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Study 7:

**Real Estate in Probate
and as a Nonprobate Asset**

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Employee Benefits in Estate Plan-
ning Committee. Neither the College
nor the members of this committee
assume any responsibility for the
accuracy of the information con-
tained in this study.*

Real Estate in Probate and as a Nonprobate Asset

ALABAMA

Lyman F. Holland
Mobile, Alabama
August 28, 1997

1. Is real estate a probate asset?

Yes, but title descends to heirs or beneficiaries under Will [Ala. Code §43-2-830], and not to personal representative.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes. As provided in Ala. Code §43-2-848. See also §43-2-837 regarding possession.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

As a cost of administration as any other asset. But mortgage not exonerated unless Will directs otherwise. Ala. Code §43-8-228. No distinction between real and personal property. No authority in personal representative to clear title. The personal representative is authorized to pay expenses reasonably necessary for management, protection and preservation of real property in his possession, but he is not required to retain possession. [Ala. Code §43-2-837].

4. Liability of real estate for decedent's debts and expenses of administration.

Same as personalty. Abatement of all assets is by class, i.e., residuary, general and then specific. [Ala. Code §43-8-76(a)].

5. Nature of lien against real estate accorded creditors.

None, except that creditors have the right to require real estate to be sold along with personal property to pay debts.

6. How may real estate be sold free of liens?

No statutory lien given the estate creditors. Under a power in the Will, property may be sold; otherwise only can be sold by judicial proceeding. Existing liens already attached to real property at time of death of decedent (i.e., recorded mortgage) are not subject to removal by personal representative or the Court. If estate tax owed to Alabama, State has a lien [Ala. Code §40-15-13]. Under proper circumstances State will execute waiver.

7. How is marketable title established—

(a) In a specific devisee?

Upon probate of will in Alabama, title passes directly to specific devisee, but subject to payment of claims and expenses of administration; therefore, title will not become marketable until administration is concluded or proof is made of payment of all claims and expenses.

(b) In a residuary devisee?

Same as (a), above.

(c) In an heir-at-law?

Administration of the estate; in the alternative, if a period of two years has expired from date of death of the owner of the real estate, title company and title lawyers generally will accept two or more reliable affidavits setting forth date of death, nonexistence of debts of the decedent and recitation of the heirs of the decedent, based upon the provisions of §6-2-42(a), which protects the rights of mortgagees and purchasers for value from the heirs.

8. Power of foreign personal representative to manage and sell real estate.

None, unless officially appointed in Alabama as the estate's personal representative. Then, procedure is the same as for an Alabama personal representative.

9. What real estate owned by the decedent alone must pass de hors the Will?

None, if there is testamentary disposition. If real estate is not disposed of by the Will, it will pass by intestacy. If there is a surviving spouse or minor children or both, real property is subject to being sold along with other probate assets to provide sufficient funds for homestead allowance, exempt property, family allowance, payment of creditors, administration costs, etc.

10. Does a Will or Codicil convey after-acquired real estate?

Yes, provided language of Will is sufficient to cover real estate acquired later (i.e. "all my real estate" or "residue of my estate" is sufficient; but a specific devise of "black acre" does not cover any other after-acquired real estate).

11. Intestate share of heirs in real estate.

(a) To a surviving spouse, one of the following:

(1) If no surviving issue or parent of the decedent, the entire intestate estate;

(2) If no surviving issue, but decedent is survived by a parent or parents, the first \$100,000 in value, plus one-half of the balance of the intestate estate;

- (3) If surviving issue, all of whom are issue of surviving spouse also, the first \$50,000 in value, plus one-half of the balance of the intestate estate;
- (4) If surviving issue, one or more of whom are not issue of surviving spouse, one-half of the intestate estate.

If the estate is located in two or more states, the surviving spouse's share cannot exceed in the aggregate an amount allowable under Alabama law. Ala. Code §43-8-41.

- (b) That part of the intestate estate not passing to the surviving spouse above, or the entire estate if no surviving spouse, passes:
 - (1) If surviving issue, all to the issue of the decedent. If all issues are of the same degree of kinship, they take equally, but if of unequal degree, then those of more remote degree take by representation;
 - (2) If no surviving issue, to decedent's parent or parents equally;
 - (3) If no surviving issue or parent, to the issue of the parents or either of them by representation;
 - (4) If no surviving issue, parent or issue of a parent, but decedent is survived by one or more grandparents or issue of grandparents, half to the:
 - (i) Paternal grandparents if both survive, or to the surviving paternal grandparents; or if both paternal grandparents are deceased, to their issue. Issue take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation.
 - (ii) Maternal grandparents if both survive, or to the surviving grandparent; or if both maternal grandparents are deceased, to their issue. Issue take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation.
 - (iii) If there be no surviving grandparent or issue of grandparent on one grandparents' side, the entire estate passes to the other grandparents' side.
 - (5) As a last resort, it escheats to the State of Alabama. [Ala. Code §§43-8-42 and 44].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. [Ala. Code §43-8-135]. It must be admitted to probate under Ala. Code §43-8-175.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Conclusive when Will probated. Recording is insufficient. But is still subject to creditor claims until two years from decedent's death or ancillary administration is concluded.

(b) In the ancillary personal representative?

Yes. Nonresident executors are authorized to be appointed as ancillary executors in Alabama upon the same terms, conditions, and requirements as domiciliary executors. [Ala. Code §43-2-191 and 192]. Once the Will is admitted to probate, the ancillary personal representative may act as if this were the estate of an Alabama resident. [Ala. Code §43-2-194]. If power to sell is set forth in the Will, the representative has authority to convey within the authority given. Absent grant of specific authority to the personal representative to convey, court approval is needed for a conveyance. [Ala. Code §43-2-441, 442, and 443]. If Will is admitted to probate outside of U.S. jurisdiction, and undertakes to dispose of real property in Alabama, it must be probated in Alabama as if original [Ala. Code §43-8-175].

(c) In the domiciliary personal representative?

There is no authority in Alabama permitting an out of state domiciliary personal representative to convey Alabama real estate unless that personal representative has qualified as discussed in (b) above.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No, but if no action is taken to probate the foreign Will within one year of the decedent's death, the heirs at law may convey the real property to a bona fide purchaser, mortgagee, or pledgee free and clear of any claims of a distributee under the unprobated Will [Ala. Code §43-8-172]. Property remains subject to creditor claims until ancillary administration is concluded. But see answer to number 7(c) above.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. [See Ala. Code §43-2-194 and §441; See also *Grist v. Carswell*, 165 So. 102, 231 Ala. 442 (1936)].

1. Is real estate a probate asset?

Real estate is a probate asset if owned by the decedent alone or as a tenant in common. Property owned as a tenant by the entirety with right of survivorship is not a probate asset. There is no joint tenancy with right of survivorship in real property in Alaska [Alaska Stat. §13.16.110, §34.15.110, §34.15.140, §13.31.070(a) (3) and §34.15.130].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Real estate is subject to costs of administration, including litigation by personal representative for estate [Alaska Stat. §13.16.005 and §13.16.435].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Expenses attributable to real estate are treated as costs of administration with a first priority for payment after statutory family allowances [Alaska Stat. §13.16.380, §13.16.470, and §13.16.480].

4. Liability of real estate for decedent's debts and expenses of administration.

See answer to question 2, above. There is no requirement that personal property be used first to pay a decedent's debts and administration expenses. Real property and personal property are treated equally for abatement purposes [Alaska Stat. §13.16.380 and §13.16.540].

5. Nature of lien against real estate accorded creditors.

Creditors do not receive and cannot enforce a lien that did not already exist against real or personal property since title immediately passes to heirs or devisees. Secured creditors can proceed against their collateral as the security instrument provides, unless the instrument or other law limits their recourse. Judgment creditors may not execute on their judgment and must proceed as regular creditors of the estate [Alaska Stat. §13.16.505, §13.16.490 and §13.16.005].

6. How may real estate be sold free of liens?

Real estate may be sold free of liens by the personal representative's paying off the lien on the specific property, transferring that property to the creditor or by bringing a quiet title action. It may also be sold free of liens by a distributee of the estate who has received an instrument or deed of distribution from the personal representative. As a practical matter, a title insurance policy is normally required [Alaska Stat. §13.16.515, §09.45.770, §09.45.780, §13.16.580 and §34.25.050].

7. How is marketable title established—

(a) In a specific devisee?

By a personal representative's deed [Alaska Stat. §13.16.570 and §13.16.580].

(b) In a residuary devisee?

By a personal representative's deed [Alaska Stat. §13.16.570 and §13.16.580].

(c) In an heir-at-law?

By court adjudication of intestacy with a determination of heirs. If no personal representative is appointed, the court's order may specifically state who holds title to the real property and that order may be recorded, or, if a personal representative is appointed, a deed may be issued to the designated heir [Alaska Stat. §13.16.145(c), §13.16.570, and §13.16.580].

8. Power of foreign personal representative to manage and sell real estate.

In the absence of a local administration, a foreign personal representative may file authenticated copies of appointment documents with the court in the judicial district containing decedent's property and then may exercise all powers that a local personal representative could, subject to any limitations placed on nonresident parties generally [Alaska Stat. §13.21.030 and §13.21.035].

9. What real estate owned by the decedent alone must pass de hors the Will?

No real estate owned by the decedent alone may pass outside the Will unless there is a written instrument conveying that property at decedent's death [Alaska Stat. §13.31.070(a) (3)].

10. Does a Will or Codicil convey after-acquired real estate?

A Will or Codicil will convey real estate acquired after execution of the Will or Codicil because a Will is construed to pass all property which the testator owns at death [Alaska Stat. §13.11.235].

11. Intestate share of heirs in real estate.

The intestate share of heirs is the same in real estate as it is in other assets, and the heirs hold the decedent's share as tenants in common with each other and with the decedent's co-tenants, if any [Alaska Stat. §13.16.005, §13.12.102, and §13.12.103].

12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Yes. See answer to question 8, above.
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Does not give a devisee authority to convey a decedent's local property [Alaska Stat. §13.16.010 and §13.16.015].
- (b) **In the ancillary personal representative?**
Gives the ancillary personal representative authority to convey a decedent's local property [Alaska Stat. §13.21.045].
- (c) **In the domiciliary personal representative?**
Give the domiciliary personal representative authority to convey decedent's local property assuming Alaska Stat. §13.21.030 and §13.21.035 have been complied with and assuming there is no local personal representative appointed [Alaska Stat. §13.21.030, §13.21.035, and §13.21.040].
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No. See the answer to question 8, above.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
If the domiciliary personal representative has complied with Alaska Stat. §13.21.030 and §13.21.035, or if an ancillary proceeding is opened at an informal nonintervention level, then a power of sale in the Will may be exercised without court approval [Alaska Stat. §13.16.085].

ARIZONA

Gregory Gadarian
Tucson, Arizona
October 12, 1993

1. **Is real estate a probate asset?**
Yes, beneficial ownership of the decedent's one-half of the community real property and the decedent's separate real property vests in the successor at death, subject to estate administration [Ariz. Rev. Stat. Ann. 14-3101]. (Arizona Revised Statutes, Title 14, is entitled Decedent's Estates, Guardianships, Protective Proceedings and Trusts) [Ariz. Rev. Stat. Ann. §14-1301].
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Yes. No distinction is made between real and personal property in the administration of the estate. However, personal representative fees are based on reasonable compensation and not a commission [Ariz. Rev. Stat. Ann. §14-3719].
"Except as restricted or otherwise provided by the Will or by an order in a formal proceeding and subject to the priorities stated in Section 14-3902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:
"18. Pay taxes, assessments, compensation of the personal representative and other expenses incident to the administration of the estate...;"
"21. Employ persons, including attorneys, auditors...and agents...to perform any act of administration..."
[Ariz. Rev. Stat. Ann. §14-3719].
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
By payment by the personal representative as authorized transactions, and as expenses incident to the administration. No distinction is made between real and personal property in the administration of the estate, unless required by the Will.
4. **Liability of real estate for decedent's debts and expenses of administration.**
No priority between personalty and realty unless directed in Will.
5. **Nature of lien against real estate accorded creditors.**
Liens existing at the time of death are unaffected by death or by the non-claim statute.

No lien is accorded general creditors, but unsatisfied claims of creditors which have been properly asserted are enforceable equally against real and personal property in the estate.
6. **How may real estate be sold free of liens?**
By payment by the personal representative of the secured debt [Ariz. Rev. Stat. Ann. 14-3715(3)].

7. How is marketable title established—

- (a) In a specific devisee?**
- (b) In a residuary devisee?**
- (c) In an heir-at-law?**

No distinction is made between devisees and distributions to heirs-at-laws. No procedure is provided for establishment of marketable title in any of the beneficiaries named. Upon distribution of the estate, beneficiaries receive whatever title the decedent had unless the personal representative has for some reason altered it. In order to remove any potential cloud on title, it is usually advisable to do a tax waiver for the property.

8. Power of foreign personal representative to manage and sell real estate.

“A domiciliary foreign personal representative who has complied with Section 14-4204 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally” [Ariz. Rev. Stat. Ann. §14-4205].

9. What real estate owned by the decedent alone must pass de hors the Will?

None.

10. Does a Will or Codicil convey after-acquired real estate?

No. No Will or Codicil conveys property of any sort in Arizona.

“If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee’s title to the property.”

11. Intestate share of heirs in real estate.

No distinction is made between real and personal property.

- (a)** If there is no surviving issue or if there are surviving issue, all of whom are issue of the surviving spouse, then the surviving spouse takes the entire intestate estate.
- (b)** If there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half of the intestate’s separate property passes to the surviving spouse. The surviving spouse takes no interest in the decedent’s half of the community property. The remainder passes as described in (c) [Ariz. Rev. Stat. Ann. §14-2102].
- (c)** If there is no surviving spouse or if the issue are not the issue of the surviving spouse, then the rest of the decedent’s estate passes to (1) his or her issue; (2) if no issue, to the decedent’s parents equally; (3) if no parents, to the issue of decedent’s parents; (4) if no issue of decedent’s parents, to paternal and maternal grandparents equally and so on.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent’s local property—

- (a) In the devisee?**
- (b) In the ancillary personal representative?**
- (c) In the domiciliary personal representative?**

No. The recording of a Will serves none of these purposes and is not required to convey title. The personal representative, ancillary personal representative, and domestic ancillary personal representative have the authority to convey real property directly [Ariz. Rev. Stat. Ann. §14-3701].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No. If no administration or application for administration is in process in Arizona, a domiciliary foreign personal representative can file in an Arizona county where decedent owned property authenticated copies of his appointment and bond and thereafter may exercise the same powers as could an Arizona personal representative. As a practical matter, ancillary administration may be simpler [Ariz. Rev. Stat. § 24-4204, and 14-4205].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

With or without a power of sale, the personal representative may properly sell, mortgage, or lease any real or personal property of the estate [Ariz. Rev. Stat. §14-3715(3)].

1. **Is real estate a probate asset?**
Yes, but only if directed by Will or by court [Ark. Code Ann. §28-49-101(b)].
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Not subject to commissions unless sold for payment of debts or distribution. Subject to legal fees if resorted to for payment of debts or for purpose authorized by statute based upon percent of value [Ark. Code Ann. §28-48-108].
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
From the residuary personal property.
4. **Liability of real estate for decedent's debts and expenses of administration.**
No priority exists unless provided by Will.
5. **Nature of lien against real estate accorded creditors.**
Court approved claims are liens subordinate only to the pre-existing liens.
6. **How may real estate be sold free of liens?**
Pursuant to order of court in course of administration [Ark. Code Ann. §28-51-301].
7. **How is marketable title established—**
 - (a) **In a specific devisee?**
Ascertainment of ample assets to pay claims, or expiration of period to file claims and no estate tax incurred and no claims have been probated. Probate of Will.
 - (b) **In a residuary devisee?**
Expiration of period to file claims and payment of allowable claims, costs, and estate taxes. Probate of Will.
 - (c) **In an heir-at-law?**
Same as (b), or lapse of five years after decedent's death.
8. **Power of foreign personal representative to manage and sell real estate.**
Foreign personal representative must apply for appointment and be approved as ancillary personal representative.
9. **What real estate owned by the decedent alone must pass de hors the Will?**
A surviving spouse has an interest in the property of the decedent which cannot be reduced by Will below one-third for life if there are descendants, or one-half in fee if no descendants, plus homestead right of occupancy for life, along with minor children.
10. **Does a Will or Codicil convey after-acquired real estate?**
Yes.
11. **Intestate share of heirs in real estate.**
Descends to children or their descendants *per stirpes* subject to interest of surviving spouse. Surviving spouse receives one-third for life if there are descendants; one-half in fee if no descendants and married less than three years; all if no descendants and married three or more years. If no surviving spouse or descendants, to surviving parents; if none, to siblings and their descendants *per stirpes* (this includes 50% if deceased was married less than three years to a spouse who survives). In addition, surviving spouse and children have homestead rights during minority of children and for lifetime of spouse unless abandoned.
12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Never. Local order admitting the Will to probate in state is required.
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
 - (a) **In the devisee?**
Yes.
 - (b) **In the ancillary personal representative?**
No. This depends upon the terms of the Will.

(c) In the domiciliary personal representative?

No. This depends upon the terms of the Will.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, if property is to be held free of local claim.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes.

CALIFORNIA

Marvin E. Levin
Santa Monica, California
August 18, 1997

1. Is real estate a probate asset?

Yes, with exceptions. If community property is devised by Will to a person other than a surviving spouse, or if passed to the surviving spouse with limitations, the decedent's one-half is still subject to probate administration. If community property is devised to the surviving spouse without limitations, the surviving spouse or the guardian, conservator, or personal representative of the surviving spouse can elect: (1) to have the decedent's one-half of community property confirmed to the surviving spouse; (2) to probate the decedent's one-half of the community property; or (3) to probate both the decedent and the surviving spouse's one-half of the community property [Cal. Prob. Code §§13650-13660, and §100]. Separate property passing to a surviving spouse may also pass without administration on petition [Cal. Prob. Code §§13650-13660].

For estates of persons dying on or after January 1, 1975, the Superior Court is now authorized by statute to determine or confirm community property where it passes absolutely or belongs to the surviving spouse. No probate administration is now necessary. A confirmation proceeding is now authorized.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes, except as noted above. Community property vested in a surviving spouse without administration is not subject to statutory commissions and fees. Nevertheless, the Superior Court is given authority to approve reasonable attorney's fees for filing the petition for confirmation of community property to the surviving spouse [Cal. Prob. Code §13660].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Fees are allocated according to value, and all property bears its share. Accomplishment varies with each case [*Estate of Reichel* 28 Cal App. 3d 156, 103 Cal. Rptr. 836; 70 A.L.R. 3d 721 (1972)].

4. Liability of real estate for decedent's debts and expenses of administration.

Same as personalty. Real property and personalty which are determined to be community property are liable for all valid debts chargeable against the community property. Such debts shall be chargeable proportionately against the interest of the surviving spouse in community property, the interest of the deceased spouse passing without administration, and the interest of the deceased spouse subject to administration [Cal. Prob. Code §§11440-11444].

5. Nature of lien against real estate accorded creditors.

None, unless liens were perfected before death (except for liens in favor of Internal Revenue Service and California Franchise Tax Board).

6. How may real estate be sold free of liens?

By judicial proceeding.

7. How is marketable title established?

(a) In a specific devisee?

(b) In a residuary devisee?

(c) Confirmation of decedent's one-half community property to surviving spouse without administration?

(d) In an heir-at-law?

In (a), (b), and (d), a Court Order of Preliminary Distribution can be obtained on Petition and Notice [Cal. Prob. Code §11620 *et seq.*]. Separate property devised to a surviving spouse can be obtained without administration as in (c).

In (c), a Court Order can be obtained on Petition, without administration (see *supra*) [Cal. Prob. Code §§13650-13660].

8. Power of foreign personal representative to manage and sell real estate.

Same as domiciliary representative, once the Will is submitted to probate locally [Cal. Prob. Code §§7052, 12513, 12520 *et seq.*].

9. What real estate owned by the decedent alone must pass dehors the Will?

A probate homestead may be set aside for the surviving spouse and/or the minor children of decedent [Cal. Prob. Code §§16520-16528].

10. Does a Will or Codicil convey after-acquired real estate?

Yes [Cal. Prob. Code §6142].

11. Intestate share of heirs in real estate.

(a) If community property, the surviving spouse will receive decedent's one-half interest in real property by confirmation order (see supra) [Cal. Prob. Code §§13650-13660].

(b) If separate property, one-half to the surviving spouse and one-half to one child; if more than one child, then one-third to the surviving spouse and two-thirds to the children [Cal. Prob. Code §6401(c)]. The entire estate goes to the surviving spouse if decedent does not leave surviving issue, parent, sibling, or issue of a deceased brother or sister .

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. California does not have any procedures for establishing a muniment of title as a substitute for administration of the estate of a decedent.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. Only the personal representative has authority to convey.

(b) In the ancillary personal representative?

Yes. If valid under (1) California law, or (2) the place of execution, or (3) execution of the Will complies with the law of the place where at the time of execution or at the time of death, the testator is domiciled, has place of abode, or is a national [Cal. Prob. Code §6113].

(c) In the domiciliary personal representative?

Only if the domiciliary is also qualified as the ancillary representative.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes. There are *no* exceptions.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

No. Procedure for sale of real property in an ancillary administration is the same as in a domiciliary administration.

COLORADO

Robert G. Fleming
Golden, Colorado
August 27, 1997

1. Is real estate a probate asset?

Yes.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Both.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

If real estate is part of the residuary estate, such expenses are paid from and charged to the residue if real estate is subject to a specific devise, such expenses are charged against the specific devise.

4. Liability of real estate for decedent's debts and expenses of administration.

No priority between realty and personalty.

5. Nature of lien against real estate accorded creditors.

No liens for unsecured creditors.

6. How may real estate be sold free of liens?

By delivery of following instruments:

1. Personal representative's deed.
2. Certified copies of Letters of Appointment of personal representative.

7. How is marketable title established—

(a) In a specific devisee?

(Answer applicable to a, b & c) — By the recording of a personal representative's deed, a certified copy of letters of personal representative's authority, and a certified copy of court order supporting the deed of distribution. Such court order is not required to vest a marketable title in a purchaser for value from, or a lender to, any of the above distributees. Any of the above distributees acquires a marketable title without a court order by the running of the statute of limitations: one year after the date of the personal representative's deed to the distributee or three years after the date of the decedent's death, whichever is later.

(b) In a residuary devisee?

See (a).

(c) In an heir-at-law

See (a).

8. Power of foreign personal representative to manage and sell real estate.

Same as domiciliary representative.

9. What real estate owned by the decedent alone must pass de hors the Will?

None .

10. Does a Will or Codicil convey after-acquired real estate?

Yes .

11. Intestate share of heirs in real estate.

No distinction between real and personal property—

(a) To the surviving spouse, one of the following:

- (1) If no surviving descendant or parent, the entire intestate estate.
- (2) If all surviving descendants are also the only descendants of surviving spouse who survive the decedent, the entire intestate estate.
- (3) If no surviving descendant, but a surviving parent or parents, the first \$200,000.00 plus three fourths of the balance of intestate estate.
- (4) If all surviving descendants are also descendants of spouse, who also has other descendants surviving decedent, the first \$150,000.00, plus one-half of balance of intestate estate.
- (5) If one or more of surviving descendants are not descendants of spouse and all are adults, the first \$100,000.00 plus one-half of the balance of intestate estate.
- (6) If one or more of surviving descendants are not descendants of spouse, but are minor children of decedent, one-half of intestate estate.

(b) Any part of the intestate estate not passing to the decedent's surviving spouse under (a), or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated who survive the decedent:

- (1) To the decedent's descendants per capita at each generation.
- (2) If there is no surviving descendant, to the decedent's parents.
- (3) If there is no surviving descendant or surviving parent, to the surviving descendants of the decedent's parents or either of them per capita at each generation.
- (4) If there is no surviving descendant, surviving parent, or surviving descendant of a parent, to the decedent's surviving grandparents, or any of them, in equal shares.
- (5) If there is no surviving descendant, surviving parent, surviving descendant of a parent, or surviving grandparent, to the surviving descendants of the decedent's grandparents per capita at each generation.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

The recording of the Will and/or other documents has no effect on transfer of title. If no local administration is pending, a foreign personal representative may file with a court in Colorado in a county where decedent owned real property, authenticated copies of his appointment, after which he has all the powers of a local personal representative. Real property is then transferred on the records by recording of personal representative's deed together with a certified copy of his letters of authority. [CRS 15-13-204 and 205].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No.

(b) In the ancillary personal representative?

No.

(c) In the domiciliary personal representative?

No.

14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No [CRS 15-13-205].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Not applicable.

CONNECTICUT

Martin Wolman
Hartford, Connecticut
September 4, 1997

1. **Is real estate a probate asset?**
Yes.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
No statutory fees for fiduciaries or attorneys. Corporate fiduciary's fees are generally determined by published fee schedules. Other fiduciary's and attorney's fees are generally based on time spent, taking into account the amount of the assets and the complexity of the estate.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Expenses are paid in the same manner as other costs of administration.
4. **Liability of real estate for decedent's debts and expenses of administration.**
Debts and expenses are payable from personalty first, unless personalty is specifically bequeathed, in which case debts and expenses are paid from realty that is not specifically devised. If the estate is insolvent or if it is solvent but there are no assets of the estate other than realty that is specifically devised, debts and expenses can be paid from realty that is specifically devised [See Conn. Gen. Stat. §45a-428].
5. **Nature of lien against real estate accorded creditors.**
Taxes, mortgages, mechanics, judgments, etc.
6. **How may real estate be sold free of liens?**
Real estate may be sold free of tax liens through obtaining a release from the IRS and state of Connecticut Dept. of Revenue Services. It may be sold free of other liens by payment or assumption.
7. **How is marketable title established—**
- (a) **In a specific devisee?**
Upon the recording of a Certificate of Devise issued by the Probate Court. The Certificate of Devise is not itself, however, a muniment of title. See Wilhelm, *Settlement of Estates*, Sections 21 and 349.
 - (b) **In a residuary devisee?**
Same as 7 (a).
 - (c) **In an heir-at-law?**
Same as 7 (a), except Court issues Certificate of Descent instead of Certificate of Devise.
8. **Power of foreign personal representative to manage and sell real estate.**
A foreign personal representative has no authority to manage or sell real estate unless he or she qualifies as an ancillary personal representative in Connecticut. If a Will does not grant or incorporate by reference (from the Connecticut Fiduciary Powers Act) a power to sell real estate or if there is no Will, a probate court order approving a sale must be obtained, whether or not the personal representative is a domiciliary.
9. **What real estate owned by the decedent alone must pass de hors the Will?**
None.
10. **Does a Will or Codicil convey after-acquired real estate?**
Yes.
11. **Intestate share of heirs in real estate.**
There is no distinction between real estate and personalty nor between males and females in intestacy. If deceased leaves surviving issue, all of whom are also issue of surviving spouse, first \$100,000, plus one-half of balance of intestate estate to surviving spouse absolutely. If deceased leaves surviving issue, one or more of whom are not issue of surviving spouse, one-half of balance of intestate estate to surviving spouse absolutely.
- If deceased leaves no surviving issue, but is survived by a parent or parents, first \$100,000, plus three-quarters of balance of intestate estate passes to surviving spouse absolutely. If deceased leaves no surviving issue or surviving parent, entire intestate estate goes to surviving spouse.

12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Always, although further ancillary administration is necessary to obtain a Certificate of Devise to establish marketable title (See question 7).
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Presumptive, but no direct authority discovered.
 - (b) **In the ancillary personal representative?**
Presumptive, assuming Will contains power of sale and subject to custody right of Executor under Conn. Gen. Stat. § 45a-321.
 - (c) **In the domiciliary personal representative?**
No authority discovered.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes, except where property is jointly owned with right of survivorship [See Conn. Gen. Stat. § 45a-288].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes, this is the practice and seems to be supported by Wilhelm, *Settlement of Estates*, and Connecticut Probate Practice, Part I, Chapter I, Section C, Paragraph 4.

DELAWARE

Thomas P. Sweeney
Wilmington, Delaware
September 11, 1997

1. **Is real estate a probate asset?**
Real estate owned by a decedent is deemed to have passed to his heirs and devisees at the moment of death. Thus, the personal representative is not entitled to take possession of the real estate. However, in the event he does take possession of the real estate, he must account for the rents and profits and keep the premises in tenantable repair [12 Del. Code Ann. §1902].
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Chancery Court Rule 192 sets forth guidelines to determine the fee that may be charged by an attorney and the commissions of the personal representative in settling the estate. This rule was substantially rewritten in 1996 to allow such fee or commissions "in a reasonable amount," which is described in detail in Rule 192.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Since under Delaware law real estate is deemed to pass directly to the devisees or heirs and does not pass through the hands of the personal representative, expenses relating to such real estate are considered to be personal expenses of the devisees or heirs and not expenses of the estate. However, it has generally been the practice of the Register of Wills to permit the costs of maintaining the real estate to be claimed for accounting purposes for the first few months following decedent's death. If the Will directs the sale of the real estate, expenses incurred between the date of death and the date of sale are generally allowed as administration expenses of the estate and are generally allowed for both accounting purposes and for Inheritance Tax purposes.
4. **Liability of real estate for decedent's debts and expenses of administration.**
Real estate is not primarily liable for decedents' debts and expenses of administration. Personal property is abated before real estate pursuant to the abatement statute at 12 Del. Code Ann. §2317, and subject to §207, which allows the sale of real property by the executor to pay such debts and expenses only where the terms of the Will so expressly provide [12 Del. Code Ann. §207]. If no power to sell real estate is granted in the Will and if the personal estate is not sufficient to pay the decedent's debts, the executor or administrator may petition the Chancery Court for permission to sell decedent's real estate to pay such debts [12 Del. Code Ann. §2701(a)].
5. **Nature of lien against real estate accorded creditors.**
There are no automatic non-tax liens against the real estate of a decedent in Delaware, other than for Property Taxes, since the real estate passes by operation of law to the decedent's heirs and devisees at the moment of death. Real property subject to a mortgage or deed of trust will pass to the heir or devisee subject to such indebtedness. In the event that the personality of the decedent is insufficient to pay the debts of the decedent, or the taxes and/or costs of the estate administration, a creditor may petition the court to order the sale of the real estate [12 Del. Code Ann. §2701(a)]. Proceeds of such sale shall first be used to pay any mortgage or lien on the real property [12 Del. Code Ann. §2710].

6. How may real estate be sold free of liens?

Since there are no automatic liens against real estate, the Delaware Code does not address this question. Where the Chancery Court orders the sale of realty in order to pay the debts of decedent's estate, a purchaser will take the real estate essentially free of liens [12 Del. Code Ann. §2709].

7. How is marketable title established—

(a) In a specific devisee?

The inventory of decedent's estate, together with the Will (if any), acts as the chain of title for the real property. Usually, the heir or devisee provides a letter to the buyer's attorney representing that there are sufficient assets in the estate to cover expenses of administration and taxes.

(b) In a residuary devisee?

Same as (a), above.

(c) In an heir-at-law?

Same as (a), above.

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has the same powers afforded a domiciliary personal representative, including, but not limited to, the power of sale [12 Del. Code Ann. §1566 and 12 Del. Code Ann. §207].

9. What real estate owned by the decedent alone must pass de hors the Will?

None. However, for decedents dying after January 1, 1987, the surviving spouse has the right to an "elective share" of one-third of the "elective estate" reduced by the amount of all transfers to the surviving spouse by the decedent [12 Del. Code Ann. §901]. The elective estate means the amount of decedent's gross estate for Federal Estate Tax purposes whether or not a Federal Estate Tax Return is filed. The elective estate shall only be paid out of the decedent's probate assets. It shall not be paid out of any jointly owned property, insurance proceeds payable to a beneficiary other than the decedent's estate, or property held in trust [12 Del. Code Ann. §908(b)]. However, the elective share may include real estate.

10. Does a Will or Codicil convey after-acquired real estate?

12 Del. Code Ann. §206 specifically provides for the application of the Will to after-acquired real property, unless a contrary intent is evidenced in the Will.

11. Intestate share of heirs in real estate.

(a) Surviving Spouse [12 Del. Code Ann. §502]:

- (1) If there is no surviving issue or surviving parents of the decedent, the entire estate passes to the surviving spouse.
- (2) If there is no surviving issue, but at least one parent survives the decedent, the first \$50,000 plus one-half of the balance of the intestate personal estate, plus a life estate in the intestate real estate, passes to the surviving spouse.
- (3) If there is surviving issue, all of whom are also issue of the surviving spouse, the first \$50,000, plus one-half of the balance of the intestate personal estate, plus a life estate in the intestate real estate, passes to the surviving spouse.
- (4) If there is surviving issue, one or more of whom are not issue of the surviving spouse, one-half of the intestate personal estate, plus a life estate in the intestate real estate, passes to the surviving spouse.

(b) Heirs other than Surviving Spouse [12 Del. Code Ann. §503]:

The intestate estate remaining after the surviving spouse's share is set aside, or if there is no surviving spouse, the entire intestate estate shall pass:

- (1) to the surviving issue of the decedent, per stirpes.
- (2) if there is no issue of the decedent surviving, to the decedent's parents, in equal shares.
- (3) if there is no issue or parent of the decedent surviving, to the surviving brothers and sisters of the decedent and to the issue of each deceased brother or sister, per stirpes.
- (4) if there is no issue, parent, or sibling of the decedent surviving, to the next of kin of the decedent and to the issue of the next of kin, per stirpes.

(c) Any property passing to two or more persons shall pass to them as tenants in common.

(d) The heirs of the decedent must survive him by 120 hours [12 Del. Code Ann. §504].

12. Is the duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes [12 Del. Code §1304; 12 Del. Code Ann. §1307].

13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Under Delaware law, real estate vests in the devisees and heirs of the decedent at the moment of death (subject to sale by the executor if necessary to pay debts, expenses and taxes). There is no indication that title of a devisee under a foreign Will would be different from that of a devisee under the Will of a Delaware resident decedent.
- (b) **In the ancillary personal representative?**
Yes, it is conclusive evidence of authority to convey decedent's local property, provided that the decedent's Will authorizes an executor to sell the decedent's real property [12 Del. Code Ann. §207].
- (c) **In the domiciliary personal representative?**
Yes, for the same reason as (b) above, provided that the domiciliary personal representative has complied with 12 Del. Code Ann. §1565, requiring the filing of exemplified copies of such representative's appointment and any bond given [12 Del. Code Ann. §1566; 12 Del. Code Ann. §207].
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
The answer depends on whether notices must be sent and whether an inventory must be filed. Where a domiciliary foreign personal representative has filed proof of appointment and any bond given, such representative may also have to arrange for notification of creditors of the decedent (if appropriate) pursuant to 12 Del. Code Ann. §2101 and file an inventory and appraisal of real estate situated within Delaware pursuant to 12 Del. Code Ann. §1905 [12 Del. Code §1566].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes.

DISTRICT OF COLUMBIA

Nicholas D. Ward
Washington, D.C.
October 1, 1993

1. **Is real estate a probate asset?**
Yes [D.C. Code Ann. §20-105; *Richardson v. Green*, 528 A.2d 429 (D.C. 1987)].
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Yes [SCR-PD 124(a)].
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
As general expenses of administration. Expenses of specifically devised real estate may be chargeable to the income received from the property or to be devised [*Estate of Mary Eileen Lemp*, ADM #2042-81; *Johnson v. Marin*, 567 A.2d 1299 (D.C. 1989); *Duggan v. Keto*, 554 A.2d 1126 (D.C. 1989)].
4. **Liability of real estate for decedent's debts and expenses of administration.**
There is no priority or preference between real and personal property. The family allowance is payable from proceeds of sale of realty [*Estate of Alex H. Burton*, 541, A.2d 599 (D.C. 1988)]. See answer to question 3 with respect to specifically devised real estate.
5. **Nature of lien against real estate accorded creditors.**
Real Estate is subject to claims on general creditors, as is any other property of the estate. The lien of a secured creditor is not affected by the six-month limitation on presentation of claims against the estate [D.C. Code Ann. §20-903(b)].
6. **How may real estate be sold free of liens?**
D.C. Code Ann. §47-3711 says that the District of Columbia has a lien for taxes, penalties, and interest due or that become due for estate tax on property owned by a decedent subject to all tax "in whatever form it may happen to be held and all property acquired in substitution." However, the estate tax regulations provide that "[t]he lien imposed by the Act on the decedent's property shall not be valid as against any purchaser, mortgagee, pledgee or other holder of a security interest for a full and adequate consideration or proceeds received as a result of any sale, mortgage, pledge or granting of a security interest shall remain subject to the lien imposed by D.C. Code Ann. §47-3711" [D.C. Mun. Regs. Tit. §3703.1].
- The Director of the Department of Finance and Revenue (the representative of the Mayor for supervision of the Inheritance and Estate Tax Revision Act of 1986) is not permitted to issue releases of liens. However, he can issue a certificate that all taxes, penalties and, interest have been paid so long as a District of Columbia estate tax return is required to be filed [See *generally* D.C. Mun. Regs. Tit. §3707; D.C. Code Ann. §47-3710].

7. How is marketable title established—

(a) In a specific devisee?

(b) In a residuary devisee?

(c) In an heir-at-law?

Real estate is distributed to the devisee or heir by a quit claim deed from the personal representative which establishes marketable title in the devisee or heir [D.C. Code Ann. §20-1103].

D.C. Code Ann. §20-1104(c) provides “[i]f property distributed in kind is sold to a purchaser for value by a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser takes good title free of any claims of the estate and incurs no personal liability to the estate. To be protected under this provision, a purchaser need not inquire whether a personal representative acted properly in making the distribution in kind.” Likewise, the D.C. Code protects one who purchases property from the personal representative [D.C. Code Ann. §20-744].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative may lease or transfer real property located in the District of Columbia if the representative: (a) posts bond with a penalty amount equal to the value of the property and makes first publication of notice pursuant to D.C. Code Ann. §20-343(a), or (b) allows six months to pass after the first publication required by that subsection and (i) no claims are filed with the Register of Wills during this time or (ii) all claims of creditors have been released or finally determined in favor of the personal representative [D.C. Code Ann. §20-343(c)].

9. What real estate owned by the decedent alone must pass de hors the Will?

The District of Columbia still has a dower law. Therefore the surviving spouse of a decedent is entitled to the use, during her or his natural life, of one-third of all the land of which the deceased spouse was seized of an estate of inheritance at any time during the marriage. The surviving spouse entitled to dower under D.C. Code Ann. §19-012 may remain in the residence for 40 days after the death without paying rent, within which period the dower of the surviving spouse is to be assigned to her or him. The right of dower and its incidents entitles the surviving spouse to lands held by the decedent at any time during the marriage, whether or not held by the decedent at time of death (unless the right to dower was released by the surviving spouse upon conveyance) but does not attach to land held by two or more persons as joint tenants while the joint tenancy exists [D.C. Code Ann. §19-102].

Dower is forfeited by desertion or by a court conviction of adultery not condoned by the aggrieved spouse [D.C. Code Ann. §19-103]. Aside from provisions relating to dower, no real estate owned by the decedent alone must pass outside the Will.

10. Does a Will or Codicil convey after-acquired real estate?

Yes [D.C. Code Ann. §18-305].

11. Intestate share of heirs in real estate.

The intestate share of heirs in real estate is the same as the intestate share of heirs in the personal estate [D.C. Code Ann. §18-301].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. A foreign estate proceeding, but not ancillary administration, must first be undertaken. The foreign personal representative must appoint an agent to accept service of process, publish a notice of his appointment once a week for three weeks in two newspapers of general circulation, and pay court costs of \$25 [SCR-PD 125(d)(9); D.C. Code Ann. §20-343]. The Register of Wills issues a certificate of examination of Book of Claims Against Non-Resident Decedents, which certifies that the Will is properly authenticated and that the foreign estate proceeding requirements have been complied with.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. The foreign personal representative must deed the property to the devisee (by quit-claim deed) after first appointing an agent to accept service of process and publishing Notice against creditors (See question 12) [D.C. Code Ann. §20-1103].

(b) In the ancillary personal representative?

Not applicable under District of Columbia Law.

(c) In the domiciliary personal representative?

Not applicable under District of Columbia Law.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No.

15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**

Not applicable under District of Columbia Law.

FLORIDA

John H. Sutherland
Vero Beach, Florida
October 19, 1993

1. **Is real estate a probate asset?**

Yes, except Homestead. See question 9 for definition of Homestead.

2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**

Both, when they are asset(s) of the Estate.

3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**

As general expenses of administration.

4. **Liability of real estate for decedent's debts and expenses of administration.**

No priority between realty and personalty. Unless source of payment directed in Will, property not willed is disposed of first, then residuary, nonspecific, and specific devisees. Devise includes bequest [Fla. Stat. Ch. 733-805].

5. **Nature of lien against real estate accorded creditors.**

None, unless recorded prior to death.

6. **How may real estate be sold free of liens?**

Petition and order of sale required in intestate cases and where will does not bestow a power of sale upon the personal representative. Non-taxable certificate or release of lien obtained from Florida Department of Revenue releases Florida estate tax lien.

7. **How is marketable title established—**

(a) **In a specific devisee?**

By filling the necessary estate tax waivers and instrument of transfer from personal representative.

(b) **In a residuary devisee?**

In a residuary devisee, as in (a), except proper distribution is to residuary devisee.

(c) **In an heir-at-law?**

In an heir-at-law, as in (a) except proper distribution is to the heir-at-law.

8. **Power of foreign personal representative to manage and sell real estate.**

If no power to sell, management ability would be very limited, and real estate must have a Florida personal representative to deliver good title.

9. **What real estate owned by the decedent alone must pass de hors the Will?**

(a) Homestead (maximum one-half acre within and 160 acres without municipality) if decedent survived by spouse or minor child, except Homestead may be devised to spouse if no minor child; otherwise, if decedent survived by spouse and lineal descendants, spouse takes life estate with vested remainder to lineal descendants in being at time of decedent's death. Amendment to Article X of the Florida Constitution, effective November 6, 1984, changes ownership requirement of Homestead from head of family to a natural person who resides or whose family resides on the property [Fla. Stat. Ch. 732.401; Fla. Stat. Ch. 732.4015].

(b) Dower is abolished; surviving spouse entitled to elective share of 30% of fair market value of all property subject to administration in Florida after deducting all valid claims against the estate and all mortgages, liens or security interests on the assets [Fla. Stat. Ch. 732.201-733.215].

(c) A pretermitted spouse or child shall receive share of estate as if decedent had died intestate [Fla. Stat. Ch. 732.301 and Fla. Stat. Ch. 732.302].

10. **Does a Will or Codicil convey after-acquired real estate?**

Yes.

11. **Intestate share of heirs in real estate.**

Surviving spouse: all if no surviving descendants; if surviving descendants who are also lineal descendants of surviving spouse, \$20,000 plus one-half of the balance of the intestate estate; discretion in the Court to allot property to spouse, provided all beneficiaries are treated equitably [Fla. Stat. Ch. 732.102]. If there are surviving lineal descendants, one or more of whom are not lineal descendants of surviving spouse, surviving spouse takes one-half of the intestate estate [Fla. Stat. Ch. 732.102 (1) (C)].

If no surviving spouse, to lineal descendants; failing such, to father and mother equally or to the survivor of them, then to brothers and sisters of their lineal descendants; then one-half to paternal and maternal kindred or their survivors; then to the kindred of the last deceased spouse of the decedent [Fla. Stat. Ch. 732.103].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes, as to either an intestate decedent or a testate decedent if commenced within two years of his death or before the domiciliary personal representative has been discharged [Fla. Stat. Ch. 734.107; Fla. Stat. Ch. 734.102; Fla. Stat. Ch. 734.104].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, if admitted after two years from the date of death of the decedent or after discharge of the domiciliary personal representative if there are no previous proceedings to administer the estate in Florida. If admitted prior to the end of the two year period or before discharge, the property would be subject to claims until such events had occurred [Fla. Stat. Ch. 734.104(1)and (4)].

(b) In the ancillary personal representative?

Yes, if foreign Will contains a general power of sale [Fla. Stat. Ch. 734.104 (4) and Fla. Stat. Ch. 733.613(1)].

(c) In the domiciliary personal representative?

No, until a court order for distribution to the domiciliary personal representative from the ancillary personal representative is obtained subsequent to the payment of all administrative expenses and claims against the estate in the ancillary administration proceedings [Fla. Stat. Ch. 734.102(5)].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No, if commenced within two years of his death or before domiciliary personal representative has been discharged [Fla. Stat. Ch. 734.101; Fla. Stat. Ch. 734.102; Fla. Stat. Ch. 734.104].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes, provided that the grant of power of sale in the Will is sufficiently specific and not limited either by law or by the Will so as to encumber its exercise [Fla. Stat. Ch. 734.102(6) and Fla. Stat. Ch. 733.613(2)].

GEORGIA

Neal J. Fink
Atlanta, Georgia
August 31, 1993

1. Is real estate a probate asset?

Technically, no; pursuant to Ga. Code Ann. §53-4-8 (a), title to real property immediately vests in the owner's heirs at law. However, the decedent's real property is subject to being administered by the legal representative, if there is one, for the payment of debts, the purposes of distribution, and other purposes provided for by law. If there is no legal representative, the heirs may bring an action in their own names [See Ga. Code Ann. §53-8-23].

In testacy, the title to real property does not pass under the Will until the executor has given his assent [Ga. Code Ann. §53-2-108]. The executor's assent, however, may be express or implied.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Real estate is subject to both commissions and legal fees as part of administrative expenses to the extent it is included in the general estate [Ga. Code Ann. §53-7-90, and §53-6-140].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Due to the lack of any statute, such expenses are generally handled as administrative expenses. As such, they are paid after the payment of year's support for the family and funeral expenses, which include the physician's bill for the decedent's last illness [Ga. Code Ann. §53-7-91].

4. Liability of real estate for decedent's debts and expenses of administration.

All the estate, real and personal, unless otherwise provided by law, shall be liable for the payment of debts [Ga. Code Ann. §53-7-90; see also Ga. Code Ann. §53-4-9]. If there is a Will, the property charged with the debts shall be first applied to the payment thereof; next the residue or, if there is no residuary clause, the undivided estate shall be so applied; next, general legacies may abate pro rata; and lastly specific shall contribute [Ga. Code Ann. §53-7-90; see Code Ann. §53-2-101].

Moreover, intestacy, real property and personal property are treated equally liable for the payment of debts [Ga. Code Ann. §53-2-101].

5. Nature of lien against real estate accorded creditors.

Liens created during the lifetime of the decedent are paid according to their priority. Mortgages and other liens on specific property are preferred only to the extent of such property [Ga. Code Ann. §53-7-91]. Note that tax liens apply to all property and are paid prior to liens created during the decedent's lifetime [Ga. Code Ann. §48-2-56(a) and §53-7-91 (Does not include government or estate tax liens arising by virtue of death)].

6. How may real estate be sold free of liens?

- (a) Satisfy the lien.
- (b) Under court order, a sale by either an executor or an administrator, as the representative of an estate, may divest liens from the property sold, although a sale by the owner in his lifetime would not have done so.
- (c) If an executor or an administrator makes a sale under a regular order of the probate court, liens on the property sold are divested and are transferred to the fund realized from the sale [Ga. Code Ann. §53-8-51 (Note that this does not apply to security interests)].
- (d) If a probate court determines in the case of intestacy that no administration is necessary, real property sold thereafter by the heirs-at-law to a purchaser who acts in good faith in reliance upon such order, will be discharged from all claims, debts, and rights of creditors of the deceased owner, except such claims, liens, judgments, security deeds, mortgages, or encumbrances as have been duly recorded or filed so as to constitute notice thereof at the time of the sale [Ga. Code Ann. §53-10-2(d); see generally Ga. Code Ann. §§53-10-1-53-10-4].

7. How is marketable title established—

(a) In a specific devisee?

Title does not pass under the Will until the executor has given his assent [Ga. Code Ann. §53-2-108]. The executor's assent, however, may be express or implied.

(b) In a residual devisee?

Title does not pass under the Will until the executor has given his assent [Ga. Code Ann. §53-2-108]. The executor's assent, however, may be express or implied.

(c) In an heir-at-law?

Title vests immediately in the heirs-at-law, subject to being administered by the legal representative, if there is one, for the payment of debts, for the purposes of distribution, and the other purposes provided for by law [Ga. Code Ann. §53-4-8].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has the same power as a resident personal representative to manage or sell real estate. However, in addition to the duties of a resident representative, a foreign representative must also file and have recorded with the probate court an authenticated certified copy of his letters at the time application for sale is made [Ga. Code Ann. §53-6-124].

With regard to a foreign Will the personal representative, appointed in another jurisdiction, cannot manage and control the assets of the estate located in Georgia until such foreign Will has been probated in Georgia [Ga. Code Ann. §53-3-49]. The foreign representative can, however, bring actions in the courts of Georgia prior to probating a foreign Will [Ga. Code Ann. §53-3-49].

9. What real estate owned by the decedent alone must pass de hors the Will?

None, unless it is properly included in year's support.

10. Does a Will or Codicil convey after-acquired real estate?

It may, provided the provisions of the Will or codicil are sufficiently broad to embrace such property [Ga. Code Ann. §53-2-117; see generally Ga. Code Ann. §53-2-5].

11. Intestate share of heirs in real estate.

Upon the death of a spouse without lineal descendants, the surviving spouse takes the entire estate upon payment of the deceased spouse's debts, if any [Ga. Code Ann. §53-4-2(1)].

Upon the death of a spouse with surviving lineal descendants, the surviving spouse and children take *per capita*, with the surviving spouse taking a child's part. If the shares exceed four, in other words if there are four or more children, the spouse receives one-fourth of the estate and the children share the remaining three-fourths. The descendants of deceased children take *per stirpes* [Ga. Code Ann. §53-4-2(2)].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

A Will executed in another state and witnessed according to the laws of said state, which is probated in another state, constitutes a muniment of title for the transfer and conveyance of real property in Georgia to the distributees or devisees mentioned in such Will, and it shall be admitted in evidence in Georgia as such muniment of title without being probated in Georgia when accompanied by properly authenticated certified copies of the record admitting the Will to probate in another state [Ga. Code Ann. §53-3-47(a)].

A foreign Will admitted to probate in common or solemn form in the state of the testator's residence at the time of his death may be admitted to probate in like form in Georgia upon production of properly authenticated certified copies of the probate proceedings, certified in accordance with [Ga. Code Ann. §24-7-24].

If real property in Georgia is devised by the terms of the foreign Will, such Will (if it is in writing and if it has been attested and executed according to Georgia law) may be admitted to probate in common or solemn form in the Probate Court of any county in which the property is situated, in the same manner and on the same proof as in cases of domestic Wills, subject to the same defenses and objections [Ga. Code Ann. §53-3-42].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

- (a) In the devisee?
- (b) In the ancillary personal representative?
- (c) In the domiciliary personal representative?

A Will executed in another state and witnessed according to the laws of said state, which is probated in another state, constitutes a muniment of title for the transfer and conveyance of real property in Georgia to the distributees or devisees mentioned in such Will, and it shall be admitted in evidence in Georgia as such muniment of title without being probated in Georgia when accompanied by properly authenticated certified copies of the record admitting the Will to probate in another state [Ga. Code Ann. §53-3-47(a)].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Ancillary administration is not required, however, if real estate in Georgia is devised or bequeathed by the terms of a foreign Will, such Will may be admitted to probate in Georgia [Ga. Code Ann. §53-3-42].

And even though a foreign Will not executed according to Georgia law cannot be probated in Georgia as to realty, all Wills executed in another state and witnessed according to the laws of said state, which are probated in another state, constitute muniments of title for the transfer and conveyance of real property in Georgia to the distributees or devisees mentioned in such Wills, and they shall be admitted in evidence in Georgia as such muniments of title without being probated in Georgia when accompanied by properly authenticated certified copies of the record admitting the Will to probate in another state [Ga. Code Ann. §53-3-47].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Ancillary administration is not required.

HAWAII

Daniel H. Case
Honolulu, Hawaii
August 27, 1997

1. Is real estate a probate asset?

Yes, except for real estate held in joint tenants with rights of survivorship or as tenants by the entirety.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes, real estate is subject to both fees, however, the fees are based upon reasonable compensation.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

They are handled as any other probate expenses would be handled, and are paid out of the estate.

4. Liability of real estate for decedent's debts and expenses of administration.

Personalty first and then realty.

5. Nature of lien against real estate accorded creditors.

Recorded liens and those which could have been perfected had the decedent lived, such as mechanics liens, can receive lien protection.

6. How may real estate be sold free of liens?

An order confirming the sale of real property may be required. Hawaii Revised Statutes §531-29 requires any personal representative to obtain from the court an order of confirmation of sale before making conveyance of the real property sold only if required by the decedent's Will or if demanded by a devisee in a testate probate proceeding or an heir in an intestate probate proceeding. However, Haw. Rev. Stat. §501-171 requires a certified copy of an order of the circuit court determining the persons entitled to distribution and approving the distribution.

7. How is marketable title established—

(a) In a specific devisee?

By filing and recording Final Order of Distribution.

(b) In a residuary devisee?

By filing and recording Final Order of Distribution.

(c) In an heir-at-law?

By filing and recording Final Order. If the personal representative's possession and control of the decedent's estate in real property is terminated by a court order in any of the foregoing cases, such an order must be filed and recorded to pass title.

8. Power of foreign personal representative to manage and sell real estate.

If there is no local administration or application or petition pending in the State, a foreign personal representative may file with the Court authenticated copies of the personal representative's appointment and of any official bond the personal representative has given. However, as mentioned in Question 6 above, the sale of real estate may require an order of confirmation of sale before making conveyance.

9. What real estate owned by the decedent alone must pass de hors the Will?

None except pursuant to election against Will by a spouse (one-third of the net estate) [Haw. Rev. Stat. §560:2-201].

10. Does a Will or Codicil convey after-acquired real estate?

Yes, a Will is construed to pass all property which the testator owns at death, including property acquired after the execution of the Will [Haw. Rev. Stat. §560:2-604].

11. Intestate share of heirs in real estate.

- 1) The entire intestate estate to the surviving spouse if:
 - (a) no descendant or parent of the decedent is surviving; or
 - (b) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
- 2) The first \$200,000, plus 3/4 of any balance of the intestate estate to the surviving spouse, if no descendant survives but a parent of the decedent is surviving;
- 3) The first \$150,000, plus 1/2 of any balance of the intestate estate to the surviving spouse, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent; or
- 4) The first \$100,000, plus 1/2 of any balance of the intestate estate to the surviving spouse, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Any part of the intestate estate not passing to the surviving spouse, or the entire intestate estate if there is no surviving spouse, passes as follows:

- 1) To the decedent's descendants by representation;
- 2) If there are no surviving descendants, then to the decedent's parents;
- 3) If there are no surviving descendants or parents, then to the descendants of the decedent's parents by representation; and
- 4) If there is no surviving descendant, parent, or descendant of a parent, then to the grandparents or descendants of grandparents and if there are no grandparents or descendants of grandparents, then to the relatives of the decedent.

See Haw. Rev. Stat. §§560:2-101 and 2-102.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Although Haw. Rev. Stat. §560:4-204 allows a foreign personal representative to file authenticated copies of the personal representative's appointment with the Court, the sale or conveyance of the real estate under Haw. Rev. Stat. §501-171 may require an ancillary probate proceeding.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. (See below.)

(b) In the ancillary personal representative?

No. (See below.)

(c) In the domiciliary personal representative?

No. (See below.)

Hawaii Revised Statutes §560:4-204 allows a foreign personal representative to file with the Court authenticated copies of the personal representative's appointment, however, the conveyance of real estate may require an ancillary probate proceeding under Haw. Rev. Stat. §501-171.

14. **Except for the procedures (specified in Question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Hawaii Revised Statutes §501-171 may require an ancillary probate proceeding for the distribution or conveyance of real estate.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Hawaii Revised Statutes §531-29 requires any personal representative to obtain from the court an order of confirmation of sale before making conveyance of the real property only if required by the decedent's Will or if demanded by a devisee or heir. However, Haw. Rev. Stat. §501-171 may require an order of confirmation of sale.

IDAHO

Robert S. Erickson and John McGown
Boise, Idaho
August 22, 1997

1. **Is real estate a probate asset?**
Yes, except that realty held in joint tenancy with right of survivorship is a non-probate asset [See Idaho Code S 15-1-201(37) defining property and §§ 55-104 and 55-508 which disfavor joint tenancy with right of survivorship].
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Both, but such fees are based on reasonable compensation for services [See Idaho Code §§ 15-3-715(18), (21), 15-3-719, 15-3-720, and 15-3-805(1)].
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Like other costs and expenses of administration. No distinction is made for general expenses attributable to real property. Specific expenses may be charged against specific devises of or interests in real property [See Idaho Code § 68-1005]. A specific devise of real estate is subject to any security interest existing at the decedent's date of death regardless of a general directive in the Will to pay debts [See Idaho Code §15-2-609].
4. **Liability of real estate for decedent's debts and expenses of administration.**
No priority between personalty and realty unless directed in Will [See Idaho Code § 15-3-902] but, the homestead is exempt from all claims against the estate [See Idaho Code § 15-2-401]. A specific devise of real estate is subject to any security interest existing at the decedent's date of death regardless of a general directive in the Will to pay debts [See Idaho Code §15-2-609].
5. **Nature of lien against real estate accorded creditors.**
No liens for unsecured creditors. Liens existing at the time of death are unaffected by death and are unaffected by the nonclaim statute [See Idaho Code § 15-3-803(e)(1)]. A specific devise of real estate is subject to any security interest existing at the decedent's date of death regardless of a general directive in the Will to pay debts [See Idaho Code §15-2-609].
6. **How may real estate be sold free of liens?**
Existing liens must be satisfied or otherwise discharged by the personal representative. Release of the federal estate tax lien is required where appropriate.
7. **How is marketable title established?**
- (a) **In a specific devisee?**
By Personal Representative's Deed of Distribution.
 - (b) **In a residuary devisee?**
By Personal Representative's Deed of Distribution.
 - (c) **In an heir-at-law?**
By Personal Representative's Deed of Distribution [See *generally* Idaho Code §§ 15-3-101, 15-3-102, and 15-3-715(23) and (27)]. (Probate proceeding does not clear defects in title or extinguish existing liens.)
8. **Power of foreign personal representative to manage and sell real estate.**
Same as local personal representative [See Idaho Code §15-4-205]. Domiciliary foreign personal representative must file proof of authority with Idaho court in an ancillary proceeding [See Idaho Code §15-4-204].
9. **What real estate owned by the decedent alone must pass de hors the Will?**
None .
10. **Does a Will or Codicil convey after-acquired real estate?**
Yes, unless otherwise limited [See Idaho Code §15-2-604].

11. Intestate share of heirs in real estate.

No distinction between real and personal property. Subject to the elective share of the surviving spouse, homestead, exempt property, family allowance, creditors and administration, the intestate estate passes as follows:

- (a) If no surviving issue, the entire estate to the surviving spouse.
- (b) If surviving issue, all of whom also are issue of the surviving spouse, all of the community property, the first \$50,000 of separate property, and one-half of the balance of the estate to the surviving spouse, and the remainder to the surviving issue by right of representation.
- (c) If surviving issue, one or more of whom are not issue of the surviving spouse, all of the community property and one-half of the separate property to the surviving spouse, and the remainder to the surviving issue by right of representation.

[See Idaho Code § 15-2-102 et seq.; See also Idaho Code §15-2-201, et seq. surviving spouse's elective share in quasi-community property; See also Idaho Code § 15-2-401, et seq. (dealing with homestead, exempt property, and family allowances); See also Idaho Code §15-3-801, et. seq. dealing with creditors and administration].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. In the absence of pending local administration, a domiciliary foreign personal representative may file authenticated copies of his appointment in an Idaho court in a county where the decedent had property. Such filing confers the power of a local personal representative [See Idaho Code § 15-4-204, et seq.; but see Idaho Code § 15-3-102].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. Authenticated copies of the personal representative's appointment also should be filed. The personal representative must execute a Personal Representative's Deed of Distribution in favor of the devisee [See Idaho Code §15-4-204 et. seq.].

(b) In the ancillary personal representative?

No.

(c) In the domiciliary personal representative?

No. The domiciliary foreign personal representative derives his authority from the state granting powers upon the filing of authenticated copies of his appointment with the court where the property is located, and not from the Will [See Idaho Code §§ 15-3-103 and 15-4-205, et seq.].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, it is required [See Idaho Code §15-4-204, et seq.].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

No, but court approval generally is not required unless the administration is supervised [See Idaho Code §15-3-704].

ILLINOIS

William L. Rowder
Chicago, Illinois
August 20, 1997

1. Is real estate a probate asset?

Yes. Although title vests in heir or devisee, representative is entitled to possession, subject to homestead, or occupation by heir or legatee as his residence.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Fees are to be "reasonable" and payable out of real estate and personalty without distinction.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Handled in same fashion as expenses attributable to personalty. No exoneration of encumbered real estate without a specific contrary provision in the will.

4. Liability of real estate for decedent's debts and expenses of administration.

Illinois law makes no distinction between real and personal property for purposes of paying debts and expenses.

5. **Nature of lien against real estate accorded creditors.**
No specific lien is created.
6. **How may real estate be sold free of liens?**
Power of sale in will, or, failing that, judicial proceeding under Probate Act.
7. **How is marketable title established—**
- (a) **In a specific devisee?**
By an executor's deed prior to discharge of executor by Probate Court; or by reason of approval of final account by Probate Court if supervised administration, or release of estate's interest if independent administration.
 - (b) **In a residuary devisee?**
By an executor's deed prior to discharge of executor by Probate Court; or by reason of approval of final account by Probate Court if supervised administration, or release of estate's interest if independent administration.
 - (c) **In an heir-at-law?**
By an administrator's deed prior to discharge of administrator by Probate Court; or by reason of approval of final account by Probate Court if supervised administration, or release of estate's interest if independent administration.
8. **Power of foreign personal representative to manage and sell real estate.**
If no letters issued in Illinois, foreign representative may petition court in county where real estate located for authorization to lease or sell.
9. **What real estate owned by the decedent alone must pass de hors the Will?**
If spouse renounces will, spouse receives an interest in the real estate.
10. **Does a Will or Codicil convey after-acquired real estate?**
Yes, if no contrary intention stated in will.
11. **Intestate share of heirs in real estate.**
If no descendants, all to spouse. If descendants, one-half to descendants per stirpes and one-half to spouse.
12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
If nonresident representative proceeds under 755 ILCS §§5/22-4 and 22-4(b) requires the following to be filed: a copy of (1) letters; (2) order of domiciliary Court authorizing application for leave to sell; (3) any bond required by domiciliary Court; and (4) order of Court issuing letters approving the bond.
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Under Illinois law, title vests immediately in devisee subject to executor's right to possession during probate. Once executor releases that right, admission of foreign Will locally is presumptive evidence of devisee's authority to convey the property.
 - (b) **In the ancillary personal representative?**
Power of sale in will, or, failing that, judicial proceeding under Probate Act.
 - (c) **In the domiciliary personal representative?**
No.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No. Under §§5/22-4 and 22-5 of Illinois Probate Act nonresident executors may file a petition to sell the property in the Court of the county where the property is located. Petition may be made for any purpose for which a state appointed representative may sell, namely (1) to pay expenses of administration; (2) to pay claims against the estate; or (3) to pay legacies charged by decedent's Will upon the real estate or (4) for such other purposes as the Court may direct.
- If proceedings are commenced under 755 ILCS §5/22-4, and then letters are issued in Illinois, proceedings devolve to the state appointed representative for completion [755 ILCS §5/22-5].
- If real estate need not be sold, issuance of a "bond in lieu of probate" makes it possible to avoid probate.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

No court approval is necessary if power of sale is clearly part of the Will. However, a title insurer may require a court order.

INDIANA

Kristin G. Fruehwald
Indianapolis, Indiana
February 7, 1994

1. Is real estate a probate asset?

Yes. While title passes to the heirs directly on death, the personal representative is entitled to possession [Ind. Code §29-1-13-1].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Both [Ind. Code §29-1-15-3].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

No distinction for such expenses exists between realty and personalty. All property subject to administration is liable. Unless specified in the decedent's Will, the determination for payment of such expenses may be made by the personal representative. A probate court has the right to exercise control over the personal representative if the personal representative's determination is unfair.

4. Liability of real estate for decedent's debts and expenses of administration.

No priority between realty and personalty [Ind. Code §29-1-15-1].

5. Nature of lien against real estate accorded creditors.

No specific lien is created in favor of a decedent's creditors, other than taxing authorities' liens.

6. How may real estate be sold free of liens?

It can be sold under court order or liens can be discharged prior to sale or at closing.

7. How is marketable title established—

(a) In a specific devisee?

By distribution order (after lapse of five months from publication of first notice of appointment of personal representative) or personal representative's deed or by certified copy of Will recorded in county where real estate is located.

(b) In a residuary devisee?

By distribution order (after lapse of five months from publication of first notice of appointment of personal representative) or personal representative's deed or by certified copy of Will recorded in county where real estate is located.

(c) In an heir-at-law?

By final court order of distribution on settlement of estate or by personal representative's deed.

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has no power to manage or sell real estate unless he/she qualifies in Indiana by filing in Indiana authenticated copies of his/her appointment and of any official bond he/she has given.

9. What real estate owned by the decedent alone must pass de hors the Will?

Subsequent childless spouse who elects against a Will is entitled to a one-third share of the decedent spouse's net personal estate and one-third life estate in real estate [Ind. Code §29-1-3-1].

10. Does a Will or Codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

Surviving spouse takes from one-half to all of net estate, depending upon number, if any, of surviving children and issue of deceased children and surviving parents, provided that a second childless spouse takes the same portion of the net personal estate but has only a life estate in one-third of the deceased spouse's real estate. There is no distinction between male and female [Ind. Code §29-1-2-1].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

In lieu of ancillary administration, foreign personal representative may file authenticated copy of his/her appointment and bond with the court having probate jurisdiction in any Indiana county in which the nonresident decedent owned real estate at the time of his/her death and the personal representative may sell through the representative appointed in Indiana [Ind. Code § 29-2-1-6].

Court having probate jurisdiction will require proof that the foreign personal representative has sufficient surety in the domiciliary jurisdiction to account for the proceeds of any sale of the real estate and, if it finds that such bond is not sufficient, will require additional security.

13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Yes.
 - (b) **In the ancillary personal representative?**
Yes.
 - (c) **In the domiciliary personal representative?**
Yes.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No. See responses to questions 8 and 12 above and question 15 below.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Not applicable.

IOWA

Le Roy H. Redfern
Cedar Falls, Iowa
August 22, 1997

1. **Is real estate a probate asset?**
Yes.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Both.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Treated as cost of administration and applied ratably against both real estate and personalty.
4. **Liability of real estate for decedent's debts and expenses of administration.**
No priority between realty and personalty.
5. **Nature of lien against real estate accorded creditors.**
None.
6. **How may real estate be sold free of liens?**
Under power of sale in Will or pursuant to order of court after notice to interested parties and after appraisal and bond unless waived by the court.
7. **How is marketable title established—**
- (a) **In a specific devisee?**
Four months after publication of second notice to creditors or one month after notice to heirs and reasonably ascertainable creditors, whichever is later. Must show payment of death taxes, claims, and expenses of administration.
 - (b) **In a residuary devisee?**
Four months after publication of second notice to creditors or one month after notice to heirs and reasonably ascertainable creditors, whichever is later. Must show payment of death taxes, claims, and expenses of administration.
 - (c) **In an heir-at-law?**
Four months after publication of second notice to creditors or one month after notice to heirs and reasonably ascertainable creditors, whichever is later. Must show payment of death taxes, claims, and expenses of administration.
8. **Power of foreign personal representative to manage and sell real estate.**
After appointment by an Iowa court as a representative in the State of Iowa, and qualification, same powers as a domiciliary.

9. What real estate owned by the decedent alone must pass de hors the Will?

- (a) One-third in value to the surviving spouse to be set off to include the homestead, or so much as will equal the share allowed [Iowa Prob. Code §§633.238 and 633.239].
- (b) In lieu of share in real property, surviving spouse may elect to occupy the homestead [Iowa Prob. Code §633.240].

10. Does a Will or Codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

- (a) If no issue or issue all of whom are the issue of the surviving spouse, all of the real estate and personal property not necessary for payment of debts and charges goes to the surviving spouse [Iowa Prob. Code §633.211].
- (b) If issue, some of whom are not issue of surviving spouse, one-half in value to the surviving spouse and one-half to the heirs. If property acquired by surviving spouse is not equal to \$50,000.00, so much additional to the surviving spouse as necessary to make the amount \$50,000.00 in value [Iowa Prob. Code §633.212].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Following the five year period from the date of death of the decedent, an exemplified copy of a Will, which has not been denied probate in Iowa, and the order admitting the Will to probate in a foreign state or country may be recorded in the office of the County Recorder where real estate is owned. This procedure operates to dispose of the property as though the Will had been admitted to probate in Iowa [Iowa Prob. Code §633.497].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Admission of foreign Will to ancillary administration and completion of the ancillary administration gives devisees title.

(b) In the ancillary personal representative?

Yes, if authority to convey without court approval is in the Will [Iowa Prob. Code §633.383].

(c) In the domiciliary personal representative?

No, unless the domiciliary personal representative is also the ancillary personal representative and there is authority in the Will to convey without court approval [Iowa Prob. Code §633.383].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes [Iowa Prob. Code §633.383].

KANSAS

Linda Constable
Wichita, Kansas
August 31, 1993

1. Is real estate a probate asset?

Yes, except that title technically passes immediately to the heirs or devisees subject to divestment pursuant to the probate proceedings [Kan. Stat. Ann. §59-1401].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes [Kan. Stat. Ann. §59-1717].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

No distinction is made between such expenses and general expenses of probate and administration.

4. Liability of real estate for decedent's debts and expenses of administration.

Unless the decedent's Will provides otherwise, decedent's property is liable for the payment of the decedent's debts and other lawful demands against the estate in the following order:

- (1) Personal property not disposed of by Will;
- (2) Real estate not disposed of by Will;
- (3) Personal property bequeathed to the residuary legatee;
- (4) Real estate devised to the residuary devisee;
- (5) Property not specifically bequeathed or devised;
- (6) Property specifically bequeathed or devised.

5. Nature of lien against real estate accorded creditors.

Only taxes and encumbrances created by the decedent constitute a "lien" against the real estate. However, as a probate asset, real estate is subject to the claims of creditors.

6. How may real estate be sold free of liens?

If the Will so authorizes, the executor may sell real estate without court order to a bona fide purchaser free and clear from Kansas inheritance tax liens, liens, and claims of all creditors of the decedent, decedent's estate and of the heirs, devisees, and legatees [Kan. Stat. Ann. §59-1413]. Where the Will does not authorize sale without court approval, the executor may sell real estate with court order to a bona fide purchaser free and clear from Kansas inheritance tax liens, liens, and claims of all creditors of the decedent, decedent's estate, and of the heirs, devisees, and legatees [Kan. Stat. Ann. §59-1410]. For a sale to be made free of a federal estate tax lien, the sale must be exclusively for the payment of debts and costs of administration and approved by the court.

7. How is marketable title established—

- (a) In a specific devisee?
- (b) In a residuary devisee?
- (c) In an heir-at-law?

Marketable title is established in a specific devisee, residuary devisee, or heir at law after petition and order of final settlement in the case of probate or administration [Kan. Stat. Ann. §59-2249], by decree of descent in the case of a determination of descent proceeding [Kan. Stat. Ann. §59-2251], upon probate of foreign Will without administration and judicial assignment to the heir or devisee [Kan. Stat. Ann. §59-806] or through proper partial distributions [Kan. Stat. Ann. §59-2246].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has no authority to manage or sell real estate unless he or she qualifies as the ancillary personal representative in Kansas [Kan. Stat. Ann. §§59-804 through 59-811] except with respect to mortgages, judgments, or liens [Kan. Stat. Ann. §59-707].

9. What real estate owned by the decedent alone must pass de hors the Will?

A homestead of up to 160 acres outside city limits, 1 acre within, if occupied by decedent and family prior to decedent's death and continued to be occupied by spouse and children may be claimed [Kan. Stat. Ann. §59-401]. Further, decedent's spouse or minor children are allowed specific personal property of the decedent, a reasonable allowance of \$1,500 to \$25,000 (the exact amount to be set by the court in money or other personal or real property at its appraised value [Kan. Stat. Ann. §59-403]. Such selection of homestead and allowances is made after the inventory and valuation is filed [Kan. Stat. Ann. §59-2235].

10. Does a Will or Codicil convey after-acquired real estate?

All property acquired by the testator after making his or her Will passes under the Will the same as if the testator possessed the property at the time when testator made his or her Will, unless a different intention appears from the Will [Kan. Stat. Ann. §59-613].

11. Intestate share of heirs in real estate.

Subject to Homestead, allowances to spouse and minor children, payment of reasonable funeral expenses, expenses of last sickness and cost of administration, taxes, and debts, the Kansas real estate of an intestate passes to the following survivors in the following amounts:

- (a) Survived by spouse but no surviving children or issue inherited solely by the surviving spouse. [Kan. Stat. Ann. §59-504].
- (b) Survived by spouse and children or issue of previously deceased child, inherited one half by surviving spouse with remaining one half to said children, per capita, or issue, *per stirpes* [Kan. Stat. Ann. §59-505].
- (c) Survived by children or issue but no surviving spouse, inherited by children, *per capita*, or issue, *per stirpes* [Kan. Stat. Ann. §59-506].
- (d) Survived by parents but no surviving spouse, children, or issue, inherited by the decedent's parents in equal shares or solely by sole surviving parent [Kan. Stat. Ann. §59-507].
- (e) Survived by collateral heirs but no surviving spouse, children, issue, or parents, respective shares which would have been inherited by parents if both living descends to heirs of such parents respectively [Kan. Stat. Ann. §59-508].
- (f) As to collateral heirs, no property of decedent shall pass to a person further removed from the decedent than the sixth degree of relationship computed by counting each generation in the ascending or descending line as one degree [Kan. Stat. Ann. §59-509].

- (g) No surviving spouse, children, issue, parents, or collateral heirs within the sixth degree of relationship, property passes to living heirs of the intestate's last spouse dying prior to the death of the intestate, and failing heirs of said spouse, such property escheats to the State [Kan. Stat. Ann. §59-514].

12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
No [Kan. Stat. Ann. §59-806]. Must be admitted upon order of the court after notice to heirs, devisees, and legatees.
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Admission of foreign Will to ancillary administration alone is not sufficient. The court must assign the property to the devisee [Kan. Stat. Ann. §59-806].
- (b) **In the ancillary personal representative?**
Yes, if authority to convey without court approval is stated in the Will [Kan. Stat. Ann. §59-1413].
- (c) **In the domiciliary personal representative?**
No, unless the domiciliary personal representative is also qualified as the ancillary personal representative.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes, if within six months of death. If six months have elapsed, and decedent is intestate, a judicial determination of heirship, and U.S. and Kansas tax clearances are required. If decedent dies testate, the Will must be admitted to probate without administration, and tax clearances must be obtained [Kan. Stat. Ann. §59-806].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes [Kan. Stat. Ann. §§ 59-804, 59-1413].

KENTUCKY

Randolph Noe
Louisville, Kentucky
August 19, 1997

1. **Is real estate a probate asset?**
No, neither in intestacy [*Wood v. Wingfield*, 816 S.W.2d 899 (Ky Ct. App. 1991)] nor in a testate situation [*Hall's Ex'rs v. Robinson*, 291 Ky. 631, 165 S.W.2d 163 (1942)].
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Real estate is not subject to personal representative's commissions, being a non-probate asset, unless additional services in connection with the real estate are involved [Ky. Rev. Stat. Ann. §391.150(2)(b)]. Accordingly, legal fees in connection with such services would not be chargeable to the estate except as they necessarily involve the estate, e.g. legal work with regard to obtaining appraisals for death tax returns, etc.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Such expenses are not chargeable against the estate since real estate is not a probate asset except insofar as they touch upon estate matters as, for example, an appraisal necessary for death tax returns. Inheritance taxes attributable to real estate are nevertheless paid from the estate assets when the Will directs that inheritance taxes be paid by the estate See *University of Louisville v. Liberty Nat'l Bank and Trust Co.*, 499 S.W.3d 288 (Ky. 1973)].
4. **Liability of real estate for decedent's debts and expenses of administration.**
Undisposed property is first subjected to payment of debts, realty being used only to the extent personalty is insufficient [*Greenway v. Irvine's Ex'r.*, 234 Ky. 597, 28 S.W.2d 760 (1929)]. Residuary property is next subjected with realty being used after the exhaustion of personalty [*Jones v. Edwards*, 447 S.W.2d 771 (Ky. 1972)].
5. **Nature of lien against real estate accorded creditors.**
Liens created by the decedent are liens only against the real estate; however, all assets except those as are exempt are subject to the claims of creditors. Thus, while a mortgage lien securing a personal obligation of the decedent may be satisfied only from the real estate, liability on the personal obligation extends to estate assets.
6. **How may real estate be sold free of liens?**
Real estate may be sold free of liens by the personal representative's payment of the secured debt. It may also be sold free of liens at a public sale in an estate settlement suit pursuant to Ky. Rev. Stat. § 395.510 and 395.515, assuming the terms of sale so provide.

7. How is marketable title established—

(a) In a specific devisee?

Upon probate of the Will with or without administration.

(b) In a residuary devisee?

Upon probate of the Will with or without administration.

(c) In an heir-at-law?

In the case of an intestate decedent, upon the filing of an affidavit of descent [Ky. Rev. Stat. §382.120]. However, the affidavit does not have the effect of warranting title and a good faith purchaser will take subject to the interest of an undisclosed heir [*Sirls v. Jordan*, 625 S.W.2d 106 (Ky. App. 1981)]. An alternative is available through a district court proceeding to determine interested parties [See Ky. Rev. Stat. §391.035].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has no standing in Kentucky [*Davis v. Whitt*, 211 Ky. 142, 277 S.W. 311 (1925)].

9. What real estate owned by the decedent alone must pass de hors the Will?

Such an interest as the surviving spouse may receive by renunciation of the Will under Ky. Rev. Stat. §392.080.

10. Does a Will or Codicil convey after-acquired real estate?

Yes, since the Will speaks as of the moment of death [Ky. Rev. Stat. §394.330].

11. Intestate share of heirs in real estate.

Under Ky. Rev. Stat. §391.010, real estate descends first to the decedent's children and their descendants; and if none, then to his father and mother, one moiety each or all to the surviving parent, and if none, then to his brothers and sisters and their descendants, and if none, to the husband or wife of the intestate; and if none, then one moiety passes to the paternal and the other to the maternal kindred in the order set forth therein. The property passes to descendants in a *per stirpes* fashion. [Ky. Rev. Stat. Ann. §391.040]. Notwithstanding the descent so outlined, such property is subject to the dower or curtesy interest of the surviving spouse which amounts to one-half of the surplus real property [Ky. Rev. Stat. §392.010]. No distinction is made between real and personal property in this regard [Ky. Rev. Stat. §391.030]. However, under Ky. Rev. Stat. §391.020, an intestate decedent dying without issue and owning real estate of inheritance which is the gift of either of his parents passes to the parent or parents making the gift.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes, legally. However, some title companies insist upon the appointment of an ancillary administrator.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes.

(b) In the ancillary personal representative?

Yes, provided the ancillary personal representative is given a power of sale thereof; otherwise, only under a court order pursuant to Ky. Rev. Stat. Chapter 389A or upon an order of the circuit court in an action filed in that court.

(c) In the domiciliary personal representative?

Yes, provided the personal representative is given a power of sale thereof; otherwise, only under a court order pursuant to Ky. Rev. Stat. Chapter 389A.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No. Real estate is a non-probate asset which vests in the heirs or devisees by operation of law [*Russell v. Hogan*, 282 Ky. 764, 140 S.W.2d 615 (1940)].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Not applicable.

- 1. Is real estate a probate asset?**
Yes [La. Code Civ. Proc. Ann. Art. 3133].
- 2. Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Both [La. Code Civ. Proc. Ann. Art. 3351].
- 3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Not applicable.
- 4. Liability of real estate for decedent's debts and expenses of administration.**
No priority between movables and immovables [La. Code Civ. Proc. Ann. Art. 3262].
- 5. Nature of lien against real estate accorded creditors.**
The Louisiana Code of Civil Procedure provides a procedure whereby succession creditors shall be paid during the administration of a succession to the extent that there are assets to pay the debts [La. Code Civ. Proc. Ann. Art. 3241; 3249; 3301-3308]. The creditors may not execute against succession property during administration except where the creditor has a conventional mortgage or pledge [La. Code Civ. Proc. Ann. Art. 3247 and 3248]. If an heir accepts real estate from the succession without an administration, creditors may execute against the property so accepted [La. Code Civ. Proc. Ann. Art. 1013 and 1032].
- 6. How may real estate be sold free of liens?**
Sale under the authority of court as provided in La. Code Civ. Proc. Ann. Art. 3261-3285; and foreclosure of mortgage and enforcement of pledge as provided in La. Code Civ. Proc. Ann. Art. 3248.
- 7. How is marketable title established—**
 - (a) In a specific devisee?**
After completion of administration unless residuary legatees accept all debts with court approval and pleadings [La. Code Civ. Proc. Ann. Art. 3031].
 - (b) In a residuary devisee?**
Same as (a).
 - (c) In an heir-at-law?**
After administration unless all heirs are competent and accept all of the debts with court approval and pleadings [La. Code Civ. Proc. Ann. Art. 3001].
- 8. Power of foreign personal representative to manage and sell real estate.**
An ancillary succession proceeding is needed [La. Code Civ. Proc. Ann. Art. 3401-3405]. The foreign representative must qualify with the Louisiana court [La. Code Civ. Proc. Ann. Art. 3402].
- 9. What real estate owned by the decedent alone must pass dehors the Will?**
None.
- 10. Does a Will or Codicil convey after-acquired real estate?**
Yes.
- 11. Intestate share of heirs in real estate.**
 - (a) Surviving spouse receives usufruct for life or until remarriage of husband's half of community if there were children of the marriage.
 - (b) In the absence of ascendants and descendants, surviving spouse inherits decedent's share of community property.
- 12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Never. There is no provision in Louisiana law permitting this treatment. An ancillary probate proceeding is required.
- 13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
 - (a) In the devisee?**
Possibly not applicable, but see below.

(b) In the ancillary personal representative?

Possibly not applicable, but see below.

(c) In the domiciliary personal representative?

Possibly not applicable, but see below.

There is no authority for an ancillary executor to convey a decedent's property without court authorization. Once a foreign Will is admitted to probate in Louisiana (Uniform Probate Law La. R.S. 9:2401 *et seq.*) the process is substantially the same as probate processed for a Louisiana resident.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes [La. Code Civ. Proc. Ann. Art. 2811 *et seq.*; 3401 *et seq.*]

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

No.

MAINE

Miles P. Frye
Waterville, Maine
August 12, 1993

1. Is real estate a probate asset?

Technically, no. Title to a decedent's real and personal property vests in the heirs or devisees at the time of death [See Maine Rev. Stat. Ann. Tit. 18A, §3-101]. However, the decedent's real estate is subject to probate administration including homestead rights, exempt property rights, family allowance, administration expenses, and creditors claims [See *id.*]. The personal representative has "power over the title" to real estate, in trust for the benefit of creditors and other interested parties [See Maine Rev. Stat. Ann. Tit. 18A, §3-711]. This includes the power to take possession of property necessary for purposes of administration [See Maine Rev. Stat. Ann. Tit. 18A, §3-709].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes, but percentage fees are not authorized.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Payable as administrative expenses.

4. Liability of real estate for decedent's debts and expenses of administration.

There is no preference or priority between real and personal estate.

5. Nature of lien against real estate accorded creditors.

General creditor of the estate has no lien.

6. How may real estate be sold free of liens?

By deed of personal representative.

7. How is marketable title established—

(a) In a specific devisee?

(b) In a residuary devisee?

(c) In an heir-at-law?

Generally by deed of distribution from the personal representative.

In the absence of a deed of record, Maine Bar Association Title Standard No. 706 provides as follows:

- (a) When a decree discharging the personal representative in formal proceedings has become final, title rests in the heirs or devisees as the case may be [Maine Rev. Stat. Ann. Tit. 18A, §3-1001; §3-1002].
- (b) One year after the closing of the estate by sworn statement if there are no pending proceedings involving the personal representative, title rests in the heirs or devisees as the case may be [Maine Rev. Stat. Ann. Tit. 18A, §3-1003].
- (c) Three years after the death of the decedent if there is a record of probate of the Will and no administration, title rests in the devisees [Maine Rev. Stat. Ann. Tit. 18A, §3-901; §3-108].

- (d) Three years after the death of the decedent if there is no record of any probate proceeding with respect to the decedent, title rests with the heirs [Maine Rev. Stat. Ann. Tit. 18A, §3-101; §3-901; §3-108].

Also, a duly executed and unrevoked Will which has not been probated within 3 years of death may be evidence of a devise in a non-probate civil action to establish title [Maine Rev. Stat. Ann. Tit. 18A, §3-102].

8. Power of foreign personal representative to manage and sell real estate.

None. Unless there is filed authenticated copies of appointment and bond or the foreign personal representative is appointed locally.

9. What real estate owned by the decedent alone must pass de hors the Will?

None. Homestead allowance of \$5,000.00 and exempt property allowance of \$3,500.00 accorded surviving spouse or children, who may select property of the estate, including real estate.

10. Does a Will or Codicil convey after-acquired real estate?

Yes, so long as Will contains a residuary clause.

11. Intestate share of heirs in real estate.

(a) The intestate share of the surviving spouse is:

- (1) If there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) If there is no surviving issue but the decedent is survived by a parent or parents, the first \$50,000, plus one-half of the balance of the intestate estate;
- (3) If there are surviving issue all of whom are issue of the surviving spouse also, the first \$50,000, plus one-half of the balance of the intestate estate;
- (4) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

(b) The intestate share of heirs re:

- (1) Issue, *per capita* at each generation;
- (2) If no issue, decedent's parent(s) equally;
- (3) If no parents, to issue of parents *per capita* at each generation;
- (4) 36

No issue of parents, to collateral relatives.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Generally no. If there is no administration, statute may provide authority.

(b) In the ancillary personal representative?

Yes, providing no domiciliary personal representative has been appointed.

(c) In the domiciliary personal representative?

Yes.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. Upon filing of documents (question 12) foreign personal representative is granted power of a local personal representative until a local personal representative is appointed.

1. Is real estate a probate asset?

Yes.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes. The personal representative is entitled to commission on all property subject to administration, including real estate, which commissions are calculated as follows: 9% on the first \$20,000.00 and 3.6% on the excess above \$20,000.00. Likewise, real estate is also subject to legal fees upon the filing of a petition and approval by the Orphans' Court.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Expenses attributable to real estate are not treated any differently than other expenses of administration and are paid out of what would otherwise be property not specifically disposed of by the Will. If there is not such property available for the payment of expenses, shares of the legatees abate, without preference or priority between real and personal property, such that residuary legacies are first abated, general legacies in various categories are abated next, and specific legacies are abated last.

4. Liability of real estate for decedent's debts and expenses of administration.

Subject to the levels of abatement indicated in answer to question (3) above, there is no preference or priority as between real and personal property for the payment of the decedent's debts and the expenses of administration.

5. Nature of lien against real estate accorded creditors.

General creditors of the decedent or of the estate are accorded no special lien against the real property. All assets of the estate are subject to the claims of creditors. Taxes and liens created by the decedent maintain priority.

6. How may real estate be sold free of liens?

The personal representative may sell real estate free of liens upon discharge or waiver of any lien or encumbrance upon it. If there is no lien or encumbrance specifically upon the real property, the personal representative may sell it, at any time, free of liens.

7. How is marketable title established—

(a) In a specific devisee?

After having provided notice to creditors and having filed an inventory with the Register of Wills disclosing the identity and value of the real property, the personal representative may convey the real property at any time following the expiration of six months from the date of his appointment provided that all liens and valid claims have been waived or discharged.

(b) In a residuary devisee?

After having provided notice to creditors and having filed an inventory with the Register of Wills disclosing the identity and value of the real property, the personal representative may convey the real property at any time following the expiration of six months from the date of his appointment provided that all liens and valid claims have been waived or discharged.

(c) In an heir-at-law?

After having provided notice to creditors and having filed an inventory with the Register of Wills disclosing the identity and value of the real property, the personal representative may convey the real property at any time following the expiration of six months from the date of his appointment provided that all liens and valid claims have been waived or discharged.

8. Power of foreign personal representative to manage and sell real estate.

The foreign personal representative has the same power to manage and sell real estate as does a domiciliary of Maryland provided, however, that notice of his appointment and of the right of creditors to file a claim has been published in each county where the real property is located.

9. What real estate owned by the decedent alone must pass de hors the Will?

None.

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

Real estate passes together with the balance of the net estate.

The share of a surviving spouse, without regard to sex, shall be:

- (a) If there is also a surviving minor child or surviving minor children: one-half.
- (b) If there is also surviving issue, but no minor child: \$15,000.00 and one-half residue.

(c) If there is no surviving issue, but a surviving parent: \$15,000.00 and one-half residue.

(d) If there is no surviving issue or parent: the whole.

If there are surviving issue, but no surviving spouse, the estate is divided equally among the surviving issue, by representation.

If there is no surviving issue or surviving spouse, distribution is made to the surviving parents and their issue, by representation.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Upon order of court, after the foreign personal representative fails to transfer property within a reasonable time. Notice must have been given, and all death taxes and creditors' claims paid [Md. Code Ann., [Est. & Trusts] §5-506].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, if in writing, signed by testator and either executed in conformity with the law of Maryland or place where the Will was executed [Md. Code Ann., [Est. & Trusts] §4-104]

(b) In the ancillary personal representative?

Not applicable.

(c) In the domiciliary personal representative?

Yes, if in writing, signed by testator and either executed in conformity with the law of Maryland or the place where the Will was executed [Md. Code Ann., [Est. & Trust] §4-104].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No [Md. Code Ann., [Est. & Trust] §§5-501 and 5-502].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Not applicable.

MASSACHUSETTS

Philip H. Suter and Erik Hestnes
Boston, Massachusetts
October 7, 1993

1. Is real estate a probate asset?

If the real estate is part of the residue or if the personal representative sells specifically devised real estate, takes charge thereof, or collects rents therefrom, it is treated as a probate asset. Real estate must be disclosed on the probate inventory of the estate, but is not subject to accounting unless treated as a probate asset. A specific devise of real estate is considered to pass title to the devisee as of the date of death.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Both, if sold. If not sold and treated as a probate asset, it is considered in setting fees.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Unless the Will provides otherwise, estate taxes and administration expense attributable to real estate passing under the Will are paid from the residue of the estate, first from personalty.

4. Liability of real estate for decedent's debts and expenses of administration.

If personal property of a deceased person is insufficient to pay the decedent's debts, legacies, and charges of administration, any real property may be sold to pay for such debts [Mass. Gen. L. Ch. 202 §1]. Unless the Will provides otherwise, specifically bequeathed or devised property, subject to security interests given by the testator, passes subject to such security interests [See Mass. Gen. L. Ch. 191, §23].

5. Nature of lien against real estate accorded creditors.

Creditors may present claims and bring actions within time period prescribed by statute [See Mass. Gen. L. Ch. 197, §9 (See answer to question 7)].

6. How may real estate be sold free of liens?

The Massachusetts Estate Tax Bureau will issue a release of estate tax lien (Form M-792) either upon the issuance of a closing letter by the Bureau or pursuant to a special procedure which allows for an expedited issuance of the M-792 in the event of a pending sale of the real estate. Release of federal estate tax lien is advisable.

7. How is marketable title established—

(a) In a specific devisee?

See below.

(b) In a residuary devisee?

See below.

(c) In an heir-at-law?

In all three categories, title to specifically devised real estate passes to the beneficiary as of the date of the decedent's death, subject to the right of the executor or administrator to sell the same to pay debts, expenses, and taxes if the personalty is insufficient. Creditors' claims are subject to the statute of limitations which runs one year after the date of death of the decedent [Mass. Gen. L. Ch. 197, §9].

8. Power of foreign personal representative to manage and sell real estate.

Foreign personal representative may obtain a license to sell real estate of a non-resident decedent, provided that six months have expired since the decedent's death and no administration has been granted in Massachusetts [See Mass. Gen. L. Ch. 202, §32].

9. What real estate owned by the decedent alone must pass de hors the Will?

Dower: Surviving spouse may claim a life estate in one-third of all realty owned at death; claim and election must be filed within six months after approval of executor's or administrator's bond [See Mass. Gen. L. Ch. 189, §1, *et seq.*].

10. Does a Will or codicil convey after-acquired real estate?

Yes, unless a different intention clearly appears in the Will. [Mass. Gen. L. Ch. 191, §19].

11. Intestate share of heirs in real estate.

1. *Spouse Survives:*

If the decedent leaves issue, the surviving spouse takes one-half of the personalty and one-half of the realty. If the decedent leaves kindred but no issue, and the estate does not exceed \$200,000, the surviving spouse takes all the personalty and all the realty. If the estate exceeds \$200,000, the surviving spouse takes \$200,000, plus one-half of the remaining personalty and one-half of the remaining realty. If the amount of personalty is insufficient to pay the \$200,000, the deficiency shall be paid from the sale or mortgage of the realty. If the decedent leaves neither issue nor kindred, the surviving spouse takes all the personalty and all the realty [Mass. Gen. L. Ch. 190 §1].

2. *Spouse Does Not Survive:*

If there is no surviving spouse, the estate passes to beneficiaries in the following order of priority: issue, parents, siblings or their issue, kindred, escheat to the state [See Mass. Gen. L. Ch. 190, §3].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. If the Will is valid without probate under the law of the state or country in which it was made, a duly authenticated copy of the Will and an affidavit of heirs and next-of-kin may be submitted to the Massachusetts Probate Court; or if the Will has been proved and allowed in another state or country, a duly authenticated copy of the Will and the probate thereof may be submitted; and the court, after notice, may allow the Will [See Mass. Gen. L. Ch. 192, §§ 9 and 10].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, if admitted to probate in Massachusetts. However, if the conveyance occurs prior to the allowance of the ancillary personal representative's final account showing payment of all debts and legacies, title will be unmarketable unless there is a power of sale and the ancillary personal representative joins in the deed.

(b) In the ancillary personal representative?

Yes, provided there is a power of sale in the Will.

(c) In the domiciliary personal representative?

No. The domiciliary personal representative of a foreign estate cannot convey Massachusetts real property except under license of court and provided that no Massachusetts administration has been granted. [See Mass. Gen. L. Ch. 202, §32 (limited power of sale); Mass. Gen. L. Ch. 199A, §§ 6 and 7 (broader power limited to personal property, dependent on absence of Massachusetts administration); *See also Nathann Miller & Sons v. Blinn*, 219 Mass. 266, 106 N.E. 985 (1914) (no power to foreclose mortgage without Massachusetts administration)].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, unless the real estate passes outside Will [See Mass. Gen. L. Ch. 191, §7 (administration required to pass property under Will); ch. 199, §§ 9 and 10 (allowance of foreign Will); ch. 199, §1 (ancillary administration gives effect to non-resident decedent's Will; if no Will, Massachusetts real estate passes under Massachusetts intestacy statute)].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. Once a foreign Will has been duly proved and allowed, it has the same effect as if originally proved and allowed in Massachusetts [See Mass. Gen. L. Ch. 192, §9-11]. A Massachusetts executor may exercise a power of sale under the Will without court approval. [See *Justice v. Soderland*, 225 Mass. 320, 114 N.E. 623 (1916)]. Although an executor may desire a license to help protect himself or herself against charges that he/she did not obtain the best price; some conveyancers may still insist upon a license.

MICHIGAN

W. Michael Van Haren
Muskegon, Michigan
September 15, 1997

1. Is real estate a probate asset?

Real estate titled jointly with a surviving spouse (entireties property) or jointly with rights of survivorship with a third party passes to the joint owner at death and is not a probate asset. Title to real estate in the decedent's name alone vests at death in the heirs-at-law and devisees subject to divestment by the personal representative during administration of the estate. The fiduciary of the estate is entitled to possession and to the rents, issues, and profits from the property until it is distributed [Mich. Rev. Prob. Code §601].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Real estate, like other assets of the estate, is subject to the fees of the personal representative(s) and legal fees. Both the personal representative and the attorney are entitled to reasonable compensation for services, both ordinary and extraordinary [Mich. Rev. Prob. Code §§541, 543]. There is no percentage fee schedule in Michigan for either the personal representative or the attorney.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

These expenses are treated as expenses of administration and have priority over other charges against the estate [Mich. Rev. Prob. Code §§192, 715]. Unless the decedent's will designates otherwise, charges against the estate are first paid out of the residue, next out of general or demonstrative devises, and finally out of specifically devised property [Mich. Rev. Prob. Code §§156, 157].

4. Liability of real estate for decedent's debts and expenses of administration.

There is no distinction between real and personal property for purposes of payment of debts and expenses. In estates settled under supervised probate administration, the personal representative must satisfy the statutory requirements for selling real estate [Mich. Rev. Prob. Code §635]. In independent probate administration, the personal representative is authorized to sell real estate [Mich. Rev. Prob. Code §334].

5. Nature of lien against real estate accorded creditors.

No lien is created in favor of general creditors. Specific liens may exist for taxes to the Internal Revenue Service and State of Michigan. A specific devise passes subject to any security interest existing at the date of death [Mich. Rev. Prob. Code §137].

6. How may real estate be sold free of liens?

Property may be sold under a power of sale in the Will by the personal representative without court order in independent probate proceedings, or pursuant to court order in supervised probate proceedings. If a lien is not satisfied prior to sale, the sale is subject to the lien.

7. How is marketable title established—

(a) In a specific devisee?

Mich. Rev. Prob. Code §216(4) provides that when distributions are made in kind, the personal representative shall execute an instrument or deed of distribution as evidence of the distributee's title to the property. In independent probate proceedings, the personal representative executes an appropriate deed. In supervised probate proceedings, an attested copy of the Will, the order admitting the Will to probate, and the order assigning the property are recorded in the office of the register of the deeds in the county where the land is situated [Mich. Rev. Prob. Code §162]. A person entitled to property by the terms of the Will may petition the court for an order directing delivery of the property to which the person is entitled [Mich. Rev. Prob. Code §166].

(b) In a residuary devisee?

Same as (a), above.

(c) In an heir-at-law?

Same as (a), above.

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative must qualify as personal representative in Michigan, except that a foreign fiduciary may execute a deed in satisfaction of a land contract for the purchase of real estate located in Michigan, a discharge of a mortgage, a discharge of a security interest or financing statement or both, and other instruments as required to reflect the payment or delivery of indebtedness so long as no local administration is pending in Michigan [Mich. Rev. Prob. Code §234].

9. What real estate owned by the decedent alone must pass dehors the Will?

Real estate in Michigan is subject to the dower rights of a surviving spouse, to the rights of a surviving spouse to elect against the Will, the right of a spouse to claim a homestead allowance, family allowance, household and personal effects, and to remain in the dwelling house for up to one year after the date of death, and to the rights of minor children to a homestead allowance and family allowance [Mich. Rev. Prob. Code §§281-292]. An unintentionally omitted spouse, child or issue of deceased child and children born or adopted after the will may also have claims against the estate [Mich. Rev. Prob. Code §§126, 127].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Mich. Rev. Prob. Code §133(3)].

11. Intestate share of heirs in real estate.

- (a) If there is a surviving spouse and issue, all of whom are issue of the surviving spouse, then the first \$60,000 and one-half of remainder to the surviving spouse and balance equally to children, with the issue of a deceased child taking by right of representation.
- (b) If there is a surviving spouse and issue, one or more of whom is not a child of the surviving spouse, then one-half to the surviving spouse and the remainder equally to children, with the issue of a deceased child taking by right of representation.
- (c) If there is no surviving child or issue of a deceased child, first \$60,000 and one-half of remainder to the surviving spouse and the balance to parent(s).
- (d) If there is no surviving child, no living issue of a deceased child, and no living parent, then all to the spouse.
- (e) If there is no spouse, equally to children with issue of a deceased child taking by right of representation.
- (f) If there is no spouse or issue, all to parent(s).
- (g) If there is no spouse, issue, or parents, equally to brothers and sisters, with nieces and nephews taking the share of a deceased parent. If only nieces and nephews they share equally.
- (h) If no spouse, issue, parent, brother, sister, niece, or nephew, one-half to paternal and maternal grandparents or their issue.
- (i) If no eligible survivor under (a) - (h), then to the state by escheat. [Mich. Rev. Prob. Code §§105, 106].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Generally, no, see question 8. If a local administration or petition for administration is not pending 30 days after the death of a non-resident decedent, a foreign fiduciary may file authenticated copies of the appointment and any official bond in a county in which property belonging to the decedent is located and, upon filing bond in the amount approved of by the judge, may be appointed and will then have the same powers and be subject to the same duties as a local personal representative [Mich. Rev. Prob. Code §§235, 236; Michigan Land Title Standards 7.13, 7.14, 5th Edition].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, following either execution of a deed in independent probate or entry of an appropriate order in supervised probate. See question 7.

(b) In the ancillary personal representative?

Yes [Mich. Rev. Prob. Code §236].

(c) In the domiciliary personal representative?

Only if the domiciliary personal representative is also qualified as the local personal representative [Mich. Rev. Prob. Code §236].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes, following appointment [Mich. Rev. Prob. Code §§236, 664].

1. Is real estate a probate asset?

Title to real estate held in the decedent's name alone (or the decedent's interest in property held as a tenant in common) vests upon death in the heirs and devisees of the probate estate, subject to divestment by the personal representative [See Minn. Stat. §§524.3-101 and 524.3-711]. Nevertheless, Minnesota practice requires probate of a decedent's real property interests in order to secure marketable title. Title to real estate held by the decedent with another as a joint tenant with right of survivorship vests in the surviving joint tenant, and such property is not subject to probate [See Minn. Stat. §600.21].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Except in the case of specifically devised real property in an estate subject to abatement (see question 4 below), the decedent's residuary estate, including both real and personal property, is liable for the payment of expenses of administration, and no distinction is made between legal fees, personal representative's commissions, and any other expense of administration.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Generally, expenses attributable to real property are treated in the same manner as other expenses of administration [See Minn. Stat. §524.3-805]. However, expenses attributable to specifically devised real property, including property taxes, ordinary repairs, interest, management costs, and taxes on ordinary income generated by such property, are charged against the income derived from such property [Minn. Stat. §501B.63].

4. Liability of real estate for decedent's debts and expenses of administration.

All assets of the estate are liable for the payment of decedent's debts and expenses of administration, and no distinction is made between real and personal property for such purposes. However, payment must be made from the residue of the estate or, if the residue is insufficient, from general devises before abatement of a specifically devised asset [Minn. Stat. §524.3-902].

5. Nature of lien against real estate accorded creditors.

Except with respect to the enforcement of mortgages, pledges, or liens established in a separate judicial proceeding, no lien for the benefit of creditors attaches against real or personal property of the estate [See Minn. Stat. §§524.3-807 and 524.3-812].

6. How may real estate be sold free of liens?

The personal representative has the power to sell real estate free of unsecured claims [Minn. Stat. §§524.3-711 and 524.3-715(23)]. The power of a personal representative appointed in an informal proceeding to sell or distribute real property of the estate is suspended for a period of 30 days after the issuance of letters [Minn. Stat. §524.3-711].

7. How is marketable title established—

(a) In a specific devisee?

If the Will identifies real property and is specific in designation of the devisee by name, then the following documents are required:

- (i) certified copy of the Will,
- (ii) certified copies of letters (subject to limitations imposed on informal proceedings under Minn. Stat. §524.3-310), and
- (iii) The personal representative's deed of distribution (including the consent of the surviving spouse, if any).

If the Will fails to describe the devisee by name or fails to provide the legal description, then, in addition to the foregoing:

- (iv) a certified copy of the Registrar's Determination, or an order or decree of the court, which determines the validity of the Will, identifies the specific devisees, and sets forth the legal description of the property.

(b) In a residuary devisee?

Same requirement as (a).

(c) In an heir-at-law?

In addition to (i) and (iii) above:

- (iv) a certified copy of the Registrar's Determination, or an order or decree of the court, which identifies the heirs, sets forth their relationship to the decedent, and specifies the interest or fractional share of each heir.

8. Power of foreign personal representative to manage and sell real estate.

A domiciliary foreign personal representative who qualifies for appointment in accordance with the procedure under Minnesota Statutes §524.4-204, or a foreign personal representative who proceeds with an ancillary administration under Minnesota Statutes §524.4-207 (see question 14 below), may exercise all of the powers of a local personal representative. In either case, the Minnesota real estate of a nonresident, intestate decedent, and the proceeds of the sale of such property, must pass or be distributed according to the laws of this state [Minn. Stat. §524.3-816].

9. What real estate owned by the decedent alone must pass dehors the Will?

None, unless the surviving spouse elects against the Will. The homestead passes free from all debts which were not valid charges thereon at the time of death [See Minn. Stat. §252.145(3)].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Minn. State. §524.2-604].

11. Intestate share of heirs in real estate.

- A. Homestead: If no surviving descendant of the decedent, then all to surviving spouse. If descendants of decedent survive, then life estate to surviving spouse, remainder in equal shares to decedent's descendants by right of representation [Minn. Stat. §524.2-402].
- B. Remaining Assets:
 - 1. If no descendant of decedent, or if all decedent's surviving descendants are also descendants of the surviving spouse, then all to the surviving spouse.
 - 2. If one or more of decedent's surviving descendants are not descendants of the decedent's surviving spouse, or if the surviving spouse has descendants who are not descendants of the decedent, the first \$150,000 of the intestate estate, along with one-half (1/2) of the balance of the intestate estate, to the surviving spouse, and the remainder to the decedent's descendants by right of representation [Minn. Stat. §524.2-102].
 - 3. Any part of the intestate estate not passing to decedent's surviving spouse, as provided in Paragraphs 1 and 2, above, passes in the following order to the decedent's surviving relatives:
 - (a) To decedent's descendants by representation;
 - (b) If no surviving descendants, to decedent's parents equally, if both survive, or to the surviving parent;
 - (c) If no surviving descendant or parent, to descendants of the decedent's parents, or either of them, by representation;
 - (d) If no surviving descendant, parent or descendant of a parent, but the decedent is survived by a grandparent or a descendant of a grandparent, one-half (1/2) of the intestate estate to the paternal grandparents or their descendants, and the other one-half (1/2) to the maternal grandparents or their descendants, such surviving descendants to take by representation and all of such estate to pass to the surviving relatives named in this subparagraph if there is no surviving grandparent or descendant of a grandparent on either the paternal or maternal side of decedent's family.
 - (e) If no surviving descendant, parent, descendant of a parent, grandparent or descendant of a grandparent, then to decedent's next of kin in equal degree, except that when there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor shall take to the exclusion of those claiming through a more remote ancestor [Minn. Stat. §524.2-103].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No, a domiciliary foreign personal representative must qualify locally, or an ancillary administration must be commenced. See question 14 and 15 below.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. See discussion under question 15 below.

(b) In the ancillary personal representative?

Yes, provided that the estate is administered in accordance with the laws of this state.

(c) In the domiciliary personal representative?

No. See discussion under question 15 below.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes. The foreign personal representative may either:

- (a) Qualify in Minnesota as a domiciliary foreign personal representative in a county in which property of the decedent is located:
 - (i) by filing with the court a certified or authenticated copy of his appointment and of any official bond he has given, and

(ii) by publishing notice of his intention to exercise as to assets in this state all powers of a local personal representative and to maintain actions and proceedings in this state [Minn. Stat. §§524.4-204 and 524.4-205].

(b) Or conduct an ancillary administration in Minnesota as a local personal representative under Minnesota Statutes §§524.4-207 and 524.3-301 through 524.3414.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. A foreign personal representative who has qualified as a local personal representative under Minnesota Statutes §514.4-207 and who is conducting an ancillary administration under Minnesota Statutes §§524.3-301 through 524.3-414 has the same power with respect to the property of the estate that an absolute owner would have, and such power may be exercised without notice, hearing, or order [See Minn. Stat. §§524.3-711 and 524.3-715(23)]. However, under local practice, a domiciliary foreign personal representative qualified and acting under Minnesota Statutes §524.4-204 is not deemed to have the power to convey marketable title to real estate [See Minnesota State Bar Association, Real Property Section, *Instruments Required to Transfer Title to Real Property*, § F(1)(e). Consequently, an ancillary administration is required].

MISSISSIPPI

W. McDonald Nichols
Jackson, Mississippi
August 19, 1997

1. Is real estate a probate asset?

Yes, if there is a deficiency of personalty to pay debts or if terms of Will require specific handling by executor to wind up estate.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Not unless such is sold by order of court or by direction in Will.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Excepting accrued taxes, such are primary problem of owner to whom property has been passed by descent or devise.

4. Liability of real estate for decedent's debts and expenses of administration.

After personalty.

5. Nature of lien against real estate accorded creditors.

None, in absence of deficiency in personalty; otherwise lien exists for duly probated claims when allowed or judgments against estate. Liens existing at time of death remain unaffected.

6. How may real estate be sold free of liens?

By order of court following due notice and adherence to statutory procedures.

7. How is marketable title established—

(a) In a specific devisee?

By decree entered after expiration of 90 day period to probate claims confirming payments of debts, estate taxes, and costs of administration (absent notice to an interested party Will may be contested within two years of death).

(b) In a residuary devisee?

Same as in case of specific devisee.

(c) In an heir-at-law?

By decree entered after expiration of time to probate claims showing interest of heir and that allowable claims, estate taxes, and costs have been cared for.

8. Power of foreign personal representative to manage and sell real estate.

None, unless also appointed personal representative in Mississippi estate proceeding.

9. What real estate owned by the decedent alone must pass de hors the Will?

Surviving spouse's right to remain in occupancy of homestead; and share of spouse without adequate independent estate for whom no provision was made or who elects to take against Will.

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

- (a) Surviving spouse and children take realty, share and share alike, subject to continuing homestead rights of surviving spouse.
- (b) In the absence of children or issue of a deceased child, surviving spouse inherits entirety.
- (c) In the absence of children or spouse, then according to statute [Miss. Code Ann. §91-1-3].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

If admitted to probate pursuant to Miss Code Ann. §91-5-35, further administration not required.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, subject however to clearance of lien if there be creditors or unpaid taxes and costs of administration.

(b) In the ancillary personal representative?

Administration within Mississippi independent of all other administrations [*Richard v. Neblett*, 122 Miss. 723, 84 So. 695, 19 ALR 272 (1920)]. Personal representative must derive authority from Will itself.

(c) In the domiciliary personal representative?

Answered at (b) above.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Ancillary administration *per se* is not recognized in Mississippi. To be assured of absence of lien due to claims of creditors, an administration of the estate is requisite [*Buckingham Hotel Co. v. Kimberly*, 138 Miss. 445, 123 So. 213 (1925); *Bolton v. Barnett*, 131 Miss. 802 95 So. 721 (1923); and *Est. of Wilson v. National Bank of Commerce*, 364 So.2d 1117 (1979)].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Foreign Will entitled to be admitted to probate either in original proceeding, Sec. 91-7-1 *Miss. Code Ann.* (1972), or based upon probate proceedings in court of domicile, with copy of Will authenticated pursuant to Acts of Congress, Sec. 91-7-33 *Miss. Code Ann.* (1972). Upon letters testamentary issuing, named executor can exercise power of sale granted by Will.

MISSOURI

Edgar T. Farmer
St. Louis, Missouri
August 15, 1997

1. Is real estate a probate asset?

Yes. Technically, the title to a decedent's real estate vests immediately in his or her heirs (*Wood v. Hudson*, 823 S.W.2d 158 (Mo. App. 1992)). Nonetheless, a probate administration is necessary in order to perfect the title of record. Thus, real estate must be listed and valued in the probate inventory, and eventually distributed by way of a court order in a supervised estate or a statement of account and an affidavit in an independent administration. While the title descends to the heirs or devisees, that title is subject to possible defeasance in the event of a successful Will contest or a sale of the property, where such sale is necessary to satisfy claims. The real estate may also be subject to the family allowance and the right of the surviving spouse to elect to take against the Will [Mo. Rev. Stat. §473.260 (1994)]. The personal representative does not formally take charge of, or administer, the property unless the Will so specifies. The probate division may, however, direct the personal representative to take possession of the real estate in order to preserve the property or to raise funds for the payment of claims [Mo. Rev. Stat. §473.263 (1994)]. An independent personal representative has inherent authority to sell the real estate, without court order.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

No. The value of the real estate is not included in the formula for determining statutory commissions and attorneys' fees unless the property has been sold under court order, independent administration, or a direction in the Will [Mo. Rev. Stat. §473.153 (1994)].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Unpaid real estate taxes for the year of death may be paid by the personal representative out of the general assets of the decedent's estate. In addition, [Mo. Rev. Stat. §473.297, (1994)] authorizes certain expenditures for the preservation of the property to the extent found necessary by the court; otherwise, general expenses of maintaining the property during the period of administration remain with those to whom the property will ultimately descend. As the title to the property is perfected by way of the probate administration, expenses incidental thereto (such as the cost of title reports, obtaining court orders, and attending to the recording of necessary instruments) are handled as any other expense of administration. The cost of a title policy would be the responsibility of the heirs or devisees.

4. Liability of real estate for decedent's debts and expenses of administration.

Real estate is liable for such debts and expenses only to the extent that the cash and personal property in the probate estate are not adequate to pay those obligations [Mo. Rev. Stat. §473.460 (1994)]. In a supervised administration either a court order or a direction in the Will would be required before the real estate could be sold for such purposes. In addition, Mo. Rev. Stat. §473.810 (1994) permits the personal representative in an unsupervised administration to sell real estate without a court order.

5. Nature of lien against real estate accorded creditors.

With the exception of tax liens, no specific lien is created in favor of the decedent's creditors; however, creditors are afforded some protection by reason of the fact that Missouri title companies will normally not issue a title policy unless or until adequate arrangements have been made for the payment of debts and taxes.

6. How may real estate be sold free of liens?

Sales are free from liens (with the exception of taxes and unsatisfied security instruments) when made by court order, under a direction in the Will or in the course of an independent administration.

7. How is marketable title established—

(a) In a specific devisee?

See (c) below.

(b) In a residuary devisee?

See (c) below.

(c) In an heir-at-law?

In each case marketable title is established by an order of final distribution in a supervised estate, or by the Statement of Account and Affidavit of the personal representative in an unsupervised or independent administration. The recording of the Affidavit or a certified copy of the order, coupled with the recording of a certified copy of the Will (if the property is located in a county other than the county of domicile), normally would be all that is required to perfect the title of record [Mo. Rev. Stat. §473.617(5) (1994)].

Caveat: It should be noted that, save for certain specified exceptions, §473.050 (Mo. Supp. 1996) provides that no probate administration (either testate or intestate) may be commenced unless an application is made to the Court for such administration within one year from the Decedent's date of death. This time limitation in Missouri is unusually short, and should be especially noted.

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative would have no such power, and a formal Missouri administration would be required. However, under a somewhat simplified procedure, if no Missouri administration (or petition therefor) is pending, a domiciliary foreign personal representative may qualify in Missouri by filing an authenticated copy of his or her appointment and bond (if any) with the probate division of the circuit court in the county in which the real estate is located [Mo. Rev. Stat. §473.676 (1994)]. This procedure avoids the need to have the Will probated in Missouri, and the foreign personal representative (who has filed such documents) may then be appointed and exercise all of the powers of the local personal representative [Mo. Rev. Stat. §473.677 (1994)]. The subsequent granting of an application for a local administration of the estate, however, terminates the power of the foreign personal representative [Mo. Rev. Stat. §473.678 (1994)]. If such a Missouri estate is to be opened Mo. Rev. Stat. §473.682 (1994) gives the domiciliary foreign personal representative priority over all other persons for appointment as the local representative in Missouri, except where the decedent's Will provides otherwise. See Mo. Rev. Stat. §474.380 (1994) regarding the probate of foreign Wills in Missouri. Note also that Mo. Rev. Stat. §473.117(3) (1994) requires the foreign personal representative, before qualifying in Missouri, to appoint a resident agent for service of process.

9. What real estate owned by the decedent alone must pass de hors the Will?

Real estate may pass outside of the Will by reason of the family allowance or the ability of the surviving spouse to elect to take against the Will [Mo. Rev. Stat. §473.260 (1994)]. The Will would also have no effect on real estate which had been the subject of a beneficiary deed executed and recorded prior to the decedent's death [Mo. Rev. Stat. §461.009 (1994)].

10. Does a Will or codicil convey after-acquired real estate?

Yes, as long as the Will contains a residuary clause and does not include any contrary intention.

11. Intestate share of heirs in real estate.

The surviving spouse receives the entire estate if there are no surviving issue of the decedent. If there are issue then the estate is divided between the surviving spouse and the issue as set forth in Mo. Supp. §474.010 (1996).

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No, a formal administration would be required [Mo. Rev. Stat. §473.668 (1994)].

13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
No, not unless the foreign Will had been formally admitted to probate in Missouri [Mo. Rev. Stat. §473.668 (1994) or a Missouri estate opened pursuant to Mo. Rev. Stat. §473.676 (1994)].
 - (b) **In the ancillary personal representative?**
See (a) above.
 - (c) **In the domiciliary personal representative?**
See (a) above.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes, however the proceedings with respect to the property of a nonresident decedent are original in nature and not technically ancillary [Mo. Rev. Stat. §473.668 (1994)].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes, a domiciliary foreign personal representative (but only if qualified in Missouri) may exercise all of the powers of a local personal representative [Mo. Rev. Stat. §473.677 (1994)] and may exercise a power of sale in the Will without court approval. Nor would a court order be required in the case of an independent administration [Mo. Rev. Stat. §473.810(16) (1994)].

MONTANA

David L. Johnson
Billings, Montana
September 11, 1997

1. **Is real estate a probate asset?**
Yes.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
The personal representative and the estate attorney are entitled to reasonable fees for their services. Unless a court order establishes a greater fee, the fee cannot exceed a stated percentage of the gross value of the estate. Accordingly, real estate is treated the same as personal property.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
The same as other probate expenses.
4. **Liability of real estate for decedent's debts and expenses of administration.**
Realty and personalty are equally liable.
5. **Nature of lien against real estate accorded creditors.**
None - approved claims are merely acknowledged debts payable in the course of administration.
6. **How may real estate be sold free of liens?**
All property which is affected by the death of the decedent and on which inheritance, estate, or death taxes are due under the laws of Montana is subject to the lien of the state until the taxes have been paid [Mont. Code Ann. §72-16-432(1)]. However, the Department of Revenue may issue a consent to transfer any real or personal property in the estate free of the lien for unpaid death taxes upon application to the Department [Mont. Code Ann. §72-16-433].
7. **How is marketable title established—**
- (a) **In a specific devisee?**
The personal representative is required to execute a deed of distribution as evidence of the distributee's title to the property [Mont. Code Ann. §72-3-904]. Proof that a distributee has received a deed of distribution from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate [Mont. Code Ann. §72-3-905].
 - (b) **In a residuary devisee?**
Same as (a), above.
 - (c) **In an heir-at-law?**
Same as (a), above.

8. Power of foreign personal representative to manage and sell real estate.

The foreign personal representative would have the power only after the personal representative has either registered in Montana, or has been appointed ancillary personal representative by the Montana court. See response to question 12 for a summary of the Montana registration procedure.

9. What real estate owned by the decedent alone must pass de hors the Will?

None.

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

- (a) The surviving spouse is entitled to the entire intestate estate if there are no surviving descendants or parents of the decedent, or if there are surviving descendants all of whom are also descendants of the surviving spouse, *and* the surviving spouse has no other descendants who survive the decedent [Mont. Code Ann. §72-2-112(1)].
- (b) If there are no descendants of the decedent, but a parent survives, the surviving spouse receives the first \$200,000, plus three-fourths (3/4) of the balance of the intestate estate. The parent(s) receive the remaining one-fourth (1/4) of the balance [Mont. Code Ann. §§72-2-112(2), 72-2-113(1)(b)].
- (c) If all of the decedent's descendants are also descendants of the surviving spouse, but the surviving spouse has any descendants who are not descendants of the decedent, the surviving spouse receives the first \$150,000, plus one-half (1/2) of the balance [Mont. Code Ann. §72-2-112(3)]. The remaining one-half (1/2) passes to the decedent's descendants [Mont. Code Ann. §72-2-113(1)(a)].
- (d) If any of decedent's descendants are not descendants of the surviving spouse, the spouse receives the first \$100,000, plus one-half (1/2) of the balance [Mont. Code Ann. §72-2-112(4)]. The decedent's descendants receive the remaining one-half (1/2) of the balance [Mont. Code Ann. §72-2-113(1)(a)].
- (e) The intestate share of the surviving spouse is in addition to the homestead, family, and exempt property allowances [Mont. Code Ann. §§72-2-412, 72-2-413, 72-2-414].
- (f) If there is no surviving spouse, then to the decedent's descendants, by representation [Mont. Code Ann. §72-2-113(1)(a)].
- (g) If there is no spouse or descendants, to the decedent's parents equally, or all to the sole surviving parent [Mont. Code Ann. §72-2-112(2)].
- (h) If there is no spouse, issue or parent, to the descendants of the decedent's parents, or either of them, by representation [Mont. Code Ann. §72-2-113(1)(c)].
- (i) If there is no spouse, descendant, parent, or descendant of a parent, then one-half (1/2) to the paternal grandparents or their descendants, and the remaining one-half (1/2) to the maternal grandparents or their descendants. If there is no grandparent or issue on one side (paternal or maternal), that one-half (1/2) goes to the decedent's relatives on the other side [Mont. Code Ann. §72-2-113(1)(d)].
- (j) If there is no spouse, descendant, parent, or descendant of a grandparent, then to the next-of-kin in equal degree except where there are two or more collateral kin in equal degree but claiming through different ancestors. Those who claim through the nearer ancestors are preferred to those claiming through an ancestor more remote [Mont. Code Ann. §72-2-113(2)].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

A procedure (sometimes referred to as an "abbreviated ancillary proceeding") is available to permit a foreign personal representative to register with the district court in the county in which the real estate is located. After the clerk of district court has issued a certificate to the domiciliary foreign personal representative, that personal representative is entitled to exercise, as to the Montana real estate, all powers of a local personal representative [Mont. Code Ann. §§72-4-303, 72-4-310].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, if the procedure described in question 12 is followed.

(b) In the ancillary personal representative?

Same answer as (a), above.

(c) In the domiciliary personal representative?

Same answer as (a), above.

14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Neither an ancillary personal representative nor a foreign personal representative who has registered with the clerk of district court needs to obtain court approval for a sale of real estate unless the Will imposes a sale restriction.

NEBRASKA

John F. Hanson
McCook, Nebraska
July 12, 1993

1. **Is real estate a probate asset?**
Yes. Although title passes at death, the personal representative has power over the title and administration powers until distribution or sale.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Both.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Specific expenses chargeable to real estate; general administration expenses and debts satisfied out of estate without distinction between real and personal property.
4. **Liability of real estate for decedent's debts and expenses of administration.**
Equally liable with personalty. Assets abate according to intent of testator or in accordance with Nev. Rev. Stat. §30-24,100 (UPC 3-902).
5. **Nature of lien against real estate accorded creditors.**
No direct lien for unsecured creditors.
6. **How may real estate be sold free of liens?**
Personal representative's deed accompanied by certified copy of letters evidencing appointment of personal representative.

Satisfaction of Nebraska inheritance tax and estate tax liens by payment or waiver.

Release of United States estate tax lien where valuation sufficient to raise issue.
7. **How is marketable title established—**
(a) In a specific devisee?
(b) In a residuary devisee?
(c) In an heir-at-law?
(Answer applicable to (a), (b), and (c)) - Subject to encumbrances on title at death of decedent, a deed of distribution by the personal representative; satisfaction of Nebraska inheritance tax and estate tax liens by payment or waiver; release of United States estate tax lien where valuation sufficient to raise issue.
8. **Power of foreign personal representative to manage and sell real estate.**
Same as domiciliary personal representative, upon compliance with Neb. Rev. Stat. §30-2505 and 2506 (UPC 4-204 and 205).
9. **What real estate owned by the decedent alone must pass de hors the Will?**
None.
10. **Does a Will or codicil convey after-acquired real estate?**
Yes, unless otherwise limited.
11. **Intestate share of heirs in real estate.**
1. If spouse survives [Neb. Rev. Stat. §30-2302]:
(a) If no surviving issue or parent of decedent, entire intestate estate to spouse.
(b) If no surviving issue, but decedent is survived by parent or parents, first \$50,000 plus one-half of the balance of the intestate estate to spouse.

- (c) If surviving issue all of whom are issue of surviving spouse also, first \$50,000 plus one-half the balance of intestate estate to spouse.
 - (d) If surviving issue one or more of whom are not issue of surviving spouse, one-half of intestate estate to spouse.
2. Intestate estate not passing to surviving spouse, or entire intestate estate if no surviving spouse [Neb. Rev. Stat. §30-2303]:
- (a) If issue of decedent, those of same degree taking equally; if degree unequal, more remote by representation.
 - (b) If no surviving issue, parent or parents equally.
 - (c) If no surviving issue or parent, to issue of the parents or either by representation.
 - (d) If none of the above, special provisions relating to tracing through grandparents or issue of grandparents with or without representation, depending upon degree, and in the absence of any of those, to next-of-kin in equal degree, those claiming through the nearest ancestor being preferred over those claiming through a more remote ancestor.
3. Representation defined as commencing at nearest degree with living survivor [Neb. Rev. Stat. §30-2306 (UPC 2-106)].
- 12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
- No, assuming recorded means filed for record in the Register of Deeds office. If filed with the County Court pursuant to Neb. Rev. Stat. §§30-2505 and 2506 (UPC 4-204 and 205), letters of authority to act as personal representative will be issued to domiciliary personal representative other than a corporation not qualified to do business in Nebraska.
- 13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) In the devisee?**
Presumptive; conclusive with personal representative's deed of distribution by locally appointed or qualified personal representative.
 - (b) In the ancillary personal representative?**
Conclusive.
 - (c) In the domiciliary personal representative?**
No evidence, unless domiciliary personal representative is also locally qualified by compliance with Neb. Rev. Stat. §§30-2505 and 2506 (UPC 4-204 and 205).
- 14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
- Yes.
- 15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
- All duly qualified personal representatives have statutory power to convey real estate.

NEVADA

Prince A. Hawkins
Reno, Nevada
August 22, 1997

- 1. Is real estate a probate asset?**
Yes.
- 2. Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Yes .
- 3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
As a cost of administration.
- 4. Liability of real estate for decedent's debts and expenses of administration.**
Liable.
- 5. Nature of lien against real estate accorded creditors.**
None.

6. **How may real estate be sold free of liens?**
Cannot.
7. **How is marketable title established—**
- (a) **In a specific devisee?**
Decree of distribution.
 - (b) **In a residuary devisee?**
Decree of distribution.
 - (c) **In an heir-at-law?**
Decree of distribution.
8. **Power of foreign personal representative to manage and sell real estate.**
None.
9. **What real estate owned by the decedent alone must pass de hors the Will?**
Homestead.
10. **Does a Will or codicil convey after-acquired real estate?**
Yes.
11. **Intestate share of heirs in real estate.**
Same as any other property.
12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
No.
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
No.
 - (b) **In the ancillary personal representative?**
No.
 - (c) **In the domiciliary personal representative?**
No.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
No.

NEW HAMPSHIRE

John C. Ransmeier
Concord, New Hampshire
October 26, 1993

1. **Is real estate a probate asset?**

Technically, title to real estate passes to a decedent's heirs or devisees at death or upon proof of the decedent's Will. Thus, the administrator or executor of a decedent's estate is not ordinarily responsible for administering real estate. Real estate, must, however, be identified on the probate inventory [N.H. Rev. Stat. Ann. §554:1]. If real estate is sold pursuant to license to satisfy the claims of the creditors, it then is treated as a probate asset, and the proceeds of sale are subject to probate administration [N.H. Rev. Stat. Ann. §§559:1 and 559:19]. This is also the practice if the Will permits or directs that real estate be sold by the executor, or if real estate is sold for the convenience of heirs or devisees, while administration remains open, with the deed signed by the administrator or executor with written consent given by the heirs or devisees [See N.H. Rev. Stat. Ann. §559:18].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

The fees of administrators, executors, and attorneys representing the estate must be disclosed on probate accounting and are subject to approval by the probate court [*In Re Estate of Rolfe*, 136 N.H. 294, 615 A.2d 625 (1992)]. These fees may include fees related to sale of real estate, if real estate is sold and the proceeds taken into the estate for purposes of distribution to heirs or satisfaction of creditors' claims. If real estate is not sold, but simply passes routinely to heirs, or devisees, it would not ordinarily provide a basis for the charging of fees by the administrator, executor, or attorneys, except insofar as they might be entitled to reasonable compensation for services connected with the real estate, such as arranging for its appraisal.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Expenses which have accrued before death are paid like other debts owed by the decedent and would be paid first from the decedent's personal estate, and from the real estate only if the personal estate were insufficient [N.H. Rev. Stat. Ann. §§554:17 and 19]. Expenses attributable to the sale of real estate may be charged as an expense of administration if the proceeds are taken into the estate. Where title to real estate has passed routinely to heirs or devisees, they are ordinarily responsible for those expenses which accrue after death.

4. Liability of real estate for decedent's debts and expenses of administration.

A decedent's real estate may be sold as necessary to pay debts and expenses of administration, if the decedent's personal estate is insufficient [N.H. Rev. Stat. Ann. §554.17].

5. Nature of lien against real estate accorded creditors.

Creditors may present claims against an estate and bring actions within time periods allowed by statute [N.H. Rev. Stat. Ann. Ch. 556]. Real estate may be used to satisfy these claims if the decedent's personal estate is insufficient. Real estate is also subject to a lien for legacy and succession taxes and for the estate tax affording a credit against federal estate tax [N.H. Rev. Stat. Ann. §§86:58 and 87:57].

6. How may real estate be sold free of liens?

By deferring sale until after the limitations periods for the filing of creditors' claims have expired and by obtaining a discharge of tax liens by order of the probate court, under N.H. Rev. Stat. Ann. §86:59, or from the Department of Revenue Administration.

7. How is marketable title established—

(a) In a specific devisee?

See (c) below.

(b) In a residuary devisee?

See (c) below.

(c) In an heir-at-law?

In all three categories, title to real estate passes to the beneficiary as of the date of the decedent's death, subject to tax liens and to the right of the administrator or executor to sell real estate to pay debts, expenses, and taxes if the personal estate is insufficient [N.H. Rev. Stat. Ann. §554:17]. Creditors' claims are subject to the statutes of limitations set forth in N.H. Rev. Stat. Ann. Ch. 556, which require that demand be exhibited to the administrator or executor within six months after the grant of administration and that suit be commenced within one year from the grant of administration [N.H. Rev. Stat. Ann. §§556:1 and 556:5]. The limitation periods set forth by these statutes may be extended by court order in appropriate circumstances [N.H. Rev. Stat. Ann. §556:28]. This however, would not ordinarily affect title transferred to a bona fide purchaser for value. When no administration has been opened within two years of death, no creditor may thereafter maintain an action against a decedent's real estate to satisfy claims against the estate [N.H. Rev. Stat. Ann. §556:29].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has no authority to manage or sell real estate unless qualified as the ancillary administrator in New Hampshire [See N.H. Rev. Stat. Ann. §554:28; *Kennan v. Tonry*, 91 N.H. 220, 16 A.2d 705 (1940)].

9. What real estate owned by the decedent alone must pass de hors the Will?

Real estate devised under a Will is subject to the elective rights of the surviving spouse [N.H. Rev. Stat. Ann. §560:10]. Also, every child born after the testator's death, and every child or issue of a child not named or referred to in a Will, may take the share to which such person would be entitled if the deceased had died intestate [N.H. Rev. Stat. Ann. §551:10].

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

The real estate and personal estate of an intestate decedent descends, subject to the homestead right and to the possible claims of creditors in the manner provided for by N.H. Rev. Stat. Ann. §561:1, which provides:

I If the deceased is survived by a spouse, the spouse shall receive:

(a) if there is no surviving issue or parent of the decedent, the entire intestate estate;

(b) if there is no surviving issue but the decedent is survived by a parent, the first \$50,000, plus one-half of the balance of the intestate estate;

- (c) if there are surviving issue all of whom are issue of the surviving spouse also, the first \$50,000, plus one-half the balance of the intestate estate;
 - (d) if there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.
- II. The part of the intestate estate not passing to the surviving spouse under paragraph 1, or the entire intestate estate if there is no surviving spouse, passes as follows:
- (a) to the issue of the decedent;
 - (b) if there is no surviving issue, to the decedent's parents;
 - (c) if there is no surviving issue or parent, to brothers and sisters and the issue of each deceased brother or sister by representation;
 - (d) if there is no surviving issue, parent or issue of a parent but the decedent is survived by one or more grandparents or issue of grandparents, one-half passes to the paternal grandparents or their issue, and one-half to the maternal grandparents, or their issue.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes. Real estate will, however, remain subject to the possible claims of creditors, who may submit claims within six months after the opening of administration and file suit thereon within one year after the opening of administration. If ancillary administration is not taken out within two years after death, a decedent's real estate may no longer be used to satisfy claims against the estate [N.H. Rev. Stat. Ann. §556:29].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, subject to the possible claims of creditors if ancillary administration is taken out and the claims are asserted within the two year time period within which claims may be asserted against real estate under N.H. Rev. Stat. Ann. §556:29.

(b) In the ancillary personal representative?

The ancillary personal representative may convey real estate pursuant to license in order to satisfy creditor's claims pursuant to N.H. Rev. Stat. Ann. §559:1 and the ancillary administrator may sell real estate with the consent of heirs or devisees pursuant to N.H. Rev. Stat. Ann. §559:18.

(c) In the domiciliary personal representative?

No. A domiciliary personal representative has no authority in New Hampshire unless qualified as ancillary administrator. See paragraph 8 above.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Not applicable in view of the answer to the preceding question. If, however, ancillary administration were opened, a power of sale contained in the Will would permit the ancillary administrator to sell real estate without court approval, but with the consent of heirs given in accordance with N.H. Rev. Stat. Ann. §559:18.

NEW JERSEY

Morris J. Oppenheim
Asbury Park, New Jersey
September 24, 1993

1. Is real estate a probate asset?

Yes. N.J. Stat. Ann. §3B:1-1 defines "estate" as "all of the property of the decedent." Although real estate is not mentioned in the definition of "estate," it is clear from the context of the entire statute relating to probate matters that no distinction is made between personal property and real property.

N.J. Stat. Ann. §3B:10-29 directs and N.J. Stat. Ann. §3B:14-23, parts(e) and (u), empowers the executor to take possession or control of decedent's property including real property.

N.J. Stat. Ann. §3B:10-30 confers upon the personal representative (executor) the same power of the title to property of the estate "that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate."

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes. Corpus commissions are allowed with respect to all corpus received by the executor [N.J. Stat. Ann. §3B:18-14]. Under current law, a personal representative has a right to, and shall take possession or control of decedent's property [N.J. Stat. Ann. §3B:1029].

With respect to real estate passing de hors the Will, by operation of law or otherwise, that does not come into the hands of the executor, which a taxing authority taxes or attempts to tax, or with respect to which the executor renders services in connection with the apportionment, or collection, of taxes between the estate and the recipient of the real estate, the court may allow reasonable compensation to the executor in addition to the compensation as may be otherwise allowable [N.J. Stat. Ann. §3B:18-9]. The additional compensation is payable by the recipient of the property or out of the property, but the court may order the additional compensation to be paid out of the corpus of the estate of the recipient or property is not within the court's jurisdiction or the executor is not successful in collecting [N.J. Stat. Ann. §3B:18-11].

Counsel fees may be allowed for legal services out of a fund in court, usually on settlement of the executor's interim or final account when supported by a detailed affidavit of services [Court Rule 4:42-9(a)(2)]. The information to be included in the affidavit of services is specified by New Jersey Court Rule 4:42-9(b) and 4:88-4 where the counsel fee is to be shared with out of state attorneys not admitted to practice in New Jersey. In practice, most estates are settled informally, and fees are fixed by the parties.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

No distinction is made between personal property and real property. Both are equally available for the payment of expenses which are properly chargeable to the estate. Although N.J. Stat. Ann. §3B:14-23(e)(1) empowers the executor to pay taxes, mortgage interest and other charges against real estate, it is not clear whether those items when paid by the executor are chargeable to the general estate or to the real estate.

4. Liability of real estate for decedent's debts and expenses of administration.

There is no distinction between personal property and real property. Both are available to pay decedent's debts and administration expenses except when the real property is specifically devised and other assets are adequate to pay estate obligations.

5. Nature of lien against real estate accorded creditors.

Decedent's real property is subject to a lien for the payment of decedent's debts for a period of one year after date of decease.

6. How may real estate be sold free of liens?

Real estate may be sold free of creditors' liens with approval of the court [N.J. Stat. Ann. §3B:22-22].

7. How is marketable title established—

(a) In a specific devisee?

Under Will of a resident marketable title is presumptively established by judgment admitting Will to probate in this state pursuant to N.J. Stat. Ann. §3B:25 and conclusively established seven years after probate of the Will pursuant to N.J. Stat. Ann. §3B:3-31. Will of a non-resident admitted to probate in any other state or jurisdiction, has the same effect as a Will admitted to probate, if the Will is valid under New Jersey law, and an exemplified or duly authenticated copy of the Will and record is filed with the Surrogate pursuant to N.J. Stat. Ann. §§3B:3-26 and 3B:3-31.

(b) In a residuary devisee?

Same as under (a).

(c) In an heir-at-law?

Title passes directly to the heirs pursuant to N.J. Stat. Ann. §3B:5-2 subject to the powers conferred on the administrator of the estate by N.J. Stat. Ann. §3B:10-29.

8. Power of foreign personal representative to manage and sell real estate.

Same as domiciliary personal representative, upon filing authenticated copies of letters [N.J. Stat. §3B:14-28 and 29] or, as to estate of non-resident intestate [N.J. Stat. Ann. §3B:10-9].

9. What real estate owned by the decedent alone must pass de hors the Will?

None, except: (i) right of pretermitted spouse pursuant to N.J. Stat. Ann. §3B:5-15; (ii) right of spouse to elective share pursuant to N.J. Stat. Ann. §3B:8-1; and (iii) right of pretermitted child pursuant to N.J. Stat. Ann. §3B:5016.

10. Does a Will or codicil convey after-acquired real estate?

Yes [N.J. Stat. Ann. §3B:3-34].

11. Intestate share of heirs in real estate.

The intestate share of the surviving spouse pursuant to N.J. Stat. Ann. §3B:5-3 is:

- (a) If there is no surviving issue or parent of the decedent, the entire intestate estate;
- (b) If there is no surviving issue but the decedent is survived by a parent or parents, the first \$50,000.00, plus one-half of the balance of the intestate estate;

- (c) If there are surviving issue all of whom are issue of the surviving spouse also, the first \$50,000.00, plus one-half of the balance of the intestate estate;
- (d) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

The part of the intestate estate not passing to the surviving spouse in accordance with the foregoing, or the entire intestate estate if there is no surviving spouse passes pursuant to N.J. Stat. Ann. §3B:5-4 as follows:

- (a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
- (b) If there is no surviving issue, to his parent or parents equally;
- (c) If there is no surviving issue or parent, to the issue of the parents or either of them by representation;
- (d) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents;
 - (1) Half of the estate passes to the paternal grandparents equally if both survive, or to the surviving paternal grandparent; or if both are deceased and the decedent is survived by maternal grandparents or grandparent, then to the issue of the paternal grandparents, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation;
- (e) If there is no surviving issue, parent, issue of a parent or no surviving grandparent, but the decedent is survived by issue of grandparents, the issue take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation.

For purposes of intestate succession any person who fails to survive the decedent by 120 hours is deemed to have predeceased, and the heirs are determined accordingly [N.J. Stat. Ann. §3B:327].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes, provided that the Will is valid under the laws of this state [N.J. Stat. Ann. §3B:3-27].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Presumptive evidence [N.J. Stat. Ann. §3-27]. It becomes conclusive evidence 7 years after entry of judgment admitting Will to probate in a court of this state, but it is not clear whether filing authenticated copy of Will has same effect as a judgment.

(b) In the ancillary personal representative?

Same as (a).

(c) In the domiciliary personal representative?

Same as (a).

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Ancillary administration is not required but is provided for if desired [N.J. Stat. Ann. §3B:3-26]. Where the Will of a non-resident has been admitted to probate in any state, and the Will is valid under the laws of this state, filing an authenticated copy of the Will together with the judgment for probate and the record of grant of letters testamentary thereon, it has the same force and effect in respect to all real estate as if the Will had been admitted to probate and the letters testamentary had been issued by the state [N.J. Stat. Ann. §3B:3-27].

NEW MEXICO

Forrest S. Smith
Santa Fe, New Mexico
September 15, 1997

Note: All citations are to Michie New Mexico Statutes Annotated 1978, as currently amended.

1. Is real estate a probate asset?

Yes [NMSA 1978 §§45-1-201A(37) and 45-3-101, and 45-3-706]. No distinction made between realty and personalty.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes. Claims against the estate, including claims for fees of personal representatives and attorneys, may be satisfied from real estate as well as personalty, without distinction [NMSA 1978 §§45-3-805, 45-3-902].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

These are treated as costs and expenses of administration, which personal representative has authority to incur [NMSA 1978 §45-3-715(A)(17)]. Costs and expenses of administration have first priority against assets of estate [NMSA 1978 §45-3-805(A)(1)].

4. Liability of real estate for decedent's debts and expenses of administration.

Liable to same extent as personalty [NMSA 1978 §§45-3-805, 45-3-902]. Preference or priority between realty and personalty expressly abolished.

5. Nature of lien against real estate accorded creditors.

None. As to non-secured creditor, no statutory lien against real estate or personalty arises; non-secured creditors whose claims are allowed in probate proceedings but not paid may petition the court for an order directing the personal representative to pay the claim to the extent funds of the estate are available [NMSA 1978 §45-3-807]. Right of a secured creditor to enforce his security interest against secured property in the estate of a decedent is not affected or altered by Probate Code [NMSA 1978 §§45-1-109 and 45-3-803D]. Procedures for payment or settlement of secured claims are set out in NMSA 1978 §§45-3-809 and 45-3-814.

6. How may real estate be sold free of liens?

Personal representative may pay the lien or renew or extend the obligation secured thereby [NMSA 1978 §45-3-814] and may then sell the asset (if not specifically devised) without court order [NMSA 1978 §§45-3-711, 45-3-715A(6)].

7. How is marketable title established—

(a) In a specific devisee?

After Will declared valid and personal representative appointed by order of informal probate or adjudication of probate in formal testacy proceeding, personal representative delivers deed of distribution of property to devisee [NMSA 1978 §§45-3-102, 45-3-907, 45-3-908, 45-3-910].

(b) In a residuary devisee?

Same as (a), above.

(c) In an heir-at-law?

The personal representative after being appointed by probate or district court, delivers deed of distribution for property to heir [NMSA 1978 §§45-3-103, 45-3-907, 45-3-908, 45-3-910].

8. Power of foreign personal representative to manage and sell real estate.

Same powers as a local representative, if no local administration (or petition therefor) pending and if authenticated copies of foreign personal representative's appointment and any bond and statement of address are filed with district or probate court of county where property located [NMSA 1978 §§45-4-204 and 45-4-205]. Comment: Although not required by Probate Code, New Mexico title companies may require that copies of Will (if any) and order admitting Will to probate be included in authenticated documents to be filed in New Mexico.

9. What real estate owned by the decedent alone must pass de hors the Will?

None .

10. Does a Will or codicil convey after-acquired real estate?

Yes. [NMSA 1978 §45-2-602].

11. Intestate share of heirs in real estate.

(a) If there is a surviving spouse:

- (1) If separate property, one-fourth goes to surviving spouse, remainder to surviving descendants of decedent by representation, or if none, then all to surviving spouse [NMSA 1978 §§45-2-102(A) and 45-2-103] .
- (2) If community property decedent's one-half goes to surviving spouse [NMSA 1978 §45-2-102(B)].

(b) If no surviving spouse, all property goes:

- (1) To decedent's surviving descendants, by representation, or
- (2) If none, to decedent's parents equally or all to the survivor, or
- (3) If none, to the surviving descendants of the decedent's parents or either of them, by representation, or
- (4) If none, then in specified shares to the decedent's surviving grandparents or the surviving issue of decedent's grandparents, or
- (5) If none, to the State of New Mexico.

[NMSA 1978 §§45-2-103 and 45-2-105].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. The term "muniment of title" is not commonly used in New Mexico and has no generally accepted legal significance. The procedures outlined in answer to Questions 7 and 8, above, are recommended. A local or foreign personal representative's deed of distribution, recorded in the county real estate records after qualifying to act in New Mexico, in accordance with NMSA 1978 §§45-4-204 and 45-4-205 is the accepted practice in New Mexico. See also answer to Question 8 above.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. Conclusive evidence of devisee's title is the receipt of a deed of distribution from the personal representative [NMSA 1978 §45-3-908]. Thus, devisee has no authority to convey until (a) domiciliary foreign personal representative has filed authenticated copies of appointment and any bond, and statement of address, with district or probate court of county in which property is located [NMSA 1978 §45-4-204], or (b) ancillary letters of administration have been granted to foreign personal representative after filing authenticated copy of Will and domiciliary letters [NMSA 1978 §45-4-207] and thereafter personal representative has delivered deed of distribution to devisee [NMSA 1978 §45-3-907].

(b) In the ancillary personal representative?

No. Ancillary personal representative derives authority from letters of administration granted by district or probate court, not from Will [NMSA 1978 §§45-3-103 and 45-4-207].

(c) In the domiciliary personal representative?

No. Domiciliary foreign personal representative derives authority from state granting powers upon filing of authenticated copies of appointment and any bond, and statement of address, with district or probate court in which property is located, not from Will [NMSA 1978 §§45-4-204 and 45-4-205]. See also answer to Question 8 above.

14. Except for the procedures (specified in Question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No. Under former law, the answer was yes. However, NMSA 1978 §45-4-205, enacted in 1975, permits domiciliary foreign personal representative to exercise as to assets in New Mexico all powers of local personal representative upon filing of authenticated copies of appointment and bond and statement of address, with district or probate court of county in which property is located, in accordance with NMSA 1978 §45-4-204. Powers exercisable include power to make distributions of realty to devisees or heirs pursuant to NMSA 1978 §§45-3-907 and 45-3-908; hence ancillary administration is not normally necessary, although it is an available alternative under NMSA 1978 §45-4-207.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. In fact, court approval is unnecessary with or without power of sale in Will [NMSA 1978 §§45-4-207(B), 45-3-711, and 45-3-715].

NEW YORK

Paul Richard Karan
New York, New York
August 19, 1997

1. Is real estate a probate asset?

Yes (although a Will may dispose of realty (Est. Powers & Trusts §3-1.2)), title vests in the devisee immediately upon the death of a testator (*In re Cunniff's Estate*, 272 N.Y. 89, 4 N.E.2d 946 (1936); *In re Powers' Estate*, 205 A.D. 49, 199 N.Y.S. 96 (2d Dept 1923)) and the power to sell specifically devised realty is limited [Est. Powers & Trusts §11-1.1].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Not generally commissionable unless sold. It is subject to legal fees [Surr. Ct. Proc. Act §2307 (2); *In re Salomon's Ex'rs*, 252 N.Y. 381, 169 N.E. 616 (1930); Est. Powers & Trusts §13-1.3].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Estate taxes apportioned between legatees and devisees unless contrary to Will. Usually attorneys' fees for appraisal, etc. handled by Surrogate, who sets fees accordingly [Est. Powers & Trusts §2-1.8].

4. Liability of real estate for decedent's debts and expenses of administration.

No priority between realty and personalty [Est. Powers & Trusts §13-1.3].

5. Nature of lien against real estate accorded creditors.

Liens against real property specifically devised are chargeable against the particular property to the extent that the property satisfies the lien. The personal representative is not responsible for satisfaction of the lien out of remainder of estate [Est. Powers & Trusts §3-3.6]. Deficiency judgment after mortgage foreclosure sale may be entered against estate. [*Jemzura v. Jemzura* 36 N.Y.2d 496, 369 N.Y.S.2d 400 (1975)].

6. How may real estate be sold free of liens?

Upon satisfaction of lien, then under power in Will or by judicial proceeding [Surr. Ct. Proc. Act §§1901, 1902; Est. Powers & Trusts §11-1.1].

7. How is marketable title established—

(a) In a specific devisee?

After Will is admitted to probate, devisee holds title by operation of law subject to taxes, liens, and mortgages against the realty and subject to claims against the general estate which would render general estate insolvent. Claims must be presented within seven months of the issuance of letters. Accounting may be required [Est. Powers & Trusts §§3-3.6, 13-1.3; Surr. Ct. Proc. Act §§1802 and 2208].

(b) In a residuary devisee?

After Will is admitted to probate, residuary devisee holds title by operation of law. Sale by devisee usually only after an accounting upon settlement of the estate.

(c) In an heir-at-law?

Title perfected by operation of law subject to taxes, liens, and mortgages against the realty and after expiration of time within which claims must be presented.

8. Power of foreign personal representative to manage and sell real estate.

None. Upon grant of ancillary letters, foreign personal representative has all the powers statutorily granted fiduciaries generally, including the power to manage and sell real estate [Surr. Ct. Proc. Act §1610; Est. Powers Trusts §11-1.1].

9. What real estate owned by the decedent alone must pass de hors the Will?

None. However, surviving spouses have a right to elect against the Will to take the greater of \$50,000 or one-third of estate after administration expenses, debts, etc. are paid [Est. Powers & Trusts §5-1.1-A (Effective for decedents dying on or after 9/1/94. Right of election is different for decedents dying prior to 9/1/94 but on or after 9/1/92 (Est. Powers & Trusts §5-1.1-A(a)(5)) or prior to 9/1/92 (Est. Powers & Trusts §5-1.1)].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Est. Powers & Trusts §3-3.1].

11. Intestate share of heirs in real estate.

If a decedent is survived by:

- (a) A spouse and issue, \$50,000 and one-half of the residue to the spouse, and the balance to the issue by representation.
- (b) A spouse and no issue, the whole to the spouse.
- (c) Issue and no spouse, the whole to the issue, by representation.
- (d) There are additional provisions for more remote heirs.

[Est. Powers & Trusts §4-1.1 (effective for decedents dying on or after 9/1/92)].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Never (although prior to 1967 this was the procedure — Dec. Est. Law §44 — now repealed).

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

See below.

(b) In the ancillary personal representative?

See below.

(c) In the domiciliary personal representative?

See below.

Foreign Will admitted to probate in New York perfects title to realty in the devisee [Surr. Ct. Proc. Act §1602]. Granting of ancillary letters is conclusive evidence of authority in the personal representative to convey the decedent's local property [Surr. Ct. Proc. Act. §1610]. Will recorded pursuant to former law is presumptive evidence of the Will, of the execution thereof and of the letters granted thereon {Surr. Ct. Proc. Act. §1615}.

14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes [Surr. Ct. Proc. Act §1610].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes, in fact, the ancillary executor or administrator has statutory power to sell the property without court approval whether or not the Will makes such provision [Surr. Ct. Proc. Act §1610; Est. Powers & Trusts §11-1.1].

NORTH CAROLINA

Robert B. Lloyd, Jr.
Greensboro, North Carolina
September 7, 1993

1. **Is real estate a probate asset?**

Technically no. Title to a decedent's real property vests in the decedent's heirs at the time of death [N.C. Gen. Stat. §28A-15-2(b)]. As a practical matter, however, the decedent's real estate is subject to probate [N.C. Gen. Stat. §28A-15-1(a)]. (a) states that all real and personal property is included among assets available for the discharge of the debts of the estate. If the decedent's personal representative determines that the sale of decedent's real estate is in the best interests of the administration of the estate, he can pull real property back into the estate - through a judicial proceeding - in order to satisfy the debts [N.C. Gen. Stat. §28A-15-1(c)]. Furthermore, the personal representative can take possession of and sell real estate where authority to do so is given by the Will, including a general grant of such authority [N.C. Gen. Stat. §28A-15-1(d)].

Finally, in order for real property to pass under a Will, the Will must be probated to vest title in the devisee [N.C. Gen. Stat. §31-39]. While actual vesting does not occur until probate is complete, once vested, title relates back to the date of decedent's death [N.C. Gen. Stat. §28A-15-2(b)].

2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**

Proceeds from the sale of real estate, like other assets of the estate, are subject to personal representatives' commissions when sold, but only to the extent that such proceeds are actually applied to discharge the estate's debts or other claims. As a general rule, commissions from the sale of real property are limited to five percent (5%) of the assets received, and five percent (5%) of expenditures made. These limitations are intended to protect against frivolous sales of real estate to increase the personal representative's commissions [N.C. Gen. Stat. §28A-23-3(a) and (b)]. The North Carolina Statute allowing costs incurred in discharging the estate has been interpreted to include "reasonable" attorney fees [N.C. Gen. Stat. §28A-23(d)(1)].

3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**

Due to the lack of any statute to the contrary, such expenses are handled in the same manner as other costs of administration of the estate. Accordingly, such charges are given priority over other creditors and are payable out of the estate's assets in the following order: property not disposed of by the Will; residuary devisees; general devisees; specific devisees [N.C. Gen. Stat. §28A-15-5(a)].

4. **Liability of real estate for decedent's debts and expenses of administration.**

North Carolina law makes no distinction between real and personal property for purposes of discharging the decedent's debts. If the personal representative chooses to sell real estate for this purpose, he must determine that such selection is in the best interest of the administration of the estate [N.C. Gen. Stat. §28A-15-1(a) and (c)].

5. **Nature of lien against real estate accorded creditors.**

With the exceptions of the IRS and North Carolina Department of Revenue, no specific lien is created in favor of decedent's creditors. All real estate is simply made available for the discharge of the decedent's estate.

6. **How may real estate be sold free of liens?**

By a judicial proceeding [See N.C. Gen. Stat. §§28A-15-1(c), 28A-17-1 through 17-13].

7. **How is marketable title established—**

(a) In a specific devisee?

Upon filing of a final account in probate proceedings, or upon expiration of two (2) years, whichever occurs first (assuming that inheritance and estate tax claims are satisfied) [N.C. Gen. Stat. §31-39].

(b) In a residuary devisee?

Upon filing a final account in probate proceedings, or upon expiration of two (2) years, whichever occurs first (assuming that inheritance and estate tax claims are satisfied) [N.C. Gen. Stat. §31-39].

(c) In an heir-at-law?

Upon filing a final account or expiration of two (2) years, whichever occurs first (assuming that inheritance and estate tax claims are satisfied) [N.C. Gen. Stat. §28A-17-12].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has no authority to manage or sell real estate unless he/she qualifies as the ancillary personal representative in North Carolina.

9. What real estate owned by the decedent alone must pass de hors the Will?

A homestead exemption of up to \$10,000 may be claimed by the surviving spouse or minor children [N.C. Gen. Stat. §1C-1601(a)-(f)]. Also, the surviving spouse is entitled to a year's allowance of \$5,000, plus \$1,000 for each child under eighteen (18) who was residing with the decedent at the time of death [N.C. Gen. Stat. §30-15]. Finally, if the surviving spouse dissents from the Will, he/she will be entitled to his/her intestate share of a life estate in one-third of the value of all real property owned by the decedent spouse [N.C. Gen. Stat. §§29-14, 29-30].

10. Does a Will or codicil convey after-acquired real estate?

Yes, so long as the Will contains a residuary clause and does not include any contrary intention [N.C. Gen. Stat. §§31-41, 31-43].

11. Intestate share of heirs in real estate.

- (a) If there are no children or lineal descendants and no parents, the surviving spouse takes the entire net estate.
- (b) If one child or lineal descendant survives along with the spouse, each takes one-half (1/2) undivided interest in all real property.
- (c) If two or more children or lineal descendants survive along with the spouse, the spouse takes an undivided one-third (1/3) interest, and all children or lineal descendants take the remaining undivided two-thirds (2/3) interest.
- (d) If decedent's parent(s) survive along with the spouse, but no children or lineal descendants survive, the spouse takes one-half (1/2) interest in real property and the parent(s) take(s) the remaining one-half (1/2) interest.

[N.C. Gen. Stat. §29-14].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. The foreign Will must still be officially probated in North Carolina [N.C. Gen. Stat. §31-27], and a N.C. Inheritance Tax return must be filed with the State Department of Revenue. North Carolina law provides, however, that if the Will of a nonresident has been probated according to the laws of the nonresident's state, and certified copies of such Will and probate proceedings are produced in North Carolina, the Will may be probated in this State as if the original Will had been produced. *Id.* So long as such Will was executed according to N.C. law, it will be valid to pass title to real property in this state once probated here.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, so long as the Will is executed according to North Carolina law. The property, however, would still be subject to claims against the estate [N.C. Gen. Stat. §31-27(d)].

(b) In the ancillary personal representative?

Yes, provided that other provisions regulating the sale of real property are satisfied [N.C. Gen. Stat. §31-27(d)].

(c) In the domiciliary personal representative?

Only if the domiciliary is also qualified as the ancillary representative [N.C. Gen. Stat. §28A-26-5].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, if the personal representative intends to take possession of the real estate, or if heirs plan to sell within two years.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. Absent any statute to the contrary, there is apparently no distinction between an ancillary personal representative and a domiciliary personal representative for this purpose. Accordingly, the personal representative must determine that the sale is in the best interests of administration of the estate, and the sale must be made to pay the debts of the estate or to carry out the express purposes set out in the Will [N.C. Gen. Stat. §28A-15-1(c)].

1. Is real estate a probate asset?

Yes.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

No. Fees of personal representatives and attorneys are not based on character or value of assets in the estate. The personal representative and attorney are entitled to reasonable compensation as determined by the personal representative. The Probate Court will review fees at the request of any interested person.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

As a general expense of administration, unless there is a specific direction in the Will.

4. Liability of real estate for decedent's debts and expenses of administration.

There is no priority between real estate and personalty.

5. Nature of lien against real estate accorded creditors.

There is no lien. All assets of the estate chargeable for decedent's debts except homestead and exemptions.

6. How may real estate be sold free of liens?

Until termination of his appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have except that his power is in trust for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of the court.

7. How is marketable title established—

(a) In a specific devisee?

(b) In a residuary devisee?

(c) In an heir-at-law?

For all of the above, the following recorded documents are required to establish marketable title: a personal representative's deed of conveyance or personal representative's deed of distribution and a certified copy of unrestricted letters of personal representative which establish that the letters were in effect on the date of the conveyance.

8. Power of foreign personal representative to manage and sell real estate.

Same as domiciliary.

9. What real estate owned by the decedent alone must pass de hors the Will?

Homestead. The real estate is one-third of the augmented estate if the surviving spouse elects to take against the Will.

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

Share of the Spouse (North Dakota Century Code Section 30.1-04-02) - The intestate share of the surviving spouse is:

1. The entire intestate estate if:
 - (a) No descendant or parent of the decedent survives the decedent; or
 - (b) All of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.
2. The first \$200,000, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent.
3. The first \$150,000, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent.
4. The first \$100,000, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Share of Heirs other than the surviving spouse (North Dakota Century Code Section 30.1-04-02, or the entire intestate estate, if there is no surviving spouse, passes as follows:

1. To the decedent's descendants by representation.
 2. If there is no surviving descendant, to the decedent's parents equally if both survive, or the to surviving parent.
 3. If there is no surviving descendant or parent, to the descendants of the decedent's parents, or either of them, by representation.
 4. If there is no surviving descendant, parent or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or maternal side, remainder is unclear.
- 12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Never.
- 13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
See below.
 - (b) **In the ancillary personal representative?**
See below.
 - (c) **In the domiciliary personal representative?**
See below.

An international Will which meets the requirements of North Dakota Century Code Section 30.1-08.2 may be registered with the Secretary of State.

- 14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No, but if no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with the court in this state, in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given and proof of authority of domiciliary foreign personal representative.
- 15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Not applicable.

OHIO

Jon Hoffheimer
Cincinnati, Ohio
July 15, 1993

- 1. Is real estate a probate asset?**
Yes.
- 2. Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Both, but commissions and legal fees are payable out of personalty first. There is no statutory provision for fixed legal fees [Ohio Rev. Code Ann. §2113.36], but fees may be paid (no fixed percentage) upon special application for an allowance covering services rendered [Ohio Rev. Code Ann. §2113.35].
- 3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Paid out of general estate without allocation if there is sufficient personalty.
- 4. Liability of real estate for decedent's debts and expenses of administration.**
After personalty [Ohio Rev. Code Ann. §2107.53].
- 5. Nature of lien against real estate accorded creditors.**
Debts of decedent are a lien on his land in default of personal assets.

6. How may real estate be sold free of liens?

Upon payment of debt or expiration of time for presentation of claim or by bringing of a sales case; otherwise under power in Will or by statutory procedure (including consent of beneficiaries) [Ohio Rev. Code Ann. §2127.011].

7. How is marketable title established—

(a) In a specific devisee?

A certificate of transfer issued by Probate Court [Ohio Rev. Code Ann. §2113.61].

(b) In a residuary devisee?

Immediately, if there is sufficient personalty and undevisee real estate to pay the debts and the time for Will contest has run.

(c) In an heir-at-law?

Immediately, if sufficient personalty to pay debts.

8. Power of foreign personal representative to manage and sell real estate.

After filing an authenticated copy of Will and appointment, a foreign personal representative may be authorized to sell real estate for payment of debts or legacies and administration expenses. Foreign executors and administrators may sell real estate under a testamentary power to record their extra state proceedings and bar claims of creditors. This having been done, they may proceed with a sale.

9. What real estate owned by the decedent alone must pass dehors the Will?

Dower interest in surviving spouse (if not relinquished or banned) is a life estate in one-third of real estate, to the extent that the real estate was encumbered during a marriage without release or bar and was conveyed without release of dower [Ohio Rev. Code §2103]. Surviving spouse may remain in house for one year free of charge [Ohio Rev. Code §2106.15], and may purchase house and land adjacent at appraised value [Ohio Rev. Code §2106.16].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Ohio Rev. Code §2107.50].

11. Intestate share of heirs in real estate.

(a) First \$20,000/\$60,000 and one-half if one child or its lineal descendants survive.

(b) First \$20,000/60,000 and one-third if there is more than one child or its lineal descendants.

(c) All if no child or its lineal descendants survive.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Proceeding to bar creditors-Will is sufficient [Ohio Rev. Code §2129.05].

Ancillary administration-need certificate of transfer [Ohio Rev. Code §2129.19].

Such documents as will demonstrate the fact of probate and due execution.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

See question 12, above.

(b) In the ancillary personal representative?

Yes, if power of sale is in Will [Ohio Rev. Code §2129.08].

(c) In the domiciliary personal representative?

Yes [Ohio Rev. Code §2127.01].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

There are two possible procedures:

(a) Proceeding to bar claims [Ohio Rev. Code §2129.02].

(b) Ancillary administration [Ohio Rev. Code §2120.04].

15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**

Yes [Ohio Rev. Code Ann. §2129.08].

OKLAHOMA

Mark W. Curnutte
Vinita, Oklahoma
August 22, 1997

1. Is real estate a probate asset?

Yes, except homestead and joint tenancy property. Homestead property is inheritable and may be included in the final decree subject to the homestead rights of the surviving spouse and the minor children. The personal representative must take all real property of the decedent, except homestead property, into his possession [Okla. Stat. tit. 58, §251]. Upon the death of a decedent, title passes to the heirs-at-law or devisees subject to the payment of taxes, cost of administration, debts and family allowance.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

All property except homestead property is chargeable with payment of debts of the decedent, expenses of administration and family allowance and may be sold to satisfy such debts [Okla. Stat. tit. 58, §381]. Proceeds from the sale of real estate constitute assets in the hands of the personal representative applicable to the payment of debts of the decedent and costs of administration. Reasonable attorney's fees may be allowed as necessary expenses incurred in settling the estate. Such fees are subject to approval by the court.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Such expenses are handled as an expense of administration. All expenses of administration must be paid before any debts are paid, except that secured mortgage debt has priority over expenses and administration.

4. Liability of real estate for decedent's debts and expenses of administration.

There is no distinction between real and personal property for purposes of discharging the decedent's debts and expenses of administration [Okla. Stat. Tit. 58, §381]. Provided that homestead property is not subject to the payment of any debt or liability except as secured by lien [Okla. Stat. Tit. 59, §313].

5. Nature of lien against real estate accorded creditors.

Only the Internal Revenue Service and the Oklahoma Tax Commission have liens created in their favor. Even a judgment on a creditor's claim against the estate does not amount to a lien [Okla. Stat. tit. 58, §345].

6. How may real estate be sold free of liens?

The general statutes governing the sales of all real estate are codified at Okla. Stat. tit. 58, §411 *et seq.* However, all sales appear to be subject to liens in place. The Oklahoma Tax Commission may issue an Order Releasing Property Subject to Estate Tax Liability and Lien (a "partial release") upon a showing that payment of any estate tax liability has been otherwise provided for.

7. How is marketable title established—

(a) In a specific devisee?

When a Decree of Distribution is granted [Okla. Stat. tit. 58, §632] or upon granting of a Partial Decree of Distribution three months after Letters are issued, and a bond, if required, is posted sufficient to pay the devisee's portion of the debts of the estate [Okla. Stat. tit. 58, §621 *et seq.*].

(b) In a residuary devisee?

When a Decree of Distribution is granted [Okla. Stat. tit. 58, §621 *et seq.*] or upon granting of a Partial Decree of Distribution three months after Letters are issued and a bond, if required, is posted sufficient to pay the devisee's portion of the debts of the estate [Okla. Stat. tit. 58, §621 *et seq.*].

(c) In an heir-at-law?

When a Decree of Distribution and Determination of Heirs [Okla. Stat. tit. 58, §621 *et seq.*] is granted or upon granting of a Partial Decree of Distribution and Determination of Heirs three months after Letters are issued and a bond, if required, is posted sufficient to pay the heir's portion of the debts of the estate [Okla. Stat. tit. 58, §621 *et seq.*].

8. Power of foreign personal representative to manage and sell real estate.

The same as a domiciliary personal representative, once qualified pursuant to an ancillary probate proceeding under Okla. Stat. tit. 58, §51-53, or 677.

9. What real estate owned by the decedent alone must pass de hors the Will?

Homestead property set apart to the surviving spouse and minor children passes, subject to the right of homestead, the same as other property of the decedent and shall be included in the Decree of Distribution [Okla. Stat. tit. 58, §311]. The surviving spouse may elect to take an undivided one-half (1/2) interest in the property acquired by the joint industry of the husband and wife during coverture, instead of taking under the Will [Okla. Stat. tit. 84, §44].

10. Does a Will or codicil convey after-acquired real estate?

Yes, unless the contrary manifestly appears in the Will to have been the intention of the testator [Okla. Stat. tit. 84, §146].

11. Intestate share of heirs in real estate.

Beginning July 1, 1985, if any person having title to any estate not otherwise limited by any antenuptial marriage contract dies without disposing of the estate by Will, such estate descends and shall be distributed in the following manner:

1. If the decedent leaves a surviving spouse, the share of the estate passing to said spouse is:
 - a. if there is no surviving issue, parent, brother or sister, the entire estate, or
 - b. if there is no surviving issue but the decedent is survived by a parent or parents, brother or sister:
 - (1) all the property acquired by the joint industry of the husband and wife during coverture, and
 - (2) an undivided one-third (1/3) interest in the remaining estate, or
 - c. if there are surviving issue, all of whom are also issue of the surviving spouse:
an undivided one-half (1/2) interest in all the property of the estate whether acquired by the joint industry of the husband and wife during coverture or otherwise, or
 - d. if there are surviving issue, one or more of whom are not also issue of the surviving spouse:
 - (1) an undivided one-half (1/2) interest in the property acquired by the joint industry of the husband and wife during coverture, and
 - (2) an undivided equal part in the property of the decedent not acquired by the joint industry of the husband and wife during coverture with each of the living children of the decedent and the lawful issue of any deceased child by right of representation;
2. The share of the estate not passing to the surviving spouse, or if there is no surviving spouse, the estate is to be distributed as follows:
 - a. in undivided equal shares to the surviving children of the decedent and issue of any deceased child of the decedent by right of representation, or
 - b. if there is no surviving issue, to the surviving parent or parents of the decedent in undivided equal shares, or
 - c. if there is no surviving issue nor parent, in undivided equal shares to the issue of parents by right of representation, or
 - d. if there is no surviving issue, parent, nor issue of parents, but the decedent is survived by one or more grandparents or issue of any grandparent, half of the estate passes equally to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of any paternal grandparent if both paternal grandparents are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation and the other half passes to the maternal relatives in the same manner; but if the decedent is survived by one or more grandparents or issue of grandparents on only one side of the family, paternal or maternal, the entire estate shall pass to such survivors in the manner set forth in this subsection, or
 - e. if there is no surviving issue, parent, issue of parents, grandparent, nor issue of a grandparent, the estate passes to the next of kin in equal degree;
3. If the decedent leaves no spouse, issue, parent, issue of parents, grandparent, issue of a grandparent, nor kindred, then the estate shall escheat to the State for the support of the common schools [Okla. Stat. tit. 84, §213B].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. The foreign Will must still be probated in Oklahoma and if necessary an Oklahoma estate tax return must be filed. An abbreviated ancillary probate proceeding is available upon petition to the court with a duly certified copy of the Last Will and Testament, order admitting Will to probate and order distributing the estate from the domiciliary probate proceeding [Okla. Stat. tit. 58, §677].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No, not until a decree of distribution is issued pursuant to an ancillary probate proceeding.

(b) In the ancillary personal representative?

Yes, subject to the ancillary probate proceeding and the statutes governing sale of real property.

(c) In the domiciliary personal representative?

Yes, upon application for distribution, after final settlement of the accounts of administration, the court may order delivery of the estate or sale and distribution of proceeds in accordance with the Will [Okla. Stat. tit. 58, §633]. The abbreviated ancillary probate proceeding allows for a conveyance according to the Will without an ancillary personal representative being appointed if there is no other need for such appointment [Okla. Stat. tit. 58, §677].

14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**

Yes.

15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**

No, court approval is still required [Okla. Stat. Tit. 58, §462]. However, upon application accompanied by acknowledged, written consents of all heirs, devisees, and legatees, the court may enter an order waiving the necessity for confirmation of sales [Okla. Stat. Tit. 58, §239].

NOTE: All references to the Oklahoma Statutes are to its 1991 Codification.

OREGON

John H. Rosenfeld
Portland, Oregon
October 10, 1997

1. **Is real estate a probate asset?**

Yes. Title to a decedent's real property vests in the decedent's heirs or devisees at death, subject to administration [Or. Rev. Stat. §114.215].

2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**

Both.

3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**

There is no distinction between real property and personal property [Or. Rev. Stat. §114.205]. The personal representative has the power to pay expenses associated with real estate in the same manner as all expenses incident to administration of the estate [Or. Rev. Stat. §§114.305(17) and 116.183(1)]. The personal representative must account for the payment of all expenses in an accounting [Or. Rev. Stat. §116.083].

Unless the Will provides otherwise, expenses incurred in connection with the settlement of a decedent's estate are charged against principal [Or. Rev. Stat. §116.007]. Expenses incurred in the management and operation of specific property are payable from the income of that property.

4. **Liability of real estate for decedent's debts and expenses of administration.**

Oregon law makes no distinction between real and personal property for purposes of discharging the decedent's debts and expenses of administration [Or. Rev. Stat. §114.205]. The personal representative has the power to sell property, although under some circumstances the sale may take place only after notice and hearing and order of the court [Or. Rev. Stat. §114.325].

5. **Nature of lien against real estate accorded creditors.**

Unsecured creditors have no lien, but real property, like all property subject to administration, is subject to payment of creditors' claims if timely filed [Or. Rev. Stat. §§114.345 and 115.005]. Judgment creditor has lien subject to possible statutory exemption of homestead from judgment liens to a limited extent [Or. Rev. Stat. §23.240].

6. **How may real estate be sold free of liens?**

Property sold, mortgaged or leased by a personal representative is subject to liens and encumbrances against the decedent and the estate of the decedent, but is not subject to rights of unsecured creditors of the decedent or liens or encumbrances against the heirs or devisees of the decedent [Or. Rev. Stat. §114.345]. The filing and allowance of a claim in an estate proceeding does not make the claimant a secured creditor.

7. **How is marketable title established—**

- (a) **In a specific devisee?**

In accordance with a decree of final distribution issued upon approval of the personal representative's final account, [Or. Rev. Stat. §116.113(1)], and the recording of a Personal Representative's Deed in the county where the real property is situated [Or. Rev. Stat. §116.223].

- (b) **In a residuary devisee?**

Same as above.

- (c) **In an heir-at-law?**

Same as above.

8. **Power of foreign personal representative to manage and sell real estate.**

In case of real property an ancillary probate proceeding must be instituted; except where a contract of sale has been executed by a deceased vendor, the foreign personal representative may execute a fulfillment deed so long as letters testamentary are then in effect [Or. Rev. Stat. §114.333].

9. What real estate owned by the decedent alone must pass dehors the Will?

None. The homestead is distributed in accordance with the terms of the Will. The spouse and the dependent children of the decedent may continue to occupy the decedent's principal place of abode until one year after the death of the decedent [Or. Rev. Stat. §114.005]. In addition, the court shall make necessary and reasonable provision from the estate for the support of the spouse and dependent children of the decedent, which may include transfer of title to real property or setting aside the whole estate after payment of claims, taxes, and expenses of administration [Or. Rev. Stat. §§114.015 and 114.085]. In addition, the spouse has an elective share of 25 percent of the decedent's net estate, subject to reduction for certain property passing under and outside the Will [Or. Rev. Stat. §114.125].

10. Does a Will or codicil convey after-acquired real estate?

Yes, unless the intent expressed in the Will is clear and explicit to the contrary [Or. Rev. Stat. §112.365].

11. Intestate share of heirs in real estate.

Real property and personal property are treated the same [Or. Rev. Stat. §114.205].

If the decedent leaves a surviving spouse and no issue, or a surviving spouse and issue, all of whom are issue of the surviving spouse, the surviving spouse receives the entire net intestate estate [Or. Rev. Stat. §§112.025(1) and 112.035]. If the decedent leaves a surviving spouse and one or more issue who are not issue of the surviving spouse, the surviving spouse receives one-half of the net intestate estate [Or. Rev. Stat. §112.025(2)].

The intestate property not passing to the surviving spouse passes to (i) the issue of the decedent (equally if in the same degree of kinship, but if of unequal degree, those of remote degrees take by representation), (ii) if no issue, to the surviving parents of the decedent, (iii) if no issue or parents, to the surviving brothers and sisters of the decedent and the issue of any deceased brother or sister by representation, and (iv) if no issue, parents, or issue of parents, to grandparents or their issue by representation [Or. Rev. Stat. §112.045]. A person is considered a surviving spouse if the person was legally married to the decedent at the time of the decedent's death, or if the person and the decedent (i) were capable of entering into a valid contract of marriage, (ii) cohabited for a period of at least 10 years which did not end earlier than two years before the decedent's death, (iii) were not legally married to another person at the time of the decedent's death, (iv) mutually assumed marital rights, duties and obligations during the 10-year period, (v) held themselves out as husband and wife, and acquired a uniform and general reputation as husband and wife during the 10-year period, and (vi) were both domiciled in Oregon, during at least the last two years of the 10-year period. [Or. Rev. Stat. §112.017(2)].

Any person who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for all purposes of intestate succession and taking under the Will of the decedent (unless the Will provides otherwise), and the heirs and devisees of the decedent are determined accordingly [Or. Rev. Stat. §112.085].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No. Administration is *generally* required where a nonresident decedent owns real estate in Oregon. The Will of a nonresident decedent may be admitted to probate upon petition therefor, by filing a certified copy of the Will and a certified copy of the order admitting the Will to probate or evidencing its establishment in the jurisdiction where the testator died domicile [Or. Rev. Stat. §113.065(1)].

Local Oregon title insurance companies *occasionally* will issue title insurance without an Oregon probate of Oregon real estate. In those limited cases, the title company usually requires Affidavits of Heirship and/or Indemnity Agreements before issuing the policy.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. Authority would only be with the duly appointed Oregon personal representative.

(b) In the ancillary personal representative?

Yes, if appointed in Oregon.

(c) In the domiciliary personal representative?

Yes, if appointed in Oregon.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes. If the real property has a fair market value of not more than \$90,000, and the probate estate in Oregon has a total fair market value of \$140,000 or less, then title may be vested using a Small Estates Affidavit instead of a formal probate. [Or. Rev. Stat. §§114.505 to 114.560].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. There is no distinction between an ancillary personal representative and a domiciliary personal representative for this purpose. Any personal representative has the power to sell real estate without court approval unless (i) the sale is in contravention of the provisions of the Will, (ii) the property is specifically devised and the Will does not authorize its sale, or (iii) a bond of the personal representative has been required and filed, the sales price of the property exceeds \$5,000, and the bond of the personal representative has not been increased to cover the sales price [Or. Rev. Stat. §114.325].

1. Is real estate a probate asset?

Yes, even though legal title to all real estate passes at the decedent's death to his heirs or devisees, subject "to all the powers granted to the personal representatives by this title and lawfully by the will and to all orders of the court" [20 Pa.Cons.Stat. Ann. §301]. Such powers include, among others, the power, upon court order, to repossess real estate already distributed by the personal representative or previously possessed by a specific devisee [20 Pa.Cons.Stat. Ann. §§3535 & 3311].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Yes. Pennsylvania allows a personal representative compensation "as shall in circumstances be reasonable and just, and may calculate such compensation on a graduated percentage" [20 Pa.Cons.Stat. Ann. §3537]. Similarly, attorney costs must be reasonable. Fees for unsold real estate or real estate sold through a broker who charges a commission may be lower than fees for fully administered assets.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Expenses are paid from the residue of the estate.

4. Liability of real estate for decedent's debts and expenses of administration.

No distinction between realty and personalty when there are insufficient assets to pay claimants and distributees.

5. Nature of lien against real estate accorded creditors.

Any lien existing against real property of the decedent at death continues after death [20 Pa.Cons.Stat. Ann. §3381]. If the lien resulted from a judgment, it will continue for the longer of one year from decedent's death or five years from the lien's inception or last revival [20 Pa.Cons.Stat. Ann. §3382]. Absent a lien existing at death, it is advisable for a claimant to file written notice of his claim within one year of decedent's death to preserve a claim against real estate conveyed by the executor [20 Pa.Cons.Stat. Ann. §3532].

6. How may real estate be sold free of liens?

Real estate may be sold free of record liens existing at decedent's death if sold by the personal representative under a court order [20 Pa.Cons.Stat. Ann. §3353].

7. How is marketable title established—

(a) In a specific devisee?

Upon confirmation of account filed at least four months after a personal representative's advertisement and appropriate recording of adjudication or decree [20 Pa.Cons.Stat. Ann. §3536].

(b) In a residuary devisee?

Same as (a), above.

(c) In an heir-at-law?

Same as (a), above.

8. Power of foreign personal representative to manage and sell real estate.

An ancillary personal representative may to the same extent as a similar local fiduciary, manage, sell, or exercise other powers related to real estate located in Pennsylvania; however, he or she may not exercise any powers within Pennsylvania for at least one month after decedent's death [20 Pa.Cons.Stat. Ann. §4101(3)]. In addition, he or she must (i) file with the appropriate Register of Wills an exemplified copy of his or her appointment in the proper jurisdiction and the Will that appointed him or her [20 Pa.Cons.Stat. Ann. §4101(1)], and (ii) execute and file an affidavit with the appropriate Register of Wills stating that, after diligent search and inquiry, the decedent's estate is not, to the extent of the representative's knowledge and inquiry, indebted to any person in Pennsylvania, and the representative will not exercise any power which he or she would not be permitted to exercise in the jurisdiction of his or her appointment [20 Pa.Cons.Stat. Ann. §4101(2)].

9. What real estate owned by the decedent alone must pass de hors the Will?

None, although the spouse, children, or parents of a decedent who died domiciled in Pennsylvania may retain or claim real estate up to a value of \$3,500 in satisfaction of the Family Exemption [20 Pa.Cons.Stat. Ann. §3121]. However, if the property is specifically devised or bequeathed by decedent and other assets are available to satisfy the \$3,500 Family Exemption, the property cannot be retained or claimed. *Id.*

10. Does a Will or codicil convey after-acquired real estate?

Yes, unless the Will or Codicil states otherwise [20 Pa.Cons.Stat. Ann. §2514(1.1)].

11. Intestate share of heirs in real estate.

Heirs take real estate in the same proportions and under the same determinations as they take personal property:

- (a) The surviving spouse takes the entire estate if there are no surviving issue or parents; \$30,000 plus 50% of the balance if there are either surviving parents or issue of the decedent of all of whom are also issue of the surviving spouse; or 50% of the estate if there is at least one surviving issue not also of the surviving spouse [Pa.Cons.Stat. Ann. §2102]. Any share taken by the surviving spouse is in lieu of and in full satisfaction of any dower or courtesy rights at common law [Pa.Cons.Stat. Ann. §2105].

- (b) The share of the estate not passing to a surviving spouse passes to decedent's issue; parents; brothers and sisters and their issue; grandparents; uncles, aunts and their children and grandchildren, in that order [Pa.Cons.Stat.Ann. §2103].

12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
No. See question 8, above.
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Yes, subject to claims against the estate.
 - (b) **In the ancillary personal representative?**
See question 8, above.
 - (c) **In the domiciliary personal representative?**
Yes.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
See question 8, above.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Generally, yes.

RHODE ISLAND

J. Russell Blease
Pawtucket, Rhode Island
August 30, 1997

1. **Is real estate a probate asset?**
No.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
No. If the realty is sold as part of the probate estate, it then becomes subject to fees for personal representatives and legal fees.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
It is customary for one-half of usual probate fees to be charged for non-probate services.
4. **Liability of real estate for decedent's debts and expenses of administration.**
After personalty.
5. **Nature of lien against real estate accorded creditors.**
Creditors have six years to petition for administration of the decedent's estate.
6. **How may real estate be sold free of liens?**
After the elapse of a six-month period to file creditors' claims and for the administration of the estate. If there is no power in Will or if no Will, a Surety Bond must be posted and a court order to sell obtained.
7. **How is marketable title established—**
- (a) **In a specific devisee?**
Upon issuance of Letters, probate of Will, and payment of debts and taxes.
 - (b) **In a residuary devisee?**
After the six-month creditors' period, probate of Will, and payment of debts and taxes.
 - (c) **In an heir-at-law?**
After the six-month creditors' period and payment of debts and taxes; appointment of personal representative and administration of estate complete.

8. **Power of foreign personal representative to manage and sell real estate.**
Same as Domiciliary.
9. **What real estate owned by the decedent alone must pass de hors the Will?**
Dower or curtesy right up to enactment of statute abolishing common law and/or statutory dower and abolishing common law and/or statutory curtesy [R.I. Gen. Laws §33-25-1 (effective date 1956)]. Surviving spouse obtains life estate in realty owned by decedent at death subject to encumbrances and any liability of decedent to discharge same [R.I. Gen. Laws §33-25-2]. Life estate takes precedence over any Will provisions or creditors' claims (except those secured by lien) [R.I. Gen. Laws §33-25-3], unless surviving spouse fails to elect same by filing waiver of devise or bequest within six months after the date of the first publication of the qualification of the fiduciary of the estate of deceased spouse [R.I. Gen. Laws §33-25-4]. Act applied retroactively to dower and curtesy rights existing prior to effective date of Act [R.I. Gen. Laws §33-25-6], but validity of provision has not been adjudicated.
10. **Does a Will or codicil convey after-acquired real estate?**
Yes.
11. **Intestate share of heirs in real estate.**
(a) Life estate to widow in husband's realty.
(b) Life estate to widower in wife's realty.
12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
No. A petition for allowance of the foreign Will must be filed in the city or town where the real estate or personal property is located and then letters testamentary or administration, c.t.a. would be issued in Rhode Island to the foreign executor. The duly recorded exemplified copy of the Will of the nonresident decedent (plus authenticated copies of other pertinent probate documents) are required to be filed in the city or town in Rhode Island where the personal property or real estate is located to have the personal representative appointed executor-administrator, c.t.a. of the estate in Rhode Island [R.I. Gen. Laws §33-7-20].
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Yes. Upon issuance of Letters, probate of foreign Will, and payment of debts and taxes, and after the six-month creditors' period.
- (b) **In the ancillary personal representative?**
Yes. Upon issuance of Letters, probate of exemplified copy of Will, and payment of debts and taxes, and after the six-month creditors' period the ancillary personal representative can sell under the power of sale in the Will.
- (c) **In the domiciliary personal representative?**
Same as (b), if the domiciliary representative has qualified in Rhode Island [R.I. Gen. Laws §33-7-20].
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes. [R.I. Gen. Laws §33-7-21].

SOUTH CAROLINA

Michael L. M. Jordan
Hilton Head, South Carolina
January 18, 1994

1. **Is real estate a probate asset?**
Title to a decedent's real property devolves immediately on death to the decedent's heirs (if intestate) and devisees (if testate) [See S.C. Code Ann. §62-3-901], and vests in the decedent's heirs or beneficiaries at the time of death [See S.C. Code Ann. §62-3-901], provided that such real property does not pass to other persons by form of ownership. However, the decedent's real estate is subject to probate, and the personal representative retains certain powers over the real property in order to satisfy claims against the estate, and for purposes of administration [See S.C. Code Ann. §§62-3-709 through 711]. S.C. Code Ann §62-3-902 states that all real and personal property is included among assets available for the discharge of the debts of the estate [See S.C. Code Ann. §62-3-901]. If the decedent's personal representative determines that the sale of decedent's real estate is in the best interests of the administration of the estate, he can sell the real property - through a judicial proceeding - in order to satisfy the debts [See S.C. Code Ann. §62-3-1301 et seq.]. The personal representative can sell real estate where authority to do so is specifically given by the Will [S.C. Code Ann. §62-3-711(b)]. Absent such authorization, the personal representative has no authority to sell real property, unless such authority is obtained through an order issued by the court in accordance with S.C. Code Ann. §62-3-1301 et seq.

As to real estate held by the decedent at his or her date of death, in a capacity other than as joint tenants with right of survivorship, the Will must be probated to fully vest title in the devisee in order for real property to pass under a Will. This is accomplished by the execution and delivery of a "deed of distribution" [S.C. Code Ann. §62-3-908]. Since title to property is deemed to pass at death [S.C. Code Ann. §62-3-101], the deed of distribution transfers possession and relinquishes control by personal representative.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

The general rule is that a personal representative is entitled to a commission for services rendered in the amount not to exceed five (5%) percent of the appraised value of the personal property [S.C. Code Ann. §62-3-719(a)]. The proceeds from the sale of real property, when sold either pursuant to powers authorized in the Will or pursuant to court order, are subject to personal representatives' commissions when sold, in the amount not to exceed five (5%) percent of the net received sales proceeds, except when purchased by the personal representative [S.C. Code Ann. §62-3-719(a)].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

There is no specific statute delineating specific expenses that may be paid by a personal representative. Such expenses are handled in the same manner as other costs of administration of the estate. Such charges are given priority over other creditors [S.C. Code Ann. §62-3-805(a)(1)]. A personal representative is charged with the duty of preserving estate property, including specifically the duty to pay taxes and take reasonable management, protection, and preservation of estate property in his possession [S.C. Code Ann. §62-3-709]. Such expenses are payable out of the estate's assets in the following order: property specified by the testator to be used to pay expenses; property not disposed of by the Will; residuary devisees; general devisees; specific devisees [S.C. Code Ann. §62-3-902(a)], unless the Will expressly provides for an alternative order of abatement for payment of such expenses [S.C. Code Ann. §62-3-902(b)].

4. Liability of real estate for decedent's debts and expenses of administration.

South Carolina law makes no distinction between real and personal property for purposes of discharging the decedent debts. If the personal representative, who has the specific authority to sell property, chooses to sell real estate for this purpose, he does so under the general authority to expeditiously and efficiently administer the estate consistent with the best interest of the estate [S.C. Code Ann. §62-3-703]. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the Will [S.C. Code Ann. §62-3-902].

5. Nature of lien against real estate accorded creditors.

With the exceptions of the IRS and South Carolina Tax Commission, no specific lien is created in favor of decedent's creditors. All real estate is simply made available for the discharge of the decedent's debts.

(A South Carolina estate tax lien arises automatically at death on all property located in South Carolina for every decedent of a taxable estate [S.C. Code Ann. §12-16-1510]).

6. How may real estate be sold free of liens?

With proper authority a personal representative may sell property. (See question 1 and S.C. Code Ann. §§62-3-711 and 62-3-1301 *et seq.*). A purchaser, who deals with the personal representative in good faith and for value, is protected as if the personal representative properly exercised his power [S.C. Code Ann. §62-3-714], provided, however, that the estate is not being administered under Part 5 of the Code. Knowledge of a Part 5 administration is presumed if the Court endorses the certificate of authority, and, if endorsed, the person dealing with the personal representative is deemed notified of those restrictions. Therefore, any time a third party purchaser is dealing with a personal representative, the certificate should be requested in order to determine if there is in fact a Part 5 administration.

Property may also be sold by judicial proceeding, pursuant to the provisions of Part 13 [S.C. Code Ann. §62-3-1301 *et seq.*].

7. How is marketable title established—

The Will must be admitted to probate, then (a) or (b):

(a) In a specific devisee?

Marketability is established by i) the execution and delivery of the "deed of distribution" [S.C. Code Ann. §62-3-908]; ii) the expiration of the creditor's claim period [S.C. Code Ann. §§62-3-802, 803], and iii) the expiration or waiver of the federal and South Carolina [S.C. Code Ann. §12-16-1510 *et seq.*] estate tax lien.

(b) In a residuary devisee?

In addition to the above, upon filing of a Final Account and other closing document required in S.C. Code Ann. §62-3-1001, the giving of proper notices, and the absence of objections, the estate probate court issues a final order closing the estate. (See S.C. Code Ann. §62-3-1001 for various methods of closing estates.)

(c) In an heir-at-law?

Intestate. If intestate administration, an attorney's certificate at conclusion of administration is generally accepted. If there is no administration, a judicial proceeding commonly known as a "quiet title action" is required to establish ownership. The expiration or waiver of the federal and South Carolina estate tax liens also apply [S.C. Code Ann. §12-16-1510 *et seq.*].

8. Power of foreign personal representative to manage and sell real estate.

A foreign personal representative has no authority to manage or sell real estate located in South Carolina unless i) the personal representative qualifies as the ancillary personal representative in South Carolina or ii) the foreign personal representative files as a local personal representa-

tive [See S.C. Code Ann. §§62-4-204, 205], and there is no administration or application for administration pending in South Carolina [S.C. Code Ann. §62-4-206]; (See also question 12).

9. What real estate owned by the decedent alone must pass de hors the Will?

Exempt property in the amount of \$5,000 may be claimed by the surviving spouse or minor children [S.C. Code Ann. §62-2-401]. Also, a decedent's spouse and children are entitled to a \$1,000 exemption in real property and \$500 in personal property from the decedent's debts [S.C. Code Ann. §15-41-30].

Spousal Elective Share. If the surviving spouse dissents from the Will, s/he will be entitled to take an elective share in one-third (1/3) of the value of the probate property [S.C. Code Ann. §62-2-201 et seq.]. There is no statutory augmentation rule. However, see *Seifert*, 409 S.E.2d 337 (1991).

10. Does a Will or codicil convey after-acquired real estate?

Yes, so long as the Will contains a residuary clause (or other general devise of real property) and does not include any contrary intention [S.C. Code Ann. §62-2-602].

11. Intestate share of heirs in real estate.

- (a) If there are no children, the surviving spouse takes the entire net estate.
- (b) If one or more surviving children along with the spouse, spouse takes a one-half undivided interest and the surviving children share equally the other one-half interest in all real and personal property.
- (c) If decedent's children survive but no spouse survives, children take entire property in equal shares.
- (d) If decedent's spouse, children, and all issue of children do not survive, surviving parents take equally.
- (e) More remote heirs, if none of above [S.C. Code Ann. §§62-2-102 and 62-2-103].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Yes, provided that the validity of the foreign appointment is ongoing, and there is no application for administration pending in the South Carolina court [S.C. Code Ann. §62-4-206]. A foreign personal representative, who has filed an exemplified copy of the probate documents (to include, at a minimum, the Will, if any, current Letters Testamentary or Letters of Administration, and certified copy of the death certificate, together with a South Carolina Application for Informal Probate, and a certified copy of the decedent's death certificate), may file as a local personal representative pursuant to S.C. Code Ann. §62-4-205, and may thereafter exercise all powers of a local personal representative on property located in the state [S.C. Code Ann. §§62-4-204, 205]. However, the foreign personal representative has the duty to file a South Carolina estate tax return if required (generally, if a federal return is required, but dependent on the decedent's date of death) [S.C. Code Ann. §12-15-270].

If there is no ongoing appointment in the foreign primary administration, but there is a previously probated will in a foreign jurisdiction, an ancillary administration is required in South Carolina. A local personal representative must be appointed to administer the estate's interest in the real property.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

A foreign Will, if admitted to probate in the foreign jurisdiction, may evidence the personal representative's authority to convey the decedent's local property. However, if the Will was not probated at the time of death, and the date of death exceeds ten years prior to the date of conveyance, South Carolina presumes that the decedent died intestate, and title passes in accordance with the statutory order of intestacy, rather than in accordance with the terms of the Will [S.C. Code Ann. §62-3-108]. Therefore, in addition to the Will, there should also be a Deed of Distribution from the estate into the devisee, executed by a properly qualified personal representative, in order to establish the devisee's right to further convey the real estate [S.C. Code Ann. §62-3-910].

(b) In the ancillary personal representative?

If the date of death is less than ten years from the date of inquiry, a foreign Will admitted to record in the South Carolina probate court of the county in which the real estate is located is presumptive evidence of the ancillary personal representative's authority. However, in accordance with §§62-4-204 and 205, the ancillary personal representative must further establish its authority to act on behalf of the estate as it regards South Carolina real property by filing authenticated copies of the foreign appointment together with any official bond. Alternatively, an application for informal appointment may be submitted in order to acquire the authority to administer South Carolina situs real property [S.C. Code Ann. §62-4-207].

(c) In the domiciliary personal representative?

As to the domiciliary personal representative, the Will provides presumptive evidence as to the authority of the personal representative named therein, subject, however, to recognition by the court of appropriate jurisdiction as to such authority. Therefore, the Will should be admitted to probate and the representative duly appointed in accordance with §§62-3-301 et seq. or 62-3-401 et seq. in order to establish the proper authority of the personal representative.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Some form of filing is required any time a non-resident decedent dies while owning real estate in South Carolina. The extent or form of filing requirement is determined by i) how title is held (i.e. whether joint tenants with rights of survivorship, tenants in common, or individually); ii) if held in a capacity other than as joint tenants with right of survivorship, whether there is an on-going primary administration with a current valid appointment in place; and iii) whether there has been an application for local administration filed in South Carolina. If held as joint tenants with right of survivorship (to be determined by the granting language of the original deed of conveyance), the surviving joint tenant or the personal representative may place on record a certified copy of the death certificate, an affidavit of joint tenancy, and a preliminary notice of estate tax. (Note: Real property titled in the name of both a husband and wife, or other two parties, is deemed to be held as tenants in common and not as joint tenants with right of survivorship, unless the deed specifically creates the JTWRROS tenancy. South Carolina does not recognize tenancy by entireties.)

However, if real property is held in a capacity other than as joint tenant with right of survivorship, a full ancillary administration will be required, including qualification and appointment of a personal representative and compliance with applicable notice requirements as set forth at S.C. Code Ann. §§62-3-101 et seq. unless the requirements of §§62-4-204 and 62-4-205 can be satisfied.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes. There is no distinction between an ancillary personal representative and a domiciliary (local) personal representative for this purpose. Accordingly, if granted the power to sell property in the Will, and the Will is duly admitted to probate either through a primary procedure pursuant to S.C. Code Ann. §§62-3-101 et seq. or pursuant to §§62-4-101 et seq., the personal representative may sell the real property [S.C. Code Ann. §62-3-711].

SOUTH DAKOTA

Irving A. Hinderaker
Watertown, South Dakota
September 11, 1997

1. Is real estate a probate asset?

Yes. Real estate can pass outside of probate where titled in joint tenancy or where held in a trust.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

The personal representative and attorney are entitled to reasonable compensation as determined by the personal representative. Fees are not based on the character or value of assets in the estate.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

As a general expense of administration unless there are specific directions in the Will.

4. Liability of real estate for decedent's debts and expenses of administration.

There is no priority between real estate and personalty.

5. Nature of lien against real estate accorded creditors.

No specific lien is created in favor of decedent's creditors. All real estate is made available for the discharge of decedent's debts subject to homestead and exemptions.

6. How may real estate be sold free of liens?

The personal representative has statutory authority to sell real estate (SDCL 29A-3-715).

7. How is marketable title established—

(a) In a specific devisee?

(See below.)

(b) In a residuary devisee?

(See below.)

(c) In an heir-at-law?

(See below.)

For all of the above, the following recorded documents are required to establish marketable title: a personal representative's deed of conveyance or personal representative's deed of distribution and a certified copy of unrestricted letters of personal representative which establish that the letters were in effect on the date of conveyance.

8. Power of foreign personal representative to manage and sell real estate.

Same as domiciliary.

9. What real estate owned by the decedent alone must pass de hors the Will?

The homestead (SDCL 43-31-1). The real estate will be included in the augmented estate if the surviving spouse elects against the Will (29A-2-203).

10. Does a Will or codicil convey after-acquired real estate?

Yes (SDCL 29A-2-602).

11. Intestate share of heirs in real estate.

SDCL 29A-2-102. The intestate share of the surviving spouse is:

- (a) The entire intestate estate if no descendant of the decedent survives the decedent; or all of the decedent's surviving descendants are also descendants of the surviving spouse;
- (b) the first \$100,000.00 plus one-half (1/2) of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

SDCL 29A-2-103. Shares of heirs other than surviving spouse. Any part of the intestate estate not passing to the surviving spouse, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- (a) To the decedent's descendants by representation;
- (b) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- (c) If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;
- (d) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half (1/2) of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or by representation to the descendants of the decedent's paternal grandparents or either of them if both are deceased; and the other half (1/2) passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No, but see 14.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

- (a) In the devisee?
No.
- (b) In the ancillary personal representative?
Yes.
- (c) In the domiciliary personal representative?
No.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, but if no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with a court in the state in a county in which property belonging to the decedent is located, certified copies of the appointment and of any official bond, and may then exercise as to assets in the state all powers of a local personal representative.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

See Question 14.

1. Is real estate a probate asset?

No. No interest in or power over real estate of the decedent is conferred upon the personal representative independent of a power given in the will of the deceased [Tenn. Code Ann. § 31-2-103(a)]. If, however, the personal assets of the estate are insufficient to pay the debts, taxes, and administration expenses, the Court, upon a finding of insolvency, shall direct that so much of real estate as is necessary to pay the same, be sold for such purpose [Tenn. Code Ann. § 30-2-418].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Only if sold to pay debts or sold pursuant to terms of Will [Tenn. Code Ann. § 31-2-103].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Absent a direction in the Will to the contrary, or in case of intestacy, all beneficiaries share estate and inheritance taxes in the proportion that their shares bear to the total value of the property, interests, and benefits received by all such persons interested in the estate [Tenn. Code Ann. § 30-2-614]. Unless real estate sold pursuant to terms of Will or to pay debts, devisees pay expenses of sale of real estate.

4. Liability of real estate for decedent's debts and expenses of administration.

After personalty [Tenn. Code Ann. § 30-2-402].

5. Nature of lien against real estate accorded creditors.

Within six months from death, mortgagee/purchaser from heir/devisee takes subject to right of creditor to subject realty to payment of debt. If administration had within said period, valid claims constitute a lien [Tenn. Code Ann. § 30-2-408].

6. How may real estate be sold free of liens?

By release or bar of debt, or by court sale to pay debts.

7. How is marketable title established—

(a) In a specific devisee?

By order admitting Will to probate and order closing administration.

(b) In a residuary devisee?

By order admitting Will to probate and order closing administration.

(c) In an heir-at-law?

By order closing administration or if no administration, after expiration of six months from decedent's death and payment of inheritance taxes.

8. Power of foreign personal representative to manage and sell real estate.

After qualification in this state, foreign personal representative has same powers as domiciliary personal representative.

9. What real estate owned by the decedent alone must pass de hors the Will?

Homestead (domicile of survivor required) not exceeding \$5,000 in value and surviving spouse's statutory share if spouse dissents from Will. Const. of Tenn., Art. XI § 11, as amended 1978; Tenn. Code Ann. § 26-2-30. Statutory share is one-third of net estate (real and personal property subject to disposition under the terms of the decedent's Will or the laws of intestate succession, reduced by funeral and administration expenses, homestead exemption and year's support) [Tenn. Code Ann. § 31-2-101].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Tenn. Code Ann. § 32-3-101].

11. Intestate share of heirs in real estate.

Realty and personalty take alike [Tenn. Code Ann. § 31-1-10 (9)].

Surviving spouse takes, in addition to homestead:

(a) If no surviving issue of deceased, entire estate.

(b) If there are surviving issue of the decedent, either one-third or a child's share of the entire intestate estate, whichever is greater [Tenn. Code Ann. § 31-2-104].

Heirs other than surviving spouse:

(a) To issue of decedent if all are of same degree or kinship to decedent, issue taking equally; if unequal degrees, those of more remote degree by representation [Tenn. Code Ann. § 31-2-104].

(b) If no surviving issue, to parent or parents equally.

- 12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Yes. A copy of the Will duly authenticated according to the Acts of Congress, certified by the Clerk, may be registered in the county where the land lies as a muniment of title [Tenn. Code Ann. § 32-5-109].
- 13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) In the devisee?**
Conclusive [Tenn. Code Ann. §32-5-109; Tenn. Code Ann. § 32-5-103].
- (b) In the ancillary personal representative?**
Unless so provided in Will, or property is ordered sold for debts, personal representative takes no interest in real estate.
- (c) In the domiciliary personal representative?**
See (b) above.
- 14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No [Tenn. Code Ann. § 32-5-109].
- 15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Not applicable.

TEXAS

Edward B. Winn
Dallas, Texas
September 29, 1993

(Unless otherwise specified, all section numbers refer to the Texas Probate Code)

- 1. Is real estate a probate asset?**
Yes. See §37 for "Passage of Title Upon Intestacy and Under Will" and § 3(1) defining "estate" as denoting the real and personal property of a decedent or ward.
- 2. Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Yes. See §241(a) relating to "Compensation of Executors and Administrators" and § 242 relating to "Expenses Allowed" including reasonable attorneys' fees necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court.
- 3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
First, such expenses are handled in the same manner as other estate administration costs, subject to a special provision in the Texas Probate Code concerning payment of a claim of a secured creditor who elects to have the claim continued as a preferred debt and lien against specific property under §306. If so specified by the claimant, the claim is allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract which secured the lien; otherwise, it is allowed and approved as a matured secured claim to be paid in due course of administration [§306]. Under §322, claims secured by mortgage or other liens, including tax liens so far as the same can be paid of out of the proceeds of the property subject to such mortgage or other lien, have a priority of payment immediately after certain limited funeral and last sickness expenses and general administration expenses.
- Generally, under §322B (which does not affect the requirements for payment of a claim of a secured creditor who elects to have the claim continue as a preferred debt and claim against specific property under §306), a decedent's property is liable for debts and administration expenses, and bequests abate in the following order (except as indicated otherwise in §322A dealing with the apportionment of death taxes such as the federal estate tax): (1) property not disposed of by Will, but passing by intestacy; (2) personal property of the residuary estate; (3) real property of the residuary estate; (4) general bequests of personal property; (5) general devises of real property; (6) specific bequests of personal property; and (7) specific devises of real property.
- 4. Liability of real estate for decedent's debts and expenses of administration.**
Real estate may be sold when it appears necessary or advisable in order to do a number of things, including the payment of administration expenses, a decedent's funeral and last sickness expenses, and allowances and claims against a decedent's estate (§341), and the real property selected to be sold for the payment of expenses and claims shall be that which the court deems most advantageous to the estate to be sold [§340].

5. Nature of lien against real estate accorded creditors.

§306 describes the method for handling secured claims. Basically, there are two methods, either as a matured secured claim to be paid in due course of administration, or as a preferred debt and lien against the specific property securing the indebtedness to be paid according to the terms of the contract that secured the lien. If the latter course is chosen (“and timely elected”), no further claim can be made against other assets of the estate, but the debt, when allowed and proved, remains a preferred lien against the specific property and remains security for the debt in any distribution or sale thereof prior to final maturity and payment of the debt.

6. How may real estate be sold free of liens?

In dependent administrations under court supervision, by applying to the court for order of sale to satisfy the lien or to pay claims, or the realty may be sold subject to existing lien which under proper procedure will vest in the purchaser all right, title, and interest of the estate to such property; otherwise, by power of independent executor under Will to sell property without court order to satisfy the lien or to see the estate’s interest subject to the lien.

7. How is marketable title established—

(a) In a specific devisee?

§89A (enacted by the 1993 legislature) defines the rights of a person entitled to property under a Will, including the right to have the Will admitted to probate a muniment of title where there is no necessity for administration.

After all claims have been paid and after obtaining probate of Will properly filed in an independent administration, or, in a dependent administration under Court supervision, by an order of distribution following the filing of an account for final settlement.

(b) In a residuary devisee?

The same as under (a).

(c) In an heir-at-law?

If no administration is instituted, by filing an Affidavit of Heirship in the deed records of the county where the real estate is located; by an heirship proceeding if one is instituted in the appropriate Probate Court; or in administration under court supervision by an order of distribution following the filing of an account for final settlement. “By an amendment effective September 1, 1993, applying to the distribution of the estate of a decedent dying or after that date, title to a homestead that is the only real property in a decedent’s estate may be transferred on an affidavit meeting of the requirements of §137 (applying to the collection of “small estates” on affidavit) by recordation in the Deed Records of the county in which the homestead is located.”

8. Power of foreign personal representative to manage and sell real estate.

When a duly authenticated copy of a foreign Will is recorded in the deed records of any Texas county, a foreign executor or trustee may exercise the power given in the Will to sell any real or personal property situated in Texas and to execute proper conveyance without the necessity of any order of a Texas court [See §107]. Where active management or administration is required, a nonresident (natural person or corporation) is disqualified to serve as an executor or administrator unless such nonresident has appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court [§78(d)]. There are simplified procedures for probating a foreign Will by filing and recording in this state (§95) and for filing and recording a foreign Will in the deed records of the Texas county in which the real estate is situated (§96). There is also provision for the original probate of a foreign Will in this state (§103), and for issuance of letters testamentary to the executor of a Will probated in another jurisdiction (§105), and a non-resident bank can be qualified to serve as an executor, administrator, ancillary administrator, or in any other fiduciary capacity, so long as a bank or trust company located in Texas can act in such capacity in the state where the non-resident bank or trust company is located [§105A]. After proof of a foreign Will under §95, the Texas court shall enter an order directing that ancillary letters be issued to the executor named in the foreign Will, subject to revocation of any letters of administration granted by a Texas court to any other person.

9. What real estate owned by the decedent alone must pass de hors the Will?

The decedent’s surviving spouse has a right to remain on the homestead so long as he or she wishes and until he or she elects to no longer use it as his or her homestead and these rights are the same whether the property was the decedent’s separate property or the community property of the decedent and his or her surviving spouse [See §284 and §285].

10. Does a Will or codicil convey after-acquired real estate?

Yes, if the Will has a residuary clause and there is no contrary intention in the Will.

11. Intestate share of heirs in real estate.

(a) “Effective as of September 1, 1993, all of the community estate passes to the surviving spouse if no child or other descendant of the deceased spouse survives the deceased spouse or if all of the deceased spouse’s surviving children and descendants are also children or descendants of the surviving spouse; if the deceased spouse’s surviving children or descendants are not children or descendants of the surviving spouse, then one-half of the community estate is retained by the surviving spouse, and the other one-half passes to the children or descendants of the deceased spouse” [§45].

(b) As to the decedent’s separate property:

If survived by spouse, such spouse receives a one-third interest for life and the remainder goes to the decedent’s child or children or their descendants, and if none, the surviving spouse receives one-half of the lands and the remaining one-half goes according to the rules of descent and distribution set out in §38(b); and if there is no surviving spouse nor any children, then to the decedent’s parents, brothers,

and sisters, and/or their descendants, and if none, then in moieties, to the paternal and maternal kindred of the decedent as detailed in §38(a); provided, however, if neither parent, brothers, sisters or their descendants survive, then the surviving spouse is entitled to all of the decedent's estate, and if there is no surviving spouse, then in moieties as detailed in §38(a).

12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Yes [See §96, *et seq.* Texas Probate Code].
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
- (a) **In the devisee?**
Conclusive authority if no administration is required.
 - (b) **In the ancillary personal representative?**
Conclusive authority in independent administration. Specific court authorization is required in dependent administration .
 - (c) **In the domiciliary personal representative?**
Conclusive authority if the authority to convey is given to an executor or trustee [See §107]. Otherwise, specific court authorization would be required.
14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
No, if there is no necessity for administration otherwise in this state. See answer to question 8 for simplified procedures available to foreign executors and administrators.
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes, if the power of sale is given to an executor or trustee [See §107]. Otherwise, specific Court authorization would be required.

UTAH

Clark P. Giles
Salt Lake City, Utah
August 13, 1993

1. **Is real estate a probate asset?**
Yes, although Utah Code Ann. §75-3-101 (1953), provides that at a person's death real and personal property devolves to devisees or heir(s) subject to certain preferences and probate administration.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Yes, but by statute both fees are to be reasonable fees.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
Such expenses are handled in the same manner as other costs of administration of the estate, as there is no statutory priority between personal and real property. Expenses specifically incurred in connection with or caused by a specific devise or interest in real property may be charged against such interest.
4. **Liability of real estate for decedent's debts and expenses of administration.**
Utah law makes no distinction between real and personal property for purposes of discharging the decedent's debts.
5. **Nature of lien against real estate accorded creditors.**
None.
6. **How may real estate be sold free of liens?**
The personal representative must satisfy or otherwise discharge existing liens or make the sale subject to existing liens. Personal representative may sell real property without power in Will or court approval.
7. **How is marketable title established—**
- (a) **In a specific devisee?**
By Deed of Distribution from the personal representative; the probate proceeding does not clear defects in title or extinguish existing liens.

(b) In a residuary devisee?

By Deed of Distribution from the personal representative; the probate proceeding does not clear defects in title or extinguish existing liens.

(c) In an heir-at-law?

By Deed of Distribution from the personal representative; the probate proceeding does not clear defects in title or extinguish existing liens.

8. Power of foreign personal representative to manage and sell real estate.

None, except a foreign personal representative may acquire the same powers as a domiciliary after filing evidence of appointment with a Utah court (see question 12); or appointment by a Utah court in ancillary proceedings.

9. What real estate owned by the decedent alone must pass de hors the Will?

None, except real property and personal property may be subject to satisfying the elective share of the surviving spouse, the homestead allowance, exempt property deficiency to a value of \$5,000 and the family allowance.

10. Does a Will or codicil convey after-acquired real estate?

Yes [Utah Code Ann. §75-2-604 (1953)].

11. Intestate share of heirs in real estate.

The intestate share in real property is the same as personal property. Subject to elective share of surviving spouse, homestead, exempt property, and family allowances, the intestate estate passes as follows:

(a) To surviving spouse:

- (1) All, unless there are surviving issue, one or more of whom are not issue of the surviving spouse.
- (2) If there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half.

(b) The one-half not passing to the surviving spouse, or all, if there is no surviving spouse:

- (1) To surviving issue by representation.
- (2) If no surviving issue, to the surviving parent or parents equally.
- (3) If no surviving issue or parent, to the issue of the parents or either of them by representation.
- (4) If no surviving issue, parent, or issue of a parent, to surviving grandparents and issue of grandparents by representation.
- (5) If none of above, to the next of kin in equal degree and if none, to the state for the benefit of the state school fund.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No, but see Utah Code Ann. §75-3-102 (1953) and 14 below.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No.

(b) In the ancillary personal representative?

No.

(c) In the domiciliary personal representative?

No.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, but a domiciliary foreign personal representative may acquire the powers of a local personal representative by filing an authenticated copy of his appointment (and bond, if any) in the court in the county where the property is located [Utah Code Ann. §§75-4-204 and 75-4-205 (1953)]. Foreign corporate personal representatives may acquire such powers only if the domiciliary state has a reciprocal provision [Utah Code Ann. §7-4-205 (1953)]. Determination of proper distribution of property necessitates an ancillary administration [Utah Code Ann. §§75-3-101 and 75-3-102 (1953)].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Utah law authorizes a personal representative to sell real property without court approval and without the power being granted by Will.

1. Is real estate a probate asset?

Yes. Probate proceedings must be had to clear the property of claims, to insure that state and federal taxes have been paid, and to determine the identity of the persons entitled to share.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Vermont does not have commissions or fees which depend upon the size of the estate. If there is no personal estate, charges for probate fees, expenses of administration, charges of personal representatives and attorney's fees would be payable out of the real estate or the proceeds of the sale thereof.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

It is impossible to give a proper answer to this question because a proper answer is dependent upon whether the estate is testate or intestate and whether or not there is a surviving spouse.

4. Liability of real estate for decedent's debts and expenses of administration.

In the manner prescribed by statute, depending on the peculiar circumstances.

5. Nature of lien against real estate accorded creditors.

Creditors do not have a lien unless based upon a mortgage or an attachment created before death.

6. How may real estate be sold free of liens?

By procuring a discharge of the mortgage or the attachment and then obtaining a license after application and notice.

7. How is marketable title established—**(a) In a specific devisee?**

By a partial or final decree after filing an inventory, adjudicating claims, obtaining tax clearances, and obtaining a partial or final decree.

(b) In a residuary devisee?

Same as (a) above.

(c) In an heir-at-law?

Same as (a) above.

8. Power of foreign personal representative to manage and sell real estate.

Foreign personal representative should commence ancillary proceedings as soon as possible. If the foreign personal representative is a corporation, it should obtain authority to do business in Vermont. A foreign personal representative has no authority over Vermont real estate, until appointed as ancillary representative.

9. What real estate owned by the decedent alone must pass de hors the Will?

If the real estate separately owned is occupied by decedent as a homestead, such interest to the extent of \$75,000.00 would pass outside the Will. If the surviving spouse waives the provisions of a Will, the statutory interest would pass outside the Will.

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

- (a) In equal shares to the children of the decedent or the legal representatives of deceased children.
- (b) If decedent is married and leaves no issue the surviving spouse shall be entitled to the whole of the estate, if it does not exceed \$25,000.00; if it exceeds that sum, then \$25,000.00 and half the remainder. The other half of the remainder shall descend as though such spouse did not survive. If there are no kindred, spouse takes all.
- (c) If decedent leaves no issue and no surviving spouse, then in equal shares to the father and mother or the survivor of them.
- (d) If no issue nor surviving spouse nor parents, the estate shall descend in equal shares to the brothers and sisters and the legal representatives of deceased brothers and sisters.
- (e) If none of the foregoing kindred survive, the estate shall descend in equal shares to the next of kin in equal degrees, but a person shall not be entitled by right of representation to the share of any next of kin who has died.
- (f) Homestead interest is \$75,000.00 and shall pass to the surviving spouse [27 Vt. Stat. Ann. §§101, 104].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

It is not sufficient in order to establish marketable title to Vermont real estate, owned by a non-resident decedent, to have an exemplified copy of the Will and probate in the court of the decedent's domicile allowed by the probate court of the district in Vermont where the land is located. The fiduciary must qualify by filing a bond, filing an inventory, having the property appraised, and obtaining a License to Sell or a Decree of Distribution.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

By the devisee obtaining a conveyance from an ancillary personal representative of the domiciliary personal representative who has been duly licensed by the Vermont Probate Court.

(b) In the ancillary personal representative?

A conveyance may be made by the ancillary personal representative if a License is granted by the probate court in Vermont.

(c) In the domiciliary personal representative?

By the domiciliary personal representative who has been duly licensed by the Vermont Probate Court.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Ancillary administration is required when a non-resident decedent owns real estate in Vermont.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

No [14 Vt. Stat. Ann. §1653(6)].

VIRGINIA

George F. Albright, Jr.
McLean, Virginia
September 27, 1993

1. Is real estate a probate asset?

Generally no, unless executor exercises a power of sale or testator directs real estate to pass to executor or gives executor more than a "naked power of sale," such as when a power of sale is aligned with some interest or testamentary purpose or duty [*Yamada v. McLeod*, 416 S.E.2d 222 (Va. 1992)]. However, all real estate not passing by survivorship rights must be inventoried [Va. Code Ann. §26-17.2]. For power with respect to real estate, see Va. Code Ann. §64.1146 *et seq.* However, upon motion of a personal representative to the circuit court of qualification, the court may grant one, all or a part of the powers under Va. Code Ann. §64.1-57 of the Code which includes power of sale [See Va. Code Ann. §64.1-57.1]. Further, the personal representative may execute a deed pursuant to a written contract of the decedent [Va. Code Ann. §64.1-148].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Generally no, except under circumstances set forth above. However, Va. Code Ann. §26-30 allows a reasonable compensation for services rendered.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Costs of perfecting title charged against probate estate: attorneys' fees and commissions and unpaid real estate taxes are charged against personalty, then realty, but testator directions control. Apportionment of death taxes is the rule under Va. Code Ann. §64.1-161 subject to contrary Will or instrument provisions [Va. Code Ann. §64.1-165].

4. Liability of real estate for decedent's debts and expenses of administration.

After personalty, Va. Code Ann. §64.1-181, but residuary real estate may be subject to payment of debts before specific or general bequests of personalty [*May v. May*, 172 S.E.2d 717 (Va. 1970)].

5. Nature of lien against real estate accorded creditors.

None, though real estate is subject to quasi liens [Va. Code Ann. §64.1-181]. Liens arise for unpaid real estate taxes and for federal and Virginia estate taxes.

6. How may real estate be sold free of liens?

By delaying conveyance for a one-year period provided that no suit has been commenced or report filed for debts and demands of creditors [Va. Code Ann. §64.1-183]; otherwise under power in Will; under power pursuant to a partition suit, sale of an incompetent's land or other judicial sale even if such sale is within one year of the decedent's death, if the proceeds of such sale are paid over to a special commissioner [Va. Code Ann. §64.1-184].

7. How is marketable title established—

(a) In a specific devisee?

After expiration of one-year creditors' period, payment of taxes, recording copy of Will and filing lists of heirs [Va. Code Ann. §64.1-183].

(b) In a residuary devisee?

Same as above.

(c) In an heir-at-law?

Payment of taxes, filing list of heirs by administrator [Va. Code Ann. §64.1-134]. An affidavit relating to real estate of an intestate decedent may also be filed by any person having an interest therein [Va. Code Ann. §64.1-135].

The above always subject to change by later Will probate as to real estate still held. No effect on real estate conveyed after one-year period, but prior to later Will probate [Va. Code Ann. §64.1-183].

Note that a deed is exempt from recordation taxes when the grantor is the executor and the sole purpose is to transfer title pursuant to the Will [Va. Code Ann. §58.1-811A(13)].

8. Power of foreign personal representative to manage and sell real estate.

Ancillary representative must be appointed [Va. Code Ann. §64.1-150] who must be a Virginia resident with certain exceptions for parent, sibling, spouse, child, child's spouse, or certain residuary legatees [Va. Code Ann. §26-59].

9. What real estate owned by the decedent alone must pass de hors the Will?

None, dower was abolished effective January 1, 1991 and replaced with "augmented estate" approach [Va. Code Ann. §64.1-16 *et seq.*].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Va. Code Ann. §64.1-62].

11. Intestate share of heirs in real estate.

- (a) All to surviving spouse if parent of all children, or if decedent not survived by children or descendants of children [Va. Code Ann. §64.1-1].
- (b) If spouse not parent of all decedent's children, then to children and descendants. (Subject to Va. Code Ann. §64.1-19, one-third for surviving spouse.)
- (c) If no spouse surviving, all to children and descendants.
- (d) Then to father and mother or survivor; brothers and sisters and descendants; then moieties to paternal and maternal kindred as specified [Va. Code Ann. §64.1-1].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Va. Code Ann. §64.1-92 provides the sole ex parte method of probating a foreign Will and requires:

- (a) An authenticated copy of the foreign Will;
- (b) The certificate of probate in the foreign jurisdiction;
- (c) The admission to probate by the Clerk provided it appears that the proffered Will was so executed as to be a valid Will of lands in Virginia by the law of Virginia.

Only after the Will has been so probated in Virginia does the simple act of recording suffice.

Va. Code Ann. §64.1-94 provides that every Will or authenticated copy admitted to probate shall be recorded by the Clerk of Court; a certified copy of that document may then be recorded in any city or county wherein there is any estate. The recorded Will gives notice to all persons of any devise or disposal of real estate in that county. Recording must be within one year of testator's death if Will is to be valid against bona fide purchasers, heirs at law, or devisees under another Will [Va. Code Ann. §64.1-95]. Thereafter, bona fide purchaser has good title; devisees only have claim to the proceeds.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes. The devisee in probate is vested with title. However, as cited above, a bona fide purchaser is in jeopardy for one year if he buys from him if a later Will is probated. The one-year period for both intestacy and probate is measured from the date of the testator's death.

(b) In the ancillary personal representative?

Alone, no; but yes, with the domiciliary personal representative.

(c) In the domiciliary personal representative?

Alone, no; but yes, with the ancillary personal representative [See Va. Code Ann. §64.1-92 explanation in question 12, above].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Not as a general rule. Real property passes to the heir pursuant to Virginia law of descents [Va. Code Ann. §64.1-1] or to the devisee on probate under the law of descents, and any deviation requires an alienation of title valid under Virginia law. This is accomplished by probating a foreign Will as a Will of real estate, pursuant to Va. Code Ann. §64.1-92. The authenticated documents must show that the foreign Will was executed so as to be valid in Virginia. Transfer of title by operation of law does not require appointment of an ancillary personal representative.

Transfer by sale or other disposition by the personal representative requires compliance with formalities [Va. Code Ann. §64.1-150].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes [Va. Code Ann. §64.1-149 and 150]. The foreign Will has to be probated and the ancillary personal representative duly qualified, but otherwise no court approval of a sale pursuant to a power given the executor is necessary. Power in the executor extends to an ancillary administrator, both of whom must sign the deed for valid conveyance. Va. Code Ann. §64.1-149 validated all conveyances by a foreign executor prior to June 30, 1960, if under a power of sale under the Will and an authenticated copy of the Virginia probate has been admitted to record in the county or city where the real estate is situated.

Va. Code Ann. §64.1-150 provides that the instrument must be signed by both the original Executor and the ancillary administrator.

If the ancillary administrator acts alone, it is felt that unless the Will specifically gives the power of sale to the ancillary administrator, court authorization would be required.

WASHINGTON

S. Alan Weaver
Tacoma, Washington
September 19, 1997

1. Is real estate a probate asset?

Yes [Wash. Rev. Code §11.44.015 §11.02.005(15)]. However, title vests immediately in heirs or devisees subject to debts, family allowance, expenses of administration, and any other charges for which such real estate is liable [Wash. Rev. Code §11.04.250].

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Both [Wash. Rev. Code §§11.56.160, 11.76.110].

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?

Costs of perfecting title to realty as a probate asset are charged against realty. Order of liability is at court's discretion based on nature of debt [Wash. Rev. Code §11.56.265].

4. Liability of real estate for decedent's debts and expenses of administration.

Assets are liable for debts in proportion to the value or amount received by devisees or legacies if there are not sufficient other assets [Wash. Rev. Code §§11.56.160, 11.76.110].

5. Nature of lien against real estate accorded creditors.

None, except a ten-year lien for state estate taxes on real estate [Wash. Rev. Code §83.100.110]. There is no lien upon probate property unless probate commenced within six years of date of death, but liens against specific parcels prior to date of death remain valid [Wash. Rev. Code §11.04.270].

6. How may real estate be sold free of liens?

By court order filing a return of sale and after court confirmation, or after entry of order of solvency [Wash. Rev. Code §§11.56.115, 11.68.090, 11.56.020]. Mortgage and judgment liens are granted preference by Wash. Rev. Code §11.76.110, but Wash. Rev. Code §11.76.120 limits the preference to proceeds of sale of the property subject to the lien.

7. How is marketable title established—

(a) In a specific devisee?

Specific devisee may obtain marketable title:

- (1) By “premature” distribution at any time after four months from first publication of notice to creditors, proof of payment of estate tax, and at any time after entry of order of solvency (providing personal representative is willing to release possessory rights) [Wash. Rev. Code §11.72.006]. Wash. Rev. Code §11.72.002 also provides for distribution of specific property to the person entitled to it under Will or by intestacy, provided that other claimants or distributees are not prejudiced thereby. The property is subject to be returned by an order of the court prior to the decree of final distribution.
- (2) By “final” distribution (i) after order of solvency, upon filing of personal representative’s Declaration of Completion of Probate Administration or (ii) upon entry of decree of distribution.

(b) In a residuary devisee?

Same as specific devisee.

(c) In an heir-at-law?

Filing proof of payment of estate tax and entry of order of solvency [Wash. Rev. Code §11.68.010]; or, if prior to filing distribution, then by petition and order for decree of distribution or, if upon final distribution, then by petition and order for decree of distribution.

Under Wash. Rev. Code §11.04.250, title vests immediately in the heirs or devisees, subject to debts, expenses of administration, and other charges for which the real estate is liable. This title is valid and good against all persons claiming adversely, except the personal representative and persons claiming under that representative.

8. Power of foreign personal representative to manage and sell real estate.

Same as domiciliary. However, a foreign individual personal representative cannot qualify as a personal representative unless there is appointed a resident agent in accordance with Wash. Rev. Code §11.36.010.

9. What real estate owned by the decedent alone must pass de hors the Will?

Each spouse has a one-half individual interest in community property. Decedent cannot will away more than his or her one-half interest [Wash. Rev. Code §26.16.030].

10. Does a Will or codicil convey after-acquired real estate?

Yes [Wash. Rev. Code §11.12.190].

11. Intestate share of heirs in real estate.

- a. Surviving spouse receives all community real estate; one-half separate, if issue survives; three-fourths separate, if no issue but parent survive; all separate property if no issue and no parent survive [Wash. Rev. Code §11.04.015].
- b. Share not received by surviving spouse is distributed in following order: (i) issue; (ii) surviving parent or parents; (iii) issue of parent or parents; (iv) surviving grandparents; and (v) issue of grandparents [Wash. Rev. Code §11.04.015].

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No provision for, although Wash. Rev. Code §11.20.090 provides for admission to probate of a foreign Will with a copy of a Will and the original record of probate, where authenticated by the Clerk of the Court; or, if no Clerk, by a Judge.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent’s local property—

(a) In the devisee?

Under Wash. Rev. Code §11.68.090 an admission to probate and entry of an Order of Solvency creates a conclusive presumption of the authority to convey. No presumption otherwise is provided by statute. Wash. Rev. Code §11.56.010 requires a court order for sale except where the Will contains authority or direction to sell under Wash. Rev. Code §11.56.250.

(b) In the ancillary personal representative?

The ancillary personal representative, who is properly qualified, has the authority to sell property in accordance with (a), above. Wash. Rev. Code §11.36.010 permits a nonresident to qualify to act as personal representative, provided he appoints a resident agent.

(c) In the domiciliary personal representative?

There is no Washington authority for a domiciliary personal representative to convey decedent’s local property. The domiciliary personal representative may be the same person as the ancillary personal representative, provided that, if the domiciliary personal representative is a nonresident, a resident agent must be appointed in a accordance with Wash. Rev. Code §11.36.010, after which the nonresident personal representative would have the same powers as a resident personal representative in accordance with Wash. Rev. Code §11.36.010. Resident agent is usually the attorney.

14. **Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?**
Yes [Wash. Rev. Code §§11.96.050, 11.16.060].
15. **If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?**
Yes [Wash. Rev. Code §11.56.250]. Power inherently exists also in non-intervention Wills under Wash. Rev. Code §11.68.090 after Order of Solvency is entered. There is a presumption of non-intervention powers where personal representative is named in Will [Wash. Rev. Code §11.68.020].

WEST VIRGINIA

Charles B. Stacy
Charleston, West Virginia
July 27, 1993

1. **Is real estate a probate asset?**

No. Title to real estate vests directly in the devisee or intestate successor, unless the Will directs its sale, or unless sold by the executor under a power of sale contained in the Will [W.Va.Code §44-8-1]. However, if the personal property is insufficient to satisfy all obligations of the estate, the real estate may be sold by judicial proceeding [W.Va.Code §44-8-3].

2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**

No, unless sold by the personal representative under a direction or powers of sale or pursuant to a judicial proceeding to subject it to the payment of debts.

3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**

Such expenses are borne by the devisee or heir, unless the property is sold by the personal representative under a direction or power of sale or pursuant to a judicial proceeding to subject it to the payment of debts.

4. **Liability of real estate for decedent's debts and expenses of administration.**

Unless real estate is directed to be sold or is sold by the personal representative under a power of sale contained in the Will, real estate is not liable for the decedent's debts or for expenses of administration unless the personal estate of the decedent is insufficient for the purpose, and a proceeding to subject the real estate to the payment of the deficiency is instituted by the personal representative or a creditor [W.Va.Code §44-8-7].

5. **Nature of lien against real estate accorded creditors.**

The statute [W.Va.Code §§44-8-3 & 5] does not specifically create a lien, but the Supreme Court of Appeals has said that it gives "to the creditors liens (severally) on the decedent's real estate at the date of his death" [*Yokum v. Yokum*, 110 W.Va. 221, 157 SE 579 (1931)]. The Virginia Court has said of the similar statute in that state, "This provision was added manifestly in the interest of the creditor of the decedent, and gave him a quasi lien on the real estate of the decedent for the period of one year" [*Heeke v. Allen*, 127 Va. 65, 102 SE 655 (1921)].

6. **How may real estate be sold free of liens?**

By judicial decree where a proper proceeding is instituted to subject the real estate to the payment of the decedent's debts, if the personal property is insufficient. Otherwise, only after the expiration of one year from the date of the decedent's death, and then only if no proceeding has been instituted to sell the property for the payment of debts, no report has been filed showing the insufficiency of the personal estate, and the purchaser has no notice of fraudulent intent by the seller [See, e.g., *Gunn v. Monroe*, 118 W.Va. 653, 191 SE 850 (1937)].

7. **How is marketable title established—**

(a) **In a specific devisee?**

(b) **In a residuary devisee?**

(c) **In an heir-at-law?**

The devisee or heir will ordinarily be deemed to have marketable title after the expiration of one year from the date of the decedent's death, if no proceeding has been instituted to sell the property for the payment of debts and no report has been filed showing the insufficiency of the personal estate [W.Va.Code §11-11-17 imposes a lien on a decedent's real property for ten years from the date of death, which must be released in order to make the property marketable. §17a provides for the obtaining of a release by the domiciliary personal representative of a nonresident estate where there is no administration in West Virginia].

8. **Power of foreign personal representative to manage and sell real estate.**

The rules governing foreign personal representatives are the same as those applicable to resident personal representatives, whether the decedent was a resident or nonresident of the state. Real property passes directly to the devisee or heir, and can be sold by the personal representative only if directed or authorized in the Will, or pursuant to judicial proceeding to subject the real estate to the payment of debts.

9. What real estate owned by the decedent alone must pass de hors the Will?

None. However, a surviving spouse may elect to take a share of the "augmented estate," the percentage varying in accordance with the length of time the decedent and the surviving spouse were married to each other; [W.Va.Code §42-3, enacted in 1992; no distinction is made between real and personal property] and any head of a household residing in the state may claim a homestead exemption of \$5,000 [W.Va.Code §38-9].

10. Does a Will or codicil convey after-acquired real estate?

Yes.

11. Intestate share of heirs in real estate.

- (i) If there is a surviving spouse, and if there is no surviving descendant of the decedent, or if all of the decedent's surviving descendants are also descendants of the surviving spouse, and there is no other descendant of the surviving spouse who survives the decedent, the surviving spouse takes the entire intestate estate.
- (ii) If there is a surviving spouse, and all of the decedent's surviving descendants are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse takes three-fifths of the intestate estate, and the decedent's descendants take two-fifths by representation.
- (iii) If there is a surviving spouse, and one or more of the decedent's surviving descendants are not descendants of the surviving spouse, the surviving spouse takes one-half of the intestate estate, and the decedent's descendants take one-half by representation.
- (iv) If there is no surviving spouse, the entire intestate estate passes to the descendants of the decedent by representation; or, if there are no descendants of the decedent, to the decedent's parents equally, or to the survivor; or, if there are no surviving descendants or parents, to the descendants of the decedent's parents or either of them by representation; [This is the language of W.Va.Code §42-1-3a(c)] or, if there is no surviving descendant, parent, or descendant of a parent, one-half to decedent's surviving paternal grandparents, or the survivor, or their descendants by representation, and one-half to decedent's surviving maternal grandparents, or the survivor, or their descendants by representation.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

Where the Will of a nonresident has been proved in the state of domicile, an authenticated copy of the Will and the certificate of probate may be admitted to probate in West Virginia as a Will of real estate if it appears from the copy that the Will was proved in the foreign court to have been so executed as to be a valid Will of land in West Virginia by the laws thereof [W.Va.Code §41-5-13]. Admission to record amounts to probate [*James' Sons Co. v. Crouch*, 72 W.Va. 794, 79 SE 815 (1913)]. Ancillary administration is not necessary, as the real estate passes directly to the devisee [Ancillary administration may be necessary if there is personal property in West Virginia requiring administration].

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

Yes, subject to the comments above under questions 4-7, which apply equally to real property of nonresident decedents.

(b) In the ancillary personal representative?

No, unless the Will authorizes or directs sale by the ancillary personal representative and one is appointed. Only an individual who has been appointed in the state of domicile may be appointed as ancillary personal representative in West Virginia [W.Va.Code §44-5-3].

(c) In the domiciliary personal representative?

There appears to be no reason why a domiciliary (foreign) personal representative who is directed or authorized by the Will to sell real estate in West Virginia cannot do so, but there is no authority on the point.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

No. Ancillary administration is required only where there is tangible personal property in the state.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

If an ancillary administrator is appointed, and has a power of sale under the Will, no Court approval is required for a sale.

1. **Is real estate a probate asset?**
Yes.
2. **Is real estate subject to fees (commissions) for personal representatives and legal fees?**
Subject to both legal and personal representative fees.
3. **How are expenses attributable to real estate handled (e.g., perfecting titles, taxes, legal fees, etc.)?**
As administration expenses.
4. **Liability of real estate for decedent's debts and expenses of administration.**
Same as personalty.
5. **Nature of lien against real estate accorded creditors.**
A judgment when docketed is a lien upon the real estate of the debtor and lasts for ten years.
6. **How may real estate be sold free of liens?**
Personal representative sells free and clear of claims in the estate but subject only to the creditors' secured interests in the property.
7. **How is marketable title established—**
 - (a) **In a specific devisee?**
On distributions by the personal representative.
 - (b) **In a residuary devisee?**
On distributions by the personal representative.
 - (c) **In an heir-at-law?**
On distributions by the personal representative.
8. **Power of foreign personal representative to manage and sell real estate.**
Ancillary letters granted on filing domiciliary letters.
9. **What real estate owned by the decedent alone must pass dehors the Will?**
None.
10. **Does a Will or codicil convey after-acquired real estate?**
Yes.
11. **Intestate share of heirs in real estate.**
 - (a) Separate property to surviving spouse provided all surviving issue are also issue of the surviving spouse, or if there are no surviving issue. If one or more of surviving issue are not the issue of the surviving spouse, one-half of the separate property goes to the surviving spouse and one-half to the issue of the decedent.
 - (b) If no surviving spouse, to the issue of the decedent, if no issue surviving, then to the parent or parents, and if no issue and no parents, to the brothers and sisters of the decedent.
 - (c) Marital property, as defined under Wisconsin Marital Property Act, is owned one-half by each spouse. The surviving spouse will retain his or her one-half interest, and the decedent's one-half is distributed the same as separate property (See (a)).
12. **Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?**
Authenticated copy of Will is sufficient if six years have passed since death of decedent (Wis. Stat. §868.05). Court certificate required showing no Wisconsin death tax is owing or has been paid (Wis. Stat. §868.05).
13. **Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—**
 - (a) **In the devisee?**
Yes [Wis. Stat. §860.01].

(b) In the ancillary personal representative?

Yes [Wis. Stat. §§860.01 and 868.01].

(c) In the domiciliary personal representative?

Yes [Wis. Stat. §860.01].

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes, certificate of assignment available under some circumstances [Wis. Stat. §868.05].

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

Yes [Wis. Stat. §860.01].

WYOMING

James L. Applegate
Cheyenne, Wyoming
September 19, 1997

1. Is real estate a probate asset?

Yes.

2. Is real estate subject to fees (commissions) for personal representatives and legal fees?

Both.

3. How are expenses attributable to real estate handled (e.g., perfecting titles, taxes legal fees, etc.)?

Expenses associated with real estate are handled like other expenses and are payable out of the income of the estate received by the person representing it from the residue unless otherwise directed by the Will. All debts and expenses are payable out of personalty or realty without priority.

4. Liability of real estate for decedent's debts and expenses of administration.

Such expenses are payable out of the income of the estate received by the personal representative, then from the residue unless contrary to a provision in the Will. There is no priority between realty and personalty.

5. Nature of lien against real estate accorded creditors.

An allowed claim against the estate or a judgment rendered on a claim against the estate does not create a lien against any estate assets. Mortgages, liens and security interests created during life are maintained, subject to a prior right of payment from the secured property for court costs, funeral expenses, allowances, expenses of administration, expenses of the last illness, and wages to servants and employees for services rendered within 90 days of death.

6. How may real estate be sold free of liens?

Real estate may be sold if a power of sale is given in the Will; otherwise by judicial proceeding.

7. How is marketable title established—

(a) In a specific devisee?

After Final Decree of Distribution and recording certified copy.

(b) In a residuary devisee?

After Final Decree of Distribution and recording certified copy.

(c) In an heir-at-law?

After Final Decree of Distribution and recording certified copy.

8. Power of foreign personal representative to manage and sell real estate.

A nonresident acting as an executor has the same powers as a resident executor. A nonresident may not act as Administrator unless a Wyoming resident is appointed as a Co-Administrator. Wyoming probate is necessary for transfer of title to Wyoming real estate, although foreign probate may be adopted for distribution of property valued under \$70,000.

9. What real estate owned by the decedent alone must pass deors the Will?

- (a) If the Will deprives the surviving spouse of over one-half of probate estate after payment of debts, the spouse may renounce the Will and take an elective share of one-half (one-fourth if there are children by a previous marriage and no children of the last marriage). This is a charge on all estate assets until satisfied, but it may be satisfied out of any part of the estate.

- (b) The surviving spouse, or if none, the minor children, may petition to receive distribution of the Homestead not exceeding \$30,000 in value, and certain items of exempt property, free of creditors' claims except for funeral expenses, and costs of administration. If there are minor children of a previous marriage and children of the last marriage, the surviving spouse and minor children each receive one-half of the Homestead.

10. Does a Will or codicil convey after-acquired real estate?

A Will is construed to pass all property which the testator owns at his death, including property acquired after execution of the Will, unless a contrary intention is indicated by the Will.

11. Intestate share of heirs in real estate.

- (a) One-half to surviving spouse, one-half to children, *per stirpes*.
- (b) If no children, all to surviving spouse.
- (c) If no surviving spouse, to children *per stirpes*.
- (d) If no surviving spouse and no children, then to the father, mother, brothers, and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts.
- (e) If no surviving spouse, children, parents, brothers, or sisters, then to grandparents, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.

12. Is duly recorded exemplified copy of the Will of nonresident decedent (and authenticated copies of other pertinent probate documents) sufficient to establish a muniment of title without the necessity for further ancillary administration?

No.

13. Is a foreign Will admitted to record locally conclusive (or presumptive) evidence of authority to convey the decedent's local property—

(a) In the devisee?

No. A foreign Will admitted to probate locally must be administered in the same manner as a Wyoming Will. The letters testamentary issued after the Will is admitted to probate are evidence of authority to convey local property.

(b) In the ancillary personal representative?

No. Letters testamentary are evidence of the authority of the Wyoming executor to execute a valid deed to Wyoming real estate.

(c) In the domiciliary personal representative?

No.

14. Except for the procedures (specified in question 12, relating to the furnishing of copies of the Will and probate documents), is ancillary administration required where a nonresident decedent owns real estate in the state?

Yes. If (i) the realty is valued at \$70,000 or less and (ii) the decedent's estate has been probated and settled in another state, ancillary administration may be avoided by filing certified copies of the petition, order of appointment of personal representative, inventory, and final decree of distribution from said other state and a full showing made that debts of the estate have been paid and the District Judge giving notice of publication for a period of three weeks of the intention of the Petitioner to have the probate proceedings admitted in this state as a probate of the estate. These copies of the proceedings will be considered as the original proceedings in Wyoming if proper notice is given and no objection is made. In all other cases, the "ancillary" probate must be handled in the same manner as the probate of a resident's estate.

15. If such ancillary administration is required, does a power of sale in the Will entitle the ancillary personal representative to exercise such power without Court approval?

As with domiciliary probate, the power of sale permits the sale of property without prior court approval. Nevertheless, as with sales made pursuant to Wills containing no such power, a return of such sale must be made to the court, and no title passes until the sale is confirmed by the court.

