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Vesting of Title in Probate Estate
The Curious Meaning of Words
By Dan Holbrook

> When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less." "The question is," said Alice, "whether you CAN make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master - that's all."
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> - Lewis Carroll, Through the Looking Glass

The Question: When is real property in the probate estate in Tennessee, subject to administration by the personal representative (PR)?1 Both Lewis Carroll and Bill Clinton might appreciate the "Wonderland" quality of the answer. There is a general rule with two functional exceptions and one real exception.

General Rule: The general rule for an intestate estate, in Tenn. Code Ann. §31-2-103, is that real property "shall vest immediately" in the heirs. The general rule for a testate estate (disarmingly buried inside the same intestacy statute) is that real property "vests immediately" in the beneficiaries named in the will. One of the purposes of probate as to real property, then, is to establish, retroactively to date of death, the identity of the takers in whom title vested. The PR in his fiduciary capacity has no legal title, and indeed no legal authority, to act in connection with real property of the decedent.

Don't lawyers for estates often prepare "deeds" to estate beneficiaries to complete the chain of title? Yes, they do. But such a deed has no legal effect, since the PR has no title to convey. [One lawyer told me she routinely prepares such deeds but states boldly on the face: "This instrument has no legal significance."2] Rather, such deed provides a record for future title attorneys of the underlying facts of the estate, title having already been conveyed immediately upon death. Thus it is more like an affidavit, useful to memorialize information under oath, but not itself a muniment of title.3

First Functional Exception: Tenn. Code Ann. §30-2-323 grants the PR authority to pay some expenses of real property for four months after death, even though the real property is not part of the probate estate. This is a fairly recent [1997] and wise addition to the PR's powers. Until the ultimate takers are proved and notified of their legal responsibilities as property owners, a PR may need to pay utilities and insurance, provide security and maintenance, and otherwise prevent waste of the real property. The statute does not grant any power of disposition or management, or permit payment of taxes or mortgage, nor does it state whether (or how) to adjust distributions from the estate where the PR has made such expenses and the real property devisees are different from the estate residuary beneficiaries.

Second Functional Exception: Tenn. Code Ann. §31-2-103 grants the PR power to "utilize" the decedent's real property to pay debts, taxes, and expenses, pursuant to the insolvency provisions of Tenn. Code Ann. §30-2-401 et seq. Interestingly, those statutes do not directly vest the PR with title to the real property, but rather allow a court to order sale of the decedent's real property as necessary, which order divests title from the beneficiaries named in the will and vests title in others.4

The Only Real Exception: Adding to the many reasons for writing a will, Tenn. Code Ann. §31-2-103 allows a will to bring the real property into the probate estate if it contains "a specific provision directing the real property to be administered as part of the estate subject to the control of the personal representative."5

What "specific provision" in the will is sufficient to bring the real property into the probate estate? One would logically track the statute almost verbatim:

I direct that all real property be administered as part of my estate subject to the control of my personal representative.

A limited poll of Tennessee lawyers suggests that trust and estate attorneys accept the statute as a good faith effort by the legislature to say what they meant, and therefore real property is brought into the estate by parroting back the statute. Title attorneys polled disagree.6 A cautious lot, they are concerned that such a clause, without more, does not necessarily authorize the PR to deal in any manner with real property in the estate. Power to sell? Power to sell even without court order? Power to sell even if the real property is the subject of a specific devise in the will? Power to sell

even if the claims period has not run? Power to sell even if the estate may become insolvent? Power to lease? Power to mortgage? Where there is uncertainty, title attorneys may require signatures of both the PR and the beneficiaries, despite the above provision.

What if the will incorporates Tenn. Code Ann. §35-50-110 by reference? That statute is a list of fiduciary powers (specifically including power to sell, lease or mortgage) that may be incorporated by reference into documents, and wills in Tennessee routinely do so.7 Surprisingly, Tenn. Code Ann. §35-50-110 does not, by itself, bring real property into the probate estate. It says merely that the PR may sell, lease, etc., any real property "of the estate," but it must first be brought in by some other language. The title attorneys whom I polled unanimously affirm this conclusion.

What if the will contains both the literal "inclusion clause" and Tenn. Code Ann. §35-50-110? Title attorneys become more confident as to most of the PR's powers most of the time, but not all of the powers all of the time.

What "inclusion clause," then, is sufficient? Title attorneys with whom I have spoken approve of the following clause in a will:

I direct pursuant to Tenn. Code Ann. §31-2-103 that any interests in real property which I may own at my death be administered as part of my estate subject to the control of my personal representative, who shall have full power to grant, bargain, sell, convey, lease, encumber, manage, and otherwise deal in any lawful manner with said real property at any time during the administration of the estate, in the sole discretion of my personal representative, without the approval or joinder of any beneficiary and without the necessity of any person or entity looking to the application of any proceeds that may or might result from any acts of my personal representative in the premises.

Humpty Dumpty began again. "Impenetrability! That's what I say!" "Would you tell me, please," said Alice, "what that means?" "Now you talk like a reasonable child," said Humpty Dumpty, looking very much pleased. "I meant by 'impenetrability' that we've had quite enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of your life." "That's a great deal to make one word mean," Alice said in a thoughtful tone.

So the "Wonderland" answer to our initial question of "When is real property in the probate estate?" is simple. Real property is not in unless it is in. "Impenetrability! That's what I say!"

Notes

1. Historically, the executor under will, or administrator under intestacy, was a "personal representative" in the sense that he dealt only with personal property. The beneficiary in whom title vested immediately upon death became the "real representative." Caruthers, History of a Lawsuit, 7th Edition, §656. This terminology reinforces the notion that the beneficiary of real property, although vested, might nevertheless be accountable to others under certain circumstances.

2. A related practice with no legal significance occurs in some counties where a deed must be produced to obtain a building permit - the beneficiary under the will executes a deed from himself to himself.

3. In fact, an affidavit of heirship is specifically authorized under Tenn. Code Ann. §30-2-712 and may be the easiest method of demonstrating with the Register of Deeds the chain of title that has passed by will. Another alternative, authorized by Tenn. Code Ann. §32-2-111 and §66-24-101(16), is to admit a will to probate without administration, solely for the purpose of providing a muniment of title. Or a certified copy of a regularly probated will may be recorded in the county where the land lies. The most common procedure for completing chain of title is to include all the information in the next deed in the chain, in effect including an affidavit in the deed itself.

4. Other statutes that may affect the ultimate vesting of title include Tenn. Code Ann. §30-2-209 (homestead), §30-2-614 (apportionment of taxes), and §31-4-101 (elective share). The elective share statute adds yet another "Wonderland" distinction by including in the "net estate," from which the surviving spouse may elect a percentage, all real property "subject to disposition" under the will or intestacy, apparently completely independently of whether or not the real property is actually "in" the probate estate.

5. Whether or not real property should be included in the probate estate is a different consideration for the attorney drafting the will. For example, inclusion might be unwise where a corporate executor's fee is calculated as a percentage of the probate estate. On the other hand, inclusion might be advisable where the property should be, or is likely to be, sold after death and a sole executor is in a better position to sell than multiple beneficiaries who may not be able to agree with one another. Or inclusion might be advisable where the will contains an estate tax marital deduction formula clause, so that the executor can easily "pick and choose" which real assets to allocate to which trust according to the formula.

6. Many thanks to several title attorney friends, especially Bill Searle of the Knoxville bar, for their thoughtful review of this column and for clarifying the issues that have perplexed us estate lawyers.

7. Paragraph (6) of Tenn. Code Ann. §35-50-110 gives the PR power "by public or private sale or sales, and for such consideration, on such terms

and subject to such conditions (if any) as in the judgment of the fiduciary are for the best interests of the estate and the beneficiaries thereof, to sell, assign, transfer, convey, or exchange any real or personal property of the estate...." Paragraphs (7) and (8) include similar powers to lease and mortgage, respectively.

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