Chapter IV

Property Transfers After Death

A. Overview and Purpose

Land is a valuable asset. When land ownership includes forest areas and wood lots, the value attributed to such assets can be misunderstood or overlooked. When the owner of such assets dies, however, the assets transfer to the deceased owner's estate where they await distribution to a new owner or set of owners.

The significance associated with the death of a property owner is illustrated by this basic point all items of property have an owner at any point in time. When an owner dies, transfer of the owner's property to someone else is a central issue resulting from the owner's death.

In this chapter, we will explore four ways in which property is transferred after an owner's death, i.e., by operation of law, by the intestate law, by a last will and testament, and by a trust created during the owner's lifetime that provides for this transfer after the owner's death. As will be shown here, a person's death sets in motion specific legal rules that make our basic point, that all items of property have an owner at any point in time, a workable legal proposition.

The chapter starts with a discussion of joint ownership of property in the form of joint tenancy with the right of survivorship, tenancy by the entirety, and tenancy in common. In some states, these various types of ownership are known by other names such as joint accounts or multiple-party accounts. Some states also recognize the concept whereby an account is owned by one person during his or her lifetime and the balance that remains at the owner’s death is payable on request to someone else after the owner’s death. Such an account is known as a P.O.D. account or one that is “payable on death” to another. Following this discussion we turn our attention to the issue of sole ownership of property and its transfer under a last will and testament or the intestate law that applies in cases where a person dies owning property in his or her own name, but without having prepared a will that provides for the transfer of the property. The fourth way in which property can be transferred is under the terms of a trust created by a property owner during his lifetime and to which the owner’s property is transferred under instructions that provide for the transfer to other owners under described conditions. Under the terms of the trust, the owner designates those who are to benefit from the property. During the owner's lifetime, the owner may retain some benefit from the trust property which ends at the owner's death. Having created the trust relationship, the owner, through the trust agreement, can designate someone to receive it after his death.

B. Lesson Objectives

When you have successfully completed this chapter, you will be able to accomplish these objectives:
1. Compare the various forms of joint ownership of property and explain how they are created.
2. Compare property distribution under the terms of a last will and testament to property distribution without a will.
3. Discuss the general characteristics and concepts of distributing property under the intestate law.
4. Discuss the various kinds of trusts that are used in the estate planning situation and discuss the role they play in distributing property after an owner's death.
5. Evaluate the various ways you own your own property and consider the advantages and disadvantages.

C. Property Transfers After the Death By Operation of Law

Transfers of real estate or personal property that occur by operation of law take place when one joint owner of a property dies and the owner’s interest passes to other owners who survive the deceased owner. Typically this form of ownership form is referred to as joint ownership with the right of survivorship. In some states this concept is simply referred to as joint ownership. This form of ownership is created when the joint owners make a lifetime decision to share ownership of property, and provide that at the end of any joint owner's life, the surviving owner(s) automatically become the owner(s) of the property. During their lifetime joint owners share the right to use all of the property as their own and they share in the income, rents, or profits that the land produces. If the property is sold each joint owner receives a share of the proceeds from the sale. Joint ownership can generally be created in a variety of ways, such as joint sharing of the purchase price, a gift of a one-half interest to the new owner, or purchase of a one-half interest in property that is fully owned by a current owner.

Not all forms of ownership involving more than one owner are considered to have this survivorship feature. One way that a joint tenant with the right of survivorship is recognized is by identifying a transaction in which the interests of the owners satisfy the requirement of the unities of time, title, interest and possession. These unities recognize that all owners acquired their interest at the same time, the nature of their ownership interest is identical, their interests are equal in relation to each other, and they share an equal right to possession of the property.

Creating a joint ownership interest with the survivorship feature is a matter of state law. Joint ownership with the right of survivorship may require the owners to clearly express their intent to create the survivorship feature as a part of their decision to share ownership with each other. If the owners fail to make this clear expression of their intention a different form of joint ownership, known as tenants in common (described below), is created. In some states, tenancy in common form of ownership is referred to a multiple-party ownership.

Unless there is clear evidence of intent to include the survivorship feature when it is created, state law, such as The Uniform Probate Code, may give each joint owner access to the account only to the extent of their net contribution to it. This result is based on the assumption that a person who deposits money in a multiple owner account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, such a person
is presumed to intend no change to the present form of beneficial ownership. The funds in the account should be accessible by those who deposited them there. Any amount remaining on deposit at the death of the original owner belongs to the surviving owner.

*Example:* If a single owner decides to add another owner to an account, thereby creating a joint ownership interest, the question is whether the original owner intends to give the new owner a present gift of a one-half interest in the account, or intends for the new owner to receive the property at the original owner's death. In the absence of clear and convincing evidence of the intent to share access to the account during the original owner's life, it will be presumed that the owner intended to delay the transfer until after death.

However, if clear and convincing evidence of an intent to create a present gift is established, each owner has access to an equal share of the account, as though each had contributed an equal amount to it. The person who received the property gift has complete authority and control over the property he or she is given. If such evidence cannot be established, however, then each owner has access to the account in whatever amount equals the proportion of their net contributions to the total account. If the original owner contributes all of the funds and the new owner fails to contribute any funds, then the original owner has lifetime access to the full account and the added owner has no lifetime access to it. Upon the death of one of the owners, the survivorship feature transfers the deceased owner's share to the surviving owners, who acquire a equal share of the portion previously owned by the deceased.

*For example:* If three people are joint owners with the right of survivorship, at the death of one person, that person's share is divided equally between the surviving owners. Their ownership share increases by one-sixth; their new ownership share would be one-half (1/3 or 2/6 + 1/6 = 3/6 or 1/2). At the death of one of the two owners, the surviving owner becomes the sole owner of the property by receiving the deceased's one-half share and adding it to his or her one-half share. Transfer takes place automatically upon the death of the person who owns property as a joint owner with the right of survivorship. Documents which show ownership must specifically state that it is owned as joint tenants with the right of survivorship.

Who can be a joint owner of property? Anyone can share ownership of property with another person under this ownership form. No restrictions or requirements limit its availability to family members or other limited groups.

Property acquired by either spouse during the time of the spouse’s marriage also creates a question about the rights of a spouse to property that is owned by the other spouse. Married persons can generally acquire property and own it as an individual person, or they can share ownership of the property with their spouses. In some states, state law grants spouses certain specific interests in each other’s separately owned property. That discussion is beyond the scope of this book.
In a number of states, property owned by spouses is considered to be owned as community property. Under this concept spouses are considered to share ownership of property that is acquired during their marriage. Property acquired before marriage, as well as property acquired after marriage under a transfer from another’s will, by gift, or by inheritance is considered separate property to which the other spouse has no claim. At each spouse’s death, essentially one-half of the community property is considered to be owned by the deceased spouse and the other one-half is owned by the surviving spouse. In some states property owned jointly by a husband and wife is classified under a special form of joint ownership called tenants by the entirety. At the death of the first spouse, the surviving spouse automatically becomes the owner of this property. Documents which show ownership of property must specify joint ownership and that the joint owners are lawfully married to each other.

One situation in which joint ownership creates a problem is the simultaneous death of both owners under circumstances that cannot determine which owner died first. Since surviving the death of the other owner is the key requirement to transfer of ownership, time of death of the first party to die is required to make that determination.

To resolve the problem created by the simultaneous death of both joint owners, state law, such as the Uniform Simultaneous Death Act, provides that unless a will, living trust, deed, or insurance contract provides otherwise, property held in these ownership forms is to be distributed in the following way: one-half is to be distributed as if one owner had survived and one-half as if the other owner survived. If there are more than two joint owners and all owners die simultaneously, the fractional share would be proportional to the number of joint owners. A person can change this result by specifying in a will, trust, deed, or insurance contract their own rule for determining the order of death in such situations. In other words, the person can create their own presumption of who dies first in the case of a common disaster or accident. This decision is frequently made when planning an estate in order to direct that the property owned by the spouses be transferred in the way that best minimizes federal estate taxes.

A third form of joint ownership of property is tenancy in common. Under this form, two or more people are the owners of undivided fractional shares of a larger piece of property. Unlike joint owners with the right of survivorship, tenants in common need not have equal ownership shares in the property. Under the four unities of time, title, interest, and possession discussed above, a tenant in common form of ownership is often recognized by the unequal ownership interests among the joint owners. One owner can own a large share while others own small shares. A second distinguishing factor involves the effect that death of one of the tenants in common has on the surviving owners. Tenants in common who survive the death of any other tenant do not have a claim to the deceased tenant’s share simply because they are surviving joint owners. When a tenant in common dies, that tenant’s share of the property becomes an asset of the deceased owner’s estate and is transferred to the heirs designated in the deceased owner’s will or under the intestate law. This method of transfer may completely disregard the surviving tenants on the property if the owner has decided to do so.

How are the various joint ownership interests created? To create a joint tenancy with the right of survivorship, the owners at the time the joint tenancy is created must specifically express the
intention to create the interest. Simply establishing ownership that is shared by two or more people may not be enough to create the survivorship feature. Words that describe the joint owners as "joint owners with the right of survivorship" are needed to create the ownership form. Under the law of some states, it is presumed that a tenancy in common is created if the document that creates the ownership interest does not contain words that express the intent to apply the survivorship feature.

Example: John and his brother, Charles purchase a tract of land in Happy Valley. Each contributes to the purchase of the property and both wish to create a joint tenancy with the right of survivorship. When the deed to the property is prepared, the deed should be to "John and Charles of Happy Valley as Joint Tenants with the Right of Survivorship" to create the necessary interest. Other language that conveys the same meaning, but uses different words, will also be effective in creating the desired result if they clearly express the intent to apply the survivorship feature.

In order to create a tenancy by the entirety, the joint owners must be legally married to each other and reference to the marriage relation is sufficient to create the interest.

Example: Mary and her husband, Bob, are purchasing a tract of land near Silver City. Mary and Bob want to create a tenancy by the entirety relationship for their ownership of the property. When the deed to the property is prepared, it should describe the buyers as "Mary and Bob, wife and husband of Silver City."

Another important issue concerning jointly owned property is the ability of each joint owner to sell his or her interest to other persons. In a tenancy by the entirety, both spouses must sell their share for a transfer of title to be effective. In a tenancy in common, each tenant is free to sell his or her own share without any involvement from the other tenants. In a joint tenancy with the right of survivorship, a sale of one joint tenant's share converts the ownership form from a joint tenancy with the right of survivorship to a tenancy in common.

What right do creditors of any joint owner have to reach the owner's share in the jointly owned property to collect on delinquent debts of the owner? In the case of a tenancy by the entirety, creditors of individual spouses cannot reach property owned jointly by the spouses. Individual creditors, however, are able to reach separately owned assets of their debtor spouse. Creditors of a tenant in common are able to reach the tenant's share since it is viewed as an individual asset. Creditors of a joint tenant with the right of survivorship are also able to reach the tenant's share of the jointly owned property. By attaching such property and executing on it to satisfy an obligation, the joint tenancy is converted to a tenancy in common.

D. Transfer By the Intestate Law

If a person owns property in his or her name alone, or the property is a tenant in common share of property that is owned jointly with others, the transfer of ownership is made either under a will prepared during the person's lifetime or under the provisions of the intestate law of the state.
where the owner resides. If a person does not have a will, the intestate law of the state that the deceased considered his or her domicile creates a schedule for the distribution of separately owned property. Within the schedule, the statute decides who is to receive the property, how much they are to receive, and any special conditions that apply to this transfer. The following table describes how the intestate statute distributes property owned by a person who died and who considered this state to be her domicile, the place which the person considered to be her home at the time of her death. This information is based on the Uniform Probate Code (UPC), a sample law prepared at the national level and available to states to adopt as part of their own state probate law. The UPC offers a typical example of what these laws address:

A. If a *spouse survives the decedent*, the share of the surviving spouse depends on the following circumstances.
   1. The surviving spouse is entitled to receive all of the decedent’s estate if either:
      a. No descendants of the deceased survive, or
      b. All of the decedent’s surviving descendants are also descendants of the surviving spouse. For these purposes the term descendants includes descendants of all generations.
   2. If one or more of the decedent’s surviving descendants is not a descendant of the surviving spouse, then the surviving spouse receives the first $100,000 of the estate plus one-half of the remaining estate balance.

B. Whatever share is not distributed to the surviving spouse, i.e. one-half of the remaining estate balance, or the entire estate if there is no surviving spouse, is distributed to the descendants of the deceased by the process of representation. Under the process of representation, a decedent’s estate is divided into as many equal shares as there are (i) surviving children of the decedent, if any, and (ii) children of the decedent who failed to survive the decedent but who left descendants who survive the decedent. In this process each surviving child is allocated one share and each deceased child who was survived by descendants also receives one share that is divided among the descendants of the deceased child.

C. *If no descendants of the decedent survive*, then to the parent(s) of the deceased.
   1. If both survive, they take equally.
   2. If only one survives, to that person individually.

D. *If no descendants and none of the deceased's parents survive*, then to the descendants of the deceased’s parents (i.e., the deceased's brothers, sisters, nephews, nieces, grandnephews, or grandnieces) take by the process of representation described above.

E. *If no brothers, sisters, nephews, nieces, grandnephews, or grandnieces of the deceased survive*, then to the deceased's grandparents or descendants of grandparents

   1. If one or both of the maternal and paternal grandparents of the deceased survive, one-half of the estate is distributed to the maternal and one-half to the paternal grandparent(s).
2. If one of either the maternal or paternal grandparents survive and neither of the other grandparents nor any of their descendants survive (aunts, uncles, and cousins of the deceased), the entire estate is distributed to the surviving grandparent.

F. If neither the maternal nor paternal grandparents of the deceased survive, and none of their descendants survive, the estate is considered to have no taker. In the case where there is no taker, the entire estate passes to the state.

In order to receive the share that the intestate law designates, each beneficiary, including a surviving spouse, must survive the decedent by at least 120 hours. This requirement will not be applied, however, if as a result the property passes to the state as described in paragraph F, above.

When property is distributed to more than one heir under the intestate law, the several owners take each of their shares as tenants in common to each other.

Example: There is a distribution of $170,000 under the Uniform Probate Code. The sum was owned by a person who is survived by a spouse and two children who are children of the marriage. Following the payment of debts, administrative expenses, and a family exemption, the spouse receives all of the estate as the descendants of the deceased are also descendants of the surviving spouse.

If one of the children is not a child of the marriage between the deceased person and the surviving spouse, but was born in a prior marriage, the shares to the spouse and children will change. The spouse is entitled to the first $100,000 of the estate plus one-half of the remaining amount or $35,000 (1/2 of $70,000). Each child's share is one-half of the remaining $35,000.

If the deceased person and spouse did not have any children from their marriage or a prior marriage, but the deceased person is survived by parents, then the spouse receives the entire estate and the parents receive nothing.

E. Transfers By a Last Will and Testament

Property owners who want to direct distribution of their property after death can do so by preparing a will. Like the intestate law, a will only provides for the distribution of separately owned property. Unlike the intestate law, which primarily benefits family members, a will can bestow benefits and property on family members, strangers, corporations, charities, churches, and other beneficiaries.

For a transfer to be made according to the will, the document must identify the person to receive property at the owner's death. Therefore, most wills provide for several levels of distribution. The first level is considered to be the primary beneficiaries. If the primary beneficiaries die before the property owner, a will commonly provides for a second level of distribution. In some cases, a will may provide for distributions beyond the second level. If all of the named
beneficiaries in the will die before the owner, the owner's property is distributed according to the intestate law even though the owner took steps to avoid this possibility. Under the laws of some states, the children of certain beneficiaries named in a will who die before the person who prepared the will can take the share that their deceased parent would have taken. In such cases, the statutory method of transferring the property can step in to avoid a situation where the intestate law would otherwise apply. Distributing property under the terms of the will can be achieved by ensuring that the will always names a beneficiary who will survive the decedent.

Under the Uniform Probate Code, a valid and enforceable will is one prepared by a person eighteen years of age or older, of sound mind, possessing testamentary intent, and understanding and acting without duress or under any undue influence. The document must recognize an intent to distribute property after death and be signed at the end by the person making the will. A will can be formally prepared by an attorney experienced in estate planning and administration matters or by a property owner. State laws generally create any detailed list of requirements that must be met for a will to be considered valid. States do and do not require that people witness the signature of the person who prepared the will. Many states do not follow a procedure that allows a will to become “self-proving.” This means that the person preparing the will has followed a detailed procedure and signed a statement in the presence of a person who is authorized to administer oaths. Under many state rules, those who witness the signature also make these statements before a person authorized to administer oaths. State laws are the source of all requirements for the validity of will, and it is advisable to consult a reputable source of current information or someone in the state where you live who is familiar with these requirements to make sure that the outcome of the planning effort is an effective document.

Under the law of many states a surviving spouse may be granted a right to elect not to take the share of property that the will has made for that spouse. Under the Uniform Probate Code, for example, within six months after a person's death, a surviving spouse has a right to elect against what the will provides for the spouse and elect to take what state law has designated as a surviving spouse's share. This election requires the surviving spouse to give up his or her claim to certain property in return for a statutory share of one-third of certain other specifically identified property. In deciding whether to elect against a will, a surviving spouse should calculate what the spouse's share would be with and without an election. This will require a detailed examination of the type of property that is subject to the election, or which is not considered to be part of it. Then an actual calculation can be made of what the surviving spouse’s share would be with and without the election. At this point the surviving spouse should have detailed information on which a better decision can be made. Timing when the election is made is an important factor. Most of such provisions require the election be made within a specific period. If not made within the period, the election opportunity is lost.

A surviving spouse's right to elect against a will can be forfeited for failure to financially support the deceased spouse, for desertion, and for participation in the willful or unlawful killing of the deceased spouse. In addition, the right to elect can be waived, as in an agreement made by two parties before they marry. Only a surviving spouse has the right to elect against the will. Other family members do not have this right.
Under prevailing state law a will can be challenged either before or after it is presented in probate following the person's death. Some of the people who can challenge the will are determined under state law and can include beneficiaries who are named by the decedent in one will but not in a different will that is presented as the decedent’s final will, the intestate heirs of the decedent, and beneficiaries whose share would increase or decrease depending on which will is admitted to probate. Subject to specific provisions in state law, some common grounds for challenging a will are that the decedent was not of sound mind when the will was prepared, that someone unduly influenced the decedent to prepare his or her will with particular terms, fraud was practiced on the decedent, the decedent intended to give property away during their lifetime rather than at death, and the decedent's failure to properly execute the document.

In addition to cases where a will is challenged, a will can also be modified by state law as a result of certain events. For example, if a married person prepares a will that provides for his or her spouse, and the marriage is later ended by divorce, the termination of the marriage may void all provisions in the will for the divorced spouse. In a somewhat reverse situation, if a single person prepares a will and then marries after the will is prepared, the surviving spouse may be entitled to an intestate share of the decedent's property if it appears from the will or other evidence that the will was made in contemplation of the marriage to the surviving spouse; the will expressed the intention to be effective notwithstanding any subsequent marriage or the person preparing the will provided for the spouse by transfers outside the will and it was intended that these transfers be in lieu of a provision in the will.

If a person prepares a will and a child is born to or adopted by that person's family after the will is prepared and before the person dies, the share of the after-born or adopted child could be either an intestate share comparable to that of all of the children, a share mentioned in the will, or nothing if the person provided for the child by transfers outside the will and the intent of such transfers was that they were in lieu of a provision in the will. If a person participates in the willful and unlawful killing of someone, the slayer may be prevented by state law from receiving any benefit or acquiring any property from the estate of the person who was killed.

Transfers by a will have other advantages that are important to the estate and the heirs. A person with a will can name a guardian for the children and thereby save the time and expense needed to obtain a court-ordered appointment. Guardians have legal authority to hold property for a minor child until the child reaches eighteen years of age.

F. Transfers Through a Trust

Ownership of property in trust is a special form of ownership that creates a formal legal relationship between the person who holds legal title to the property and the persons who receive some benefit from it. To create a trust, an owner of property transfers ownership of it by written agreement to a person or an organization that is designated to act as a trustee. As a trustee, the person who holds the property is subject to a legal obligation to manage, protect and preserve the property for the benefit of a designated beneficiary. The beneficiary is designated by the person who creates the trust. The trustee maintains "legal" ownership or title to the property, and the beneficiary has a "beneficial" ownership interest in it. Since the trustee holds the property for the
benefit of the beneficiary, the trustee's personal creditors must respect the rights of the beneficiary to the property. Therefore, the property is protected from the claims of the trustee’s creditors.

A trust created during an owner's lifetime is called a living trust, in contrast to a testamentary trust which is found in a will. Trusts are also known by the terms revocable and irrevocable. Each of these terms describes whether the trust agreement can be changed by the person who creates it. The creator is often referred to as the trust grantor. If the grantor retains the right to amend or change the trust after it is created, the trust is considered revocable because the grantor can revoke it after it is created. An irrevocable trust, on the other hand, is one that cannot be changed or revised after it is created. Trusts also are named for purposes they serve or the types of assets involved, such as a charitable trust or marital deduction or credit shelter trust. Each of these terms refers to specific federal estate tax planning opportunities that will be discussed in more detail in later chapters.

In today’s estate planning world, transfers of property after death under terms of a living trust reflect the owner's lifetime decision to use the trust vehicle to own, control, and manage property, and to designate those who have a beneficial interest in the property. Commonly the grantor retains a lifetime right as a beneficiary of the trust, as well as the broader right to change or amend the trust or cancel it entirely. Following this trust beneficiary's death, the living trust terms provide for the transfer of ownership to some other beneficiary. Therefore, the trust becomes a vehicle by which the original owner of the property provides for a lifetime interest and also designates who will receive the property after the owner’s death. When the trust is created, the property owner and trustee negotiate an agreement that controls the trustee's ownership of the property and its eventual distribution to a beneficiary. This process allows the granter to make decisions about who will receive property after the owner’s death and to instruct the trustee about uses that can be made of the property while the trustee is its owner.

Chapter IX deals with trusts in estate planning and discusses this topic in more detail.

G. Disclaimers

Although property is directed to pass to designated or identifiable heirs after a person’s death, the heirs are not required to accept them. Heirs who choose to refuse acceptance of such transfer have disclaimed the transfer to them. In such cases the will or trust considers the beneficiary as having died before the property owner and whoever would inherit the property in that case will then inherit the property. Disclaimers are used in cases where the designated beneficiary has no need for the transfer and the beneficiary who stands next in line is an acceptable substitute for the person who is originally named as beneficiary. In some situations, a disclaimer by a beneficiary may lower estate and inheritance taxes, which makes the decision one that has financial considerations for the parties themselves.
H. Comparison of Transfer Methods

In general, comparison of these transfer methods can be made on three bases: cost to create, time required to complete the transfer, and transfer taxes applicable to it. To facilitate the discussion, this comparison is not made on the basis of any specific state law. Reference to such law must eventually be made, however.

On the basis of cost to create the transfer method, transfers under the intestate law are generally the least expensive method since taking no action triggers this method. Transfers by operation of law are generally inexpensive to create, often at little or no expense at all. Creating joint ownership of bank accounts, certificates of deposit, and other property is generally accomplished without cost. Real property that requires a deed or motor vehicles that require certificates of title may have cost or expenses associated with creating the documents.

Preparation of a will or living trust agreement can be the most expensive transfer method to create as it often involves the services of professional advisors to assist in making the needed decisions and in preparing the documents needed to carry out such decisions. However, it is not necessary that either of these documents be prepared by professional advisors to be valid. Individuals who are knowledgeable about the issues and options they confront when preparing documents, and who understand the requirements to create valid documents, can certainly do so without intervention by a professional. If, however, a professional is retained to provide this service, the cost of the professional's service can be reduced by the amount of time and effort put forth by a property owner in gathering information about property ownership, insurance plans, retirement benefits, and plans to distribute property after death. Work done by the property owner saves the professional's time in gathering the same information and should lower the final expenses that the property owner pays to complete the process.

In regard to the time required to complete the transfer, transfers by operation of law transfer are made immediately to the surviving owners when one or more joint owners dies. Next, in terms of relative speed of completing the transfer, is the transfer of property under a trust arrangement. The significance of the trust agreement is that title to property is held by a trustee who already has explicit instructions on how to transfer the property if certain events occur. If the owner of the property retains an interest in the trust property, the agreement designates the successor and the trustee completes the transfer according to the agreement's instructions. A potential delaying factor in such situations is a challenge to the validity of the trust agreement or one based on fraud or undue influence of a beneficiary who persuaded an owner to provide for the beneficiary to the exclusion of other potential recipients. Other potential delaying factors involve the potential need to determine the tax consequences involved with the transfer of property under any of the methods described above. These tax consequences involve the application of federal estate tax to property retained in the estate, federal gift tax applied to gifts made before the owner’s death, and inheritance or other death taxes imposed by states on the transfer of property after the owner’s death. In each case, expenses may be incurred to determine if the estate is subject to the tax, the value of property subject to tax, the party responsible for the payment of the tax imposed, and filing the required estate, gift, or inheritance tax return.
Generally, the most time-consuming method of transferring property after death is that of either a will or the intestate distribution statute. Both of these methods involve appointing a personal representative for the decedent’s estate to take control and responsibility for property owned by the decedent at the time of his or her death. Once appointed, the personal representative gathers the estate assets, collects its debts, pays its bills, and manages the affairs of the estate, including the payment of applicable inheritance and estate taxes. This period is called the estate’s administration. While each estate has its own unique problems and opportunities that affect the time needed to complete the transfer under this method, it generally takes 12 months or more to complete it.

The third point of comparison concerns inheritance and estate taxes that apply to the transfer. Transfers of property under a joint tenancy with the right of survivorship may be subject to state inheritance and estate taxes and, potentially, federal estate taxes as well. Under current federal estate tax law, tenant by the entirety property that passes from one spouse to another spouse is included in the gross estate of the deceased spouse, but it is also eligible for a marital deduction from the gross estate. In other words, although the tax statute requires that the property be included in the calculation, it also provides for its deduction from the same calculation.

Separately-owned property that passes under a will is generally subject to state inheritance and tax and potentially subject to federal estate taxes. Property that passes from a trustee to a designated beneficiary may be subject to state inheritance and estate tax and federal estate tax. Factors that influence the question of whether such property is subject to these taxes include the existence of an interest retained by the property owner who created the trust after its creation and the time period between the owner's creation of the trust and the owner's death. These taxes are discussed in more detail in Chapter V.

I. Student Exercises

Multiple-Choice Questions
Please read the following questions carefully, then select one of the three or four choices following the question that correctly answers the question asked.

1. Charles and his brother, Harold, own a 150-acre farm in Happy Valley. They inherited the farm from their mother who died in 1981. At the time of her death, the property was transferred to Charles and Harold as her sole surviving heirs under the intestate law. What is the tenancy that Charles and Harold enjoy in the 150-acre farm?
   a. Tenancy by the entirety.
   b. Joint tenancy with the right of survivorship.
   c. Tenancy in common.
   d. None of the above.

2. Bill and his wife Betty own all of their property as tenants by the entirety. Neither Bill nor Betty has a will and they have no children. In the event Bill and Betty die under circumstances where it cannot be determined whether Bill or Betty died first, which of the following statements correctly describes how the property will be distributed?
a. Bill will be presumed to be the first to die. Betty will then be the sole owner and the property will pass to her heirs.
b. Betty will be presumed to be the first to die. Bill will then be the sole owner and the property will pass to his heirs.
c. The property will be divided into two shares. One share will pass to Bill's heirs and the other share will pass to Betty's heirs.
d. The property will pass to the state in which they live since Bill and Betty have no will and are not survived by children.

3. Gerald and Harriet were married in 1990. Gerald owned a dairy farm and several forested tracts in his own name before he married. After the marriage, he transferred some of the forested tracts to himself and Harriet as tenants by the entirety.

In 1998, Gerald died in a plane crash. In addition to his jointly owned property he owned $150,000 of separately owned property and did not have a will or trust agreement. At his death, Gerald was survived by Harriet and Gerald's parents, Ben and Helen. Harriet and Gerald did not have any children from their marriage.

Which of the following statements correctly describes how Gerald's separately owned property will be distributed under the Uniform Probate Code's intestate distribution statute?

a. Harriet will inherit all of Gerald's separate property as she is his surviving spouse.
b. Ben and Helen will inherit all of Gerald's separate property as his surviving parents.
c. Harriet will receive one-half of Gerald's separate property and Gerald's parents will inherit the rest.
d. Harriet will receive the first $30,000 of the separate property, plus one-half of the remainder of the property. Gerald's parents will receive the other one-half of the property.

4. Which of the following statements correctly describes the role a trust can play in providing for the transfer of property after death?

a. By transferring property to a trustee, the property owner can instruct the trustee to transfer the property to a designated beneficiary when specific events occur.
b. In creating a trust, the owner makes the trustee a joint owner of the property.
c. Under the terms of a trust, the property owner retains legal ownership of the property.
d. The creation of a trust does not protect the property from creditors of the trustee.

5. Which of the following events can have the effect of modifying provisions in a person's will?

a. Divorce of a married person after a will is prepared.
b. Marriage of a single person who prepared a will while single.
c. Birth of a child after a will is prepared.
d. All of the above.
Short Essay Questions

Please read the following questions carefully and then respond to the question that is asked at the end of the situation. Your answer need not be long or involved, but it should be clear and concise. If you want to refer to important facts in your response, please feel free to do so.

6. Clifford is a retired businessman. Since his wife died last year, he is sad and lonely. Clifford's relationship with his nieces Cindy and Cathy is one of the bright spots in his life. Because of his advancing age and deteriorating health, Clifford wants to do something special for his nieces.

At his next stop at the local bank where he maintains several accounts, Clifford instructs the bank to add Cindy's name as an owner of a certificate of deposit and Cathy's name as an owner of another certificate. Neither Cindy nor Cathy know what Clifford did and neither know about the certificates Clifford changed. Under the bank's own rules, whenever two or more people are listed as owners of a bank account or certificate of deposit, these owners are considered as joint tenants with the right of survivorship.

Based on our discussion of transfers by operation of law, describe the tenancy relationship between Clifford and his nieces on the various certificates and comment on the rights of Clifford, Cindy, and Cathy to use the funds in the certificate during Clifford's lifetime.

7. Walter died in 1990. At his death, he was survived by one daughter, Mary, and two sons, Bill and Gregory. Walter's wife Martha died in 1986 and he did not re-marry after her death. Walter did not have a will.

When Walter died, his daughter, Mary, worked with him on the family farm. Mary decided to stay and continue the farm operation. Mary's brothers had no objection since they were not interested in the family farm.

In 1994, Bill died. Under Bill's will he left all of his property to his wife, Wendy, and his son, James.

In 1999, Gregory died. At his death, Gregory was survived by his sons Allen and Richard. Gregory's will left all of his property to his wife, Geraldine. In 1987, Gregory and Geraldine were divorced. In the event Geraldine died before Gregory, Gregory's will provided that his children inherit his property.

Mary now considers herself to be the sole owner of the property and its prospering farming operation as she is the surviving child of Walter and Martha.

Based on our discussion of the various ways property is transferred after death, comment on whether Mary is the sole owner of the property.
8. John and Mary own and operate a saw mill business in suburban Silver City. Some of the assets are owned as tenants by the entirety while others are owned by John and Mary individually. In addition, John and his brother Charles jointly own a 200-acre tract of land along the Silver River. John and his brother own the land as joint tenants with the right of survivorship.

John has several debts owed to local creditors. Each of these debts are John's sole responsibility. Mary is not obligated on these debts.

Based on our discussion of the characteristics of joint ownership, if John fails to pay his debts, describe the rights that John's creditor's have to enforce their debts against John's various properties.