

Real Estate of Deceased Persons How it Transfers/How it is Taxed

By: Bernard H. Campbell, Esquire
State Counsel to NHTCA
BEAUMONT & CAMPBELL, PROF. ASS'N.
One Stiles Road, Suite 107, Salem, NH 03079
Tel: 603-898-2635 Fax: 603-894-6678
Email: bcampbell@beaumontandcampbell.com

An outline prepared for the New Hampshire Tax Collector's Association Annual Conference, September 23, 2016.

*"...but in this world nothing can be said to be certain, except **death and taxes.**"*

Benjamin Franklin.

This outline attempts to address both of these "certain events" and how they relate to each other.

I. Real Estate "Owned" by the Decedent

Any discussion must first make clear what we are talking about. When someone passes away, whether they have a probate estate is a function of what they owned, in their own name, at time of death.

- Real estate held as a "joint tenant" passes to the surviving joint tenant(s)
- Real Estate held by Trustees of a Trust ("in trust") is not owned by the deceased
- Real Estate which was held under a "life estate" vests in the remaindermen.

In all of these cases, the ownership passes "automatically, by operation of law, to another party who becomes the owner thereof and should be assessed the taxes. [NOTE: We discussed the issue of "Trust" real estate last fall.]

Real estate that is individually owned can be:

- Real estate where the decedent was the sole owner
- Real estate where the decedent holds an interest as a "tenant in common" with one or more people

Our focus is on this individually owned real estate.

II. Testate vs. Intestate

When someone dies, and they do not have a Last Will and Testament (or one is never found or brought forward for probate), they are deemed to have died "Intestate". If a person dies leaving a Will, they are deemed to have died "Testate". Under New Hampshire law, when a person who left a Will (called a Testator) dies, the person in possession of any Will must deliver it to the named Executor or the Probate Court. RSA 552:2. Every Executor named in a Will must present it to the Probate Court even if there are no assets in the estate to probate. RSA 552:3. If there are no assets to probate, then the filing is considered a "Will Filed Not Probated" filing. Id.

If a person dies without a Will, then State law governs who is to receive the property left behind by the deceased:

I. If the deceased is survived by a spouse, the spouse shall receive:

- (a) If there is no surviving issue or parent of the decedent, the entire intestate estate;*
- (b) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, and there are no other issue of the surviving spouse who survive the decedent, the first \$250,000, plus 1/2 of the balance;*
- (c) If there are no surviving issue of the decedent but the decedent is survived by a parent or parents, the first \$250,000, plus 3/4 of the balance of the intestate estate;*
- (d) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, and the surviving spouse has one or more surviving issue who are not the issue of the decedent, the first \$150,000, plus 1/2 of the balance of the intestate estate;*
- (e) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, the first \$100,000, plus 1/2 of the intestate estate.*

II. The part of the intestate estate not passing to the surviving spouse under paragraph I, or the entire intestate estate if there is no surviving spouse, passes as follows:

- (a) To the issue of the decedent equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degree take by representation.*
- (b) If there are no surviving issue, to the decedent's parent or parents equally.*
- (c) If there are no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation.*
- (d) If there are no surviving issue, parent or issue of a parent but the decedent is survived by one or more grandparents, one half of the estate passes to the paternal grandparents if both survive or to the surviving paternal grandparent if one paternal grandparent is deceased and the other half passes to the maternal grandparents in the same manner; or if only one grandparent survives, such grandparent shall receive the entire estate.*
- (e) If there are no surviving issue, parent, issue of a parent, or grandparent but there are issue of the decedent's grandparent who survive, one half of the estate passes to the issue of the paternal grandparent who are not beyond the fourth degree of kinship to the decedent and said issue shall take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation, and the other half passes to*

the issue of the maternal grandparent who are not beyond the fourth degree of kinship and said issue shall take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; provided, however, that if there are no issue of the decedent's grandparent within the fourth degree of kinship to the decedent on either the paternal or maternal side, the entire estate passes to the issue on the other side who are not beyond the fourth degree of kinship to the decedent and said issue shall take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation.

(f) No portion of a decedent's intestate estate shall pass to any person who is of the fifth or greater degree of kinship to the decedent.

(g) If there is no taker under the provisions of this section, the intestate estate passes to the state of New Hampshire.

RSA 561:1

If the decedent left a Will, then the provisions of the Will govern distribution of the property if the Will so provides and is deemed valid. There can be cases where assets are not fully disposed of (a Will without a "residue clause" or the death of beneficiaries without designation of successors). A Will can also be challenged, leaving a person with no "valid" Will. In such cases the state law will "fill in" the language.

When speaking of beneficiaries of an estate, if there is no Will, then it is the above named parties who are the "Heirs" of the deceased. Under a Will, the beneficiaries receive property by "bequest" (when receiving personal property) or by "devise" (if named to receive real estate).

III. A Decree of Probate

Regardless of whether or not the decedent had a Will or not, the first step in the process is the filing of a Petition for Estate Administration with the Circuit Court-Probate Division (formerly known as the "Probate Court") for the county where the deceased lived. If there is a Will, the Petition includes the Will and the Petitioner is the named "Executor/Executrix" unless the named person is unable or unwilling to serve. If the decedent left no Will, the Petitioner generally seeks to be appointed the Administrator/Administratrix of the Estate. State law governs who may Petition to Administer an Estate:

553:2 Right to Administer. – Administration of the estate of any person deceased shall be granted:

- I. To the executor named in his will.*
- II. To the widow, husband or any of the next of kin, or to such suitable person as they or any of them may nominate.*
- III. To one of the devisees or creditors.*
- IV. To such other person as the judge may think proper.*

Unless an immediate challenge is asserted, in the normal course, the Probate Court will "appoint" the Petitioner as the "Fiduciary" (generic term which covers both Executor/Executrix and Administrator/Administratrix). In most cases, a "bond" will need to be filed by the Fiduciary with the Probate Court. See, RSA 553:13. The purpose of the bond is to secure the faithful performance of all duties as Fiduciary. 10 N.H. Practice (DeGrandpre/Zorn) 4th Ed. Sec. 28.1 citing, Perkins vs Perkins, 46 N.H. 110 (1865). The Court sets the bond amount, often at the estimated value of the Estate as listed on the Petition for Estate Administration. Once the bond is filed and accepted, a "Decree of Probate" is issued. The Decree confirms the approval of the decedent's Last Will and Testament (where applicable) and confirms the appointment of the Fiduciary to serve.

There is a process to "challenge" a Will (a process called a Petition to Re-Examine) which is outside the scope of this outline.

IV. Fiduciary Duties

Once appointed, the Fiduciary's duties can be generically described as follows:

- Collect up and secure the decedent's assets
- Pay/satisfy debts of the decedent (when possible)
- Distribute remaining assets to those who are legally entitled to receive them.

Unless the requirement is waived due to specific circumstances, a Fiduciary must complete and file an "Estate Inventory" within 90 days of his/her appointment. RSA 554:1. This is a listing of all assets owned by the deceased at death, at market value. Id. This includes both the "personal estate" as well as the real estate (Id.) even though, as we will see below, the role of the fiduciary with respect to real estate is limited.

With regard to debts, creditors must "exhibit" and "demand payment" of their claim within 6 months of the fiduciary appointment. RSA 556:1. If they fail to do so, their claim may be barred. RSA 556:3. With regard to the debts of the decedent, the Fiduciary must satisfy them if assets are available to do so (including the sale of real estate if necessary). If the estate does not have sufficient assets, it is considered "insolvent" and there are certain procedures used for "insolvent" estates. There is also a priority order of claims set forth in state law:

554:19 Priority of Charges. –

I. The administrator of an estate shall make payment of the claims in the following order:

- (a) Costs and expenses of administration of the estate.*
- (b) Reasonable and necessary funeral, burial, and cremation expenses.*
- (c) Debts and taxes with preference under federal law.*
- (d) Claims made for financial and/or medical assistance provided to the deceased by the department of health and human services, debts collected by the state pursuant to RSA 126-A:34, and charges pursuant to RSA 166:19. The department of health and human services may distribute claims made in the following order: first, that assistance funded entirely by moneys from the general fund; and second, that assistance funded by a combination of state and federal funds.*
- (e) Just debts of the deceased.*
- (f) Legacies given by the will of the deceased or distribution to heirs according to law.*

II. No preference shall be given in the payment of any claim over any other claim of the same class.

III. No creditor of a lower class shall receive any payment until all those of the preceding class shall have been fully paid.

V. Closure of the Estate

Once the six (6) months statutory claims period has passed, and if there are no unpaid obligations and all the assets are collected, then the Fiduciary can move to close the estate. This is done in one (1) of two (2) ways:

- Preparation and filing of a First and Final Accounting, or
- Filing a Motion for "Summary Administration" under RSA 553:33.

The former process is the historical process, and involves the reporting of all monies taken in by the fiduciary, the amounts paid out for costs and expenses (including bills paid), and the balance available for distribution to the beneficiaries. The Account is filed with the Court along with a "Petition for Distribution" which seeks confirmation of the names of beneficiaries, and the amount of the personal estate (goods and monies) each person is to receive. Interested parties can object to the accounting and request a hearing. Once an accounting and Motion for Distribution have been approved, then the Fiduciary distributes the funds to the Beneficiaries. The Fiduciary must obtain and file Receipts for the balance shown on the Motion for Distribution. The Fiduciary Bond is then discharged and the estate is closed.

An account is required on an annual basis, so if, for some reason, an Estate needs to be open longer than twelve (12) months (say due to litigation or difficulty resolving debt claims), it may be necessary to file a "first" account, and then subsequent annual accounts until the Estate is ready to close. There exist procedures for requesting a "Partial Distribution" of an Estate in advance of a final closing distribution.

A Motion for Summary Administration avoids the needs for an accounting, but requires the Assent of all interested parties. The fiduciary advises the Court that all debts (including taxes) are paid and that the fiduciary will distribute the estate as required by law. If/when a Motion for Summary Administration is granted, no account or receipts are required, and a bond discharge is issued.

VI. Real Estate

When someone dies, their "personal estate" (bank accounts, stock, bonds, furniture, etc.), comes under the control of the appointed fiduciary, who takes custody of such property and then pays debts and distributes it to the beneficiaries. Real estate is treated very differently.

Under New Hampshire law, real estate of a deceased passes directly to the devisees or heirs at law on death, subject only to the right of the fiduciary to "divest" the beneficiaries and sell the property to pay the debts of the deceased if the personal estate is insufficient to do so. 10 N.H. Practice supra, at Sec. 35.1. The State Supreme Court has reaffirmed this rule on multiple occasions:

"title to the real estate passed directly to the devisees subject to their interests being divested due to insufficient personal assets in the estate...or insolvency of the estate. In the absence of the necessity of the executor seeking a license to sell the real estate, the probate court has no jurisdiction of the real estate of a decedent.

Fleming vs Aiken, 114 N.H. 687 (1974).

If a decedent dies solvent, either testate or intestate, the fiduciary has "no rights whatsoever" in the decedent's real estate and any rights and obligations as to the decedent's real estate belong to the heirs or devisees. 10 N.H. Practice, supra, Sec. 35.3 citing, Bergin vs McFarland, 26 N.H. 536 (1853).

Where an estate is "insolvent", then by statute the fiduciary is obligated to account for the rents and profits of the real property and keep it in repair pending its sale and disposition of the proceeds. RSA 554:15. In such circumstances, the fiduciary must apply for permission from the Probate Court for authority to sell the real estate:

554:17 Sale of Real Estate. – Every administrator shall apply for and procure license for the sale of so much of the real estate as may be necessary to pay debts and legacies, if the personal estate is insufficient; and neglect or refusal to obtain such license, to make such sale, to account for the proceeds thereof, or fraudulent conduct therein, shall be deemed maladministration and a breach of his bond.

In addition, a fiduciary, in cases where there is a solvent estate, has duties to:

- Pay off financial liens

554:16 Redemption of Property. – The administrator, if there be sufficient assets, shall redeem all property of the deceased under mortgage, pledge or levy of execution for less than its value, or which if unredeemed would diminish the value of the estate, unless he shall by license sell it subject to the encumbrance; and

neglect so to redeem shall be deemed maladministration and waste. Provided however, when real estate under mortgage is specifically devised, the devisee shall take such real estate subject to the mortgage, unless the testator in his will or by insurance has provided expressly or by necessary implication that such mortgage be otherwise paid; and if the note or obligation of the testator secured by such mortgage be paid out of other property in his estate after his decease, the executor of his will, at the request of any person interested, and by leave of the probate court shall sell such specifically devised real estate for the purpose of satisfying the estate of the testator for the amount so paid, together with the costs and expenses thereof.

- Pay real estate taxes for the tax year in which the decedent died, treating such as a "debt" due (remember- real estate becomes beholden to all taxes to be assessed for that year as of April 1st). In Re: Estate of Robbins, 116 N.H. 248 (1976).
- To Notify Cities and Towns of those persons coming into ownership of real estate through inheritance or devise unless the real estate has been sold as part of the estate settlement process either by license or by consent. RSA 554:18-a. This is typically the primary way the municipality learns of the transfer of real estate by death if no sale occurs. Remember, because title vests in the heirs/beneficiaries, there is no need (nor is it appropriate) for the fiduciary to "deed" the property to the beneficiaries. See, NH Title Examination Standards, 7-16, 7-17. Therefore the "Notice to Cities and Towns" under RSA 554:18-a often provides the required notice to assessors to change their records. A copy of this form is attached hereto.

As noted above, the fiduciary has the ability to request authority ("a license") to sell the decedent's real estate to pay debts (RSA 559:1) or if the Will of a testate decedent specifically directs that such real estate be sold. RSA 559:17. Under RSA 559:18, adopted in 1977, a fiduciary may be authorized to sell the decedent's real estate with the written consent of any surviving spouse and the heirs or devisees of such real estate. Typically such consents are either (i) included right within the fiduciary deed, or (ii) filed with the records of the Probate Court. If a sale is completed under the "consent" provisions, the purchaser obtains a title free and clear of any debts of the estate. The proceeds of such sale (after payment of debts) are to be distributed to the person(s) who would have been entitled to such real estate had it not been sold. RSA 559:19.

VII. Assessment and Tax Issues

With regard to assessment and taxation issues surrounding a death transfer, there are a couple of statutes to keep in mind:

73:10 Real Estate. – Real and personal property shall be taxed to the person claiming the same, or to the person who is in the possession and actual occupancy thereof, if such person will consent to be taxed for the same; but such real estate shall be taxed in the town in which it is situate.

and

73:21 Estates. – Estates of persons deceased may be taxed to the widow, to any of the children, to the heirs, or to any other person who will consent to be considered as in possession thereof; otherwise to the heirs generally of such deceased person.

Because the property is assessed to the Owner as of April 1st, unless picked up through an estate transfer, it would be taxed to the deceased for the tax year in which the decedent died. Keep in mind that if an estate is opened, and is solvent, the fiduciary is obligated to “pay” the taxes as an estate obligation.

If the decedent has died before the start of a given tax year (i.e. before April 1st), then RSA 73:21 suggests that the property “may” be assessed to the widow or children of the deceased. In many cases it may be unclear if a “spouse” exists, or the names of children, and a better practice would be to assess to “The Heirs of (decedent).”

If/when the community receives a Notice to Cities and Towns under RSA 554:18-a, then the assessment records would be changed to reflect such parties.

The “problems” come when the community is not aware of a probate estate, or one is never opened (or not fully completed). In cases where the community is aware that a property owner is deceased, it should first consider having a check made of the Probate Court records by counsel or the abstractor who does your title searches. If a file exists, you should be able to know the name and address of heirs (intestate) or devisees (testate). Because we know title vests in them subject only to “divestment”, they are presumed to be the owners, and the property should be assessed/taxed to them.

What if there is no probate? The first “presumption” we can make is that the decedent died intestate, because nobody came forward to present a Will as required under law. See, RSA 552:2 and RSA 552:3 above. Consequently, title passes to the “Heirs” of the deceased, and hence the assessment under RSA 73:21 is appropriate. From a title standpoint, the filing of a probate estate is not mandatory to pass title. This is because RSA 556:29 creates an absolute bar to creditor claims against the decedent’s real estate after two (2) years:

556:29 Two-Year Limitation. – *If no administration shall have been granted upon the estate of a deceased person within two years from the date of death, no creditor of the deceased shall thereafter be entitled to maintain any action or proceeding in any court to appropriate the real estate or interests therein of which the deceased died seized, to the payment or satisfaction in whole or in part of his claim against the estate.*

The New Hampshire Title Standards of the Bar Association address this issue with the following Title Standard-

7-23. Intestacy. *In the case of intestacy, title passes to the heirs as of the date of death, subject to defeasance by the fiduciary acting either with the consent of the heirs, or under license from the Probate Court. See Lane v. Thompson, 43 N.H. 320 (1861).*

The fact of death and the identities of the surviving spouse, if any, and the heirs must normally be evidenced of record as follows:

(a) Where death occurred prior to January 1, 1997, or more than 20 years prior to the date of search, recitals in affidavits or acknowledged instruments of record as to the fact of death and the identities of the surviving spouse, if any, and the heirs may be relied upon in the absence of any contrary information. A statement as to the identities of the heirs may be presumed to include all of the heirs, even if not expressly stated.

(b) Where death occurred after January 1, 1997, and within 20 years prior to the date of search, but not within the period specified in the next subsection, recitals in affidavits or acknowledged instruments of record may be relied upon in the absence of contrary information, if such recitals state facts that establish the following:

- 1. The date of death and residence or domicile at death;*
- 2. The nonexistence of a will;*
- 3. Information regarding the surviving relatives and/or the value of the estate to the extent necessary to establish the identities of the heirs to the New Hampshire real estate; and*
- 4. Whether and where any probate proceedings have been filed.*

(c) Where death occurred after January 1, 1997, and within two years prior to the date of search, New Hampshire administration is required.

Accordingly an Affidavit as to the facts set forth above, if a decedent has been deceased two (2) years, is sufficient to establish a claim to title without a probate procedure having been undertaken.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: _____

Case Name: Estate of _____

Case Number: _____
(if known)

NOTICE TO TOWNS AND CITIES PURSUANT TO RSA 554:18-a

Notice is hereby given that ownership of the real estate specified below has been passed by inheritance or devise from the deceased to the parties listed.

1. Deceased Name _____ Date of Death _____
Residence (city or town) _____

2. Location of Real Estate _____

3. Names and addresses of recipients

NAME	MAILING ADDRESS
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

4. The deed to this real estate is recorded in the _____ County
Registry of Deeds, Volume/Book _____, Page _____

5. I certify to the Probate Division that this notice was sent to the Assessor of the City of _____
_____ or Selectmen of the Town of _____
as required by law.

Date

Fiduciary Signature

Date

Fiduciary Signature

TO BE FILED WITH THE CITY ASSESSOR OR TOWN SELECTMEN AND THE PROBATE DIVISION PRIOR
TO PRESENTING THE FINAL ACCOUNT.