



# Analyzing Your Client's Estate Documents - Wills, Deeds, Titles, Joint Tenancy and Community Property

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# Reviewing and Analyzing Your Client's Estate Documents

## Will

A Will in its simplest form says who gets my assets when I die and who is in charge of making sure the assets get distributed in accordance with my wishes. The person in charge is called the executor. The will normally names one or more executors and includes instructions for successor executors if the named executors are unable to serve.

In larger estates a trust document is commonly executed in tandem with a "Pour-Over Will". A Pour-Over Will simply instructs the executor to transfer assets to the trust that have not already been so. If the planning has been done correctly most assets should have already been transferred to the trust so the will should have little purpose other than to act as a catch-all. However assets not transferred to the trust prior to the death will probably require a probate proceeding to get them into the trust, defeating one of the primary benefits of having a trust in the first place.

Many wills include provisions which address the allocation of estate tax and expenses. A pour-over will often defers to the trust provisions. Caution: sometimes there will be a conflict between the allocation provisions in the Will and the Trust, requiring careful analysis.

Caution: In many states Wills and trusts executed prior to marriage have no validity after a client remarries. These documents must be

updated after remarriage or the client will be treated as if he or she died intestate.<sup>1</sup>

### **Deeds and Titles**

We often encounter situations where a client executes an elaborate trust and fails to fund it properly. Follow through is crucial. A trust is rendered useless unless and until assets are transferred into it. This process includes the following:

- Record quitclaim deeds for real estate

- Change title on brokerage accounts and bank accounts

- Change title for interests in partnerships, LLCs, corporations, etc.

- In some cases, change designated beneficiaries for life insurance policies, IRAs and pension plans (addressed more fully below).

Remember, the Trust has no control of assets unless they are actually in the trust. Thus, it is crucial during the planning process to confirm all assets have been properly transferred.

### **Joint Tenancy with Right of Survivorship (JTWROS)**

Assets do not always have to be in a trust to avoid probate. For example, an asset can be held as JTWROS or can have a designated beneficiary. JTWROS is probably the most common form of ownership among married couples because it is simple and can avoid probate without the need for a trust. (Caution: for most lenders JTWROS is

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<sup>1</sup> E.G. California Probate Code § 21610 states: Except as provided in Section 21611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse shall receive a share in the decedent's estate, consisting of the following property in said estate:

- (a) The one-half of the community property that belongs to the decedent under Section 100.

- (b) The one-half of the quasi-community property that belongs to the decedent under Section 101.

- (c) A share of the separate property of the decedent equal in value to that which the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one-half the value of the separate property in the estate.

the default title but it may not always be the best choice as discussed below). When the first spouse dies, property transfers automatically to the surviving spouse. No probate is required. However, in larger estates this form of ownership is not without its problems.

Beware property held as JTWRROS is controlled neither by will nor by trust. So any special provisions in either of these documents will not apply, often leading to some unexpected consequences. More importantly, although probate is avoided when the first spouse dies it is not avoided when the second spouse dies. Here is a typical scenario:

John and Mary Jones own a home in La Jolla, CA with a cost basis of \$1,000,000 and a fair market value of \$3,000,000 held as JTWRROS. John dies and the house automatically is transferred to Mary. Mary dies one year later. Since the house is now held by her individually it must go through probate. Total probate fees in California on \$3,000,000 would be about \$86,000.

Property held as JTWRROS creates some interesting income tax issues for residents of community property states. If property is deemed to be the community property of a married couple and the first spouse dies the property gets a step-up in basis for both the decedent's and the survivor's share of community property.<sup>2</sup> However, for purposes of this rule property held as JTWRROS is not generally deemed to be community property. Consequently, when property is held as JTWRROS and the first spouse dies the property gets a step-up in basis only for the decedent's one-half joint interest.

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<sup>2</sup> IRC § 1014(b)(6)

Thus, in our example above, when John dies Mary's cost basis would be \$2,000,000. Conversely, if the property were deemed to be community property Mary's cost basis would be \$3,000,000.

### **Community Property with Right of Survivorship (CPWROS)**

Several years ago California created a new way for married couples to hold property called Community Property with Right of Survivorship (CPWROS). Similar to JTWROS, when the first spouse dies property transfers automatically to the surviving spouse. No probate is required. However unlike JTWROS, property held as CPWROS is deemed to be community property and therefore when the first spouse dies the property gets a step-up in basis for both the decedent's and the survivor's share of community property. (Caution: probate may still be required on the death of the surviving spouse).

### **Community Property Agreement**

A third alternative is for the married couple to execute a separately signed Community Property Agreement. This agreement says that both spouses agree to treat their assets as community property regardless of title, and that property held in JTWROS for convenience purposes only. Beware, a Community Property Agreement may have unintended and unexpected consequences in the event of a divorce!

### **Designated Beneficiary**

Another classification of assets that may avoid probate without being in a trust are those containing provisions for naming a designated beneficiary including: life insurance policies, annuities, IRAs and qualified employee pension plans. Typically a trust is neither the

owner nor the beneficiary. Generally it is best to name an individual or individuals as primary beneficiary and perhaps the trust as contingent beneficiary. Caution: generally, one should avoid naming a trust as beneficiary of a retirement plan. This could severely limit the ability to defer distributions unless the trust contains special language to avoid this problem.

Caution: the client's surviving spouse is always deemed to be designated beneficiary of a qualified employee pension plan covered by ERISA (regardless of beneficiary designation to the contrary) unless the surviving spouse has signed a waiver.

