



Westchester Bar Journal

VOLUME 42, No. 1

SUMMER 2017

Estate Litigation Tidbits	1
GARY E. BASHIAN, ESQ. and ANDREW FRISENDA, ESQ.	
Devolution of Real Estate Upon Death: A Primer	9
ANDREW BRODNICK, ESQ.	
Tax Certiorari and Eminent Domain Decisions in 2016	15
THOMAS A. DICKERSON, ESQ. and JOHN MECHMANN, ESQ.	
Planning for an Aging Population	23
BERNARD A. KROOKS, ESQ. and ELIZABETH VALENTIN, ESQ.	
New York's Aggravated Unlicensed Operation Law	31
MICHAEL J. PALUMBO, ESQ.	
The Unanswered Questions Lingering Among Family Lawyers Two Years Following the Supreme Court's Ruling That Same Sex Couples May Not Be Deprived the Right to Marry	43
JOHN A. PAPPALARDO, ESQ., with EMILY RAWDON	



Devolution of Real Estate Upon Death: A Primer

BY ANDREW BRODNICK, ESQ.

WHO “OWNS” REAL PROPERTY owned by an individual, not a business entity, after the owner dies? This is a simple question, with a more or less simple answer, that still often manages to confuse practitioners. This article is a quick primer on how to answer that question.

The confusion arises from the historical distinction between the devolution of a decedent’s personal property as opposed to real property. Under English common law, personal property became part of a person’s estate, which could be distributed to beneficiaries and creditors by the fiduciary appointed to administer the estate. On the other hand, a decedent’s real property was not available to pay the decedent’s debts.¹ Instead, title vested at death in the decedent’s heirs. An estate representative generally had no power to reach the decedent’s real property.²

This rule is a remnant from English law which sustained the estates of aristocratic landlords.³ The landlord’s title would vest in his eldest son or male heir upon his death by “entail” or “fee tail,” free from any of his creditor’s claims.⁴ This prevented the dissolution of aristocratic land estates.⁵

“Entail” or “fee tail” no longer exists in New York. A remnant of it exists in the principle that title vests in a decedent’s heirs upon the death of the decedent, just as it did when an aristocratic land owner in England died leaving his real property to his eldest son or other male heirs.

While title still passes upon death, the principle that title vests free of creditor claims has been relegated to the dustbin of history. In 1732, the English Parliament instituted the “Act for the More Easy Recovery of Debts in His Majesty’s Plantations and Colonies”.⁶ As a result, while title to real property would still vest in the heirs upon death of the owner, the administrator or executor of an estate could look to the real property to satisfy the debts of the decedent, and the heirs would take title subject to such claims.

This is where the confusion arises. Most practitioners know that title vests in the heirs upon the demise of the decedent, but are not clear on what authority a fiduciary has regarding the real property, and how that authority interfaces with the vesting of title in heirs. The following analysis will hopefully provide an explanation.

Title Vests Upon Death

“Law—like nature—abhors a vacuum. For this reason it is the prevalent conception that the rights of those succeeding to property upon a death attach immediately, with no intervening hiatus of ownership.”⁷ Title does not pass to the estate representatives upon death, but passes directly to the decedent’s distributees and devisees.⁸

To whom it passes is determined by the decedent’s will or by the laws of intestacy.

If by intestacy, the real property devolves upon death to the intestate distributees.⁹ If by will, then the real property devolves to the devisees designated in the will.¹⁰ If the will creates a trust to hold real property, then title vests in the trustee.¹¹

If, however, a will specifies that real property be part of the general estate, as opposed to be inherited by specific individuals, then the real property becomes part of the decedent’s estate and will be administered solely by the fiduciary. If a will attempts to create a trust, but the trust is found void, then title does not vest in the trustee but instead vests in the heirs or other beneficiaries.¹²

If the decedent owned an interest in real estate through a business entity, then the estate representative obtains authority to deal with the decedent’s interest.¹³ For example, if title to the property is owned by a decedent through a joint venture, that interest is to be marshaled and distributed by the estate representative.¹⁴ In the case of a decedent’s interest in a partnership which owned real estate, the partnership interest vests in the surviving partners,¹⁵ and the fiduciary should seek an accounting from them.¹⁶ If the

decedent is the last remaining partner, then title vests in the estate representative.¹⁷

If a limited partner dies, the estate representative administers all the rights of the deceased limited partner.¹⁸ Similarly, all rights of a deceased member of a limited liability company vest in the estate representative.¹⁹

Real Property Is Subject to Creditor Claims

Prior to 1930, an administrator could not administer real property,²⁰ notwithstanding the fact that the value of the real property might be needed to pay the decedent's debts. In light of the fact that heirs taking title to real property might attempt to evade creditors, the New York Legislature over the years extended powers to fiduciaries to use the real property of a decedent to pay debts, and to otherwise preserve the real property specifically or the estate generally. The current manifestation of these efforts may be found in the Estates, Powers and Trusts Law and Surrogate's Court Procedure Act, both of which were enacted in 1966.

Accordingly, the current state of the law is that, while title vests in the heirs, the estate representative may take charge of real property where there are third party claims to the real property.²¹

All of the property of a decedent, and any income therefrom in the course of estate administration, is chargeable with the payment of . . . [a]dministration and reasonable funeral expenses, debts of the decedent and any taxes for which the estate is liable. . . *In applying such property . . . no distinction shall be made between real and personal property.*²² (Emphasis added.)

As a result, the proceeds of an estate, including real property, may be recovered from beneficiaries to pay for estate debts and other expenses.²³ An executor may also mortgage real property to pay debts,²⁴ may use estate funds to pay for maintenance of real property pending a probate contest,²⁵ and may collect rent from a non-distributee co-tenant.²⁶ The fiduciary may apply for permission to sell real property not only for specified purposes,²⁷ such as to pay debts and administration expenses, but also for "any other purpose the court deems necessary."²⁸

A simple way to determine if the fiduciary may take control of real property is to ask the following question:

Is the power reasonably necessary for the preservation of the decedent's property (during administration and pending distribution) or for the liquidation of the decedent's property for the payment of debts and legacies?²⁹

This is the nub of what a practitioner must address with heirs to whom title in real property vests: *Yes*, you have title to the property; *but* you must make sure that the value of the property will not be needed to satisfy estate debts or expenses. If it is necessary to use the real property to pay those debts or expenses, the fiduciary or creditors may come after you.

For example, if a mortgage foreclosure action against a decedent results in a deficiency judgment against the estate and no property remains in the hands of the personal representative to pay the judgment,³⁰ the heirs may be liable to disgorge estate assets, such as real estate, that were distributed to them. The estate representative is *not* responsible for the satisfaction of a lien on real property unless the will so provides.³¹ The heirs cannot look to the fiduciary to satisfy a mortgage on real property, but must satisfy it themselves or suffer a foreclosure.³²

Conclusion

Title in real property vests upon death in the intestate heirs or in devisees designated in the will to take title. That vesting, however, does not take real property out of the reach of estate creditors, and the fiduciary is granted broad powers to take control of and/or sell the real property to pay the debts of the decedent. In other words, you can assure heirs that they immediately take title to real property, but they must recognize that the real property can later be reached by fiduciaries and creditors.

Endnotes

- 1 *Matter of Cuniff*, 272 N.Y. 89, 92 (1936).
- 2 *Matter of Rosenblatt*, 167 Misc. 258, 259, 3 N.Y.S.2d 619, 622 (Sur. Ct., Kings Co. 1938).
- 3 An interesting review of the history of real property devolution may be found in Francisco Augspach, “*The Executor and Real Property*.” *New York Real Property Law Journal*, Spring 2012, pp. 17–30.
- 4 This is an exceedingly simplified description of “entail” or “fee tail” which is in fact exceptionally complex. For a taste, see en.wikipedia.org/wiki/Fee_tail.
- 5 Fans of *Downton Abbey* will recall that Lord Grantham, a/k/a Robert Crawley, did not have a son, which left cousin Matthew Crawley in line to inherit *Downton Abbey*. His untimely death came after he sired a son with Mary Crawley, which gave the Crawley family a male heir.
- 6 Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 *Harvard Law Review* 385, 421 (2006).
- 7 *Matter of Williams*, 162 Misc. 507, 509, 295 N.Y.S. 56, 58 (Sur. Ct., Kings Co. 1937) (quoting *Matter of Killough*, 148 Misc. 73, 86, 265 N.Y.S. 301, 317 (Sur. Ct., Kings Co. 1933)).

- 8 *In re: Grace*, 62 Misc. 2d 51, 53, 308 N.Y.S.2d 33, 39 (Sur. Ct., Nassau Co. 1970).
- 9 *In re Lindsay's Estate*, 18 N.Y.S.2d 800, 804 (Sur. Ct., Delaware Co. 1940).
- 10 *Matter of Seviroli*, 31 A.D.3d 452, 454, 818 N.Y.S.2d 249, 251 (2d Dep't 2006).
- 11 *In re: Manning*, 159 N.Y.S.2d 29, 32 (Sur. Ct., Nassau Co. 1957).
- 12 *Tilden v. Green*, 130 N.Y. 29, 52 (1891).
- 13 This article does not address the complex issues which arise in the devolution of shares in a corporation which owns real property, including a residential cooperative.
- 14 *In re: Grace*, 62 Misc. 2d 51, 54, 308 N.Y.S.2d 33, 39 (Sur. Ct., Nassau Co. 1970).
- 15 Partnership Law § 51(2)(d).
- 16 *Vick v. Albert*, 17 A.D.3d 255, 258, 793 N.Y.S.2d 413, 416 (1st Dep't 2005).
- 17 Partnership Law § 51(2)(d).
- 18 Partnership Law § 110.
- 19 Limited Liability Company Law § 608.
- 20 *Johnson v. Depew*, 38 A.D.2d 675, 676, 327 N.Y.S.2d 183, 185 (4th Dep't 1971) (*Witmer, J., dissenting*).
- 21 *In re: Grace*, 62 Misc. 2d 51, 54, 308 N.Y.S.2d 33, 39 (Sur. Ct., Nassau Co. 1970).
- 22 Estates Powers and Trusts Law ("EPTL") §13-1.3(a)(1), (b) (emphasis added).
- 23 EPTL § 12-1.1.
- 24 EPTL § 11-1.1.
- 25 *Matter of Payson*, 132 Misc. 2d 949, 506 N.Y.S.2d 142 (Sur. Ct., Nassau Co. 1986).
- 26 *Johnson v. Depew*, 38 A.D.2d at 676, 327 N.Y.S.2d at 184.
- 27 Surrogate's Court Procedure Act § 1901.
- 28 Surrogate's Court Procedure Act § 1902.
- 29 Francisco Augspach, "The Executor and Real Property." *New York Real Property Law Journal*, Spring 2012, p. 25.
- 30 *Jamzura v. Jemzura*, 36 N.Y.2d 496, 502, 369 N.Y.S.2d 400, 406-407 (1975).
- 31 EPTL § 3-3.6.
- 32 *In re: Rogers*, 142 Misc. 572, 255 N.Y.S. 745 (Sur. Ct., Orleans Co. 1932).

Andrew D. Brodnick, Esq., is a real estate litigator in Rye Brook, New York. He has extensive experience in real estate law and land-use issues, and was a member of the Planning Board of the Town of Pound Ridge for sixteen years. Mr. Brodnick has published in the *New York Law Journal* and the *New York Real Property Law Journal*. He graduated from Cardozo School of Law in 1985, where he was a member of the *Law Review*.