



***“ . . . alternatives will depend on the circumstances of the estate.”***

**Executors & Administrators should keep these things in mind:**

- **Obtain legal advice as to whether you can sell real estate.**
- **It is recommended that you obtain a title exam if you intend to sell real estate.**
- **Clear communication with heirs and beneficiaries will minimize problems.**

## **Sale of Real Estate in the Decedent's Estate**

Selling real estate in connection with a decedent's estate involves a number of considerations, and the alternatives for sale will depend upon the circumstances of the estate.

### **The Intestate Estate**

If the decedent died intestate (without a will), then title to the decedent's real estate transfers automatically upon death to the decedent's heirs at law. A list of heirs filed with the Court will identify the owning heirs.

The Administrator of an intestate estate does not have power to sell real estate under Virginia law, only the power to sell and dispose of personal property. The Administrator can petition the Court for power to sell the real estate, if necessary for the administration of the estate.

Since the heirs own the real estate when the decedent dies, all the heirs must join in selling the property, including signing the real estate contract, deed of sale and other documents incidental to a sales transaction. This can present certain practical difficulties, especially if there are a large number of heirs, or if some or all of the heirs live in other states or countries.

### **The Testate Estate**

If the decedent died testate (with a will), then the will may expressly direct or empower the Executor to sell real property. If the will "directs" the Executor to sell, then he or she can and by direction in the will should sell the property; and the Executor may consummate the sale, without involving the beneficiaries of the real estate.

If the will simply provides that the executor has the power of sale, without directing the sale, then the Executor may or may not be able to sell the real estate, depending on the circumstances of the estate.

There is case law in Virginia providing that mere power of sale in a will does not absolutely give the Executor the right to sell the real estate unless there is some necessity to sell, for example, where the personal property of the estate is not sufficient to pay the debts and costs of administration.

Some title insurance companies, because of this case law, take the position that unless necessity of sale exists, they will not insure title to the property sold by the Executor unless the beneficiaries of the real estate join in signing the deed of sale.



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If title to the property is not insurable, then it may be difficult for the Executor to find willing purchasers for the property. Therefore, even though a reading of the decedent's will may contain wording that appears to give the Executor the power to sell the real property of the estate, as a practical matter, he or she may not be able to do so without having all the beneficiaries of the real estate agree to the terms of sale and sign the deed conveying the property.

Of course, if there is only one or a few beneficiaries of the estate, and all agree to the terms of sale and can conveniently sign the contract and deed of sale, then the issue is easily resolved.

### **One Solution for Sale – Intestate Estate**

As mentioned above, the Administrator of an intestate estate does not have power of sale, unless granted by Court order. But let's suppose, for convenience or other reasons, the heirs agree that the Administrator should sell the real estate and the Administrator agrees to do so.

One solution is to have each of the heirs give a special power of attorney to the Administrator, or other agreeable person, providing written authority for that person to act as agent for the heirs to sell the real estate. Ideally, the power of attorney should clearly state sufficient powers to accomplish the sale, perhaps provide minimum terms for sale and adequately address any compensation for the agent's services. This solution could also be used for a testate estate, where there is a question as to whether the Executor can sell.

### **The Last Resort – Partition Suit**

If there is an intestate estate with no power of sale by the Administrator, or a testate estate where the Executor is unable to sell because of lack of necessity of sale and resulting lack of title insurability, and if the heirs or beneficiaries cannot agree on terms or timing for sale of the property, what can be done?

In such a case, any of the owners of the property can file a partition suit in the jurisdiction where the property is located. In the suit, if any of the owners wish to purchase the property, then they will be given an opportunity to do so. If none of the owners wish to purchase the property, and assuming the property cannot be fairly subdivided among the owners, then the Court will enter an order providing for the appointment of a special commissioner to sell the property and distribute the proceeds of sale to the owners in proportion to their respective interests in the property.

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