

# Probate 101

## Part 1

By Tammie J. Lund-Smith

# Biography:

- ▶ Graduated from the College of Great Falls from the Paralegal Studies program in 1986.
- ▶ I have specialized in probates since 1986.
  - I presently contract with the Legal Services Developer Program.
  - I was the Chair of the Paralegal Section of the State Bar of Montana at its early stages.

# Note:

- ▶ If I make a statement someone doesn't understand, please stop me, questions are welcome

# HOW DO I KNOW IF A PROBATE IS NECESSARY?

- 1<sup>st</sup> Question: Did the decedent own real estate in their name ALONE?
  - Did they own it with someone else and the words Joint tenancy with the right of survivorship WERE MISSING?
- 2<sup>nd</sup> Question: Did the decedent own \$50,000 or more personal property in their own name without a designated beneficiary, POD or TOD?
- 3<sup>rd</sup> Question: Did the decedent own a mineral interest? This usually complicates things because more often than not mineral interests are owned as TC.

# JTWROS

## ▶ Joint Tenancy with Right of Survivorship

- Last man standing – If I gave my house to all 7 of my children as Joint Tenancy with Right of Survivorship and the youngest of the 7 children was the last one to die and had no children but the other 6 children all had children (my grandchildren) my youngest child's wife would receive my house, none of my grandchildren would

# TC

- ▶ Tenants in Common – is always assumed if the words Joint Tenancy with right of survivorship isn't added behind the names.
- ▶ Meaning: It means that each individual shares an interest in the entire property to share; however, upon their death, their share will go to their estate to plan with as they choose.

# Mineral Interest complications

- ▶ 1.) They can be owned as JTWRORS
- ▶ 2.) They can be owned as TC
- ▶ 3.) They can be owned in another State
  - Ancillary Probate
- ▶ 4.) They are very fractional in ownership
- ▶ 5.) They are difficult to value:
  - Are they producing?
  - Have they produced in the past?

# You or who you are talking to is grieving

Grieving will cause people to remember only a portion of what you are telling them. Always get a pen and paper.

There will be **homework detail.**



# THE HOMEWORK

- ▶ Explain to them that these are the items they need to bring in for you to HELP:

# The homework list:

- Death certificates;
- The decedents social security number;
- The personal representative's social security number;
  - Personal Representative: A Personal Representative may be named in a Will; however, is not actually able to act as a Personal Representative until appointed by the Court and only get appointed when NECESSARY.
- Addresses of all of the lineal decendants including the P.R.;
- The original Will; and codicil if any;

# The homework list continues:

- a copy of any and all deeds;
- a copy of ALL investment account statements, any co-ops;
- a copy of ALL of the most recent bank statements;
- a copy of savings bonds;

# The homework list continues

- a copy of ALL life insurance policies;
- a copy of ALL vehicle titles, list of machinery, brand certificates, cattle inventory, grain inventory;
- was there any coin collections, stamp collections, or art collections? If so bring them in.

# Lost money?

- ▶ Montana Department of Revenue
  - ▶ Division of Unclaimed Property
  - ▶ Director: Jason Lay, Unclaimed Property Program Manager
  - ▶ Office phone: (406) 444-6900
  - ▶ P.O. Box 5805 Helena, MT 59604-5805
  - ▶ Unclaimed Property website: <https://tap.dor.mt.gov/>
  - ▶ Reporting website: <https://tap.dor.mt.gov/#1>
- 
- This site is a government site and what happens is people move, dividend checks don't get cashed etc. so they turn them over to the last known state and the state holds them in unclaimed funds until someone claims them.
  - Every PR or every firm should check this site out at the beginning AND before closing the estate.

# SCENARIO 1

- ▶ The decedent was Harry S. Harness, He died on 01 /01 /2021 at the age of 81. He left behind a widow, named Sarah Sue Harness and 3 children and 2 stepchildren but no Will, So he died INTTESTATE.
- ▶ Does everything go to Sarah Sue Harness?

## Scenario 1 Answer:

At this point, it is difficult to answer that because we do not have enough facts in the case. Just because she is the surviving spouse, she doesn't automatically get everything even if she was married to him for the last 10 years or longer, she must make claims.

# SCENARIO 2

- ▶ The decedent was Harry S. Harness, He died on 01 /01 /2021 at the age of 81. He left behind a widow, named Sarah Sue Harness and 3 children and 2 stepchildren this time he left a Will, So he died TESTATE.
- ▶ Does Sarah Sue Harness get everything?



# Scenario 2 Answer with examples:

- The only way to answer this is to review the Will AND review how Harry S. Harness owned everything.
- If Harry left everything in his Will to Sarah Sue; however, owned his Edward Jones account in his name alone with his 3 children as Beneficiaries on it, then those 3 children receive the beneficiary items via inheritance.

# Analyzing if a probate is necessary:

- ▶ The survivor(s) has(ve) done his/her homework:
  - They have brought in everything they needed to bring in, to the best of their ability.
  - You must wait 5 days after the death before you can file the documents with the court, during that time, the survivor should spend time with family and grieve.

# Will vs. Ownership

- ▶ Will – A will is important because it dictates a decedent's desire especially if you have a mixed family like Harry and Sarah Sue
- ▶ Ownership always trumps a Will;

# LAST WILL AND TESTAMENT

- ▶ Is it a Will?
- ▶ Does it meet the criteria?
- ▶ Is it Holographic?
- ▶ Does it meet the criteria for Holographic?
- ▶ Self-Proved?

# MCA 72-2-522

- ▶ Execution -- Witnessed Wills -- Holographic Wills
- ▶ **72-2-522. Execution -- witnessed wills -- holographic wills.** (1) Except as provided in [72-2-523](#), [72-2-526](#), [72-2-533](#), and subsection (2) of this section, a will must be:
  - ▶ (a) in writing;
  - ▶ (b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
  - ▶ (c) signed by at least two individuals, each of whom signed within a reasonable time after having witnessed either the signing of the will as described in subsection (1)(b) or the testator's acknowledgment of that signature or acknowledgment of the will.
- ▶ (2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
- ▶ (3) Intent that the document constitute the testator's will may be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

# MCA 72-2-523

- ▶ Writings Intended As Wills
- ▶ **72-2-523. Writings intended as wills.** Although a document or writing added upon a document was not executed in compliance with [72-2-522](#), the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
  - ▶ (1) the decedent's will;
  - ▶ (2) a partial or complete revocation of the will;
  - ▶ (3) an addition to or an alteration of the will; or
  - ▶ (4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will.

# MCA 72-2-524

▶ Self-Proved Will

▶ **72-2-524. Self-proved will.** (1) A will may be simultaneously executed, attested, and made self-proved by acknowledgment by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

▶ I, ....., the testator, sign my name to this instrument this ..... day of ..... 20... and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will, that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes expressed in it, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

▶ .....  
▶ Testator

▶ We, ....., ....., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's will, that the testator signs it willingly (or willingly directs another to sign for the testator), that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

▶ .....  
▶ Witness  
▶ .....  
▶ Witness

▶ THE STATE OF .....  
▶ COUNTY OF .....

▶ Subscribed, sworn to, and acknowledged before me by ....., the testator, and subscribed and sworn to before me by ..... and ....., witnesses, this ..... day of ....., 20...  
▶ (SEAL) (Signed).....  
▶ (Official capacity of officer)  
▶ .....

▶ (2) An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

▶ THE STATE OF .....  
▶ COUNTY OF .....

▶ We, ....., ....., and ....., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will, that the testator signed willingly (or willingly directed another to sign for the testator), that the testator executed it as the testator's free and voluntary act for the purposes expressed in it, that each of the witnesses, in the presence and hearing of the testator, signed the will as witness, and that to the best of the witness's knowledge the testator was at that time 18 years of age or older, of sound mind, and under no constraint or undue influence.

▶ ..... Testator  
▶ ..... Witness  
▶ ..... Witness

▶ Subscribed, sworn to, and acknowledged before me by ....., the testator, and subscribed and sworn to before me by ..... and ....., witnesses, this ..... day of ....., 20...  
▶ (SEAL) (Signed) .....  
▶ (Official capacity of officer)  
▶ .....

▶ (3) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will's due execution.

# Operation of Law

- ▶ Joint Tenancy
- ▶ Revocable Transfer on Death Deed
- ▶ Beneficiary Designation
- ▶ Transfer on Death
- ▶ Payable on Death
  - Examples:
    - Bank Accounts
    - Life Insurance Policies
    - Investment Accounts
    - Retirement Accounts



# Real Estate owned as Joint Tenancy with Right of Survivorship

- ▶ This is considered an operation of law; however, there is still a legal action that must happen when someone passes away.
  - It is called an Affidavit (or Acknowledgment) To Terminate Joint Tenancy
  - This document must be completed, the names must be identical as the vested deed, the legal description must be accurate, then recorded.
  - NOTE: Some counties require a Realty Transfer Certificate, some do not.
  - NOTE: Make sure you look for whether there was water rights and if so, they get transferred as well, especially if it wasn't owned between H & W.

# Revocable TODD

- ▶ To complete this transaction the beneficiary or beneficiaries must complete and record an Affidavit of Death.
- ▶ This document transfers the real estate into the beneficiary's name.
- ▶ NOTE: the creditors have 12 months to “claw back” the property for debts against the real estate.
- ▶ Is there a way to shorten this or not allow it? YES

# How to Avoid Creditors Clawing Back Beneficiary designated Assets

- ▶ Always seek the advice of legal counsel, every instance is different.
- ▶ If you open probate, a Creditor is only allowed 4 months to file a Claim against the Estate not 12 months

# Can Creditors go after assets with Beneficiary designations?

- ▶ Yes!
- ▶ Creditors can go after assets of a decedent for 12 months after a decedent passes away, specifically the items listed as a beneficiary
- ▶ see MCA 72-6-112

# Can a surviving spouse/children go after a Beneficial Interest?

- ▶ YES! If there isn't enough probated assets to satisfy the decedent's probate estate and statutory allowances for the spouse to claim their statutory allowances to the extent the estate is insufficient they can "claw back" those beneficial interests. See MCA 72-6-112

# Non – Probate processing

- ▶ 30 days after a person passes away a rightful heir can collect almost any non-tangible personal effect with an Affidavit for Collection of Personal Property. This document is used if you do not need to open a Probate with the Court.

# Scenario of Non-Probate

- ▶ The decedent was Harry S. Harness, He died on 01 /01 /2021 at the age of 81. He left behind a widow, named Sarah Sue Harness and 3 children and 2 stepchildren but no Will, So he died INTTESTATE. The bank account was in his name alone with only \$10,000. Harry also owned 1 vehicle worth \$4,000 in his name alone. Harry also owned a Life Insurance Policy with Sarah Sue as a Beneficiary and Harry and Sarah Sue owned the House they lived in as Joint Tenants with Right of Survivorship.

# Affidavit for Collection

- ▶ 1.) Sarah Sue needs to do an Affidavit for Collection of Personal Property for the Bank Account of \$10,000
  - A.) I hope they have a joint account too so that if there is a check coming from somewhere with just his name it can go into an account with both, if not, she needs advice to leave an account open with his name on it for 6 months to 1 year for that purpose, maybe talk to the bank to take some of the \$10,000 but not to close it yet.



# Vehicle

- ▶ 1.) Sarah Sue needs to use an MV12 Form to transfer the vehicle to herself

# Life Insurance Policy – Beneficiary naming

## Sarah Sue

- ▶ Sarah Sue will need to complete the Claim Form for the Life Insurance Company – they will work directly with her since she is the named beneficiary.

# Home owned as JTWRORS

- ▶ When it is owned as JTWRORS it is by operation of law; however, it will need to have an Affidavit of Termination of Joint Tenancy recorded at the Clerk and Recorder, which takes Harry's name off.
- ▶ If this isn't done, when Sarah Sue passes away whoever remains will need to remove two decedent's names off the real estate and the only one with authority to remove Harry's name was Sarah Sue.

# Inheritance vs. Gift

- ▶ Inheritance:
- ▶ Inheritance is when you receive an item after a person passes away – when that happens it is valued at the highest reasonable value to give you a step up in tax value.
  - Example: Your Dad bought his house and land for \$10,000 in 1930 and still owns it. He passes away and you inherit. You value it in the probate, and it is worth \$300,000 in today's market. You sell it for that amount and have zero capital gain.

# Inheritance vs. Gift continued

- ▶ Gift:
- ▶ Gift is when your parent gifts you their home commonly via a Quit Claim Deed (usually out of fear of losing it to a nursing home) – when that happens it is valued at their original purchase price with NO step up in tax value.
  - Example: Your Dad bought his house and land for \$10,000 in 1930 and still owns it. When he gifts it to you, you receive it at his purchase price for \$10,000. When you sell it for \$300,000 you will have a capital gain of \$290,000 which you will be taxed on at a very high rate of tax.

# Issues with Gifting

- ▶ Capital Gains Tax Consequences
- ▶ Possible Eviction from your own home
- ▶ Begins a 5 year look back period should you need to file for Medicaid
- ▶ Possible Issue qualifying for Medicaid
  - Fraudulent Transfer
  - Transfer for less than FMV
  - Creates a Penalty Period; therefore, one must self pay during the penalty period.
    - \$252.18 per day (7/1/2020 to present)
  -

# FORMAL PROBATE

- ▶ Formal Probate you must appear before the Judge.
- ▶ Formal Probate must be done if the decedent died more than 3 years ago.
- ▶ Formal Probate must be done if the Original Will cannot be found.
- ▶ Formal Probate must be found if the Heirs cannot be given proper notice.
- ▶ Sometimes Formal Probate is suggested for strategy

# INFORMAL PROBATE

- ▶ You file it via Testate – with a Will;
- ▶ or you file it Intestate – without a Will.
  
- ▶ You file all opening documents with the Clerk of Court, you do not appear in Court in front of the Judge.
  - and if you meet the proper criteria, the Clerk of Court will stamp all of your documents and open your probate.



# COME BACK NEXT WEEK

- ▶ PROBATE 101      PART 2
- ▶ I will discuss all of the documents, the deadlines and some of the reasons probating it as an individual vs. a law firm becomes problematic.