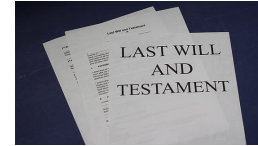


**Brian Funk's Unofficial Guide on Who Should be the Seller(s) When the Sole Owner of Real Estate Has Died in the State of Delaware**



revised on 6/8/2022

Did the Decedent Have a Valid Last Will & Testament?  
(i.e. Signed, Dated, and 2 Witnesses)



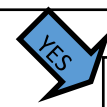
**NO WILL** (i.e. *intestate*)

**General Rule:** All of the Heirs Must Sign Everything from Listing Agreement, Contract, Deed, Settlement Statement, Transfer Affidavits, Form 5403, and other settlement paperwork. Unlike some states, the personal representative/administrator does not have the power to sell real estate in Delaware.

**Exception:** If the estate is insolvent and *intestate*, the personal representative of the estate may file a Petition with the Court of Chancery seeking the power and authorization to sell the real estate on behalf of the estate itself. In this situation, after a hearing, the Court of Chancery may issue an Order allowing the personal representative to sell the real estate on behalf of the estate.

**YES** (i.e. *testate*)

Does the Last Will specifically contain language that "**Authorizes and Directs**" the Real Property to be Sold by the Personal Representative or Estate?



Is the real estate *specifically gifted* go to specific beneficiaries?  
(i.e. a specific gift or specific devise)

If this magic language exists that mandates a sale, then the personal representative/executor must sell the real estate on behalf of the estate (no court order is required).



- In All Situations Whether the Estate is *Testate* or *Intestate* in the State of Delaware:
1. If the estate does not have an Delaware attorney of record (i.e. *pro se*) and the sale is occurring within the 8-month creditor-claims period, you should expect that the settlement attorney to escrow 100% of the net proceeds until the estate is closed. Why? Open estates with unpaid (or still unfiled) creditor claims have the same potentially devastating effect as not paying off a seller's mortgage on a home—and it's a title insurance issue.
  2. If the estate is *pro se*, the settlement attorney will likely insist that the estate's Inventory be filed at the Register of Wills by closing. Why? We do this to make sure heirs/beneficiaries for the real estate on Schedule A match our new deed.
  3. When there are multiple heirs/beneficiaries—in particular, ones who live across the country, a specific Power of Attorney (POA) may be given from the heirs to one trusted and responsible person to handle the sale. However, remember that by Delaware law, a personal representative cannot delegate his or her official role using a POA.
  4. Regardless of where the Decedent last resided and primary probate may be occurring, Register of Wills filings will required in the specific county where the real estate is located (e.g. if the Decedent died in Sussex County or another state, ancillary filings will be necessary if the house being sold is in New Castle County).

**Real Estate is Part of the "Residue"**

**General Rule:** When the real estate is part of the "residue", all of the named beneficiaries must sign everything from Listing Agreement, Contract, Deed, Settlement Statement, Form 5403, Transfer Affidavits, and other settlement paperwork.

**Exception:** If (1) the real estate is part of the "residue" and the personal representative reasonably believes that the sale is necessary to pay debts of the decedent and (2) there is general authorization giving the personal representative/executor the "power" to sell real estate on behalf of the estate in the Last Will—but not a direction/mandate to sell—then the personal representative may sell real estate—without a court order under 12 Del. C. § 207 (c). (Caution: Do not make the serious mistake of assuming that this exception could or will apply to your sale without speaking to an attorney.)

**Specific Gift by Last Will**

**General Rule:** If the real estate is specifically gifted to go to specific beneficiaries, then all of the named beneficiaries must sign everything from Listing Agreement, Contract, Deed, Settlement Statement, Transfer Affidavits, Form 5403, and other paperwork.

**Rare Exception:** If the estate is insolvent—even with a specific gift—the personal representative of the estate may file a Petition with the Court of Chancery seeking the power to sell the real estate on behalf of the estate itself. In this situation, after a hearing, the Court of Chancery may issue an Order allowing the personal representative to sell the real estate on behalf of the estate itself.