

Of Death and Real Estate

from the desk of David M. Touchstone

In the October newsletter, this writer penned a column about the interaction of how classifying property as "community" or "separate" affects spouses' rights to buy, sell, own, and mortgage property. I am now following up with the explanation of how classifying property interacts with the spouses' rights when one of the spouses has died. Or, more to the point, this column will address what happens to the property of a deceased person.

When a person dies owning real property, the title examiner who checks title for the sale from or mortgage by the deceased person's heirs will require that a succession be filed. As succession is a legal proceeding which either results in a judgment recognizing the heirs of the deceased as the new owners of the property or authorizes the sale of the property by the succession representative. Either way, the proper documents must be filed with the Clerk of Court and must result in a properly signed judgment or order by a district court judge. As these things sometimes take time, a careful real estate agent will undertake an inquiry upon listing a property when there has been a recent death by one of the owners. There are many people who do not realize the necessity of filing a succession and many more who are confused about who succeeds to the property of the deceased person.



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These are the criteria: The first question to ask is whether the deceased person left a last will and testament. If he did, and it is valid, then the owners of the deceased person's interest in the property will be whoever was named as his legatees (heirs) in the will. In some cases this can be modified according to rules of forced heirship. For instance, if the deceased person had children who were less than the age of 24 at the time of the deceased person's death, they will probably be entitled to inherit a portion of the estate even if they were not named as legatees in the will.

If the property is the separate property* of the spouse, he is entitled to will all of it (subject to the rules of forced heirship) to whomsoever he pleases. If property is owned by a spouse as his community property, he or she can only will his or her half

interest in the property; the surviving spouse will continue to own the other one half interest as his or her own property.

Most people die without having made a will. In such cases, the law provides for the distribution of their property. As to separate property, the same descends according to the following exclusionary ranking, to wit:

1. First, to children;
2. If no children, then to any other living descendants;
3. If no children, nor other descendants, then to siblings and/or parents;
4. If no children, other descendants, siblings, nor parents, then to the surviving spouse;
5. If no children, other descendants, siblings, nor parents, nor surviving spouse, then to collateral relations (e.g. aunt, uncle, cousin).

As to community property, when a person dies without a will, the half belonging to the deceased person descends according to the following exclusionary ranking, to wit:

1. First, to children;
2. If no children, then to any other living descendants;
3. If no children, nor other descendants, then to the surviving spouse;
4. If no children, other descendants, nor surviving spouse, then to siblings and/or parents;
5. If no children, other descendants, surviving spouse, siblings, nor parents, then to collateral relations.

Occasionally, a real estate agent will

encounter a situation in which one or more of the heirs want to sell the interest of the deceased person, but one or more of the other heirs are either opposed to sale or simply cannot be located. If no succession has been filed, this obstacle can oftentimes be overcome by having one of the heirs appointed as the succession representative. This entails the filing of the proper pleadings with the Court and obtaining an order signed by the Judge authorizing the appointment of the heir as a succession representative. In most cases, when a buyer is located, an additional set of pleadings must be filed, the purpose of which is to secure an order signed by the Judge authorizing the sale of the succession's interest in the property. If this procedure is employed, the real estate agent can reasonably anticipate about a 40-day delay from the initiation of the process to the time that the succession representative will be authorized to sign the deed.

Remember: by carefully interviewing your listing clients, you should be able to identify the relevant issues. But also remember that only attorneys can give legal advice regarding successions. When you discover that your clients are the heirs in an unfiled succession, the best idea is to get them to make contact as soon as possible with an attorney who can assist them.

Note:

*The definition of separate property and community property was given in the October 2006 article.