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The Various Ways in Which Property Passes at Death

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The following article was featured in the March 2016 edition of *Legacy*, the Vorys newsletter focused on wealth planning.

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Mr. Smith, a widower, died survived by his three children. At the time of his death, Mr. Smith had the following assets: Residence (valued at \$250,000), Checking/Savings Accounts (valued at \$50,000) and Investment Account (valued at \$600,000). Mr. Smith intended to treat his three children equally, and his attorney prepared a Last Will and Testament that left his entire estate in equal shares to his children.

During Mr. Smith's final years, Child 1 served as Mr. Smith's agent under his durable financial power of attorney and took care of his affairs—Child 2 and Child 3 lived out of state, so Child 1 was the logical choice to assist Mr. Smith with his affairs. For "convenience purposes," Mr. Smith added Child 1 as a joint owner on the Investment Account—he did this to enable Child 1 to communicate with his broker about investment decisions and make withdrawals from the account for Mr. Smith's benefit. Mr. Smith did not realize the account had a "survivorship" feature, which is common and provides the account automatically passed to Child 1 upon Mr. Smith's death.

When Mr. Smith's children met with his attorney to commence administration of Mr. Smith's estate, they were surprised to learn that the Investment Account would not pass in equal shares to Mr. Smith's three children as he intended under his Last Will and Testament. Instead, they learned that the entire account, representing two-thirds of Mr. Smith's gross estate, would pass directly to Child 1, because Mr. Smith had added Child 1 as a joint owner on the account. As a result, without benevolent actions by Child 1 or possibly litigation among the children, Child 1 would receive \$700,000 from Mr. Smith's estate and Child 2 and Child 3 would only receive \$100,000 each.

Unfortunately, variations of this hypothetical scenario are all too common. Despite the attorney's advice, clients oftentimes make changes to the titling of their existing assets, or acquire new assets,

without ensuring the titling is consistent with their overall estate plan and intentions. The above hypothetical provides just one illustration of why it is so important to regularly review asset titling and ensure such titling is consistent with one's estate plan.

Property passes in one of the following four ways upon death:

1. **Probate Property.** Probate property consists of all property which is owned in the decedent's name at the time of their death and that does not pass automatically by operation of law to another party, such as by beneficiary designation or the survivorship feature mentioned above. If a decedent has a Last Will and Testament, it will only control the distribution of the decedent's probate property. If a decedent dies without a valid Last Will and Testament, the property in the decedent's probate estate will pass in accordance with the state's laws of intestate succession.
2. **Beneficiary Designation.** Property for which a decedent has designated a beneficiary will pass automatically (regardless of what a decedent's Last Will and Testament provides) to the designated beneficiary, if then living. Such a designation is a contract and supersedes the decedent's Last Will and Testament. Beneficiary designations are most common with life insurance and retirement plans, but they can be added to almost all types of assets (bank accounts, investment accounts, stocks, bonds, LLC interests, cars, real estate, etc.). Depending on a client's estate plan, the beneficiary could be a spouse, children, charitable organizations, or a trust.
3. **Joint Ownership with Rights of Survivorship.** When two or more people own property "jointly with rights of survivorship," the result is that at the death of one of the joint owners, the property will pass automatically (regardless of what a decedent's Last Will and Testament provides) to the surviving joint owner(s). Joint ownership with rights of survivorship is a common way for spouses to own bank accounts or real estate together. Adding someone as a joint owner on a bank or investment account for convenience purposes could have unintended consequences (see the hypothetical example above), because the likely result is that the property would pass automatically to surviving joint owner at death. Such property is also subject to the creditors of each named owner. This form of ownership should be distinguished from "tenants in common," in which each owner owns a fractional portion of the property without the described survivorship feature.
4. **Trust.** The final way that property passes at death is via a trust. Property can be owned by a trust at death, or pass to a trust at death via a Will or beneficiary designation. Property owned by a trust at death will be excluded from a decedent's probate estate, and the trust's terms will control to whom and how such property passes. Trusts can serve several potential benefits, both tax and non-tax.

An estate plan is much more than simply a Last Will and Testament and/or a trust. It is very important to coordinate the titling of assets with the overall estate plan. If you have any questions about your estate plan or would like to set up a review of the titling of all of your assets to ensure that they coordinate with your estate plan, please contact your Vorys attorney.