

MUPC AND REAL ESTATE

Boston Bar Association
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Zachary P. Allen, Esq.
David Marshall Datz, P.C.

MUPC Terminology

Terminology

- Personal Representative
 - Replaces “executor”, “administrator”, and similar fiduciaries regardless of testate or intestate
 - General v. Special

Terminology

- Formal Proceedings
 - Formal are conducted by a **judge** with **notice by citation**
- Informal Proceedings
 - Informal are conducted by a **magistrate** with **at least seven (7) days notice**

Terminology

- Magistrate
 - Court official who performs the duties set forth under the Code
 - Reviews informal petitions to determine whether the petitioner has complied with the statutory requirements for the petition

Terminology

- Descendant
 - All descendants at all generations determined by parent-child relationship
 - Specifically excludes stepchildren and foster children
 - Includes adopted children

Terminology

- Guardian
 - Person appointed by the court to protect and have custody of an individual who may be a minor or incapacitated
- Conservator
 - Person appointed to manage the business affairs and property of a protected person

Law of Intestacy

Intestacy Scheme

- Spousal Share
 - Entire estate if:
 - No descendant or parent of D; or
 - All D's descendants are descendants of the surviving spouse (and there are no other of the surviving spouse)
 - \$200K plus $\frac{3}{4}$ of the balance if:
 - Survived by a parent, but no descendant
 - \$100K plus $\frac{1}{2}$ of the balance if:
 - All D's descendants are descendants of surviving spouse and spouse has descendants not descendants of D
 - If one or more of D's descendants are not descendants of the surviving spouse

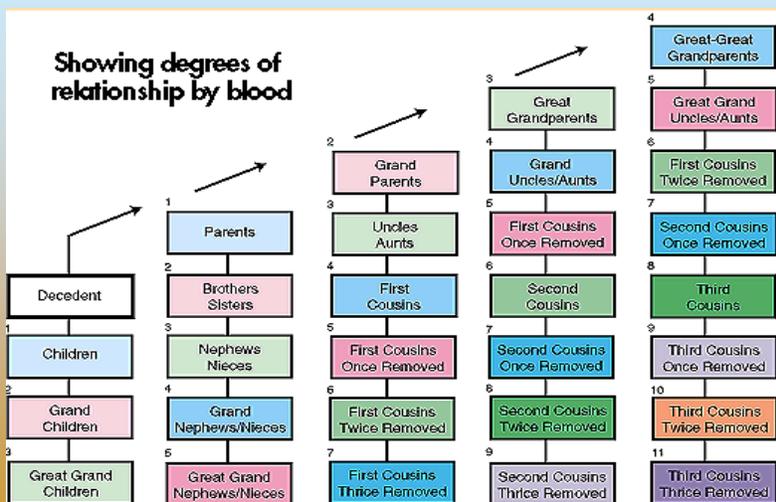
Intestacy Scheme

- No Spouse or Spouse does not receive entire estate:
 - D's descendant's by rep; or
 - D's parents equally, or the survivor; or
 - D's parent's descendants by rep; or
 - D's next of kin in equal degree (Table of Consanguinity)

Intestacy Scheme

- Per Capita at Each Generation
 - “Equally near, equally dear”
 - Each person takes equally at each generation.
 - Start on the first generation that has a living descendant and split the share to the living descendants based on that generation
 - Combine the remainder and move down to the next living descendants splitting shares amongst those living at that generation

Intestacy Scheme



Intestacy

- Remember:
 - Half blood = whole blood
 - Children in gestation are children so long as survival 120 hours or more after birth
 - Adopted children are children of their adoptive parents, not natural; **unless** the natural parent is the spouse of the adopted parent

Rights of Surviving Spouse and Children

Pre-marital Wills

- Old law:
 - Ch. 191, §9: Marriage revokes a will unless the marriage was contemplated at the time of execution
- New law:
 - §2-301: Will not revoked and spouse receives the spousal share unless:
 - Will was made in contemplation of marriage; or
 - Expressed intention; or
 - Spouse provided for otherwise (non-testamentary transfers) with implicit intention

Omitted Children

- Old law:
 - Ch. 191, §20: No distinction between children omitted and children included in the calculating the share of the omitted
- New law:
 - §2-302: Distinguishes between (1) if testator had living children when the will was executed (and provided for them) and (2) if the testator did not have any children at the time of execution

Exempt Property

- Rights are in addition to any shares passing to spouse or children
- Rights have priority over any unsecured claims
- Surviving spouse may remain in house for a period of up to six months rent free
- Surviving spouse entitled up to \$10K in excess of any security interest in household goods, automobiles and personal effects
 - Children are entitled to same, jointly, if no surviving spouse

Allowances

- Surviving spouse and minor dependants are entitled to support paid out of the estate not exceeding \$18K in lump sum or in installments of not more than \$1.5K per month for one (1) year

Guardianships and Conservatorships

Scope of Article V

- Designed to add additional protections for minors and incapacitated individuals
- Wards = minors protected by guardians
- Incapacitated persons = person unable to provide for their own needs (health, safety, etc.) which is a product from reasons other than just advanced age or minority protected by guardians
- Protected persons = a minor or disable person for whom a conservator has been appointed

Guardians

- Appointed for the personal care of the ward or incapacitated individual
- Does not have the authority to manage the assets of the person's estate (i.e., convey, acquire, mortgage, lease, etc. any real estate interest)

Conservators

- Person appointed to manage the business affairs and property of a protected person pursuant to court order under a protective proceeding
- Has the duty to inventory within 90 days of appointment and account annually (unless otherwise ordered by the court)

Conservators

- §5-423: A conservator may, subject to court approval:
 - Acquire real estate
 - Lease real estate
 - Manage real estate
 - Develop real estate
 - Improve real estate
 - Abandon real estate

Conservators

- However, “a conservator may not sell, mortgage or grant options in real estate, except as provided in chapter 202”
- License to sell real estate is required pursuant to Ch. 202
 - Income not sufficient; or
 - In the protected person’s best interest

Durable Power of Attorney

DPOAs

- What is a DPOA?
 - A written instrument whereby the principal designates an attorney in fact and the writing contains a provision that shows the intent of the principal is to confer authority to the attorney in fact power that shall be exercisable notwithstanding subsequent disability or incapacity, and unless otherwise limited in time, notwithstanding lapse of time

DPOAs

- All acts done by an attorney in fact pursuant to the DPOA during incapacity or disability of the principal shall have the same force and effect as if the principal was competent

DPOAs

- May nominate a guardian or conservator if a guardianship of the person or conservatorship of the estate is necessary
- Court will appoint based upon principal's most recent nomination

DPOAs

- Notice of Revocation
 - Requires actual knowledge of death, or in the circumstance of a power exercised that is not durable, incapacity or disability
- Affidavit
 - Stating that affiant (attorney in fact) has no actual knowledge or revocation, death, disability or incapacity at the time the act was/is committed

DPOAs

- Reliance by third parties
 - Third parties may rely upon the affidavit as conclusive proof of authority
 - If the third party unreasonably refuses to honor a valid DPOA, attorney in fact may prosecute for damages
 - Lender's refusal to honor actions taken by an attorney in fact under a DPOA??
 - No third party, acting in good faith, will be held liable for actions taken in reliance

Considerations in Real Estate Negotiations

Considerations

- Representing the Estate as Seller:
 - Work closely with the PR or their attorney in determining time frames that would be appropriate
 - Ensure that the PR has been duly appointed
 - Have letters been issued?
 - Appt in informal proceedings have shorter time frames; no need for temporary any longer
 - How is the power to sale acquired?

Considerations

- Representing the Estate as Seller (cont.):
 - If power conferred under the Will
 - Is there a directive to sell or just a power?
 - Is the proceeding formal or informal?
 - Note: Current Title Standards for Formal vs. Informal
 - Protect the fiduciary on the best offers available (G.L. c. 202, sec. 38)
 - If power not conferred under the Will or D died intestate
 - License to Sell required

Considerations

- Representing the Estate as Seller (Cont.)
- Capacity of the PR:
 - “John Doe, as Personal Representative of the Estate of Jane Doe, (Suffolk County Probate Docket #XXXXXX), and not individually (hereinafter SELLER)”
 - Signature should follow similar language “as Personal Representative as aforesaid, and not individually”
- Note: This may not protect from personal liability

Considerations

- Representing the Estate as Seller (cont.)
- Best Offers
 - The PR has a duty to obtain the best offer for real estate when selling.
 - Remember, this duty is a duty accountable to the beneficiaries
 - Include language making the P&S conditioned upon:
 - Receipt of better offers (not necessarily the highest PP)
 - Receipt of a license to sell at the PR's discretion
 - Requirement of license to sell

Considerations

- Representing the Estate as Seller (cont.)
- Representations
 - Watch what you are representing to in the P&S
 - Limit customary Seller representations as much as possible by including a provision akin to “any representations made herein are made to the best of SELLER’s knowledge, and without making any further inquiry or duty to do so.”

Considerations

- Representing the Estate as Seller (cont.)
- Damages Clause
 - Customary damages for Seller's breach of contract to purchase real estate is specific performance
 - Include a clause in the liquidated damages provision limiting to the return of the Buyer's deposit (such being the Buyer's sole and exclusive remedy at law or in equity)

Considerations

- Representing the Estate as Seller (cont.)
- Deeds
 - Conveyance from PR should be by fiduciary deed and not by a quitclaim or warranty deed
 - Fiduciary deed passes whatever title D possessed

Considerations

- Representing the Buyer
- Request copy of letters if deed is coming from PR
 - Authority to contract on the estate's behalf
- Request authority to convey
 - Power to sale under will?
 - Petitioning for license to sell?
- Work closely with a title insurer

Considerations

- Representing the Buyer (cont.)
- Know that unless 1st and Final filed
 - BFPs from heirs of decedent protected after one year, except for:
 - Taxes, legacies, or expenses of the estate
 - Also protected if a license to sell is issued