TAKING TITLE FROM AN ESTATE

Nature abhors a vacuum. Like nature, real property cannot exist without an owner. Upon death title passes immediately, but to whom? In the case of property owned by joint tenants with the rights of survivorship the answer is easy, to the surviving joint tenant, skip ahead to claims of creditors, liens and taxes. For those not so lucky….

Title from Heirs: The Intestate Estate

Title to real property descends upon death of an intestate to heirs, subject to payment of debts, claims, expenses of administration, state and federal inheritance and succession taxes. National Shawmut Bank v. Joy, 315 Mass. 457 (1944) An heir may be divested of his title by a fiduciary in order to pay any of these matters.

Who are the heirs? M.G.L. Chapter 190 tells us how to determine who they are and in what shares they take. There is, however no formal procedure for establishing judicially who they are. In Hopkins v. Treasurer and Receiver General (1931) 276 Mass. 502 it was determined that the only conclusive way to establish the heirs was by means of registration in land court. As a practical matter however, conveyancers may rely on Title Standard 41 and Title Standard 14 which provide:

1. The listing of heirs in a probate petition is may be relied upon two years after the approval of the bond of the fiduciary. If the decedent's date of death is within the last 25 years, a petition for probate should be initiated in order to establish the heirs.
2. If the decedent's date of death is more that 25 years ago a conveyancer may rely on a recorded affidavit or death certificate that provides the date of death and the place of residence of the decedent AND a recorded affidavit that names the decedent's heirs, states the decedent died intestate and that no probate has been filed in any jurisdiction.
3. If the decedent's date of death is over 50 years ago a conveyancer may rely on documents in the chain of title that identify the heirs.

Now that we have established who the heirs are, who takes what? In the rare instance that the decedent left no issue, the first step will be to value the estate. First, the debts of the decedent, charges of his last sickness and funeral, and costs of the settlement of the estate are paid. Once that is complete the valuation of the estate can be determined. Good clear record and marketable title is not established merely by filing an inventory, or having the final account allowed. A decree from the probate court as to the valuation of the estate is the one thing a conveyancer may rely on in cases where the decedent left no issue in order to determine who holds title to the real property.

Once it has been established that the decedent left issue, or once the estate has been valued we can determine who holds title. Since 1986, if the decedent leaves a surviving spouse, then:

1. If the decedent left issue, the spouse takes one half of the personal property and one half of the real property. The issue take the remaining half of the personal property and real property, with the issue of any predeceased issue taking by right of representation.
2. If the decedent leaves kindred, but no issue, if the estate is worth less than $200,000.00 the surviving spouse takes the entire estate. If the estate is worth more than $200,000.00 the surviving spouse takes $200,000.00 plus one half of the remaining personal property and one half of the remaining real property.
3. If the decedent leaves a surviving spouse and no issue and no kindred, the spouse takes all.

If the decedent left no spouse and no issue and no kindred then the estate escheats to the Commonwealth. Anecdotally, if the decedent was a member of the Soldiers' Home in Massachusetts or the Soldiers' Home in Holyoke, the property escheats to the Home of which he was a member and not the Commonwealth. For a chart of thresholds prior to 1986 see Park §734 p. 131.

Wife and kids, that is easy: but who are kindred? M.G.L. Chapter 190 § 3 outlines simply the descent of real property. If there is no surviving spouse, then:

1. In equal shares to his children and to the issue of any decease child by right of representation;
2. In equal shares to his mother and father;
3. If he has no mother, to his father;
4. If he has no father, to his mother;
5. If no mother and father than to his brothers and sisters, the issue of any predeceased sibling to take by right of representation.
6. No wife, kids, mother, father, brothers, sisters? See "Chart Illustrating Method of Computing Degrees of Kindred" 2 Belknap, Newhall's Settlement of Estates and Fiduciary Law in Massachusetts, sec. 24.5, page 47 following.

If the heirs are all of the same degree of kinship, they share equally. For example, if decedent leaves a brother and a sister, they share equally in the estate. If the heirs are not of the same kinship they take by right of representation. For example, if the decedent leaves a brother and the children of the predeceased sister the children of the sister share a one half interest the brother takes the other one half interest. If both the brother and sister predecease, the children of the brother and sister share equally.

Now we know who the heirs are, and in what share they hold title, how do they pass title? A conveyancer may safely take title from the heirs provided the following terms have been met:

1. One year has passed since the date of death;
2. The probate court docket reveals that no claims of creditors have been filed;

3. The probate file contains receipts for the payment of taxes and municipal assessments as well as the expenses of administration.

If, as in the usual case, the probate file does not contain all of the above your Stewart Title Underwriter may have an acceptable solution.

Title From Devisees: The Testate Estate

Although title passes upon death to the devisees in a testate estate, in order to determine who the devisees are the will must be proved and allowed. A devise to a subscribing witness, or his or her spouse, is void, unless there are two other subscribing witnesses who are not beneficiaries under the will and passes no title to that devisee. (M.G.L. 191 § 2) The allowance of the will alone, however, is not sufficient to pass good, clear, record, and marketable title as in some instances devisees may be divested of their title even after the allowance of a will as will be discussed later.

A surviving spouse has six months from the allowance of the will to elect to take a statutory share of the estate rather than the testamentary share. The elective share for a surviving spouse who waives their interest under the will pursuant to M. G. L. Chapter 191 § 15 takes a lesser share than the share provided a surviving spouse of an intestate decedent. When a will leaves to a surviving spouse an interest in the property of the estate they would be entitled to under the intestacy laws of the Commonwealth of Massachusetts, however, they take the share provided in M.G.L. Chapter 190 § 1 and not §15. The elective share of a surviving spouse if the decedent left issue is one third of the personal and one third of the real property. If the decedent left kindred but no issue, the surviving spouse would take $25,000.00 plus one half of the remaining personal and one half of the remaining real property. To the extent that this would entitle the surviving spouse to receive more than $25,000.00 M.G.L. Chapter 190 § 15 provides:

> "… to an amount exceeding twenty-five thousand dollars in value, he or she shall receive, in addition to that amount, …. and the real property vested in him or her for life,"

Presumably, therefore, the surviving spouse obtains a life interest in the real estate. If the decedent left no issue and no kindred, the surviving spouse would take title absolutely.

And what about everyone's favorite – the pretermitted child? A child who is not intentionally omitted from the will of the decedent takes the same share he would have if the decedent had died intestate. The shares of the devisees will be proportionally reduced. Since 1971 a child claiming to be an omitted heir has no interest in real property unless a claim is filed in probate court within one year of the approval of the executor's bond. M.G.L. Chapter 191§ 20. Prior to 1971, a pretermitted child had 20 years from the allowance of the will to file a claim.

Just to make life fun, who takes title when the devisee predeceases the testator? If the devise is made to a child or other blood relation of the testator, who dies before the testator, but leaves issue surviving the testator, such issue shall, unless a different disposition is made or required by the will, take by right of representation. A spouse is a non-blood relative. A devise to a non-blood relative who predeceases the decedent fails and the property passes under the residuary clause, if any.

Devisees may also be divested of their title by a duly authorized deed of an executor or administrator in order to pay debts, claims, legacies, expenses of administration and taxes.

How do devisees convey? Title Standard 40 provides that a deed from devisees, not joined by an executor, is not defective if:

1. The final account has been filed and allowed showing payment of all debts, legacies, expenses of administration, and taxes; or
2. If the time for debts, legacies, expenses of administration, and Massachusetts death taxes are barred by statute.

Like the requirement for deeds of heirs, there may be other instances in which your Stewart Title Underwriter will insure deeds from devisees.

A deed joined by the executor prior to that time is likewise be relied upon.

The Foreign Decedent

What if the decedent was not a resident of Massachusetts but owned Massachusetts real property? In the case of an intestate decedent title passes according to the Massachusetts descent and distribution laws. A Massachusetts probate must be filed in order to establish the heirs. If a probate has been filed in another jurisdiction, an ancillary probate is filed in this Commonwealth. Likewise, with a will filed in a foreign jurisdiction an ancillary probate must be filed in Massachusetts. A foreign jurisdiction may be either another state or another country. A discussion of the rights and powers of foreign fiduciaries follows in their respective section. M.G.L. Chapter 217 § 15C requires that if the decedent owns property in a county other than the county in which the probate is filed, copies of the will, petition for probate, and inventory be filed in the county in which the land lies.

Title from an Administrator

As previously discussed, at death, title passes immediately to the decedent's heirs or devisees, subject to possible divestiture. An administrator, whether temporary or permanent, holds no interest in the title and may not, without further authority, transfer title. An administrator may, however, petition the probate court for a license to sell. A license may be granted either to pay debts of the decedent under M.G.L. Chapter 202 § 1 or for distribution under M.G.L. Chapter 202 § 19. The petition for a license must

contain the terms of the sale, i.e. either public or private sale, the sales price, and a sufficiently accurate description of the real estate. Once a license has been granted, by decree of the probate court, it is valid for one year. M.G.L. Chapter 204 § 19 provides, a deed executed within one year from the issuance of the license, but not delivered within the one year period is not defective if:

1. The license was granted by a court of proper jurisdiction;
2. The fiduciary gave any bond as required;
3. Proper notice of the sale was given; and
4. Property was sold in accordance with the notice and was sold to a buyer in good faith.

Real estate sold pursuant to a license to sell is free and clear of all claims and debts of the estate. Massachusetts probate court rules provide that a license to sell will not issue unless proof of payment of Massachusetts estate taxes is provided. Conveyancing practice, however, is not to rely on the probate courts following their rules but to require compliance with Title Standard 24.

A license to sell has an additional benefit. A fiduciary is required to obtain the best possible price for the property. A decree authorizing a sale is a conclusive presumption that the best possible price has been obtained thereby protecting the administrator against claims of the heirs. M. G. L. Chapter 202 § 38 Onanian v. Leggat, 2 Mass. App. 623 (1974)

An administrator appointed in a foreign jurisdiction has no authority in this Commonwealth. (See Massachusetts Practice, Probate Law and Practice, Volume 21, §11.2, page 176) A foreign court has no jurisdiction over Massachusetts real property, and cannot, therefore, authorize a license to sell. An administrator duly appointed and qualified in another state or country may file in any Massachusetts county in which real property owned by the decedent lies, an authenticated copy of his appointment, and his bond and may, upon notice to the commissioner of revenue, creditors and all other persons interested through any ancillary probate be licensed to sell real estate by a Massachusetts probate court.

Title from an Executor

An executor derives his powers from the will. He may have full power to sell, limited power to sell or no power to sell. His power may be implicit or explicit (although generally only an explicit power to sell requires no further inquiry). A probate court docket sheet reflecting the appointment of an executor is not sufficient to establish an executor's power. A will must always be carefully read to determine the executor's power.

An executor may be specifically granted a general power to sell real estate. If so a deed executed pursuant to that right terminates the rights of general creditors of the estate in the property as well as the rights of any devisees or legatees. See Title Standard 10.

The typical power of sale conferred by will is explicit, and typically contains language along the lines of:

> "In addition to power given elsewhere in this will or a codicil or by any present or future statue or rule of law, the executor in administering my estate under this will shall have the following powers and discretions, in each case to be exercised in his or her discretion and without leave of court, at any time and from time to time:
>
> > (i) to sell, exchange and to lease personal or real property for such consideration and on such terms as he or she considers advisable and either at public or private sale to execute, to acknowledge and deliver deeds, transfers, contracts and other instruments…."

But the power may also be implicit. A direction to the executor that the testator's real estate by sold and the proceeds to be distributed in a certain fashion, even absent any specific power to sell, carries with it an implied power to effectuate the testator's direction.

A will may also provide a limited power of sale. The power may be granted to a specific executor and not run to any successor executors. A power of sale may also be limited to a specific class of people, e.g. "I direct my executor to sell my real property located at Sunny Acres to the Daughters of the American Revolution." If the Daughters of the American Revolution are not interested in buying, the executor is not authorized to sell to anyone else either at public or private sale absent a general power of sale elsewhere in the will or a license from the court.

Absent a power to sell in the will, either explicit or implicit, the executor must, like an administrator look to a license to sell from the probate court. The nature of the license and the methods of obtaining and exercising the license mirror those of an administrator discussed above. An executor may also apply for a license to sell even when the power to sell is specifically granted in the will. While probate courts are increasingly reluctant to issue a license to sell when the power is clearly given in the will, one may be granted when the executor anticipates as dispute and wants the protection offered by M.G.L. Chapter 202 § 38 as discussed above.

An executor appointed in a foreign jurisdiction, like a foreign appointed administrator, has no general authority in this Commonwealth. 1 Belknap, Newhall's Settlement of Estates and Fiduciary Law in Massachusetts §8.2 (5th ed. 1994). The will would first be allowed in the state in which the decedent was domiciled. A petition for the allowance of a foreign will is then brought in the Massachusetts probate court. Upon allowance of the will in this Commonwealth, the executor or some other appointed fiduciary has the power as proscribed by the court to act

A deed from a duly authorized executor may be accepted at any time while the estate is open and transfers title free and clear of claims of general creditors, legatees and devisees.

Claims of Creditors, Liens, and Taxes

Property held in a joint tenancy with rights of survivorship is not part of the probate estate. Its title passes upon death of one of the joint owners immediately to the surviving joint tenants. Debts of the decedent, claims of creditors, legacies, and charges of administration have no effect on property held by the decedent at time of death means of a joint tenancy. Generally, attachments and executions against the interest of the deceased no longer affect the real estate as they affected only the decedent interest in the property and upon death the decedent has no interest.

Property owned individually, or owned as a tenant in common becomes part of the probate estate and is subject to claims of creditors.

In settling either a testate or intestate estate, debts, legacies and charges of administration are first applied to personal property of the estate. If the personal property is insufficient to pay such expenses, real estate may be sold to pay them. Real estate not specifically devised must be sold first in order to satisfy these debts. If there are still insufficient funds to pay the debts, claims and charges, a fiduciary may petition for license to sell to pay debts of the decedent. An executor with the power to sell may also sell real estate to satisfy debts, legacies, and charges of administration without license.

In order for claims of general creditors, other than Division of Medical Assistance claims, to be perfected an action must be commenced within one year of the date of death of the deceased. M.G.L. Chapter 197 §9. This section applies to claims other than:

1. Federal tax claims;
2. Claims for Massachusetts estate or income taxes;
3. Actions to enforce equitable interests in specific estate assets;
4. Claims by administrators or executors in their individual capacities; and
5. Claims of temporary administrators or executors for fiduciary fees.

Notice of the action must be delivered in hand to the fiduciary or filed with the probate court. As a practical matter, record title will not show any notices delivered to a fiduciary, it may be prudent, therefore, to obtain an affidavit from the fiduciary that he has no knowledge of any claim against the estate. A notice filed with the probate court must contain the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought. This statute of limitation applies to creditors of the decedent but not to creditors of the estate.

Claims filed in an estate do not constitute liens on the real estate. Unless an action is brought in a court of competent jurisdiction to enforce a claim it has no effect on record title. The allowance of an accounting reflecting payment of the claim is sufficient to clear record title of any claim of creditor.

Claims filed for Medical Assistance are governed by 118E §16A and may be filed two ways. The most common and customary way for a medical assistance claim to be filed

is by a notice of claim filed within four months of the approval of the fiduciary bond. A fiduciary then has 60 days to respond. If no response is made in 60 days, the claim is deemed to be allowed. If the fiduciary denies the claim, the Division of Medical Assistance has sixty days to commence and action for payment. A medical assistance claim may also be filed pursuant to M.G.L. Chapter 197 §9.

Please bear in mind that liens affecting real property existing at the time of death remain as liens against the property. They do not fall under this discussion of claims. In sales of real estate by either the fiduciary or successor to title the outstanding liens of record must be dealt with.

Property held in any type of joint tenancy as well as property held individually is subject to Massachusetts estate tax liens. Massachusetts tax liens are not subject to the one year provision of M.G.L. 197 §9. A Massachusetts estate tax lien arises under M.G.L. 65C § 14 automatically at the death of an owner of an interest in real estate. Title Standard 24 provides that land is free of that lien under the following circumstances:

1. Proof of payment of the amount shown due on the Massachusetts estate tax closing letter;
2. The Commissioner of Revenue issues a release or partial discharge of lien;
3. If the decedent died after December 31, 1996 and an affidavit stating the gross estate does not necessitate the filing of a Federal Estate Tax Return; or
4. Ten years after the date of death of the decedent.

Property that has been conveyed prior to death in which the grantor reserved an interest, such as a retained life estate, or transfers for which for less than adequate consideration is paid are also subject to the automatic estate tax lien and must be released. For a further discussion of the impact of Massachusetts tax liens on property transferred for inadequate consideration please refer to Ward Graham's article in the Spring 2002 issue of The Massachusetts Focus.

Federal estate tax liens, like Massachusetts estate tax liens, arise automatically at death if there is tax liability and attach to probate and non-probate property alike. Title Standard 3 provides land is free of the lien under the following circumstances:

1. There is proof of payment of the amount shown on the tax closing letter;
2. The IRS issues a certificate discharging the land or releasing the lien;
3. When, in the case of non-probate property, there is a transfer to a bona fide purchaser or holder of a security interest; or
4. After ten years from the date of death of the decedent.

The Effect of Death on Registered Land

Attached are copies of the Land Court Guidelines relating to registered land. It is important to remember that when the sole owner, or last surviving joint tenant dies and the property is being conveyed, the deed and all required documents must be submitted to land court in Boston for approval before they will be accepted for registration.