



When an owner of Real Property dies, his or her property passes by one of the following two methods:

1. Testate, wherein the decedent executed a Last Will and Testament directing to whom the property in question shall pass
- or-
2. Intestate, wherein no will was executed by the decedent and therefore the disposition of property is determined by operation of law.

The current statutory law determining disposition of property by Last Will and Testament is found in Article 3 of the New York Estates, Powers and Trusts Law (“EPTL”). The statutory provisions determining descent in the case where there is no will (“intestacy”) is found in Article 4 of the EPTL.

In the case of (1) the Surrogate’s Court, in the county where the property is located, admits the Will to probate where it is proved to be the Last Will and Testament of the decedent. This avoids the possibility of a forged Will or the existence of multiple Wills which contradict each other. An Executor or Executrix is then appointed by the court via “Letters Testamentary” to represent the estate and to administer the estate pursuant to the terms of the Will. For deed transfers out of the decedent’s name, title usually passes from said Executor or Executrix to a third party.

In the case of (2) when a Will is not known to be in existence it is possible that there will be Administration Proceedings in Surrogate’s Court to appoint an Administrator, via “Letters of Administration”, over the estate and affairs of the decedent. In the event of a transfer of title it would be the Administrator who would convey out.

It should be noted for standard underwriting title practices, that all deeds executed by an Executor/Executrix or an Administrator should be signed by those individuals having had Letters issued by the court within six months of the time of signing. If the Letters are older than six months, they are considered “stale dated”, and more current Letters should be issued by the court.

Another option to transfer title from a decedent’s estate where a Will has not been executed, to transfer from all the heirs-at-law of the decedent. For us to accept this type of deed we would require heirship affidavits from two disinterested blood relatives (no one benefiting from the transaction) setting forth all the heirs of the decedent. The passing of time from the date of death of the decedent will weigh favorably in the title company permitting the use of such affidavits because it would allow any subsequent heirs time to claim their interests, in addition to allowing us to accept a deed with minimal risk.

Recently, we received a phone call from an attorney asking us how a deed should be drawn up pursuant to the death of his client's uncle. He advised us that the uncle passed away and his client, the nephew, wanted to transfer title to himself and his sister. He said that the nephew was the Executor of the uncle's estate. Upon further questioning, it was discovered that there was a Last Will and Testament in existence—which had not been probated (admitted to Surrogate's Court to verify its authenticity and to direct the appointment of an Executor to administer the terms of the Will). When we asked the attorney if there were other heirs of the uncle (wife, children, sisters or brothers, nieces or nephews), he did not know. He was advised to determine the heirs at law of the uncle and to probate the Will. Another issue materialized in our conversation, and that involved a possible specific devise in the Will (wherein the decedent specifically recites that he exclusively wants "Property XYZ Easy Street, Oshkosh, New York" to go to John Jones, his nephew, thereby making John Jones a "specific devisee". In this situation, and upon the probate of the uncle's Last Will and Testament, the rights of the specific devisee take priority over the rights of the duly appointed Executor. In this instance the deed would pass from John Jones as specific devisee to the grantee.

As a consequence to not probating the Will, should the nephew convey from the uncle's estate to himself and his sister without the benefit of a court order by the Surrogate's Court appointing him as an Executor, the newly recorded deed would be subject to attack by possible outstanding heirs at law whose interests were not disposed of. It is possible that with litigation by these outstanding heirs, the deed could be set aside and be deemed "null and void".

Should the decedent not have an existing Will to probate, the heirs could go into court and have Administration Proceedings wherein an individual, usually related in some way to the decedent, will be appointed an Administrator of the estate. In this case upon transfer of title the Administrator would convey out to the new owners.

When dealing with estates one must take into consideration possible New York and Federal Estate Taxes which are due against the decedent's estate. Federal Estate Tax, statutorily a lien on real property for a period of 10 years, is based upon the decedent's "aggregate" estate holdings (all property owned within the United States, all assets such as bank accounts, investments, insurance policies, etc.). In New York State, the estate tax, which is statutorily a lien on real property for a period of 15 years from the date of the decedent's demise, is based upon all holdings the decedent retained within New York State.

Estate taxes are based upon the decedent's assets surpassing the applicable exclusion amount necessary to file estate tax returns. Estate taxes are also based upon the prescribed amounts by law at the time of the decedent's demise. In New York State, estate taxes are exempted as follows:

-For decedents dying between 10/1/94 and 10/1/98, the exclusion amount ("e/a") is \$115,000.00; if the decedent died between 10/1/98 and 2/1/00, the e/a is \$300,000.00; and for decedents dying after 2/1/00, the e/a follows the federal levels as follows:

For Federal Estate Tax purposes-

-If a decedent died between 1987 and 1997 the e/a is \$600,000.00; if a decedent died in 1998 the e/a is \$625,000.00; if a decedent died in 1999 the e/a is \$650,000.00; if the decedent died in 2000 or 2001, the e/a is \$675,000.00; if a decedent died between 2002 and 2003, the e/a is \$1,000,000.00; for decedents who died during 2004 and 2005, the e/a is \$1,500,000.00. In the event of a future demise in 2006,2007 and 2008, the e/a will be \$2,000,000.00

An estate tax return for a U.S. citizen or resident needs to be filed only if the gross estate exceeds the above amount for the applicable years.

Note, one perfectly acceptable method for the title company to omit the exceptions which reference New York and Federal Estate Taxes is to insure a deed conveying the real property where the grantors are all the heirs of the decedent. The New York State Land Title Association specifically addresses this matter in their recommended practices for title companies:

“The lien for Federal Estate Tax against a decedent may be disregarded upon a mortgage for value or a transfer made to a purchaser for value , which transfer or mortgage is made by the heirs, devisees or distributes of the decedent.:

The same clause appears in the section of the recommended practices concerning New York Estate Taxes.

Lest anyone imagine that the just recited recommended practices is some quirky title insurance industry position, it should be noted that the recommended practices with regards to New York and Federal Estate Taxes is, in fact, firmly based on statutory authority. The authority comes from Section 6324(a)(2) of the Internal Revenue Code as to Federal Estate Taxes and Section 975 of the tax law as to New York Estate Taxes. Under such circumstances the lien of the estate taxes attaches to the proceeds of the sale while the real property can be conveyed free and clear of the same.