

FOR SALE – THIS PROPERTY HAS BEEN IN THE FAMILY FOR YEARS

By Blake W. Kirkpatrick

So, you found that perfect little gem of a house or perhaps vacant lot on which to build your next one? You've been told by the owner that "this house/property has been in the family for years." At this point, your antenna should go up. The question stemming from a simple statement like this should be "who truly owns this property?"

Unfortunately, most prospective buyers do not have the luxury of combing official records or conducting title searches while searching for property for sale. Multiple listing service (MLS), Zillow®, Trulia®, other real estate search engines and/or even the local County property appraiser do not state who the real current owner of the property is on their website or on the listing page.

In Southwest Florida, where we have many retirees, etc., it is not uncommon for property to be sold by an estate or trust, or, even beneficiaries of deceased owners directly. While this does not necessarily mean that the buyer of such property will never be able to acquire clear title to property owned by an estate/trust/beneficiary, it does mean that additional steps may be necessary before that estate/trust/beneficiary can convey clear title to the property. These steps can have the effect of delaying the ultimate closing of the sale.

As a buyer, you may not be aware that the property you are purchasing may have probate/trust administration and/or tax-related title issues to overcome until well after the contract has been signed. Not to worry, because these title issues can be cleared, though some may be more difficult than others. As a seller, many of these things can be avoided early on by recognizing that certain steps may need to be taken to confirm that you can pass good title to a prospective buyer.

Before addressing these, it may be helpful to cover a few misconceptions or problems that can arise in the probate/trust administration context when dealing with real estate:

• **Surprise Effect of Prior Conveyance Provisions in Deeds** - It is not uncommon for joint owners to misunderstand how they hold title based on the language in the prior deed. In other words, the conveyance language in the prior deed is not worded properly, or, the owners did not realize how the property was conveyed to them based on the language in the prior deed. Furthermore, changes in facts and circumstances subsequent to the prior purchase or transfer of

the property, can arise that, if not addressed, will leave unintended consequences. These situations can arise on property that has been inherited, property that has been transferred among family members and even property previously owned by a married (but now divorced) couple.

• **Lack of Effect of Northern Probate on the Transfer of Florida Property** - A misconception of many executors and personal representatives is that the authority granted in the northern jurisdiction does not automatically give them authority to transfer, sell, lease, etc., Florida real property. Instead, the Florida real property will need to pass through an ancillary probate administration wherein the personal representative/executor is granted authority to the Florida probate proceeding. Depending upon the facts and circumstances and the value of the property, simpler forms of probate administration (as opposed to a formal ancillary administration) are available; however, either a court order or separate ancillary letters of administration will likely be required in order for the Florida property to be properly conveyed.

• **Tax Liens and FIRPTA** - most tax lien issues are addressed through the closing process; however, if a decedent's estate or heirs are in the process of selling the decedent's property, clearance of any estate tax liens will need to occur. Even if the decedent did not have a taxable estate, certain documentation will need to be recorded at or prior to closing to evidence that all tax liens have been cleared. Further, it is also not uncommon for property to be owned by foreign residents (or estates). There are certain withholding requirements under the Foreign Investors in Real Property Tax Act of 1980 (FIRPTA) when property is being sold by a foreign owner. Technically, the income tax withholding requirement is an obligation of the buyer. Nevertheless, both buyer and seller are involved (or should be involved) in the withholding process through the closing.

• **Homestead** - While an entire article can be written separately about this issue, suffice it to say that primary residences in Florida (homestead) may have devise restrictions at death, etc., depending on whether the decedent was survived by his spouse and/or minor children. In other words, in the context of an estate/trust administration, other heirs or beneficiaries may have an interest in the property and without their approval, clear title cannot be conveyed.

This Article does not constitute legal advice and may not be relied upon as such. Each individual's facts and circumstances are different. If you have any questions regarding your particular situation, please consult with legal counsel.

Steps to consider if you are a listing agent of estate or inherited property:

- Ask the person who is listing the property with you to show evidence or proof that they have actual title and authority to sell the property
- After or in lieu of the above, confirm on your own who has legal title on the property (again, the county property appraiser's website does not always indicate who the legal title holder is).
- Suggest that the seller consult with legal counsel (early in the process) to make sure that the seller has taken the necessary steps to convey clear title.
- buyer and clearly communicate timing!

Steps to consider if you're a prospective buyer of estate or inherited property:

- Ask questions about the owner and how title is currently held.
- Before signing the contract, make sure that the seller listed on the contract is the proper party.
- Recognize and understand that closing can be impacted or delayed by probate, creditor claims, tax liens, etc., but that those title issues can be cleared with the assistance of legal counsel, and, perhaps delays minimized if counsel is consulted early in the process.

Steps to consider if you are the seller of estate or inherited property:

- #1 - Do not wait until you have a signed contract or listing agreement before consulting with legal counsel regarding the estate administration and tax issues.
- Review the deed or transfer document wherein you or the decedent acquired title to the property. If you have any questions regarding how such property is titled, ask legal counsel and attempt to clear up any issues stemming from the prior conveyance.
- Many of the title issues related to probate and estate tax will be identified in a title commitment letter. Make sure that the title underwriter issues title commitment letter as soon as possible after the contract has been signed.

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