

Decedent Estates – The Basics

In Virginia, when a person who is a record owner of real estate passes away, “the estate” is *never* the owner of real estate.

If the identity of the living owner is not clear, then, in the commitment, the owner can be listed as “(TBD), heirs or devisees of (name of record owner)” until we determine who inherited the real estate.

To determine who owns the real estate depends, ask the following four questions:

1. Did the deed provide for survivorship?
2. Is a Transfer on Death deed recorded?
3. Did the decedent have a Will? Has it been probated?
4. Did the decedent die without a Will? If so, has a list of heirs or real estate affidavit been recorded?

Also ask 5. Does the *surviving* spouse have a right to an elective share and possession of the family residence?

I. Did the deed provide for survivorship?

A deed can use specific terminology to designate survivorship. There are two ways to specify survivorship:

First, when a married couple takes title as **tenants by the entirety**, survivorship is presumed. To be valid, the couple must actually be married to each other at the time the property is conveyed to them and, in addition to being married, the couple must take title in the same deed and have equal interests for tenants by the entirety to apply. Property that passes to the surviving spouse due to tenants by the entirety status is not part of the probate estate. Tenancy by the entirety is terminated upon death, divorce, or agreement of the owners, i.e., both husband and wife sign a deed terminating the tenancy. Upon divorce, at the moment the judge signs the divorce decree, the tenancy automatically becomes tenants in common.

Second, any number of people can take title as **joint tenants**, as long as each owner owns the real estate in equal shares, in the same deed or will and as long as the deed states title is taken as “joint tenants with right of survivorship at common law.” [See](#) Va. Code § 55.1-134 When one owner dies the survivors own the decedent’s interest in equal shares. Property that passes due to joint tenant status is not part of the probate estate. When one joint tenant sells his interest, files bankruptcy, or pledges his share as collateral for a loan, the joint tenancy is broken as to his interest, and he now owns as a tenant in common with the others who remain joint tenants as to each other.

Tenants in common, the default form of ownership, takes no special language in the deed. Ownership upon death of a tenant in common, or of a single owner, is determined through the terms of the will, or if there is no will, through the intestate rules outlined in the Virginia Code. Any number of people or entities can be co-owners, in any percentage interest, in any number of deeds, i.e., they do not all have to take title in the same deed.

II. Is a Transfer on Death deed recorded?

Pursuant to Va. Code [§ 64.2-624](#), an individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed. The transfer becomes effective upon the death of the grantor, and the interest passes outside of the decedent's probate estate. However, the value of the real estate can be included in the taxable estate. In addition to sole owners, an individual joint tenant, or a tenant in common may transfer his interest by means of a transfer on death deed. But tenants by the entirety cannot transfer their interest unless the transfer on death deed is signed by both spouses.

III. Did the decedent have a will? Has it been probated?

A person may designate in his will who shall inherit his real estate. Transfer of ownership is effective at the time of death. Ownership is said to "drop like a rock" to the new owner(s). To make the new owner(s) a matter of public record, the will needs to be probated. The will is presented to the Clerk's office with an original death certificate and list of heirs. No deed is required. Real estate in Virginia passes by deed, by will, by intestate succession and rarely by court order.

Whether the beneficiary or the executor (administrator/personal representative) takes title to the real estate depends on how the will is written.

A testator can:

- a) leave the real estate directly to a beneficiary, or
- b) *direct* that the executor sells the property and divide the money, or
- c) give the executor the *discretion* to sell the real estate if the executor thinks that is best.

Frequently wills give the executor or administrator general fiduciary powers under Va. Code [§64.2-105](#), which includes the power to contract for the sale of real estate, and to sign all documents needed to convey the property.

An Executor named in a will has no powers at all until he qualifies as executor in the probate office of the circuit court where the decedent lived at the time of death or where the real estate is located.

Judgments of the beneficiaries do not attach if the will directs the real estate be sold, or if the sale is necessary to pay the debts of the estate. Otherwise, judgments of a beneficiary will attach to the real estate and must be released of record.

IV. Did the decedent die without a will? If so, has a list of heirs or real estate affidavit been recorded?

If a decedent does not have a will, the Code of Virginia designates who inherits. [Va. Code §64.2-200](#). A real estate affidavit ([Va. Code §64.2-510](#)) or list of heirs should be recorded to provide the proper chain of title. [Va. Code §64.2-509](#) The form includes the names, ages, addresses and degree of kinship of the heir to the decedent. Lists of heirs are notoriously inaccurate but are often the best information we have available. We may require affidavits of family relationships. Seldom is a copy of a death certificate necessary.

Frequently the tax records have been changed to a person other than the record owner, which alerts title examiners to the fact that we may have an estate issue. Often, they say "the estate of (name)" even though the estate cannot be the owner.

From time to time the laws are amended as to who inherits if there is no will, to reflect what most people are doing in the wills they have attorneys draft. [See "Virginia Decedent Chart" outlining [Va. Code §64.2-200](#)]

V. Rights of a Surviving Spouse

When (a) a surviving spouse inherits under the intestate statute and there are children of the decedent that are not children of the surviving spouse; or (b) the surviving spouse decides to take an elective share of the decedent's augmented estate, i.e., the surviving spouse does not think he/she was fairly provided for in the will, the surviving spouse has a right to reside in the family residence owned by the decedent until matters are resolved. [Va. Code § [64.2-308.16](#)] In these cases we typically require the surviving spouse to also sign the deed.

VI. Creditors of the Decedent

Creditors of an estate have one year after the *date of death* to make a claim against the estate, to be able to collect from the assets of the estate. Subject to the exact language of a will which can change the standard rules, the executor may need to use personal property, both intangible and tangible, to pay debts of the decedent, prior to selling real estate. Most professionally drafted wills incorporate the fiduciary powers of Va. Code § [64.2-105](#), allowing the executor the power to choose to sell the real estate if that is needed to administer the estate. The power of creditors to collect debts from the real estate owned by the decedent at the time of death is the reason Old Republic Title requires one of the following:

- a) Full proceeds from the sale to be held in escrow until a year after date of death has passed, and title has been updated; or
- b) Extra hazardous risk premium of \$2.00 per thousand, with \$250.00 minimum, paid totally to Old Republic Title for accepting the risk, along with an Indemnity Agreement signed by whomever receives the proceeds. In the Indemnity Agreement the persons receiving the proceeds agree to repay them, along with all expenses paid by Old Republic, if creditor(s)'s demands require the funds to pay debts.

Real estate passes free and clear to a *bona fide purchaser* after one year has passed from the date of the decedent's death.

VII. Estate Taxes

Federal Estate taxes are a lien on a decedent's real estate for a period of 10 years after date of death. [USCA §26-6324] Federal estate taxes are applicable to about 2% of the population. The value of assets that can be passed free of estate tax is found online at <https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax>

Virginia estate taxes are also a lien on a decedent's real estate for a period of 10 years after date of death after a memorandum is filed in the Clerk's office. [Va. Code §[58.1-908](#)] The exempt amount in Virginia mirror the federal exemption amounts.

VIII. Contract signed prior to death

When the owner of real estate signs a contract to sell real property, then dies before settlement, the real estate is treated as personal property rather than real estate. The personal representative of the estate may sign the documents necessary to convey title. A copy of the contract must be attached to the deed as an exhibit. [Va. Code § [64.2-523](#)]

IX. Ancillary proceedings (Where is the will? The real estate is in Virginia?)

Often a person dies a resident of another state, owning property in Virginia. Once a will is probated in another state, an authenticated copy along with a certificate of probate may be submitted to the locality in Virginia where real estate is owned, to show transfer of title. The Administrator/Executor/ Personal Representative who has authority to sell real estate in the state where the will is probated may also sell real estate in Virginia once the will is recorded here.

Within Virginia, when real estate is owned in localities other than the one in which the decedent resides at the time of death, a certified copy shall be recorded in each locality where real estate is located.

X. Disclaimers

Beneficiaries under a will or through intestate succession, have the option of refusing to take the property left to them. To disclaim, a beneficiary must file in the Clerk’s office a written statement of disclaimer within 9 months of date of death. The disclaimer has the effect of treating the person who disclaimed being treated as if he or she predeceased the decedent. [Va. Code [§ 64.2-2600](#) et. seq.]

Sample language for Schedule A, B-1 and B-2 attached. Virginia Decedent Chart attached (intestate succession).

Title Insurance Underwriting: Testate Succession in Virginia Schedule A:

Title to fee simple estate or interest in land is vested in:

“(Name the executor, if qualified with the court), Executor of the Estate of (name of decedent)” or “(Name of devisees), devisees of (name of the decedent)”

If not known name, the last record owner. Do NOT say “the estate of xxx.”

Estates do not own title, Executors or Personal Representatives do.

Schedule B-1 requirements:

Probate of the will of **XX** in **xx** County/City Circuit Court Clerk’s Office.

The property to be insured is subject to the following exceptions to coverage due to the death of **XX** on **xx**:

- a) possible debts of decedent, or against decedent’s estate;
- b) possible federal and state estate taxes;
- c) possible appeal from the order admitting to probate the last will and testament of the decedent;
- d) possible suit to impeach the will;
- e) possible discovery and probate of a later will.

The net sale proceeds must be escrowed pursuant to the terms of the Old Republic Estate Indemnity Agreement; or the owner/seller may pay an extra hazardous risk premium of \$2.00 per \$1,000 of coverage (sales price or loan amount) with a minimum charge of \$250 paid all to Old Republic. The parties receiving funds or putting funds in escrow must execute the Old Republic Estate Indemnity Agreement.

Evidence of payment of federal and state estate taxes, if any, due for the estate of **XX**, or evidence satisfactory to the Company that no estate taxes are/were due.

Other requirements may be made, depending on what title search shows.

Schedule B-2 Exceptions:

If requirements are met there should be no special exceptions due to death of prior owner.

Title Insurance Underwriting: **Intestate Succession in Virginia**

Schedule A:

4. Title to fee simple estate or interest in land is vested in:

“(Name the heirs at law, if known) heirs of (name of decedent)”

If not known, name the last record owner.

Do NOT say “the estate of xxx.” Estates do not own title, the heirs or personal representatives do.

Schedule B-1 requirements:

Record list of heirs for **XX** in **xx** County/City Circuit Court Clerk’s Office.

The property to be insured is subject to the following exceptions to coverage due to the death of **XX** on **xx**:

- a) possible debts of decedent, or against decedent’s estate;
- b) possible federal and state estate taxes;
- c) possible discovery and probate of a last will and testament.

The net sale proceeds must be escrowed pursuant to the terms of the Old Republic Estate Indemnity Agreement; or the owner/seller may pay an extra hazardous risk premium of \$2.00 per \$1,000 of coverage (sales price or loan amount) with a minimum charge of \$250 paid all to Old Republic. The parties receiving funds or putting funds in escrow must execute the Old Republic Estate Indemnity Agreement.

Evidence of payment of federal and state estate taxes, if any, due for the estate of **XX**, or evidence satisfactory to the Company that no estate taxes are/were due.

Proof, satisfactory to the Company, showing heirs of **XX**, is required to be established by affidavit of family relationship from two persons.

Other requirements may be made, depending on what title search shows.

Schedule B-2 Exceptions:

If requirements are met there should be no special exceptions due to death of prior owner.