

# **UNTIL DEATH DO US PART: Interesting Scenarios Involving Death and Real Estate**

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## I. Introduction

A. “Should my life time warranty pacemaker fail, or other tragedy take my life...” That introductory phrase from an actual will probated in a Circuit Court in Virginia is the perfect lead in to discussing unusual and interesting situations involving life tenants and decedents. This outline will focus on addressing underwriting in the following scenarios:

1. How the “Stranger Rule” and an absolute power of disposal impact your underwriting when you have a life tenant on title.
2. What to do when you have a fully executed ratified contract and the seller dies; or, the purchaser dies.
3. How does a transfer on death deed in the chain of title affect your underwriting?
4. What happens when the settlor of a revocable trust dies.
5. Who is authorized to act when the sole member of an LLC dies?
6. What is required when a decedent dies either testate or intestate in another state and owns real property in Virginia.

## II. What to do when a life estate shows up on title?

A. Determine if you have a violation of the “Stranger Rule”

1. A life estate in real property must be created by either a will or a deed. *See Va. Code § 55-2 (“No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will . . .”).*
2. If you have a deed a special rule applies: *a deed cannot be used to create a life estate in anyone other than the grantor.* This is commonly known as the “Stranger Rule.” This is based on the English Common Law principle, still recognized in Virginia, that a life estate is a *reservation* of rights, not a *granting* of rights. Since a deed to a third party is a granting of rights, a grantor in a deed can only reserve a right for himself, not a third party.
  - a) *If you have a deed conveying title from A to B for life, with a remainder to C, the conveyance fails and C takes the fee simple interest.*
  - b) *If you have a deed conveying title from A to B with A reserving a life estate in A, A has a life estate and B takes the fee simple interest.*
3. On the other hand, if you have a will, the “Stranger Rule” does not apply, and a decedent can devise (grant) a life estate to a third-party devisee (a “stranger”).

B. Determine whether you have an “express” or “implied” life estate

1. VA Code § 55-11 presumes that words in a deed or will shall be construed to convey the maximum interest owned (generally, fee simple) unless there are “words of limitation” that demonstrate “a contrary intention.”
2. So you have to look for words of limitation that sufficiently create a life estate. Your job is easy if the words “life estate” are specifically used and a specific remainder is identified. Unfortunately, that is not always the case:
  - a) *It is certainly not necessary to use the words, “life estate.” Edwards v. Bradley, 227 Va. 224 (1984).*
  - b) *Nor is it necessary for there to be any specific mention of a remainder. Spicely v Jones, 199 Va. 703, 707 (1958)*
3. Determine whether the words of limitation are explicit or ambiguous or unclear.
  - a) *If the words of limitation that are used are clear and unequivocal, you can reasonably determine the grantor or decedent intended to convey a life estate. See, Camp v. Camp, 220 Va. 595, 598 (1979)(“If the language is explicit and the intention is thereby free from doubt, such intention is controlling...”).*
  - b) *If the words of limitation are ambiguous or unclear, you may have something other than a life estate. Contact your underwriter to help determine whether you have a life estate. It is possible a court order is needed to determine the matter.*
4. An express life estate seems to be formed when words expressly referring to the life estate are used. Examples:
  - a) *“to my wife for and during her natural life... at the time of her death, I will, devise and bequeath to my heirs at law.” Borum v. National Valley Bank of Staunton, 195 Va. 899 (1954).*
  - b) *“a life right in and to the property... for the period of their life.” Edmunds & Abernathy v. Pike, 136 Va. 270 (1923).*
5. Even if the words used don’t form an express life estate, an implied life estate may be created. Examples:
  - a) *“I give all my Real Estate to my wife and at her death it is to go to F. M. Robinson...” Robinson v. Caldwell, [need cite].*
  - b) *“I give to my children by her, and their descendants at their death, the remainder of my property...” Robinson v. Robinson, 89 Va. 916 (1892).*
  - c) *“my estate I will to my Wife . . . for her use and control as long as she lives. At her death any amount of this portion of my estate remaining in her possession shall be given to my son...” Estate of Fields v. C.I.R., T.C. Memo 1981-592 (1981)*

C. Does the purported life tenant have the power to dispose of the property absolutely during his or her life?

1. What constitutes an absolute power of disposal?
  - a) *When the element of control is introduced, an absolute power of disposal has been held to exist. Examples:*
    - (1) “...with full power and authority to consume or dispose or sell and convey all or any of said property as she may see fit in her sole discretion...” *Borum v. National Valley Bank of Staunton*, 195 Va. 899 (1954).
    - (2) “...for her use and control...” *Estate of Fields v. C.I.R.*, T.C. Memo 1981-592 (1981).
    - (3) “have full control for her life time...” *Trustees of Duncan Church v. Ray*, 195 Va. 803.
    - (4) “with full authority to dispose of any part thereof that she may deem necessary for her support and maintenance...” *Mowery v. Coffman*, 185 Va. 491 (1946).
  - b) *On the other hand, the word “use” and similar expressions, such as “use as she pleases” or “use as he sees fit” do not constitute an absolute power of disposal. Examples:*
    - (1) *Bristow v. Bristow*, 138 Va. 67 (1924) (“...to use as she pleases during her life and while she remains my widow...”)
    - (2) *Johns v. Johns*, 86 Va. 333 (“...have and hold all my estate during her natural life... to be used as she may think proper”)
2. Apply the appropriate rule pertaining to explicit or implied life estates<sup>1</sup>:
  - a) *An express life estate coupled with an absolute power of disposal creates a fee simple interest in the purported life tenant to the extent the absolute power of disposal has been exercised; any remainder vests in the remaindermen.*
    - (1) If you have an express life estate with absolute power of disposal, the outcome depends on whether that power was exercised. If that power was not exercised, then the purported life tenant remains a life tenant, and the purported remainderman remains a remainderman. But if that purported life tenant exercises the absolute power of disposal, then the purported life tenant becomes a fee simple owner *to the extent of the exercise*, and the remainderman receives whatever is left over, if anything.
  - b) *An implied life estate coupled with an absolute power of disposal creates a fee simple interest in the purported life tenant; remaindermen get nothing.*

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<sup>1</sup> Based on Virginia Supreme Court cases and VA Code § 55-7.

### **III. What happens when you have a fully ratified contract and then the seller or purchaser dies?**

#### **A. What to do when the seller dies**

1. You should first determine whether the decedent owned as a tenant by the entirety with the common law right of survivorship or as a joint tenant with the common law right of survivorship. If, the property automatically passes at the moment of death to the survivor(s) and the survivor(s) is then the seller.

2. If the seller was the sole owner or held as a tenant in common, Va. Code Section 64.2-523 provides that the deed and related documents be signed by the personal representative of the decedent contract seller, whether this is the executor of a will or administrator of the estate.

*a) Pursuant to VA Code Section 64.2-523, any personal representative qualified in another state, upon posting a bond to over the value of the real property and taking an oath that the decedent owed no debts in the Virginia, may convey real property without qualifying in Virginia.*

3. A copy of the original contract of sale must be recorded with the deed as an exhibit.

4. The transfer is effective as if it had been made by the decedent. As such, the transaction is not part of the estate, and is not subject to the terms of the will, objections of the heirs, creditors of the decedent or estate taxes.

5. Judgments of the heirs do not attach.

6. This type of real estate transaction is considered a personal property issue, rather than a real property issue

#### **B. What happens when the buyer dies**

1. You should first determine whether the contract contains language binding the parties' heirs, executors, administrators, successors and/or assigns.

*a) Most of the standard form sales contracts contain such language. In the NVAR form contract, it is in Paragraph 38.*

2. If there is no such provision binding the purchaser's heirs, executors, administrators, successors and/or assigns, then, the contract would likely be unenforceable and the deal likely dead.

3. If the parties' heirs, executors, administrators, successors and/or assigns are bound, then whether the transaction will likely survive the death of the purchaser will likely turn on whether there is financing involved.

4. If there is financing involved, the lender to whom the decedent applied for a loan will likely reject the loan, leading to the contract becoming void pursuant to the terms of the financing contingency.

5. If it is a cash transaction, then the duly qualified executor (if there is a will), a duly appointed administrator, or the decedent's heirs would likely be in default if they did not complete the purchase of the property.

a) *A court order may be required for the executor to purchase the property. See W.J. Counts v. Richards L. Counts, Executor, 165 Va. 61, \_\_ (1935) ("an executor unless authorized by will or by order of court has no power to purchaser real estate.").*

#### **IV. How does a Transfer on Death ("TOD") Deed in the chain of title affect your underwriting?**

A. The National conference of Commissioners on Uniform State Laws succinctly summarizes the Uniform Real Property Transfer on Death Act (URPTODA), Virginia Code §64.2-621, *et seq.*, as follows:

The Uniform Real Property Transfer on Death Act (URPTODA) enables an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by operation of law by means of a recorded transfer on death (TOD) deed. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed. On the owner's death, the property passes to the beneficiary, much like the survivorship feature of joint tenancy.

B. The TOD deed must be recorded prior to the transferor's death.

C. If property is held as tenants by the entirety or as joint tenants with a right of survivorship, all co-tenants must sign for the TOD deed to be effective. This does not apply to property held by multiple parties as tenant in common.

D. What is the effect of a recorded TOD deed during the transferor's lifetime?

1. A TOD deed is only effective after the death of the transferor. (VA Code 64.2-631).

2. A TOD deed has no effect on the right of the transferor to sell, gift or encumber the real estate, i.e., have a deed of trust recorded. (VA Code 64.2-631).

a) *A TOD deed is revocable, even if it is silent on the matter, and even if it says that it is not revocable. (Va. Code § 64.2-625).*

b) *Pursuant to Va. Code § 64.2-630, revocation of a TOD deed may be by:*

(1) *An inter vivos transfer of the property, i.e the transferor (grantor) sells it or gives it to someone else by deed recorded before he/she dies.*

(a) *If the owner has recorded a TOD deed, the owner then contracts to sell the property to a third party, but dies before the deed can be recorded Va. Code § 64.2-523 prevails, and the property should be conveyed by the executor or administrator as discussed in Part III above.*

(2) *A deed of revocation.*

(3) *A TOD name naming a subsequent beneficiary.*

(a) *What if inconsistent TOD deeds are notarized the same day? Normally Virginia is a “race/notice” state, so we rush to get documents recorded. In this situation you’d want to be the latest/last deed recorded. The last deed recorded prior to death controls transfer of title.*

3. *The fact a third party has actual knowledge of the TOD deed does not affect the ownership interest of the transferor, i.e., he can do what he wants with the real estate. (VA Code 64.2-631).*

4. *No interest is vested in the transferee during the life of the transferor. He has no legal or equitable interest. His creditors cannot attach any interest in the real estate. (VA Code 64.2-631).*

E. *What is the effect of the TOD deed after the transferor’s death?*

1. *The property interest conveys at the moment of death to the beneficiary in the most recent, recorded, unrevoked TOD deed. (VA Code § 64.2-632).*

2. *The beneficiary must survive the transferor. (VA Code § 64.2-632).*

a) *If the beneficiary does not survive the transferor, the transfer lapses.*

b) *No requirement to survive by 120 days exists in URPTODA, as exists under the statutes relating to wills. Transfer occurs at the moment of death.*

3. *Multiple beneficiaries take title in equal undivided shares with no right of survivorship. (VA Code § 64.2-632).*

a) *If the share of one of multiple beneficiaries lapses or fails then surviving named beneficiaries take that interest in proportional shares.*

4. *Divorce or annulment revokes a TOD deed, unless the deed specifically says otherwise. (VA Code § 64.2-632).*

5. Beneficiaries take title subject to “all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor’s death.” (VA Code § 64.2-632).

6. A TOD deed “transfers property without covenant or warranty of title even if the deed contains a contrary provision.” (VA Code § 64.2-632).

7. A beneficiary may disclaim all or part of their interest following disclaimer rules set out in Va. Code § 64.2-2600, et seq. (Va. Code §64.2-633).

8. Property is subject to claims of creditors of the transfer, but a proceeding to enforce the liability must be “commenced not later than one year after the transferor’s death.” (Va. Code §64.2-634).

*a) If property is being sold less than one year after the death of the transferor in the TOD deed, just like in the estate context, you must require the seller to sign an Indemnity Agreement and compliance with one of the following:*

(1) Escrow the entire proceeds until one year after the date of death has passed;

(2) Provide a corporate surety bond;

(3) Pay an extra hazardous risk premium of \$2/\$1000 based on the sales price of the property, with a minimum payment of \$200, all paid to Old Republic.

## **V. What happens when the settlor of a revocable trust dies?**

A. Many people have the mistaken belief that putting real estate in a revocable trust (often with the same person as settlor, trustee and beneficiary) makes it immune from claims of creditors. Unfortunately, creditors and spouses can reach the assets of revocable trust.

B. Pursuant to Virginia Code § 64.2-747(A)(1), during the lifetime of the settlor, creditors are entitle to make a claim against the assets of a revocable trust. Make sure that your title examination includes a judgment search for the individual settlor, as well as the trust name. You will need to require that judgment liens in the name of the settlor or the trust be released.

1. Pursuant to Virginia Code § 55-20.2(C), property held by a married couple as tenants by the entirety and conveyed by them into their revocable or irrevocable trust or trusts may retain protection against creditors if the spouses remain married to each other and continue to be current beneficiaries of the trust(s).

a) *While during the life of both spouses/settlors, this would protect trust assets from the state court judgments against one spouse/settlor, when one spouse/settlor predeceases the other, then state court judgments against the surviving spouse could be enforced against trust assets.*

b) *Tenancy by the entirety, even in this context involving the assets of a trust, does NOT protect against IRS tax liens or federal judgments against one spouse.*

C. Pursuant to Virginia Code 64.2-747(A)(3), for up to two years after the death of the settlor, creditors are entitled to make a claim against the assets of the trust.

1. If you have a revocable trust selling real property within one year after the death of the settlor- there is no need to extend this to 2 years- in addition to requiring a trust certification executed by the successor trustee, follow the requirements for estates where property is being sold within a year of the date of death:

a) *Death certificate;*

b) *An indemnity agreement from the successor trustee of the trust*

c) *Either escrow the proceeds from the transaction until a year after the date of death has passed, provide a surety bond, or pay an extra-hazardous risk premium of \$2/\$1000 based on the sales price of the property, with a minimum payment of \$200 all paid to Old Republic.*

d) *Estate tax affidavit.*

D. Pursuant to Virginia Code 64.2-747(A)(3), for up to two years after the death of the settlor, spouses are entitled to make a claim against the assets of the trust.

1. If the property was conveyed into the trust by gift deed from the settlor to the settlor's revocable trust, and if the spouse did not sign the gift deed, the augmented estate rules are triggered.

2. Even if the property was conveyed by to the trust by deed of bargain and sale, when the settlor dies, the surviving spouse can claim an elective share.

a) *If the property being sold by the trust is the principal family residence, pursuant to VA Code § 64.2-307, where the surviving spouse claims an elective share of the decedent's augmented estate, the surviving spouse may occupy the property until surviving spouse's rights have been determined.*

b) *Also, pursuant to VA Code § 64.2-307, if the surviving spouse is deprived of possession of the principal family residence, upon filing a complaint for unlawful entry or detainer, the surviving spouse is entitled recover possession of the property.*

3. Consider having the surviving spouse sign the deed being conveyed.

## **VI. Who is authorized to act when the sole member of a Virginia limited liability company (“LLC”) dies?**

A. Check to see if the LLC has an operating agreement or another writing that would constitute an operating agreement.

1. VA Code § 13.1-1023(A) provides that the members of an LLC may enter into an operating to regulate or establish the affairs of the LLC and the conduct of its business as long as the provisions are not inconsistent with Virginia law or the articles of organization of the LLC.

2. The operating agreement can even provide rights to a person who is not a party to the operating agreement.

3. This applies to a sole member LLC.

- a) *In fact, an operating agreement for a sole member LLC is deemed to include any writing signed by the member that relates to the affairs of the LLC.*

- b) *Any agreement between the member and the LLC that relates to the affairs of the LLC provided the LLC has a manager that is a person other than the member.*

4. Review the operating agreement.

- a) *Determine if there is a manager, and, if so, whether the manager has the authority to act when the sole member has died.*

- b) *If there is not a manager, or they manager does not have the authority to act when the sole member dies, determine if the operating agreement provides the authority to act to a third party in the event of the death of the sole member.*

B. If there is not an operating agreement, or the operating agreement is silent, the VA Code § 13.1-1040.1 provides that an individual member is disassociated from an LLC upon the member’s death.

1. In this case, the former member’s successor(s) in interest would hold the membership interest in the LLC. *See* VA Code § 13.1-1040.2.

2. If the member died intestate, his heirs would constitute his successor(s) in interest and would hold the membership interest in the LLC.

- a) *In addition to the intestate estate requirements, we would require confirmation of the heirs (Affidavit of Family Relationship), all of the heirs to sign on behalf of the LLC or all of the heirs to sign an LLC resolution authorizing the transaction and appointing an authorized signatory.*

b) *Alternatively, an administrator could be appointed and specifically given the power to act on behalf of the LLC. See VA Code § 64.2-106.*

3. If the member died testate, review the will to determine:

a) *if the named executor has the authority to act on behalf of the LLC either based on specific power provided or based on the incorporation by reference of VA Code § 64.2-105;*

(1) if the executor has the authority to act and qualifies, require the executor to act on behalf of the LLC and to sign the deed and settlement papers on behalf of the LLC

b) *if there is a specific bequest of the membership interest; or*

(1) if the executor does not have the authority to act, require the specified beneficiary to act on behalf of the LLC and to sign the deed and settlement papers on behalf of the LLC;

(2) if the executor has the authority to act, the best course of action is to require both the executor and the specified beneficiary to act and sign papers;

c) *whether the membership interest passes to the residual beneficiaries.*

(1) if the executor does not have the authority to act, require all of the residual beneficiaries to act and sign papers;

(2) if the executor has the authority to act, the best course of action is to require both the executor and the all of the residual beneficiaries to act and sign papers.

## **VII. What is required when a decedent dies either testate or intestate in another state and owns real property in Virginia?**

A. If the decedent died with a will (testate) in another state:

1. The will is valid in Virginia to act to convey real property:

a) *Once the will has been probated in the other state,*

b) *The will was duly executed pursuant to Virginia law, and*

c) *An authenticated copy of the probated will has been admitted to probate in the jurisdiction in which the property is located.*

(1) This is called an ancillary probate. See VA Code § 64.2-450.

2. Follow Old Republic's Estate guidelines, including:

a) *Review the will to determine who the devisees are;*

(1) Do not rely on a list of heirs or real estate affidavit even one is filed in the Virginia jurisdiction where the property is located.

b) *Review the will to determine who can sign the deed and settlement papers:*

(1) If the will meets VA Code § 64.2-450 and also gives the foreign executor the power to sell real property, then the Executor, without separately qualifying in Virginia, may sign the deed and the settlement papers. See VA Code § 64.2-524.

(a) Where the will specifically provides the executor with the authority to sell, but does not direct to sell, title to the real property vests in the devisees subject to divestiture by the executor.

(i) *Require the executor to sign; although the executor AND devisees may all sign.*

(ii) *Judgments against the devisees that are recorded in the jurisdiction where the property is located would attach.*

(b) Where the will directs the executor to sell, title to the property vests in the executor.

(i) *Require the executor to sign.*

(ii) *Judgments against the devisees do not attach.*

(2) If the will does not provide the foreign executor with the authority to sell real property, the devisees must sign the deed and the settlement papers.

c) *Require an estate tax affidavit*

d) *If the decedent died less than one year prior to the sale, follow ORT's guidelines, including requiring an indemnity agreement and charging an extra hazardous risk premium (or other bond or escrow proceeds)..*

**B. If the decedent died without a will (intestate) in another state:**

1. Title to real estate of a decedent who dies intestate vests automatically in his or her heirs at the moment of death. Consequently, these heirs normally have the authority to sign your settlement papers.

2. Follow the intestacy laws of Virginia NOT the state in which the decedent died.

a) *Heirs*

(1) Require a list of heirs and/or a real estate affidavit be recorded in the jurisdiction where the property is located. See VA Code §§ 64.2-509 and 64.2-510.

(2) Since these documents may not be trustworthy – they may be self-serving or simply incorrect, and they do not cut off a legitimate heir's rights- confirm who the heirs are by reviewing obituaries or other information pertaining to the decedent and/or have an Affidavit of Family Relationship executed.

(a) If you have questions, please call your Underwriter.

(3) The list of priority of kinships found in Va. Code §64.2-200 sets forth the order of priority of who owns a decedent's estate when the decedent died intestate.

(a) All the new owners of the estate should fit into just one of the categories listed in this code section.

(b) NOTE: this code section has undergone various statutory enactments. Call your underwriter if the decedent died before December 31, 1990.

(4) Require all heirs to sign the deed and your settlement papers.

(a) A POA may be appropriate.

(5) NOTE: Remember to check all heirs for judgments liens, which would attach, and need to be addressed. Remember to follow ORT's underwriting guidelines for intestate estates, including requiring an estate tax affidavit, and if the decedent died less than one year before settlement, require an indemnity agreement and an extra hazardous risk premium (or other bond or escrow proceeds).

*b) Administrator*

(1) Under Virginia law, an administrator of such an intestate estate can be granted powers by the Circuit Court authorizing the sale of real property. VA Code § 64.2-106.

(a) It is possible to be appointed administrator and not have the power to convey real property. Obtain a copy of the order appointing the administrator and make sure the administrator has the authority to sell real property.

(2) Unlike VA Code § 64.2-524, which authorizes and validates sales by foreign executors, there is no Virginia statute that authorizes a foreign administrator to sell real property in Virginia.

(a) If a foreign administrator has been appointed, require that the administrator be appointed and authorized to sell real property by the Circuit Court in the jurisdiction in which the real property is located.

(b) If you have questions, please call your underwriter.