

Don't Forget the Will with the Prenuptial Agreement

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Many prenuptial agreements include detailed provisions regulating the division of the parties' property in a divorce but include no waivers of rights the law provides to a surviving spouse at death. The most well known of these rights is the right of election. The surviving spouse's right of election, essentially, prevents the first spouse to die from fully dis inheriting the survivor. Generally, in New York, if a surviving spouse does not inherit at least one-third of the deceased spouse's assets, the surviving spouse can file a claim to receive this threshold amount—even when the deceased spouse's Will (or other testamentary documents) names different beneficiaries.

It is common for prenuptial agreements—particularly between parties without children—to not waive spousal rights at death. After all, many individuals getting married have no objection to their beloved receiving at least one-third of their assets at death.

However, in some states, when a married person without children dies without a Will, his or her surviving spouse receives all of the deceased spouse's assets. For instance, in New York, all assets of a married person without children dying without a Will (or other testamentary document) are distributed to the spouse; parents, siblings, nieces, nephews, and other relatives or friends receive nothing.

Consider the following example. Wanda, who has worked for years and has five million dollars of pre-marital assets in a brokerage account in her own name, is marrying Harry, who just graduated school and has few assets. Wanda requests that Harry sign a prenuptial agreement to protect this five million dollars from division in divorce, but the agreement is silent regarding distribution of her assets at death. Imagine Wanda has parents with limited means, a sick relative who needs money for medical care, and nieces and nephews she loves like children. If she dies before Harry without a Will (or other testamentary documents), these other loved ones would receive nothing.

What should Wanda do? The answer is simple. Before marrying Harry, Wanda should sign a Will that bequeaths assets to Harry and these close relatives. Of course, to avoid Harry exercising his right of election, her Will should bequeath to Harry, at least, the minimum threshold necessary to satisfy what Harry's right of election would be; but her Will can freely dispose of her remaining assets however she'd like.

Many individuals sign prenuptial agreements, get married, but don't simultaneously sign Wills. Indeed, the most common catalyst for a first Will is having children (you need a Will to appoint a

guardian), which may happen years after marriage. So, in that rush to the alter, don't forget to also sign a Will.

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