

## **Estate Questions 2: Electric Boogaloo**

Hello, Readers. I'm back again on my favorite topic: Estates. If you're getting tired of reading my essays on estate underwriting issues, I do apologize, and I'll point out that The Beacon is always open to suggestions for any topic you'd like me to opine on. I keep coming back to this particular genre because estates are, by far and away, the topic I get the most questions about.

Today, I want to discuss situations where an estate seller is asking for only the Executor/Personal Representative to sign the outgoing deed. I've had this question pop up at least a half dozen times in the past couple of months, and it's not as straightforward as it would seem. There are competing opinions from attorneys on the matter, and as is often the case, our underwriting requirements may differ from the bare minimum requirements of statutory or case law.

Generally, legal title to a decedent's property vests in their heirs or devisees immediately upon death. However, as I have discussed in a previous article ("Probate? Never Heard of Her", May 2025), the interests of the heirs/devisees is subject to divestment by the Personal Representative. N.C.G.S. § 28A-15-1(c) grants the PR of the estate the broad authority to take property that would otherwise be vested in the heirs and sell it if the PR deems it necessary to satisfy claims or other debts of the estate.

This is why our typical requirement with an open estate is for the PR to sign the deed (to waive this right) as well as the heirs/devisees and their spouses. §28A-15-1(c) requires that the PR institute a special proceeding before the Clerk in order to be granted the authority to divest the heirs/devisees unless the sale is "...made pursuant to authority given by will. A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding..." So basically, the PR's ability to sell without a court order depends on the language of the will.

That leads us to the enticing question of exactly what language in the will is sufficient. There is broad agreement on the fact that if the will directly conveys the property to the PR, the PR has the power to sell the property. However, when the property is conveyed to heirs, we get into a matter of interpretation – this is where attorney opinions differ. Recall that §28A-51-1 allows the PR to sell real property otherwise devised to the heirs if "...such selection is in the best interest of the estate." Some attorneys (and title insurers) believe this grants broad authority for the PR to sell property for any reason the PR deems fit without the ability of the court to second-guess that decision. I beg to differ, and there is some case law to back that.

The court in the case of *Montgomery v. Hinton*, 45 N.C. App 271, 262 S.E.2d 697 (1980) declined to grant such broad authority to the PR in all situations. In that case, the will devised all

the decedent's property to his minor child and granted the decedent's brother guardianship over the minor child. There was general language granting broad authority to the PR and referencing the relevant statutes. The PR chose to sell the property, but the court enjoined him from doing so, stating that to allow the sale "would be to grant to all executors unbridled discretion to dispose of devised real estate without showing any reason or necessity therefor and without the knowledge of the devisee."

So, if the PR's discretion is not unlimited, then what language would be sufficient? Again, this differs between attorneys and title insurers, but I will insure a deed where only the PR has signed under the following circumstances:

- 1) Will conveys property to the PR/Executor with a specific provision permitting the PR/Executor to sell the property;
- 2) Will conveys property to the PR/Executor making reference to the provisions of NCGS 32-36;
- 3) Will conveys property to the heirs/devisees, but explicitly grants the PR/Executor the power to sell the property without a court order and the PR/Executor has determined it is in the best interests of the estate to convey;
- 4) Will does not convey the property to the PR/Executor or the heirs/devisees but affirmatively states that the PR must/shall (vs. may or can) sell the property and distribute only the proceeds to the heirs/devisees.

For Item 3) above, I recently found the following provision in a will sent to me by an attorney in the Triad area, which I thought was nearly perfectly drafted:

The personal representative shall be authorized in the personal representative's discretion, to take possession, custody, or control of any real or personal property in my estate, to use any real or personal property not specifically devised or bequeathed to satisfy any devise or bequest under this Will which may be satisfied in kind, and/or to sell, rent, release, trade, transfer, convey, encumber, mortgage or otherwise to deal with any real or personal property in my estate, all without the necessity of prior court approval or notification to any beneficiary. If the personal representative determines in the personal representative's discretion that taking possession, custody or control of or otherwise dealing with any real or personal property in the estate in any manner is unnecessary or undesirable, then such decision shall be conclusive and binding upon all persons interested in the estate.

As always, I welcome your comments, questions and suggestions for future articles.

/s BSS