



PROBATE 101: SELLING PROPERTY OUT OF A PROBATE ESTATE

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Someone in Title has died – do we need a probate?

No probate needed if the deceased owner –

- is survived by one or more joint tenants (including tenant by the entirety);
- held only a life estate in the property;
- held title as Trustee of an inter vivos Trust;
- died more than 25 years ago with no probate proceedings and an Affidavit as described in REBA Title Standard 14; or
- died more than 50 years ago and instruments recorded in the chain of title identify the heirs.



If I don't
need a
probate,
what do I
need?

- Evidence of Death – see REBA Title Standard 71
- Address Homestead Rights in Deed – see REBA Title Standard 77
- Eliminate Estate Tax lien:
 - Releases from Department of Revenue and IRS, if applicable
 - Affidavit pursuant to MGL c. 65C, s. 14
 - Passage of 10 years from date of death

Title Standard 71

The title standard was revised in 2020 to expand sources of evidence which may be relied on for proof of death.

- (a) death certificate recorded in the registry district or filed with probate in any Massachusetts county;
- (b) recording in the registry of district of:
 - (1) record a certified copy of a foreign probate petition or appointment that recites the date of death;
 - (2) Massachusetts Inheritance Tax Lien Release relative to the decedent's interest in the property;
 - (3) Massachusetts Certificate of Release of Estate Tax Lien relative to the decedent's interest in the property;
 - (4) a deed to the property from survivors containing a recital that the decedent has died – once recorded for more than 20 years;
 - (5) a subsequently recorded death certificate of the surviving spouse that lists status as widowed and identifies the predeceased as the spouse.
 - (6) for prior transactions only when a death certificate cannot be obtained (not all states make death records available to the public) – an attorney's affidavit explaining the circumstances and due diligence conducted with a true copy of a published obituary that includes date of death.



When Do We Need Probate?

A Massachusetts probate is necessary when the deceased owner:

- was the sole owner of the property
- was a tenant in common with other owner(s)

In the rest of this session, we will discuss how title can be properly conveyed from a probate estate.



Who Owns the Property Now?

MGL c. 190B, s. 3-101:

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to property are subject to the restrictions and limitations contained in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to the decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to allowances and exempt property, to rights of creditors, elective share of the surviving spouse, and to administration.



What does that mean?

Title vests in the heirs/devisees at death, BUT their interest is subject to the probate.

While the probate is open and Personal Representative (PR) is administering the estate, the PR can divest their title either by exercising a power of sale in the admitted will or by selling the property pursuant to a License to Sell of Real Estate (a/k/a Decree of Sale) in a formal or informal probate. Late & Limited probates are different – more on that coming up later!



Types of Probate – Formal and Informal

For deaths since the Massachusetts Uniform Probate Code (MUPC) took effect on March 31, 2012, both formal and informal procedures are available if filed within three years of death.

Formal Probate matters are typically heard by a judge and may involve 1 or more court hearings. Certain circumstances require a formal filing.

Informal probate is an administrative proceeding processed by a Magistrate. They are subject to a challenge period (3-4 years from date of death).



Types of Probate – Late & Limited

The Late & Limited Probate process is required if filed more than three years after a date of death and the death occurred after 3/31/2012.

- L&L Probate is a formal process to identify heirs/devisees;
- PR is limited and *optional* – they cannot get a license to sell or exercise power of sale in will;
- If a PR is appointed, the heirs/devisees ownership is subject to costs of administration and their title is not clear until the court issues an Order of Complete Settlement (or six years from bond approval).





What if there's a probate somewhere else?

Any Massachusetts real property interest passing through probate requires a Massachusetts probate filing.

The probate filing need not be in the same county as the real estate.

If the decedent has a foreign probate (outside Massachusetts), an ancillary proceeding must be filed in Massachusetts. The court of the state of domicile does not have jurisdiction over real property located outside its borders. See MGL c. 190B, § 4-207.



Power of Sale

If the will gives the Personal Representative the power to sell real estate, the PR may exercise that power once the will has been admitted, PR appointed and bond approved.

MGL c. 190B, § 3-715 (23 ½)



More about the Power of Sale

- The Power of Sale must be explicitly given in the Will.
- The Power of Sale is a power to *sell* the property for value.
- A nominal consideration deed to an heir or devisee and/or others is not a sale.
- A Deed in Lieu of Foreclosure is not a sale.
- The probate can be either formal or informal.
- However, a PR appointed in a *Late & Limited* does not have the Power of Sale, *regardless of what the will says*. MGL c. 190B, s. 3-108
- See also REBA Title Standards 10, 40 and 78.



When can the Power of Sale be exercised?

AFTER – the Personal Representative has been appointed and bond approved, but

BEFORE – the estate is closed with an allowed final account (pre-MUPC) or Order of Complete Settlement (MUPC).

What if the estate is never formally closed?

The power of sale can certainly be exercised while the estate is subject to claims for debts, legacies, and expenses of administration (i.e., 6 years from bond approval). After that, it gets a little more murky and will depend on the circumstances.



Sample Grantor
Clause for deed
under
Power of Sale

Minerva McGonagall, as Personal Representative of the Estate of Albus Dumbledore, Middlesex Probate and Family Court, Docket MI20P14673EA of Hogsmeade, Massachusetts, pursuant to power of sale contained in the Will and every other power



BOTTOM LINE ON USING THE POWER OF SALE



The will must be admitted and give the PR power of sale.



The conveyance must be for value.



Need estate tax affidavit and/or release(s), as applicable, for 10 years from death.



No requirement to close estate.



Registered Land – Deed needs Land Court approval.



Decree on Petition for Sale of Real Estate (License to Sell)

If there is no will or a will with no power of sale, the PR can sell real estate only in accordance with an approved license to sell.

See MGL c. 202 and REBA Title Standard 78

REMINDER: License to Sell is not available to the PR in a Late & Limited unless for costs of administration.



More About a License to Sell

- PR may seek a License even if authorized under the will.
- PR can petition for a general license within 1 year of bond approval. MGL c. 202, § 20
- PR can petition for a license to sell for expenses and charges of administration within 6 years of bond approval. MGL c. 202, §20A
- The Decree must reflect a correct legal description.
- Co-Tenant Ownership – Sale price is for only decedent's interest



Sample
Grantor
Clause for
deed
pursuant to
Decree

Luke Skywalker, as Personal Representative of the Estate of Obi Wan Kenobi, Worcester Probate and Family Court, Docket WO22P1138EA of Tatooine, Massachusetts, pursuant to the Decree of Sale issued September 15, 2022 and every other power



Bottom Line on Using a License to Sell



License issued by Court and exercised within 1 year.



The conveyance must be for value and in accordance with the Decree.



Need estate tax affidavit and/or release(s), as applicable, for 10 years from death.



No requirement to close estate.



Registered Land – Deed needs Land Court approval.



Sale by Heirs/Devises in Formal or Informal Probate

Heirs or devisees can convey title –

- When testacy is certain;
- When heirs/devisees are identified; and
- Administration is complete.

See REBA Title Standards 40 and 41.



Sale by
Devisee
when real
estate
devised to
Trust

For real estate devised to Trustee of an Inter Vivos Trust (pour-over), you must establish the trustee of record in accordance with REBA Title Standard 68, which can include:

- Named as Trustee in a Deed of Distribution from the PR;
- Names as Trustee directly in the Will;
- Established with a Certificate pursuant to MGL c. 203E, § 1013;
- Named in Order of Complete Settlement;
or
- Named in some other court decree or order.

For real estate devised to a Testamentary Trust, the Trustee will be named by the court and must have bond approved.



Sale by
Heirs/Devises
in a Late &
Limited
Probate

If no PR appointed, the heirs/devisees can convey as soon as the court issues the Order confirming them and (1) a release or waiver of claims from Division of Medical Assistance/MA Health; or (2) satisfactory evidence from DMA/MA Health that there are no claims against the estate. MGL c. 118E, § 32.

If PR appointed, need Order for Complete Settlement (or more than 6 years since bond approval).



Sample Title Reference for a Deed from Heirs or Devisees

Being the premises conveyed to Eric Praline by deed dated December 7, 1969 and recorded with the Plymouth County Registry of Deeds in Book 3081, Page 81. Eric Praline died on July 1, 2014. See Plymouth Probate and Family Court Docket 15P21215.



Bottom Line on Taking a Deed from Heirs/Devisees



Testacy must be certain – if Informal Probate, must be past challenge period.



Deed from all devisees (testate) or heirs (intestate). If property devised to Trust, need to establish the Trustee of record (see REBA Title Standard 68).



Need estate tax affidavit and/or release(s), as applicable, for 10 years from date of death.



Estate must be closed, or claims for debts, legacies and expenses of administration are barred by lapse of time.



Registered Land

See the “Effect of Death” Memorandum issued October 31, 2019 by the Chief Land Court Examiner for details, but key points to remember:

Deeds from a surviving tenant by the entirety requires an Affidavit of No Divorce;

Deeds from a PR *always* require Land Court approval;

Deeds from PR pursuant to Power of Sale must be to an arms’ length third party for value;

Land Court requires an S Petition for a new Certificate of Title to vest record title in the heirs/devisees and will not approve a Deed of Distribution from the PR except as in accordance with the Order of the Land Court on such a petition. Requires either formal probate or Order of Complete Settlement with determination of tetacy and heirs.



Deeds of Distribution

See MGL c. 190B, §3-907 and REBA Form 58.

Deeds of Distribution are useful for giving heirs/devisees record title and establishing Trustee of a pour over Trust.

However, they do not preclude the PR from invoking the Power of Sale or seeking a License to Sell while the estate remains open.

REMINDER – not accepted in Registered Land without an S Petition!



Helpful REBA Title and Practice Standards

- Title Standard 3 – Federal Estate Tax Liens
- Title Standard 10 – Executor’s Power of Sale
- Title Standard 14 – Missing Probates
- Title Standard 24 – Massachusetts Estate Tax Liens
- Title Standard 36 – Probate Inventories
- Title Standard 40 – Transfers by Devisees
- Title Standard 41 – List of Heirs
- Title Standard 50 – Pretermitted Issue
- Title Standard 71 – Evidence of Death of Deceased Joint Owners and Life Tenants
- Title Standard 78 – Personal Representative Conveyances per Power of Sale Under Massachusetts Uniform Probate Code
- Practice Standard 10 – Conveyances after Death: Recording of Documents



Helpful REBA Forms

Form 32 -- Affidavit
M.G.L. c. 65C, § 14(a)

Form 32A – Affidavit
Regarding Federal
Estate Taxes

Form 58 – Deed of
Distribution M.G.L. C.
190B, § 3-907



QUESTIONS?



Based on a True Story

Carol was the sole owner of recorded land property when she died intestate in 2009. The probate petition filed in 2009 listed her heirs as her surviving spouse, Mike, and their three sons, Greg, Peter and Bobby. A first and final account was filed and approved in 2011.

In 2012, Mike signed a deed conveying his interest to Greg, Peter and Bobby as tenants in common, which was recorded shortly thereafter.

In 2014, Peter died intestate. He had no spouse or children. An informal probate petition filed that year named Mike as Peter's sole heir. There have been no further filings since Greg was appointed PR and his bond was approved in 2014.

Mike died intestate in 2018, but no probate has been filed for him. He never remarried and had no children other than the three boys with Carol.

Greg and Bobby want to sell the property. What do they need to do?

Answers

CAROL – her probate is complete and heirs established. Her probate is sufficient evidence of death and we don't need to address estate taxes because she died more than 10 years ago.

PETER – Although the estate was an informal filing and never closed, REBA Title Standard 41 says we may rely on the list of Heirs at Law filed in the probate petition because more than 6 years has passed since bond approval. We are also beyond the time limit for Greg to obtain a decree for sale. The probate is sufficient evidence of death, but we will need estate tax releases and/or a 65C Affidavit to address estate taxes, as appropriate.

MIKE – had conveyed the interest he inherited from Carol in 2012, but then reacquired an interest as Peter's sole heir. Since he died more than three years ago, Greg and Bobby will need to file a Late & Limited Probate to establish themselves as Mike's heirs. The probate filing will be sufficient evidence of death, but we will need estate tax releases and/or a 65C Affidavit to address estate taxes, as appropriate.

Note: If the real estate is the only probate asset, Greg and Bobby should *not* request appointment of a PR. If they get a PR, they will need an Order of Complete Settlement before they can sell.

Extra Credit – what if this had been Registered Land?

The 2012 deed from Mike could have been filed only if a new Certificate of Title had been issued after Carol's death and probate, so let's assume that happened.

After the 2012 deed, another Certificate of Title would have been issued reflecting Greg, Peter and Bobby as the owners.

PETER – Since Peter's probate was an informal filing, Greg and Bobby will need an Order of Complete Settlement that makes a formal determination of testacy and heirs to comply with Land Court requirements.

MIKE – The answer on Mike's estate is the same as recorded land. Note that a Late & Limited proceeding is a formal proceeding and the court's order will make a determination on testacy and heirs.

Once the probate court issues the necessary orders, Greg and Bobby will file an S Petition in accordance with Method 2 in the Effect of Death Memorandum and get a new Certificate of Title issued in their names only.