



## HAVE YOU MADE A WILL?

### WHAT IS “PROBATE PROPERTY?”

A will controls the disposition of probate property only. This is a very important concept. In general, a testator’s probate property consists of all property held in the testator’s name, individually, at the time of his or her death. Property held jointly with another individual or property held in the name of a trust would not typically be probate property, and therefore would not be controlled by the will. Similarly, the testator’s beneficiary designation, and generally not his or her will, controls the disposition of the death benefit under a life insurance policy and the distribution of retirement assets.

### WHEN DOES A WILL BECOME EFFECTIVE?

A will becomes effective on the testator’s death, but its validity must be established in the probate court.

### ARE THERE LIMITATIONS ON DISPOSITIONS BY WILL?

The only person who cannot be effectively excluded by a will is the testator’s surviving spouse. A spouse who has been excluded by the will may exercise an election within a prescribed period of time to take the statutory share of property. A testator’s children do not have a statutory right to a share of the estate, but a testator who wants to exclude his/her children must express that intention clearly in the will.

### DOES A WILL CREATE AN ADDITIONAL EXPENSE FOR THE ESTATE?

No, when compared to having no will at all. If an individual leaves property in his/her own name at the time of his/her death (i.e., probate property), the estate will require administration in the probate court. A will names the person responsible for the administration of the estate (the executor)

and provides the executor with guidance as to the disposition of assets. A will also allows the testator to provide the executor with certain powers that can reduce the cost and delay of the probate process. If there is no will, the probate court must determine the testator’s heirs (see “What happens to the decedent’s property when there is no will”) and appoint an administrator to administer the estate.

### HOW OFTEN SHOULD A WILL BE REVIEWED?

A will is valid until it is modified or revoked, and it may be modified or revoked as often as you wish. Changes in the family, changes in the amount and kind of property owned and changes in tax laws may require changes in the will. A will should be reviewed at least every five years, somewhat like having a periodic medical examination.

### WHAT IS THE EFFECT OF MARRIAGE OR DIVORCE ON A WILL?

Marriage revokes the will in its entirety unless the marriage is expressly contemplated in the will. Divorce or annulment revokes only the disposition of property to (or fiduciary appointment of) the former spouse, as though he/she had predeceased the testator, unless the will expressly provides otherwise.

### WHAT HAPPENS TO THE DECEDENT’S PROPERTY WHEN THERE IS NO WILL?

When a person dies intestate, his or her property is distributed to the “heirs at law” according to a statutory formula. The laws are inflexible and make no exceptions for those in unusual need. The law provides that after payment of the expenses of administration, funeral, last illness, debts, taxes and any family allowances, the decedent’s property is divided as follows:

- If the deceased leaves a spouse and issue (children, grandchildren, etc.), the spouse takes

one-half of the personal property and one-half of the real estate. The balance goes to the issue in equal shares.

- If the deceased leaves issue but no spouse, all real and personal property goes to the issue in equal shares.
- If the deceased leaves a spouse and no issue, but there is kindred (other family), the surviving spouse takes all of the first \$200,000 and one-half of the remaining personal property and one-half the remaining real estate. The balance goes to the kindred in equal shares.
- If the deceased leaves no issue and no kindred, the surviving husband or wife takes all of the personal property and all of the real estate.
- If the deceased leaves no spouse, no issue and no kindred, all property passes to the state.

There are a number of other provisions, depending on the circumstances.

### IS JOINT TENANCY A GOOD SUBSTITUTE FOR A WILL?

It is sometimes tempting to use joint ownership as a vehicle to avoid the probate process. In some cases, and for certain kinds of property, joint ownership, in addition to a will, may be a useful legal tactic. Countless problems arise from the indiscriminate use of joint tenancy, however. Joint tenancy always involves a gamble as to which joint owner will die first. While the will may be changed as often as the testator desires, a joint tenancy once created, cannot be modified without the consent of all the joint owners (except in the case of bank accounts and certain other types of property). Holding property jointly also exposes that property to the creditors of the joint owner, and puts the joint owner in the position to remove assets without the owner’s prior knowledge or permission.

Further, joint tenancies should be used with

### WHAT IS A WILL?

A will is a written instrument that controls the disposition of an individual’s probate property at death. The laws of each state establish the formal requirements for creating a will. In Massachusetts, as a general rule:

- The testator (the person creating the will) must be at least 18 years old.
- The testator must be of sound mind.
- The will must be written (there are specific, limited exceptions).
- The will must be witnessed by two competent persons in a special manner provided by law. A beneficiary of a will or spouse of a beneficiary should not be a witness, because the beneficiary may lose benefits under the will as a result.

The technical formalities required for the execution of a will must be followed precisely.

a great deal of care since they may create federal and state tax problems. Contrary to popular belief, the creation of a joint savings account or joint ownership of stocks, land or other property does not avoid the problems of state and federal estate taxes. It also does not allow planning for contingencies such as the death of joint tenants in a common accident.

### WHAT ABOUT LIFE INSURANCE?

As stated earlier, life insurance proceeds are paid in accordance with the owner's contract with the company. It is important to review beneficiary and ownership designations in connection with the creation of your will. Life insurance can be used to provide cash for the payment of debts, administration expenses and other obligations for which the estate is responsible. An individual should have the lawyer and the insurance underwriter work together to provide a life insurance program that will complement the individual's estate plan.

### WHAT ARE ESTATE TAXES?

Estate taxes are a form of tax levied against the estate of a decedent by the federal and state governments. The tax is levied on any property in which the decedent had any incident of ownership at the time of death, including life insurance, jointly held property and annuities. Proper estate planning can provide for substantial estate tax savings through the use of all available deductions and credits. Often a trust is also used to maximize tax-saving opportunities. A will also can direct how the estate shall pay the estate taxes. The shares of certain beneficiaries may pass "free" of taxes while others may pay their share or more. If there is no will or no provision in a will, a statute determines the allocation of taxes among the beneficiaries.

### WHEN AND HOW SHOULD GIFTS BE MADE TO CHARITIES?

Gifts may be made to charities during lifetime or by will, and there may be both income and estate tax deductions available as a result of such gifts. An individual may leave the income from property to one or more persons for life and the remainder of the property to charity. Certain prescribed regulations must be followed in order to achieve the desired tax deductions, and it is advisable to review these plans with your attorney.

### HOW DOES ONE MAKE A WILL?

The drafting of a will can be complex and involves the making of decisions requiring professional judgment. A practicing estate-planning lawyer can help you avoid innumerable pitfalls and advise the course best suited for your individual situation. A "printed form" or "will kit" may not suit your situation and your needs and could, in fact, create more problems in the future.

### WHAT DOES A WILL COST?

Professional fees for estate planning services are usually based on the time and work involved, the complexity of the client's planning situation, and lawyer's experience. The subject of fees should be discussed frankly with your lawyer, preferably at your first meeting.

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