

REAL ESTATE TRANSACTIONS IMPACTED BY DEATH AND DIVORCE

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Fiduciary Duties in Death and Divorce in Real Estate Transactions Only

Fiduciary Duty: The obligation created by law or by agreement to act in the best interests of another. It requires the exercise of care in performing functions related to that duty.

When representing a client in the sale of property due to divorce or death, an agent must take care not to get tangled up in the emotions of the client. This refresher on fiduciary duties will also keep agents from getting tripped up by well-meaning friends and family as well as the agent's own desire to be helpful.

Common sticking points include:

- Making sure the right parties are named in the listing contract and agreement of sale.
- Seller Disclosure issues.
- Best practices for dealing with communication during the transaction (especially when contacted by individuals who are not the legal decision maker).

Real Estate Transactions Involving Divorce

- **In a divorce, who should sign the documents such as the listing contract and agreement of sale?**
 - ALL owner(s) of the home!
 - If both spouses own the home, then both should sign.
 - If one spouse owns the home, then that spouse should sign.
 - If both spouses own the home and one spouse has given authority to the other to complete these documents, then you need all relevant property distribution agreements, court orders and/or a letter from the divorce lawyers outlining the agreements between the spouses, including anything purporting to provide one spouse's authority to the other.

- **What if one spouse lives in the home but the spouse who owns the home does not, who completes the seller's disclosure?**
 - The seller(s) of the home! Seller(s) = Owner(s).
 - The owner's spouse may claim not to know about any issues with the home, so shouldn't the other spouse fill it out? NO!
 - The owner/"seller" must fill out the seller's disclosure.

68 Pa. C.S. § 7303. Disclosure of material defects.

Any seller who intends to transfer any interest in real property shall disclose to the buyer any material defects with the property known to the seller by completing all applicable items in a property disclosure statement which satisfies the requirements of section 7304 (relating to disclosure form). A signed and dated copy of the property disclosure statement shall be delivered to the buyer in accordance with

section 7305 (relating to delivery of disclosure form) prior to the signing of an agreement of transfer by the seller and buyer with respect to the property.

- The spouse who lives in the property should help by, for example, providing receipts/invoices for all maintenance, repairs or upgrades in the home.
 - The owner spouse should ask the spouse who lives in the property for their input, go-betweens including lawyers, Realtors or agents may be used in particularly combative situations but, however accomplished, communication is key.
- **What if your client is buying from a couple in the midst of a divorce?**
- Be aware of the points above.
 - Did the correct seller sign all relevant documents?
 - Who lived in the home prior to listing? If not the owner/seller, was the home's occupant consulted?
 - Expect delays!
 - The Sellers may have disagreements on terms.
 - There may be multiple lawyers reviewing documents.
 - The sellers' agent may need to obtain additional paperwork.

Real Estate Transactions Involving Death

- **The home seller died after signing the agreement of sale but before closing, can you complete the transaction?**
- Yes! The sales agreement is binding upon the estate of the deceased.
 - But there are some additional steps to take and pitfalls to avoid.
 - If the deceased was incapacitated but had a Power of Attorney prior to passing away, the POA has no authority once the principal dies, so who does? The executor or administrator of the deceased's estate.
 - The seller must raise an estate to establish the identity and authority of the executor/administrator. Until the estate is raised, no one can sell the property.
 - The prior POA may be the executor or administrator but not necessarily. Do not assume.
 - Do not accept oral representations about the decedent's wishes, about what the will says or what the plan was prior to the death. You need it in writing.
 - Nothing signed is binding until the estate is raised and the executor/administrator signs off.
 - Much like in the divorce setting, expect delays!
 - The estate must be raised.
 - The will, if any, must be consulted.
 - If you are mid-transaction communication with the parties to set expectations, extend deadlines where possible, and potentially loop in

counsel for the estate when possible to get reliable timelines and possibly assurances that the transaction will occur.

- **The home buyer died after signing the agreement of sale but before closing, can you complete the transaction?**

- Yes, but not always.
- What does the agreement of sale say? Is it binding on the heirs, executors, administrators and assigns of the buyer? If not, it may be hard to enforce the sales agreement. If yes, then you have a chance.
 - If the sales agreement is binding on the heirs, executors, etc... then you can seek specific performance:

20 Pa. C.S. Section 3390(a): “If any person makes a legally binding agreement to purchase or sell real or personal estate and dies before consummation, his personal representative shall have power to consummate it, but if he does not do so, the court, on the application of any party in interest and after such notice and with such security, if any, as it may direct, in its discretion, may order specific performance of the agreement if it would have been enforced specifically had the decedent not died.”

You’ll have to file a lawsuit. You may also have to take a back seat to other, possibly secured, creditors of the deceased’s estate.

- If the sales agreement is not binding on the heirs, executors, etc... it’s less likely that you can enforce the sales agreement to buy the home and, even then, you may still have to take a back seat to other, possibly secured, creditors.
- If the sales agreement is binding on the heirs, executors, etc... is the agreement conditional on obtaining a mortgage? The heirs, executors, etc... would need to attempt to obtain the mortgage before they could back out. *Bassetti v. Talarico*, 80 Pa. D&C 572 (Phila CCP 1952).
- If the sales agreement is not binding on the heirs, executors, etc... and the agreement is conditional on obtaining a mortgage, you’re out of luck.

Make sure the executor/administrator signs all documents in their official capacity – not just their name. The individual human who was named the executor/administrator is NOT the seller; it’s the estate.

Bonus Issue:

- **Does PA law require disclosure of murder/suicide/violent crime inside a home for sale?**
 - o NO! The only disclosures required are material defects.
 - o Whether a violent crime or death constitutes a material defect is a highly subjective inquiry and the law does not require such disclosure as a result

Milliken v. Jacono, 96 A.3d 997 (Pa. 2014) – murder/suicide in home does not constitute an actionable material defect.

In February 2006, a man shot and killed his wife and then himself in the family home in Pennsylvania. The crime was highly publicized in local media and on the internet. The Jaconos purchased the home in September 2006 for \$450,000. They invested a lot of time and money in refurbishing the home before listing it for sale with Re/Max in 2007.

The Jaconos disclosed the murder/suicide to their listing agent. They conferred with their attorneys, listing agent and PA Real Estate Commission about whether they had to disclose the crimes on the RESDL. They were uniformly advised it was not a required disclosure. Their listing agent advised them to disclose it anyway but the Jaconos declined based on the previous advice that it was not required.

Plaintiff Milliken, a California resident, purchased the property for \$610,000 later in 2007 after viewing the home and the RESDL. About a month prior to closing, Milliken was given a copy of the Homeowner's Association documents listing the prior owners of the home and noting that the sellers purchased from their estate. Milliken did not investigate further despite admitting she had some lingering questions about why the home was purchased for so much less than it was selling for (her agent suggested it may be a mortgage foreclosure).

The sale closed. Milliken moved in. A month later, she learned of the crimes and claimed she never would have purchased the home had she known. She filed a lawsuit alleging the Jaconos had violated their duty of disclosure of this material defect.

The trial court ruled in favor of the Jaconos (sellers). On appeal, the Superior Court initially reversed but after an *en banc* panel reviewed the case, the Superior Court affirmed holding that “psychological damage to a property cannot be considered a material defect in the property which must be revealed by the seller to the buyer.”

The PA Supreme Court also affirmed wondering aloud: “does a bloodless death by poisoning or overdose create a less significant ‘defect’ than a bloody one from a stabbing or shooting? How would one treat other violent crimes such as rape, assault, home invasion, or child abuse? What if the killings were elsewhere, but the sadistic serial killer lived there? What if satanic rituals were performed in the house?” The high court declined to weigh in on such questions and certainly did not expect seller's to navigate them.

Not Directly Real Estate Related Bonus Issue:

- **If in the midst of a divorce proceeding one spouse dies, can they still get divorced?**
 - o NO! So long as no grounds for divorce were established prior to the death.

Gerow v. Gerow, 962 A.2d 1206 (Pa. Super. 2008) – In general, death of a spouse during pendency of divorce proceeding abates the divorce action and any and all claims for equitable distribution.

Husband filed for divorce and served wife on December 26, 2001. No answer was filed for 4 years! Husband had a heart attack and lapsed into a coma in July 2006. A special master was appointed in August 2006. In an attempt to keep the proceeding moving, a petition to appoint a guardian ad litem was filed on August 1, 2006. Husband passed away on September 19, 2006 and the petition to appoint guardian was denied as moot thereafter.

On September 21, 2007, a motion to substitute a personal representative for the deceased husband in the divorce action was filed seeking to determine the parties' economic rights and dispose of "his" assets as contemplated in husband's will. The trial court denied the motion on grounds that it could not determine whether there were grounds for a divorce without husband.

Notably, if grounds for divorce had previously been established, the court could have determined the parties' economic rights, but still could not enter a divorce decree.