Title Tips by TUTE

Description

Lists of Heirs I Have Known and Loved

Spoiler alert! This may descend into a rant. Being raised by a genteel woman of moderately impeccable breeding, it will not rise to the level of Twitter flame wars (or whatever they are called these days, at least I hope not), but Tute begins from a pit of miasma and despair that places your humble correspondent at a horrible disadvantage.

Let us start with the statutory authority. Guess what? Lists of heirs are mandatory.

> Every personal representative of a decedent, whether the decedent died testate or intestate, shall, at the time of his qualification, and every proponent of a will where there is no qualification of a personal representative, shall, at the time the will is presented for probate, furnish a list of heirs under oath in accordance with a form provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court or a computer-generated facsimile thereof to the court or clerk where the personal representative qualifies and to the clerk of the circuit court for the jurisdiction where any real estate that is part of the decedentâ??s estate is located. Virginia Code Â§ 64.2-509(A)

Let me summarize and repeat myself. Every personal representative who qualifies and every proponent of a will where there is no qualification (weâ??re just recording the will to establish a link in the chain of title) SHALL furnish the list of heirs. So, why am I flabbergasted when I canâ??t find one?

Guess what else? They get recognition.

> A list of heirs made under oath and recorded pursuant to this section shall be prima facie evidence of the facts contained in the list. Virginia Code Â§ 64.2-509(C)

This should come as no surprise to title examiners, who have long relied on lists of heirs and affidavits of heirship, and recitals in deeds regarding family antecedents, to construct their family trees. Such reliance is based on the above statute, and one in the evidence section of the Code, which extends the recognition to recitals in deeds and deeds of trust.

> [R]ecitals of any fact in a deed or deed of trust of record conveying any interest in real property shall be prima facie evidence of that fact. Virginia Code Â§ 8.01-389

Prima facie is good, right? You betcha. From the Latin meaning â??at first sight,â?• it also means sufficient to establish a fact or raise a presumption unless disproved or rebutted. Blacks Law Dictionary, Abridged Seventh Edition, p 969. That is a tad better than â??assume,â?• the real meaning of which is known to all title examiners. Many of us might assume the â??Affidavit Relating to Real Estate of Intestate Decedentâ?• under Â§64.2-510 will get the same treatment as the â??List of Heirsâ?• under Â§64.2-509. Iâ??m not saying it wonâ??t, but the statute doesnâ??t say it will. If your examination reveals conveyances from five â??heirsâ?• and the list of heirs only discloses three, reliance on the list might be misplaced, as there is now additional information rebutting the presumption of accuracy formerly attached to the form.

So why have I pulled out my soapbox? Where is this rant coming from? â??When, oh verbose one, will you get to the point?â?• I hear you saying. Fine.

What do I want to know as a title examiner when presented with a list of heirs? (OK, maybe my personal expectations are too high, what do you want to know?) Who gets the real estate if there is no will? Do we get that? Sometimes, but not every time. Let me illustrate.

Just to be fair, Iâ??m going to fuss at the Office of the Executive Secretary of the Supreme Court, the agency which promulgates the â??officialâ?• forms used by most Clerks. Form CC-1611 (List of Heirs) has the affiant stating â??the following are all of the heirs of the Decedentâ?• and then provides space to list names, addresses, relationships and ages. The alternate form (CC-6612 â?? Real Estate Affidavit) uses the same language and provides blanks for the same data.

To be a teency bit nit-picky (Who? Me? Gasp!) an heir is a person who, under the laws of intestacy, is entitled to receive an intestate decedentâ??s property. Blacks Law Dictionary, Abridged Seventh Edition, p 580. Proponents of a will or family members filing a list of heirs so they can convince the Treasurer to send them the tax bills are not always going to have thought through who is, or might be, an â??heir.â?• The determination of who would be an â??heirâ?• and the filing of the form seems to fall within the â??any matter involving the application of legal principles to facts or purposes or desiresâ?• part of the definition of practice of law, but the easy-peasy form down at the courthouse might lead folks to think otherwise.

Examples, you ask? OK, here are a few. If the will leaves all the real estate to â??my very special friendâ?• there is a good chance the friend is not an heir under the statute of descent and distribution. To put the friendâ??s name on the form is just plain wrong. A will replaces the judgment of the legislature of â??where we think most people would want their property to goâ?• with â??where I want the property to go.â?•

Similarly, if the will devises real property to â??Child A, Child B, and Child C,â?• and specifically withholds any from the Prodigal Child who took an early distribution and squandered his inheritance with loose living in a far country, the list of heirs should include all four children.

And should a fifth child exist, letâ??s call her â??Pretermitted,â?• a favorite of title insurance examinations, she also needs to appear on the list of heirs.

And if the will did not have a catch-all residuary clause (Parcel 1 to A, Parcel 2 to B, and Parcel 3 to C, and no mention at all of the â??Beach Houseâ?•) then we need to know about Prodigal and Pretermitted because, despite having what seemed a very detailed will, the decedent is intestate to the

vacation property.

If the form were purely a factual affidavit, the OES could ask for a listing of all the members of the decedentâ??s immediate family. I canâ??t blame them for not doing that since that would be subject to misinterpretation if the decedent were a serial monogamist, with a trail of â??Brady Bunchâ?• â??yours, mine and oursâ?• descendants spread over multiple states. Preposterous, you say. Perhaps, but just this week I reviewed two lists of heirs filed on behalf of a husband and wife who died a year apart. Mommaâ??s list identified five children and eight grandchildren in three states. Poppaâ??s list identified eleven children and seven grandchildren in four states. Three children and five grandchildren appeared on both lists.

This leads to another pet peeve. If the affiant is going to treat the list of heirs as a genealogical document as opposed to a conclusory legal document, they need to follow the â??begatâ?• rule. (See Genesis 5 â?? get coffee first). To decide if the ten grandchildren listed in the preceding paragraph (and why do I have a sneaking suspicion there might be more?) are the heirs of Momma or Poppa or both (and I will need to know since Momma held a partial interest, Poppa held a partial interest, and both held a partial interest with survivorship), I need to know who their parents are. If there was another child who predeceased, then the grandchild is an heir, standing in the shoes of their deceased parent (who predeceased the grandparent). If the parent was one of the children already reported, they arenâ??t an heir . . . maybe an â??heir in waitingâ?• if distribution doesnâ??t happen quickly, but not an heir of the decedent who died seized and possessed of the real estate being examined.

But begetting is not all we care about. Remember, this is all about applying the statute of descent and distribution to the fluid relationships that represent human dynamics. If Poppa married Momma, sheâ??s on the heir list . . . how high depends on the year in which Poppa died. If Poppa merely entered into a housekeeping relationship strongly resembling a traditional nuclear family, but without benefit of licensure (the cad! Unless she cleaned him out with a pre-marital agreement, in which case, is there anything left to inherit? but I digress), then sheâ??s not. Virginia is not California (yet, and one might hope, never will be) so â??palimonyâ?• is a foreign concept, along with any related concept having to do with estates. But, to get back on topic, if we have grandchildren on the list, but no surviving spouse of a deceased child, is there something missing I might want to know? (hint: nod your head up and down) I suspect many folks facing this form are trying to figure out who is â??bloodâ?• kin, and forgetting the in-laws.

Another aspect of filling out the state form that can render it less than helpful is the willingness of the Clerk to accept a substitute for age. I realize most folks going down to probate donâ??t expect to be filling out a full genealogy, but â??adultâ?• and â??minorâ?• and â??infantâ?• are not ages, they are ranges. The designation as a minor on a list of heirs filed five years ago doesnâ??t help me determine their status today. Designation as child or grandchild may allow me to sort by generations, but I still donâ??t know who is related to whom, and how. The use of Jr. and III, IV, etc. may help identify one line of male children, but it doesnâ??t help with the rest. And let us hope that the world at large knows that â??Jr.â?• was traditionally used when a son was given the same name (first, last, middle) as his father, and II was used when the boy was named in honor of a different male relative (but again, identical first last and middle names).

And donâ??t even get me started on adoption and child-bearing without benefit of wedlock. Virginia Code Â§ 64.2-102. Kummer v. Donak, 282 Va. 301, 715 S.E.2d 7 (2011); Jenkins v. Johnson, 276 Va.

30, 661 S.E.2d 484 (2008) Or divvying up the maternal and paternal moieties when there are no immediate takers under the statute. Sheppard v. Junes, 287 Va. 397, 756 S.E.2d 409 (2014)

Letâ??s all be careful out there.

TUTE

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