

Sixth Sense

I seem to be seeing my share of dead people these days in real estate transactions. Naturally, when a seller dies during the pendency of a real estate contract the question asked is whether the contract is still enforceable.

In 1835 the Virginia Supreme Court answered this question, in the case of *Moore's Adm'rs v. Fitz Randolph*, 33 Va. 175 (1835), as follows:

For myself, I must say, that I can come to no such doctrine; for the cases clearly shew, that if a man owning land contract for the sale of it, and die before a conveyance executed, his heir at law will be decreed to perform the agreement in specie, even though not named in the covenant. The cases cited by Sugden (p. 145), fully support this.

Now, if you were ever wondering why lawyers get paid so much to do research then all you need do is read this case – I didn't know what "specie" was either. (It means in a similar kind, such that the judge was saying the heirs will have to perform under the contract in a fashion similar to the original seller).

This result is true not only in Virginia, but to my knowledge in all fifty states. In many jurisdictions the answer will turn on whether the contract contains language stating that it is "binding on the heirs." Curiously, The REIN Standard Purchase Agreement no longer contains that language (the VAR contract still does), but the law presumes that it is meant to be binding on the seller's estate (that is the language from the case quote above means when the judge says "even though not named in the covenant") anyway.

Sometimes the seller dies before the deed is executed and so the question becomes: who will sign the deed? Again, Virginia law provides a pretty clear answer, at VA. CODE § 64.1-148:

Legal Corner

When any deceased person shall have executed and delivered a bona fide written contract of sale, purchase option, or other agreement binding such deceased person, his heirs, personal representatives, or assigns, to convey any real property or interest therein, his personal representatives may, upon full compliance by the purchaser with the terms and conditions of such contract, option or agreement execute a deed and do all things necessary to effect the transfer of title to such real property or interest therein to the purchaser and such transfer shall be as effective as if it had been made by the deceased obligor.

It may well be that closing will be delayed somewhat when a seller dies, but as you can see it is clear that the buyer can insist and require the estate to conclude the transaction. Is the reverse true? Can a seller require a deceased buyer's estate to perform under a contract? While in theory it is true (the judge above refused to answer that converse question), bear in mind the practical nature of our modern contracts – financing based on the buyer's income, owner occupancy, etc. would almost certainly dictate a different result. Perhaps if the contract were a straightforward, non-personal, cash deal one could bind a buyer's estate. Otherwise I would say no.

Please email any questions, comments or suggestions to me at bdlytle@lytlelaw.com, where, to the best of my knowledge (but perhaps like Bruce Willis's character Dr. Malcolm Crowe), I am still alive.