



# Affairs of the Estate

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**Plan ahead for  
your practice  
and family  
with tips on  
estate planning  
and wills**

**M**ost of us concentrate on building our practices, but we need to remember to protect ourselves and families from events that may occur in our lives. Having a sound estate plan is essential to the survival of you, your practice, and your family.

One such part of estate planning is your will. Unfortunately, a lot of people die without a valid will. A will can direct the disposition of your estate at death. The term *intestacy* deals with state statutes that govern distribution of the property of a person who dies without a valid will or whose will does not completely dispose of his estate. In most states, the rules are the same for real and personal property. Heirs and next of kin are synonymous and describe persons who take either real or personal property by intestacy. Generally, the state where a person dies determines the disposition of personal property. The disposition of real property is determined by the law of the state where the real property is located.

Intestacy statutes (or wills) apply only to a decedent's probate estate. This consists of assets that pass by will or inheritance and are subject to administration by the decedent's personal representative (cash, real estate, and personal items). Nonprobate assets pass under contract (life insurance proceeds, trust assets, etc).

If there is no will, the will was not valid, or does not make a complete disposition of the decedent's property, then the intestacy succession statute applies. For personal property, the law of the decedent's state where they lived governs. For real property, the law of the state where the property is located governs.

The most asked question is: How should the property be distributed? Some general rules are:

- The spouse usually takes half or one-third if there are decedents; if not, all distribution of assets goes to the spouse.
- Children inherit all if there is no surviving spouse, or a smaller amount if there is a surviving spouse.

These rules apply to separate property. Different rules apply to community property. Keep in mind if your state is a community-property state, the spouse already owns half of all community property. Some states that have community property laws are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington.

The definitions of separate and community property vary from state to state but are basically similar.

**Separate property.** This is property owned by a spouse before marriage or

properly acquired during marriage, by donations, or inheritance. In Arizona, California, Nevada, New Mexico, and Washington, the income from separate property is separate. In Idaho, Louisiana, and Texas, the income from separate property is community property.

**Community property.** This is all property acquired during marriage that is not separate property. Under this rule, all property upon divorce or death is presumed community property. The burden of establishing that a particular asset is separate property is on the party so contesting.

**Quasi-community property statute.** This is property acquired by one spouse while living in another state. California and Idaho have quasi community statutes. In effect, the acquiring spouse has the power to dispose of property acquired outside the state of residence but may only dispose of one half of the interest in the property. The other half passes to the surviving spouse. Under the statute, if there is no will, the property passes to the surviving spouse. There are other states that have the quasi-community statute that applies to divorce, but not to the death of a spouse. Arizona and Texas are two states that apply the statute to divorce cases.

#### **Inheritance rights of children.**

1. Adopted children: They become the child of the adoptive parent, and in most cases, lose the right to inherit from the natural parents.

2. Children born out of wedlock: They inherit from the mother and her kin but need paternal proof to inherit from the father.

3. Stepchildren: They cannot inherit from the stepparents absent certain circumstances.

4. Grandchildren: They can inherit only if they are the only surviving descendent.

In cases of simultaneous deaths, all jurisdictions, except Louisiana and Ohio, have enacted the Uniform Simultaneous Death Act. Depending on the priority of death and not enough sufficient evidence that the parties died other than simultaneously, the property of each person shall be disposed of as if one spouse had survived.

For example: If property owner (PO) and beneficiary (B) die simultaneously, the act would cause PO's property to pass under PO by will or intestacy to PO's kin rather than through B's estate or kin. Under the Uniform Probate Act, which deals with deaths or by quick succession, by providing that a person must survive the decedent by 120 hours in order to take as heir or beneficiary.

### **Where There's a Will**

A will is an instrument executed in accordance with certain formalities that directs the disposition of a person's property at death. It acts as a transfer of title of real and personal property. It is effective only upon death of the maker and is sometimes referred to as an ambulatory document. It has no

operative effect during the maker's lifetime. It is fully revocable or amendable at any time.

A will has the following formal requirements:

- 1) be in writing,
- 2) executed with testamentary intent (intent and wording of the maker at the time of execution);
- 3) intent to dispose of property;
- 4) disposition to occur only upon death of the maker;
- 5) maker's capacity to make the will;
- 6) Executed free of fraud, duress, and undue influence;
- 7) meet all the state statutory requirements; and
- 8) duly executed and witnessed.

Changes in a will may revoke all or part depending on state law. A will is revoked by executing another will, revoking the previous one or by physical destruction, such as tearing up, burning, or writing "cancel" across the face of the will.

In most cases a complete, formally executed will does not need other documents to administer the decedent's estate. Grounds for contesting or challenging a will and usually involve the following:

- Was the will properly executed?
- Was it revoked?
- Did the maker lack capacity?
- Was there lack of intent?
- Was there undue influence, fraud, or duress?

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In estate administration proceedings, remember to open the proceedings, that all proceedings are subject to court supervision and control, and that the jurisdiction is the state of the decedent's death.

Fourteen states have adopted the Uniform Probate Act: Alaska, Arizona, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, and Utah.

The importance of estate planning is essential to protecting yourself and your family. Consult with the proper person to provide you with all your financial needs in planning your future. ☞

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