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Coping with Death

In many respects it is very difficult to prepare for death. However the planning needed to avoid creating chaos for one's survivors is not difficult. It is only necessary to anticipate the steps necessary to settle the affairs of a decedent. Whether you are thinking of your own "estate," or that of a loved one for whom you are responsible, some planning will make the estate settlement process (which most people refer to as "probate") easier.

The first challenge for the survivors is to locate and read the deceased's will, if there is one. The last will and testament nominates someone to serve as executor of the estate. For purposes of this article I will assume that a will was written and found. I will also assume that everyone is acting in good faith and, unlike some television drama, nobody destroys the will in order to increase their share of the estate.

The first task facing the executor is to identify the assets and how ownership of them will pass. In Georgia there are basically four "classes" of ownership: joint tenancy with right of survivorship ("JTROS"), beneficiary designated assets (e.g. life insurance, IRA's, etc.), personally owned assets and those owned in a revocable trust.

A common misconception among people who establish "living trusts" is that, upon their death, all their property will be covered by that trust. That is only true to the extent that they formally changed the title of any asset to make the trust the owner. Similarly, jointly titled property is not covered by a person's will after death. Unless it is a "tenancy in common," which is not often done, such property passes by right of survivorship to the other joint owner(s).

This can easily lead to a case of unintended consequences when an older parent puts the name of an adult offspring on their bank account or other financial asset for the purpose of giving them signature authority. Unless specifically instructed not to do so, people at the bank will pull out an account agreement form that contains a "pay on death provision" or creates a right of survivorship. This sort of sloppiness can lead to bitter fights between siblings after the death of the parent because a major asset may be taken out of the probate estate if someone asserts his or her right of survivorship and a sibling disputes the correctness or propriety of that assertion.

In Georgia jointly titled property must specifically refer to the "survivorship" rights, otherwise a tenancy in common is created. Property owned by a decedent in a tenancy in common is in that person's probate estate and is controlled by his or her will (or the laws of inheritance when there is no will). In other states, especially when a husband and wife jointly own property, the rules can be very different. The extreme examples of such different rules are the community property laws out West in places like California.

Only those assets which are personally owned, which includes money owed to the decedent or his estate, pass under the supervision of the probate court. Those are usually referred to as being in the probate estate. However, all four classes are considered to be "owned" by the decedent for purposes of calculating what federal estate tax, if any, must be paid by the executor of the estate. Thus, collectively they make up the "taxable estate."

The executor has a duty to locate and gather the assets that are in the probate estate. In the case of those assets in the taxable estate, but not in the probate estate, the executor needs to tabulate the total to ascertain whether a federal estate tax return must be filed with the Internal Revenue Service. The threshold amount for that tax, as of January 1, 2006, is \$2 million. That amount increases to \$3.5 million in 2009. Even when no estate tax is due, because of deductions and credits, the return must be filed within nine months of the date of death when the taxable estate exceeds the threshold amount. The executor is personally liable if he or she distributes the estate's assets to the heirs without satisfying any tax liability.

It should not need saying, but experience has proven otherwise: the authority of a person acting under a durable power of attorney ends with the death of the person giving that power. Once appointed by the court, the executor must close any bank accounts in the decedent's name and open a bank account in the name of the estate. If the executor finds that someone used a power of attorney after his authority ended, he must hold that person accountable.

Finding the records of the decedent is an essential part of the executor's job. A checklist is helpful in this regard. The following items should be on any checklist: bank records, including check registers and canceled checks; mortgages and deeds; stock brokerage statements; stock certificates; life insurance policies; pension benefit statements; loan documents; income tax returns for the past three years; any prior gift tax returns; recent credit card statements; inventories and appraisals of valuable assets (e.g. art, jewelry, coins); burial plot contracts; motor vehicle titles; and insurance policies covering the home and personal property.

Insurance is also an issue for the executor because insurance on the decedent's automobile(s) and other property will not continue indefinitely. The executor should contact an insurance agent, preferably the decedent's, to continue coverage, even if a new policy must be issued to the estate.

One consolation to the survivors is that they do not have to do all of this work on their own. The decedent's attorney and accountant can be of immense help in organizing the effort and providing expertise. However the first inheritance from the decedent will be the organization, or chaos, they have brought to their own affairs.

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Patrick J. Gibbs practices law in Roswell with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.