

# Your Will Means Your Way: A Look at the Most Overlooked and Undervalued Estate Planning Tool

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**Y**our Will means your way, and this is a powerful reality. We've all heard a horror story from a family member or friend, or have lived through one ourselves involving a friend or family member's estate gone awry.

It usually begins with something like "My friend's aunt Mabel on her father's side died without a will, and everything went to her nephew who she stopped talking to years ago...the nephew that never called, never visited and never lifted a finger to help poor Mabel. Now he's inherited all the money, and the family is livid."

Unfortunately, no matter how many stories we hear or problems we live through, many people still do not have their estate plans completed and have not executed their own Last Will and Testament. But be reminded that the Will is one of the most important estate planning documents you should have in your possession. In today's world of joint ownership, trust documents and deeds with life estate interest, the Will is often under-valued in terms of its true significance in estate planning. By definition, a Will is a legal instrument, executed with the formalities of state statutes, by which you make a disposition of your real and personal property after your death. The Will is by its very nature both ambulatory and revocable during your lifetime.

When drafted in conformity with very specific formal requirements it is a document that allows distribution of your assets (estate) after death in accordance with your wishes. The assets subject to the provisions of a Will are the assets owned solely by an individual. A Will does not cover jointly owned assets and/or assets that do not have a named beneficiary.

For example, a home owned jointly

by a husband and wife as "tenants by the entirety" would not pass pursuant to a Will on the death of the first spouse. The home shall pass legally to the surviving spouse at the time of the first death.

However, upon the death of the second spouse, the home shall be distributed under the Will. That's because the home is now solely owned by the surviving spouse (at the time of his or her death). If, like our friend's Aunt Mabel, you do not have a Will, or you have bought a Will off the Internet or from a form book and the Will is improperly executed (i.e. an invalid will) when you die, you will have died "intestate." That means without a Will. This is an important distinction to understand because lacking a Will, any property you owned will be distributed in accordance with state laws known as "intestate succession." And the general rule is that the property is distributed to your closest surviving relative(s).

All states have their own version of the laws of intestate succession; however, in Massachusetts specifically, the property of one who dies intestate will be distributed in the following manner. If the decedent (the person who has died):

- is survived by a spouse and children of the decedent, then the spouse takes half of the personal property and half of the real property in the decedent's estate, with the other half being distributed to the children
- is survived by the spouse and no children, but there are blood relations, the surviving spouse receives \$200,000.00, half of the remaining personal property and half of the remaining real property, and the blood relations get the other half. If the amount of the personal

property is not sufficient to pay the \$200,000.00 then such amount can be obtained by the sale or mortgage of the real property

- has left no children, and no blood relatives, then the surviving spouse takes all
- is survived by only children, then the property passes in equal shares to the living children and to issue (offspring) of a deceased child by the right of representation
- is survived by parents, but no children and spouse, then the property will pass to the parents in equal shares or in its entirety to the survivor if one parent has died
- has no spouse, children or parents, but is survived by siblings, then the property will pass to the siblings in equal shares or to the children of deceased siblings by right of representation
- dies with no spouse, children, parents or siblings but is survived by other family relations, the property will pass to the nearest blood relations, called 'kindred'
- leaves none of the above referenced family members or blood related persons, then the property passes to the Commonwealth of Massachusetts.

Hopefully it is clear that based on the guidelines above, if a person dies intestate then the Commonwealth of Massachusetts could end up with the assets from their estate. That means your favorite charity, church, scholarship or friend may never receive the inheritance you wanted them to have upon your death because you failed to set out your wishes in your Will to ensure the distribution would be your way.

And let's not forget Aunt Mabel; had she duly executed a properly drafted Will, her undeserving nephew would

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not have inherited her assets and she would have been able to make bequests to those people she desired to inherit her assets.

The test to put to Aunt Mabel's Will to ensure it is duly executed and properly drafted is set forth in the laws of the state where the Will was drafted and executed. In order to have a valid will, all states require that you be at least 18 years old and of sound mind. This means you understand what you have in your estate at the time you make the Will and that you understand what you are giving to the named beneficiaries.

Certain requirements must also be met in order to treat the Will as effective. Basically, the Will must be in writing (except in very specific situations); it must be signed by the person who makes it, and it must be witnessed by at least two people who sign the Will in the presence of the maker and state that they witnessed the maker's intention to make the Will.

The witnesses must also certify that it is their belief that the maker was of sound mind, over the age of 18 and not under any undue influence when making and signing the Will. Failure to meet any of these requirements will make the Will invalid and will subject the creator of the Will to the laws of intestacy.

Nearly limitless terms can be set forth in a Will as to distribution of assets, payment of debts, division of property and the like. Additionally, guardians of minor children can be named in the Will and protections for animals can be included as well.

The Will is the set of instructions to the probate court, which is charged with the power to oversee the division of property among those who are entitled to it. The Will does not avoid the process of probate but guides it. Understanding the terms and provisions to be included in the document will result in a planning tool that clearly sets out your instructions and desires as to how your

“probate-able” property (property that you own solely at your death) is distributed, and directs how your final wishes are to be carried out.

Obviously, Aunt Mabel should have consulted an attorney to assist her with her Will as it is easy to draft an unclear document or fail to include the requirements of a valid document. The risk of not planning is to pass away intestate, or to die with a Will that is invalid or ambiguous and will not provide you with a legal instrument that sets forth “your way.” ■

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