

INSOLVENT ESTATES

When estate assets need to be sold in order to obtain funds to pay debts, taxes and expenses of administration, all of the assets of the decedent's estate, real and personal, are available to be sold by the personal representative, absent a contrary provision in the decedent's Will. However, the personal representative must be satisfied that a sale of specific assets is in the best interest of the decedent's estate. See N.C.G.S. § 28A-15-1 and N.C.G.S. § 28A-13-3(a)(1). Unless otherwise specified in the Will, N.C.G.S. § 28A-15-5 provides that the assets of the estate will abate, without preference or priority between real and personal property, in the following order:

- (1) property not disposed of by Will;
- (2) residuary devises;
- (3) general devises;
- (4) specific and demonstrative devises.

Since title to personal property vests in the personal representative upon qualification, a personal representative has the power to sell or lease it without court order. A judicial sale is not required and the personal representative may sell personal property at public or private sale under N.C.G.S. § 28A-16-1. This general rule is subject to an exception set forth in N.C.G.S. § 28A-16-3, which provides that if a decedent is survived by a spouse, the personal representative cannot sell household furnishings located in the decedent's home place until the expiration of the time limits for the surviving spouse to elect a life estate in lieu of an intestate share pursuant to N.C.G.S. § 29-30.

With regard to real property owned by the decedent, if the personal representative has title to the realty, an express power of sale under the terms of the decedent's Will, or if the Will incorporates the provisions of N.C.G.S. § 32-27(2) by reference, the personal representative may sell real estate without obtaining court approval upon such terms as

the personal representative determines to be in the best interest of the estate. See N.C.G.S. §§ 28A-17-8 and 28A-15-1(c). If the personal representative does not have title to the real property or a power of sale in the Will, a sale by the personal representative to raise cash to pay debts, claims and expenses of the estate, or for the advantage of the estate, must be pursuant to a special proceeding before the Clerk of the county in which the land is located. See N.C.G.S. § 28A-17-1. All persons having an interest in the estate must be made parties to the proceeding, and the property will be sold at public auction unless a private sale is allowed by the Clerk.

If the heirs or devisees of real property desire to sell it and the personal representative is satisfied that there are sufficient assets to pay debts, taxes and expenses, the personal representative must join in the sale of the property by the heirs or devisees in order for good title to pass to the purchasers. If, however, the personal representative needs funds to pay debts, and the heirs are willing to sell the property and advance a portion of the sale proceeds to the personal representative, a written agreement is advisable prior to the sale in order to give the personal representative assurance that the personal representative will receive the necessary funds from the proceeds of the sale.

If all assets of the estate have been liquidated to pay debts of the estate and there is still a shortfall, the personal representative may need to look outside of the estate for property that previously belonged to the decedent. N.C.G.S. §28A-15-10 provides that when needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

- (1) Tentative trusts created by the decedent in savings accounts for other persons;
- (2) Gifts causa mortis made by the decedent;
- (3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of N.C.G.S. § 41-2.1 or otherwise; and joint tenancies with right of survivorship created by decedent in corporate stocks or other investment securities.

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees.

If there are still insufficient assets available for the payment of claims, N.C.G.S. §28A-19-6 provides that after payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

- (1) claims which have a specific lien on property;
- (2) funeral expenses up to \$2,000 (not including cemetery lot or grave marker);
- (3) taxes and claims due the United States;
- (4) taxes and claims due the State of North Carolina;

- (5) judgments which are a lien on property of the decedent;
- (6) wages due an employee of the decedent; and medical services within the last 12 months (including drugs, and medical supplies within that period for the last illness);
- (7) all other claims.

There is no preference within a class, so if there are a number of general creditors of the estate, they will share pro rata based on the amount of their claims as provided in N.C.G.S. § 28A-19-13.