

# MORELLI LEGAL COUNSEL, P.C.

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## ATTORNEYS AT LAW

## Estate Planning and Probate Law

The death of a loved one can be a traumatic event, and as a result, the process of dividing their remaining assets and property can be an emotional one. In the interest of propagating as smooth a process as possible, it's crucial to set clearly defined expectations for how the process will unfold.

Probate court is a necessary step in that process. The purpose of probate is three-fold: to identify the property, to appraise the property, and to pay taxes and any creditors with the assets derived from that property. There are two different ways in which the process is handled, depending upon the presence (or absence) of a will:

- If there is a will, an executor will oversee the process.
- If there is not a will, a court-appointed representative will oversee the process. In the case of an executor, that person will administer the estate in accordance with the instructions of the will. In the case of a court-appointed representative, the state will ultimately determine how the estate is administered.

However, just because a will is involved, that does not mean probate is not necessary. The determining factor is whether or not the property or asset is listed in the deceased's name alone. If that is the case, then such property must first pass through probate in order for their heirs to assume ownership. But jointly owned property and the proceeds derived from such property are another matter. In that instance, the surviving joint owner may assume full ownership of all assets without the involvement of probate.

By clearly defining the process and setting expectations for the outcome, you can more easily manage the situation, increase expediency, and even help to bring about closure.

**Contact Morelli Legal Counsel, P.C. today at 630.377.7500.**

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## What is a conditional will?

A conditional will can be an attested will, a holographic will or a nuncupative will. Any of these become a conditional will when the gifts in the will are conditioned on some event occurring or on whether some fact is true or not. For example, my will would be conditional if it said “if I die of cancer, this is my will and

I want half of my estate to go to charities for research and the other half of my estate to go to my spouse.” This will would only be effective if I did, in fact, die of cancer. If I died by any other means, and did not have any other wills, intestacy would apply.

## What is tenancy in common?

“Tenancy in common” is one of the ways that people may own property together. For example, in most states, if you give away your property to two other people, unless you specify otherwise, they will own that property by tenancy in common. This form of ownership means that each so-called tenant-in-common has full rights to use and enjoy the property while they are alive. When one of the owners dies, their share in the property goes through their estate, via a will or state intestacy statutes. This differs from some other forms of joint ownership of property where there is something

called survivorship, which means that the other owners get the dead owner’s interest. The impact of this point is that simply owning a property by tenancy in common does not remove the property from your probate - instead, you have to make an inter vivos transfer or give away the future interest.

This same distinction does not generally apply to property owned by joint tenancy or tenancy by the entirety, where there are survivorship rights which remove the property from the deceased’s probate estate.

## Inter vivos transfer

An inter vivos transfer is a transfer of property made between living people. For example, where you give someone a flat-out gift of property, that is an inter vivos transfer and that property would not be part of your probate estate when you die because, obviously, you no longer own it. More specifically, a gift of property will count as an inter vivos gift if:

- (1) you intended to give the gift, voluntarily, to another person;
- (2) your giving of the gift was gratuitous, meaning you received nothing in return for it;
- (3) you actually gave the property to another person; and

- (4) that other person accepted the gift.

When people are planning their estates, drafting their wills, etc., they will often give inter vivos gifts of some of their property because it lets the other person enjoy it immediately, it gets the property out of the estate making the whole process easier, and it may have advantageous tax implications. However, there are certain disadvantages to an inter vivos transfer, mainly that these transfers are not revocable, so you can’t ever get the property back and you lose all control over it. When you want to retain some control over the property, you might be better off putting it into an inter vivos trust.

## Real Estate Law: What is a quitclaim deed?

A quitclaim deed transfers or “releases” to the transferee whatever present right or interest the grantor has in the described property. Unlike a grant deed, a quitclaim

deed carries with it no express or implied covenants. Thus, if the grantor holds no interest in the property, a quitclaim deed conveys nothing.

## Typical restrictions imposed by law on owning real property.

There are many federal, state, county, and local laws which may restrict what you can do with the property that you own. Enforcement of these laws typically resides with agencies which are responsible for keeping you in compliance with these laws. The three most common restrictions imposed by government are:

(1) zoning - restriction on the use of the property as to residential, industrial, agricultural, or commercial purposes are very common. The size and height of improvements attached to the property are likewise subject to restriction.

(2) environmental hazards - what materials can be stored on the real property as well as who is responsible for

removing environmental hazards from real property (such as asbestos, lead paint, petro-chemicals, radon and toxic wastes) are government regulated.

(3) public easement and right of way - a portion of the real property may have to be left open for others to use. Easements and right of way are used to allow access to other property, to provide for roads and sidewalks, and to enable electric/gas/telephone/sewer lines to be installed. A broader discussion of easements appears below.

Violation of government law can result in fines, penalties, injunctions and even criminal prosecution resulting in you being sent to prison.

## Think Before You Drink — Sleeping It Off In Your Vehicle May Result in a Big Hangover

At one time or another we have all heard the infamous marketed phrase of “Think Before You Drink.” This phrase holds true in so many aspects, even in those scenarios never thought of before. Consider the following:

Imagine one night that you decide to throw a small party (consisting of yourself, your girlfriend and a handful of your closest friends) at your parents Yorkville home before returning back to college. Before the party, you pick up your girlfriend living with her folks in a Naperville apartment. The party turns out to be hit based upon the fact that you drank more than you probably should have throughout the night. After the friends leave, your sober girlfriend tells you that her parents want her to come home. You explain to her that you had too much to drink and cannot drive her home. She responds indicating that she can drive the two of you back to her apartment in your car and that you can spend the night there. However, upon your arrival to her place, you learn that your girlfriend failed to mention you spending the night to her parents who have a strict pre-marital policy against co-ed sleep-overs. Having drank too much to drive home and with no other thinkable alternative, you decide to sleep it off in your

car in the parking lot of your girlfriend’s apartment. Because it is cold outside, you leave the car running and jump into the backseat and fall asleep with a blanket. In your dreams, you think to yourself how uncomfortable you are sleeping in the back of your car but are thankful that you will not have to worry about going to jail by driving home. However, your dreams are abruptly cut short as you are awakened by a police officer. Despite being startled at first, you reassure yourself that you have nothing to worry about because you were not driving, right? However, unfortunately after having failed some field sobriety tests, you discover that you were wrong as you are being arrested for DUI. Not sure why you were arrested?

The facts presented are analogous to an Illinois Supreme Court Case. The reason you were arrested was due to Illinois’ DUI statute which provides that a person shall not drive or be in actual physical control of any vehicle within the State while under the influence of alcohol. 11 USC 5/11-501. Noticeably absent from the statute, unlike Illinois’ implied consent statute, is any reference to operating a vehicle on a public highway. Therefore, even though you were not driving nor on a public

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## Think Before You Drink (continued)

highway, you were in actual physical control of motor vehicle within the State while you were under the influence.

One need not be driving to be in actual physical control of his vehicle in Illinois. Moreover, one's intent to drive is not a relevant determining factor. Instead, actual physical control is determined on a case by case basis giving consideration to the following factors: (1) whether the person is positioned in the driver's seat; (2) possession of the ignition keys; and (3) capability of starting the car and moving the car. Moreover, individuals found sleeping in their vehicles have been found to be in actual physical control of their vehicle. Despite realizing the preferable furtherance of the goal of safer highways, the Illinois Supreme Court does recognize as public policy permission of intoxicated persons to sleep it off behind the wheel of a parked car. The court's reasoning behind not supporting a public policy of sleeping it off without fear of

prosecution is because while a person may embark upon an evening of drinking with the intention of sleeping it off in his car, the actual decision to do so will not be made until such a time when the person's judgment is impaired by alcohol.

Based upon the facts in our scenario, the underlying reasons you found yourself in jail for DUI was: (a) you were intoxicated; (b) you were found in your car; and (c) you were in possession of your ignition keys. Under this scenario, you could have easily changed your mind about driving home while intoxicated therein endangering your life as well as others.

Therefore, if you intend to spend a night out drinking, it is imperative that you think of all contingencies before you drink. Simply deciding to sleep it off in your vehicle may not protect you in the event you are stopped by the police — unless, you do not have your keys on you.