

Section 20 - Real and Personal Property - Supervised Administration

20.10 Real Property

20.10.1 Taking Charge

20.10.1(a) Pursuant to Order

The personal representative may secure an order to take charge upon the grounds set forth in § 473.263. The proposed order submitted to the Court must specify the precise authority which is being requested, i.e., to pay taxes, to maintain the premises, to purchase insurance. At the conclusion of the administration, any rents collected less any expenses incurred with respect to the real property must be distributed to the distributees entitled to the real property.

20.10.1(b) Pursuant to Terms of Will

If a decedent's will contains an express power or direction to take charge of real property, no order will be required. Note the distinction between a power and direction: A power is a discretionary right and a direction is mandatory absent consents to the contrary. The authority to take charge will not be implied from a power of sale.

References: §§ 473.260, 473.263

20.10.2 Discovery of Assets

This procedure is available when an estate is currently pending. It is available to a personal representative, administrator, creditor, beneficiary or other person who 1) claims an interest in property which is claimed to be an asset of an estate, or 2) claims an interest in property which is claimed should be an asset of an estate. A petition for discovery of assets is a procedural vehicle for alleging a substantive cause of action and should be filed in the estate proceeding. See *Barrett v. Flynn*, 728 S.W.2d 288 (Mo. App.1987).

The petition must be in compliance with § 473.340, and the proceeding will be designated as an adversary probate proceeding. See Section 7, *supra*.

Reference: § 473.340

20.10.3 Purposes for Order of Sale; Consents to Sale

The purposes for sale are set forth in § 473.460.

Additionally, the personal representative may sell real property if all heirs or devisees who would be effected by the sale are age 18 or older, are not incapacitated, and consent in writing to the sale. A conservator may consent for his protectee. A natural parent may consent on behalf of a minor child.

Practice Tip: If it is apparent that the real property need not be sold for the payment of claims, expenses of administration or taxes or for the payment of specific or general devises, the real property may be sold outside of the estate, without court order, by the heirs or devisees (and their spouses) entitled to the real property. In this case the final decree of distribution must still distribute the real property to the heirs or devisees entitled thereto.

References: §§ 472.130, 472.135, 473.460, 473.467

20.10.4 Procedure for Private Sale

20.10.4(a) Hearing

If consents of interested persons are not obtained, the petition to sell real property shall be filed with the Court together with a proposed order and request for notice of hearing, listing the names and addresses of all interested persons to be given notice of the hearing. The notice of hearing will be sent by ordinary mail. A minimum of ten (10) days for ordinary mail notice is required. Notice of sale may not be waived by a minor or incapacitated person except by his conservator or, if none, by the natural parent of a minor. If the whereabouts of an heir is unknown, notice of hearing must be published. Where there is a power of sale in the will, see Section 20.10.5.

References: Form 10368, Form 10470, Form 10472, Form 10475
§§ 473.493, 473.500

20.10.4(b) Consents to Sale

Notice and hearing are not required if consents of interested persons are obtained and filed with the petition and order.

20.10.4(c) Report of Sale and Order Confirming

After the order of sale is entered, the report of sale may be filed. Section 473.513.1 states that a full report shall be made within 10 days after making a sale (the date the contract is signed). Failure to file within that period of time may create title problems. The real property contract should not be attached to the report of sale or otherwise filed with the Court. On the eleventh day after the filing of the report of sale as calculated by Civil Rule 44.01, the Court, if satisfied that the sale is at the price and terms most advantageous to the estate, shall enter the order approving and confirming the sale. Upon entry of the order confirming the sale, the parties may effect the closing of the sale by delivery of deed and receipt of the sale price. If the personal representative is bonded, additional bond in an amount sufficient to cover the sale price must be filed before the Court will enter the order confirming sale. See Section 11, supra, for other bond requirements.

References: Form 10032, Form 10475, Form 10477, Form 10482
§§ 473.473, 473.493, 473.500, 473.513, 473.517, 473.520

20.10.4(d) By Public Auction

A public sale under § 473.507 is infrequently used. Any other auction must follow the same procedures as a private sale. See Section 20.10.4.

20.10.5 Authority in Will to Sell Real Property

If a power of sale is clearly vested in the personal representative of a testate estate, no court order for sale will be required. Where the will contains a power to sell, if the personal representative still wants an Order to Sell Real Property and has not complied with the statutory requirements for sale, the order will issue pursuant to the power in the will. However, the filing of a report of sale is not appropriate and an order confirming sale will not be entered unless the statutory requirements are met.

Reference: § 473.457

20.10.6 Purchase Price - Private Sale

The purchase price must not be less than three-fourths of the inventory value of the real property unless interested persons consent to a lower price. If, in the judgment of the personal representative, due to change in conditions, the original value of the real property is excessive, he may file an inventory amending the value of the real property. In this event the purchase price shall not be less than three-fourths of the amended inventory value.

References: § 473.500

20.10.7 Terms of Private Sale

While cash sales are preferable, the Probate Code does not preclude the payment of the purchase price of the sale of real property in installments, nor does the Code preclude a sale which is contingent upon the happening of an ascertainable event, e.g., approval of an application to rezone. However, the Court is required to find that the proposed sale is at a price and on terms most advantageous to the estate, so that when the sale terms and/or consideration are unusual, the attorney should consult with the Judge, Commissioner or Deputy Commissioner prior to the signing of the contract.

Notes: If the personal representative becomes aware of a bona fide, more advantageous offer, the personal representative should advise the Court of the better offer.

It is recommended that the real property contract provide that it is subject to approval by the Probate Division.

References: §§ 473.473, 473.513

20.10.8 Suggested Practice Aids

In preparation for the sale of real property:

- (1) The attorney should consult the title company or examiner for exceptions to marketable title;
- (2) The legal description contained in the inventory and the ownership should be reverified;
- (3) The personal representative should determine, if possible, whether an amended inventory will be needed;
- (4) The report of sale should list the terms of sale including any incidental closing costs such as title insurance, real estate commission, loan discount, proration of taxes, insurance and/or loan escrow account which will reduce sale proceeds; and
- (5) The attorney should review the file and obtain adequate bond, if needed, in order to obtain a timely Order Confirming or Approving Sale.

References: § 473.473, 473.513, 473.530

20.10.9 Reporting Real Property Sales on Settlement

20.10.9(a) Time for Reporting

The proceeds of the sale of all real property sold by the personal representative must be accounted for on the settlement next following the date the sale is completed. See Section 22.50 regarding the reporting of closing costs.

20.10.9(b) Disbursement of Proceeds by Personal Representative or His Attorney

If disbursement of the sale proceeds is handled by the personal representative or his attorney, vouchers for each item of expense must be filed in support thereof. The gross purchase price should be shown in the debit column and the expenses of sale in the credit column.

20.10.9(c) Disbursement of Proceeds by Title

If disbursement of the sale proceeds is handled by a title company or real estate broker, a copy of the closing statement reflecting the disbursements shall be a sufficient voucher to support the expenses of sale. The net sale proceeds should be shown in the debit column.

Reference: § 473.543

20.10.10 Abandonment of Real Property

Generally, the Court wants to ensure that all distributees of the estate are agreeable to relinquishing their interest in the property proposed to be abandoned before a court order for abandonment will issue.

Real property may be abandoned, upon court order, when it is so encumbered as to be a burden to the estate or when it is of no value and distribution would be burdensome.

The Court may require a hearing on the application for abandonment if consents to the abandonment are not filed by the distributees. See Section 22.60 for the manner in which to reflect an abandonment of property on the settlement.

Reference: § 473.293

20.10.11 Foreclosure

Depending upon the assets of the estate, it may be desirable to obtain a court order allowing foreclosure, in advance of the foreclosure. See § 443.300 regarding stay of foreclosure on death. See also Section 22.60 regarding providing proof of the foreclosure on the settlement.

Reference: § 443.300

20.20 Personal Property

20.20.1 Values of Property

Personal property shall be valued as of the date of death. See Section 14.50, supra.

Property may be valued by the personal representative or by an appraiser.

Generally, the services of an appraiser will not be necessary unless the estate contains (1) tangible personal property of potentially significant value or of a value that cannot be determined by general knowledge of the personal representative or (2) stock in a closely held corporation or a business interest of the decedent.

If the original value listed on the inventory is incorrect, an amended inventory should be filed reflecting the correct value. Changes to assets as a result of loss or destruction must be reflected on the next filed settlement. See Section 22.60.2, infra.

Reference: § 473.233

20.20.2 Possession

The personal representative shall take possession of all the personal property of the decedent except exempt property of the surviving spouse and unmarried minor child. Intangible personal property located in another state may be collected by the personal representative if the property is

voluntarily relinquished to the jurisdiction of this state and to the personal representative. But see § 473.223, regarding possession of partnership property.

References: §§ 473.223, 473.260, 473.671

20.20.3 Discovery of Assets

See Section 20.10.2.

Reference: § 473.340

20.20.4 Sales

The personal representative may sell personal property of the estate upon court order or by power of sale in the will.

If the property to be sold is specifically devised, the order of sale will only be entered with the consent of the specific devisee, or if needed for the payment of taxes, expenses of administration or claims and all other property of the estate has been or will be liquidated. See Section 22.120 for the manner in which to reflect a sale on the settlement.

References: Form 10460, Form 10461
§§ 473.457, 473.460, 473.467, 473.483, 473.487

20.20.5 Abandonment of Personal Property

Generally, the Court wants to ensure that all distributees of the estate are not interested in receiving the property proposed to be abandoned before a court order for abandonment will issue.

Property may be abandoned, upon court order, when it is so encumbered as to be a burden to the estate or when it is of no value and distribution to the distributees would be burdensome.

The Court may require a hearing on the application for abandonment if consents to the abandonment are not filed by the distributees. See Section 22.60 for the manner in which to reflect an abandonment of property on the settlement.

Reference: § 473.293

20.20.6 Secured Property

The personal representative may want to obtain a court order before allowing personal property to be taken in satisfaction of a pledge or other lien. See § 443.300. The Court may determine instead that assets of the estate will be used to preserve the property depending upon the type of property, the condition of the estate and the distributees entitled thereto. The Court may request consent of the distributees to the proposed surrender of the property. See Section 22.60 for the manner in which to reflect a surrender of property on the settlement.

Reference: § 473.287

20.20.7 Expense Associated with Delivery of Specifically Devised Property

The reasonable expense of delivery or transport of specifically devised property is considered an expense of administration and may be paid out of estate assets without court order.

20.20.8 Continuation of Decedent's Business

20.20.8(a) In General

The personal representative should seek authority to continue decedent's business at the earliest possible date. Section 473.300 authorizes the Court to act on the personal representative's petition ex parte with notice of hearing issuing subsequently to interested persons to appear and show cause why the order authorizing the continuation of the business should not be set aside or modified.

Reference: § 473.300

20.20.8(b) Financial Information Required

Because the Court will be interested in the financial impact of continued operations on existing assets and creditors, it is important to present as complete a financial picture as is possible. If decedent maintained conventional business records, copies of a current balance sheet and profit and loss statement should be presented with the petition. The Court should be advised of the amount of working capital which will be required to continue the business and the anticipated income and expense which will be generated.

The personal representative should be in position to explain to the Court why he believes that the business should be continued rather than liquidated. He should also be prepared to advise whether the business is to be sold or is to be distributed to the heirs or devisees. The Court will probably not sanction the continuance of the business if it cannot be demonstrated that it can be operated at a profit or, at least, on a break-even basis.

20.20.8(c) Use of Estate Assets

If the business consists of the manufacturing of a product or the sale of goods on hand, some arrangement should be made for the "business" to "buy" any goods or materials from the estate at the estate's cost so as to minimize the danger of depleting existing estate assets to the prejudice of existing creditors.

20.20.8(d) Confidential Financial Information

If disclosure of the financial details of the business would give competitors or potential purchasers an unfair advantage, the Court should be requested to hold the information *in camera*, permitting access only to those persons having a right to such information.

20.20.8(e) Solvency of Estate

Section 473.300 specifically deals with the power of the personal representative to continue a business if the estate is solvent subject to the provisions of the will. The converse of this provision is, of course, that if the estate is not solvent, the personal representative has no authority to continue the business except on court order and then it must be shown that the continuation is of advantage to the estate. Presumably such an advantage might be to reduce the degree of insolvency or possibly render the estate solvent.

Reference: § 473.300

20.20.8(f) Testamentary Authority

The statute relating to testamentary authority speaks in terms of the solvency of the estate. The statute does not expressly deal with the issue of the solvency of the business operation itself although the phrase “advantage to the estate” might imply that the business operation must be sound. Thus, even though the estate may be solvent, a personal representative who continues an insolvent business and incurs further losses may render himself personally liable to the creditors with whom he incurs business liabilities. In re Estate of Torreyson, 442 S.W.2d 110, 114 (Mo. App.1969).

20.20.8(g) Contents Show Cause Order

The ex parte order authorizing the continuation of the business should contain at least in broad outline the terms, conditions and limitations under which the business is to be operated. This is necessary since the order will be the vehicle for informing interested persons of the actions taken and the actions proposed.

20.20.8(h) Bond of Personal Representative

In granting an ex parte order authorizing the continuation of decedent's business, the Court may require that the personal representative file a bond even though a bond may be excused by the will.

20.20.8(i) Segregation of Business Assets

If the personal representative is not required to incorporate the business assuming it is a sole proprietorship, the Court may require that the personal representative segregate all financial transactions and maintain separate records and bank accounts.

20.20.8(j) Limitations on Operations

The Court may impose various limitations or requirements on the business operation designed to protect the assets of the estate. These limitations might consist of a limit upon the extent of new operations which the business will be permitted to undertake. The Court might impose outside limits on operational discretion beyond which the personal representative may not go without

further court order. These restraints might limit the number of employees retained or the amount of salary payable to management or executive personnel. The Court might also limit the personal representative's authority to borrow money without further court order, might sanction operations on month-to-month basis, and may impose a duty upon the personal representative to report any circumstance to the Court which might prevent the business from being operated on a break-even basis.

20.20.8(k) Confirmation Order

Section 473.300 does not specifically require the entry of an order confirming the order authorizing the continuation of decedent's business after the show cause hearing. If the original order is modified, it would appear necessary to issue a subsequent order. If the original order is terminated, then not only should a subsequent order issue, but a copy should be served on every person then known to be interested in the estate since it is conceivable that interested persons did not appear at the show cause hearing because they did not oppose the terms of the initial order. But even if the initial order is merely ratified in all of its particulars, good practice dictates that an order of confirmation be entered and the Court customarily does so. In this way, doubt as to the actions taken and the duties of the personal representative is eliminated.

Reference: § 473.300

[END OF SECTION]