



# Decedent's Estates and Title Insurance

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## Course Outline

1. Disposition of Property Upon Death
  - 1) Probate and Non-probate.
  - 2) Wills & Intestacy
2. Estate Administration – Types and Procedures
3. Personal Representatives
4. Liens and Claims Against Decedents
5. War Story – The Intra-family Farm Lease
6. Nonprobate Transfers
  - 1) Joint Tenancies
  - 2) Beneficiary Deeds
  - 3) Trusts
7. War Story – Estate of Victoria Smith
8. Conclude

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## Decedent's Estates

What happens to real property when the owner dies?

1. Non-probate Property:
  - Property held in joint tenancy with right of survivorship.
  - Property held in a trust, LLC or other entity.
  - Property subject to Transfer on Death Deed.
  - Retirement Accounts, Life Insurance with beneficiaries designated.
2. Probate Property: everything else.

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### Decedent's Estates – Probate Property

Disposition of "probate property":

- MCA 75-3-101: Upon the death of a person, his real and personal property "devolves" to:
  1. "Devises": persons to whom the property is devised by his last will (or to substitutes by law); or
  2. "Heirs": persons entitled by intestate succession.
  3. Subject to: homestead allowance, exempt property, family allowance, and rights of creditors.
- Although Devises and Heirs take title immediately upon death, probate of the will, or administration of the intestate estate, is necessary to prove the title.
  - Therefore, when asked to insure property that is part of a decedent's estate, title should be vested as: "Heirs and devisees of \_\_\_\_\_, deceased."
  - Vesting remains as such, subject to probate proceedings, until such time as it is conveyed by a personal representative or administrator, or transferred by court order or judicial determination.

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### Wills v. Intestacy

- If a party dies with a valid will, his estate is said to be a "testate estate."
- If party dies without a will, or if a will is invalid, the estate is said to be "intestate."
- In either case, probate is necessary to:
  - Affirm validity of will or status of intestacy, to appoint a personal representative.
  - Determine Heirship
  - Address family allowances and address creditor claims.
  - Pay taxes.
    - Estate Tax – constantly evolving exemption (\$11.5 million in 2020).
    - Inheritance Tax – none in MT.

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### Wills

- To be valid, a will "must be":
  1. In writing;
  2. Signed by the testator (or in the testator's name by another individual in the testator's conscious presence and by testator's direction); and
  3. Signed by at least 2 individuals, each of whom signed within a reasonable time after witnessing the testator's signature of the will. (MCA 72-2-522(1).)
- "Self-proved" will – testator and witnesses sign before notary using statutory forms of acknowledgement and affidavit. (MCA 72-2-524.)
- Holographic wills – A will that does not comply with above, is valid as a holographic will, whether or not witnessed, if the signature and material provisions are in the testator's handwriting.

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**Holographic Will – The Castle of Ahhhh**




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**Intestate Succession**

- Intestate Succession
  - Any part of a decedent's estate not effectively disposed of by will passes by intestate succession. (MCA 72-2-111.)
- Share of surviving spouse (MCA 72-2-112):
  - The Entire Estate, if: (1) no surviving descendants or parents; OR (2) all surviving descendants are also children of the surviving spouse.
  - The first \$300,000, plus 3/4 balance, if: a surviving parent but no descendants.
  - The first \$225,000, plus 1/2 balance, if: all surviving descendants are also descendants of the surviving spouse, AND surviving spouse has children from another marriage.
  - The first \$150,000, plus 1/2 balance, if: decedent has children from another marriage.

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**Intestate Succession –part 2**

- Share of descendants (MCA 72-2-113).
- The share not passing to a surviving spouse:
  1. To the decedent's descendants by representation. (= "By generation.")
  2. To the parents, equally.
  3. To siblings, equally.
  4. Grandparents, cousins.....consult the statute.
- How do we know? Determination of Heirship.

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**Poll Question 1**

Poll Question 1 – Estate Planning Survey



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**Probate Procedures**

1. Informal Probate
2. Formal Probate
3. Supervised Administration
4. *Collection of Personal Property by Affidavit*
5. *Small Estate Summary Procedure*



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**Probate Procedure - Testate**

1. Probate Proceedings are initiated when the will is declared valid, either:
  - i. By the clerk of the court - Informal Probate, or
  - ii. By the court after notice, adjudication and a hearing – Formal Probate.
2. Administration is commenced by the issuance of a *Statement of Probate and Appointment of Personal Representative* ("Letters").
3. Determination of creditor claims is made, following notice. (MCA 72-3-801.)
4. Distribution. (MCA 72-3-901.)
5. Closing the Estate. (MCA 72-3-1001.)



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### Probate Procedure - Intestate

1. Administration is commenced by the issuance of a *Statement of Probate and Appointment of Personal Representative* ("Letters").
  - i. By the clerk of the court - Informal Probate; or
  - ii. By the court after notice, adjudication and a hearing – Formal Probate
2. Determination of creditor claims is made, following notice. (MCA 72-3-801.)
3. Determination of Heirship.
4. Distribution. (MCA 72-3-901.)
5. Closing the Estate. (MCA 72-3-1001.)

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### Personal Representatives

**"Personal Representatives" in Montana**

- Includes executors, administrators, special administrators.
  - Identified in will or determined by statutory preference.
  - Duties and Powers commence upon appointment.
  - PR must give notice of appointment to heirs and devisees.
- By statute, the PR "shall":
  1. proceed expeditiously with settlement and distribution of the decedent's estate
    - WITHOUT supervision, adjudication or order of the court,
    - UNLESS specified as supervised PR.
  2. take possession of decedent's property (except as specified in will), but real property may be left with person presumptively entitled to it. PR has authority to bring eviction action.
  3. pay taxes and take other steps necessary for preservation of the estate.
- May sue and be sued in name of decedent (except as to claims expired upon death).
- Fiduciary – must act in best interest of the estate.

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### Personal Representatives & Real Property

**Broad powers of the PR (or Administrator) relative to real property:**

A personal representative has the same power over the title to property of the estate that an absolute owner would have, *in trust*, for the benefit of the creditors and others interested in the estate. (MCA 72-3-619.) These powers include (MCA 72-3-613):

1. The ability to acquire or dispose of an asset including real property.
2. To subdivide, develop, or dedicate land to public use; make or vacate plats, adjust boundary lines, or dedicate easements to public use without consideration.
3. Enter into leases, with or without the option to purchase, for a term within or extending beyond the period of administration.

These powers may be exercised **without notice, hearing, or order of the court**, subject to limitation in Letters of Appointment.

\*Note: "Foreign" Probate. Caution should be exercised if insuring property being administered in an out-of-state probate, as many jurisdictions require an Order Approving Sale. Generally, an "ancillary proceeding" must be opened in a Montana court, wherein Montana Court adopts the foreign court's appointment of the PR.

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### Personal Representatives – Conflict of Interest

- **Limitation on the powers of the Personal Representative relative to real property:**
- **Conflict of interest (MCA 72-3-615):** Any sale or encumbrance to the personal representative, its spouse or affiliate, or any transaction with is affected by a substantial conflict of interest on the part of the PR, is **voidable** by any person interested in the estate who did not consent, **unless:**
  1. The will or a contract entered into by the decedent expressly authorized the transaction, or
  2. The transaction is approved by the court after notice to interested persons (must be a final non-appealable order of the court.)

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### Poll Question 2

#### Liens against Decedents.

- Husband and Wife own property, as tenants in common, and reside in Gallatin County. Creditor obtains judgment against Husband in Flathead County.
- Husband passes, and probate is opened, in Gallatin County. Wife is appointed PR.
- Seeing the notice to creditors, the Judgment Creditor records a transcript of the judgment in Gallatin County. Husband's interest is distributed to children by PR Deed , as provided in will.

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### Creditor Claims (MCA 72-3-801)

- A creditor **who has not secured a lien** against the debtor's property prior to the debtor's death must file a claim in the probate proceeding.
  - Limitations on presentation of claims - earliest of:
    1. One year from decedent's death;
    2. 30 days from actual notice to creditors (mail or service), or
    3. 4 months from published notice to creditors.
- If a creditor **secures a lien** against the debtor's property *prior to the debtor's death*, the creditor is not required to present a claim against the estate.
  - The PR (or heir or devisee taking title by PR Deed) may not sell or refinance without paying off the debt.
  - Otherwise applicable limitations on enforcement of liens apply.

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### Creditor Claims – Protection of Purchaser

- Purchasers from PR (MCA 72-3-618): Good faith purchaser for value protected as if PR properly exercised the PR's power.
  - Exceptions – recorded liens, supervised administration, limitations in letters.
- Distributees may have personal liability to estate or creditors, but purchasers from *distributees have protection*. (MCA 72-3-907.)
  - Takes title free of rights of any interest person in the estate and incurs no personal liability to the estate.
  - Whether or not the distribution was proper or supported by court order.




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### Title Requirements

When a commitment is requested, must include an exceptions for, as applicable:

1. Administration of estate;
2. Appointment of PR and/or Restrictions on PR;
3. Federal estate taxes.

Other steps to closing:

1. Verify and review Letters of Appointment – record a certified copy with any deed or recorded instrument executed by the PR, must have a certification date not exceeding 30 days old.
2. Determine whether or not the transaction involves a conflict of interest with the PR – if so, a court order following notice will be required.
3. Verify estate or inheritance taxes are paid or not due.
4. Personal Representative's Deed.




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### Probate War Story – The Intra-family Farm Lease

Timeline

- Mom & Dad own farm as tenants in common.
  - Left wills devising the farm to each other, or equally to their eight children.
- Mom & Dad lease farm to son Robert, who has helped farm it.
  - Lease includes renewal terms and ROFR.
- Dad passes during initial lease term.
  - Mom renounces PR. Daughter Roslyn becomes PR for Dad's estate.
- Robert timely notifies Mom of intent to renew lease.
  - Mom & Robert execute new lease five months into renewal term.
  - Same renewal and ROFR terms.
- Robert solicits help from Wheeler for planting. Files paperwork with ASCS to list Wheeler as operator, to secure subsidies in favor of Wheeler. ASCS rejects paperwork because it was not signed by PR of parents' estates.




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**Probate War Story – The Intra-family Farm Lease**

Timeline, continued:

- Mom passes, daughter Roslyn becomes PR for Mom's estate.
- Roslyn learns of lease renewal, ROFR and Wheeler appointment, and sends Robert notice of termination of the Lease, effective immediately.
  - In response, Robert sends notice of exercise of the ROFR for \$400,000 (property value is \$1.6 million).

Litigation:

- Roslyn alleges:
  - Renewal invalid because PR did not sign it on behalf of Dad.
  - Appointment of Wheeler violated prohibition against subleasing.
- Robert alleges:
  - Roslyn breached the lease by wrongfully terminating it.
  - Failed to give Robert opportunity to cure any breach.

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**Probate War Story – The Intra-family Farm Lease**

Result, after four-day bench trial:

- Mom owned Dad's 1/2 interest immediately upon his death, therefore had authority to execute the renewal of the lease.
- Wheeler arrangement was not a sublease. Even if it was, Roslyn obligated to give Robert opportunity to cure.
- Specific Performance and damages granted to Robert.

Affirmed on Appeal.

- Absence of PR Deed distributing dad's 1/2 interest to mom did not invalidate the new lease.
- Not a sublease. Therefore, no breach by Robert – opportunity to cure moot.

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**Nonprobate Transfers – Joint Tenancy**

- Property held in joint tenancy is not subject to probate.
- Title passes to remaining joint tenant(s), upon death of a joint tenant, by operation of law.
- Effectuate vesting in survivor by recording an Affidavit under MCA 7-4-2613(1)(c).
  - Attach death certificate.

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**Nonprobate Transfers – Joint Tenancy**

- **Creation of Joint Tenancy**
  - Instrument of conveyance using the words "joint tenancy," or "right of survivorship."
  - MT case law supports use of "words of similar import," ...but why risk it!
  - Otherwise, it is an interest in common.
  - MCA 70-20-105 & 70-20-310.
- **Termination of Joint Tenancy.**
  - Record of Affidavit.
  - Conveyance of an interest in the joint tenancy, *including involuntary*.
    - Exception: If two or more joint tenants remain, they hold their interest in joint tenancy.
  - Divorce (converts joint tenancy to tenants in common).

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**Poll Question 3**

**Liens and Joint Tenants.**

- Husband and Wife hold property as joint tenants.
- On 3/15/2019, Creditor obtains \$15,000 judgment against Husband in another county.
- On 3/18/2019, Creditor records the judgment in property records of the county where property is located. Husband passes away in June 2020. Today, Wife is attempting to refinance.
  - Do we need to show the Judgment?

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**Nonprobate Transfers – Joint Tenancy**

- The interest of a joint tenant is extinguished upon the joint tenant's death.
  - Liens against deceased joint tenant, now merely claims against estate – no interest in real property for attachment or foreclosure.
  - Before death, foreclosure or other transfer as to one joint tenant severs the joint tenancy, and results in TIC between buyer and remaining joint tenant.

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**Nonprobate Transfers - Transfer on Death Deed**

- Formerly known as the "Beneficiary Deed."
  - 2007 (Old) Act – MCA 72-6-121, 123.
- 2019 - Uniform Real Property "Transfer on Death Deed" Act.
  - MCA 72-6-401 et seq. Effective date: October 1, 2019.
  - Deeds made prior to this date, in compliance with the 2007 Act, are enforceable.
- Terminology:
  - Grantor = "Transferor"
  - Grantee = "Designated Beneficiary" or "Beneficiary."
  - Instrument: "Transfer on Death Deed"




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**Nonprobate Transfers - Transfer on Death Deed**

- Deed Requirements:
  1. Same elements and formality as an *inter vivos* deed.
    - Elements Not Required:
      - i. Notice, delivery or acceptance by grantee. (Grantee may disclaim.)
      - ii. Consideration.
  2. State that the transfer is valid upon death.
  3. **Recorded** before grantor's death.




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**Nonprobate Transfers - Transfer on Death Deed**

- Eligible "Designated beneficiaries."
  - Includes individuals, corporations, partnerships, LLCs and trusts.
  - Excludes a class of persons, such as "grandchildren."
  - Multiple parties takes as tenants in common, with no right of survivorship.
- Lapse. If a designated beneficiary fails to survive the Transferor, the transfer lapses.
- Revocation (acknowledged and recorded before death):
  1. Another TODD expressly or by inconsistency.
  2. An instrument of revocation by express revocation.
  3. An *Inter vivos* deed that expressly revokes the TODD.




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### Nonprobate Transfers - Transfer on Death Deed

- Liens – Subject to all liens and encumbrances to which property is subject at time of grantor's death.
  - Includes liens arising upon grantor's death, such as estate taxes or medical benefits reimbursement.
- Deemed transferred upon death.
- Effectuating Transfer of Title.
  - Record Affidavit, with death certificate attached, in form prescribed by MCA 7-4-2613(1)(c).

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### Transfer on Death Deed - Issues

- Subject to all recorded liens at time of death of transferor.
  - Including those recorded after TODD.
- Liability of Non-probate Transferees. (MCA 72-6-112.)
  1. Allowed Creditor Claims against decedent's estate;
  2. Statutory allowances of spouse or children; and
  3. Elective Share of Surviving Spouse.
- Claims must be asserted within 1 year after death of transferor.

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### Transfer on Death Deed - Guidelines

- If a TODD appears in the chain prior to your seller/borrower's acquisition, it should be shown as an exception.
  - Require express revocation of TODD in conveyance instrument.
- If Transferor is still alive and in title, disclose the TODD & require revocation (which can come in various forms approved by UW).
- If your seller/borrower came into title by TODD:
  1. Consider timing of execution of TODD, capacity of Grantor at that time, and potential for undue influence.
  2. Take exception for all recorded matters at the time of grantor's death.
  3. Require recordation of Affidavit, in form prescribed by MCA 7-4-2613(1)(c), with death certificate attached.
  4. Within 12 months of grantor's death, take exception for claims against the estate and statutory allowances to surviving spouse or children or medical benefits recovery.
    - Contact UW for possibility of accepting PR's Affidavit to clear claims of estate and potential liability for taxes or medical benefits.

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### Nonprobate Transfers - Trusts

- Trusts are another probate avoidance device. Other benefits:
  - Centralized asset management.
  - Minor age children and disability concerns.
  - Tax Planning.
  - Privacy.
- Parties to trust:
  - Grantor/Trustor/Settlor – all refer to the person(s) setting up the trust.
  - Trustee – often, not always, same as Grantor.
  - A trust is typically not regarded as a separate legal entity capable of holding title. However....

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### Trusts – Vesting

- Vesting in a Trust.
  - Title is typically vested in natural person as Trustee of the Trust. (“John Doe, as Trustee of The John Doe Family Trust dated March 7, 2019.”)
  - Conveyance identifying grantee as trustee, vests entire estate in trustee, subject only to trustee’s duties under the trust agreement.
  - Beneficiaries of trust obtain *no estate or interest in the real property*, but may initiate action to enforce or determine the terms of the trust. (Liens do not attach.)
- Conveyance into “Trust,” without identification of Trustee, vests title in the trustee. Subsequent conveyance may be made by trustee. (MCA 72-38-1111.)
  - Trustee may be established as a matter of record by a recorded affidavit :
    1. Stating Trustee’s name an address; and
    2. Confirming that party is currently serving as trustee.

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### Trusts – Trustee Authority

- Authority of Trustee
  - Authority to take action with respect to trust property that an individual owner could take as to individually owned property (MCA 72-38-815).
- Limitations:
  - Terms of Trust Agreement
  - Duty of Loyalty – Act solely in the interest of the beneficiaries.
  - Transaction involving self-dealing voidable by beneficiaries.
  - Impartiality between beneficiaries.

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### Trusts - Requirements

- Review complete copy of Trust Agreement in order to determine:
  - Current Trustee(s)
  - Authority of Trustee to convey/mortgage etc.
  - Limitations on Trustee?
  - Provisions for removal of Trustee?
  - Directives triggered upon death of grantor.
- Certificate of Trust to verify continuing validity of Trust Agreement and other facts.
  - Must be signed by Trustee.
  - Not a substitute for the Trust Agreement.
  - Useful for affirmation of facts leading to successor trustees.

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### Another War Story - The Estate of Victoria Smith

Parties:

Vernon Smith, Sr. (d. 1966)	Dad
Victoria Smith (d. 9/11/2013)	Mom
V.K. Smith ("VK")	Son
Joseph Smith	Son
Victoria Smith Converse	Daughter

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### Estate of Victoria Smith

Timeline:

- 1966: Vernon, Esq. passes away, having acquired substantial real estate assets.
- 1971: VK, the oldest son, is licensed to practice law. Begins managing mom's affairs.
- 2/14/1990: Victoria makes Holographic Will, witnessed by Vernon.
  - "I give all my property, real and personal, to my son Vernon ("VK")."
- 1999: Durable POA making VK attorney in fact.
- 2008: Victoria hospitalized – executes another "unconditional, unlimited and all inclusive" Durable POA – again naming VK attorney in fact.

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### Estate of Victoria Smith

Timeline, Continued:

- July 3, 2012: VK forms VHS Properties, LLC, with VK and Victoria as 50/50 members.
- July 4, 2012: VK, under POA, executes transfer instruments conveying all of Victoria's assets to VHS Properties, LLC.
- July 4, 2012: Vernon, Under POA, executes transfer instruments conveying Victoria's membership interests in VHS Properties, LLC to VK.
- 9/11/2013: Victoria passes away, at nearly 100 years old.

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### Estate of Victoria Smith

Litigation:

- VK's ex-wife files a probate action for Victoria, claiming VK in possession of (the holographic) will.
  - If assets to be distributed to VK, ex-wife can execute judgment against them.
- Joseph (brother) seeks appointment as PR and administration under laws of intestacy.
 

Argues:

  1. Transfers under POA invalid gifts.
  2. Holographic will is invalid as product of VK's undue influence.
- VK seeks:
  1. Dismissal of probate action as moot, based on valid transfers of assets to the LLC, or
  2. Appointment as PR under holograph will or statute.
- **Result** – Transfers to VK invalid, Will invalid, returned to lower court for probate.

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**Thank You!**

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