FINANCE

How Property Passes at Death no. 9.101

by Celeste Holder Kling[1]

Quick Facts...

Your estate is everything you own (referred to as "assets").

At death, your assets are transferred to the new owner by non-probate or probate transfers. How the transfer occurs depends on the type of asset and how it is titled.

With a valid will, you can, within certain limits, distribute your assets as you wish.

If you want to control how your estate will be handled, you must write a will.

Review your will periodically to make sure it meets changing conditions and serves your best interests.

Colorado State University Cooperative Extension

Putting Knowledge to Work

Your estate consists of everything you own. This includes real property (houses and land), tangible personal property (furniture, jewelry and automobiles), and intangible personal property (stocks, bonds and bank accounts). The estate also may include such items as proceeds of life insurance policies and death benefits under retirement or pension plans. All of this property is referred to as your assets.

How Assets Pass at Death

At death, a person's assets are transferred to new owners. The dead person is called the decedent. The transfer of ownership takes place either as a non-probate transfer or as a probate transfer.

In a non-probate transfer, property passes to the new owner(s) because of the way property was titled or who was named as beneficiary. During his or her lifetime, the decedent titled his or her property in a way that designated the person(s) to receive it at death.

In a probate transfer, the decedent's property passes to specific individuals either according to a will made by the decedent or according to the Colorado laws of inheritance if the decedent had no will.

Non-Probate Transfers

Non-probate assets generally fall into three categories: those which are transferred by title, by contract, or by trust.

1. **Title:** Assets transferred by title include property held in joint tenancy with right of survivorship, such as a house, car or bank account, or bank accounts payable on death to a named individual ("POD" accounts). Note that property jointly owned as a tenant-in-common has no rights of survivorship and is probate property.
2. **Contract:** Assets transferred by contract include life insurance policies, pension and retirement plans, and any other asset on which the owner names the beneficiary to receive it upon the owner's death.
3. **Trust:** If the decedent has created and funded a trust, the trust will generally contain provisions regarding transfer of the property at the time of death. While many people have jointly titled assets and contractual assets with beneficiary designations, living trusts are relatively rare and are not discussed further in this fact sheet.

Title to these non-probate assets passes automatically at death without any court proceeding. While ownership transfers automatically, certain steps may be necessary before the property is released to the new owner(s). A certified copy of the death certificate is required. Additional documentation may be required as well, depending on the asset.

Even if assets will be transferred through non-probate arrangements, a will still may be needed to:

- *distribute probate assets,*
- *distribute jointly owned property if no joint owner survives,*
- *shelter large estates from taxes,*
- *determine how minor children will be cared for, and*
- *determine who will handle the business affairs of the estate.*

If a person has arranged for non-probate transfer of ownership through title, contract or trust, this does not mean that a will is unnecessary. A will still may be needed to distribute probate assets (including property not jointly owned), to distribute jointly owned property if no joint owner survives, to shelter large estates from taxes, to determine how minor children will be cared for, and to determine who will handle the business affairs of the estate.

For many married couples, virtually all of the assets pass to the surviving spouse by non-probate methods (joint ownership of the home, car, bank account and contractual designation of the surviving spouse as beneficiary of the life insurance policy and retirement fund). Nevertheless, these couples still need wills, because probate transfer of the assets will be required when the second spouse dies. No one can be sure in advance which spouse will die first.

Probate Transfers

Probate is a court proceeding to determine who should receive an individual's property at death, who should handle the business affairs of the decedent, and who should care for the decedent's minor children and their property. If a person prepares and executes a will, he or she is testate. The will, within certain legal limits, governs probate decisions.

If a person has no will, the person is intestate. Colorado intestacy law governs probate issues for a decedent with no will. Essentially, the intestacy laws provide a will substitute, written by the state legislature.

Intestate Transfers of Property (Transfers without a Will)

Under Colorado intestacy law, property passes to the surviving spouse and blood relatives only. Here are some examples of how the law works:

- If a decedent is married, Colorado law provides that the surviving spouse will receive the majority of the estate. The actual amount varies, depending upon whether the decedent and the surviving spouse have mutual or separate children or no children at all. In many cases, the decedent's children or parents receive a share of the estate.
- If a decedent is single and has children, the children divide the estate equally. If one of the decedent's children is dead, the grandchildren in that branch of the family receive the dead child's share.
- If a decedent has no spouse, children or other descendants, the decedent's parents receive the estate. If the decedent has no living parents, the estate goes first to the decedent's siblings, then to nieces and nephews and their children. If no relatives are living at this level, the estate goes to grandparents, then to aunts and uncles, then to cousins and their children. If no relatives are living at this level, then the remaining property will go to the State of Colorado.

Under Colorado law, the relationship between the decedent and his or her heirs has to be proved in court. The more remote the relationship, the more time-consuming and costly this might be. A will leaving the estate to named individuals eliminates the need to prove relationship.

Under Colorado law, property is distributed by mathematical formula with no attention given to needs of family members. This may not always be desirable or meet the needs of family members.

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Testate Transfers of Property (Transfers by Will)

If a person has a valid will, a person can, within certain limits, distribute his or her assets to anyone he or she desires.

The principal limitation is that a spouse has a statutory right to a share of the estate. A husband or wife cannot disinherit the other. If the will leaves little or nothing to the spouse, the spouse can take a statutory share of the estate. The execption to this rule is if the spouses have executed a valid marital agreement.

Colorado probate law allows a spouse to claim up to half of the estate. The permissible share is 5 percent per year of marriage, up to 50 percent after 10 or more years of marriage. If a couple were married one year, the surviving spouse may claim 5 percent of the estate; if they were married 5 years, 25 percent. After 10 or more years, the 50 percent share applies.

Under Colorado law, one spouse may not disinherit the other, and a parent may not disinherit a minor child for whom the parent has an ongoing support obligation.

A second exception prohibits a parent from disinheriting a minor child for whom the parent has an ongoing support obligation. Adult children certainly may be omitted; they have no legal right to receive an inheritance from their parents.

Adult children, however, have no legal right to receive an inheritance from their parents.

A person is not obligated to leave property to family members, other than the two exceptions above. Some people leave assets to friends and distant relations. Others make charitable gifts to organizations they wish to support.

Who May Write a Will

In Colorado, every person over age 18 who is of sound mind and under no constraint or undue influence may write a will. Through a will, a person can consider the special needs of heirs or can make gifts to friends or charities.

Appointment of Fiduciaries

In addition to distributing property, a will also nominates a personal representative for the estate, a guardian and conservator for minor children, and a trustee for any trusts created in the will. These individuals, who take on financial responsibility for someone else's affairs, are called fiduciaries. If a person dies intestate, the court appoints fiduciaries according to state probate law.

Appointment of a Personal Representative

A personal representative is the person who handles the business affairs of the estate. A person nominated in a will as personal representative (sometimes called executor) will be appointed by the court if the person is at least 21 years old and is found suitable by the court.

The personal representative is responsible for gathering the assets of the estate, notifying potential creditors, paying the debts of the decedent and the estate, and distributing the remaining assets to the beneficiaries. It is wise to appoint a personal representative who is honest and has some business sense.

The personal representative may be a family member or a friend, or may be a corporate fiduciary, such as a bank trust department. The personal representative is entitled to charge a reasonable fee for services rendered. Family members who serve in this role often do not charge for their services. A testator (person making the will) can nominate someone as personal representative, and that nomination has priority in the court.

Appointment of a Guardian for a Minor Child

The parents of an unmarried minor child may appoint a guardian for their child. If both parents die or the surviving parent is incapacitated, this appointment is effective upon filing of the guardian's acceptance. It will not become effective if a minor 14 years or older files objections or if the court finds the appointment contrary to the best interests of the minor child.

If no will or other designation of quardianship form exists nominating a guardian, or if the nominee is not appointed, the court may appoint any person whose appointment would be in the best interest of the minor, or a person nominated by the minor if the minor is at least 14 years old. The guardian is not required to be a family member.

If parents of minor children do not appoint a guardian, conservator or trustee in their will, the court will appoint one.

Generally, the guardian lives with the minor child. The guardian makes decisions about medical care, education, religion and residency for the child. Guardianship ends when the child is 18 years old.

Appointment of a Conservator for a Minor Child's Estate

When property is distributed to a minor child (or transfered to a trust approved by the court), a court-supervised conservator is required if the child's personal estate exceeds $10,000. If the child is at least 14 years old and has the mental capacity to make an intelligent choice, the child may nominate someone. If the child cannot nominate, the court may appoint the spouse of the minor child, the parent of the minor child, any relative with whom the child has lived for more than six months, or a person nominated by whomever is caring for or paying benefits to the child.

The conservator is appointed by the court and must file a financial plan and an annual accounting with the court. The conservator must receive the court's permission for major expenditures. A child will receive the remaining conservatorship assets at age 21.

Appointment of a Trustee of the Children's Assets

The question of who will manage a child's estate also may be solved by leaving a child's property in trust to be managed by a trustee named in the will, instead of a court-supervised conservator, who would be appointed if property is left outright to the child. The trustee manages the property according to the guidelines established in the will.

If you want to control how your estate will be handled, you must write a will.

Leaving property in trust may be more flexible than leaving it outright to the child. For instance, most parents want their assets to be available to fund a college education for their children, if the children are interested and able to pursue a college degree. Many parents would rather have their assets held in trust until their children are 25 years old, and probably finished with college, instead of giving them their share of the assets at age 21, which is required in a conservatorship situation.

If both parents are deceased, a testamentary trust (one that is created within the will) is a very effective asset management tool. If parents make appropriate beneficiary designations on their non-probate assets, such as life insurance policies and retirement plans, the proceeds of those policies and plans can be deposited directly into the trust without passing through probate.

A testamentary trust can be created only with a will. It cannot be created if the parents die intestate. In the will, the parent names the individual or corporate fiduciary who will serve as trustee. The trustee manages the assets, handles accountings and tax returns, and makes distribution decisions about the trust assets until the trust is closed and the remainder is distributed to the children according to the terms of the trust.

Writing a Will

If you want to control how your estate will be handled, you must write a will. No matter how simple the will, consult an attorney.

This can be the same attorney you use for other legal work. If that attorney does not do estate work, he or she will suggest another lawyer who has the expertise to help you.

If you do not have an attorney, ask friends for suggestions. In some communities, the Lawyer Referral Service or county bar associations may be able to suggest attorneys. Also check the local yellow pages. However, advertisements are not a guarantee of experience or quality of service. If you qualify for legal aid services, inquire at a legal aid office. Older people should inquire at senior citizen centers or at the county office on aging to see if legal services are available.

After selecting an attorney, make an appointment to plan your will. Some attorneys charge no fee for the initial visit, but most do charge. Expect a fee for the actual estate planning session. This could occur at the first meeting. Charges begin after an attorney has been engaged.

Before selecting an attorney, have a general idea of how you want to dispose of your property and of the needs of your heirs. The attorney will need to know the extent of your estate, how much property it includes, how property is titled (individually or jointly), what transfer provisions already exist (such as named beneficiaries), and how much indebtedness exists against the property.

For more information related to estate planning, see fact sheet 9.102, Estate Planning for Parents of Young Children.

A will is effective only at death. You may change your will at any time before death.

Review your will periodically to make sure that it fits changing conditions and serves your best interests. Do this when the family situation or size of the estate changes. Review it yourself first and then decide if your attorney needs to review it.

Individuals and couples with a taxable estate should seek advice on legitimate methods of reducing estate taxes. In 2005, a taxable estate is one over $1.5 million. That amount will increase in uneven amounts until it is phased out in 2010 and reinstated at the $1 million level in 2011, unless Congress changes the law. The most common method of reducing estate taxes, a tax shelter trust in a will or a living trust, can be structured only while both spouses are alive. This is a sophisticated estate planning tool and requires the assistance of an attorney to draft the documents properly.

This material should not be used as a substitute for seeking needed advice from an attorney or other qualified adviser.

All 50 states recognize wills written in other states. Accordingly, if your will is valid when and where it was written or where you lived when you executed it, it is valid in other states regardless of where you live at the time of your death. Probate laws vary among states, however, so it is a good idea to have your will reviewed if you move to a new state.

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