

Ask the Probate Judge—Joint Tenancies & Oaths

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**Q: My spouse and I own a home with joint tenancy on the deed. He has a will that leaves everything to me, and I have a will that leaves everything to him. We live in New Mexico. My understanding is if he dies before I do, the home is now mine and I would have to provide a death certificate to change the deed to my name, and when I die, unless I have a beneficiary on the home, or a trust, my estate must go to Probate Court. Our other accounts have beneficiaries. Please clarify this for me.
R.M.**

You are mostly correct in your understanding of the law. The nature of joint tenancy is that the surviving joint tenant acquires title to the whole property. So, yes, the home is all yours if your husband dies first. Conversely, the home is all his if you die first.

If he dies first, you would record his death certificate in the county clerk's office in the county where the home is located. This has the effect of "changing the deed to your name," although you do not actually receive a new deed. The recording of the death certificate transfers legal title to you. When title companies search for information on your home, they should find the joint tenancy deed and death certificate, which tells them that you are now the sole owner.

Assuming your husband dies first, upon your death, if you have not: 1) created a "transfer on death deed" prior to your death; or 2) titled the home in the name of a trustee of a trust; or 3) added another joint tenant to the house deed (sometimes a dangerous decision), then the house would need a court proceeding to pass clear title upon your death. The court proceeding could be filed in either the probate court or the district court.

As long as the beneficiaries on your other accounts survive you and your husband, a court proceeding should not be necessary to pass these assets. They should pass directly to the named beneficiary or beneficiaries.

Q: You wrote that other people besides notaries can administer oaths. Who else is authorized by law to do so?

According to New Mexico law, "The secretary of state of New Mexico, county clerks, clerks of probate courts, clerks of district courts, clerks of magistrate courts if the magistrate court has a seal, and all duly commissioned and acting notaries public, are authorized and empowered to administer oaths and affirmations in all cases where magistrates and other officers within the state authorized to administer oaths may do so, under existing laws, and with like effect."

Magistrates may also administer oaths and affirmations and take acknowledgments of instruments in writing, but may not charge a fee for doing so.

Further, "notarial act" within New Mexico means any act that a notary public of the state is authorized to perform, including taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, and witnessing or attesting a signature. Notarial acts may be performed by a:

- (1) notary public of New Mexico;
- (2) judge, clerk or deputy clerk of any court of this state; or

(3) person authorized by the laws of this state to administer oaths.

Do not be surprised, however, if judges or clerks will not administer an oath for paperwork required in their own courts or offices. For example, to avoid potential conflicts of interest, the probate court clerks and judges do not notarize or administer oaths on documents that will be filed in the probate court. I have, however, administered oaths to personal representatives who are appointed in other states, live in New Mexico, and need to be sworn in before performing their duties.

New Mexico's laws allow many people to administer oaths. Other laws outline who can administer oaths and affirmations in matters pertaining to the state defense force, the enlistment of soldiers, and the state election code.

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