

Where there's a Will, There's an Heir



We've all heard the expression, "where there's a will, there's a way," but among estate planning specialists, the old adage becomes "where there's a Will, there's an heir." We have all heard the stories about heirs coming out of the woodwork when money is to be had. This saying likely arose from that very common occurrence. This saying also reflects the inherent complexities involved in establishing a Will and highlights the importance of having a well-drafted Will to ensure that the heirs you wish to receive your estate actually do receive all that you intend.

A Will is document in which you direct to whom and in what proportions your probate property will be distributed when you die. In Massachusetts, to execute a valid Will, you must be at least eighteen (18) years old and of sound mind. Your Will must be in writing, signed by you, and witnessed by at least two people, who must also sign the Will. A well-drafted Will also contains an affidavit that establishes that you followed all of the legal formalities required when executing a Will. This Affidavit eliminates the need to have a witness go to the Probate Court to prove your Will after your passing. Once you have established a Will, you can change it at any time so long as you remain competent to do so.

Many people believe that if they have a Will, their estate will avoid probate, but that is incorrect, as in order for a Will to be proven as valid, it must be probated. A Will directs the disposition of your probate estate, which consists of all the assets at the time of your death that you hold in your name alone and that do not have a named beneficiary. Whether your estate must be probated depends upon whether you leave behind probate assets. Upon your passing, if you leave probate assets and a Will, the Will must be probated. If you do not leave a Will, your estate will be administered in accordance with rules established by the state legislature, as discussed below.

Many people attempt to avoid probate by holding all of their assets jointly with the person(s) that they want to have them if they pass away and by naming those persons as beneficiaries on any assets where beneficiary designations are allowed. When doing so, many people believe that they do not need a Will. This is another common misconception. If the joint owner or named beneficiary predeceases you, that asset will be part of your probate estate. Further, it is very common that there is an asset of some sort requiring probate, particularly refunds for cancelled insurances and from medical facilities, which could not have been made joint prior to death.

When you die without a Will, the distribution of your property is determined first by identifying your spouse and the blood relatives that have survived you. The legislature has enacted statutes identifying your “heirs at law,” who are the relatives who will receive from your estate, and also establishing how much of your estate a given relative will receive. If you leave no known blood relatives and no spouse, your property will escheat to the Commonwealth. Having a Will allows you to make sure that you are the one to direct how your estate will be distributed.

A Will is also necessary to name people to fill important roles. You will designate a Personal Representative, who will be responsible for gathering your probate assets, paying your debts, and making distributions of the remaining assets to your beneficiaries as set forth in your Will. If you have minor children, you will designate a guardian to look after them upon your passing. If you leave assets to a minor child, you might also establish a trust within your Will to hold the assets and manage them until the minor is old enough to receive them outright. By not making a Will, you forfeit your power and ability to make these designations and to direct the distribution of your property.

Due to the inherit pitfalls involved in establishing a Will, it is best to have an estate planning attorney assist you. By doing so, you will ensure that your estate will be carried out as you wish by those you have named to do so. When you pass away having a Will that is properly drafted and executed, the adage changes again to “where there’s a well-drafted Will, there’s a happy heir.”

Gina M. Barry is a Partner with the law firm of Bacon Wilson, P.C. She is a member of the National Academy of Elder Law Attorneys, the Estate Planning Council, and the Western Massachusetts Elder Care Professionals Association. She concentrates her practice in the areas of Estate and Asset Protection Planning, Probate Administration, Guardianships, Conservatorships, and Residential Real Estate. Gina may be reached at (413) 781-0560 or gbarry@baconwilson.com.