

Real Estate and Trusts and Estates: What Real Estate Agents Should Know!

By John Dolgetta, Esq.

One of the most important assets an individual will own in his or her lifetime is real estate. For most, it represents one of the largest investments a person will make and one of the most complex transactions in which a person will be involved. But what happens when an individual who owns real property dies or when real property is titled in the name of a Trust? This article will address the interplay between the sale and ownership of real estate and how those issues become more complicated when dealing with Trust and Estate administration. This article will address the issues a licensed real estate agent may confront when representing clients with real property owned by an Estate or a Trust.

What Happens to a Person's Property after Death?

When a person dies (i.e., the "Decedent"), the property of the Decedent's Estate is divided into two categories: (1) "probate" property and (2) "non-probate" property. This article will focus primarily on real property. Depending how such real property was owned at the time of death, it will be classified as either "probate" property or "non-probate" property.

"Probate Property"

"Probate property" is property owned by a Decedent in his or her individual name without a beneficiary designation. It does not automatically transfer to a beneficiary upon death. Thus, real estate owned by one person, or real estate owned by two or more persons as "Tenants-in-Common", would be considered "probate property." When property is owned by two or more individuals as "Tenants-in Common", each individual's undivided share goes to that person's heirs. However, before the real property can be transferred, an application must be made to the Surrogate's Court in order to obtain the necessary authorization needed to sell or transfer the real estate. This authorization is evidenced by the Court's issuance of either "Letters Testamentary", where the Decedent passes away having a valid Last Will and Testament ("Will") in place, or "Letters of Administration" (where an individual passes away without a Will).

If the Decedent died with a Will, all probate property will be subject to distribution pursuant to the terms of the Decedent's Will. If Decedent died without creating a Will, probate property will pass to the Decedent's heirs at law pursuant to the laws governing intestate distribution which is addressed in Section 4-1.1 of the New York State Estates, Powers and Trust Law ("EPTL") (*see* <http://bit.ly/2cFgmKy>).

"Non-Probate Property"

"Non-probate" property is property owned by a Decedent at the time of death which passes to beneficiaries outside the Decedent's Will. Non-probate property passes to a designated beneficiary or "joint owner" directly. This type of transfer is known as a transfer that occurs automatically or "by operation of law." For example, a piece of real property that is owned by two or more persons as "Joint Tenants With Rights of Survivorship" is considered "non-probate"

property because the surviving owner(s) take immediate ownership of the Decedent's share of the real property upon Decedent's death. Other examples of non-probate property are assets that pass pursuant to a beneficiary designation form (such as bank accounts, an IRA or life insurance policies).

Transferring Real Estate that is "Probate" Property

If the Will of the Decedent provides for the disposition of real estate, the "Executor" of the Decedent's Estate is the person entitled to manage and dispose of that real estate. The Executor is a "fiduciary" named in the Will who is charged with administering the Estate and is subject to the same fiduciary duties as real estate licensees. The Executor's primary duties are to marshal and consolidate assets, identify creditors of the Decedent, pay the Decedent's debts and expenses, and make final distributions to the beneficiaries named in the Will.

A common misconception is that the person named as "Executor" in the Will automatically becomes an "Executor" upon Decedent's death. This is not the case. As mentioned previously, the Will must be submitted for "probate" before an Executor may be appointed and before the Estate can be administered. A probate proceeding is typically commenced in the Surrogate's Court of the county in which Decedent was domiciled at the time of his or her death and seeks to prove the "validity" of the Will. In the instance where a person passes away without a Will, a fiduciary, known as the "Administrator," will be appointed by the Surrogate's Court. The proceeding for appointment of an Administrator is similar to the Probate proceeding and is usually commenced by a blood relative of the Decedent. The appointment of an Executor or Administrator can take several months.

The Importance of Real Estate Licensees Having a Basic Knowledge of Estate and Probate Issues

Real estate agents must be cognizant of the appropriate person to represent when selling a Decedent's real estate. A blood relative or beneficiary under a Will is not the person who has the authority to market and sell the Decedent's property. Therefore, real estate agents must know who the authorized party is and deal *only* with and take direction *solely* from the Court appointed "Executor" or "Administrator." The Court appointed Fiduciary(ies) is (are) the only party(ies) charged with the authority to market, dispose of and/or distribute real estate. Agents can violate their own fiduciary duties (e.g., loyalty, confidentiality, etc.) if they deal with anyone other than the Executor(s) or Administrator(s) appointed by the Court.

Avoiding Delays in connection with Probate and Administration

It is not uncommon for real estate transactions to take several months to close. Unfortunately, both the Probate and Administration proceedings can be very time consuming and may add weeks or months to that time frame; especially if there are strained familial relationships or if questions exist regarding the validity of a Will. Therefore, real estate agents, who are usually the first to be contacted in a real estate transaction, can help guide a client in the right direction by simply referring a client involved in selling a property owned by an Estate (or in a Trust) to an attorney as early as possible in the transaction.

It is also important to note that a real estate licensee cannot enter into a Listing Agreement with a person who is not a Court appointed Executor or Administrator. Real estate agents should request copies of the Letters Testamentary or Letters of Administration before entering into any listing agreement or other agreement relating to the sale of real property in order to verify that they are dealing with the appropriate party. If the prospective client has not been appointed by the Court, then he or she should be informed that they need to meet with legal counsel as soon as possible.

What Happens if Real Property is the Only “Probate” Asset of Decedent?

Quite often, a Decedent will die with little or no debt and the family home being the sole “probate” asset. If the sole asset of the Estate is real estate, and the Decedent had no debts outstanding at the time of death, in certain circumstances the filing of a Probate or Administration may not be necessary. Technically, New York State law provides that, at the moment of Decedent’s death, real estate vests in the Decedent’s heirs at law (those individuals designated in EPTL Section 4-1.1 (see <http://bit.ly/2cFgmKy>) or the “legatees” (the person or persons named in the Will to receive the specified property). While the above method is generally accepted as a valid way for a beneficiary to transfer a Decedent’s real property without having to file a Probate or Administration proceeding in the Surrogate’s Court, the agent should recommend that their client contact an attorney to ascertain what may be needed to transfer the real property.

Transferring “Non-Probate” Real Property

Non-Probate property may be sold or transferred without having a “fiduciary” appointed by the Court. For example, the surviving “Joint Tenant with the Right of Survivorship” takes full ownership of the property immediately upon the death of the other “Joint Tenant” and, therefore, is able to sell the property immediately. All the person would need is a copy of the Decedent’s death certificate. As such, the party authorized to hire a broker or agent to market and sell the house is (are) the surviving joint tenant(s). It is important, therefore, for the agent to obtain a copy of the last deed of record to the property, along with the death certificate, in order to ascertain whether the person is a “Joint Tenant.”

Transferring Real Property Titled In the Name of a Trust

Another form of “non-probate” property is real estate titled in the name of a Trust. Such property is “owned” by the “Trustee” of the trust to be held, managed and administered for the benefit of the beneficiaries of the Trust. Popular estate planning techniques include the use of a “Revocable Trust” or “Living Trust,” and an “Irrevocable Trust.” One characteristic of Trusts is that they are “probate avoidance” entities. The “Creator” or “Grantor” of the trust funds the trust with the Grantor’s property. With a revocable trust, usually the Grantor is also named as the Trustee of the Trust to provide the Grantor with full control over the Trust property while alive. With an “Irrevocable Trust”, the Trustee is usually a person other than the “Grantor.”

As with an Estate, agents need to be careful in identifying the appropriate person authorized to transact Trust business. Again, it is not the beneficiary of the Trust, but rather the Trustee, who has the authority to hire an agent to assist in the purchase, sale or renting of real estate titled in the name of the Trust. Moreover, the Trust Agreement may contain detailed provisions restricting the Trustee's authority in the purchase and/or sale of Trust property, including real estate. Therefore, before an agent agrees to represent a client seeking to sell or purchase real estate titled in the name of the Trust, inquiries should be made concerning the Trustee's authority to market, sell and even purchase real estate.

Real estate transactions are complicated even in the most straight forward of cases. Transactions involving Estates and Trusts add another layer of legal issues, possible Court involvement and potential restrictions in connection with purchases and sales of real estate. Because of the specific issues involving real estate titled in the name of an Estate or Trust, it is recommended that real estate agents consider consulting an attorney prior to representing the seller (or purchaser) of real estate and also advise their clients to do so as well.

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