

WHAT REAL ESTATE AGENTS SHOULD KNOW ABOUT TEXAS PROBATE

John A. Crane

Zunker, Crane & Gibson, L.L.P.
700 Lavaca Street, Suite 1010, Austin, Texas 78701
(512) 469-9444, Fax (512) 469-9060
E-mail: jcrane@zunkercrane.com

Introduction

You may have already had it happen. A prospect calls you to come out and see a property that sounds interesting. You drive up to find a nice home in a hot area that looks like it could be a real moneymaker. The client's expectations are reasonable and he is eager to follow your advice. During your visit, he casually mentions that the place has actually been in the family for years. His parents have passed away and now it's time to finally put it on the market. You walk away from the meeting with a signed listing agreement in your hand and a song in your heart. Little do you know that you have just entered ... the Probate Zone.

For 15 years I have handled probate estates and learned many lessons the hard way. In a few instances, there was a poor, unsuspecting real estate agent who learned those lessons with me. I figured it would help if I put some of those lessons learned in writing. That way, I would at least have something to hand my client's agent so that there would be less chance of misunderstandings.

In this paper, I will try to explain how to:

- **Make sure your listing agreement is enforceable.**
- **Add necessary special provisions to the earnest money contract.**
- **Get the sale closed properly and get paid!**

Please note that this is not intended to be an in-depth legal treatise. Answers to your specific problems may involve considerations not covered here. My simple goal was to educate you enough to start asking the right questions. If you want help finding the answers, talk to a lawyer.

Just what is probate anyway?

Before we go too far, you need a little primer on the probate process. Too many people have heard the term “probate” but don’t understand what it really means.

The instant a person dies, everything they owned immediately belongs to someone else. In simple terms, one of the primary functions of the probate process is to provide another link in the chain of title showing the transfer to the new owners. The term “probate” is generally used today to refer to the entire process of wrapping up the affairs of one who has died, known as the “decedent.”

To successfully navigate the probate process, you must answer a series of questions, including:

Is the decedent dead? Yep, you would think this one would be easy. But what about the fellow who falls off the sailboat on his vacation to the Caribbean and the body cannot be recovered? How long do you have to wait to see if he turns up on some deserted island?

Did the decedent leave a will? This requires you to understand what constitutes a valid will. Often, the decedent intended to leave a will, but failed to do it right. If a will was left, proof must be offered that it was never revoked or amended.

NOTE: A will is just another worthless piece of paper until a probate court has “admitted it to probate” by declaring it to be *THE* piece of paper that disposes of the decedent’s property.

If there is no will, who are the heirs? When there is no will, the decedent is said to have died “intestate” and Texas law dictates who gets what.

Are there any creditors? The decedent’s property passes subject to the debts he or she owed. The person receiving the property does not become personally liable for the decedent’s debt, but the property may have to be sold in order to pay the debt. If there are no debts, there may be no need to have a formal administration of the estate.

If an administration is necessary, who gets to handle it? If the will appoints someone to handle the estate, that person is called an executor. If there is no will (or the will fails to appoint anyone), the court will appoint an administrator.

Should the executor/administrator be independent or dependent? The default rule in Texas and most states is that the probate court supervises the administration of all estates. For example, permission to pay any debt **or sell any property must be obtained in advance**. Also, the administrator must usually put up a surety bond. The added expense can be hard to justify unless the family likes the idea of having extra protection against mismanagement of the estate.

In certain instances, however, Texas law allows the representative of the estate to be free of court supervision, greatly reducing the cost of probate.

How do you make sure you have been properly hired?

I don't know of a way to feel good about your listing agreement if the signatures on that agreement aren't the same signatures that will be on the deed. Can someone sell it on behalf of the estate or do you need to join every person who might have inherited an interest in the property? We'll focus first on determining who inherited the property.

If the decedent left a will, presumably it should be easy to determine how his or her real estate transferred by reading the will. Just remember to be sure that the will has been admitted to probate or else it has no effect. (Bear in mind also that if the decedent was survived by a spouse, minor child or unmarried adult child living in the house, any of those individuals can claim a homestead interest in the house for as long as they choose to live there, even if they inherited no other interest in the house.)

If the decedent left no will, things can get a bit more complicated. To determine who inherited the property, you must first know if the decedent was married. If so, then everything acquired during the marriage is presumed to be community property. Everything owned prior to marriage, or received as a gift during marriage, is separate property. The distinction is important because different rules apply to each type:

COMMUNITY PROPERTY

Facts	Disposition
Married with no kids	All to spouse
Married with kids who are also the kids of Decedent's spouse	All to spouse
Married with kids, but at least one of the kids is not a child of Decedent's surviving spouse	All of Decedent's one-half interest in any community property passes to kids, spouse simply retains one-half interest

SEPARATE PROPERTY

Facts	Disposition
Unmarried with kids	All separate property passes to kids
Unmarried, no descendants, parents surviving	All separate property passes equally to father and mother

Unmarried, no descendants, one parent deceased, at least one sibling	One-half to surviving parent and the other half to surviving sibling(s) or their descendants
Unmarried, no descendants, one parent deceased, no siblings	All to surviving parent
Unmarried, no descendants, no parents, at least one sibling	All to surviving sibling(s)
Unmarried, no descendants, no parents, no siblings	Equally to paternal and maternal grandparents or their descendants.
Married with kids	1/3 of separate personal property to spouse, 2/3 to kids. All separate real estate to kids, subject to spouse's life estate in an undivided 1/3 of it.
Married, no descendants, no parents, no siblings or their descendants	All to spouse
Married, no descendants, a parent or sibling or niece or nephew	One-half to spouse, other half to parents or siblings as if decedent was unmarried

If there is no need to administer the decedent's estate, then the people who inherited an interest in the property are the ones who can sell it. In such instances, usually an affidavit of heirship signed by two disinterested witnesses will be sufficient for most title companies to prove the identity of the new owners. Your job (not always easy) is to round everyone up and get them to sign the deed.

If an administration is commenced, however, then either an executor or an administrator will have been appointed to represent that estate and they will likely be the ones to hire you to sell the property. Different rules apply depending upon whether we're talking about an "independent" or "dependent" administration.

Independent Administration

If the decedent left a good will, chances are the will appoints an executor to handle to the estate. In Texas, it is common to go further and state in the will that the executor shall be "independent" or free of court supervision. Independent executors in Texas basically step into

the shoes of the decedent and can pay bills, handle property and generally take any action necessary to properly administer the estate without asking the judge for permission.

CAVEAT: Unless the will gives the executor the power of sale, even an independent executor has no power to sell real estate unless it is necessary to pay debts or expenses of the estate. If the decedent left no debts, and there is ample cash to cover the funeral and costs of administration, then an executor may have no right to sell property just because he or she thinks it best. The other beneficiaries under the will may object, or at least the title company may require the other beneficiaries to sign the deed.

Now is as good a time as any to mention **The Title Company Rule** of which you are probably very familiar:

**RULE: WHEN IT COMES TO REAL ESTATE,
TITLE COMPANIES MAKE THE RULES!**

Sure, legislators and judges may think that the creation and interpretation of Texas property law is their job, but as a practical matter they're only the starting point. If the title company insists that you jump through a hoop to get an exception removed from the commitment, you do it or find another title company. If the title company insists that all beneficiaries of an estate sign the deed, and a particular beneficiary is mad because she doesn't think the executor is getting a good price, you're going to have to persuade that beneficiary to sign or figure out another course to take.

If the sale is necessary to pay debts and expenses; if the will authorizes the sale; or if all the beneficiaries agree, then the sale can proceed. There is nothing to file with the probate court, since it is not supervising the process.

Dependent Administration

If there was no will, or if the will fails to name an executor, and there is a need to administer the estate, then the court will appoint an "administrator." That administrator will be subject to court supervision unless all adults who stand to get something from the estate agree that the administrator can be independent. If any of these "distributees" is a minor, or if any one of the adults disagrees, then a *dependent* administration is required.

In order to sell real estate in a dependent administration, the administrator is required to prove to the court that a sale is necessary in order to pay proper expenses of the estate or to accomplish some other purpose serving the estate's best interest. This is done by filing an application to approve the sale **before any listing agreement is signed or the property is placed on the market!**

A citation putting the world on notice that the application has been filed must be posted by the clerk on the courthouse bulletin board used for such notices. The Court then sets a

hearing date (in Travis County usually on a Monday about 10 days after the date of filing). At the hearing, the attorney for the administrator has to appear and explain to the judge why the property is being sold. Assuming the judge is satisfied, then an order is signed authorizing the marketing of the property to proceed.

After a buyer is found and an earnest money contract is signed, the parties can proceed to prepare for closing. Texas Probate Code states “all sales of real property of an estate shall be reported to the court ordering the same within 30 days after the sales are made.” If the judge approves the terms of sale, a decree confirming the sale is signed and the administrator is authorized to convey the property upon the buyer’s compliance with the terms of sale.

Now, I read the Probate Code to mean that a report of sale should be filed with the court at the time that you have a binding earnest money contract, because in my opinion that is when you have a “sale.” That way, the administrator gets approval before he or she signs a deed at the closing.

In Travis County, however, things are done a little differently. Administrators in this county are required to proceed to closing *before* they file the report of sale. This means that the parties proceed to closing before you are sure that the probate judge will even approve the deal! As the agent for the estate, you would be wise to warn the buyer, as well as buyer’s agent and lender of this process.

Everyone needs to also understand that funding of the closing and delivery of the deed will be **delayed** after closing for at least 5 days until the court signs a decree confirming the sale. If this was a tough property to market and there are peculiar reasons why the sale price is way below a prior appraisal, be prepared to appear in court with the administrator’s lawyer to explain.

What About Lienholders?

Mortgages:

Sometimes the sole owner of property dies leaving a mortgage. The heirs either do not want to pay the mortgage or can’t afford it. Before you know it, the mortgage company is sending the usual demand and acceleration letters threatening foreclosure.

If the estate is being independently administered, the mortgage company can proceed right along with its foreclosure rights as set forth in the deed of trust. The independent executor simply stepped into the shoes of the decedent and must find a way to hold the mortgagee at bay while you try to sell the property.

In a dependent administration, however, the power of nonjudicial foreclosure in that deed of trust is no longer good. The mortgagee has to come to court, get its claim approved and ultimately seek court permission to foreclose. If the judge decides to let the foreclosure proceed, the judge can impose a minimum sale price in order to ensure the estate gets full market value.

In other words, there are handy ways to stave off creditors in a dependent administration to allow you and the client time to seek a good price.

Other lienholders:

If you are selling the decedent's homestead, and the decedent is survived by a family member who can also claim homestead protection (spouse, minor child, unmarried adult child living there) then no creditors besides the mortgagee can look to the proceeds for payment. Any liens against non-homestead property securing the decedent's debts will likely have to be paid from the proceeds in order to convey clear title. (The topic of creditors' claims in probate is too large to discuss here.)

What if one of the heirs has some judgment liens out there? Do those attach to the estate's property? If the sale is to pay debts and expenses of the estate, the answer should be "NO" because there are several Texas court opinions clarifying that an heir's interest in specific estate property is subject to divestment if the property must be sold in order to pay the decedent's debts.

Nonetheless, I have had a title company list liens against individual heirs as exceptions on Schedule C of the title commitment in a dependent administration in which we were selling the property to pay debts of the estate. Recall **The Title Company Rule** discussed above. I faxed case authority, wrote impassioned arguments and ultimately ... found another title company. It took longer, but we got that sucker closed. Sometimes you just have to punt.

What if we had simply been selling the property in order to divide the proceeds between heirs? There appears to be a good argument that those liens against individual heirs attach to the property and must be released in order to convey title. Of course, the lien should be satisfied only from that heir's share of the proceeds, but if that share is insufficient to pay it all you can imagine the difficulty in convincing that creditor to give a release based upon partial payment.

Summing It Up

Any time you run across a deal in which an owner of the property has died, stop and make sure the probate issues have been worked out. Taking these matters for granted may cause you and your client both money and headaches.

- **Always ask probate-related questions the minute you learn that an owner has died. You don't necessarily need all the answers to start, but you need to know the danger signs.**
- **When that listing agreement is being signed, ask yourself if you have every signature that will be needed at the closing. Understand that ALL agreements will need court approval if a dependent administration becomes necessary.**

- **Always make sure every earnest money contract is expressly made subject to the approval of the particular probate court. As an example, under Special Provisions put “This sale and all of Seller’s obligations herein are expressly contingent upon approval by the Probate Court No. 1 of Travis County, Texas.”**
- **Always be prepared to have a certified appraisal supporting the sale price. The court will invariably require it in any dependent administration, and even an independent executor should have some proof that an adequate sales price has been obtained. If the buyer’s lender will share their appraisal, it will usually suffice.**
- **If the estate is subject to a dependent administration in the Travis County probate court, always alert the buyer, buyer’s lender, and the title company that funding will be delayed *at least* 5 days after closing in order for the administrator to obtain confirmation of the sale. ONLY UPON THE COURT’S CONFIRMATION OF THE SALE WILL TITLE PASS!**

I hope you find this discussion helpful. If I can answer any questions or be of service to you in the future, don’t hesitate to call.

John Crane