Affidavits of Death: Transferring Property without Probate after an Owner Dies

Owners of real estate can plan ahead to allow the real estate to be transferred without probate after their death. This article discusses how the new owners can remove the deceased owner from title and obtain title in their own name after the owner's death.

Unless one of these estate planning methods is used, the owner's beneficiaries (persons named in a will) or heirs (persons entitled to inherit if no will exists) generally need to go to court to get a probate order transferring the property. If one of these methods is used, the new owners can usually record a notarized affidavit to change ownership of the real estate without needing to go to court. There are still steps to follow, but they are faster and less expensive than a formal probate case.

If there are any liens on the property, they will still apply after the transfer is complete. Also, the beneficiaries accept liability for all of the owner's unsecured debts, such as credit cards and other loans, and may have to give up the home if a creditor files in court. California Probate Code (Prob. Code) § 5672. (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PROB&sectionNum=5672.)

Types of Affidavits of Death

Joint Tenants

When multiple people own property, they can choose to hold it as joint tenants. Joint tenants own equal shares of the property. After one owner dies, the surviving owner(s) receive their share automatically. Parents sometimes add children as joint tenants so that their property goes to them without probate after the parent dies.

The remaining owner(s) can remove the deceased owner's name by recording an Affidavit of Death of Joint Tenant (https://www.saclaw.org/resource_library/affidavit-of-death-of-joint-tenant/) , along with a certified copy of the Death Certificate.

To clarify the record, the survivor(s) can then record a Grant Deed listing themselves as the new owner(s). Title companies are often looking for a Grant Deed, not an Affidavit, when they research whether the seller of a property has clear legal ownership, so this can be helpful.

Surviving Spouse or Domestic Partner

Married couples (including registered domestic partners) who own real estate together can hold title in joint tenancy, community property, or community property with rights of survivorship. These different methods have different effects, which should be discussed with a family or estate planning lawyer to decide which is right for your situation.

Community property with right of survivorship: The surviving spouse can record an Affidavit of Surviving Spouse or Domestic Partner Succeeding to Title (https://www.saclaw.org/resource_library/affidavit-of-surviving-spouse-or-domestic-partner/) and a certified copy of the Death Certificate, without the need for a court order. They may then want to file a Grant Deed to clarify the record, as well.

Community property (without right of survivorship): the surviving spouse would go to probate court and file either a Spousal or Domestic Partner Property Petition (DE-221 (https://www.courts.ca.gov/documents/de221.pdf)) (a special type of summary probate case (https://www.courts.ca.gov/10440.htm)) or a full probate case. (https://www.courts.ca.gov/42629.htm)

Joint tenancy: the surviving spouse would use the Affidavit of Death of Joint Tenant.

Note: a surviving spouse can choose to probate the property even if it qualifies for one of these affidavit methods. This can be advantageous for debt, tax, or other legal reasons. Talk to a probate attorney if you have questions about this.

Transfer on Death Deed (TOD or Beneficiary Deed)

The beneficiary under a Transfer on Death Deed also uses an Affidavit to transfer the property. However, in addition, they need to mail notification to anyone who would be entitled to claim the property as an heir, to allow them time to challenge the transfer. See our detailed guide on Transferring Title to Beneficiaries after a Transfer on Death Deed Takes Effect (https://www.saclaw.org/resource_library/transferring-title-to-beneficiaries-after-a-transfer-on-death-deed-takes-effect/) for instructions and samples.

Real Estate in a Trust

When property is placed into a living trust or irrevocable trust, the owners usually appoint themselves as trustees. The trust usually names someone to take over after the owner dies (the "successor trustee"). That person must record an Affidavit of Death of Trustee (https://www.saclaw.org/resource_library/affidavit-of-death-of-trustee/) as notification that they are now managing the trust, along with a certified copy of the prior trustee's Death Certificate.

After the Affidavit of Death of Trustee has been recorded, the new trustee can use a grant deed to transfer the real estate to whoever is named in the trust as recipient.

Other Ways to Transfer Real Estate Without Probate

Even if none of the above Affidavits is applicable, real estate with smaller market value may be eligible for summary procedures rather than full probate. Note that before you can use any of these procedures, you must have the **court-appointed probate referee** appraise the property to confirm it qualifies. Contact the court in the county where the property is located for referrals.

- **Beginning April 1, 2025: Petition to Determine Succession to Primary Residence (DE-310) (https://www.courts.ca.gov/documents/de310.pdf) :** For primary residences only, up to $750,000 in assessed value, heirs can file this petition to have the probate court declare the new owners without a full probate. The maximum assessed value increases every three years. Current amounts can be found on Judicial Council form "Maximum Values for Small Estate Set-Aside & Disposition of Estate without Administration" (DE-300 (https://www.courts.ca.gov/documents/de300.pdf)). Like the Transfer on Death deed, the beneficiaries become personally liable for the decedent's unsecured debt if they use this procedure. **Prob. Code § 13156.** (https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PROB&sectionNum=13156.)
- **Prior to April 1, 2025: Petition to Determine Succession to Real Property (DE-310) (https://www.courts.ca.gov/documents/de310.pdf) :** If the death occurred prior to April 1, 2025, the maximum value in real estate that can be transferred with this petition is $184,500. Prior to April 1, 2022, the maximum was $166,250, and before 2020, it was $150,000. The previous version of the law applied to any real estate, but the current version only applies to primary residences.
- **Affidavit re Real Property of Small Value (DE-305) (https://www.courts.ca.gov/documents/de305.pdf)** : If the assessed value of the decedent's real estate is less than $69,625 (after April 1, 2025), the heirs can use this affidavit to transfer the

property. This amount also increases every three years and can be found on DE-300. Unlike the other affidavits in this article, the Affidavit re Real Property of Small Value does need to be filed in court, but the court clerk does need to certify it. No hearing is needed.

Information on how to use these procedures is available in the self-help book *How to Probate an Estate in California* or professional practice guides such as *California Decedent Estate Practice* from CEB Publications.

For Help

SH@LL (Self-Help at the Law Library) (https://saclaw.org/services/civil-self-help/)
609 9th Street, Sacramento CA 95814
(916) 476-2731 (Appointment Request Line)

Services Provided: SH@LL provides general information and basic assistance to self-represented litigants on a variety of legal issues. All assistance is provided by telephone. Visit "What we can help with (https://saclaw.org/services/civil-self-help/#canhelp)" for a list of qualifying cases.

Eligibility: Must be a Sacramento County resident or have a qualifying case (https://saclaw.org/services/civil-self-help/#who) in the Sacramento County Superior Court.

SH@LL can help with some small estate probate matters. Call to request an evaluation of your situation.