

Attacking the Probate Beneficiaries in Real Estate Investing

Whatever the title may have you thinking, it probably isn't correct. What I am about to divulge is a very underhanded tactic that a few unscrupulous investors have been using to get probate deals. I am exposing their actions so you better know what to do in your next probate situation.

Let's start when you have a personal representative ("PR") or executor who says "yes" to your offer to sell his property that is currently in probate. Let's assume further that the judge has agreed to allow the sale and you set a closing date – this deal is in the proverbial bag or is it?

If the property is still in the name of the deceased, each of the beneficiaries will have to individually sign deeds transferring their interests to you, the buyer. As a rule of thumb, if there are two or more beneficiaries, there seems to always be one that wants to keep the property, second guesses the sales price, and generally believes that his price will be reduced by the amount of his beneficial interest.

For example, if there are two beneficiaries and the sales price is \$100,000, each beneficiary would get \$50,000 less any expenses for the sale and the probate costs. One beneficiary, almost always not the personal representative, decides his real cost for the property is only \$50,000 and he can rehab and resell the property for much more – and he may be right. If he succeeds in convincing the PR that he wants the property he will have to come up with at least \$50,000 plus the same expenses he would have had plus the PR's expenses. This is a deal-killer for you if he succeeds, but this happens only about 10% of the time.

So now let's move forward even further in time where you have no apparent opposition from anyone and you are headed to the closing. The closing agent will have mailed the deed to the second beneficiary, or how ever many other beneficiaries there are. But he can't close until the deeds come back. The issue for the closing agent is that if he doesn't get a deed from each beneficiary, that beneficiary can come back and make a claim on the title insurance for any number of reasons, and the title company will likely settle the claim.

Suddenly the second beneficiary says he won't sign anything and he wants more money – even if you are already over-paying for the property! Now what? The first point of contact is the PR who signed the contract and who is responsible for its terms. If the property had been transferred to all the beneficiaries on title (in the public record) all of these beneficiaries should have signed the Purchase and Sales Agreement. If they all signed, each one, including the one who changed his mind has a breach of contract liability and resulting damages. Your liability as a buyer is limited to your deposit.

For all probate deals we do, we first file a Notice of Interest or Memorandum of Contract in the public record. In our area, the Clerk of the Court sends a certified copy to each party mentioned in the document – you as the investor, each beneficiary as a seller. This official notification puts the seller(s) on record that you have a viable and enforceable contract. We usually send the probate attorney a copy on our own so he is “in the loop” of the sales process. Almost always, the probate isn’t getting paid until the property, the main asset of the estate, is sold. He definitely has a vested interest in getting the deal closed.

In the situation that happened to one of our mentoring students recently, all six beneficiaries were in the same city. Since a probate is a matter of public record, all six were contacted by other investors, but one investor asked and was told what the property sold for. He targeted two of the beneficiaries to agree not to sign the deeds necessary for the title transfer and one of them said “No, I want more money”. This is called torturous interference with a legal contractual agreement, or interfering with a valid contract under civil (tort) law. This aspect of getting sued never seems to bother unscrupulous people.

The Notice of Interest would have clouded the title so the other investor couldn’t have closed without us giving the closing agent a Release of Lien or Release of Notice of Interest. Otherwise, had it closed, we would have started a title action against the closing agent’s title insurer. It cost over \$50 to send the Notice of Interest to all the beneficiaries and us as the buyer but it proved to be worth it as it has so many times in the past. If you decide to use a Notice of Interest, make sure your Purchase and Sale Agreement allows it. If it doesn’t, just add a clause that says something to the effect, “Seller understands and agrees that Buyer will file a Notice of Interest in the Public Record”. Check with your attorney to see what wording he/she prefers.

I guess to add insult to injury; we had already sold the property, pending our getting legal title, to another investor – who later turned out to be the party that contacted the lone wolf holdout! In this case, the probate attorney also threatened to sue the one person who wouldn’t sign. Not only is real estate investing a small community, life remembers also, so do the right thing all the time so it doesn’t come back to haunt you.

To you limitless success,
Dave Dinkel