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OUR MISSION

Empowering Our Members for Success and Enhancing the Quality of Life in Our Communities

A Guide to Estate-Owned Property

As our population ages, REALTORS® face more issues relating to the sale of estate-owned property and sellers either dying during the listing term or while the property is under contract. In question and answer format, this article addresses the most common questions REALTORS® ask in this area.

{1} **What is Probate?** Probate is the formal court process for administering a deceased person's estate, whether they died with or without a will. An estate must go through probate if an individual died owning property in their individual name without a joint owner or a beneficiary designation where title to the property automatically transfers upon their death. If a person dies without a will, they are said to have died "intestate." Dying with a will means they died "testate." Unfortunately, as discussed later in this article, probate is not always initiated in a timely fashion, if at all.

Most wills name an "executor" to oversee the payment of debts and distribution of assets. Nevertheless, the probate court must still formally approve the person appointed to be executor. The probate court issues "Letters Testamentary" to allow the executor to perform its duties. If no executor is named or if the executor refuses to serve, the probate laws provide for the appointment of someone to act on behalf of the estate to handle its disposition. When a person dies without a will, the executor is called an administrator. Administrators are issued "Letters of Administration" by the probate court to allow them to handle estate matters. No matter whether it's an executor or administrator, the process of probating an estate typically lasts between six to twelve months, assuming that there are no disputes or challenges. If there are challenges or will contests, the process can take years.

{2} **Can the heirs hire a real estate broker to market the property before an executor or administrator is officially appointed?** Unfortunately, until an estate is probated and an executor or administrator is appointed, no one has the legal authority to act on behalf of an estate or its assets, including real property. While heirs can interview potential real estate bro-

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kers, they cannot legally be hired until the probate court issues Letters Testamentary to the executor or Letters of Administration to the administrator.

{3} **If two people are on title, does the real property need to go through probate?** If a property is owned by two or more joint tenants with a right of survivorship, and one owner dies, the property automatically transfers to the surviving owner(s) and does not become part of the deceased person's estate. The surviving owner can then fully and immediately act as the sole owner of the property. Many married couples own real property as joint tenants with a right of survivorship. If parties own a property as tenants in common, and one of the owners dies, the deceased person's interest in the property becomes part of their estate and must go through probate. Couples already owning a property as tenants in common who want to revise their deeds to give the other owner a right of survivorship can do so, but it requires the preparation of new deeds that clearly specify that ownership is now held as joint tenants with a right of survivorship.

{4} **Are there other ways to transfer ownership of property without going through probate?** Georgia recognizes transfer on death deeds to allow the property owner to name a beneficiary to inherit the property upon the owner's death. This type of deed, sometimes called a "Lady Bird Deed," must be recorded in the land records of the county where the property is located and does not require probate to transfer title to the beneficiary. A Georgia statute passed in 2024 sets out the requirements for creating a death deed. There are technical issues with the law that should be carefully considered before choosing to use a death deed. As a result, most title insurance companies will not insure property conveyed by a death deed until at least four years have passed since the owner died. This timeframe alone makes their use less than desirable.

A better way to bypass probate without adding someone as a joint right of survivorship owner is through a living trust. If the deceased has placed the home in a living trust, the property can simply be transferred or sold by the trustee according to the trust terms. Typically, a home being in a trust will not prevent the sale of a property, but some extra steps may be needed to close the sale of the property. In any case, trust property can generally be conveyed much faster than property going through the probate court.

In some cases, if there are only a few heirs and no

If the deceased has placed the home in a living trust, the property can simply be transferred or sold by the trustee according to the trust terms.

disputes, title insurance companies will also permit heirs to sell property out of an estate that has not gone through probate if the decedent passed away more than three years prior to the sale, two people (at least one of whom is a disinterested party) sign affidavits of descent naming all the heirs, and all of the named heirs sign deeds to transfer title out of the estate. Closing attorneys are usually able to evaluate the circumstances related to the transaction to determine if this sort of process is a viable option in lieu of probate.

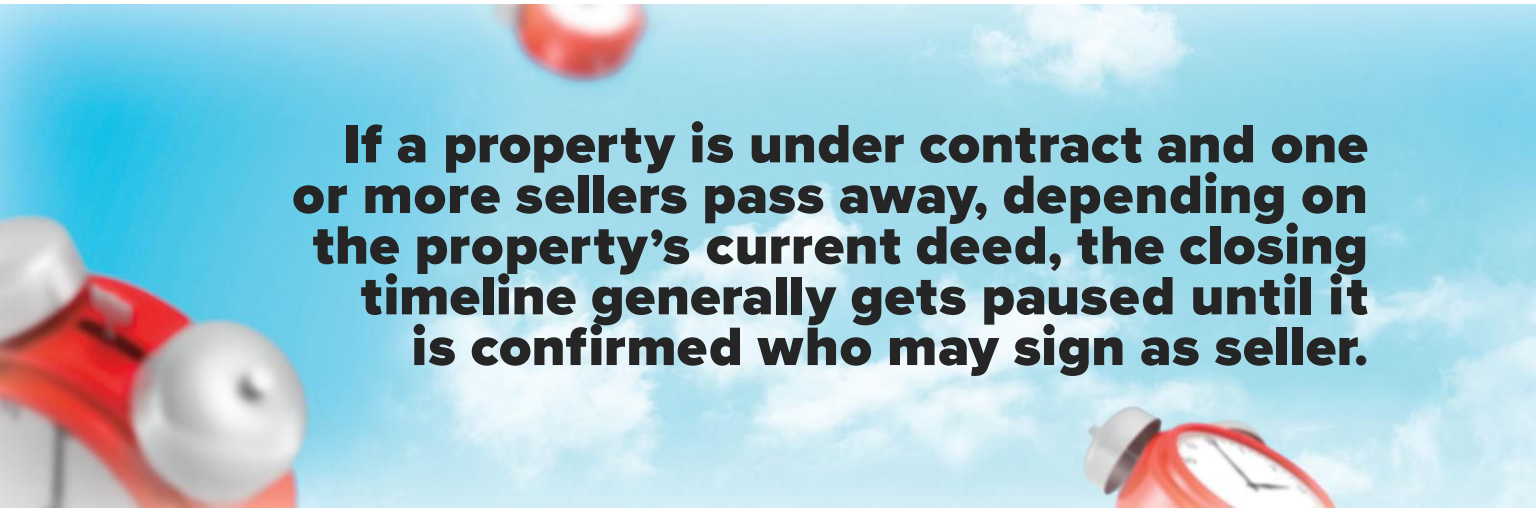
{5} **Can an executor or administrator sell the deceased person's real property?** The rules are different for executors and administrators, and there are many nuances for when and how the probate court grants an estate representative the power to sell real property. In general, the court documents explain what power an executor or administrator has and whether there are any limitations on their right to sell. Obtaining the requirements the court has imposed on an executor or administrator to sell real property prior to listing is key to preventing unforeseen legal hurdles.

{6} **How does the executor know who gets a deceased person's property if there is a will?** Some wills direct that the deceased person's real property must be sold. Other wills give the executor the option to sell it, giving the family the right of first refusal at fair market value. Sometimes, wills leave property to a particular person. A closing attorney will typically review the will to confirm that the conveyance to a new buyer is allowed and is not overriding a specific gift of the property to a particular person.

{7} **How does the administrator know who gets a deceased person's property if there is no will?** Georgia statutes direct how a person's estate must be distributed if there is no will. For example, if the deceased had a spouse and one child, they would each receive 50 percent of the estate. If there are multiple children, then the surviving spouse would receive one-third of the estate and the children would receive the remainder of the estate in equal shares. Parents only inherit if there is no surviving spouse, children, or grandchildren.

Georgia is one of the few states that still recognizes Year's Support, which is a probate proceeding that allows a surviving spouse or minor child to claim assets from an estate outside of a full administration. Despite the name, any property awarded becomes theirs permanently, not just for a year. Unlike standard probate, Year's Support does not involve appointing an executor or administrator. Instead, it is a petition-based request that can include money, personal property, vehicles, or real estate, including the family home. If the petition goes unopposed by heirs or creditors, the court typically grants it in full. When real estate is included, a full legal description must be provided, and if granted, the court's final order is recorded in the county deed records, vesting fee simple ownership in the recipient.

To be eligible, the petition must be filed within two years of the decedent's death, and only a surviving spouse or minor child may file. If the spouse remarries before the order is finalized, the right to claim Year's Support is lost. Importantly, this type of award supersedes most unsecured estate debts, like a lien, but it does not eliminate mortgages or other secured liens. Because the final order is recorded like a deed,



If a property is under contract and one or more sellers pass away, depending on the property's current deed, the closing timeline generally gets paused until it is confirmed who may sign as seller.

Year's Support offers a practical workaround for clearing title, especially when full estate administration isn't ideal. That said, depending on the facts, it is not always the fastest option to closing.

{8} **Do seller brokerage engagement agreements survive the death of the seller?** A seller brokerage engagement agreement is generally thought of as a personal services contract and, as a general rule, does not survive the death of the seller. More importantly, if the seller dies, there is normally some period of time where no one can sell the property. Therefore, even if a brokerage engagement is binding on a seller's heirs, as is the case with the GAR brokerage engagements, there will be a period of time during which no one has yet been appointed to act on behalf of the deceased to enforce the agreement. If a property is under contract and one or more sellers pass away, depending

on the property's current deed, the closing timeline generally gets paused until it is confirmed who may sign as seller. Sometimes, a closing may be delayed for many months if the probate court has to appoint someone to sign on behalf of the deceased person's estate.

{9} **Is the GAR Purchase and Sale Agreement binding on heirs?** If a buyer or seller dies while the property is under contract, the GAR Purchase and Sale Agreement specifically provides as follows:

> **"… this Agreement … shall be binding upon the parties and their successors, heirs and permitted assigns …"**

However, even though it is binding on heirs, as a practical matter, it may be difficult for the buyer or seller to timely fulfill their obligations under the contract because until an executor or administrator is appointed, there is no one who can legally act on behalf of the deceased. This delay can often be frustrating for buyers and brokers involved in the transaction because there is no one who can even sign an extension to a contract to allow for performance by the parties to be delayed. If probate is required, it should be promptly initiated to minimize delays.

{10} **If the heirs sell the property, do they have to pay a lot of taxes?** Heirs of a property who decide to sell it benefit from a provision in the tax code that gives them what is known as a stepped up basis in the property. This benefit means that the heirs' basis in the property is the market value of the property at the time of the owner's death rather than the value of the property at the time the decedent purchased the property. For example, let's say that a property owner bought a property in 2015 for $500,000. The owner dies and the property is now worth $1,000,000. If the heirs now sell the property for $1,000,000, they will not pay capital gains tax because their basis in the property is now the stepped up value of $1,000,000. This benefit does not apply if the owner added the heir to the title to the property because the heir's ownership now dates back to the original purchase date. From a tax perspective, its better to inherit the property rather than be added as an owner on the deed.

{11} **What is "heirs property" in Georgia?** Unfortunately, some property in Georgia has been passed onto heirs over time without anyone updating the deed. Regardless of whether an owner had a will, if the property met the earlier-discussed conditions for when probate is required, it should go through probate. Failure to do so often leads to what is known as "heir's property." In many cases, heirs property is created because family members were living on the property when an owner or co-owner died, and they simply continued to live on the property, believing it was theirs. In other cases, the owner may have written down who gets the property, but the will was not probated, or the writing was not actually a valid will. As you might imagine, when these types of informal transfers occur within families over multiple generations, the legal title to the property becomes very unclear and clouded. As a family tree expands, more people are

required to authorize property-related transactions. Sadly, the large number of people with claims to title has sometimes resulted in the heirs losing property that they truly owned because they could not prove ownership or could not agree on who pays property taxes. In rural areas, successive generations of farming families often occupied land without any formal transfer of the legal title to the property. In Georgia, during segregation, the probate laws particularly affected Black families who may have been reluctant to have any interactions with governmental officials.

{12} **How do you clear title with "heirs property"?** While a family may seek deeds from all possible heirs to resolve ownership issues, this approach often does not solve the problem because one or more heirs never agree to sign a deed. In those situations, or where all of the heirs may not be known, a quiet tile action is normally filed by an heir or heirs in the superior court of the county in which the property is located to legally resolve who owns the property. The superior court judge then appoints a special master to identify all heirs, gather essential documents like birth, marriage and death certificates, serve all potential claimants with notice of the quiet title proceedings, and ultimately make a recommendation to the court on who are the rightful property owner(s). In most cases, the quiet title action is brought against everyone known or unknown who might have a potential interest in or claim to the property in question. Heirs must hire an attorney to bring a quiet title action and, unfortunately, the process can be expensive and time consuming. REALTORS® can, on occasion, play a limited role in the process, however, by helping collect vital documents or creating a family tree of the people who may have an interest in the property.

{13} **Can an heir who is occupying the property use adverse possession to avoid bringing a quiet title action?** In theory, an heir can try to acquire title in a property with a clouded title through adverse possession, but this process is extremely difficult. The heir would need to show continued, public, peaceable, exclusive and uninterrupted occupancy of the property for more than 20 years. The occupancy must be accompanied by a claim of right to the property such as the erection of valuable improvements on the property. If the occupant has what is known as "color of title" where the occupant has some sort of legal documentation to support their right to occupy the property, the time period to establish a right by adverse possession is seven years. Because the legal standard for establishing ownership of property through adverse possession is so difficult to prove, bringing a quiet title action is almost always the better way to establish ownership of a property.

{14} **What options do heirs have when there are multiple heirs and they cannot decide on what to do with the property?** In many cases, multiple heirs quickly reach a consensus to sell the property. In such instances, all of the heirs sign the deed to convey their interest in the property. If the heirs cannot agree on what to do with the property, one or more of them can bring an action to partition the property. With partition actions, an heir may request that the court physically divide the property between the different heirs or sell the property so that the proceeds can be distributed to the heirs.

In theory, an heir can try to acquire title in a property with a clouded title through adverse possession, but this process is extremely difficult.

CONCLUSION

Most of the challenges with estates and real property would be resolved if owners simply took the time to consider what happens to their property when they pass away and what legal documents are necessary. While there are legal procedures available to resolve clouded titles, they are almost always far more expensive and time-consuming than the cost of estate planning. REALTORS® can make a huge difference in this area by simply encouraging buyers to meet with a qualified estate attorney to prepare a will and consider other estate planning tools. For most people, a home is their largest asset. Protecting what happens to it if the owner dies is well worth the time and expenses. Proper planning also makes selling the property easier and more efficient down the road.