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Wm. C. McGehee

THE AWKWARD STATUS OF COLORADO REAL PROPERTY IN A DECEDENT'S ESTATE

BY WM. C. MCGEHEE*

I. INTRODUCTION

At common law, title to real property is said to pass instantly from one owner to the next. This concept of immediate passage of title to real property is a consequence of the abhorrence of the common law for a gap in the seisin and its insistence that title should never be *in nubibus*. Thus, when an owner of real property dies, title to that property vests immediately in his devisees or his heirs, depending on whether he died testate or intestate. The personal property of a decedent, however, vests in his personal representative for ultimate distribution to his legatees or next of kin. Actually, the person or persons in whom title to real property vests immediately on death may not be known definitely for weeks, or even months, if there is controversy or uncertainty as to the validity or meaning of a will, or if the identity, relationship, legitimacy or survival of purported heirs is in doubt. This delay often negates, in fact, the certainty which the common law purports to achieve by the theory of immediate vesting. The common law attempts to explain such delays by resort to a second theory, namely, that when the heirs or devisees are identified with centainty, the finding "relates back" to the date of death.

Devisees or heirs in whom immediate title to real property vested enjoyed all the privileges of ownership, free from any right of, or interference by, the decedent's personal representative. This isolation of the real property of a decedent from the administration of his estate has become increasingly undesirable and impractical for several reasons.[1] Foremost among these reasons are the changes which have occurred in the nature of real property itself and in the manner in which it is owned. We have changed from a society in which the usual situation was that of fee simple ownership of a residence or farm, occupied by the owner, to one in which it is common to find many different estates in the same piece of real property and multiple ownership of these estates. In the case of farms, ranches or other rural properties one now finds that the surface and mineral estates often are separately owned, in whole or in part. The mineral estate is frequently subject to an oil and gas lease or other mineral lease and these leases, in turn, give rise to working interests, royalty interests and sometimes overriding royalties. Mineral, leasehold and royalty interests are often owned in small fractions by many persons who invest in such interests in much the same way one invests in corporate shares. Similarly, the surface estate may be the subject of a number of interests,

* Member of the Denver firm of Gorsuch, Kirgis, Campbell, Walker and Grover.

[1] See Basye, *Abolition of the Distinction Between Real and Personal Property in the Administration of Decedents' Estate*, 51 ILL. BAR J. 214 (1962); *Efficient Administration of Estates*, 102 TRUSTS & ESTATES 902 (1963).

such as agricultural, grazing or timber leases, and rights of way for roads, ditches, reservoirs and pipe lines.

Equally complicated interests exist in urban real estate. Perhaps the most sophisticated real property interest yet developed is the ownership of a piece of air, exemplified by the condominium. Such an interest could well be termed "intangible real property," creating an interesting real property counterpart to the well recognized phenomenon of intangible personal property.

In addition, improved means of transportation and communication and the increasing availability of investment capital have given rise to more frequent instances of nonresident ownership of real property.

The increasingly complex nature of interests in real property, the fragmentation of ownership thereof, and the growth in nonresident ownership create many situations in which it is impossible or impractical for heirs or devisees to assume possession and management of real property upon the death of the owner.

The other major factor which militates against the isolation of a decedent's real property from the administration of his estate is the fact that in many instances, particularly since the imposition of death taxes, the personal property of a decedent is insufficient to pay death taxes, expenses of administration and other claims against the decedent's estate, thereby making it necessary to resort to the real property, or at least to the income therefrom.

For the reasons mentioned, many states, including Colorado, have passed statutes modifying the common law to the extent that real property which is within the jurisdiction of the probate court is made "subject to administration." Our statute which so provides states in pertinent part:

> Every personal representative, by virtue of his office, shall have power, and it shall be his duty to receive, take possession of, sue for, recover and preserve the estate, both real and personal coming to his attention or knowledge, and the rents, issues and profits arising therefrom. All of such property and the rents, issues and profits arising therefrom shall be assets in the hands of the personal representative for the payment of debts, widow's, wife's, orphan's or minor's allowance, expenses of administration and legacies, in accordance with the will and the preferences granted by law, to be administered under the direction of the court.[2]

The personal representative also is given statutory authority, where not otherwise authorized by will, to sell or mortgage real property "whenever it shall appear necessary or expedient for the best interest of any estate or the persons in interest therein, having due regard to the rights of all . . ."[3] subject, of course, to compliance with the statutory provisions relating to sale of mortgage of real estate.

Thus, while the Colorado statutes give personal representatives very substantial rights with regard to a decedent's real property, they do not purport to change the common law concept of im-

[2] COLO. REV. STAT. § 152-10-13 (1953).
[3] COLO. REV. STAT. § 152-13-6 (1953).

mediate vesting of legal title in the heirs or devisees; nor do they give the probate court any specific authority in a testate estate to decree the manner in which title to real estate has devolved under a will. This arrangement frequently places real property involved in a decedent's estate in an awkward status. It is awkward because, in moving away from the original common law concept of complete divorcement of real property from estate administration and in moving toward placing the devolution of real property under the control of the court and the personal representative, we have stopped half-way. We have given the personal representative most of the practical attributes of ownership, including the right to possession and income, but have left the legal title itself,

and the devolution of that title in the case of a will, exactly where the common law originally had it—outside the estate proceeding.

A discussion follows of problems which arise under the present posture of the law, closing with remedial proposals. The problems are divided into two categories: (1) Those relating to rights in, and responsibilities toward, real property during administration of an estate; and (2) title and conveyancing matters.

II. RIGHTS AND RESPONSIBILITIES DURING ADMINISTRATION

Certain questions arise at present concerning the right to occupy real property, the enjoyment of income therefrom and the responsibility for payment of taxes and expenses thereupon while the property is subject to administration. Some of them are interestingly illustrated by a 1959 Colorado case[4] involving an estate in which one of the assets was an apartment building productive of rental income. A life estate in this property had been devised by testator to his daughter, who received all rents from the apartment subsequent to his death. The daughter paid the taxes on the apartment for the year of testator's death, which taxes had been a lien at the time of his death, and then requested reimbursement from the estate for the taxes thus paid. The executrix refused, and litigation ensued. In its opinion upholding the executrix, the court pointed out that the daughter took title subject to any burdens or encumbrances existing at the time of testator's death and that since she had enjoyed the income from the property she should assume the burden of taxes.

The action of the devisee-life tenant in taking possession of the property and receiving the income therefrom was proper by common law standards. Her assumption of the burdens related to the property would simply be a counterpart to her assumption of the benefits. Since the tax lien in *Robinson v. Tubbs*[5] was a statutory lien, and not a lien created by the voluntary action of the testator, it would not, strictly speaking, appear to involve the common law doctrine of exoneration. However, in a case[6] decided in the year following the decision in *Robinson v. Tubbs* which properly presented the doctrine of exoneration for consideration, the Supreme Court of Colorado held that the doctrine had previously been rejected by *Robinson v. Tubbs*.

As implied in passing in the *Robinson* case, statutes making real property subject to administration have modified the common law by permitting the personal representative to receive income from real property during administration and have likewise shifted the burden for payment of taxes and other expenses. While the section making real property subject to administration does not, in so many words, require the personal representative to pay taxes, it has been judicially determined that payment of property taxes is encompassed in his duty to "preserve the estate."[7] The respon-

[4] Robinson v. Tubbs, 140 Colo. 471, 334 P.2d 1080 (1959).
[5] *Ibid.*
[6] Ambrose v. Singleton, 144 Colo. 303, 356 P.2d 253 (1960).
[7] Brown v. Commissioner of Internal Revenue, 74 F.2d 281, 285 (10th Cir. 1934); Kretsinger v. Brown, 165 Fed. 612, 614 (8th Cir. 1908).

sibility of a personal representative to see that taxes are paid is likewise implicit in that portion of the claims statute which provides that "wherever it may be necessary to preserve or protect the estate for the benefit of persons in interest, the personal representative may pay any tax, assessment or encumbrance without the filing of a claim; . . ."[8]

The general property tax law in effect until August 1, 1964, refers specifically to the duty of fiduciaries to list property and pay taxes thereon.[9] While the new general property tax law no longer requires owners to list real property[10] and contains no language regarding payment of taxes by fiduciaries, there is no reason to believe that the underlying responsibility of fiduciaries for payment of taxes has been altered.

The *Robinson* case indicates that if the personal representative had retained possession of the apartment property and the income therefrom, the real property taxes would have been paid out of the income. What if real property subject to administration is not productive of income? Is the personal representative still responsible for payment of taxes? Since the property is under the control of the personal representative and is available, if needed, for satisfaction of claims against the estate, and since the personal representative is charged with responsibility to protect and preserve the assets, the responsibility logically should remain with the personal representative.

If nonproductive real estate is part of the residuary estate, taxes on it may be satisfied out of other residuary assets. It has been held that taxes arising subsequent to the death of the tastator and paid during administration by the personal representative may be treated as expenses of administration.[11] However, if the real estate has been specifically devised and is not part of residue, may the real property taxes still be charged against residue as an expense of administration? If *Ambrose v. Singleton*[12] does not allow exoneration of specifically devised property as to liens existing at the death of testator, it is reasonable to think that the same philosophy would apply to taxes incurred subsequent to death. Thus, while the personal representative appears to be equally responsible for payment of taxes on real property subject to administration whether it is specifically devised or part of residue, the ultimate burden for taxes (and presumably other expenses) attributable to specifically devised real estate would still seem to fall upon the devisee.

The amorphous nature of rights in real property following the death of the owner also creates problems in the assessment of real property taxes. Because the identity of heirs or devisees may not be known for some time after the death of the former owner, and with or without the benefit of permissive statutes, assessments are made variously in the name of the decedent, the estate of the decedent, the heirs of devisees as a class, the personal representa-

[8] COLO. REV. STAT. § 152-12-12 (Perm. Supp. 1960).
[9] COLO. REV. STAT. § 137-3-23 (1953).
[10] Colo. Sess. Laws 1964, § 137-5-2.
[11] *Supra* note 8, at 285.
[12] *Supra* note 6.

tive, or to unknown owners. There is statutory authority in Colorado for assessment to "owners unknown."[13]

The present practice in Denver County apparently is to assess property in the name of an owner who may be deceased until such time as the assessor is given actual notice of his death or until such time as an instrument is recorded in the real property records of the county which indicates his death. Upon receiving such notice, the assessor then assesses the property in the name of the estate of the former owner until such time as someone notifies the assessor to assess taxes to him or until instruments are recorded evidencing the succession of title.

While not discussed in the *Robinson* case, it is probable that the executrix permitted the life tenant to receive income from the apartment *ab initio* because of the fact that there were ample additional assets of the estate to pay claims, death taxes and expenses of administration, making it unnecessary for the executrix to administer that property. Such a relinquishment of the right to to administer real property either at the outset or during the course of estate administration is, in effect, a partial distribution of the real property. Unfortunately, there exists no well-defined means by which real estate may be partially distributed during the course of administration. Although a statute was passed in 1959 which sanctions partial distributions to legatees or heirs,[16] there is considerable doubt whether this provision can be considered to include real property. The distribution made by the court on final settlement of an estate covers only personal property, on the theory that since title to real property vests immediately on death it is not part of the property which the court distributes. If the court does not distribute real property when an estate is closed, it seems to follow that it would not do so in a partial distribution.

One exception which emphasizes the foregoing generalization is found in a recent amendment to the statute governing the composition of the share of an electing spouse which provides that "Any order of court made pursuant to this section providing for the distribution of property shall be deemed to provide that any real property disposed of by the order shall vest in the distributee."[15]

Despite lack of apparent authority, the courts sometimes are willing to enter orders tendered by counsel, such as the following recorded decree which purported to effect a partial distribution of Colorado real property:

> Now on this day this matter coming on to be heard upon the petition of the executor, and the court being advised in the premises, the court finds that as to the following described real estate, to-wit: .....lying and situated in the County of....., State of Colorado and with respect to said real estate, this estate has been administered according to law and the orders of this court, and that, as respects the above described real estate, ample and proper provision has been made for creditors

[13] Colo. Sess. Laws 1964, § 137-5-2.
[14] COLO. REV. STAT. § 152-14-5 (Perm. Supp. 1960).
[15] COLO. REV. STAT. § 152-14-10 (Perm. Supp. 1960).

> of the estate, and for expenses of administration, and for all other persons in interest, and that it is in the best interests of said estate that the fiduciary be discharged as respects the said real estate, wherefore,
>
> IT IS ORDERED that....., executor, be and he is hereby discharged with respect to his rights to and responsibilities toward the above described real estate only, and that title to said real estate may henceforth pass in accordance with law as if final distribution had been made, and the final report herein filed and approved, and said fiduciary had been fully discharged.

Query as to the effect of that decree.

A personal representative or a court should be able to achieve a partial distribution of real property in the same way that a partial distribution of personality can be made. Statutory authority to do so should be clear enough to avoid any title questions related to such a partial distribution.

In the same realm as the questions of taxation and partial distribution previously discussed is the question of occupancy of a family residence during administration. Theoretically, the personal representative should charge rent to whomever occupies the property. One can readily imagine a widow's reaction to such a suggestion. The potential harshness of this situation is ameliorated to some extent by the statute giving the court authority to permit the spouse or minor children to remain in possession without payment of rent for such period and upon such terms as the court may deem just.[16]

It may be seen that the present posture of the law leaves some areas of doubt concerning the relative rights and responsibilities of personal representatives and heirs or devisees with regard to real property of an estate during the period of administration. Such doubts are best resolved by drawing wills which spell out with precision the rights and responsibilities of the parties during administration.

III. Title and Conveyancing Problems

The first title problem considered hereunder is the question of who can give a valid deed to real property which is subject to

[16] Colo. Rev. Stat. § 152-12-15 (1953).

administration. Ordinarily, the conveyance will be by executor's or administrator's deed and it is rare that the purchaser's attorney will require the joinder of the heir or devisee who, in theory, is the owner.

The ingenuity of the common law explains this seeming anomaly of conveyance by someone other than the holder of legal title by pointing out that the deed of the personal representative serves to divest the title of the heir or devisee and give it to the grantee. This, of course, has its parallel in other types of conveyance by public officials or officers of the court, such as sheriffs' deeds or deeds of court appointed trustees. It also has its parallel as to risk, if the personal representative thus conveying abuses or exceeds the authority granted in the will or fails to comply with necessary statutory requirements.

How about taking a deed from an heir or devisee while the property he "owns" is subject to administration? If the estate can be closed properly without resort to the property in question, the title conveyed was good. Until the estate is closed, however, there is at least the theoretical risk that title thus acquired will be divested by the personal representative.

The second question for consideration is whether a will or decree of heirship operates as an adequate muniment of title to real property which was not owned by the decedent at death, and which is taken in the name of the personal representative during administration. This situation could arise when a personal representative exchanges real property which was owned by the decedent for other real estate, when a personal representative purchases real property as an investment with funds of the estate or perhaps, in rare instances, when some third party gives or devises real property to the estate of the decedent so that the property can be handled as part of that particular estate. While it has been clear in Colorado that a will disposes of real property which a testator acquired after he excuted the will but prior to his death,[17] this carries the question one step further. The safest approach would be to have the personal representative convey title to the distributees at the appropriate time. However, suppose the estate has been closed and the personal representative has failed to do this. Should the estate be reopened for purposes of such a conveyance? If the personal representative has died in the meantime, should a successor fiduciary be appointed solely for this purpose?

It is hard to conjure any rationale under which a will or decree of heirship could be said to pass title to real property not owned by the testator at death. To apply the doctrine of after-acquired title to a testamentary disposition would be a perversion of that doctrine. Such an approach would fly in the face of the notion of

[17] Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429 (1902). Note however, that the cited case relies upon statutory language similar to that found in COLO. REV. STAT. § 152-5-2 (1953). That section was amended in 1957. The present § 152-5-2 (Perm. Supp. 1960) omits the phrase appearing in earlier versions "which he or she has or at the time of his or her death shall have." It is improbable that the legislature intended to re-establish the common law rule that a will does not pass title to real property acquired after its execution, but it is arguable that the present statutory language has that result.

immediate vesting upon death. Further, it would produce an improper and unintended result in the situation where the personal representative uses personalty of the estate to purchase real property if the real and personal property do not pass to the same parties, and in the same proportions.

The final title problem treated here is the difficulty in establishing the devolution of title to real estate under a will which is not, in and of itself, a sufficient muniment of title. The insufficiency of a will as a muniment of title will be examined in two contexts: (1) Where a specific devise contains an inadequate legal description; and (2) where distribution of real property is discretionary with the executor.

Consider first a devise of residential property without a specific legal description, such as:

> I devise unto my wife all my right, title and interest in such real property and improvements thereon as she and I are using as our residence or residences at the time of my death, subject to any lien or liens existing against said property at the time of my death, if she survives me.

This type of devise need not be criticized, since many testators are likely to change their residence without thinking to change their will, in which case the devise might adeem if it set forth only the specific legal description of the former residence. Nevertheless, this type of will provision standing alone does not provide an adequate muniment of title. It is necessary to record an additional document which will establish the proper legal description of the property referred to by the general language in the will.

However, since title already was vested in the devisee and is not being divested, none of the instruments referred to conveys title, but is simply in explanation thereof. Perhaps that is enough. The trouble is that in the absence of an established and uniformly accepted practice the lawyer who handles the estate and the lawyer who later examines the title may not agree as to the proper method.

Consider finally a will in which the executor is given discretion to distribute real property in a disproportionate manner. For example, an estate might include mineral interests having considerable potential value but producing no present income. Such assets would not be particularly appropriate in a marital trust giving the surviving spouse a life estate with power of appointment.[18] The executor probably should distribute all of these mineral interests to other beneficiaries and avoid a proportionate distribution of them to the martial trust.

In another case, a testator might have as his equal beneficiaries a son who is in the ranching business in Colorado and a daughter living in another state. If the testator's estate includes Colorado ranch property, it very probably would make sense to satisfy the son's legacy with this type of interest and give the daughter cash, securities or other personal property which she could manage more easily.

It is in such situations, where the testator purposely refrains

[18] See U.S. Treas. Reg. § 20.2056(b)-5(f)(5) (1958).

from specifically devising real property by his will and in which an executor is given broad discretionary authority in the distribution of real estate, that the common law rule of immediate vesting in devisees seems farthest removed from both reality and desirability. In fact, if a subsequent disproportionate distribution of real property by the executor results in a theoretical "divestment" of interests previously vested, the resulting rearrangement of interest might be treated by the tax authorities as a taxable exchange.

Here again, the will alone is not an adequate muniment of title and one or more additional instruments must appear of record to set forth the actual devolution of title, such as a quit claim deed or assignment from one beneficiary to another, a decree, a deed or other instrument of conveyance by the executor, or perhaps a combination of several of these, none of which enjoys definite sanction. There is doubt whether the statute subjecting real property to administration or any other provision of the Colorado statutes gives a probate court authority to enter an order decreeing a disproportionate distribution of real property which is binding, particularly if such a decree is entered as a routine part of administration without special notice to the parties affected. As mentioned earlier, the schedule of distribution in a final report deals only with personal property and does not purport to distribute real estate, which is consistent with the common law theory. Although some of our probate courts will enter decrees purporting to dispose of real property when tendered by counsel, the effectiveness of such decrees is questionable at best.

IV. REMEDIAL PROPOSALS

It might be appropriate to consider one or two possible solutions to the problems which have been presented. The most drastic and perhaps the most effective solution would be to abolish completely the common law rule of vesting in heirs or devisees and provide, instead for vesting of legal title to real property in the personal representative. This would avoid the ambivalence now existing as a result of ownership by a devisee on the one hand and practical control by the personal representative on the other hand. All of the rights and responsibilities as to a decedent's real property would be centralized in the personal representative until such time as title was conveyed to the beneficial owner upon a partial or final distribution. The deed of the fiduciary then would be the principal muniment of title rather than a will or decree of heirship.

Although no state in this country is known to have adopted such a far-reaching statute, the statutory rule in England since 1897 has been that real property devolves upon the personal representative in the same manner as personal property.[19] England, the source of our common law, has frequently shown more flexibility than we in discarding or revising common law principles dissatisfying the needs of the time.

[19] Land Transfer Act, 1897, 60 & 61 VICT., c. 65, § 1, superseded by Administration of Estates Act, 1925, 15 GEO. 5, c. 23, § 1.

In the absence of statutory authorization, the same result could be achieved in an individual estate by an appropriate will provision vesting title in the personal representative. A provision appearing in a recent edition of Trusts and Estates is designed to accomplish this result:

> In the event that my wife survives me and there should be included in my residuary estate any interest in real estate, I direct that ownership of such interest shall vest in the first instance in my Executor, even though under applicable local law title would otherwise pass directly to the the devisee, and that my Executor shall make the division, allocation, and conveyance of the same and the net income therefrom between the trusts as above provided.[20]

A more limited solution is afforded by the Model Probate Code, which provides specifically for a decree of final distribution which, rather than the will, is to be the significant muniment of title and which is required to distribute by specific description every tract of real property which is subject to administration.[21] The Model Probate Code further provides that the decree is to be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, and requires that a certified copy of the decree "be recorded by the personal representative in every county . . . in which real property distributed by the decree is situated."[22] Such a decree would provide a more effective method of establishing the passage of record title than does a will supported by various other explanatory documents of questionable effect and effectiveness. The weakness of the Model Probate Code is that its retain the concept of immediate vesting in devisees[23] and, therefore, retains the same potential for confusion during the period of administration which exists under our present practice.

[20] Durbin, *Marital Deduction Formula Revisited*, 102 TRUSTS & ESTATES 545, 610-11 (1963).
[21] SIMES, MODEL PROBATE CODE § 183 (1946).
[22] *Id.* at § 183(e).
[23] *Id.* at §§ 84 and 124 and comment following § 124.