Massachusetts Probate Tips
a Survival guide

Probate is not something to be feared IF you are armed with the knowledge legal insiders have. Avoid the common traps. Learn the shortcuts. Save time and money. Don't make an already difficult situation even harder on yourself. Learn how to:

- *Resolve Issues Regarding Funerals and Burials*
- *if There is No Will…*
- *Probate misconceptions: what actually gets probated*
- *Duties of an Executor simplified*
- *How to get money right away*
- *Dividing the Assets*
- *Why you shouldn't pay all debts right away*

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INTRODUCTION

Losing a loved one is difficult enough without having to worry about that person's bills, creditors, medical expenses, court proceedings, etc. In order to ensure that your loved one's assets are being handled properly, and to make your job *significantly* easier, we highly recommend seeking counsel to guide you through the process of settling someone's estate. Although it can be a simple process, it is one fraught with strict procedures and specific time deadlines. Our attorneys understand what a difficult time this is in a family's life, and are experienced in the field of probate law. We know the procedure and the deadlines, and we are glad to help you through this stressful time by taking these worries off your hands.

The following are some of issues that we find concern families the most:

- *How to Resolve Funeral and Burial Issues*
- *What Happens if There is No Will*
- *What Assets Actually Get Probated*
- *What are the Duties of an Executor*
- *How to Get Money Quickly*
- *Dividing the Assets*
- *Paying Debts*

Let us simplify some of these issues for you in this booklet.

RESOLVING ISSUES REGARDING FUNERALS AND BURIALS

Unfortunately sometimes it is unclear exactly what your deceased loved one wished to happen with his or her remains. Did they want to be cremated or buried? Where did they want their final resting place to be? Who gets to decide these questions?

When there is a dispute, or question, regarding the disposition of a loved one's remains, there is a distinct "pecking order" designating who has the right to make the final decisions regarding these matters. Generally, the order is as follows:

1. provision in decedent's will
2. spouse of decedent
3. next of kin
4. if next of kin is a minor, the minor's guardian

Very often funeral homes, morgues, etc. are not aware of this order, and do not know who to listen to when it comes to the final arrangements. And unfortunately, it is oftentimes the case that families cannot agree on what they want or what they think their loved one would have wanted. Regardless, the law is very clear on who has the right to make these decisions, and this is a stressful situation that our firm is often able to resolve with one letter or phone call if need be.[1]

GETTING MONEY IMMEDIATELY

In addition to being emotionally upset at the loss of a loved one, oftentimes, people become immediately stressed upon the death of a loved one worrying about the financial aspects involved with death, such as the funeral expenses and medical bills. People tend to dread the probate process, because they think it means a long time before they see any assets from the estate. This is not necessarily true however. For instance, life insurance policies are not subject to the probate process, and are payable immediately upon death to the named beneficiary.

Access to estate assets may also be obtained quickly through the court processes of having a temporary administrator or a special administrator appointed. The court understands that certain circumstances necessitate one of these temporary appointments in order to manage the affairs of the estate and protect the assets. (i.e. collect rent, repair property or maintain a pending lawsuit). Also, in addition to allowing expedited appointments, the court will compensate such administrators as it sees fit.

WHAT IF THERE'S NO WILL? (MGL 190, §1,3)

Who Gets the Assets??

People often come into our office with the misconception that if someone doesn't have a will, then his or her property goes to the state upon death. Under most circumstances, this is absolutely not true. When someone dies without a will, rather than going automatically to the state, his or her property will pass to relatives according to state statutory provisions.

The following is the *general* order in which people receive the estate assets of someone who did not have a will:

1. spouse
2. children (including, natural children, adopted children and children born out of wedlock, if paternity is established, but *not* stepchildren)
3. grandchildren
4. other lineal descendents
5. parents
6. siblings

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7. nieces and nephews
8. any relative, or "kindred"
9. the state

Why Hire an Attorney to Help You??

We recommend contacting an attorney as soon as possible to guide you through the process of estate administration. Allowing counsel to do this process correctly is extremely important to protect yourself, hasten the process, and oftentimes decrease the cost of administration. Not only will it cost more time and money if you do it wrong the first time around, but doing this process incorrectly can leave yourself vulnerable to the risks of financial sanctions from the court, lawsuits by other relatives, etc.

The process for probating an estate can be easy, but the procedure and requirements involved are extremely particular and subject to strict time deadlines. So again, we highly recommend allowing counsel to assist you in the process. It is important to note that the costs of estate administration are ultimately paid for by the estate. Anyone who pays costs upfront towards the administration will be reimbursed with estate assets once the estate has been opened.

Does Everything Cost More Without a Will??

It is a common concern among clients that the costs of administering an estate will be greater when there is no will, as will taxes. As such it is important for you to realize that costs and taxes are the same whether there was a will or not. You will not be financially "penalized" because your loved one did not have a will. Having said that, we highly recommend having a will in order to ensure that your property will go to the people whom you choose, rather than those chosen by the Massachusetts intestacy statute.

How Do We Get The Assets??

As we have mentioned previously in this booklet, there is a very specific procedure that must be followed before someone's assets can be distributed. For this reason, we recommend you seeking the assistance of counsel to help you through this process.[2]

Some of the steps include the following: obtaining a death certificate; petitioning the court to have someone appointed the "administrator" of the deceased person's estate; notifying interested parties (i.e. heirs) of certain rights; publishing a notice in a newspaper specified by the court; gathering a list of the assets; preparing an inventory of assets to file with the court; preparing an accounting; paying debts; and, distributing assets to beneficiaries.

How long this process takes and how quickly assets are distributed to the rightful beneficiaries depends on the circumstances of each individual estate. For instance, if there is only one person inheriting, and no debts, then that beneficiary will have control of the assets within a few months. However, if there are outstanding debts, legal disputes, trusts and multiple beneficiaries involved, if may take over a year for beneficiaries to be paid.

THE PAYMENT OF DEBTS

Why You Shouldn't Pay All Debts Right Away

Something that people often panic about is paying the bills that continue to come after a loved one has passed away. Well don't worry, you can't damage a deceased person's credit!! In fact, under M.G.L. c. 197, §2, executors/administrators of estates are not obligated to pay debts until **six months** after the date of death, and even then, only if the estate is solvent (i.e. has enough money to satisfy all the known debts against it). Also, creditors generally only have one year from the date of death to file claims against an estate. No matter what, it is never the family's or the executor/administrator's *personal* duty to pay a decedent's debts. The debts are paid from estate assets, if there are any.

Order of Debt Payments (M.G.L. c. 198, §1)

Once an administrator/executor has been appointed by the court, she or he will be responsible for assessing the outstanding debts, as well as the assets available for paying them. The following is the priority in which debts should be paid:

1. administration costs
2. funeral expenses, expenses of last illness
3. debts entitled to preference by law
4. public rates, taxes, child support, excise duties
5. Division of Medical Assistance
6. moneys owed for labor performed within the year preceding death
7. moneys owed for necessaries furnished to the decedent or his family within the 6 months preceding death
8. debts due to all other persons

WHAT ARE "PROBATE ASSETS"?

A common misconception that people have is that every asset must go through the probate process. This is not true. For instance, the following is a list of assets that are not considered probate assets:

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1. property held jointly with another person – example: you and your spouse own a home together at tenants by the entirety
   example: you and a sibling own property together as tenants in common
   example: you and your parent share a joint bank account
2. trust property
3. life insurance policies with a named beneficiary
4. most retirement funds with a named beneficiary

Assets, such as the above-listed assets, generally pass directly to the joint holder or named beneficiary without any action or court involvement.

What if My Spouse Excluded Me From His or Her Will??

With or without a will, and regardless of whether you were left out of your spouse's will, you are entitled to receive money following the death of your spouse. Aside from certain state benefits that may be available to you, if there is no will, spouses collect via the Massachusetts intestacy statute, M.G.L. c. 190. Furthermore, even if your spouse had a will, but he or she excluded you from it, you, as the surviving spouse, can recover up to $25,000 plus ½ of all remaining real and personal property via M.G.L. c. 191, §15. A surviving spouse can also opt to obtain assets under M.G.L. c. 191, §15, if he or she is dissatisfied with the gift that his or her spouse *did* leave him or her in a will. No matter what the surviving spouse will not be left with nothing!!

What if Your Parent Excluded You From His or Her Will??

Similarly to being left out of your spouse's will, being left out of your parent's will can be emotionally upsetting and financially stressful. Fortunately M.G.L. c. 191, §20 provides at least some protection to children not provided for in their parents' wills.

Specifically, a child left out of his or her parent's will may inherit the same amount he or she would under the intestacy statute, as though his or her parent died without a will. Under M.G.L. c, 190, children of a person who dies without a will, or "intestate," inherit the parent's assets in equal shares with his or her siblings, if the parent had no spouse. If the parent did have a spouse, the spouse would be entitled to 50% of the assets, and the child would share the remaining 50% of the estate with his or her siblings.

There are two exceptions however. If there is evidence that the child was purposefully omitted from his or her parent's will, the child will not inherit. Example: Parent's will reads "I am intentionally omitting my child, Henry, from my will." The other exception is where the child was provided for during the parent's lifetime. Example: Parent gave $100,000 to his child prior to death, and was then left out of the will.

It is important to note, however, that even when a minor child is intentionally disinherited by his or her parent, previous child support obligations survive the parent's death. L.W.K. v. E.R.C., 432 Mass. 438 (2000).

WHAT IS AN ADMINISTRATOR OR EXECUTOR

Throughout this booklet we have repeatedly used the terms "administrator" and "executor." It is important to understand the difference between these two terms, as well as the duties that they are responsible for in the administration of an estate.[3]

The Difference Between the Two

An **executor** is someone nominated by another person in his or her will to be in charge of handling estate matters. For instance, oftentimes a wife will name her husband as executor in her will, so that he will be responsible for handling her estate matters upon death.

An **administrator**, on the other hand, is the person appointed by the court to handle the matters on an estate that had no will. It is important to note that while any party having an interest in the estate may petition for the estate's administration, there is a prescribed order under M.G.L. c. 193, § 1 for who may be appointed as the administrator. The order is as follows:

1. surviving spouse
2. next of kin or their guardians
3. principal creditor(s)
4. public administrator

There are also many similarities between executors and administrators, however. For instance, whether the executor is named in the will, or a spouse seeks to be appointed administrator, in either case, the person must be appointed by the court via petition.

Once the court has issued a decree approving the appointment of an administrator or executor, the two roles share very similar duties, namely, paying estate debts and administering the estate assets to the appropriate beneficiaries. Note that an administrator

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would distribute assets to beneficiaries pursuant to the Massachusetts Intestacy Statute, whereas, an executor would administer assets pursuant to the terms of a will.

General Procedure and Duties for Estate Administration

Again, whether you are an administrator or an executor, the following is a list of some of your duties:

1. take possession of and protect assets
2. apply for any death benefits for which the estate may be eligible.
3. locate insurance policies and apply for benefits if the proceeds are payable to the estate.
4. collect income such as rents, accounts receivable, interest, dividends.
5. assume responsibility for any litigation in which the decedent had an interest.
6. open estate bank account for payment of debts and expenses.
7. sell real property if applicable.

WHY HAVE A WILL

A will is something that we recommend every adult have, young or old. Many people think a will is not necessary until later in life. Unfortunately, life is uncertain, so it is much better and smarter for you and easier for your family to have your affairs in place to be safe. A will is a powerful tool in which you can designate who will take your property and when they will receive it. (i.e. if the person receiving assets is young, you can direct that certain property be held in trust until the beneficiary reaches a certain age). Through a will you can also designate the "executor," the person who you would like to be in charge of handling your estate matters upon your death, as well as the "guardian," the person who you would like to raise your children.

If you do not have a will, the state intestacy statute will apply, leaving the law to determine who will receive your property. With a will, you can broaden the powers that your executor will have, and eliminate the need for sureties on the executor's bond.

Finally, it is a common misconception among clients that husbands and wives share one "joint" will together. However, there is no such thing as a "joint" will in Massachusetts. Each individual must have his or her *own* will, separate from anyone in his or her family. Each spouse must have his or her own will. They can have an identical structure, but they must be separate.

Documents to Protect You While You're ALIVE

While having a will is extremely important, a will has NO effect until you have passed away. There are other legal documents, however, that can protect you and your interests while you are still alive, which our office provides for **FREE** when you obtain a will through our office.[4] The documents we are referring to are –

1. Durable Power of Attorney
2. Healthcare Proxy
3. Living Will

The difference between these documents can be confusing; however, they each provide a crucially different form of protection.

A **durable power of attorney** is a written instrument in which you can designate someone to act as your agent or attorney in fact in order to allow them to perform certain acts. You can designate a power of attorney under many circumstances; however, with regard to estate matters, we highly recommend that you obtain a durable power of attorney that only becomes effective if you become incompetent, i.e. incapable of handling your own affairs. For instance, if you designate your spouse as your durable power of attorney upon your incompetence, then if you ever become sick or injured in a way that leaves you incapable of acting and/or making decisions independently, then your spouse will have the power to manage your affairs and protect your interests on your behalf. For instance your spouse would automatically be capable of managing your assets, transferring property if necessary, signing documents on your behalf, etc. This avoids the need for your family to go to court and request the court to appoint someone as your guardian or conservator.

Unlike a power of attorney, a **healthcare proxy** is someone that you designate strictly for the purpose of making medical decisions on your behalf if you are no longer able to make such decisions for yourself. Similarly to the power of attorney, however, the healthcare proxy only comes into effect upon your incompetence, i.e. you have lost the ability to make sound decisions and/or the ability to communicate your decisions. Designating a healthcare proxy puts your medical treatment in the hands of someone that you trust and who knows you well. Also similarly to the power of attorney, it can avoid costly disputes in court if family members disagree on treatment.

Finally, a **living will** is extremely important in order to make your end of life wishes known. Not only does this

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assist medical staff in assessing your treatment, but it will give your loved ones immeasurable relief to know exactly what treatment you would have wanted were you able to articulate it, rather than being forced to make certain extremely difficult decisions on their own. For instance, you can use a living will to specify that if you are brain dead or in a coma *with no hope of recovery*, then you do NOT want life-sustaining treatment. That way you alleviate any guilt that your family may have had from making that decision on their own, and, once again, you avoid potentially costly and time consuming court action regarding this issue (i.e. the Terri Schiavo situation).

In short, remember –

1. Healthcare Proxy – medical decisions
2. Living Will – your wishes for end of life care
3. Power of Attorney – legal, business, personal affairs decisions.

You want to make sure the right people, whom you trust, and who know you the best, are handling you and your affairs if and when the time comes that you are unable.

Call our office right now for ***FREE CONSULTATION*** with one of our highly qualified attorneys. We are glad to answer any questions you may have regarding the information in this booklet.[5]

Our telephone number is **617-479-4300** and we are available 24/7 to answer your call.

If you have recently lost a loved one, then give yourself peace of mind that you and your family deserve and let us guide you through this difficult time. Allow yourself the time to grieve with your family and friends, and let our office handle the logistics.

Take control of *your own affairs* today, and save your family future hassles and confusion by creating your own will and related estate documents. Our office will provide you with a **Free Consultation**, and if you allow us to draft your will package, you essentially get three other estate documents **FREE**.

With our "Affordable estate planning packages", each person receives a will, a Healthcare Proxy, a Durable Power of Attorney, and a Living Will.

[5] This booklet and the information contained herein does not constitute legal advice. Laws and procedures vary among states, counties, etc. We advise every person seeking legal advice to contact an attorney for guidance.

The attorneys at Hamill Law Office are experienced in the field of estate and probate law. We are sensitive to the specific needs of each family that we deal with, and understand the difficulty of losing a loved one.

We also understand what precautions you should take to protect your own family and assets.

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