

If You Should Die Before You Wake, Whom Do You Pray Your Estate to Take?

By Gina M. Barry, Esquire

Imagine that when you close your eyes tonight, they never reopen. Do you have a Will? Did you have a Will drafted, but never sign it? Regardless of your answer to these questions, the good news is that everyone has a Will. If you fail to draft or properly execute a valid Will, then the laws of the state in which you pass away will determine how your estate will be distributed. Thus, even though you may have never signed a Will, state law will distribute your estate upon your passing.

First, it is important to note that your estate for purposes of this discussion is defined as your probate estate only. Your probate estate consists of any asset held in your name alone at the time of your passing that does not have a designated beneficiary. The default rules will not apply to any asset that is held jointly so long as the joint owner is alive when you pass away, nor will they apply to any asset with a named beneficiary so long as the beneficiary is alive when you pass away. If the joint owner or named beneficiary predeceases you, then the asset may pass to your estate to be distributed in accordance with the default rules if you have not made a valid Will.

When you die without a Will,

the distribution of your property begins by determining if a spouse and any blood relatives have survived you. The statutes identify your "heirs at law," who are your spouse and the blood relatives who will take your estate. These statutes also establish how much of your estate your spouse or a given blood relative will take. When establishing these statutes, the legislature took into consideration the most likely distribution a person would choose, but that does not necessarily mean that the legislature's plan will agree with your wishes.

As such, the question remains whether the state will distribute your estate as you would have wanted to distribute your estate. In Massachusetts, when you pass away without a Will, if you are survived by a spouse and children, your spouse will take half of the personal property and half of the real property, and your children will take the remaining halves in equal shares. Thus, when assets have been left in the deceased spouse's name alone with no beneficiary designated, they will be split as stated. This division is generally shocking to a surviving spouse who may have expected to receive all of the probate assets from the estate of their spouse. In this case, the children will often agree to give

their interests in the probate estate back to their surviving parent, but this is not always the case.

If you are survived by only your children and no spouse, then your children will take all of your probate estate in equal shares. If you have an estranged child, this may be exactly what you did not intend to occur. The only way to effectively disinherit a child is to make a Will intentionally omitting that child from taking any portion of your estate. Similarly, if you wish to benefit one child over another, perhaps because that child provided more care to you prior to your passing, you can only do so by making a Will setting forth the unequal distribution.

In addition, while the equal division of property seems straightforward, it is often not so simple when actually carried out by the children. Surprisingly, one of the most common sources of disagreement will be your personal property, which typically includes jewelry, furniture, collectibles, art and other mementos that were collected during your lifetime. As these items may have sentimental value, children often squabble when dividing this property. Unfortunately, the statutes do not provide any

further guidance, and the best way to avoid any conflict between your children is to take the time to draft a Will detailing your personal items and the individuals to whom they should be given.

Ultimately, if you leave no spouse and no blood relatives, your property will pass to the Commonwealth, which is an outcome that most people would choose to avoid. Should you find yourself having no living heirs, or having no living heirs to whom you wish to leave your estate, you should execute a Will and leave your estate to friends or a favorite charity,

both of whom would never be entitled to your estate should you pass away without a Will.

Due to the legalities involved in making a Will and the inherit pitfalls involved in the process, it is best to have an estate planning specialist assist you when drafting this very important legal document. By doing so, you will ensure that your estate will be carried out in accordance with your wishes by those you have named to do so. Should you fail to do so, all of your prayers as to who will take your estate may very well go unanswered.

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