particular estate, but, just to name a few, a good estate plan often includes well-thought-out beneficiary designations, power of attorney documents for finance, health care power of attorney documents (along with some other related documents) and oftentimes, one or more trust agreements.

If, however, you have minor children, another very important purpose for a will is to nominate guardians for any minor children you may have in the event of your death, if the child(ren) does not have another parent that survives you.

There's so much that a good estate plan does, and so little of that is found in the will. So the next time you revisit your will, remember that you probably don't just need a simple will. You need a good plan.

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