

PRESENTED AT

25th Annual Estate Planning, Guardianship and Elder Law Conference

August 11, 2023
Galveston, TX

Cribs, Million Dollar Listings, and Property Wars: The Realities of Navigating the Drama of Administering Estates with Real Property

**Presented by:
T. Aaron Dobbs**

Author Contact Information:

T. Aaron Dobbs
Gray Reed & McGraw LLP
Houston, TX
adobbs@grayreed.com

Sara Madole
Schlanger Silver
Houston, TX
smadole@schlangersilver.com

Cribs, Million Dollar Listings, and Property Wars: The Realities of Navigating the Drama of Administering Estates with Real Property

By T. Aaron Dobbs and Sara Madole

I. Introduction

Administering, selling and dividing real property in the context of estate administration can seem like a modern-day reality television program with lots of drama and complexity among multiple levels of stakeholders. This paper is an *overview* of a personal representative's powers and limitations relating to the administration of real estate in probate proceedings, including the interplay between a beneficiary's vested ownership interest and an executor's right of possession, dealing with a surviving spouse's homestead rights, the extent of the duty to take care and procure insurance, whether a power of sale is really all that powerful, and the statutory framework for partitioning real property when a division "down the middle" is an impossibility.

II. GTFOOMH¹ – Vesting vs. Rights of Possession

When a person dies, all of his or her estate vests immediately in the devisees, if a will exists, or in the heirs at law, if no will exists, and there is never a time when title is not vested in someone. Tex. Estates Code § 101.001; *Welder v. Hitchcock*, 617 S.W.2d 294 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.). However, a devisee may be surprised to learn that his or her legal title does not preempt a personal representative from managing or possessing the estate during the course of the probate administration.

A personal representative has a right to collect and take possession of the estate *as it existed* at the time of the decedent's death, including taking possession of record books, title papers and other business papers. *See* Tex. Estates Code §§ 101.003 and 351.102. Furthermore, a personal

¹ *GTFOOMH* (or *Get the F*ck Out of My House*) is a reality television show originally launched in the Netherlands. In the show, 100 complete strangers cram into an average sized family home in the bid to become the last person standing, while continuously watched by television cameras. *Per Wikipedia*.

representative “shall recover possession of the estate and hold the estate in trust to be disposed of in accordance with law.” Tex. Estates Code § 101.003. If there is a reasonable prospect of recovering the property of an estate, the personal representative shall use ordinary diligence to recover possession of all property to which the estate has claim or title. Tex. Estates Code § 351.151(a). If a personal representative wilfully neglects to use the ordinary diligence required to recover the property of an estate, the representative and the sureties on the representative’s bond are liable for the use of the estate, for the amount of those claims or the value of that property lost by the neglect. Tex. Estates Code § 351.151(b).

Courts have held that the personal representative’s right to possession and control of estate property is enforceable by court order, if necessary. *Atlantic Insurance Company v. Fulfs*, 417 S.W.2d 302 (Tex. Civ. App.—Fort Worth 1967, writ ref’d n.r.e); *see also Bloom v. Bear*, 706 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1986, no writ) and *Estate of Hutchins*, 391 S. W. 3d 578 (Tex. App.—Dallas 2012, no writ) (court should have granted an administrator's motion to compel delivery of estate property). In *Estate of Hutchins*, the beneficiary disputed the estate’s purported interest in the property at issue and argued that title must be cleared through a lawsuit initiated pursuant to Section 351.054 of the Texas Estates Code which provides that an executor or administrator may commence a suit for title to or possession of land, any right attached to or arising from that land, or an injury or damage done to that land. However, the Court concluded that a separate lawsuit was not a required mechanism for a personal representative to seek recovery of estate property in a beneficiary’s possession. *Id.*

Note that the right and duty to collect estate assets extends to community property assets that were under the sole or joint control of the decedent and the decedent’s surviving spouse at the time of the decedent’s death. *See* Tex. Estate Code § 453.009. But also note that, as of September

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First appeared as part of the conference materials for the
25th Annual Estate Planning, Guardianship and Elder Law Conference session
"Cribs, Million Dollar Listings, and Property Wars: How Executors can Navigate the Drama
of Administering Estates with Real Property"