SERVICE IN ACTION
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How property passes at death

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Quick Facts

- A person's estate consists of everything a person owns (referred to as "assets").
- Upon a person's death, assets are transferred by non-probate or probate transfers.
- If a person has a valid will, a person can—within certain limits—distribute his or her assets as he or she desires.
- Persons who want to determine how their estate will be handled should write a will.
- A will should be reviewed periodically to make sure that it meets changing conditions and serves the best interests of the individual.

A person's estate consists of everything he or she owns. This includes such obvious things as real property (houses and land); tangible personal property, such as furniture, jewelry and automobiles; and intangible personal property, such as 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 will be referred to as "assets."

How Assets Pass at Death

Upon a person's death, assets are transferred to new owners. This transfer of ownership takes place as either a non-probate transfer or a probate transfer.

In a non-probate transfer property passes to a specific person(s) because of the way property was titled. During his or her life the owner of the property titled it in such a way that the person(s) to receive it at death was indicated.

In a probate transfer, the property passes to a specific person(s) named in a will which was prepared before death or, in the absence of a will, persons determined by Colorado laws of inheritance.

Non-Probate Transfers

Non-probate assets include such things as property held in joint tenancy with rights of survivorship, savings accounts payable on death to a named individual, bonds with named beneficiaries, and life insurance payable to named beneficiaries. (Property owned as a tenant-in-common has no rights of survivorship and is probate property.)

Title to these non-probate assets passes automatically at death without any court proceeding. While the property transfers automatically, certain steps may be necessary before the property is released to the joint owner(s).

For example, real propety held in joint tenancy passes to the other joint tenant(s) at the time of death. To establish proof of this, a certified copy of the affidavit of death and a supplementary affidavit are filed with the county clerk and recorded in the county in which the property is located.

Jointly owned personal property, such as cars, bank accounts, stocks and bonds, are turned over to the other joint owner(s) upon presentation of a certified copy of the affidavit of death.

If a person jointly owns all or most of his or her property, this does not mean that a will is unnecessary. A will still may be needed to distribute property not jointly owned, to distribute jointly owned property in the situation where there is no surviving joint owner, to determine how minor children are to be cared for, and to determine who should handle the business affairs of the estate.

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 deceased person, and who should care for minor children and their property. If a person has no will (intestate) Colorado law has provided how these things are to be done. If a person prepares a will (testate), he or she in the will, determines how these things are to be done.

Intestate transfers of property (transfers without a will)—If property is passed by Colorado law, property passes to the surviving spouse and blood relatives only. If a deceased person has a surviving spouse, Colorado law provides that the surviving spouse will receive:

1) The entire estate if the deceased person has no children or descendants of children (grandchildren, great grandchildren, etc.).
2) $25,000 plus one-half of the balance of the estate if the deceased person has children or descendants of children who are also children or descendants of children of the surviving spouse. The remaining estate is divided among the children or descendants of deceased children.
3) One-half of the estate if there are one or more children or their descendants who are not children of the surviving spouse (i.e., children of a former marriage). The remaining estate is divided among the children or descendants of deceased children.

If a deceased person has no surviving spouse, but has children or descendants of children, the estate will be divided among those children and descendants of deceased children.

If a deceased person has no surviving spouse and no descendants, property then passes to relatives and their descendants. For example, if a deceased person has no surviving spouse and no descendants, property will go to:

1) Parent or parents.
2) If no parent survives, to brothers and sisters and to those descendants of deceased brothers and sisters.
3) If no parent or descendant survives, to grandparents and descendants of deceased grandparents.
4) If the deceased has none of the relatives mentioned, property will go to the nearest lineal ancestors and their descendants.

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When property passes under Colorado law, the relationship between the deceased 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 necessity of proof of relationship.

When property passes under Colorado law, it passes by mathematical formula with no attention given to needs of family members. This may not always be desirable or meet the needs of the family members.

For example:

—An older couple whose children are grown and whose estate is modest might want the entire estate to go to the surviving spouse and at the death of the last spouse to pass to the children. If on the death of the first spouse, the surviving spouse gets only one half of the estate, this may not be sufficient to support the surviving spouse.

—A young couple with small children and a modest estate might want the entire estate to go to the surviving spouse believing that the surviving spouse will provide fully for the children.

—A couple who has both grown children who are self-supporting and children who are dependent on parents for support may want more of their estate to go to the dependent children.

Testate transfers of property (transfers by will)—If a person does not want probate property to pass according to Colorado law, that person must prepare a 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 on a person's power to dispose of property by will in Colorado is that the person's spouse has a statutory right to one-half of the estate of the deceased spouse. A husband or wife cannot disinherit the other. If the will leaves nothing to the spouse, the spouse may elect to take one-half of the estate.

In Colorado everyone over the age of 18, who is of sound mind, has the privilege of writing a will. If a person writes a will, provisions can be made for property to pass according to his or her wishes. By writing a will, a person can consider the special needs of his or her heirs.

In addition to indicating who is to receive property, a will also nominates a personal representative for the estate and a guardian and conservator for minor children.

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 of age and found suitable by the court.

A testator (person making the will) may want an individual to benefit from his or her estate, but may not want him or her to handle the business affairs of the estate. A testaor can indicate in a will who he or she would prefer as personal representative.

Every personal representative must file a surety bond unless the will expressly waives this requirement. A will also may indicate that the personal representative administer the estate without court supervision.

Appointment of a guardian for a minor child—The parent of an unmarried minor child may appoint by will a guardian of this child. This appointment becomes effective, upon filing of the guardian's acceptance, if before acceptance both parents are dead or the surviving parent is found incapacitated. The appointment will not become effective if a minor is at least 14 years old files objections or if the court finds the appointment contrary to the best interest of the minor.

If there is no will nominating a guardian, or the person nominated in the will is not appointed, the court may appoint as guardian any person whose appointment would be in the best interest of the minor or a person nominated by the minor, if the minor is 14 years of age or older.

Appointment of a conservator for a minor child's estate—When property is distributed to a minor child, appointment of a conservator is required fi the personal estate of the minor child exceeds $10,000. The court may appoint a nominee of the minor child if the minor child is at least 14 years of age and has the mental capacity to make an intelligent choice. 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 resided for more than six months, or a person nominated by the person who is caring for or paying benefits to the child.

The question of who is to manage a child's estate also may be solved by leaving a child an interest in property rather than property. For example, the property may be left in trust for the benefit of the minor child. The property would be managed by the trustee.

Leaving the property in trust for the child may allow more flexible arrangements than leaving the property outright to the child.

Writing a Will

Persons who want to determine how their estate will be handled should write a will.

No matter how simple a will is, an attorney ought to be consulted.

If an individual has a regular attorney for other business purposes, the individual may consult the lawyer about a will. If the attorney does not do this type of work, another lawyer who does will be suggested.

When a person does not have a regular attorney, a friend may be able to suggest one known to be trustworthy. The Lawyer Referral Service also can suggest competent attorneys. The address is Lawyer Referral Service, University of Denver Law Center, 200 West 14th Ave., Denver, Colo. 80204. County bar associations also may have a lawyer referral service. Check the local telephone directory. Persons eligible for legal aid services should inquire at a legal aid office. Older persons should inquire at senior citizen centers to see if there are any legal services available for them.

After selecting an attorney, the individual must make an appointment to plan the will. Most attorneys charge no fee for the initial visit to secure their services. Charges begin after an attorney has been engaged.

Even before selecting an attorney, individuals should begin work on a will and have a general idea of their desires regarding the disposal of property and the needs of the heirs. The attorney will need to know the extent of the estate, how much property it includes (individually or jointly), what transfer provision already exists (such as named beneficiary) and how much indebtedness exists against the property.

A will speaks only at the death of the testator (the person making the will). A testator may change the will at any time before death.

A will should be reviewed periodically to make sure that it continues to meet changing conditions and serve the best interest of the individual. This review should be done when family situation changes or the size of the estate changes.

In order to have a will when it is needed, the time to write it is now.

For more information related to estate planning, see Service in Action sheet 9.102, *Estate planning—its importance for parents of young children.*

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