The Claims Corner: A Failed Specific Devise â?? Intricacies of Examining and Underwriting Estates in Virginia

Description

Letâ??s face it â?? itâ??s just not easy to determine how to vest property that has gone through an estate in Virginia. Itâ??s a complicated task, and sparks quite a few title insurance claims. This article discusses the issue of a specific devise in a probated will that failed due to the devisee predeceasing the testator.

Kermit died in Virginia in December, 2021, and his will was probated in March, 2022. Kermit had one nephew, Robin. In his will, Kermit devised the real estate located at Main Street in Richmond to Statler and Waldorf, â??in equal shares, share and share alike.â?• He left the rest and residue of his property to Robin.

In January, 2023, Waldorf signed a contract selling the Richmond Property to Sam. He presented evidence that Statler had predeceased Kermit, and claimed that he was the sole owner of the Richmond property. Settlement agent closed and insured with a deed from Waldorf. Robin then claimed that he owned an interest in the land, and the claim ensued.

First, letâ??s address the specific devise to Statler and Waldorf â??in equal shares, share and share alike.â?• â??Share and share alikeâ?• in Virginia means they each get an equal share â?? in this case, one half each â?? as tenants in common. See Gardner v. Gardner, 152 Va. 677, 148 S.E. 781 (1929). Virginia does not follow the common law standard here: in many jurisdictions, this language means that the named parties take with survivorship. But in Virginia, you have to use the magic words â??survivorâ?• or â??survivorshipâ?• or some other language to indicate that the interest of one who predeceases the testator passes to the other members of the group. There has to be a clear intent of survivorship, per Virginia Code Â§ 55.1-135.

The next step, then, is to review the entire will, and all of its clauses, to see if there is any provision that indicates survivorship or some other direction when a beneficiary predeceases the testator. If there is no guidance anywhere in the will, we then look to the statutes.

The statutory rules are different depending on whether the predeceased beneficiary was â??a grandparent or a descendant of a grandparent of the testator.â?• See Virginia Code Â§ 64.2-418. A â??grandparent or a descendant of a grandparentâ?• of the testator, which includes the testatorâ??s grandparents, parents, siblings, children, aunts, uncles, nephews, nieces, and cousins, or their issue. This does not include the grandparentsâ?? siblings or any descendants of the grandparentsâ?? siblings. In any devise, specific or residuary, if the predeceased devisee was such a relation to the testator, then his share goes to the descendants of the predeceased devisee. This poses a problem for an examiner or underwriter, if they donâ??t know or cannot tell whether the beneficiaries are related to the testator, or to what degree they are related. We may need to go to the internet to search for obituaries or family trees to try to gather that information, or require a family tree from the seller.

For beneficiaries who are unrelated to the testator, the rules diverge. In a specific devise, if the predeceased devisee was NOT such a relation to the testator, then his share of this specific devise passes to the residue, under Virginia Code Â§ 64.2-416.B.1. If the residue is devised to more than one person not so related to the testator and the share of one fails for any reason, the failed share passes to the other residuary devisees, per Virginia Code 64.2-416.B.2.

This is just one provision of will construction that you need to be aware of, in order to properly vest title. You may not find all the information you need to make a clear determination in the land records. Review wills in the chain of title carefully, and reach out to your underwriter advisor for guidance when a beneficiary has predeceased the testator.

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