Death
Divorce
&
Bankruptcy

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This outline is a general treatment of the subjects covered and is not intended as legal advice or comprehensive answers to all questions, nuances, etc. that may come up in particular transactions.

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1. **Death**. The death of a friend or family member is always a difficult situation, but the death of that person can have a dramatic effect on the ability of the friends or family members to manage and sell real property owned by the decedent. In order to understand how the real property can me sold, we must first look back to how the decedent took title to the property at the time of purchase.

1.1 Tenants by the Entirety: This tenancy is only available to a married couple, and it comes with a survivorship interest. Title is held jointly by the named spouses and their ownership interest is treated as if the two people are one legal entity. Upon the death of either spouse, the full interest shall pass to the survivor as a matter of law. This means that upon the passing of a spouse, the property automatically vests in the surviving spouse. The surviving spouse can fully manage and sell the property without the need to record anything at the courthouse. The property can be sold at any time after the spouse's death. The surviving spouse need only provide a death certificate to the title company.

1.2 Joint Tenants with Right of Survivorship: This tenancy is similar to tenants by the entirety in that it provides for the property to automatically pass to the surviving joint tenants. There could be more than just two joint tenants. Upon the passing of a joint tenant, the property automatically passes by the survivorship of the deed to the surviving joint tenants. The survivorship stated in the deed takes precedence over any bequest in a will and the transfer to the surviving joint tenants is immediate upon the death of an owner. The surviving joint tenants can fully manage and sell the property without the need to record anything at the courthouse. The property can be sold at any time after the owner's death. The surviving joint tenants need only provide a death certificate to the title company.

1.3 Tenants in Common: The multiple owners hold title to the property together, but they each own a designated share of the property. There is no survivorship aspect to the ownership. Upon the passing of one owner, their ownership interest passes per their will, if they have one. If they do not have a will, then their ownership interest passes per Section 64.2-200 of the Code of Virginia. (Exhibit A) In order to sell the property, the remaining owners must coordinate with the administrator of the decedent's estate. If the decedent died testate (with a will), then the executor named in the will must file the will with the probate office of the circuit court for the county in which the property lies. If the decedent died intestate (without a will), then one of the descendants must apply with the probate office of the circuit court for the county in which the property lies to be appointed as the administrator of the estate. Once an administrator or executor has been appointed by the probate office, that person may begin the process of selling the property. However, if the decedent has not be deceased for at least one year at the time of closing,

then the administrator or executor has three options. 1) Allow the title company to hold the proceeds from the sale until one year has passed. 2) Pay for an indemnity bond. 3) Pay an extra hazardous risk premium on the title insurance.

1.4 Sole Ownership: If the decedent was the only owner of the property listed on the deed or they became a sole owner by surviving other joint tenants, then the process is very similar to a tenant in common who passes away. If the decedent died testate (with a will), then the executor named in the will must file the will with the probate office of the circuit court for the county in which the property lies. If the decedent died intestate (without a will), then one of the descendants must apply with the probate office of the circuit court for the county in which the property lies to be appointed as the administrator of the estate. Once an administrator or executor has been appointed by the probate office, that person may begin the process of selling the property. However, if the decedent has not be deceased for at least one year at the time of closing, then the administrator or executor has three options. 1) Allow the title company to hold the proceeds from the sale until one year has passed. 2) Pay for an indemnity bond. 3) Pay an extra hazardous risk premium on the title insurance.

1.5 Trust Ownership: If the decedent owned the property in a revocable living trust, then upon their death the ownership does not transfer – the property is still owned by the trust. However, the Successor Trustee named in the Trust now takes over the role of managing the Trust and its assets. The Successor Trustee can now sell the property by just providing a copy of the death certificate to show that the original Trustee is deceased.

1.6 Transfer on Death Deed: In 2013 the General Assembly enacted the Uniform Real Property Transfer on Death Act. The Act authorizes the creation of a transfer on death deed, which passes title directly to a named beneficiary without probate upon the transferor's death. The beneficiary is named when the deed is created, but the beneficiary is not a co-owner and does not obtain an rights in the property until the transferor's death.

2. **Divorce**. A divorcing or divorced couple can make a real estate sale very stressful for everyone involved. For purposes of real estate a couple can only be considered either married or divorced. If they are separated, then they are still married. They are not divorced until the court has entered the final divorce decree.

2.1 Creditor Protection: Married couple typically own property as tenants by the entirety. Title is held jointly by the named spouses and their ownership interest is treated as if the

two people are one legal entity. Therefore, a judgment lien recorded at the land records of the circuit court against just one spouse does not attach to the property and does not have to be paid out of the proceeds of closing. However, if the judgment creditor is the IRS, then they get to break through the bonds of matrimony and enforce their judgment. Tenants by the entirety offers wonderful creditor protection to the spouses, but at the moment when the final divorce decree is entered, the tenancy automatically changes from tenants by the entirety to tenant in common, which does not enjoy the same creditor protection. Thus, after the divorce is finalized a judgment against only one spouse attaches to the property and must be paid out of the proceeds at closing.

2.2 Scheduling Closing: Closing can be a very emotional moment, especially for a divorcing or divorced couple. They are often not on speaking terms, and can in some instances be openly hostile to each other. Let the title company know if the sellers do not get along. The sellers can be scheduled to come in to sign their documents at different times, on different days, or in different locations.

2.3 Property Settlement Agreement: If the parties have a property settlement agreement, the title company will need a copy of the agreement in order to see how the parties agree to split the proceeds. The most difficult part of a closing with a divorce is often getting the parties to agree to the how the proceeds should be divided, even when there is a property settlement agreement. The parties need to determine how the proceeds are to be divided prior to settlement. If the parties cannot decide on how the proceeds are to be divided, then they need to decide where the proceeds should be held. Typically, one the divorce attorneys can hold the funds.

3. **Bankruptcy**. A seller who has filed for bankruptcy protection is very limited in his ability to manage and sell the property.

3.1 Automatic Stay: Immediately upon filing for bankruptcy an automatic stay is put into place by the bankruptcy court to protect the debtor from their creditors. This is wonderful protection for the debtor, and it can help them obtain relief from the constant barrage of creditor mail and phone calls. However, once in bankruptcy, the debtor is also very limited in their ability to manage and sell assets, including their home.

3.2 Selling While in Bankruptcy: There are three ways in which a debtor in bankruptcy can sell their home. First, they could obtain a discharge from bankruptcy. This means that they have completed the bankruptcy process, and the bankruptcy court has closed their case. At that point, they are no long under the restrictions of the bankruptcy court, and

they can sell their property without needing to ask permission. Second, they could ask the bankruptcy trustee to abandon the property and move it outside of the bankruptcy. Once the property is no longer a part of the bankruptcy, the debtor can sell the property without needing to have the sale terms approved. One word of caution: When the property is abandoned by the trustee and is outside of the bankruptcy, it is once again subject to creditors, and the bank could start the foreclosure process again if the debtors are behind on payments. Third, they could file a motion requesting that the bankruptcy court approve their sale of the property. Under this option, the seller would list the property and ratify a contract subject to third party approval. Settlement date will need to take into account the length of time to get the motion heard by the bankruptcy court and for the appeal time frame to have expired.

3.3 Bankruptcy, Foreclosure, and Short Sale: Clients often see these three options as almost interchangeable, and they will often ask their agent which of these options they should choose. Be careful in advising clients regarding these three options. Each of them has its own benefits and its own pitfalls. Encourage your clients to speak with an attorney if they are considering bankruptcy, foreclosure, or short sale.

4. **Conclusion**.

Death, divorce, and bankruptcy each have their own pitfalls that can derail your transaction. The best way to avoid problems with listings involving one of these scenarios is to get the sellers to talk to an attorney prior to selling their home and letting the title company know as soon as possible.

Exhibit A

§ 64.2-200. Course of descents generally; right of Commonwealth if no other heir

A. The real estate of any decedent not effectively disposed of by will descends and passes by intestate succession in the following course:

1. To the surviving spouse of the decedent, unless the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case, two-thirds of the estate descends and passes to the decedent's children and their descendants, and one-third of the estate descends and passes to the surviving spouse.

2. If there is no surviving spouse, then the estate descends and passes to the decedent's children and their descendants.

3. If there is none of the foregoing, then to the decedent's parents, or to the surviving parent.

4. If there is none of the foregoing, then to the decedent's brothers and sisters, and their descendants.

5. If there is none of the foregoing, then one-half of the estate descends and passes to the paternal kindred and one-half descends and passes to the maternal kindred of the decedent in the following course:

a. To the decedent's grandparents, or to the surviving grandparent.

b. If there is none of the foregoing, then to the decedent's uncles and aunts, and their descendants.

c. If there is none of the foregoing, then to the decedent's great-grandparents.

d. If there is none of the foregoing, then to the brothers and sisters of the decedent's grandparents, and their descendants.

e. And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

B. If there are either no surviving paternal kindred or no surviving maternal kindred, the whole estate descends and passes to the paternal or maternal kindred who survive the decedent. If there are neither maternal nor paternal kindred, the whole estate descends and passes to the kindred of the decedent's most recent spouse, if any, provided that the decedent and the spouse were married at the time of the spouse's death, as if such spouse had died intestate and entitled to the estate.

C. If there is no other heir of a decedent's real estate, such real estate is subject to escheat to the Commonwealth in accordance with Chapter 10 (§ 55-168 et seq.) of Title 55.

Questions?

Contact Me!

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