
 **WESTCOR**  
LAND TITLE INSURANCE COMPANY

## When the Owner is Dead

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 **WESTCOR**  
LAND TITLE INSURANCE COMPANY

**About us**

- A top national Title Insurance Underwriter
- To ensure the importance of Title Insurance
- Protect your property rights
- Advocate for all real estate industry partners
- Commercial transactions up to \$150 M

Title Insurance is boring.  
We're not.

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 **WESTCOR**  
LAND TITLE INSURANCE COMPANY

### Meet your Presenter

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Victor Davis  
SCS Underwriting Counsel



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**This Seminar is About New Mexico ONLY**




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**DISCLAIMER**

NOTHING IN THIS PRESENTATION IS A SUBSTITUTE FOR DISCUSSING YOUR SITUATION WITH A LICENSED ATTORNEY WITH EXPERTISE IN ESTATE PLANNING OR PROBATE LAW.




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**Why are we Doing this?**

**Common Misunderstandings:**

- If I have a will, I don't need to probate
- If I'm named executor in the will, I have the right to handle estate matters without a court.
- If my spouse dies. I automatically inherit everything.


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### Why are we Doing this?



- Often, the 1<sup>st</sup> moment the heirs realize there's a problem is when they get a title commitment.
- You can anticipate the problem sooner if the realtor asks a few questions:
  - How did you get title? Did you inherit it?
  - When did you get title? Were you married then? Are you still married to the same person?
- This course is partly about how each answer to those questions affects closing?

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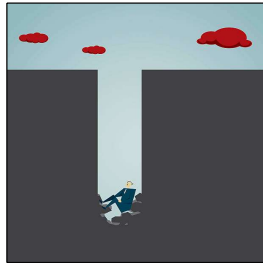
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### Why are we Doing this?

- There once was a common phrase in oil & gas called drilling a dry hole, meaning you did all the work and got no oil production.
- This course is to help you avoid dry holes.



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### Intestate Succession

- Intestate Succession – Who inherits if there is **NO WILL?**



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### Intestate Succession

By Representation:

If, pursuant to Section 45-2-103 NMSA 1978, a decedent's intestate estate or a part thereof passes "by representation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are:

- (1) surviving descendants in the generation nearest to the decedent that contains one or more surviving descendants; and
- (2) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.




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### Intestate Heirs for An Unmarried Person

- Inheritance from a single person is like a champagne glass pyramid, overflowing to each generation.
- If someone dies without descendants, the top of the pyramid becomes their parents.
- If someone dies without descendants or parents, the top of the pyramid becomes decedent's grandparents.




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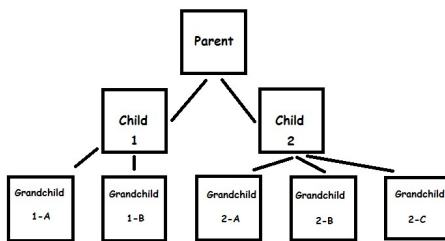
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### Intestate Heirs for An Unmarried Person - Example




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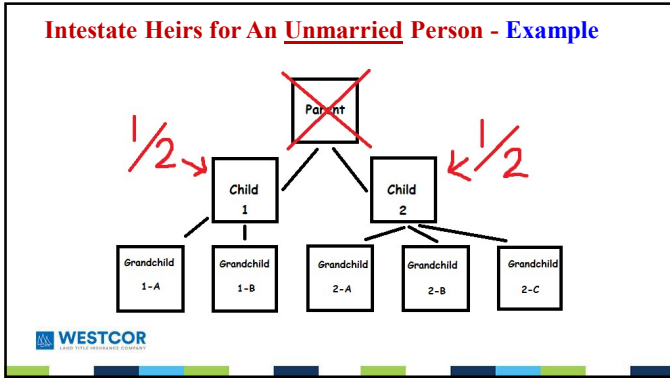
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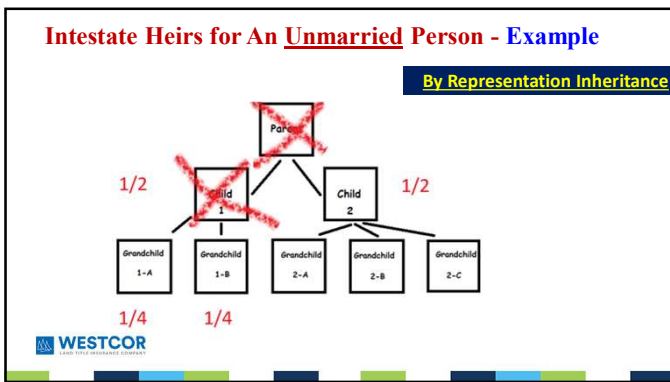
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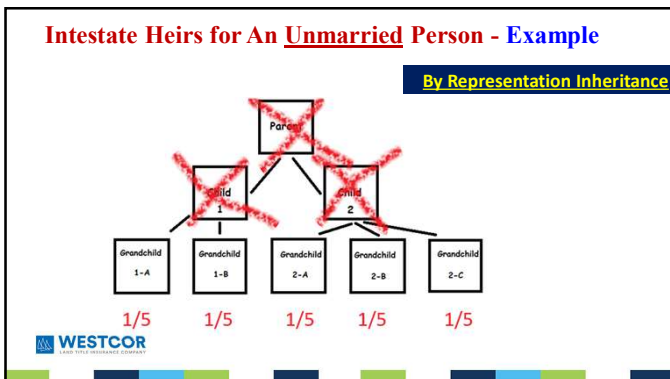
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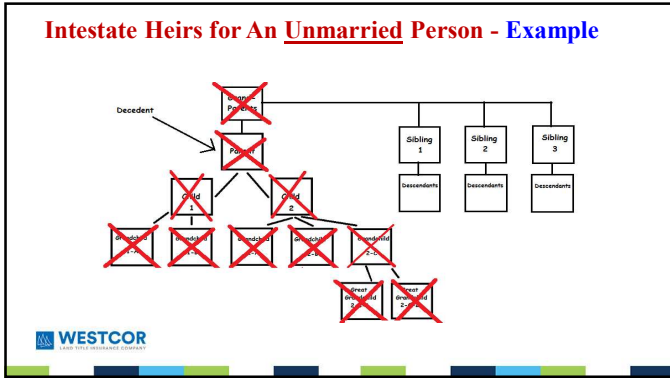
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### Intestate Succession

A parent is barred from inheriting from or through a child of the parent if the parent's parental rights were terminated.

For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

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### What is Community Property?

- Generally, **Community Property** is all property obtained during marriage.
  - We generally go by the "**Inception of Title Doctrine**" - Was the titled "owner" married or single when they obtained title?
  - **Community Property Presumption** - ALL property owned by a married person is presumed to be community property on death or divorce until proven otherwise.

Odds of being married at least once by age

Source: Bureau of Economic Analysis, "Estimates of Marital Property Income, 1980-2014"

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### What is NOT Community Property?

*Separate Property* is all property–

- Owned before marriage; or
- Divided by written agreement; or
- Received by Gift or Inheritance; or
- Acquired as compensation for Tort
- Final Judgment by a Court of Competent Jurisdiction




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### Intestate Succession: Married People

Separate Property

1. No Surviving Issue- The Entire Intestate Estate to Surviving Spouse
2. Surviving Issue- 1/4 to Surviving Spouse, 3/4 to Issue




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### Intestate Succession: Married People

Community Property

All to Surviving Spouse




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**Transfer of title to homestead to surviving spouse by affidavit**

- Where a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by the husband's or wife's will devises the husband's or wife's interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary.




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**Transfer of title to homestead to surviving spouse by affidavit**

- Six months after the death of a decedent, the surviving spouse may record with the county clerk in the county in which the homestead is located an affidavit describing the real property and stating that:




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**Transfer of title to homestead to surviving spouse by affidavit**

- (1) six months have elapsed since the death of the decedent as shown on the death certificate;
- (2) the affiant and the decedent were at the time of the death of the decedent married and owned the homestead as community property;
- (3) a copy of the deed with a legal description of the homestead is attached to the affidavit;




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**Transfer of title to homestead to surviving spouse by affidavit**

- (4) but for the homestead, the decedent's estate need not be subject to any judicial probate proceeding either in district court or probate court;
- (5) no application or petition for appointment of a personal representative or for admittance of a will to probate is pending or has been granted in any jurisdiction;
- (6) funeral expenses, expenses of last illness and all unsecured debts of the decedent have been paid;
- (7) the affiant is the surviving spouse of the decedent and is entitled to title to the homestead by intestate succession as provided in Section 45-2-102 NMSA 1978 or by devise under a valid last will of the decedent, the original of which is attached to the affidavit;




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**Transfer of title to homestead to surviving spouse by affidavit**

- (8) no other person has a right to the interest of the decedent in the described property;
- (9) no federal or state tax is due on the decedent's estate; and
- (10) the affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement may subject the person to penalties relating to perjury and subornation of perjury.




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**Survival**

- (1) an individual born before a decedent's death who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent.
- (2) an individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives one hundred twenty hours after birth




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### No Takers

If there is no taker under the provisions of Chapter 45, Article 2 NMSA 1978, the intestate estate passes to the state.



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### Intestate Succession

- Remember, Intestate Succession only happens if there is **NO WILL!**



According to Caring.com:

- The number of Americans with a will (24% in 2025) has declined steadily from 33% of respondents in 2022.



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### PROBATE Process



- Probate is necessary when a person dies leaving property titled in his/her name.
- This property is called the “decedent’s estate.”

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**PROBATE**  
**Process**

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- Probate case must be filed with the Probate Court in the county where the decedent was domiciled (physically living) at the time of his/her death.

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**PROBATE**  
**Process**

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- Probate can be filed any time between 5 days and 3 years after the decedent's death.
- A probate case may be filed after the 3 year period for the limited purpose of transferring title to real property from the decedent's name to the decedent's heirs.

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**PROBATE**  
**Process**

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- If the decedent left a valid Will, the person filing the probate case must submit the original Will and a certified copy of the decedent's death certificate to the Probate Court.
- The court will appoint the person(s) designated in the Will as "Personal Representative" ("PR") of the decedent's estate.

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**PROBATE**  
**Process**

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- When the Probate Court appoints a person to be the Personal Representative of the decedent's estate, the court gives the PR a document called "Letters Testamentary."
- If the decedent died without a Will (intestate), the document is called "Letters of Administration."
- These "Letters" give the PR the legal authority to transact business on the decedent's behalf.

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**PROBATE**  
**Process**

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- The PR is responsible for:
- Notifying all of the heirs of the decedent's estate;
- Gathering and inventorying the decedent's assets;
- Identifying and paying the decedent's debts (to the extent that funds are available in the estate to do so);

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**PROBATE**  
**Process**

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- The PR is responsible for:
- Distributing the decedent's assets in accordance with the decedent's Will or the intestacy laws if there is no Will; and
- Closing the probate case by filing a sworn statement with the court stating that the PR's duties are completed.
- The probate case must be open for a minimum of 3 months before it can be closed.

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### Probate Claims



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- If there are claims filed in the probate, we will want to look carefully at the transaction to make sure it's a market priced, arms length, sale.
  - Insured sales to heirs or relatives should get particular attention from underwriting counsel.
- Probate claims do not create a lien on property, but they create a risk to title if they appear to be for the purpose of defrauding creditors.
- The PR may need to sell the decedent's real property to pay claims against the Estate.

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### MERP!



- "MERP" means the *Medicaid Estate Recovery Program*.
  - The Federal Government mandates each state adopt a program to recover Medicaid funds (not Medicare funds) from the estate of people who received them.
- MERP claims are not a lien on real property.
- They are no different from any other claim on the Estate.
  - However, while some creditors may not pursue estate claims, MERP might.
    - It's not clear this program has been funded by the State?

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### PROBATE Process

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- If the decedent's estate includes real property, the PR may need to execute a "Personal Representative's Deed" in order to transfer the property out of the decedent's name.

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**PROBATE**  
**Process**

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LAW FIRM

- Who Can Be Appointed PR Where There Is No Will?
- A spouse has the highest priority for being appointed PR,
- Followed by the decedent's children.
- A person who wishes to be appointed PR must have the written consent of all other people with the same or higher priority for appointment.

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**Avoiding Probate (For Real Estate)**

1. Trusts
2. Joint Tenants with Rights of Survivorship
3. Transfer of Death Deeds

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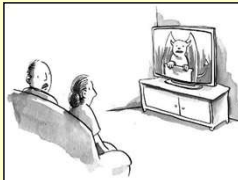
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**TRUSTS**

- An estate planning trust is called an *intervivos trust*, meaning created while alive.
- A trust created in a will is called a *testamentary trust*.
- A trust is a separation of *beneficial ownership* from *actual ownership*.
  - The trust doesn't own the property, the *Trustee* owns the property.
  - The *Beneficiaries* own the beneficial interest in the property.



We need a Trust Agreement?

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### TRUSTS



"I'll come right to the point.  
How up-to-date is your estate plan?"



- In most cases the original **Grantor** of the trust, called the **Trustor**, is both a beneficiary of the trust and the initial trustee, but the trust has provisions for a person to succeed as trustee when the trustor dies, so the trust continues after the trustor dies.
- This gives the **Successor Trustee** ownership of all property and the right to administer the trust after death of the original trustor.
- Sometimes this is just a method of avoiding probate, and the **Successor Trustee** proceeds to convey the property to the **Successor Beneficiaries**.
- Sometimes the trust continues to support the **Successor Beneficiaries**.

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### Common Problems With Trusts



- The Trustee has to have authority to conduct the transaction.
  - Either specific authority, or
  - "All of the authority given to Trustees in the Texas Trust Code."
- Some Trusts are purposely set up to maintain and protect the property held in the Trust, so the trustee cannot convey it.
  - Spendthrift Trusts.

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### Common Problems With Trusts



- People create them, then fail to transfer the property into them.
- They fail to designate a successor trustee in the trust agreement.
- The trust agreement doesn't provide any clear authority for the trustee to convey real property.

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### JTROS Deeds

- JTROS means, "*Joint Tenancy with a Right of Survivorship*"
- An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants, to two or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship, shall be prima facie evidence that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value.




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### TODD's



- **TODD** stands for *Transfer on Death Deed*
  - A deed that becomes effective only upon death.
- Can be revoked or replaced during grantor's life.
- Must be filed of record, prior to death.
- *It's ineffective if filed after death.*
- Subject to the same challenges as any other deathbed deed.
- Does not require notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or consideration.




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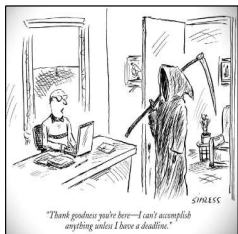
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### TODD's



- During a transferor's life, a transfer on death deed does not:
- A. affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;
  - B. affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;
  - C. affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;
  - D. affect the transferor's or designated beneficiary's eligibility for any form of public assistance;
  - E. create a legal or equitable interest in favor of the designated beneficiary; or
  - F. subject the property to claims or process of a creditor of the designated beneficiary.




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