

## Estate Planning in New York State

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Estate planning is a matter of identifying goals and making use of certain tools to accomplish those goals.



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# Why is Estate Planning Necessary



## What is Estate Planning?

At its core, estate planning is a natural extension of the financial planning that families are already using to create and preserve wealth. Modern estate planning tools are used to transfer assets efficiently to one's heirs and beneficiaries while addressing the many complex issues that may arise in the process.

When most people consider estate planning goals, they think of controlling to whom their assets will go after they die. This is indeed one of the objectives of estate planning, but it is far from the only one.

Proper estate planning focuses not only on your beneficiaries, but also on you. When considering how to divide up your estate among your beneficiaries, there are several concerns involving your own financial well-being that should be addressed. Planning for retirement and the potential need for [long-term care](#) are necessary corollaries to estate planning.

Wealth preservation is an important goal of estate planning. In addition to making sure that your assets are transferred to your intended heirs, your estate plan should

include strategies to reduce taxes and protect your assets from creditors and disputes.

Finally, estate planning is about exercising your right to control what is yours. This may involve not only the disposition of your assets after death, but also the management of your resources and your own care in the event that you become incapacitated. You have the right to decide who will receive what assets and who will manage various aspects of your affairs, both during your life and after death.

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# Creating an Estate Plan

The first step in creating your estate plan is to apply the general goals of estate planning to your individual needs.

Exactly what you want to accomplish will depend on the amounts and types of assets you own, the people or entities you wish to distribute assets to, and any special considerations.

Making a thorough inventory of your assets is essential. You may intend to leave certain non-liquid assets such as real estate directly to your beneficiaries, but it is important to tally the fair market value of everything you own for planning purposes. Along with their value, you must consider how certain assets are titled. For instance, accounts with a designated beneficiary may pass directly to that person upon your death, and will not be considered part of your will.

When you have a full picture of what your estate contains, you can make a plan that includes your own retirement and potential long-term care needs, as well as what you would like to give to your heirs or other beneficiaries. At this point, you will need to meet with an [estate planning attorney](#) to discuss your options. Proper use of estate planning tools such as wills and trusts can ensure that your assets are distributed according to your wishes with no more than necessary going to pay taxes and creditors.

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## Why You Need a Will

A will, a foundational document in estate planning, directs the distribution of your property according to your wishes. A will may be simple or complex, but it is necessary, unless you want to leave your estate plan to the government.

### You Make the Decisions



Without a will, state law provides a single set of rules to be followed the same way in every case, regardless of what you would have done.

### You Designate Executors and Guardians



Without a will, the New York State Surrogate's Court will appoint an administrator to distribute your assets.

### You Can Engage in Tax Planning



A will may permit you to avoid estate taxes and establish trusts for your children and other beneficiaries.

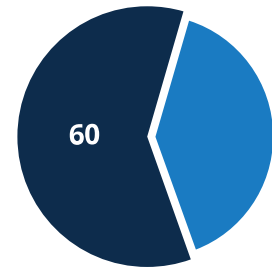
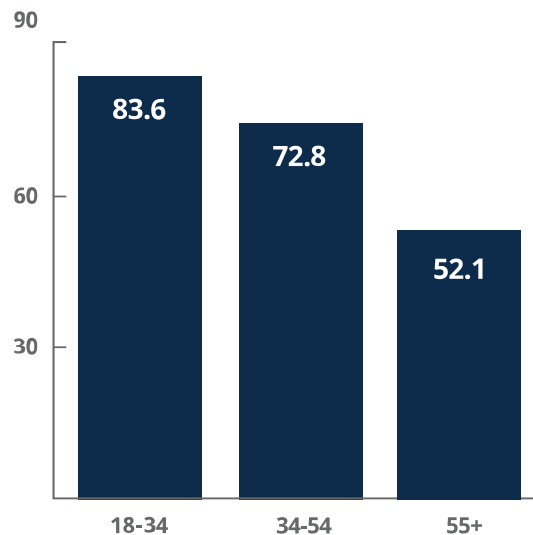


## How Many Americans Have a Will?

Only approximately 32 percent of all Americans have a will. Analysis shows the number of adult Americans who have a will or other type of estate planning document has decreased by almost 25 percent since 2017.

**68%**  
OF ALL  
AMERICANS  
DO NOT  
HAVE A WILL

■ Percentage of  
Americans without  
a will, by age



**60%**  
SAY HAVING  
A WILL IS  
IMPORTANT

*Numbers presented as a percentage of 100. Source: Caring.com's 2020 Estate Planning and Wills Survey*

## What Happens If You Die Without a Will?

A person who dies without a will is said to have died intestate, and the state laws of intestate succession will dictate the distribution of the person's assets. In this situation, state law provides a single set of rules to be followed the same way in every case. However, estate planning is not a one-size-fits-all affair, and it is unlikely that the government's plan will be the same as what you would choose for yourself.

As an example, under New York law, if you are married with children and die without a will, then, your spouse will inherit the first \$50,000 of your estate, plus half the remainder, and your children will inherit the other half

of the remainder. You may wish to make different arrangements in your own estate plan, particularly if you have children from a previous marriage.

When you have a will you are also able to control certain other matters, such as designating a executor to be responsible for distributing your assets according to your will. Without a will, the New York State Surrogate's Court will appoint an administrator to distribute your assets. A will also permits you to designate a guardian for your minor children in the event that both you and their other parent die. In addition, a will may permit you to take advantage of tax planning to avoid estate taxes, and establish trusts for your children and other beneficiaries.



# The Estate Administration and Probate Process

In New York State, each county has Surrogate's Court which handles the probate of wills and the administration of estates.

When a person dies with a will, the first step is for someone - usually the person named as the executor in the will - to ask the Surrogate's Court to approve the will. The will be filed with the court along with a petition for probate, and proper notice must be given to interest parties. If anyone contests the will or there are other issues regarding the validity of the will, the court will address them. If the will is found to be valid, then the court will issue letters testamentary, which give the executor the authority to take legal title to the assets in the estate and begin the process of distributing them, after any creditors are paid.

One important aspect of the [probate](#) process is the distinction between probate and non-probate assets. Probate assets are those titled in your name only, with no named beneficiary. Non-probate assets may include real estate

that is titled jointly with your surviving spouse, or with another person, as joint tenants with right of survivorship. Certain accounts such as individual retirement accounts (IRAs) or 401ks, which may be payable to a designated beneficiary, are also non-probate assets. These assets pass directly to the survivors or beneficiaries without ever being considered part of your will. There are many reasons why a person may wish for certain assets to not be part of the probate process, and that is where trusts come in.

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A photograph of a middle-aged couple with blonde and grey hair, both smiling and looking out a large window. The woman is on the left, and the man is on the right, leaning his head against hers. They are both wearing light blue button-down shirts. The background shows a modern building with large glass windows and a stone wall.

# Using Trusts in Estate Planning

Trusts are an extremely useful tool for estate planning and for the management of assets in special circumstances.

## How Trusts Work

A trust is a relationship in which one party holds property for the benefit of another. The person creating the trust is known as the creator, trustor, settlor or grantor. The trustee is the person who holds the property for the benefit of the beneficiary or beneficiaries. There are many different types of trusts, with a few types being especially common in estate planning.

## Testamentary Trusts

A testamentary trust is one that is established in your will and goes into effect after you die. There are many reasons why you may want to direct that your assets be put into a trust rather than distributed directly to your beneficiaries. A common purpose for such a trust is to provide an income for beneficiaries who may not be able to manage large amounts of money on their own because of their youth, a disability, or another condition. Instead of leaving a

large lump sum inheritance that may be spent imprudently, your will can direct a trustee to manage the money and provide the beneficiary with a set income and distributions for particular expenses.

## Revocable Living Trusts

In contrast to a testamentary trust, a living trust or inter vivos trust goes into effect while you are alive. A properly structured living trust can allow you to arrange for the proper management of your assets while you are alive, even if you become incapacitated. It can also provide for the distribution of your assets after your death. With a revocable living trust, you can designate yourself as both trustee and beneficiary while you are alive and healthy, and because the trust is revocable, you maintain complete control over the assets, even to the point of terminating the trust if you wish. The trust can designate a successor trustee who can step in to manage your affairs for your benefit if you become incapacitated. When you die, the successor trustee will distribute your assets to your designated beneficiaries according to the instructions in the trust document.



One of the primary benefits of a revocable living trust is that it can be used as a complete or partial substitute for probating your will at your death. If you choose to put all of your assets into such a trust, then when you die, there may be no assets held in your name, and nothing to probate. Many families wish to avoid having all their assets pass through probate, for several reasons. First, probate is a public process, and families may wish to keep their financial affairs private. Also, the use of a living trust allows your successor trustee to distribute assets to your beneficiaries immediately, without the need to wait for the approval of the court. Trusts are harder to challenge than wills, and the use of a trust may therefore prevent disgruntled heirs from taking legal action. Living trusts can facilitate as a smooth transition of your affairs to a successful trustee in the event you become incapacitated. Finally, the use of a living trust can avoid court costs and reduce attorney's fees.



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*A trust allows you to control assets during your lifetime and to distribute them privately on your own terms. For example, your will can direct a trustee to manage assets and provide a beneficiary with a set income and distributions over time. Or, your successor trustee can distribute assets to your beneficiaries immediately.*

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### Do I Still Need to Have a Will?

Trusts are very flexible and can be structured in a number of different ways. You may wish to place some but not all of your assets in a trust. If you intend to place all of your assets in a living trust, then you could be left with no probate assets and theoretically no need for a will. However, even in this circumstance, you should create what is known as pour-over will, directing that any assets that do happen to be titled in your name upon your death be transferred to your trust.

# Trusts for Special Purposes

In addition to revocable living trusts, there are a number of other types of trusts that exist to address specific issues that may arise in estate planning.

- **Asset Protection Trusts** can be created to place resources out of reach of future creditors, either through a self-settled out-of-state trust or a New York trust where the grantor is not beneficiary.
- **Special Needs Trusts** are an essential tool for leaving money for the benefit of family members with a disability, without jeopardizing their eligibility for public benefits.
- **Minor's Trusts** are a way to arrange for assets to be held for the benefit of a minor child, with the trustee directed to use the trust's income for the child's health and education, and distribute the principal when the child reaches a designated age.
- **Spendthrift Trusts** or spendthrift provisions in a trust can be used to protect young adults or heirs with profligate habits from spending their inheritance unwisely. A trust can provide income to the beneficiary while withholding the principal until a certain time.
- **Charitable Remainder Trusts** are a type of split-interest trust allows the grantor to

make an irrevocable gift for a charitable purpose, taking advantage of tax deductions, while also providing a benefit to non-charitable beneficiary.

- **Bypass Trusts** can be useful for wealthy families to preserve the New York estate tax exemption of the deceased spouse for the estate of the surviving spouse, as New York does not recognize portability of the unused estate tax exemption that is available for the federal estate tax.



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*Trusts are an extremely useful tool for estate planning and for the management of assets in special circumstances. There are many more types of trusts that may be useful in specific situations, many of which have to do with reducing tax liability.*

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# Reducing Estate and Gift Tax

One of the goals of estate planning is providing your heirs and beneficiaries with the maximum possible benefit, and that means paying no more in taxes than necessary. Estate taxes and gift taxes are of particular concern in estate planning.

## Federal Estate Tax

The Internal Revenue Service imposes a tax on estates, taking a cut from the deceased person's total estate. And, although revocable living trusts can prevent assets from going through probate, they do not help with estate tax, because assets in the trust are considered part of the estate for tax purposes. The good news is that under current law, the federal estate tax exemption amount is set relatively high — \$11.8 million per individual in 2020 — and the exemption is portable from the first spouse to die to the surviving spouse, meaning that a married couple can shield \$23.6 million from federal estate taxes. However, wealthy families still have to contend with an estate tax of 40 percent over the exemption amount. Proper estate planning can reduce this tax burden.

## New York Estate Tax

New York State imposes its own tax on estates. The exemption amount is currently somewhat lower than the federal exemption amount, \$5.85 million per individual in 2020. However, New York's estate tax is less forgiving than the federal estate tax in two important ways. First, there is no portability between spouses as with the federal estate tax exemption, so the surviving spouse may be hit with an estate tax unless a bypass trust is used. Second, New York State, unlike the federal government, stipulates that if a person's estate is greater than 105 percent of the exemption amount, then the estate tax is imposed on the entire value of the estate, not just the amount by which the estate exceeds the exemption amount. This means that planning for ways to reduce the estate tax burden are that much more important.

## Gift Taxes

Giving assets to your loved ones during your lifetime is an excellent way to ensure that your assets are distributed as you wish, and it may reduce your tax burden as well. Gifts, defined as a transfer of property for less than

full value, are taxable, but you may give a certain amount — \$15,000 in 2020 — to any number of different people in a single year without incurring a taxable gift. Gifts above this amount count toward the lifetime estate and gift tax exemption mentioned above. So making lifetime gifts of up to the \$15,000 annual exclusion amount can be an important part of a plan to reduce your eventual estate tax burden. Because New York has no gift tax, lifetime giving can be even more useful to avoid the more onerous New York estate tax.



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Estate planning can be complex, and it may seem overwhelming before you begin. The estate planning attorneys at Littman Krooks are your partners in this process. We take pride in simplifying this complex process for our clients and helping you create a plan that will protect your family's future.





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