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TAX AND WEALTH ADVISOR ALERT: DO I NEED A WILL AND WHY?

As an estate planning attorney, the most common question I get—both from potential clients and at cocktail parties (or kids' soccer games)—is, "do I need a Will?" Now, I know that a lot of estate planners have a simple, consistent three letter answer for that is, "YES". But that is not my answer. My answer, maybe a typically frustrating lawyer answer is, "it depends."

So let's say a potential estate planning client, John, has asked me that exact question— do I need a Will? The first question I will lob back to my new inquisitive friend, is does he have minor children? If the answer is yes, my questions are complete and my answer is "yes, you need a Will." Why, might you or John ask? Well, what is more important to a parent than who will raise his kids if he (and his wife) cannot? The answer is nothing. Who makes that decision? In other words, if John and his wife get into a fatal car accident on the way home from dinner that night, who will decide who gets to raise his kids? The answer is, under all circumstances, a judge…A probate court judge. The next question is how will the judge make that decision? Well, from experience, I will tell you what the judge hopes will be in place to aid in making that decision: a nomination of a guardian in John's Will. The Will is the only document in which John can nominate a guardian for his children; if there is no Will, regardless of whether John has written down his hopes on another document, the judge will be on his or her own in making the decision. Therefore, if the answer to the question, "do you have minor children?" is "yes," then the answer to whether "you need a Will" is also "yes."

But what if the answer is no—what if John and his wife do not have minor children—does he need a Will? The second question is, in general, who do you want your property to go to? You see, even if John does not have a Will, he does have an estate disposition plan that dictates where all of his property will go when he dies. It is just not a plan he has created. Instead, it is a plan created by the state in which he resides under that state's "intestacy" law . While each state's law is different, generally, the intestacy laws provide that, first, everything goes to the surviving spouse; if no spouse, then equally to the kids, then if no kids, to the grandkids, if no grandkids, to parents, then siblings, then nieces, and nephews, then cousins. So, if John wants everything to go to his wife when he dies, does he need a Will? Maybe not. But what if he and his wife die together, in a common accident? Given they have no chidren, everything he owns goes to his parents. And if his wife outlives him, everything they own goes to her parents. Is that what he wants? Is he okay with that? If so,

he does not need a Will. But if he is not, then, yes, he does need a Will.

Finally, even if the intestacy statutes work in general, I need to make sure they work specifically. For example, let's say John was not married but rather a 70-year-old widower with three adult children. Who does John want the property to go to? Equally to his three kids. If he had no Will, where would his property go? Equally to his three kids. Seems like he does not need a Will. But what if he wants specific property to go to specific people? Maybe John has some real estate investments, and he has a child that has strong acumen and passion in real estate development. And, he also has a stock portfolio with a child who is talented in managing and trading equities. Remember an estate plan gets the right property to the right people. Intestacy laws give the kids 1/3 of each asset—only a Will gets the right property to the right people. So if that is the case, and John wants to get specific property to specific people, he needs a Will.

So your client asks, do I need a Will? Don't be a sheep and simply say "yes." Be an advisor and ask:

1. Do you have minor children?
2. Who do you want your property to go to?
3. Do you want specific property to go to specific people?

The answers to these questions will drive the answer to your client's question.