Does Affidavit override Mom's Will?

Dear Mr. Premack: My mother drew up an affidavit of heirship after her husband passed away but she did not list all of the children in the affidavit. Later, she made a Will naming all of her children as heirs. My question is: does her will replace the affidavit or does the affidavit take priority? – EBM

According to Texas law, when your parents were both alive, they were co-owners of certain assets (like bank accounts and a house). Under usual circumstances, those items were community property owned 50-50 between them. Your mother's husband died first, without a Will. According to state law, his 50% share passed to his wife (unless he had children from a prior marriage).

Her legal difficulty was the lack of documentation to prove that she was now 100% owner of the assets. The affidavit of heirship was created to act as the documentation of her ownership. While it is traditional to list the names of all the children in the affidavit, the law provides that if all of HIS children were also HER children, then SHE was his sole heir. In that case, failure to list all the children does not change the legal outcome. (But if he had any children from a prior marriage, then failure to list them was not legally correct).

Assuming it is true that she became owner of 100% of the assets, she next (wisely) decided to make a Will. In it she named all of the children as heirs. Her Will does not "replace" the affidavit. Rather, they do two different jobs at two different times. The affidavit recognized her legal ownership of her husband's half of their community property because he died without a Will. Her new Will allows her to dispose of that property in the manner she desires when she eventually dies.

It is difficult to tell from your letter whether your mother has already died. If she is deceased, then the Executor she nominated in her Will should talk to a qualified probate attorney about the next steps. It is likely that her Will should be reviewed by the probate court so that letters testamentary can be issued to her Executor. That Executor can then legally take the actions necessary to divide her assets among the children as called for in her Will.

Dear Mr. Premack: When a person dies, what is the order of informing others of the death, and who does the informing? – LJ

According to Texas law there are official legal notices, and there are informal family notices. The informal notices can be handled any way that family dynamics (functional or dysfunctional) allow. Some families draw closer when a loved one dies, and some fracture.

The official legal notices depend on the type of planning that was done in advance by the decedent. As far as the heirs are concerned, if there is a probate then they are notified twice. First, when the Will is filed with the court a public notice of the pending hearing is posted at the courthouse. Second, after the Will is admitted to probate the Executor must send them a copy of the Will and of the order which admitted the Will to probate.

If the preplanning included a living trust (and there is no need for probate) then the beneficiaries will be notified when 1) the trustee deems it appropriate within the scope of the trustee's fiduciary duty to the beneficiary or 2) when the trust document instructs that they be notified. Living trusts do not impose the same rigid notification requirements as probate of a Will.

Other notifications happen as needed. There is not a specific order which must be followed. They might include: 1) The funeral home almost always contacts the Social Security Administration to stop the

monthly check.: 2) The life insurance company is notified when the policy beneficiary files a claim for death benefits. 3) The pension administrator is notified by the Executor or the designated beneficiary. 4) The tax-assessor is notified by the Executor or by the new owner if the homestead is transferred to an heir or is sold.

Paul Premack is a Certified Elder Law Attorney practicing estate planning and probate law in San Antonio. View the archive of his past San Antonio Express-News legal columns (1989 forward) or address Elder Law questions to him by clicking “submit a question” at www.premack.com.