

TITLE ISSUES

PASSING TITLE TO REAL ESTATE WHEN THE TITLE HOLDER DIES

by **Paul Peterson**
Assistant General Counsel
Chicago Title Insurance Company

An attorney who wishes to establish title in Illinois real estate passing through a deceased title holder must first establish how title was held, the date of the decedent's death, whether the decedent died testate or intestate, what assets are in the decedent's probate estate, how large the estate is for federal estate tax purposes and normally identify the legatees, heirs and creditors of the decedent. When the attorney has this information, he or she may then discuss with the client whether title will pass through a simple deceased joint tenancy affidavit, through a formal probate proceeding or through affidavits with a trustee or title insurance company.

Although how title is held is critical, it is not always known. An old deed or title policy will show how title was acquired. It would not show if title was subsequently put into a land trust or living trust as part of an estate plan. A tract book search showing the last record title holder should be considered if a full title insurance policy will not currently be obtained.

DECEASED JOINT TENANTS

If the decedent held title in joint tenancy, the surviving joint tenants take the decedent's share free and clear of the decedent's heirs, legatees and creditors in almost all cases. A deceased joint tenancy affidavit, death certificate and certified copy of the will, if any, are needed to clear the decedent's interest. The affidavit will identify the decedent, the property, the date of death, whether the decedent died testate or intestate and the value of the estate

for estate tax purposes. The death certificate will confirm the identity of the decedent, the date of death and the cause of death. The cause of death must be considered in light of 755 ILCS 5/2-6, which prohibits those intentionally and unjustifiably causing the death of another from profiting from the death.

The will, if any, must be reviewed to determine that the case law dealing with joint and mutual wills or the doctrine of election is not applicable. Fortunately, those types of wills are rarely seen today. A joint and mutual will is where the will evidences an agreement that the survivor will leave their property to specified legatees. The agreement becomes binding if not revoked before the death of one of the testators. Those legatees may enforce the agreement against any subsequent legatees of the last testator to die. The doctrine of election is where a will specifically devises joint tenancy property to a third party while devising other property to the surviving joint tenant. The surviving joint tenant must elect between taking under the will or taking as a surviving joint tenant.

SOLE OWNER OR TENANT IN COMMON

If title was held as a sole owner or tenant in common, the title will be in the heirs of the decedent, subject to the rights of the legatees to divest the heirs through the admission of the will to probate. Title will also be subject to claims by the decedent's creditors against the estate, rights of the personal

representative of the decedent, and state and federal estate taxes, if any.

In order for a legatee to divest the heirs from title as if the heirs never acquired title, the will must be admitted to probate. That requires statutory notice to all heirs who would take title if the will was invalid. In Illinois, the heirship is determined based on the statute in existence on the decedent's date of death. A historical heirship chart is available in the publication "Rights of Heirs and Legatees and Their Purchasers in Illinois Real Estate", which is made available by Chicago Title Insurance Company.

Claims filed against the estate of the decedent by creditors of the decedent, however, have a superior right over the heirs and legatees. Claimants can have the property sold to satisfy their claims. Where no estate is opened, claimants currently have two years from the date of death to open an estate and file their claims. Where an estate is opened, the time in which to file a claim shrinks to six months from the date of issuance of letters of office to the decedent's personal representative, assuming proper notice was given to potential claimants.

The heirs, legatees and claimants are all divested by a proper sale by the personal representative of the decedent. With a deed from a personal representative to a bona fide purchaser, the remaining probate title exception will relate to state and federal estate taxes.

BENEFICIARY OF TRUST

On the death of the beneficiary of a trust, title will remain in the trustee. The trustee will determine who the new beneficiaries are and whether the trust will continue or terminate and distribute. The clearance material given to the trustee can be similar to the deceased joint tenancy clearance material or may become more complicated if succession of the beneficiaries is not clearly established in the trust agreement itself.

STATE AND FEDERAL ESTATE TAXES

State and federal estate tax liens will affect any transfer of title, including transfers through joint tenancy, sole ownership or a trust. For decedents dying on or after January 1, 1983, Illinois and federal estate taxes will only affect those whose taxable federal estate exceeds \$600,000. Note, however, that a probated estate excludes property that is otherwise disposed of, like joint tenancy or trust property. The federal estate, on the other hand, usually includes insurance proceeds, joint tenancy property, trust interests, and gifts in excess of the yearly exemption made during the decedent's lifetime.

IS PROBATE NECESSARY?

At times title insurance is used to avoid the expense of a formal probate proceeding and speed up the distribution of the decedent's assets to the heirs or legatees. Title insurance assures the purchaser that all necessary parties have conveyed their interest and the purchaser will not suffer a loss if an unknown creditor against the decedent appears. Whether probate can be avoided for assets in the name of the decedent, however, depends primarily upon whether title can pass outside of probate and whether potential claimants of the decedent can be dealt with.

As noted earlier, title to the assets held in the decedent's name pass to the decedent's heirs, subject to the right of the legatees under the last will to acquire title through admission of the will to probate. If the property will not be sold and the heirs and legatees are the same, no further action is required to pass title.

If all heirs and legatees are competent adults willing to act in concert, they may deed title to a purchaser. Competent heirs can also confirm title in the legatees under the decedent's last will by use of

deeds. Prior to use of this method, however, a title search should be obtained to make sure none of the parties have judgements or other adverse matters against them personally that would attach to the land. If so, the attachment of those judgements to the land could be avoided by a sale by the personal representative of the decedent, which divests the heirs and legatees as if they never held title.

If any of the heirs are minors or incompetent or the heirs and legatees are unwilling to confirm title through a deed, title to a purchaser or legatee must be passed through a probate proceeding. Passage of title through a formal probate proceedings is had through the sale by the personal representative, or through the order of heirship or admission of the will to probate, as confirmed by the personal representative's instrument of release and distribution.

It should be noted, however, that a will can be admitted to probate to vest title in the legatees and no further probate proceedings had. Summary Administration for estates under \$50,000 pursuant to 755 ILCS 5/9-8 and 9-9 can also be used to admit the will to probate, thereby vesting title in the legatees. Such title, however, will be subject to claims against the estate and state and federal estate tax liens.

If the title can be passed, the next consideration is claims against the estate. Title insurers will insure a purchaser against unknown claimants during the claims period based on affidavits, indemnities and a risk premium from the heirs or legatees if the purchaser takes within the two year claims period. If two years have passed since the date of death of the decedent and no probate has been had, the claimants are out on time. Prior to the passage of two years, heirs and legatees may also assume the risk of claims based upon knowledge of the decedent and/or an agreement to share the payment of any future claims. A Small Estates Affidavit pursuant to 755 ILCS 5/25-1 through 25-4 is of no

help for heirs, legatees or their purchasers in real estate since the affidavit protects only transferors of personal property to the heirs or legatees. Summary Administration is also of no help against claimants since it specifically provides a claimant may specifically enforce his claim in any other manner provided by law.

If claims can not be resolved to the title company's satisfaction, a formal probate sale must be had. A purchaser from a personal representative takes title free and clear of parties claiming through the estate, even if the estate has just been opened.

If title and claims issues can be resolved outside of probate, title insurers will delete the rights of the personal representative with an agreement and indemnity from the parties that if probate proceedings are had, the property will not be sold. The state and federal estate tax liens are customarily deleted on an affidavit from the attorney stating that no taxes are due.

TITLE INSURANCE PROTECTION PROVIDED FOR PURCHASERS FROM A DECEDENT'S ESTATE

The risks assumed by a title insurer for a purchaser where a decedent is involved include omitted heirs, unknown wills, will contests, will construction, improper notice in a probate proceeding, claims against the decedent's estate, state and federal estate taxes and rights of the personal representative of the decedent, if appointed. Probate proceedings eliminate many, but not all of these risks. Title insurance provides additional coverage over these risks. For a fuller discussion of this subject and a historical intestate descent chart, consult the publication "Rights of Heirs and Legatees and their Purchasers in Illinois Real Estate" available through Chicago Title Insurance Company.