ORANGE IS THE NEW BLACK(ACRE):
NAVIGATING THE COMPLEXITIES OF THE TRANSFER OF A DECEDENT’S REAL PROPERTY INTERESTS

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I. INTRODUCTION

When a Kentucky decedent dies owning real property, ownership of that real property generally passes by one of these methods: (1) by operation of law; (2) by the terms of a last will and testament or by trust; or (3) by the laws of intestate succession.

The fact that there is not one defined way can be a very difficult concept for anyone, including attorneys. What is often most confusing is that although title passes because of the death of the decedent, real property is not necessarily subject to “probate” and probate administration. When and whether real property interests are subject to probate presents real challenges for the Kentucky lawyer who may struggle in a particular situation with some of the following issues:

A. When can/should/how a fiduciary sell real property in a probate estate?

B. What are the rights of creditors in probate estates where real property was the primary asset of the decedent?

C. What are the rights of the beneficiaries to object to a sale by a fiduciary?

D. How are the real property bills (taxes, mortgage, gas, electric, water) paid during the probate estate?

E. What steps is a fiduciary obligated to take to protect title to the real estate?

F. What are the obligations for real property subject to a mortgage?

G. How should property pass if an heir/beneficiary has creditor/debt issues?

H. Can real property passing by operation of law (i.e. survivorship) stand “good” for the debts of the decedent?

This article primarily focuses on real property that does not pass by operation of law (example, real property passing by virtue of joint tenants with rights of survivorship where there is a survivor), although it will touch on those issues. Instead, it will walk you through the basics of real property issues that a Kentucky attorney may encounter when a decedent’s interest in Kentucky real property passes by the laws of intestacy, by last will and testament, and/or by trust, and will attempt to answer the above questions.
II. PROBATE AND KENTUCKY REAL PROPERTY: IN GENERAL

A. General Rule of Real Property Interests in Kentucky

When a person dies owning real property in Kentucky, his or her interests pass in accordance with Kentucky law. As stated above, at the death of a real property owner, such real property can pass by one of these methods: by operation of law; by the terms of a last will and testament or trust; or by the laws of intestate succession, if there is not a valid will.

When real property passes by intestate succession or by a last will, then the successor to the decedent's interest in the real property is not the decedent's estate, but rather the decedent's heirs or beneficiaries under a Last Will and Testament. Stated differently, real property vests in the heirs or beneficiaries at the moment of death. This is a challenging concept to grasp for both attorneys and their clients. Even more difficult is that although real property vests immediately, Kentucky case law and statutes give a fiduciary certain rights for the transfer and sale of real property under some situations such as the payment of debt or a mandated distribution.

The general rule is that real estate passes outside of probate, except when it does not. The author of this article wants to establish first and foremost that virtually every issue concerning the passing of Kentucky real property upon death will come back to this general rule. And, while we agree that this is rule is (1) confusing and (2) difficult to explain in terms of title and counseling those impacted by real estate passing as a result of the death of a person owning property in Kentucky, it is what it is, so to speak.

B. The Petition for Probate: Real Estate Inclusion Issue

If the general rule is that real estate vests at the moment of death unless it does not, then at the inception of the probate the issue becomes whether there is an obligation by legal counsel to include real property interests of a decedent on the petition for probate.

The recommendation of the author is that the real property interests in which the decedent had an interest should be listed on the petition, even if the inclusion is for informational purposes and denoted as such. The rationale behind this is that our law allows for the use of real property interests to be pulled into an estate under some circumstances. For example, KRS 395.515 states in relevant part:

...that if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real

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1 Slone v. Casey, 194 S.W.3d 336 (Ky. App. 2006); Wood v. Wingfield, 816 S.W.2d 899 (Ky. 1991).

2 Id.

3 KRS 395.515.
property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts.

Petitions to open a probate are public documents and undoubtedly creditors have certain rights. The disclosure of the real property interests of a decedent can only mean that the probate attorney has provided any person or entity who is examining the decedent’s assets with information to determine that person or entity’s rights in proceeding forward. Basically, it means full disclosure.

Further, including real property interests of a decedent within the petition can potentially assist with title issues. Specifically, when the six-month creditor period\(^4\) has passed, then the title can reflect that unsecured creditors are known.

Essentially, the disclosure of a decedent's real property interests can strengthen the argument of a fiduciary that full disclosure was made to all potential creditors and can establish that unsecured creditors are known and made aware of the real situation.

### C. Dispensing with Administration and Real Estate

Since real estate vests at the moment of death,\(^5\) in theory, if a decedent dies with real property but without other assets subject to probate (or probate assets less than $15,000), then there may be a determination to dispense with administration under **KRS 395.455**. Yet, if a dispense with administration occurs, it does not necessarily mean that the decedent's creditors do not have rights. To the contrary, **KRS 396.205** provides that a creditor has two years from a decedent's death to come forward if a full administration is not opened.\(^6\)

This opens up a very real concern about dispensing with the administration of an estate when the decedent owned real property. The practical implication of the law is that while title may vest without a probate administration, the rights of an unsecured creditor to the decedent's assets are: (1) the six months of a full administration; or (2) two years if there was not a full administration.\(^7\)

\(^4\) **KRS 395.195**

\(^5\) *Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006); *Wood vs. Wingfield*, 816 S.W.2d 899 (Ky. 1991).

\(^6\) **KSR 396.205**. However, note that the KBA Probate and Trust Law Section has proposed a change to this law which would decrease the two-year period of time.

\(^7\) The KBA Probate and Trust Law Section has proposed a change to this law which would decrease the two-year period of time.
This calls into question whether clear title can be passed prior to the expiration of two years (or less if the new proposed law passes) from a decedent’s death if there was a dispense with probate. It would appear that at the very least, an attorney facilitating the dispense with probate would need to disclose this issue to the parties especially if the intent was the immediate sale of the real property.

III. FIDUCIARY SALE OF REAL PROPERTY IN A KENTUCKY PROBATE ESTATE

A. Authority to Sell Property

It is easy to overlook the complexity of the real property issues in probate. Many attorneys just assume that the fiduciary can sell property if they want to do so or can transfer it to heirs or beneficiaries if they do not wish to sell the real property.

However, the authority to convey real property by a fiduciary depends upon:

- Whether the estate is intestate;
- Whether a testate decedent authorized a sale and all parties agree; or
- Whether the fiduciary is mandated to sell in the testamentary document.

Below we examine intestate and testate situations with real property interests.

1. Real property sale by an estate fiduciary (intestate estate).

When a decedent dies intestate (without a last will), KRS 389A.010 requires that a personal representative must seek district court permission for the sale of real property. Compliance with KRS 389A.010 is not typically an easy task. A KRS 389A.010 Motion must satisfy the following requirements:

a. It must be made in the district court;

b. It must include:

   i. An adequate description of the real property;
   ii. A summary of the grounds for the motion;

c. It must have a sufficient bond;

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8 KRS 389A.010.
d. It must provide notice of the hearing with a copy of the motion;

e. Notice must be served in a manner authorized by the Rules of Civil Procedure for the initiation of a civil action;

f. Those entitled to service include all persons who have a “vested or contingent” interest in the sale.

One aspect that can be particularly difficult is complying with the statutory mandate of notice “served in a manner authorized by the Rules of Civil Procedure for the initiation of a civil action.” This means confirming that service has occurred and that all heirs-at-law have had the sufficient time to answer. Assuming service occurs in compliance with the statute, the hearing can then take place.

Although not mandated by statute, some courts also require that the method of sale (auction or private realtor) be approved and therefore, a sales contract should be submitted for approval. In addition, some courts require an appraisal to be submitted as well. That can differ from judge to judge. Further, when a person with an interest in the property is a minor or is disabled, special notice has to be provided that could extend the notice requirements.

Taken as a whole, the process for the approval of the sale of property under KRS 389A.010 can sometimes be lengthy. Some intestate estates have several fractional interest holders. Complicating the whole process is that these heirs at law can be disabled, minors, or difficult to locate. Also, assuming the KRS 389A.010 Motion is approved by the district court, the real property cannot be transferred for 30 days after entry of the order.

One important aspect is that a sale under KRS 389A.010 does not “strip” liens from the real property. Therefore, a fiduciary must carefully weigh the implications of the sale prior to arranging the sale. For example, a fiduciary should make sure that title has been run to assure that the fiduciary knows of liens and mortgages.

Attached as Appendix A is a general checklist for sale by 389A.010 Motions.

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9 Id.
10 Id.
11 See KRS 389A.010(3)(a).
12 Id.
13 KRS 389A.010 Checklist, Appendix A.
2. Real property sale by an estate fiduciary (testate estate).
   
a. If a testamentary document does not authorize sale.

   Most experienced probate attorneys have seen last will and testament documents the entirety of which consists of a paragraph or two. These can come in a variety of formats — they could be holographic (handwritten) wills, older will document that were very brief, or a newer downloaded “form.” Those documents tend to simply provide the “who gets what” and “who is in charge” without regard to powers of an executor.

   With regard to the sale of real property, silence or lack of authority in a testamentary document does not necessarily prevent the sale of real property by the fiduciary. Rather, it means legal hoops to jump through in order to facilitate such a sale. In Kentucky, if a fiduciary, such as a personal representative, is “…not otherwise possessing a power of sale…” then KRS 389A.010 requires district court approval for the sale of real property.\(^{14}\) As provided in more detail in Section II A 1 above, compliance with KRS 389A.010 is not typically an easy task.

b. If a Testamentary Instrument provides a discretionary authorization for sale.

   Most last will and testament documents do grant the executor with the power and authority to sell real property. Often, it is boilerplate which reads something like this:

   My Executor is granted the specific authority to sell publicly or privately, without a court order and upon such conditions, including credit, as my Executor deems best, any of my assets, real or personal (tangible or intangible) that are not otherwise specifically devised and/or bequeathed.

   When this discretionary power to sell is included in a testamentary document, then KRS 395.220 grants such an authority to sell.\(^{15}\) KRS 395.220 states in relevant part:

   The executors, or such of them as undertake the execution of the will, or, if all or more than one (1) undertake the execution of the will and part die or vacate the office, the residue

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\(^{14}\) KRS 389A.010.

\(^{15}\) KRS 395.220.
or survivor, may sell and convey the land which the will directs or devises to the executor or to another person to be sold, or gives a discretionary power to sell, if no other person is appointed for that purpose, or if the person appointed refuses to perform the trust or dies before he has completed it. [Emphasis Added].

However, just because an executor may have the authority under a testamentary document to sell real property does not necessarily mean that he or she actually has the authority to do so. Rather, there are many issues which an executor must consider before making a determination for sale including but not limited to an analysis of the liquid assets available to pay debt; the potential objection of the beneficiaries to a sale considering Lucas v. Mannering (see Section III B below), and liens/mortgages on the real property vs. the potential net sales proceeds expected.

When considering sale under a discretionary power, the analysis becomes what is an acceptable “reason for the sale.” Generally, the best acceptable reason for the sale of real property by a personal representative is to pay debt that the decedent owed because the cash assets and personal property of the probate estate are insufficient to satisfy the debt. Yet, other reasons are not as clear. For example, one may think that having multiple beneficiaries could qualify as an acceptable reason for sale; after all not many would want to own, for example, a 1/40th interest in a parcel of real property. However, even when there are many fractional ownerships of the property, Kentucky law favors division in kind, not sale.

Also, it is important to note that a fiduciary cannot purchase the real property in which he or she controls at the sale unless all parties consent. See Section III C below. Attached as Appendix B is a general checklist for sale when there is a testamentary authorization.

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17 Walker’s Trustee v. Walker, 244 S.W. 772 (Ky. 1922).

18 Schlickman v. Dusing, 203 S.W. 295 (Ky. 1918); Charles v. Daniels, 131 S.W. 42 (Ky. 1910); Ely v. Com. ex rel. Horine, 33 Ky. 137 (1835); Blakey’s Ex’r v. Blakey, 26 Ky. 674 (1830); §1685. Purchase by the Fiduciary, 2 Ky. Prac. Prob. Prac. & Proc §1685.

19 Checklist for sale by testamentary authorization, Appendix B.
If a Testamentary Instrument mandates or forbids the sale of real property.

When a testator directs that certain actions be taken with regard to real property, the executor must comply unless there is a reason not to comply. Where a Last Will and Testament is ambiguous, a court may void the ambiguous language.\(^{20}\) A court may remove the testamentary limitation on the power to sell the land.\(^{21}\) KRS 389A.020 provides that a limitation on the power to sell real estate in a last will and testament may be altered or amended by the circuit court of the county in which the fiduciary was appointed.\(^{22}\) However, the court shall determine that circumstances exist unknown to the testator, that such circumstances would substantially impair the accomplishment of the purposes intended, and that the deviation is in the best interests of all the parties.\(^{23}\)

B. Beneficiary Objection to Sale by Fiduciary

Case law supports that a discretionary power to sell in a last will and testament means that an order of sale from the court is not necessary.\(^{24}\) However, this discretionary power is not as all encompassing as some attorneys would like to think.

To the contrary, many attorneys fail to recognize that objecting beneficiaries are vested with rights under Kentucky law to object to a sale by an executor. Specifically, legal counsel should consider Lucas v. Mannering wherein it was held that when the power to sell realty is discretionary, and there is no reason for the sale which would benefit the estate, the executor must convey the property to the residuary beneficiaries and the executor did not have the discretion to sell the real property.\(^{25}\) A beneficiary could effectuate this objection by filing a notice in the district court probate. A sample “notice” is included in Appendix C of this article.\(^{26}\)

However, beneficiaries and their counsel should be cautious about taking

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\(^{21}\) Id.

\(^{22}\) KRS 389A.020.

\(^{23}\) Id.

\(^{24}\) Testamentary power given an executor to sell land at public or private sale, at his discretion, does not require an order of court authorizing its exercise. Mann, by Elliott v. Peoples-Liberty Bank & Trust Co., 256 S.W.2d 489 (Ky. 1953).


\(^{26}\) Sample Notice attached as Appendix C.
this action as even if the sale of the real property is stopped in district court and vests into the beneficiaries, because any owner may force a sale under KRS 389A.030. Thus, a beneficiary may win the battle in probate court of having a sale of real property halted, but lose the war when a co-owner later forces a sale by master commissioner. For example:

Jane and John are siblings. Their widowed mother dies testate a resident of Warren County, Kentucky. The Will provides for all assets to pass equally to the two children and contains a discretionary power to sell real property. John lives in Washington state and Jane lives in Warren County, Kentucky. John is the Executor. Jane wants the property to stay in the family; however, she does not have assets to buy her brother’s share.

Here is what we know: (1) the ownership of the real property vested immediately in John and Jane; (2) if Mother’s assets subject to probate are sufficient to pay all debt, then there is not an asset/debt reason to sell within the probate estate; (3) If John sells the land in the estate then he will have to file an IRS 1041 and he may be entitled to an executor commission from the sale proceeds; (4) Jane may object to any sale under Lucas v. Mannering; (5) If the land is not sold in the estate, even if Jane objects, John can force a sale under KRS 389A.030.

The law is not clear as to what discretionary action a fiduciary may have to sell property without a specific mandate. It would appear that with the real property rights vesting immediately, the fiduciary and his or her counsel may in fact be limited if debt is not an issue.

C. Restrictions on Fiduciary Purchase of Real Property

An executor or administrator is not permitted to purchase real property of the estate for which he or she is the fiduciary. This rule applies even if the fiduciary possesses a life estate in the real property sold. If such a sale occurs, then it is “voidable” by the beneficiaries. The rational appears to be that allowing for the purchase by a fiduciary would be to allow that

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27 KRS 389A.030.

28 Slone v. Casey, 194 S.W.3d 336 (Ky. App. 2006); Wood vs. Wingfield, 816 S.W.2d 899 (Ky. 1991).

29 Schlickman v. Dusing, 203 S.W. 295 (Ky. 1918); Charles v. Daniels, 131 S.W. 42 (Ky. 1910); Ely v. Com. ex rel. Horine, 33 Ky. 137 (1835); Blakey's Ex'r v. Blakey, 26 Ky. 674 (1830); §1685. Purchase by the Fiduciary, 2 Ky. Prac. Prob. Prac. & Proc §1685.


fiduciary to take advantage of his or her position.\textsuperscript{32} Interestingly, this also applies to the fiduciary’s attorney (for him or herself or for the fiduciary)\textsuperscript{33} and/or any third persons attempting to purchase the real property for the representative\textsuperscript{34} or by the personal representative for a third person.\textsuperscript{35}

However, it appears that heirs and/or beneficiaries can consent to the purchase of estate property by the fiduciary so long as they have the capacity to do so, are of legal age, and are aware of the relevant facts and circumstances.\textsuperscript{36} Therefore, it would seem prudent for any fiduciary contemplating the sale of real property to request the consent of the heirs/beneficiaries to the sale if the fiduciary (or any party on his behalf) if he or she is interested in the purchase thereof.

IV. PRACTICAL IMPLICATIONS OF THE TRANSFER OF REAL PROPERTY BY A FIDUCIARY

Evaluating the implications of a sale and or transfer of real property in a Kentucky estate requires the analysis of many factors, including but not limited to the following.

A. Income Tax Consequences

The decedent’s interest in real property takes a stepped-up basis.\textsuperscript{37} Much of the time, this simply means that the value of the decedent’s interest is the date of death value. Thus, for example, if the decedent owned a home in the decedent’s sole name and that home was valued at $100,000 at the time of the decedent’s death, the stepped-up tax basis of the beneficiary is $100,000.

When a fiduciary sells real estate in his or her capacity, he or she must file an IRS 1041 to report the sale, even if there is not a capital gain to report. However, if the real estate vests directly with the heirs/beneficiaries then those heirs/beneficiaries would report the sale of the home on his or her personal taxes.

\textsuperscript{32} Id.

\textsuperscript{33} \textit{Browder v. Nourse}, 251 S.W. 825 (Ky. 1923); §1685. Purchase by the Fiduciary, 2 Ky. Prac. Prob. Prac. & Proc §1685.


\textsuperscript{36} \textit{Malone’s Guardian ad Litem v. Malone}, 73 S.W.2d 38 (Ky. 1934); \textit{McGary’s Heirs v. McGary}, 105 S.W. 891 (Ky. 1907); §1685. Purchase by the Fiduciary, 2 Ky. Prac. Prob. Prac. & Proc §1685.

\textsuperscript{37} \textit{26 U.S.C.A. §1014} (West).
B. Inheritance Tax

Notwithstanding the mechanism in which it passes, Kentucky real property is subject to our laws of inheritance tax.\(^{38}\) Stated differently, although real property may pass outside of probate, if it passes to a person who is not exempt under KRS 140.070, then an Inheritance Tax Return must be completed and filed by the personal representative.

C. Executor Fee

As interests in real property pass outside of probate unless brought in to sell real property (or unless sale is mandated by the testamentary document), an executor's fee does not include the value of real property.\(^ {39}\) However, in the event that the fiduciary facilitates the sale of real property by and through the estate, then KRS 395.150 can be read to include the value of the real property sold.\(^ {40}\)

D. Bond Issues

If the fiduciary of an intestate estate motions the District Court for the sale of real property under KRS 389A.010, then the statute requires that the bond reflect the estimated sales proceeds.\(^ {41}\)

E. Spousal Issues

If real property vests in a beneficiary, then for the sale of such real property by a beneficiary, a spouse must release his or her spousal interests. However, if a fiduciary is selling real property, then the spouses of the heirs/beneficiaries would not need to consent.

F. Beneficiaries/Heirs with Debt

Some title companies will "run" the names of the heirs/beneficiaries of an estate for liens and judgments. This is true even when the fiduciary is selling the real property (and not the individual).

Appendix D of this article offers a chart showing some of the implications for real property vesting in the heirs/beneficiaries vs. real property sold by the fiduciary of an estate.\(^ {42}\)

\(^{38}\) KRS 140.010.

\(^{39}\) KRS 395.150.

\(^{40}\) Id.

\(^{41}\) KRS 389A.010.

\(^{42}\) Chart of estate vs. personal sale of real property, see Exhibit D.
V. MECHANICS OF A FIDUCIARY TRANSFER OF REAL PROPERTY FROM A PROBATE ESTATE

A. Operation of Law

When real property is held in a manner that allows for the transfer by operation of law such as joint tenants with right of survivorship and the survivor actually survives, there is not any action that a personal representative must take to facilitate the transfer.

B. Transfer to Heirs/Beneficiaries

When the decedent’s interest in real property was held in the decedent’s name alone or by tenants in common, then the personal representative must effectuate the completion of the chain of title to recognize the transfer of the asset. The instruments of transfer include:

1. Affidavits

a. KRS 382.120. This statute concerns real property that passes by “descent.”43 The affidavit must be filed and recorded in the county where the real estate is located. The affidavit must be executed by any one (1) of the heirs at law or next of kin of the ancestor of the grantor, or of two (2) residents of this state and must state:

   (a) The name of the ancestor;
   (b) The date of the ancestor’s death;
   (c) Whether the ancestor was married or single, and if married, the name of the surviving spouse and his or her address;
   (d) The place of residence at the time of the ancestor’s death, if known to the affiant or affiants;
   (e) The fact that the ancestor died intestate; and
   (f) The names, ages and addresses, so far as known or ascertainable, of each of such ancestor’s heir at law and next of kin, who by his death inherited such real property, and the relationship of each to the ancestor and the interest in such real property inherited by each.

b. KRS 382.135(4). This statute concerns real property that passes by “will or under the laws of intestate succession”44 The statute states that the personal representative shall file an affidavit prior to the closing of the estate, in the county where the real estate is located. The affidavit must be executed by the personal representative and must state:

43 KRS 382.120.

44 KRS 382.135(4).
(a) The names and addresses of the persons receiving each property passing by will or intestate succession; and
(b) The full or fair market value of each property as estimated or established for any purpose in the handling of the estate, or a statement that no such values were estimated or established.

2. Deed.

Some attorneys prepare a transfer document in deed form. Some do this without an affidavit under KRS 382.120 and KRS 382.135(4); others complete the affidavit and the deed, while others put affidavit language in the deed. Some attorneys call this an ‘Executor’s Deed” or “Estate Deed.”

It would appear that this could be an issue for title purposes if the title company preferred one form over the other. It is the preference of the author of this article for the fiduciary to execute a Deed only in the event that: a sale occurs; or the real property will be passed to or placed into a trust.

VI. CREDITORS’ RIGHTS CONCERNING THE SALE/TRANSFER OF REAL PROPERTY IN AN ESTATE

Probate lawyers and title companies have to co-exist with one another in the real estate world and the probate world; however, both need to accept that the probate attorney is likely concerned with following the laws concerning transfer and the title company’s likely priority is evaluating the risk involved in the transfer.

• Title Issues with Passing of Title Real Property

If a full probate administration is opened, unsecured creditors have six months to come forward and make a claim. However, if a probate is not opened, creditors have two (2) years to come forward.

Practically speaking, an attorney should advise his or her client that there are potential title issues that exist when a probate is dispensed with and the client intends to sell the real property in his or her individual capacity.

45 KRS 395.195. However, note that the KBA Probate and Trust Law Section has proposed a change to this law which could decrease the two-year period of time and the time period for known creditors to file a claim.

46 KSR 396.205. However note that the KBA Probate and Trust Law Section has proposed a change to this law which would decrease the two-year period of time and the time period for known creditors to file a claim.
VII. MORTGAGES ON A DECEDENT’S REAL PROPERTY

Most mortgages contain what is known as a “due-on-sale clause” in which a borrower agrees that his mortgage note will become due upon transfer of the property pledged as security. The Garn-St. Germain Depository Institutions Act of 1982 [12 U.S.C.A. §1701j-3] supports the viability of the due-on-sale clause, but it also recognized nine types of transfers in which the due-on-sale clause should not be enforced. Most relevant to the probate issues include:

- Transfers by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- Transfer to a relative resulting from the death of a borrower; and
- Transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

As a practical matter, this generally means that as long as beneficiaries/heirs are maintaining mortgage payments, a foreclosure could not and should not occur. The author has had to “discuss” the Garn-St. Germain Depository Institutions Act of 1982 and 12 U.S.C.A. § 1701j-3 with some attorneys for banks who have been trigger-happy on accelerating a mortgage of a decedent despite payments not in default.

VIII. ANCILLARY ADMINISTRATION FOR KENTUCKY REAL PROPERTY

If a decedent is a nonresident who died intestate, the Kentucky courts will normally apply the law of Kentucky to the passing of any real estate located in Kentucky. Sometimes, this means that an attorney can just open an ancillary estate for the limited purpose of filing the affidavit of descent and placing the title of record. For example, if a decedent was domiciled in a state other than Kentucky and died testate, his or her Will would need to be placed of record in Kentucky to complete the chain of title.

This may be accomplished with an ancillary Kentucky probate placing the Will of record and completing an Affidavit. It is important to follow the instructions for placing an out of state Will of record in Kentucky – the clerk in the home county and state will likely need to “certify” the Will and other documents of administration. Different states have different methods to certify.

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48 In re Rowley’s Estate, 178 Wash. 460 (Wash. 1934).
IX. MISCELLANEOUS ISSUES IN KENTUCKY PROBATES WITH REAL PROPERTY

A. Estate Litigation and Real Property Sale Issues

If beneficiaries are in dispute over the Will, KRS 395.220 specifically provides that a court order for sale is required when there is a pending action to set aside or reject the Will.49

B. Paying the Costs of Real Estate during a Probate

Despite the vesting of real property at the moment of death, many times, real property bills (taxes, mortgage, gas, electric, water) will be paid from estate assets. The rationale behind this is that the estate administration time is necessary to determine if the real property must be sold to satisfy debts of the decedent.

However, when there is a devise of real estate the issues are different and can impact the fiduciary’s actions. Specifically, KRS 395.360 provides that income from real estate vests in the devisee.50 However, recall that real property can stand “good” for a decedent’s debts. Thus, an executor of an estate with debt but not much liquid cash may have to collect rent and pay expenses and then sell the property if the estate is insolvent or have to trace back rent and expenses to a specific devise. The issue with tracing can be the timing and tax issues.

For example:

1. Facts:

   Joe dies testate a resident of Logan County, Kentucky in October 2018. Joe’s Will gives his rental property to his daughter, Valerie. His residuary assets pass in 1/3 shares to his children. The rental property has a leased tenant who pays $1,200 per month. Joe’s son, Henry, is the Executor of Joe’s Will, and the probate estate is opened December 2018.

2. One way:

   Henry collects rent and puts it in the Estate account. In January 2018 the roof collapses at the rental home and must be immediately fixed. Valerie thinks the estate must pay for it. Henry is not sure what to do. Valerie is upset that Henry did not maintain the insurance on the home. Henry read Kelli Brown’s

49 KRS 395.220.

50 KRS 395.360.
real estate article and tells Valerie that “real estate vests at the moment of death” to which Valerie responds, “then why did you put MY rent in the estate account?” Everyone “lawyers up” and is upset.

3. The Better way:

Henry hires legal counsel to help him with the issues. Henry’s attorney writes to all three children and tells what to expect including that while real estate vests at death, Joe’s creditors still have rights. He helps Henry do the following:

- Henry opens a separate estate account and deposits all rent in just that account.

- From the rent account, all of the rental home expenses are paid, including liability insurance.

- Title is run on the property to see if there are mortgages, liens, or any title issues.

- When the roof collapses, insurance covers it.

After the six-month creditor period expires, Henry transfers the rental income account to Valerie; he also itemizes the rent and expenses so that Valerie can include the same on her taxes (which he told her would happen at the inception of the probate if the estate was solvent). Henry signs an affidavit of descent which vests title to Valerie.

Henry pays all claims, files all required documents, and closes his father’s estate. Everyone is happy and continues to eat Thanksgiving dinner together.
Run title on the real property to check for liens and judgments

Review/inspect property

Determine if estimated sales proceeds will cover secured debt, if so proceed below

Arrange for proposed method of sale (auction or realtor)

Secure BLANK contract with auctioneer or listing agent for court approval

Contact heirs to approve method of sale (recommended but not required)

Secure sufficient bonding which is at or greater than the anticipated sale price

Prepare Petition for sale to be filed in district court which includes:

A description of the real property

A summary of the grounds for the sale

Comply with Notice Issues

Give "Notice" to all interested parties in the manner authorized for initiation of a civil action

In lieu of "notice" interested parties can sign waivers

If a party is disabled or a minor, follow special rules in statute for notice

Schedule hearing such that all interested parties received notice at least 20 days prior to the hearing

Have the hearing

Provide proof of service to the Court for all those not signing waivers

Have an Order ready for the Court to sign

The Order MUST sit for 30 days before a transfer can be made so schedule the sale for at least 30 days after the order is executed

Run title on the real estate again right before the sale
___ Provide a copy of the Order of Sale to the closing attorney

___ Deposit all net proceeds into the Estate account for distribution approved by the Court
Run title on the real property to check for liens and judgments

Review/inspect property

Determine if estimated sales proceeds will cover secured debt, if so proceed below

Arrange for proposed method of sale (auction or realtor)

Secure BLANK contract with auctioneer or listing agent for approval

Contact beneficiaries to:

  ___ Approve the method of sale

  ___ Have them sign a "consent"

  ___ Give them the opportunity to object

  ___ Let them know that the executor fee would likely be greater if sale occurred

  ___ Explain that the fiduciary cannot be the purchaser unless they consent

Address any title issues including judgments and liens of beneficiaries filed in the county where the real estate is located
COMMONWEALTH OF KENTUCKY
WARREN DISTRICT COURT

CASE NO. 13-P-00033

IN RE: JOHN DOE DECEASED

NOTICE OBJECTING TO THE SALE OF REAL PROPERTY

Comes now Jane Doe beneficiary under the Last Will and Testament of John Doe, deceased by and through counsel, and for their Notice Objecting to the Sale of Real Property state as follows:

Under the authority of Lucas vs. Mannering, Jane Doe objects to the sale of any real property by the fiduciary of the Estate of John Doe.¹ Jane Doe and three other beneficiaries have executed Affidavits objecting to the transfer of the decedent's real property.²

Further, as the decedent's interests in real property vested in the beneficiaries upon the death of John Doe, Jane Doe hereby notifies the Executor that with the exception of a preparation of an Affidavit as required under KRS 382.135(4), she objects to disbursement of any Estate funds for expenses related to real property.

This _____ day of ____________________, 2019

GOLDBERG SIMPSON, LLC
9301 Dayflower
Prospect, KY 40059
502-589-4440 (P)
502-581-1344 (F)
kbrown@goldbergsimpson.com

Kelli E. Brown

¹ Lucas vs. Mannering, 745 S.W.2d 654 (Ky. App.1987).

² Copies of the Affidavits are attached hereto as Exhibit 1.
CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served by placing a true and correct copy of the same in the United States Mail, first class postage prepaid, addressed to the following:

This the ___ date of May, 2019

__________________________________
KELLI E. BROWN
## APPENDIX D
### ESTATE SALE VS. VESTING

<table>
<thead>
<tr>
<th></th>
<th>Real Estate Vested at Death</th>
<th>Real Estate Sold in Estate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income Tax Considerations</strong></td>
<td>Heirs/beneficiaries report capital gains from sale (if any) on their own tax return.</td>
<td>Estate has to file an IRS Form 1041 to report sale of real property.</td>
</tr>
<tr>
<td><strong>Executor Fee</strong></td>
<td>No fee on value of real estate.</td>
<td>Potential fee up to 5 percent.</td>
</tr>
<tr>
<td><strong>Bond Issues</strong></td>
<td>None.</td>
<td>For sales under KRS 391.010, the fiduciary bond must be at least the potential sale amount.</td>
</tr>
<tr>
<td><strong>Spousal Issues</strong></td>
<td>Real estate vests in heirs/beneficiaries which means their spouses have an interest and must sign deed if sold.</td>
<td>Spouses of heirs/beneficiaries do not have to execute sale documents.</td>
</tr>
<tr>
<td><strong>Creditor/Title Issues</strong></td>
<td>Unsecured creditors have six months to assert claim if there is a full probate and two years from the decedent's death if there is not a full probate.</td>
<td>Unsecured creditors have six months to assert claim in the probate.</td>
</tr>
<tr>
<td><strong>Inheritance Tax</strong></td>
<td>If non-exempt heirs/beneficiaries inherited, then tax must be paid.</td>
<td>If non-exempt heirs/beneficiaries inherited, then tax must be paid.</td>
</tr>
<tr>
<td><strong>Beneficiary/Heir Credit Issues</strong></td>
<td>These issues may appear later if the property is sold.</td>
<td>Title could be impacted if an heir/beneficiary has liens or judgments in the county where the real property is located.</td>
</tr>
</tbody>
</table>