



Fund Affiliate Assembly

PROBATE AND THE TRANSFER OF REAL PROPERTY

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I. Preliminary Determinations

- A. Who owns the property? Try to get a copy of the Deed
 - 1. Did the decedent own it alone?
 - 2. Was the decedent married?
 - 3. Are there survivors in title?
 - 4. Was it owned by an entity like a trust, limited liability company, or corporation?

B. Was the property homestead?

1. Did the decedent own an interest in the property?
2. Does the property fit the Constitutional definition in Art. X, Sec. 4?

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

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3. Did the decedent or his family live in the property at the time of his or her death?
 - a. Did the decedent intend to return if he or she lived offsite temporarily? Nursing home?
 - b. Did the decedent rent the property?
 4. Was it owned by the decedent alone?
 5. Was the decedent survived by a spouse or minor child? (was it devisable?)

II. Individual ownership by the Decedent

- A. If it was the decedent's homestead, it does not need to be included in the probate proceeding
- B. However, it is advisable to have a judicial determination of homestead under Rule 5.405 Fla. Prob. Rules in the probate proceeding to resolve title issues, creditor and other claims
- C. The Order Determining Homestead will establish the owners who must sign the listing agreement, sales contract and closing documents

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- D. The proceedings to obtain an Order Determining Homestead will take at least six months since the creditors of the estate will need to be included in this proceeding
 - E. Creditors normally have the later of three months after the first publication of the Notice to Creditors or thirty days after service of a Notice to Creditors to file their claims in the estate. Sec. 733.702(1) Fla. Stat. Therefore, be sure the contract provides that the closing date can be extended to obtain all necessary Court orders.
 - F. If the property was not the homestead of the decedent, the Personal Representative of the estate will need to sign the listing agreement, sales contract, and closing documents. The process of appointing the Personal Representative will take about thirty days after filing a Petition for Administration.

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- G. Further, if an Order Approving the Sale is required, that can take another forty-five days (if there is no Will, no power to sell real property in the Will, the Personal Representative has a conflict of interest, or if the beneficiaries do not get along). Sec. 733.613(1) Fla. Stat. Hence, provide in the sales contract for extensions of the closing date to obtain the necessary Court orders.
 - H. If the decedent was survived by a spouse, there could be an elective share claim that could delay distribution of the proceeds. Sec. 732.201 et seq. Fla. Stat.

III. Tenancy by the Entireties (Husband and Wife named in the Deed)

- A. If the decedent had a surviving spouse, that spouse can sell the property without approval from any other party
 - 1. The surviving spouse would sign the listing agreement, sales contract and closing documents
 - 2. Recording a Death Certificate without the cause of death will transfer title to the surviving spouse

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- B. Someone will need to sign and record an Affidavit of No Estate Tax to clear the estate tax lien
 - C. There may also be a need to record a Continuous Marriage Affidavit
 - D. The sale would not be subject to probate administration, so delays should be minimal

IV. Joint Tenants with Right of Survivorship (the decedent and at least one other person on the Deed, with specific mention of survivorship rights)

- A. Upon the death of one of the joint owners, the surviving owners would be the title holders to sign the listing agreement, sales contract and closing documents
- B. You still need to record a Death Certificate and an Affidavit of No Estate Tax

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- C. The sale would not be subject to probate administration
 - D. If the survivors do not include the decedent's surviving spouse, you may need to watch out for an elective share claim
 - E. An elective share claim may not hold up closing, but it could delay disbursement of the proceeds

V. Tenants in Common (the decedent and at least one other person on the Deed without any mention of survivorship rights)

- A. The decedent's share of the property will be subject to probate, unless it was the decedent's homestead
- B. A Court Order may be needed to sell a partial interest in the property
- C. Likewise, the other owners would have to agree to sell the property or a partition under Chpt. 64 Fla. Stat. would be needed

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- D. The other owner(s) of a partial interest would need to sign the listing agreement, sales contract and closing documents, as well as the Personal Representative of the decedent's estate
 - E. If the property was the decedent's homestead, there may need to be a judicial determination of homestead as outlined above
 - F. If the property was the decedent's homestead, the beneficiaries of the decedent's homestead, plus all other co-owners would need to sign the listing agreement, contract and closing documents
 - G. If the surviving spouse is not the beneficiary of the decedent's share, there could be an elective share claim

VI. Life Estates

- A. A life estate is when title is in the name of an owner for life, and the remainderman is someone else.
- B. Upon the death of the life tenant, title vests in the remainderman.
- C. The property would not be subject to probate, so the remainderman would have the authority to sign the listing agreement, contract and closing documents

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- D. A Death Certificate and an Affidavit of No Estate Tax would need to be recorded
 - E. If there was a surviving spouse who was not the remainderman, there could be an elective share claim

VII. Trusts

- A. If the decedent was the trustee
 - 1. The successor trustee should be able to sign the listing agreement, the sales contract and closing documents
 - 2. Confirm that there is a power of sale provision in the trust agreement
 - 3. However, depending on the wording of the trust document, it is possible that the beneficiaries must also sign the listing agreement, sales contract, and closing documents, and a trust certificate under Sec. 736.1017 Fla. Stat. may need to be recorded for closing

B. If the decedent was a beneficiary

1. The trustee or successor trustee should be able to sign the listing agreement, sales contract and closing documents
2. The trust agreement will need to be reviewed to determine if the beneficiaries must also sign the listing agreement, sales contract and closing documents
3. If a deceased beneficiary's signature is needed, typically the Personal Representative would be able to sign on his or her behalf. However as indicated above, be sure the Contract provides sufficient time to open the estate and have the Personal Representative appointed.

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- C. Was the property the decedent's homestead?
 - 1. Did the decedent own an equitable interest in the property and
 - 2. Have a right to use the property as the decedent's or his family's personal residence?
 - D. If it was homestead, was it subject to devise?
 - 1. Is there a surviving spouse?
 - 2. Is there a minor child?

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- 3. The spouse and children may own the property despite the language of the trust. Hence, they would have to agree to sign the listing agreement, contract and closing documents
 - E. While the trust administration may be simple, because the Personal Representative of the estate is entitled to request payment by the trustee for probate expenses, there could be delays in the sale by the trustee of the Trust

VIII. Individual Retirement Accounts and Qualified Retirement Plans

- A. If the property is titled in the name of the custodian or trustee of an Individual Retirement Account or qualified retirement plan, the listing agreement, contract and closing documents can be signed by the custodian or trustee
- B. The custodian or trustee should sign: “as custodian or trustee of the _____ plan for the benefit of _____.”

IX. Company or Corporation

- A. The manager of the limited liability company or President of the corporation can sign the listing agreement, sales contract and closing documents
 - 1. However there will likely need to be statement of authority under Sec. 605.0302 Fla. Stat. or an incumbency certificate to verify that the signatory has that authority
 - 2. Minutes may be needed from a meeting of the Board of Directors and potentially the shareholders if the property constituted substantially all the assets of the corporation. Sec. 607.1202 Fla. Stat.
 - 3. Be aware of appraisal rights under Sec. 605.1006 (1) (d) Fla. Stat.

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- B. The death of the President, manager or primary owner of an entity will not necessarily delay a real estate transaction if there are other officers or managers
 - C. However, if there is no other officer, manager, or member, then the Personal Representative of the estate may need to be appointed by the Probate Court to handle the real estate transaction under Rule 5.350 Fla.Prob.Rules
 - D. If that occurs, be sure the contract allows for extensions of the closing date and other time periods to obtain Court approvals

X. Powers of Attorney prior to death

- A. Powers of Attorney can be used, but often there are nuances that must be followed for title purposes
 - 1. Is the Power of Attorney valid?
 - 2. Was the Power executed with the formalities of a deed?
 - 3. Is there a power to sell real property?
 - 4. Is the principal incapacitated? If so, is the Power of Attorney durable?

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- 5. Has the Power of Attorney been suspended or revoked?
 - a. By expiration
 - b. By express revocation
 - c. Filing of a Petition to Determine Incapacity
 - d. Death of the principal
 - B. If none of those problems exist, the Power of Attorney can be used to sign the listing agreement, contract and closing documents
 - C. Signing with a Power of Attorney: “Peter Principal, by Allen Agent”

XI. Ancillary Administrations

- A. These situations occur when a property is owned in Florida, but the decedent was a resident of another state
- B. The same procedures and considerations apply as above, but clearly the property would not be considered the decedent's homestead

XII. Context

- A. You now have the technical information to do what needs to be done to sell or clear title to the property
- B. But the missing piece that may set your services apart will be your emotional understanding
 - 1. The family will be grieving in many of these situations
 - 2. The family may have a hard time making good business decisions
 - 3. The family may have no one onsite to help with the normal decisions and actions such as repairs, disposition of personal property, and clean up

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4. Your knowledge, reassurance, and expertise will be called upon to comfort and lead the family through these emotionally trying times
 5. You may even be called upon to mediate interfamily disputes over the sale
 6. Do not be afraid to tell your clients that you do not have all the answers, but can lead them to other professionals that can also help
 7. This will set you apart as a professional and hopefully lead you to a more satisfied client, and repeat or referral business

Questions

1. What is elective share and how does it work?
 - A. Under Sec. 732.201, *et.seq.*, Fla.Stat., a minimum of 30% of a decedent's estate needs to go to the surviving spouse
 - B. This prevents the surviving spouse from being disinherited below a certain level
 - C. The total assets of the decedent, including bank accounts, brokerage accounts, homestead, jointly owned property, transfer on death assets, life insurance, transfers within the last year of life, retirement accounts, and trust benefits are calculated
 - D. Then 30% is determined

E. Thereafter, whatever the surviving spouse is entitled to receive from the decedent is compared to be certain it meets or exceeds 30% calculation

F. If it does not, then property needs to be transferred to the surviving spouse to bring the amount to 30%

G. This would be in addition to the surviving spouse's right homestead, exempt property and family allowance (Sec. 732.2015 Fla.Stat.)

H. The Personal Representative of the estate is empowered and directed to collect these funds or assets before making any distribution to other beneficiaries

2. What is a “ladybird” deed?

A. This is also known as an “enhanced life estate deed”, but was historically named after Lady Bird Johnson, the wife of President Lyndon B. Johnson

B. The normal life estate divides the life estate from the remainder interest

C. When the owner of the life estate dies, title to the property is automatically transferred to the remainderman

D. Once the life estate deed is recorded, the remainder interest is considered fully vested, and cannot be changed or revoked by the life tenant

E. However, with a ladybird deed, the life tenant (usually the grantor) retains the right to cancel or change the remainderman

F. So the interest of the remainderman is **not** vested

G. Therefore, whenever you have a ladybird deed you need to confirm after the death of the life tenant that he or she did not change the remainder beneficiary during his or her lifetime

3. How do appraisal rights work?

- A. Unless waived, appraisal rights automatically arise when certain major company or corporate actions are approved, such as a merger or a proposed sale of substantially all of the assets of a company or corporation
- B. In those cases, any dissenting members or shareholders are entitled to have their ownership interest bought out by the company or corporation
- C. There are complicated rules governing valuation, notices and the timing of notices, so you need to strictly follow the procedures in Sec. 605.1006 *et.seq.*, Fla.Stat. and Sec. 607.1301 *et.seq.*, Fla.Stat.

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4. What is involved with a partition action?
- A. Chapt. 64 Fla.Stat. governs partitions
 - B. Basically, if joint owners cannot agree on their relative interests in a property, then they can seek a judicial determination of their relative interests
 - C. This happens when a person owns a shared interest in real estate with other persons, but there is disagreement on how much that interest is, and when and how it can be liquidated

D. Therefore, upon the filing an action in Court, unless the parties agree to the appointment of a special master, the Judge will appoint a commission of three people to divide, or sell the property and pay the proceeds into the registry of the Court

E. The Judge will then divide the proceeds after holding a trial or hearing

5. What will be needed for a single purpose entity to transfer real estate?

A. This is often done with commercial property to prevent liability arising from one asset to affect other assets owned by an owner

B. However when there is a proposed sale of a single purpose entity's property, all the owners of the single purpose entity need to be informed of the proposed sale since this would constitute a sale of substantially all of the assets of the company or corporation

C. Hence, appraisal rights arise if there are dissenting members or shareholders

D. Minutes of a meeting of the members or shareholders need to be kept to document that the meeting was properly called to consider the action, that the notice to members or shareholders was properly and timely given, that a quorum for the meeting was reached, and that the vote was properly taken and results recorded

E. If the transaction was approved, the minutes should reflect who dissented and who was authorized to sign the documents to consummate the sale

F. If there were dissenters, then appraisal rights need to be given to each dissenter as mentioned previously



Thank You!
for attending