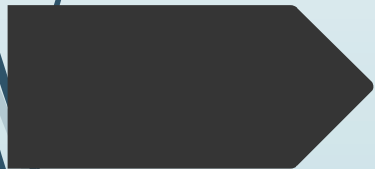


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Probate Pitfalls & Power Plays: Navigating Authority in Real Estate

A CE class by Melanie McLane



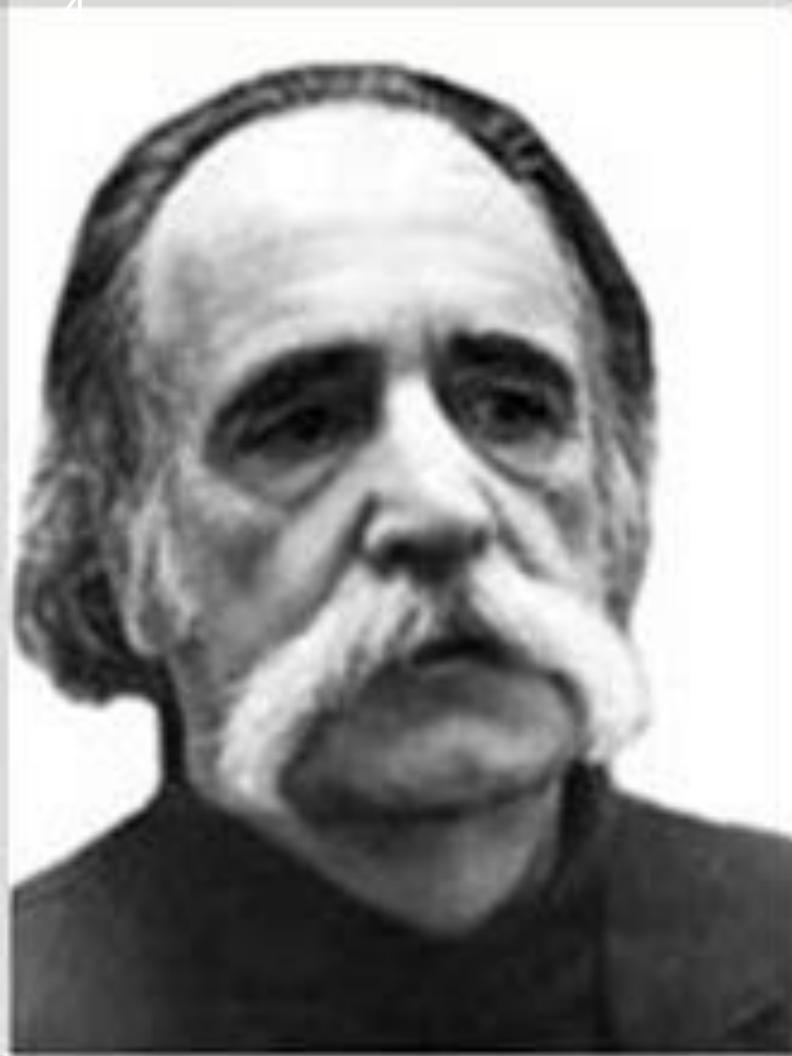
The² Owner of the Property is Dead



- Now what?
- Is there a will?
- Are there co-owners?
- Who's in charge?

“The Devil
Comes to
Every
Funeral”





Everybody has got to die, but I have
always believed an exception would
be made in my case.

— William Saroyan —

AZ QUOTES

Icebreaker Quiz

■ Take a few moments on each question, consulting with those near you.

⁶House Under Contract



- ➡ POA signed for his father
- ➡ Father dies before closing
- ➡ Now what?

Under Contract with POA Signature



- All POAs END upon death of the person who granted it
- If the POA is NOT also the Executor, you have a problem
- Who is the Executor?
- What does the will say?
- Worse yet, what if there is no will?

Power of Attorney

- Legal authorization that allows one person (the principal) to give another person (the agent or attorney-in-fact) the authority to act of their behalf.
- The scope of authority, duration, and purpose depend on how the POA is written and the laws of the state.

Types of Power of Attorney

- **General: broad power for nearly all financial or legal matters**
- **Ends on principal's death**
- **Can automatically end upon incapacitation**
- **Durable: similar to general but remains valid if principal becomes incapacitated**
- **Ends upon death**
- **Common in estate planning.**

Grandpa Weatherby

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- Writes up deed and gives property to favorite grandchild
- Never delivers it
- Upon his death, they find the *undelivered deed*
- And a will giving the property to ALL his grandchildren
- Who gets the property?



Don't Forget These Elements:

For a deed to be **legally effective**, it must meet three elements:

Execution – The deed must be properly signed and acknowledged by the grantor.

Delivery – The deed must be delivered to the grantee (or their agent).

Acceptance – The grantee must accept the deed.

Without delivery, **there is no transfer of title**, even if the document has been signed and notarized.

No Will? They've Searched and Searched....

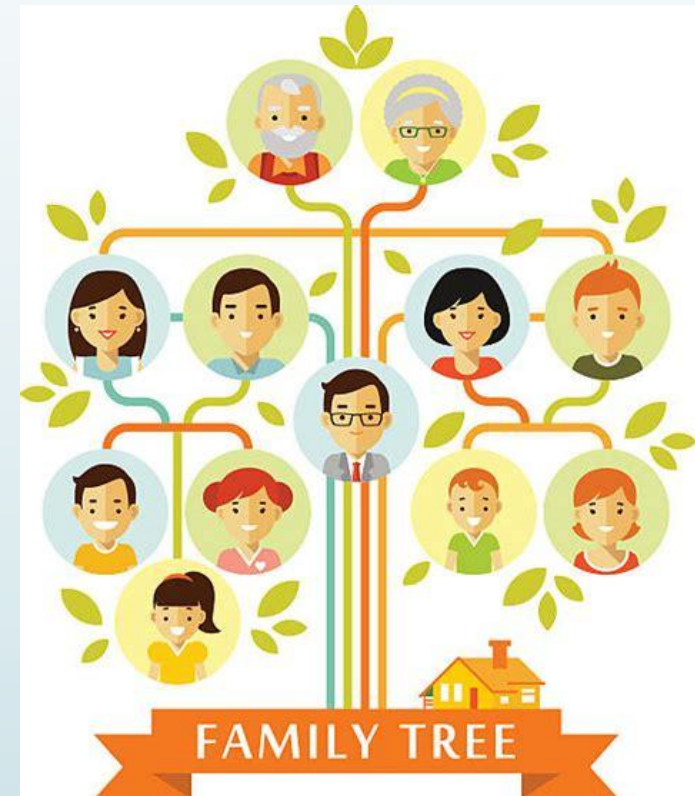
- ➡ **Intestate: dying without a will**
- ➡ **Does the spouse get everything?**
- ➡ **NO!**

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Laws of Descent and Distribution

- Vary from state to state
- Spouses, children, natural and adopted, included in every state
- Shares vary
- Intestate means none of these can be disinherited



Intestate Distribution



Most states spouse and children

No spouse or children?

Siblings, Parents, Grandparents

Aunts, Uncles, Cousins

VARIES BY STATE!



So, Who Gets What?

Generally protected:

Spouses

Natural children,
including children
from previous
marriages,
relationships

Amount they get
varies!

New York



Spouse, no
kids

Spouse gets all

Kids, no
spouse

Kids get all

Spouse and
children

Spouse
inherits the
first \$50,000
plus half of the
balance, kids
get rest of the
balance

New York

Parents, no
spouse or kids

Parents get
everything

Siblings, no
parents spouse
or children

Siblings get
everything

Grandchildren

If their parents
are dead, their
parents' share
goes to them



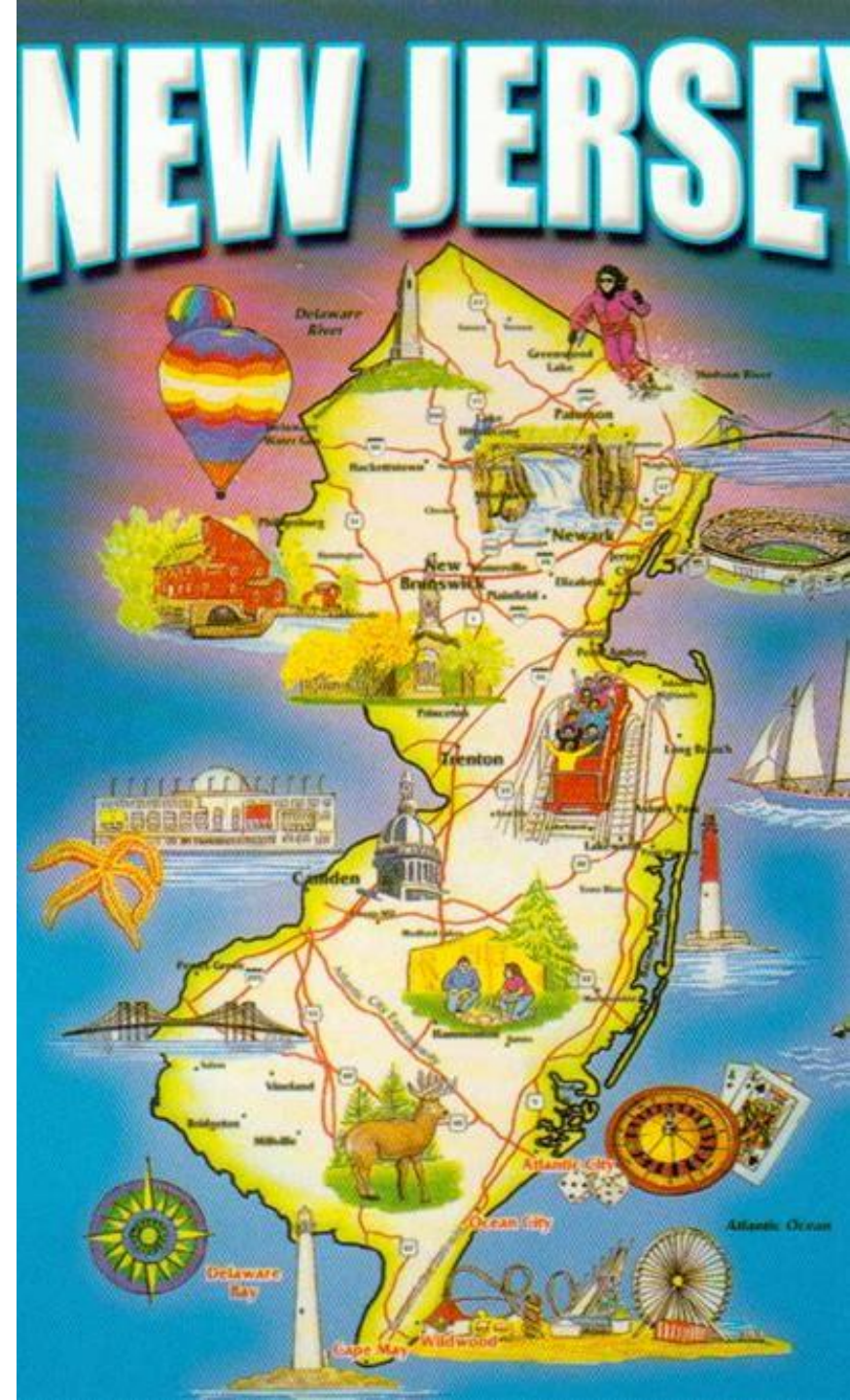
New Jersey

Married, no kids: surviving spouse gets all

Married, no surviving spouse, children get all

Unmarried, no children, parents inherit

No parents? Siblings inherit



New Jersey Quirks

Spouse dies, partner, no kids, spouse has living parents

Surviving spouse get the first 25% of the probate estate (not less than \$50,000 or more than \$200,000) plus an additional $\frac{3}{4}$ share of remaining probate estate

Spouse dies, surviving spouse, child from marriage, child from a previous marriage

Surviving spouse receives the first 25% of probate estate (same limits) plus half of the balance

Remaining probate estate in equal shares to children

[illegible]

Same for living parents



Tenants by the Entireties

All three states have this

Husband and wife considered 'one person'

Spouse automatically gets real estate titled this way

Taxes

New Jersey highest marginal inheritance tax rate at 16%

PA rate varies depending upon relationship to the deceased: spouses exempt

New York: Only very high worth estates

The basic exclusion amount for dates of death on or after January 1, 2026, through December 31, 2026 is \$7,350,000.

What This Means For Agents:

With or without a will, real estate often must be sold!



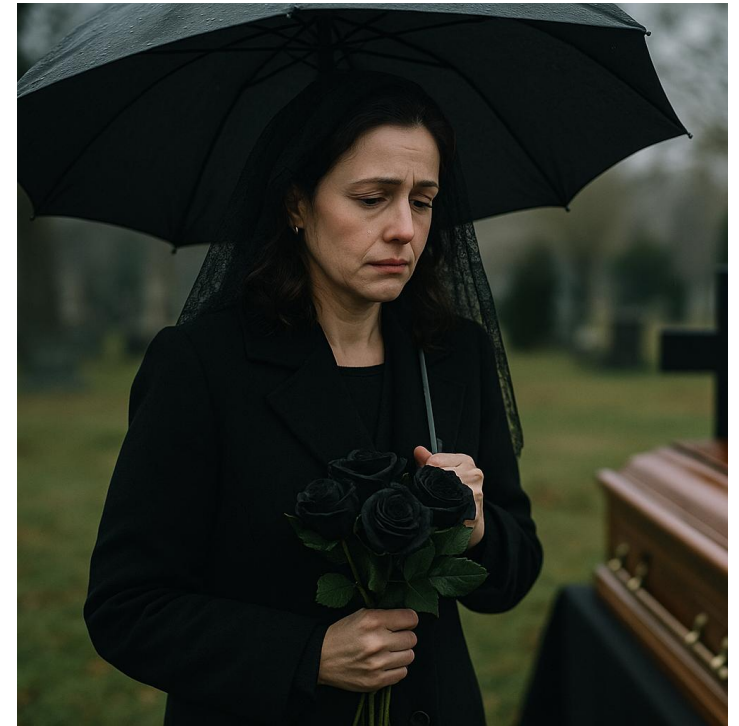
Community Property vs Common Law

Most states protect surviving spouse

Some states limit how much they can inherit

Depends also upon children

Check state law





Howard Hughes: Multi-millionaire

“Eccentric”

Died intestate

No wife, no children

11 cousins inherited

Took 34 years to
settle \$230 million
estate

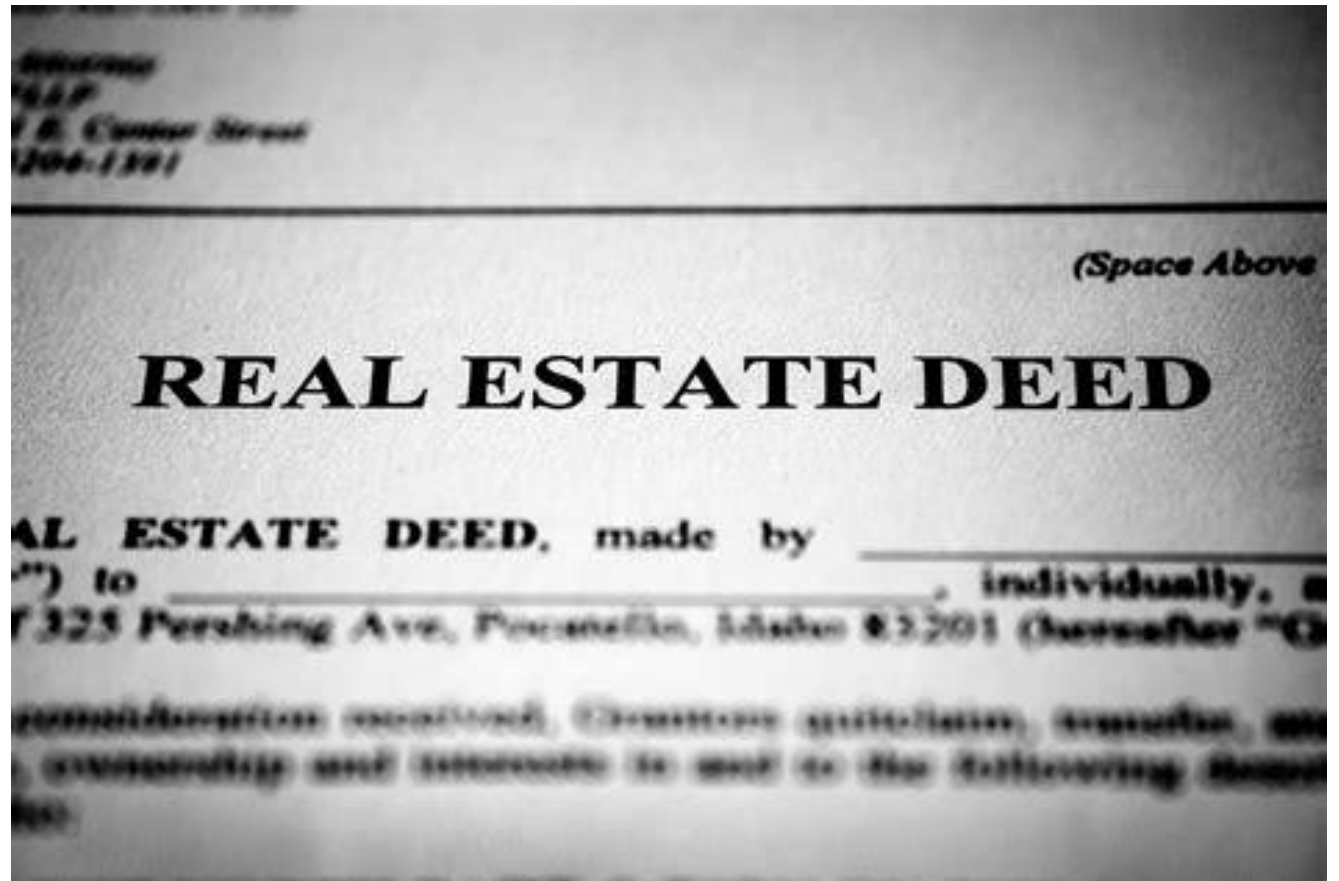
But:



- At time of his death, he was worth \$2.5 billion
- Estate eventually disbursed \$143 million
- Who got the rest?
- Attorneys, administrators, etc.

Deed Says “Irrevocable Trust”

What are your
questions for the
person trying to list
the property?



Ownership is Irrevocable Trust

- Who is the trustee?
- What does the trust say?



**Both signed listing and
AOS...husband has
stroke...incapacitated**

- **NO POA!**
- **Wife will have to
petition the court to
have him declared
incompetent and
have herself (or
someone)
appointed as his
guardian**



General Power of Attorney

- ➡ Not a solution!
- ➡ General Power of Attorney ENDS upon incapacitation!



Durable Power of Attorney

- ➡ Continues after incapacitation
- ➡ Wife can sign on his behalf
- ➡ Proceed with closing



Elderly Person: Deplorable Living Conditions



- ➡ Dementia
- ➡ Unsafe living conditions
- ➡ No known relatives

Neighbors:

- Mental state is 'bad'
- No known relatives
- Very concerned about her living conditions



Guardian or Conservator

- Agent: Social services for the aging
- Legally or physically incompetent individuals
- Rights must be protected
- Petition filed in family or probate court by friend, family member, social services



If you suspect client is not capable of making decisions, what do you do?



- Find out if there is a trusted family member
- Do they have POA?
- Be very careful about entering into any contract where the client may not be legally competent

Appraisals Needed



- Estates
- Guardianships / Conservators
- Protect assets of estate or incompetent individual
- To ensure assets are sold at market value

Appraisal NOT BPO, or CMA

Courts want an independent third party with no interest in the property

If ultimately the house won't sell after a reasonable time at the appraised value, guardian will have to petition the court

New appraisal

Or

Accept an offer

Appraisals for Estates

- Always date of death
- Check WHEN that was
- Market may have changed

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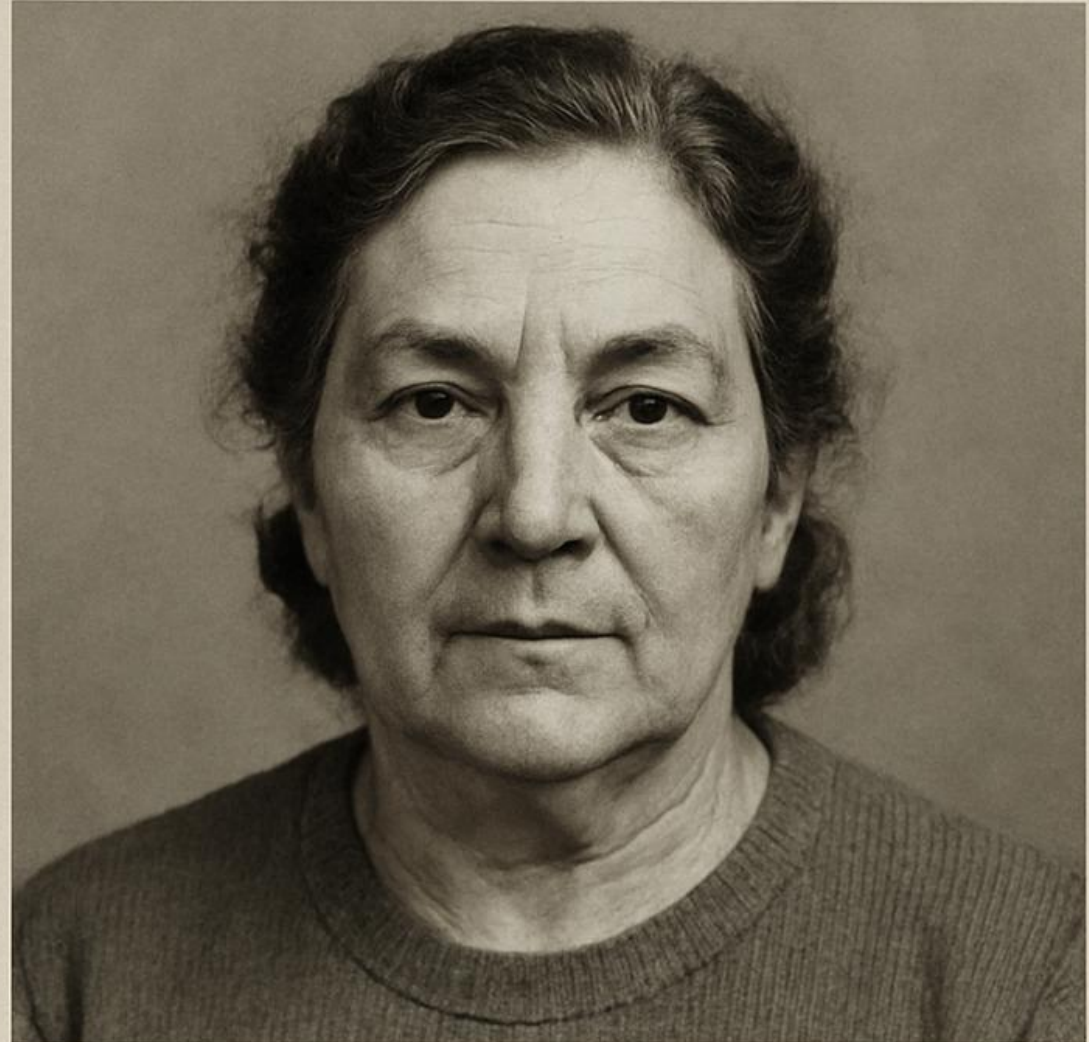


Dad's House

- ➡ Just one problem
- ➡ Deed is in two names
- ➡ Dad's second wife
- ➡ MIA

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PERSON



BERTHA FIDDLER

Dad's Missing Wife

- ➡ Second wife
- ➡ Not your client's mother
- ➡ Missing for years
- ➡ Now what?
- ➡ Is she dead or alive?

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MISSING



NAME:

AGE:

HEIGHT:

WEIGHT:

HAIR COLOR:

HAIR LENGTH:

EYE COLOR:

WEAR:

LAST SEEN:

HAVE YOU SEEN THIS PERSON?

IF YOU HAVE ANY INFORMATION PLEASE CALL:

DEED

This Indenture made the _____ the
_____ at _____, and _____
and in _____ the _____
Witnesseth. that the said party of the first part, for
and in consideration of the sum of _____ lawful money of
the United States of America, to him in hand paid by
the said party of the second part, the receipt whereof is
hereby acknowledged, does grant and convey unto the
said party of the second part, and to his heirs and assigns
forever, all that certain tract or parcel of land situ-
ate in the _____ ind _____

Together with all and singular the tenements, here-
ditaments and appurtenances thereunto belonging, and
all the estate, right, title, interest, claim, and demand
whatsoever of the said party of the first part in law or equ-
ity, to have and to hold the above-described premises
unto the said party of the second part, and to his heirs
and assigns forever,

In Witness Whereof, the said party of the first part
has hereunto set his hand and seal this _____.

**Titling is
Everything!
If you hold
title to a
property, you
own it!**

Brother Calls: “You Can’t Sell That Without My Ok!”

- Client
- Has will
- Is named as executor
- Has gone through probate process
- Has appropriate documents



Beth is Executor

- Brother Tim calls
- “What are you doing with Mom’s house? You can’t sell without my okay!”
- Yes she can!



44 Power of Attorney

- ➡ Different kinds
 - ➡ Durable
 - ➡ Limited
 - ➡ Specific
- ➡ Some states require recording of a POA if real estate is involved

Owner's Daughter:



- Thinks house is in trust
- Thinks she's trustee
- But: will shows a Testamentary Trust

Testamentary Trust



- Created in a will
- “Springing document”
- Becomes effective only upon death of will maker
- Are parents competent to make a new will?

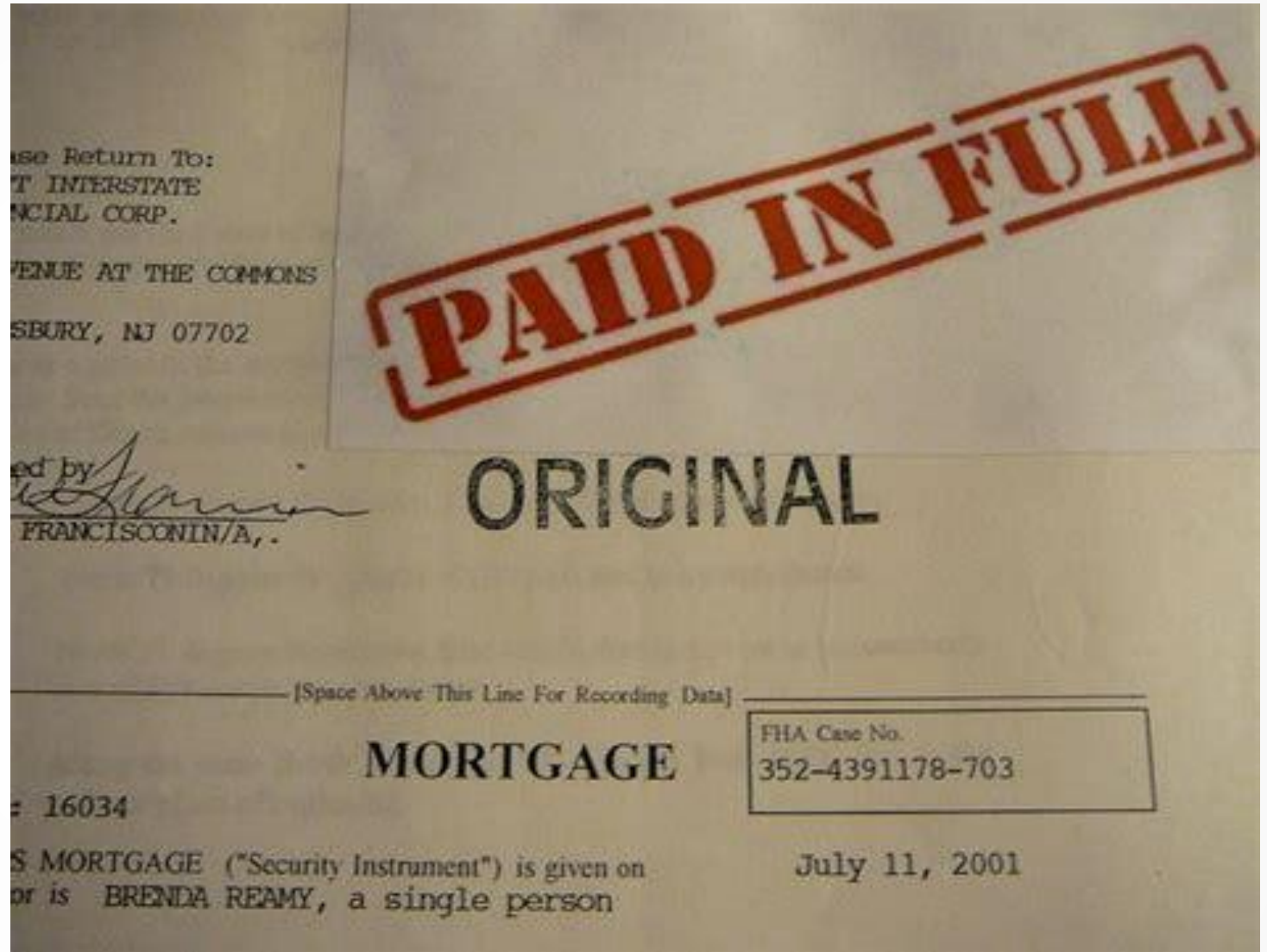
Last Parent Dies

- ▶ Adult children contact you to list
- ▶ You check public records—there's reverse mortgage against it
- ▶ Adult children had no idea
- ▶ Now what?



Like All Mortgages Must be Paid Off!

- Heirs are entitled to any remaining proceeds
- Heirs are not required to use other assets to pay off mortgage
- Non-recourse loan



If “Underwater”

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- “Friendly foreclosure”
- Hand over keys
- Heirs can take personal property from house

Executors and Administrators

Executors

- Named in the will
- Can be more than one person
- Can be an institution
- A person can decline to be executor

Administrators

- Generally court-appointed
- Both with wills (sometimes) and without wills (always)
- Can be an individual
- Can be an institution

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Documents Generally Needed

- **Certified death certificate**
- **Last Will and Testament (if one exists)**
- **Any codicils or amendments to the Will**
- **Any Trust documents**
- **Letters Testamentary or Letters of Administration**

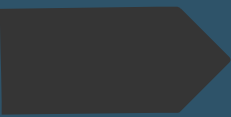
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Documents Generally Needed

- Inventory of assets
- Deeds/title documents for real property, vehicles, financial statements, life insurance policies, retirement accounts etc
- Records of debts/obligations
- Documented communications (notices to creditors, beneficiaries/ heirs)
- Tax returns: personal and estate
- Final accounting
- Closing paperwork for probate court

Probate

- Probate is the legal process through which a deceased person's estate is administered, and their assets are distributed to heirs or beneficiaries, under the supervision of a court.
- Court ensures will is followed
- Bills and final expenses are paid
- Assets are distributed to heirs



What Does NOT Go Through Probate:

Property held in a living trust or an irrevocable trust

Life insurance policies that go to a named beneficiary

Payable-on-death (POD) bank accounts

Retirement accounts that go to a named beneficiary

Beneficiaries for Retirement Accounts

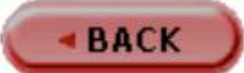
- Beneficiary forms can't be changed after death
- Not changing beneficiary after deaths, divorce, etc.
- Don't name estate as heir: will require retirement accounts to be paid out fully
- Can designate layer of heirs
- Beneficiaries: what %
- 401(k) Federal law: spouse must be heirs unless they sign a waiver
- What are allowable beneficiaries for the company
- (some don't allow step-children)

Probate

- Probate is not private
- Anyone can look up a will and see what assets were distributed to whom

NO PRIVACY



True Trust.comBACK

Jacqueline Kennedy Onassis Will and Trust

Jacqueline Kennedy Onassis (1929 - 1994)

Jacqueline Lee Bouvier Kennedy Onassis (born on July 28, 1929) was the wife of John F. Kennedy from 1953 to 1963. Following his assassination in 1963, she married Aristotle Onassis and remained his wife until his death in 1968. Affectionately known as Jackie or, more informally, as Jackie O, her Will makes reference to many personal artifacts collected from her husband, John F. Kennedy, and her years in the White House. For more information about Jacqueline Kennedy Onassis, please see her biography in [Wikipedia](#).

LAST WILL AND TESTAMENT of Jacqueline Kennedy Onassis

I, JACQUELINE K. ONASSIS, of the City, County and State of New York, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils at any time heretofore made by me.

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⁵⁸ Assets Distributed to Beneficiaries Directly

- Do not go through probate
- Retirement account
- Life and term insurance proceeds
- Jointly held property

⁵⁹Life Estates



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- A life estate is a form of property ownership where one person (the life tenant) has the right to use and benefit from a property for the duration of their life, but ownership automatically transfers to another person (the remainderman) upon the life tenant's death.

⁶⁰Life Estates

- Vary from state to state
- Some states (FLA) a life estate is protected from a Medicaid lien
- Enhanced life estates: grantor has right to control and revoke life estate in their lifetime (Lady Bird Life Estate)



⁶¹LIFE ESTATES ARE A PARTIAL INTEREST



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- Review: Fee simple absolute is ownership of everything
- A life estate creates two interests
 - Interest of the life tenant
 - Interest of the remainderman

Appraisals Are Often Done..



- ➡ When a person who has a life estate in a property goes into a nursing home
- ➡ Appraisers use actuarial tables in this process.

A photograph of a cemetery path with autumn leaves and tombstones. The path is paved and curves through rows of tombstones. The ground is covered with fallen yellow and orange leaves. Trees with autumn foliage line the path. The sky is overcast.

Bottom Line for Agents:

- If there is a life estate:
- Has that person died?
- If not, voluntary surrender?
- Merger of interests?
- Sale by agreement?

⁶⁴Well, that didn't go as planned...

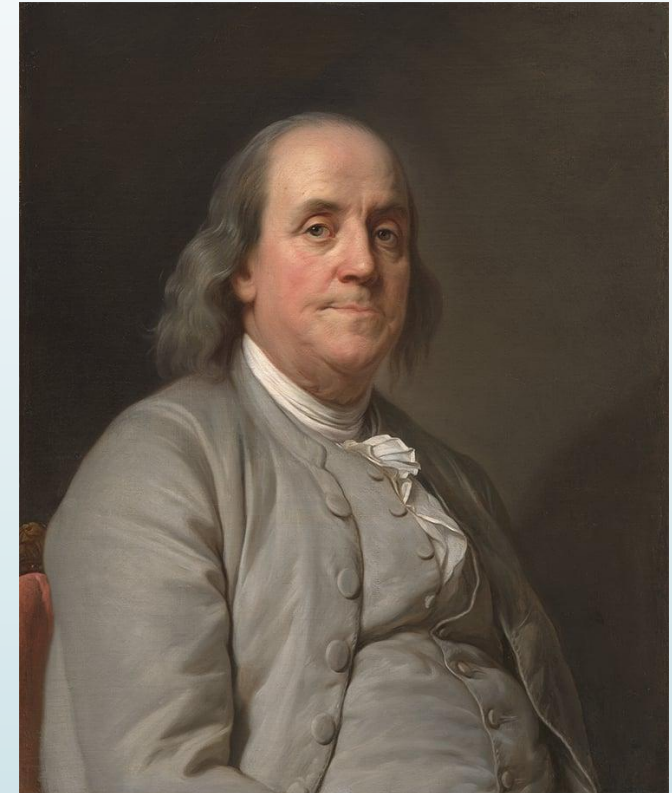


- **Jeanne Calment**
- **Born in France on 21 February 1875, Jeanne lived a record-breaking 122 years 164 days**
- **Property attorney Andres Francois Raffray agreed to give her a life estate in 1965**
- **He paid her monthly, expecting to one day get her apartment**
- **He died two years before she did!**

DEATH AND TAXES

► Our new Constitution is now established, and has an appearance that promises permanency but in this world nothing can be said to be certain, except death and taxes.

► —Franklin, in a letter to Jean-Baptiste Le Roy, 1789[1]



People try to Avoid Both!

Death

- ➡ Inevitable
- ➡ **ONLY 32% of Americans had a will in 2024**
- ➡ **68% will let the state decide!**

Taxes

- ➡ **Inheritance**
- ➡ **Estate**

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Estate and Inheritance Taxes

- ➔ Some states tax estates based on location of property
- ➔ Not domicile of deceased owner



Domicile

- An individual's **fixed or permanent home**
- Established **physical presence**
- Plan to stay indefinitely
- People may have more than one **RESIDENCE**, but only **ONE DOMICILE**



Key Points Domicile

- New will recite domicile
- Register to vote, change driver's license, vehicle registration
- Use that address on all tax returns, credit cards, mortgages, leases etc.
- Pay all taxes from that address
- Take advantage of any tax breaks (homestead)
- Cancel voter registration in other states, quit clubs, notify people in writing of your domicile

Stupid Things People Do:



- ➡ Don't have a will
- ➡ Don't do estate planning

One of the reasons people 'vote with their feet'



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- In addition to the federal estate tax, which has a top marginal rate of 40 percent, 12 states and the District of Columbia impose estate taxes, while five states levy inheritance taxes. Maryland is the only state that imposes both an estate and an inheritance tax.

Capital Gains Tax

■ **Always due on the sale of an investment property, unless a 1031 exchange is done**

- Since 1997
- Exclusion of gain on a primary residence for a single person \$250,000
- Exclusion of gain on a primary residence for a married couple \$500,000
- Two years from date of death for surviving spouse to sell and exclude \$500,000

Capital Gains

- Sold for over \$3 million
- Bought for \$400,000
- OUCH!
- Current exclusion rates date from 1997

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DO NOT OFFER ADVICE



- For things you are **NOT** qualified to give advice about:
- Taxes
- Estates
- Trusts
- Wills etc
- Tell them to check with their attorney or accountant!

Stupid Things People Do....



- Add a person's name to a deed
- They can predecease you
- Then you can pay tax
- Lawsuits & divorces affect any asset this person owns

That's Not All...

- Lose control over your own house
- No step-up basis for the other person (generally an adult child)
- Unintended gift taxes
- Family conflicts
- Probate doesn't go away



Trusts

- ➡ **Revocable living trust**
- ➡ **Irrevocable trust**
- ➡ **Testamentary trust**

- ➡ **Domestic Asset Protection Trust**
- ➡ **Qualified Personal Residence Trust (QPRT)**
- ➡ **Spendthrift Trust**
- ➡ **Dynasty Trust**

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Revocable Living Trust (aka Ladybird Trust):

- Created during grantor's lifetime
- Can be altered or revoked
- Grantor maintains control
- Does NOT protect from creditors or estate taxes while grantor is alive
- Becomes irrevocable upon death
- Avoids probate
- Provides flexibility

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Irrevocable Trust: Asset Protection and Tax Advantages



- Once assets are transferred, grantor cannot modify or dissolve the trust
- Assets removed from taxable estate (can reduce estate taxes)
- Strong creditor and lawsuit protection
- Real estate and other assets can be placed in trust

⁸⁰ Testamentary Trust: Protects Heirs after Death

- Established by a will
- Activated only upon Grantor's death
- Used to manage assets for minor children or spendthrift heirs
- Can specify distributions at certain ages or milestones

Domestic Asset Protection Trust

- Currently allowed in only seventeen states
- Must meet strict statutory requirements to prevent fraud
- Legal shield for personal and real property
- Allows grantor to be both a beneficiary and protector of the trust
- Offers creditor protection

Qualified Personal Residence Trust (QPRT)

- Type of irrevocable trust
- IRS Code §2702
- Grantor transfers ownership
- Retains the right to live in it for a specified period
- After that: passes to beneficiaries
- Or can be leased back at fair market rent



83 Often used for family/vacation homes



- Transfer is taxable gift but only for remainder interest
- Value of the house *minus* the value of your retained right to live there
- If you survive the term, property passes to heirs with no additional estate tax
- If you die before that, home's value pulled back into estate and taxable

⁸⁴ Spendthrift Trust



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- **Commonly used when heirs have:**
 - **Addiction issues**
 - **Financial instability**
 - **Divorce risks**

Dynasty Trust: Multi-generational wealth preservation

DYNASTY

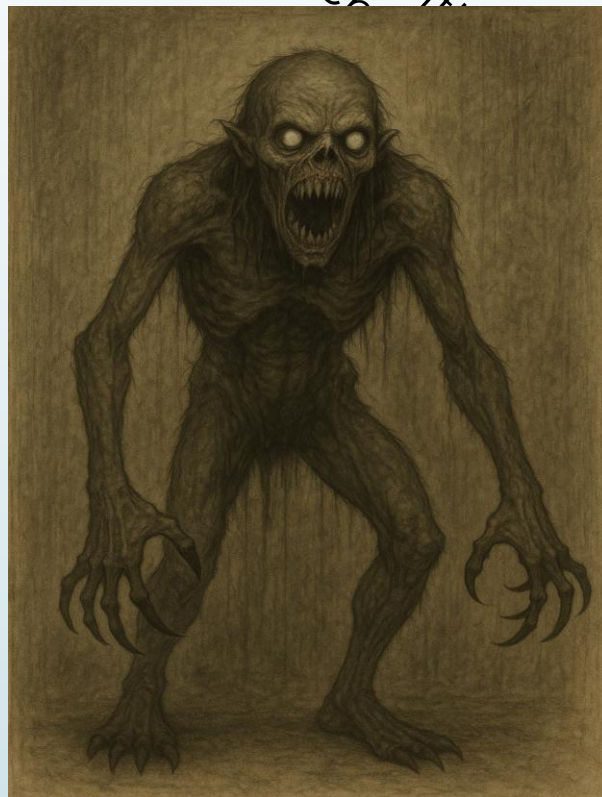
- Can last for several generations
- Minimizes estate, gift, and generation-skipping (GST) taxes
- Long-term asset control and protection from heirs' creditors or ex-spouses



Stupid Things People Do:

Wait until a family member needs nursing home care to try to set up a trust!

Medicaid Look Back: The Monster in the Room



- 5 Year look back period
- Some states have additional rules
- Any asset given away, sold for less than market value is 'brought back' and reduces eligibility for Medicaid

⁸⁸Nursing Home Costs



- Average monthly cost in US \$9277 per month for a semi-private room
- \$10,646 for private room
- Costs vary depending upon location, care etc.

MERP: Federal Law requires states to try to recover costs

➡ **Lien will be on public record**

➡ **Liens can be placed to cover other long-term expenses, not just nursing home care.**



Medicaid Estate Recovery Program (MERP)

- Selling your home while on Medicaid can trigger a loss of benefits.
- Homes are exempt while you live in them, but the proceeds from a sale become a countable asset.
- Most states give you a short window (e.g., 90 days) to reinvest or spend down proceeds before disqualification.
- Gifting or transferring ownership of your home may trigger penalties.

Two Kinds of Assets: Exempt & Countable

Exempt assets	Countable assets
Primary residence (within equity limits)	Proceeds from your home sale
One vehicle	Checking, savings, investments
Prepaid funeral expenses	Secondary residences or other real property
Household furnishings	Cash or lump-sum inheritances

One Spouse Still in House



- Won't force sale
- Some states file 'deferred lien'
- Some wait until death of both
- Depends upon state law

Agent Response: Should We Put Our House in a Trust?

- It depends on your financial situation
- Are you aware of the Medicaid look-back period?
- They could have cash
- They could have nursing home insurance



Agent Response: “Should we put cabin in children’s names, so it stays in the family?”



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- **Consult with an attorney**
- **Consider loss of control, future events in their lives (divorce, lawsuit)**
- **Ask attorney about a trust**
- **Some trusts allow you control**
- **Most trusts shield a property from nursing home costs**

Agent Response: “I don’t know where to begin...”



- “I can recommend people who can help sort personal belongings for you
- We will take this step by step
- It’s often easier for you to move into your new apartment first, taking *only* what will fit and you know you need.

Multi-Generational Communication



- Clients may instruct you to communicate with other family members
- Get it in writing
- In-between situations: older person appears competent, but wants POA to okay everything

⁹⁷Take-Aways



- Who is legally able to list or sell the property?
- Will a listing require a third party (guardian, conservator)?
- What issues is the client facing?
- How can you help them?

Takeaways:

- Don't offer legal advice
- Do state what you know is true regarding titling, setting up a trust to preserve house
- Do recommend they consult with an attorney, financial planner
- Do have trusted resources



Thank you for attending!

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