Dying Without a Will: The Texas Two-Step Solution to Sell

INTRODUCTION

If a person dies without a will, and the deed to the property does not expressly include joint tenancy with survivorship language (unlikely in Texas), then issues arise as to which persons have title to that property. This property is regularly referred to as "heirship property." "Heirship property" is basically unsellable as it is, and a title company will not issue title insurance until heirship issues are handled and resolved. This can be done by (1) a probate proceeding in county court (resulting in appointment of a personal representative of the estate and ultimately a judgment determining heirship) or (2) an "affidavit of heirship" followed by a curative deed (our term) signed by the heirs.

Title companies typically require an affidavit executed by an immediate member of the family and corroborated by at least two disinterested parties containing the marital history of the deceased and his spouse and a complete list of heirs, together with an original death certificate attached.

An Affidavit of Heirship is used to describe family history and state who the heirs are pursuant to the Texas Probate Code. The affidavit must be signed under oath by a person familiar with these facts, and is then filed in the real property records of the county where the property is located.

SUCCESSION

When a person dies without a will, that person died intestate. In this situation, the Texas Probate Code provides very specific rules, referred to as the rules of intestate succession. If a person dies intestate, then the State of Texas, basically, has made a will for that person.

If the decedent is unmarried, then Section 38 applies, providing that the property goes in equal shares to the children, if any. If not, then the property goes in equal shares to the parents. If the decedent was married, then community property is involved, and Section 45 applies. The text can be complicated to understand and apply:

> § 45. COMMUNITY ESTATE. (a) On the intestate death of one of the spouses to a marriage, the community property estate of the deceased spouse passes to the surviving spouse if: (1) no child or other descendant of the deceased spouse survives the deceased spouse; or (2) all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse. (b) On the intestate death of one of the spouses to a marriage, if a child or other descendant of the deceased spouse survives the deceased spouse and the child or descendant is not a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse. The descendants shall inherit only such portion of said property to which they would be entitled under Section 43 of this code. In every case, the community estate passes charged with the debts against it.

A good affidavit refers to specific sections of the Probate Code and reaches a conclusion as to the proper heirs.

THE TEXAS TWO-STEP

Curing title of heirship issues outside of court is usually a two-step process. First, the affidavit of heirship must be prepared and signed by someone with first-hand, personal knowledge of the family history, including marriages, births, and deaths. Probate Code Section 52A offers a suggested form for this affidavit.

Probate Code Section 52 provides that the affidavit will be presumed to be true "if the affidavit or instrument has been of record for five years or more in the deed records of any county in this state in which such real or personal property is located. . . ." The purpose of the affidavit is to reach conclusions as to the identity of the rightful heirs and the amount of their respective interests. Other sections of the Probate Code may need to be consulted in order to reach this determination.

Second, after preparation of the heirship affidavit, a deed that consolidates title into a single heir who may then keep the property or sell it is required. Alternatively, all heirs may sign a deed conveying the property to a third party. The deed is usually a special warranty deed or deed without warranties. All heirs named in the affidavit (or their legal guardians) must sign. Both documents are filed in the real property records in the county in which the property is located - the affidavit first, and then the deed, back-to-back.

CONCLUSION

Because of the complexities of this issue and the necessity of attempting to contact, negotiate with, and perhaps buy out other surviving heirs who also might want the property, legal fees and expenses could be high, with no guarantee of success. Also, heirs may have attempted to resolve heirship issues on their own, and done so incorrectly. Affidavits and deeds may then have to be re-prepared and refiled, prolonging the process. Allow Tiago Title to work for you; allow us to try and solve the problem; and allow us the opportunity to do the process correctly from the start.