

The Beacon Article 5.8.2025: Probate? Never Heard of Her

I'm sure this one is going to be a familiar situation to many of you: the client comes to you to purchase a property, purportedly sold by the heirs of someone who died long ago. After the title search, you find out that Granny died 20 years ago with no will, and her estate was never probated. Grandpa predeceased her by 10+ years. Her children or grandchildren have owned and/or occupied the property since then. Of course, no one has the money or time to hire an attorney and open an estate for probate, and the seller's agent is all over you to get this closed quickly in 30 days because the heirs need the money. How can you get this insured?

First and foremost, who would legally hold title to the property in this situation and have the ability to sell? Per N.C.G.S. § 28A-15-2(b), title to the Decedent's real property vests in the intestate heirs immediately upon death. If no valid Will is found and submitted for probate, this will remain the case. However, if a Will can be found and probated, then there is the potential to divest title from the intestate heirs and vest title in the devisees of the Will, if the two are different. Per N.C.G.S. § 28A-2A-1 and § 28A-2A-2, a Will can be submitted for probate at any time by an Executor named in the Will. After 60 days from the date of death of the Decedent, any beneficiary named in the Will may also submit for probate, provided they give 10 days written notice to the Executor.

That doesn't sound great – are we just supposed to sit around and hope that a Will is never probated and divest title from the folks who sold it? That would both seem unfair and make sales out of the estate unnecessarily treacherous. Fortunately, the story doesn't end there. Per N.C.G.S. § 31-39(b) and N.C.G.S. § 28A-17-12(b), after 2 years from the date of death of the Decedent, the intestate heirs may convey the property to an innocent purchaser for value free and clear from lien creditors of the Decedent's estate. This conveyance will not be affected by the subsequent probate or registration of a Will. That puts a reasonable time limit on the potential for divesting of title from the intestate heirs under § 28A-2A-1 and § 28A-2A-2. After two years from the date of death, if no estate has been opened and no Will has been submitted, the legal heirs can convey the property without the joinder of the Executor/Personal Representative and no creditors of the Decedent's estate or later registration of a Will can overturn that absent fraud or if the purchaser was not an innocent purchaser for value in an arm's length transaction.

So, if we are more than 2 years from the date of death of Granny, all we need to do is have the heirs and any spouses sign the deed and your buyer can, depending on the underwriter, likely get insurable title. If you are less than 2 years from the date of death, I'm afraid that in almost all cases, the opening of an estate will be required.

A few suggested steps for the practicing attorneys out there to help convince your title company that you've done everything you can to get this in an insurable state:

- 1) Get proof of death. In an ideal world, that would be the death certificate for the Decedent. If they did not die in the county or state where the property is located, it would help to put the onus on the heirs to provide this documentation. If the death was a long time ago and/or we just can't get the Death Certificate, as a last resort, check websites like www.findagrave.com to see if you can turn up some proof of death. This isn't just for your title company – it's to protect you as the attorney from an attempt to fraudulently sell an elderly person's property when that person may not actually be deceased. Simple proof of death should be a minimum requirement that even the most desperate seller's agent can't argue with (too much...);
- 2) Check for a Will. The last thing you want to happen is for someone to come in and register a Will right before you go to record the deed. If the Decedent passed in another County or State, it may be worth your time to get those records examined for an Estate filing or Will, just as a backup. Again, the intent here is to avoid fraudulent sales.
- 3) Ascertain the proper intestate heirs. Typically, this is going to come in the form of two Intestate Heir Affidavits from disinterested parties – that means someone who does not stand to inherit or their spouse. Family friends, other members of Granny's church, Grandpa's fishing buddy, etc. These affidavits should be notarized and in a form for recording.
- 4) The Deed. Once we have identified the heirs and had all of them sign the deed along with their spouses, it's always helpful to future abstractors and title companies to put as much on record as possible in the Deed. A simple statement in the deed along the lines of "Granny died intestate a resident of Mecklenburg County on May 7, 2005. Per the attached Affidavits, the Grantors herein are the legal heirs of Granny's estate and make this conveyance pursuant to N.C.G.S. § 28A-15-2(b), § 28A-17-12(b) and § 31-39(b)." I think it's always a good idea to attach the Affidavits of Heirship and the Death Certificate (if the RoD will record it in the form you are able to obtain) to the Deed as well.

As always, this is not a guarantee that any title company (including Harbor City) will insure under these circumstances. In special situations like these we examine the facts on a case-by-case basis to understand any unique risks and make underwriting decisions and requirements accordingly. However, I hope that the discussion of the relevant law and possible steps above will give you a good chance of getting a situation like this insured and making that difficult Seller's agent happy.