

Common Misconceptions About Your Last Will & Testament

Written by Brandon C. Walecka, Esq.

Before I discuss the common misconceptions that many of my clients have about their Last Will & Testament, we should ask, "What is a Last Will and Testament?"

The Last Will and Testament is a document in which you designate who will receive your property after your death. It is used by the Probate Court to transfer property that is owned in your name alone at your death to your heirs. In most Wills, you will name a person called a "Personal Representative" (formerly executor/trix) who will bear the responsibility for administering your estate. The personal representative works with your lawyer and the Probate Court to transfer your property to your heirs.

Often when I meet with clients for planning, they have several misconceptions about what a Will can and cannot do regarding their goals. Below I hope to eliminate some of these misconceptions and help emphasize the importance of proper estate planning.

- 1. A Will Avoids Probate.** While meeting with a prospective client, I often hear, "I already have a Will, so I don't have to worry about Probate, right?" That is wrong. A Will is Probate. As described above, to execute the wishes expressed in your Last Will and Testament, the document must be probated. This means the Personal Representative must submit the Will, along with a petition, to a judge for approval. This is the Probate process. The timeline for submitting the Probate petition, receiving authority from the court, filing an inventory of assets within the estate, liquidating

assets, selling property, and finally closing the estate could take 12 to 15 months, if not longer. Often, the cost and delay of probate can be avoided through some basic estate planning techniques such as proper beneficiary designations or a trust.

2. **There is No Benefit to Probate.** Despite the cost and delay of the probate process, discussed above, sometimes an individual may want his or her estate to go through probate. Why? Well, perhaps the individual has minor children and should both spouses die simultaneously, they want their minor children's inheritance to be held in a trust until they reach the age of 25. Also, they want to name within their Wills someone who will raise and care of their minor children in their place (called a Guardian). Also, sometimes the client wishes to establish a testamentary (within the Will) special needs trust for the benefit of a disabled person who is receiving, or may in the future receive, needsbased government benefits. Assets held by a special needs trust created by a Will generally are not considered to be owned by the beneficiary of the trust. Therefore, if the beneficiary of the trust applies for Medicaid/MassHealth the trust assets will not count.
3. **The Will Distributes All of the Decedent's Assets.** The Last Will and Testament distributes Probate assets only. A Probate asset is an asset that was held solely in the name of the deceased person. For example, a bank account owned in your name individually, or a retirement plan or life insurance policy without a named beneficiary. Often clients mistakenly believe their goal of equally distributing their assets upon their death will be accomplished through the Will, when in actuality an improper beneficiary designation could supersede the Will causing unequal distributions to your beneficiaries.
4. **Only Older People Need a Will.** As an attorney, I know proper estate planning is especially important. If you

are over age 18 and are of sound mind, you should execute foundational estate planning documents, including a Will. Particularly, you should have a Will if: a) you have minor children, b) you have personal property or family heirlooms that you want a specific person to receive at the time of your death, c) you are married and own property jointly, d) you have an unusual distribution scheme in mind after you pass away, and e) you were married previously and have children of a previous marriage.

Want to learn more about what benefit a Will can offer you? Consider scheduling a consultation with a qualified estate planning attorney who can help.

The information contained in this article is not intended to make you an expert on estate planning nor is this article intended to replace the need for the advice of a professional. Rather, this article is simply intended to provide a basic understanding of why estate planning is important for everybody and a basic understanding of some of the more common estate planning tools. This article does not constitute legal advice.

Also see this same article published in Fairhaven Council on Aging's Senior Lifestyles [January 2021 Newsletter](#). Reproduced with permission.