

Death & Disclosure

License Holders' Legal and Ethical Responsibilities

Kerri Lewis
August 27, 2020

Publication 2282



People often say they are dying to buy or sell a home, but what happens when one of the parties to a transaction actually dies before closing? Or what if someone previously died in the home and is believed to be haunting it?

Real estate license holders should not give legal advice to their clients when a death occurs, but instead recommend they consult an attorney. However, an understanding of the legal ramifications can help license holders prepare themselves and their clients for the situation's practical implications.

Did Someone Die Here?

A question that comes up more often lately is, does the seller or agent have to disclose if someone died of COVID-19 in a house that is being listed for sale?

Under Texas law, a seller or seller's agent has no duty to disclose a death from natural causes, suicide, or an accident unrelated to the property's condition [Texas Property Code 5008(c)]. Death from COVID-19 falls under natural causes and does not have to be disclosed.

The Takeaway

Death can create complications for real estate professionals, whether it's while trying to sell a property with a murder history or while trying to complete a transaction in which one of the parties has died. License holders shouldn't offer clients legal advice, but they need to be aware of the implications death can have on a transaction.

Whether or not it *should* be disclosed is a question that will be addressed shortly.

What types of death must be disclosed? A murder that occurred in the home, if known to the seller, must be disclosed. This includes a murder that predates the seller's possession of the property if the seller is aware of it. Also, a death caused by the property's condition, even if the death was accidental and even if the condition that caused the death was subsequently remedied. Both of these types of deaths are considered material information that a prospective buyer would want to know.

Buyers, Sellers, and ‘Haunted Houses’

What if the seller thinks the house is haunted by a previous resident who committed suicide? Suicide is not required to be disclosed, and paranormal activity is not mentioned in the statute, so the seller is not required to disclose either. What if the seller believes a “demon” caused a death on the property? Does the seller need to disclose this? Under the plain reading of the statute, it should be disclosed because the death was not from “natural causes, suicide, or accident unrelated to the condition of the property.”

Before concluding that this is far-fetched or the result of the author having watched *Poltergeist* a few too many times, consider the following statistics from YouGov.com:

- 45 percent of Americans believe ghosts and demons exist.
- 43 percent of U.S. adults think ghosts can haunt people or places.
- 36 percent of Americans say they have personally felt the presence of a spirit or ghost.
- 13 percent of Americans say they have communicated directly with a ghost or spirit.

These statistics suggest that, for about half of the population, the decision to purchase a property could be impacted by perceived paranormal activity on that property. No one wants to stigmatize a property when selling it, but if a death occurred on the property, disclosing the death is the best practice, whether the seller is legally required to do so or not. Neighbors will be more than happy to fill the new owner in on the details after they buy it, so full disclosure upfront can prevent future litigation and negative reviews of the brokerage.

One more thing. What happens if the seller and agent do not disclose a death upfront because they are not legally required to do so, but a potential buyer specifically asks if there have been any deaths (or ghosts, for that matter) on the property? The seller must disclose it, or he will be misrepresenting information that the buyer considers material. The agent must also disclose it if known to the agent [TREC Rule 531.2].

Seller’s Death After a Contract is Signed

Contrary to what many people think, the death of a seller does not automatically terminate a contract. The signed contract is still binding on the seller’s estate, and the buyer still has the right to buy the property under the terms of the contract. The death should be communicated

to the buyer’s agent with the message that the closing will be delayed due to probate issues.

A buyer might not be willing or able to wait to close on the property. If the buyer is in the early stages of the contract, he may be able to terminate under the inspection period provision. He could also choose to terminate and forfeit his earnest money or wait for the seller to miss the closing date and hold the seller in default and demand a return of the earnest money.

Regardless of whether the buyer wants to terminate or continue with the purchase, the first thing a real estate license holder should recommend is that the seller’s heirs see an estate attorney as soon as possible. That way, if an Amendment to Contract or Termination Notice needs to be executed, they will know who is able to sign the document.

Who can sign on behalf of the seller depends on how the property was held by the seller. If the property was a joint tenancy with right of survivorship (JTWROS), title passes to the surviving owner on death. In that case, the surviving owner can sign all necessary documents, and the closing likely does not have to be delayed. The surviving owner would need to get a death certificate and be able to show that the property was held JTWROS. The deed under which the joint sellers took title is the most common place to find this.

If the deed under which the joint sellers took title refers to a tenancy in common or doesn’t mention a tenancy in common or a JTWROS, probate will be required. If there is only one seller who holds title to the property, probate will also be needed. Probate is the legal process where a court recognizes a person’s death and determines who can sign on behalf of the deceased’s estate and oversee distribution of assets to the estate’s beneficiaries.

Probate takes time. Certain factors can determine just how long it will take. Did the deceased seller have a valid will that appointed an executor and provided for independent administration that includes the power to sell real estate (best case for speedy action)? Did the seller die intestate (with no will), so the property will pass to heirs pursuant to the Texas Estates Code and two disinterested parties will need to sign Affidavit of Heirship documents (this can take months)? Is the will or intestate proceeding going to be contested by anyone (which could take a year or more)?

The title company will need to determine who must sign the closing documents based on the probate proceedings.

License holders should discuss the possible delay time with their respective clients. Patience will be required of those wanting to continue with the transaction. A license holder should never assume who will be the heir or tell another person who they think will be the heir. Intestate laws, as well as wills, can be complicated and not what one would anticipate. Again, a probate attorney or the title company should make that determination.

One other nonprobate possibility exists that could speed up the closing process following a seller's death. It is a Transfer on Death Deed (TODD) and is relatively new in Texas. Under Texas Estates Code §114.051, a property owner can transfer title to another effective on the owner's death. The deed must be signed, acknowledged, and recorded in the county where the property is located. When the owner dies, the person named in the recorded TODD becomes the new property owner, effective as of the date of the death. The property is not part of the deceased's estate. If an owner who has a TODD transfers all interest in the property to another prior to his death, the TODD is null and void.

What happens when the death occurs in the middle of a transaction? Texas Estates Code §114.104 provides that the person named in the TODD takes the property when the owner dies subject to liens and contracts to which the property is subject to at the owner's death. This means the new owner under the TODD steps into the seller's role under the contract and can sign closing documents and receive the proceeds from the sale. If the TODD was prepared properly and recorded, there will be little delay for closing.

To learn more about TODDs, read "New Tool in the Toolbox" at www.recenter.tamu.edu/articles/tierra-grande/new-tool-in-toolbox.

If the Buyer Dies After a Contract is Signed

Here again, a contract does not automatically terminate if the buyer dies. It is still binding on the buyer's estate, subject to the terms of the contract. Depending on the

stage of the contract, the buyer's estate likely has several "outs" if the property is no longer desired. If the inspection period has not expired, the buyer's executor could terminate the contract under that provision. Similarly, if a loan were contemplated and the Third-Party Financing Addendum was attached to the contract, it is likely that Buyer Approval under that addendum would not be met, and the buyer's executor could terminate. Either of these options would result in earnest money being returned to the buyer's estate. The issue here, as was the case when the seller dies, is whether or not there is a will appointing an executor and how quickly the executor can get letters testamentary to act on behalf of the buyer's estate.

The buyer's estate could also terminate without the contractual right to do so and forfeit the earnest money. In reality, if the buyer's estate wants out, the parties can just agree to terminate and release the earnest money per whatever agreement they make. This will allow the seller to put the property back on the market sooner.

The best advice to real estate license holders when a death occurs prior to closing is to communicate that the closing will be delayed and find out what your client (or client's heirs) wants to do in this situation. Recommend that the heirs contact a probate attorney as soon as possible. Prepare an Amendment to Contract to extend the closing if this is what your clients desire, but do not give legal advice. This is a time for attorneys and title companies to take the lead regarding contract rights, who holds title, who must sign documents, and who receives title to the property.

Nothing in this publication should be construed as legal advice for a particular situation. For specific advice, consult an attorney. 📌

Lewis (kerri@2oldchicks.com) is a member of the State Bar of Texas and former general counsel for the Texas Real Estate Commission.