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THE PROBLEMS OF INTESTACY

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Your Default Estate Plan

Many people know that a last will and testament directs the distribution of your assets following your death. They may consider signing their will as "creating" an estate plan. What they may not realize is that a will actually replaces another estate plan. That's because, if you fail to sign a valid will prior to your passing, your state's intestacy statute (also called a "descent and distribution" statute) becomes your default estate plan and will ultimately determine how your estate will be distributed. Rarely, if ever, does this default estate plan reflect your wishes or those of your family since you had no input with its creation. Intestate statutes exist because most people fail to create an estate plan of their own, so the state needed to create one for them. The estate distribution dictated by the statute is based upon what the state assumes you would want to happen to your assets, since you failed to leave any instructions. It does not change based on your actual needs, preferences or family.

State intestacy statutes are based on the concept of the traditional family and name your heirs accordingly. All heirs are related to the decedent by either blood, marriage or legally adopted. Neither a friend nor a charity, like a church, is a possible intestate heir. Each state has its own variations, but the same basic pattern is followed. If you are married, your spouse will be your primary beneficiary. If you are unmarried, but have surviving children, they will be your heirs. If you have no spouse or any children, then your parents are your heirs. If your parents are deceased, it would be your siblings and so on to more distant relatives. Your estate goes to the surviving members of the nearest class of heirs. Your heirs receive their inheritance in full once the probate case is completed, without any restrictions on its use. This extremely inflexible plan, which applies by default, makes no allowances for blended families, minor children, special needs children or other unique aspects of your family.

Who Will Probate Your Estate?

In your will, you name a personal representative to handle the administration of your estate. Generally, you select someone you know and trust who will follow the instructions in your will regarding the distribution of your estate. Without a will, a probate judge, who likely does not know you or your family, will appoint an administrator for your estate. The judge's selection will be based on a statutory (state-mandated) preference list which is very similar to the list of intestate heirs. The first person on that list who agrees to serve who the judge finds to be acceptable becomes administrator. If all of your relatives live out of state, the judge may name an in-state co-executor or require a local attorney be retained. Estate administrators are usually awarded a fee for their services, unlike many family member personal representatives. Your estate's administrator's responsibilities will include numerous reports back to the judge, and many of the actions require the judge's approval. The administrator has no discretion on how your assets are distributed.

Intestacy and Second Marriages

Intestate statutes aim to provide the estate distribution you would want. They are essentially the state's "best guess" as to what your will would say if you had created one. The intestacy statutes in most states are based upon the assumption that spouses get married once and any children are the children of both spouses. This assumption is no longer true for a majority of married couples, and as a result, statutes often fail to meet the wishes of those with blended families. The statutes also assume that you would want your spouse to receive all of your assets at your passing. This type of "all to spouse" plan is usually not a good fit for couples when the spouses have separate children. Following their traditional family bias, intestate statutes define children as biological children and adopted children only. Stepchildren are not heirs of their stepparents. This definition of children can result in the unintentional disinheritance of the children of the first spouse to die, since the children of the deceased spouse will not be heirs of the survivor because they are not related by blood. As a result, if their stepparent also dies intestate, the children of the first spouse to die do not receive any inheritance from their parent, even after their stepparent dies. Instead, all of the couple's remaining property goes to the children or other heirs of the second spouse to die.

Intestacy and Unmarried Couples

Not all couples decide to get married, creating problems if they don't create their own estate plan. Intestate statutes do not work well for unmarried couples. Intestate statutes define heirs as only relatives by blood, marriage or legally adopted. Unmarried partners are not related by either blood or marriage, so they are not heirs under an intestate statute. They are also not on the preference list to be the administrator of each other's estate. If the deceased partner owned the home they shared, the surviving partner does not have the right to remain in the home, unlike a spouse. The deceased partner's heirs could evict the surviving partner from their home. If the couple shared children, the children, and not the partner, would be the heirs. As the surviving parent, the surviving partner would have custody of the children but may not be placed in control of the children's inheritance. It may also be difficult to identify what property belonged to which partner, causing additional time, stress and expense, possibly even litigation, when it's time to distribute the estate to the deceased partner's heirs.

Intestacy and Minors, Special Needs and Spendthrift Heirs

Intestate statutes are inflexible. They determine your heirs and direct the immediate and unconditional distribution of your assets to your heirs. If your statute-defined heirs are minors, special needs persons or spendthrifts, the resulting asset distribution will be problematic. If your children are below the age of 18 (21 in some states) when you pass away, their inheritance will be held in trust for them until they are either 18 or 21, at which time they will gain full control of the funds. (Your property will all be sold and the inheritance converted to cash.) While they are minors, their physical custodian will likely have difficulty securing any distributions from the funds being held in trust. In some ways, the results for a special needs heir who receives needs-based government benefits is even worse. Inheriting even a relatively modest amount of money will result in the loss of their benefits (like Medicaid) until the inheritance has been spent. Once the inheritance is spent and they can requalify, a new application will likely be required. The special needs heir will then find themselves without their parents or access to any funds for additional services and support. If you heirs are spendthrifts or have a substance abuse problem, they will get immediate full control of their inheritance, allowing it to be quickly exhausted. The default estate plan created by an intestacy statute does not make any allowances for these common situations.

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Intestacy is Often the Most Expensive Way to Leave an Inheritance

Intestacy is often the most expensive type of estate plan, despite the lack of up-front cost. The application of the statutory defaults to your specific situation, instead of the specific directions in a will, is more expensive for a number of reasons. The first reason for the increased cost is that most intestate estates involve formal probate, while most testate (will-based) probates are informal. Formal probate means that the judge is more involved, requiring additional filings, hearings and steps. Second, most intestate estates involve the use of an attorney, sometimes per the judge's order, to prepare the additional filings and conduct needed research. Third, the administrator of an intestate estate will likely need to post a bond, which is usually waived in a will. Fourth, intestate probate usually takes substantially more time than testate and increases costs. The additional time is needed to comply with the statute's requirements and find someone acceptable to the judge who is willing to act as administrator. Other additional costs and delays are associated with searching for information, collecting property and locating the heirs of the decedent. Finally, intestate estates are often subject to numerous disputes over the identity of the current heirs and the proper administration of the estate, resulting in expensive litigation.

The Risks of Intestacy

Intestate estates also face a higher risk of litigation, which can quickly exhaust an estate's assets. The litigation risk is higher because the decedent's intentions for the distribution of their assets are unknown. The statute directs the decedent's assets to the heirs, which may be different than what the family expects. Disappointed children of the decedent may file suit because of the unexpected outcome of not receiving an inheritance at their parent's death. Intestate estates also often feature disputes over the identities of the correct legal heirs under the statute, especially when the decedent lacked a spouse or immediate family members. As mentioned earlier, there can be disputes over what property the decedent owned, especially for unmarried couples. Finally, intestate estates are often the target of people who claim the deceased owed them money, which the administrator needs to either litigate or settle.

Conclusion

Everyone has an estate plan established by a default by a state statute. This inflexible plan directs the distribution of your estate to your nearest relative by blood, marriage or legal adoption. Intestate statutes are based on the likely preferences of the members of a traditional family. The distributions mandated by these statutes are unlikely to meet the expectations and needs of a blended family. They are also problematic when the designated heirs are minors, special needs people, spendthrifts or substance abusers.

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