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## 4 Ways To Transfer Property

**(Explaining the four ways that property can be transferred at death and why a revocable living trust is often the best option for you.)**

Educating yourself is the first step to doing effective estate planning. We have used the following as an expanded and complete definition most people would agree with to describe what they want from an estate plan:

*I want to control my property while I am alive. I want to reasonably and intelligently maximize my resources. I want to rely on and get assistance and advice from professionals in a setting where what I receive in return for my expense has good and recognizable value. I want to reduce and avoid unnecessary expenses and taxes. At my death, I want my property to benefit or transfer to whom I want in a manner that is efficient and in a way that is appropriate for each beneficiary.*

So, let's start with a basic understanding of how property can be transferred at death. It is not as simple as whether you should have a will or a trust. What you want is to have your assets titled and beneficiary designations made so that what you want to have happen, will happen. There are four basic ways for title and ownership of property to be transferred at death.

### **1. You own it in your own name alone.**

If at your death you own property in your name alone, then the way ownership of that property is transferred to someone else is to obtain a court order that states who now owns the property. This process is commonly known as "probate" or "probate administration." Of course, the process is not as simple as going to the courthouse and getting an order signed by a judge. There are several steps to the probate process (and there are several types of probate processes), however, the only reason there is a probate proceeding is because the person who died had property in his or her name alone. However, this is how title and ownership of property is transferred when there is no other way recognized by law for title or ownership to be transferred. Many years ago probate was the only way that title or ownership of property could be transferred at death. Because of statutes that have been enacted by the legislature, we now have joint tenancy, beneficiary designations (POD and TOD) and revocable living trusts, and therefore, having to use probate and court orders as the only way to transfer property is no longer the case.

If you have a will, the court is to apply the terms of your will to the property that is in your name alone, subject to the need for the payment of expenses, claims and taxes. A common misconception is that a will can control anything other than property

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that you own in your name alone or which is made payable at your death to your “estate.” Please understand, a will only controls the property that is subject to the probate process. A will does not control any of the property that is owned jointly with the right of survivorship, or for which valid beneficiary designations have been made to transfer or pay benefits on death. This is true, even if the will says “I direct that *all of my property* should be distributed to . . .” The phrase, “all of my property” in a will only refers to the property controlled by the probate process.

However, a will is like a spare tire. Even though you may plan with joint tenancy, or beneficiary designations, or a living trust, or a combination of all of these, it is still necessary to have a will directing the distribution of any property or interest in property that may not be covered by one of those ways of transferring property. No matter how you plan, something can happen that is beyond your control in this regard. For example, if you have your property in a living trust, it is possible that some property may not be in your trust at your death and the purpose of the will is to get it there. In essence, the will provides that all property not in your trust at your death is to be distributed to your trust. This is then done by court order. Or, for example, if you have a beneficiary designation and the beneficiary doesn’t survive you, then the will directs what is to happen if what you expect to happen-doesn’t.

It is often good planning to avoid probate and therefore planning only with a will won’t accomplish your goals, but it is always a necessary part of the planning.

## **2. Joint Ownership/Joint Tenancy with the Right of Survivorship**

Real estate, bank accounts, and other investments such as mutual funds, stocks, etc., can be owned jointly with someone else. There are two ways of holding property jointly under Kansas law. The property can be owned jointly as “tenants in common,” or as “joint tenants with the right of survivorship” (JTWRROS). If property is held jointly with the right of survivorship, and if there is a surviving joint tenant, then the property is not subject to probate administration.

Tenancy in common is different. If you own property in two or more names with no reference to the right of survivorship, then each owner holds an “undivided” interest. For example, if you and your spouse own real estate and the deed does not provide that the joint ownership is as joint tenants with the right of survivorship, then you each own an undivided one-half interest. Kansas law presumes that if the deed is silent as to the manner of joint ownership, it is a tenancy in common. At death, your undivided one-half interest is subject to probate administration because it is in your name alone.

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However, if the property is owned with one or more joint owners who have the right of survivorship, the property simply belongs to the survivor or survivors at the death of one of the owners. This is allowed by statute and we find it is common for a

married couple to hold property in this fashion. For many reasons, joint tenancy with the right of survivorship works best when it is between spouses and when those spouses don't have combined assets that are greater than the individual "exemption," (exclusion amount that can be transferred under the unified credit) which is currently \$850,000 for the state of Kansas Estate Tax and \$1,500,000 for Federal Estate Tax.

Joint tenancy is not a good way to hold title to property with children because the children immediately become a joint owner, and this often affects your ability to deal with the property without the child's approval. It may also be at risk in the event of a child's divorce or other litigation. This is also an adverse way to own property with children in the event the property has appreciated in value and is subject to capital gains.

Joint tenancy and beneficiary designations only work if people die in the "right" order. Therefore, if something goes wrong with joint tenancy, it often happens when it is too late to correct the result.

### **3. Beneficiary Designations, including Pay on Death (POD) and Transfer on Death (TOD)**

All sorts of property can be owned, registered and titled with a death beneficiary, payee, or transferee. Life insurance, annuities, 401(k) plans, IRA's, and other contracts often allow you to make a primary and even a contingent beneficiary designation. At your death, these assets can be paid or transferred directly to the designated beneficiary.

By statute, we can now have bank accounts and certificates of deposit set up as "pay on death" accounts. They simply "pay" to the designated beneficiary or beneficiaries.

Other statutes allow us to set up stock certificates, mutual funds, titles to vehicles, deeds to real estate and other assets to transfer on death to the designated beneficiary or beneficiaries.

When there is a beneficiary to whom the property is to be transferred or paid to at your death, the property is not subject to probate administration. This means that your will does not direct what is done with any of this property.

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It is an important part of your planning process to understand the use of beneficiary designations and contingent beneficiary designations, particularly with “Qualified” retirement plan benefits, such as 401(k) and IRA investments. It is crucial to

understand when you should and should not make the beneficiary your living trust. The transfer of these types of assets will also result in income tax issues to the recipient at some point in time.

#### **4. Fully Funded Revocable Living Trust**

In our opinion, this is by far the best way to plan. This type of planning, if done properly, can address all kinds of contingencies that otherwise would not be addressed. If you have a revocable trust, it is important to have all property “owned by” or titled in the name of the trust. Beneficiary designations can be made directly to the trust. If you own property in your name at your death, it will be subject to the probate process. You might have a “pour-over” will to take care of this possibility, but the property will still be subject to probate administration. The most common planning technique today is to use a revocable trust as the centerpiece for the plan.

Here are some of the many reasons why it has become such a popular way to plan:

- a. Like Joint Tenancy and Beneficiary Designations, probate is avoided; but in addition
- b. All of the “what ifs” can easily be addressed that can’t be addressed with Joint Tenancy and Beneficiary Designations (i.e., what if a beneficiary predeceases the owner, what if a beneficiary is too young or has special needs, what if a beneficiary has creditor or other litigation problems, etc.);
- c. Control remains within the family and the settlement process remains private;
- d. The costs associated with settling an estate with a revocable trust are far less than the costs associated with settling an estate through the probate process.
- e. Using a trust, similar to the probate process, provides a means through which expenses, claims and taxes can be satisfied.
- f. Tax planning can conveniently be included in the trust plan.
- g. For many married couples, a “joint trust” may be an appropriate plan, simplifying the process.

One of the best ways to further educate yourself is to work with professionals who are knowledgeable and have your best interests at heart. In fact, a “team approach” is best. When the professionals on whom you are relying communicate together about your planning and help you determine what is the best option for you, only good things can happen.

Tim J. Larson