

Real Estate Agents: A Primer on Florida Probate Property

By [Long H. Duong, Esq.](#)



Off the top of my head, real estate assets make up about 75% of the estates we handle. With over 600 probate cases under our belt, that's roughly 450 real estate transfers throughout the State of Florida. Many of these properties are either sold during probate administration or shortly after the property is transferred to the heirs. As a result, we've become very familiar with title companies and real estate title attorneys throughout the State. This demands a collaborative effort because we're all working towards the same goal.

Below is a primer on what you, the real estate agent, **need to know** about how probate works and how it might affect your ability to list, negotiate and close that deal. All of the following questions and answers are targeted specifically to you, *the hardworking real estate agent*.

What is Probate?

In the context of real estate, it's a court process that authorizes either:

1. the sale of real estate to a prospective buyer, or
2. the release/transfer of real estate to a decedent's heirs

Is probate necessary if the owner had a Will?

Maybe. The need to probate is **not determined** by the existence of a Will. A Last Will and Testament is a set of clear instructions if probate is necessary.

So when is probate necessary?

Probate is necessary if the title to the property **terminates in the name the decedent**.

Example 1: Steve owned a townhouse in Clearwater which he rented out to snowbirds. The last recorded **deed named Steve as the sole grantee**. There were no subsequent deed transfers of the property. When Steve died, the property terminated with him, that is, the property did not automatically pass onto anyone else. Therefore, a probate court must grant Steve's personal representative (PR) the authority to transfer or sell the property.

Example 2: If Steve was married when the deed was executed and the deed read: "to Steve and Nancy, **as husband and wife**", then the property would pass to Nancy by operation of law and terminate in Nancy's name if she survived him. No probate would be necessary. The language indicating that they are husband and wife is imperative in this scenario. Again, probate would *not* be necessary and Nancy is free to sell the property.

Formal Administration of Real Property

Formal administration of an estate – the traditional probate process – is necessary when all of the non-exempt assets are valued at more than \$75,000 and less than 2 years have passed since the date of death. One may not pick and choose what assets are probated. As the agent, here are the finer points that apply to your potential listing:

Homestead Property:

1. Title examiners will require a copy of an **Order Determining Homestead Status of Real Property**. In the probate arena it is often referred to as a "homestead order". A petition should be filed as soon as possible to request this "determination".
2. The homestead order **protects the property from unsecured creditors** such as credit card banks and medical bills. It does not sever any existing mortgages on the property.
3. Some judges will not sign a homestead order until the 90 day creditor period has expired – the **notice to creditors** should be published as soon as possible.
4. Once entered, the property is severed from the probate administration and the property is officially released into the names of the heirs.

Agent's Tip: Estate is not the Seller of Inherited Homestead

In a purchase/sale agreement, the actual heirs should be listed as the sellers, not the estate (or the PR). However, if court authorization is sought to sell the property BEFORE the homestead order is issued, then the estate/PR will be the seller.

Non-homestead Property:

1. Property that was not the decedent's homestead is considered non-exempt, that is, **not protected from claims** against the estate.
2. Once probate is opened, a **notice to creditors should be published** to begin the running of a 90 day "creditor period". This period presents an opportunity for creditors to file claims against the estate.
3. If there is a Will that grants the PR powers to sell property, then the property can be sold by the appointed PR*, but the **proceeds must be held in an estate checking account** until the probate administration is complete.
4. If there is no Will or the existing Will does not expressly grant PR powers to sell, the **PR must seek court authorization** prior to selling the property.

**In some counties, like Miami Dade, the judges require that the PR seek an explicit authorization to sell property, regardless of an existing "power to sell" clause in a Will.*

Agent's Tip: Ask your Client about Potential Estate Creditors

Claims against an estate can eat profits from the sale of non-homestead real estate. You should ask your client if there are any significant creditors (medical debt is often the sneakiest). This information will likely have an effect on your purchase price negotiation.

Summary Administration of Real Property

Summary administration is available if all non-exempt assets are valued at \$75,000 or less *or* more than 2 years have passed since the date of death. Note that the value of a homestead property is *not counted* towards the \$75,000 threshold so it is possible to bring a homestead property through the summary administration process even if the value far exceeds \$75,000.

As the name suggests, summary administration is *procedurally* faster but it doesn't always serve as the best option. Encourage your client to discuss all facts with a probate attorney before diving in.

Homestead Property:

The factors concerning homestead property in summary administration are virtually identical to the factors in formal administration. If the only asset that demands probate is a homestead property, summary administration is a suitable choice.

Non-Homestead Property:

If the asset is not homestead property and summary administration is a good option, note that most judges will not transfer the property until the 90 day creditor period has expired.

Questions to Ask Your Client

In no particular order, there are a host of questions you should ask your client. If you don't feel comfortable making your initial assessment, just secure the answers to these questions and consult with a probate attorney.

If probate has not been filed:

1. Have they consulted with a probate attorney?
2. Do all beneficiaries/heirs of the estate agree that the property should be sold?
3. Was the property to be sold the decedent's homestead (primary residence) until death?
4. Will debts of the decedent be significant?
5. Have they determined which probate procedure is appropriate?

If probate *has* been filed:

1. Where applicable, ask if a homestead petition has been filed.
2. Has the notice to creditors been published? When?
3. If the property must be sold relatively soon, is court authorization necessary and has the client taken the appropriate steps?

Final Considerations: Be Prepared!

Entering into a transaction for the purchase and sale of probate property requires some planning and preparation. **Don't treat it like a normal transaction** or your buyers and sellers may become frustrated with delays and missed deadlines or premature closing dates.

Consider the timing of your transactions – **summers and holiday seasons slow down all court activity**. Be sure to **add conditional language** to allow for probate contingencies. Buyers and sellers who are notified ahead of time that their transaction is subject to probate are going to be much more understanding and patient. Happy Selling!



About the author:

Long H. Duong (last name pronounced "Young") is the founding attorney of LD Legal, LLC, based in Gainesville, FL. He has represented clients in probate matters **throughout the State of Florida** and takes particular interest in helping them understand the process and finding the most practical solutions for their probate needs. Learn more at <http://www.weprobateflorida.com>.