

How to split up the willed family home

By [Jay MacDonald](#) • Bankrate.com

The most popular final directive in many a last will and testament reads: My estate shall be divided equally among my children.

But what happens when most, if not all, of an estate's assets are real property, most commonly the family home? How do you divide that three ways?

In a best-case scenario, the siblings would agree unanimously on a fair and equitable settlement: Sell the home and split the proceeds, distribute other assets so one heir retains the property or negotiate buyouts for those wanting cash.

But best-case scenarios can be as elusive as family harmony when the second parent dies, according to Katherine Tennyson, chief probate judge for Multnomah County in Portland, Ore.

"If there is more than one sibling, you usually have very different ideas about what should happen to the family home," she says. "What is stunning to me is that the resentment that has been building over time in a sibling group really comes out after Mom and Dad aren't around anymore. Then people are looking for payback."

Willed family homes

Even if there's no acrimony among family members, an executor can make plenty of missteps, legal and otherwise. Here's what you need to know.

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Executor job not easy

Determining the fate of the family home when both parents have passed can be the most knotty and explosive issue an executor -- also called a personal representative -- will face in executing the terms of a will.

In addition to refereeing what discord exists among siblings and other heirs, you'll almost certainly have to go through regular probate to transfer the deed unless the change of ownership is provided for outside the will via a living trust or similar instrument. A simplified or summary probate that's faster and cheaper is only allowed for "small estates" in most

states.

"The dollar limit (for summary probate) varies a lot by state, from just a few thousand dollars up to about \$200,000," says attorney Mary Randolph, author of "The Executor's Guide." "If you're going to liquidate a house, you're probably over because it is based on the value of the entire estate."

Retaining counsel is advised, and frequently required, when entering probate, especially if real property is involved or you are unfamiliar with the probate process.

"When you are put as the head of the estate, you have some serious responsibilities and liabilities," says Jonathan Alper, an estate attorney in Heathrow, Fla. In the case of a house, you must maintain the house, keep it insured, make repairs. If you let the insurance lapse and something happens, the executor can be personally liable for negligence."

Because we may only be an executor once in our lives, few of us get any good at it.

Next: "You have an obligation to maintain the value of the assets ... "

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Here's what you should know about the particular challenges the family home presents to the executor of an estate:

Wait for court order before acting

Doing anything with estate assets, much less selling a home, before you've been granted authority to do so by the court is one of the biggest mistakes an executor can make.

"The biggest issue is people who make decisions they ought not to be making and take money that doesn't belong to them," says Tennyson. "This includes mixing estate money with personal money, borrowing from the estate or distributing money before ordered to do so by the court. Those are all things that you just shouldn't do, but it gets tempting when you're sitting there with this large bank account."

This is particularly difficult if you have been living with and caring for your parents and their money. Once they're gone, their estate, including their bank accounts, becomes a separate legal entity with its own rights. Be sure to respect that line as executor or you may be liable for misappropriations and inappropriate distributions.

Don't even think about posting a "for sale" sign in the front yard just yet.

"There are certain things you can't do as a personal representative without getting approval from the court, and selling a piece of real estate is one of them," says Tennyson.

The main job: maintain and organize

Once the will is ruled valid and the executor is selected, several steps follow. You'll be asked to identify and take an inventory of assets and outstanding debts, notify named parties and creditors, and arrange for maintenance of the home until its fate can be determined.

As executor, you have an obligation to maintain the value of the assets in the estate. Expenditures you make from the estate to clean out the house and pay the ongoing mortgage, insurance, utility and maintenance bills are appropriate and will pass court scrutiny on your interim or final accounting. However, a new swimming pool, a \$50,000 kitchen remodel or other upgrades almost certainly will not.

"Generally, your prime directive as an executor is to keep things from losing value," says Randolph. "It's not like you're a trustee and you're investing to increase the value of the assets. You just don't want to mess up."

Beware of homestead exemption

In a handful of states, including Florida, Iowa, Kansas, South Dakota and Texas, you may be prevented from using estate assets to maintain the family home. Why? Every state has a homestead exemption that seeks to protect the primary residence from creditors, not to be confused with the homestead tax exemption that lowers your property tax bill.

Most states have a dollar cap on homestead exemption those named above do not. Primary residences in states with unlimited homestead exemption generally are transferred outside of probate and are not considered part of the estate. Vacation homes and other real estate holdings generally remain part of the estate, however.

Next: "If the family can't agree, tempers and legal fees tend to rise ... "

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That means that if your state's homestead exemption is \$50,000 and your second parent died \$75,000 in debt with no other assets, creditors could attach liens to the home to recover the \$25,000 above the exemption.

State laws vary widely and contain many exceptions to the homestead exemption, so it's best to consult an attorney for details. Suffice to say, you should tread carefully when spending estate money on the old family home.

"Essentially, it's going to be your home because you're the heir," says Alper. "The creditors can't get it, but you can't ask the creditors to diminish the estate assets that they can recover upon to fix your house."

Seek an equitable, fair solution

When a family home is involved, you will likely need a probate court order to sell the house or transfer the deed. In most states, you also will be required to notify all heirs and other interested parties if and when you plan to sell.

And you'll be required to get an appraisal before proceeding with a sale. Remember: It's your fiduciary duty to get a fair market price.

"You can't just sell it to your brother-in-law," says Randolph. "(The transaction) has to be at arm's length and you have to have documentation for why you sold it for a certain amount."

Deciding the ultimate fate of the family home is the tough part, says Ralph Neuzil of Neuzil, Sanderson, Sigafosse & Flynn in Iowa City, Iowa, who has been an estate attorney for 50 years.

"What do we do if everybody wants the homestead? Or if nobody wants the homestead? Anyone can agree to anything as long as they want to. It's when somebody thinks they're getting the short end of the stick that they cause trouble," he says.

Some common scenarios: One sibling has lived in the home taking care of the parent and wants to stay, but can't qualify for a mortgage to buy out the others. Or the caregiver may have a financial windfall from the deceased outside of the will -- perhaps in jointly held property, bank certificates or as the life insurance beneficiary -- that causes dissension among siblings, who then resent having to give him an equal portion of the estate. And sometimes a sibling with greater wealth will have an unfair advantage to acquire the home in a court-ordered auction or sale.

Unless a single heir is named to inherit the home, the siblings are free to work out any sort of mutually agreeable

solution. If cash is an obstacle, for instance, they might even consider payments over time.

But once they agree on a plan, they will still need court approval before distributing the assets. "In my 50 years of experience, when a family agreed on something, I have never had the court deny it. Ever," says Neuzil.

On the other hand, if the family can't agree, tempers and legal fees tend to rise exponentially.

"My old law professor used to tell heirs that if you don't get along, your lawyer will become an heir to the estate, which was probably not the intent," Neuzil says.

Next: "Settling an estate ... can take a minimum of six to nine months"

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What often follows when heirs reach an impasse is a partition action, whereby heirs who want to sell the home file suit to force its sale against the wishes of those who want to keep it. Says Neuzil, "That's one of the meanest, most gut-wrenching, tear-shedding actions of all."

Shortcuts, good and bad

Settling an estate when the family homestead is involved can take a minimum of six to nine months even if all parties are in agreement, and longer if they aren't. Neuzil just closed an estate that began more than three years ago.

To streamline inheritance of the family home, several states recently adopted what is called a transfer on death deed that, in essence, enables the homeowner to provide for the transfer of ownership so heirs can avoid the probate process. Better still, it's revocable as long as you live.

In addition, the beneficiary of a transfer on death deed -- also called a beneficiary deed -- receives a step-up in cost basis to the fair market value of the property on the date of death, which is how inherited property normally transfers. For example, let's say that Ed inherits Dad's house. When Ed eventually sells the home, for the purpose of calculating capital gains taxes, his cost would be equivalent to the home's value at the time of his dad's death.

One tempting alternative to the probate battle is having the parent simply deed the parental home to an heir while he or she is still able.

"That's a bad idea," Randolph says. "For one, what if you change your mind? It's been known to happen. Families have falling-outs.

"No. 2, gift taxes. It's certainly going to be more than the \$12,000 annual exclusion for the gift tax, which means you'll have to file a gift tax return. And what if the kid you give it to gets divorced or goes bankrupt? The fact is, you could lose the home."

You also have to consider the tax implications. The child to whom the property is gifted before the parent passes away generally doesn't get the advantage of a full step-up in cost basis. That could mean a larger tax bill if the child eventually sells the house.

So what should you and your remaining parent do if you want to keep the home in the family and avoid probate? The prudent course is to use a living trust or a transfer on death deed if it's available in your state.