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Probate Conveyancing

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PROBATE CONVEYANCING

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The need for an understanding of the art of conveyancing by personal representatives and guardians is not confined to the probate practitioner. Every attorney who is called upon to pass on title to real estate frequently must base his opinion on a chain of title containing a fiduciary's deed. The principles of this form of conveyancing, from a practical standpoint, are the subject of this article.

In deference to the basic maxim of real property law, *lex situs,* this discussion is confined mainly to a consideration of conveyances by personal representatives and guardians under Florida law and of the decisions of the Florida courts. The validity or intended legal effect of any such fiduciary conveyance depends, of course, upon the conformity of the antecedent administrative proceedings to the essential requirements of Florida law.

POWER OF PERSONAL REPRESENTATIVE TO CONVEY

An executor or administrator, merely by virtue of his office, has no power to sell a decedent's real property, either at common law[1] or under the Florida Probate Law.[2] He may sell only when power of sale has been conferred upon him by will[3] or, in the absence of such power, when the sale of a particular piece of property has been authorized or confirmed by an order of the probate court.[4] Ordinarily, if the will contains a clear and comprehensive power of sale, there is no necessity to obtain a court order authorizing the sale.[5] Many cautious practitioners nevertheless insist on a supporting order of

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[1]*E.g.,* First Trust & Sav. Bank v. Henderson, 109 Fla. 175, 147 So. 248 (1933); Hay's Adm'x v. McNealy, 16 Fla. 409 (1878).

[2]FLA. STAT. §733.23 (1957).

[3]Lott v. Meacham, 4 Fla. 144 (1851); FLA. STAT. §733.22 (1957).

[4]FLA. STAT. §733.23 (1957).

[5]An exception to this general rule exists: If the personal representative is the purchaser, in those cases in which he is permitted to bid an order confirming sale must be secured. FLA. STAT. §733.31 (1957).

court. On the other hand, in instances in which the power of sale is fully spelled out, it has been argued that the executor who follows the policy of always securing a court order may be avoiding his duty to exercise his own judgment as intended by the testator, the suggestion being that a court order would give the executor little comfort if it should develop that he in fact used poor judgment. In this connection some probate judges favor the securing of supporting orders of authorization or confirmation on the ground that this tends to promote safe and orderly administration. The matter having been brought to the court's attention, the court may suggest, for example, that the power of sale itself is not as clear as it might be or that an additional bond should be required.[6]

Conveyances Under Power Conferred by Will

No particular language is necessary to confer power of sale upon an executor; but, as is true in almost every facet of probate administration, the testator's intention to grant the power must be present in the instrument, either expressly or by implication.[7] A clause providing that the executor is authorized to sell any property which at any time is a part of the estate, without authority of any court and upon such terms and conditions as the executor shall in his discretion determine, is sufficient to authorize public or private sale of estate realty without court approval unless the personal representative is the purchaser, in which case an order confirming sale is required.[8]

Implied Power. A power to sell may be implied from the provisions of the will. A direction to pay debts or legacies in cash or to pay debts and legacies from the proceeds of real estate may necessarily imply a power to sell if such a direction cannot be implemented without a sale.[9] For example, a power to sell has been implied from directions in a will to divide particular property among

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[6]*E.g.*, FLA. STAT. §733.29 (1957).

[7]First Baptist Church v. American Board of Comm'rs, 66 Fla. 441, 63 So. 826 (1913).

[8]A personal representative may bid on realty only at public sale when he has an interest in the estate "which he represents, either in his own right or in the right of his wife or infant child, as creditor, devisee, legatee or heir at law . . . ." FLA. STAT. §733.31 (1957).

[9]Archer v. Puffer, 146 Fla. 568, 1 So.2d 565 (1941).

certain beneficiaries,[10] to convert the estate into money,[11] and to invest a certain amount of money which can be raised only by a sale of real estate.[12] On the other hand, a power to sell is not implied merely from a general direction to pay debts or legacies or because debts and legacies are made an express charge upon the real estate.[13]

Limited Power. A testamentary power to sell may be a limited one. The intention of the testator is controlling, and he may limit the power of sale to be exercised by a particular person or persons[14] to a particular piece of property,[15] within a specified time,[16] or for a particular purpose.[17]

Sales of real property under a testamentary power are specifically authorized by a section of the Florida Probate Law[18] which provides that "in every case where a power is given in a will to sell or dispose of property of the estate, or any interest therein, a sale made under authority of such will shall be valid." In this connection the question often arises as to whether an executor's power of sale extends to an administrator c.t.a. or d.b.n. The same section of the probate act provides:

> "The sale and disposition of property under such power may be made by the executors, or such of them as qualify, or by the surviving executor or executors, or by the administrator with the will annexed, or by the administrator de bonis non, if no other person is appointed in the will for such purpose, or, if

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[10]*E.g.,* Stoff v. McGinn, 178 Ill. 46, 52 N.E. 1048 (1899); Mimms v. Delk, 42 S.C. 195, 20 S.E. 91 (1893).

[11]*E.g.,* Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933); Haggin v. Straus, 148 Ky. 140, 146 S.W. 391 (1912).

[12]*E.g.,* Robinson v. Robinson, 105 Me. 68, 72 Atl. 883 (1908); *In re* Garris' Estate, 24 N.J. Misc. 65, 46 A.2d 76 (Orphans Ct. 1946).

[13]First Baptist Church v. American Board of Comm'rs, 66 Fla. 441, 63 So. 826 (1913); *compare In re* Tanqueray-Williams, L.R. 20 Ch. 465 (1882).

[14]*E.g.,* Union Stave Co. v. Smith, 116 Ala. 416, 22 So. 275 (1896); Coleman v. Connolly, 242 Ill. 574, 90 N.E. 278 (1909).

[15]See ATKINSON, WILLS 668 (2d ed. 1953).

[16]Hay v. Mayer, 8 Watts 203 (Pa. 1839). *But see, e.g.,* Hale v. Hale, 137 Mass. 168 (1884); *In re* Abrams' Estate, 114 Wash. 51, 194 Pac. 787 (1921), stating the view that provisions as to time are merely directory.

[17]Standard Oil Co. v. Mehrtens, 96 Fla. 455, 118 So. 216 (1928), limiting power of sale only for purpose of investments.

[18]FLA. STAT. §733.22 (1957).

the person so appointed refuses to perform the trust or dies before he has completed the same or is otherwise rendered incompetent."

It appears that the Florida legislature has adopted the rule that a power of sale follows the office rather than the individual unless a contrary intention is clearly expressed in the will. The legislature apparently meant this section to apply to any specific power to sell, but some courts have held that when the will makes exercise of the power discretionary with the particular executor, that is, the personal representative named in the will, the power cannot be exercised by an administrator with the will annexed.[19]

Conveyances Requiring Court Order

Although this topic relates specifically to sales of realty by an administrator, it should be remembered that the same principles apply to sales made by an executor operating without benefit of a valid testamentary power of sale. In the absence of a testamentary power of sale, title to real property of a decedent may be transferred only when authorized by the probate law and upon order of the probate court entered in accordance with its provisions.[20]

A petition for authority to sell or for confirmation of a sale of realty should show by appropriate allegations that the sale is for the best interest of the estate and those interested therein and is for a proper administrative purpose. For example, a petition to sell in order to pay debts should show that there are valid claims against the estate and that there is insufficient cash available for their payment; a petition to sell for the purpose of making a distribution should show that distribution in kind is impracticable. The better practice is to show in the petition the efforts that have been made by the administrator to obtain the best price available. In all possible cases it is desirable to file with the petition the consent of those heirs or beneficiaries interested in the property.

It is not always necessary that the administrator file the petition to sell. As set forth in section 733.24 of Florida Statutes 1957, any

[19]This statute is in derogation of the common law, *e.g.*, Taylor v. Benham, 46 U.S. (5 How.) 233 (1847), unless the power is coupled with an interest, *e.g.*, Wilson v. Snow, 228 U.S. 217 (1913).

[20]FLA. STAT. §733.23 (1957), First Trust & Sav. Bank v. Henderson, 109 Fla. 175, 147 So. 248 (1933).

person interested in the estate may be the petitioner "if a personal representative neglects or refuses to sell property of an estate when it is expedient or necessary to do so or when a testator has directed a sale to be made . . . ."

On sales made without benefit of a power, notice is quite important, even though on a petition for leave to sell real property it is not always required. The probate law requires notice to parties affected by the sale in each of the following situations:[21] (1) when it appears to the county judge, for any reason, that notice is necessary or desirable, (2) when application is made to sell property that has been specifically devised, (3) when any person interested in the estate has filed a demand with the personal representative and with the probate court for notice of any sale, (4) when the will contains a direction or expresses a desire that certain property not be sold, and (5) when the property is to be sold for purposes of distribution.

Notice. The Florida Probate Law covers citation and service.[22] These sections provide that service of notice of a petition upon parties in interest may be perfected either by personal service or by publication. If by personal service, service of a citation issued by the county judge's court, together with a true copy of the petition, must be made. Service may be made by any person within or without the State of Florida, with return of service by affidavit except in the case of a service made within the state by any sheriff, constable, deputy sheriff, or deputy constable, in which case return need not be by affidavit. Personal service upon minors or insane persons, as well as the contents of all returns, are governed by provisions similar to those applicable to process in other courts of record within the state.

Service by publication is permissible when so ordered by the probate judge based upon an affidavit setting forth the reasons why personal service is impracticable. For example, service by publication might be ordered in an estate when there were many beneficiaries who resided in foreign countries. Publication must be made once a week for four consecutive weeks in a newspaper published in the county in which the court is located. The usual provisions relative to posting are applicable if there is no newspaper qualified to take legal publications in the county in which the administration is pending.

Any person interested in the estate may waive service of citation and notice.

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[21]FLA. STAT. §733.26 (1957).

[22]FLA. STAT. §§732.09-.10 (1957).

The effect of these statutory provisions is to require notice of application for leave to sell real property in practically all instances except when the property is to be sold to pay debts, expenses of administration, or legacies. This is a sound requirement. If a sale is not necessary to pay debts, expenses, or legacies, the personal representative is thus effectively prevented from selling the property merely for the purpose of converting it into cash. It should be borne in mind that under Florida law, title to real estate vests in the heirs or devisees immediately upon the death of the owner.[23] If the property is to be sold for the purpose of converting it into cash, the decision to sell should be made by the heirs or devisees of the property and not by the personal representative.

If the probate court authorizes a private sale, the order should describe the property and fix the price and terms of sale. If a public sale is authorized, the order should prescribe the form and manner of notice of sale to be given. The order should also provide whether the personal representative is required to give any bond, or additional bond, in connection with the sale.[24]

Sale upon Terms. An order to sell real property may authorize a sale upon terms, and under section 733.30 of Florida Statutes 1957 the "personal representatives may sell upon such terms as the order prescribes." The same section also provides the terms that may be authorized:[25]

> "If credit is given, it shall be for not more than sixty per cent of the purchase price nor longer than five years, unless the county judge, in his discretion by written order, authorizes a larger percent of credit. The county judge may . . . also enlarge the time for payment. . . . The deferred purchase price shall be evidenced by the promissory note of the purchaser payable to the personal representative and secured by mortgage upon the property sold, if real property, or by such security as may be approved by the court in any case."

Sale of Property Subject to Contract to Sell. Real property may be sold by a personal representative even though it is subject to a

[23]FLA. STAT. §731.21 (1957) (vesting of legacies and devisees); *In re* Slawson's Estate, 41 So.2d 324 (Fla. 1949) (vesting of interest of heirs in an intestate estate).

[24]FLA. STAT. §§733.28-.29 (1957).

[25]FLA. STAT. §733.30 (1957).

prior contract to sell or to a mortgage. With reference to the sale of an estate's interest in real property subject to a contract to sell made by the decedent, the probate law provides:[26]

> "[T]he interest of the estate in such property and such contract may be sold under order of the county judge in the same manner as other real estate. No recourse shall be had against the estate or the personal representative for the nonpayment or nonperformance by the vendee under any such contract. The consent of the vendee under any such contract to the sale thereof shall discharge the estate and the personal representative from all obligations, . . . but such consent shall not be required if no claim has been filed thereon and the time for filing claims has expired."

With reference to sale by the personal representative of real property that is subject to a mortgage, the probate law provides:[27]

> "The county judge may, . . . with the written consent of the holder of the mortgage, authorize the sale of real property of the estate subject to mortgage . . . . The consent of the mortgagee shall discharge the estate and the personal representative from liability for mortgage indebtedness or obligation. Such consent shall not be required if no claim has been filed upon the mortgage indebtedness and the time for filing claims has expired."

When the probate court has jurisdiction of the parties and the subject matter, an order authorizing or confirming a sale of real property is not subject to collateral attack even for errors that might bring a reversal of the order on appeal.[28]

Conveyances when Decedent's Wife Survives

The sale of real property by the personal representative when the decedent's wife survives him deserves more than casual emphasis because it may be subject to her possible dower interest. This is true whether the sale is made under a testamentary power or under court

[26]Fla. Stat. §733.34 (1957).

[27]Fla. Stat. §733.35 (1957).

[28]Fla. Stat. §95.21 (1957); Mitchell v. Bogue, 142 Fla. 787, 196 So. 306 (1940).

order. The relevant section of the probate code provides:[29]

> "[N]o sale or disposition of real property shall be made, whether pursuant to . . . the decedent's will or under the provisions of this law, until it appears that the widow will not have dower assigned to her, or, if she takes dower, until after her dower has been assigned, unless the widow consents to such sale and joins with the personal representative in the execution of a deed of conveyance to the purchaser thereof."

Power of Personal Representative to Acquire Real Property

An executor or administrator ordinarily has no authority to invest funds belonging to the estate. His authority is usually limited to collection of the assets of the estate, payment of the decedent's debts and expenses of administering the estate, and distribution of the remainder of the estate to the heirs or beneficiaries under the will.[30] Of course, if the decedent's will gives the executor investment powers a different and sometimes delicate situation is presented.[31]

In 1953 the Florida legislature adopted the so-called prudent man rule,[32] as set out in section 518.11 of Florida Statutes 1957, which expressly gives personal representatives the power to invest in real estate but with the proviso that such investment should be made by exercising the judgment which men of prudence, discretion, and intelligence would exercise in the management of their own affairs "not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital." The burden is placed upon the fiduciary to justify the investment upon the foregoing criteria.

It is submitted that the statutory prohibition against "speculation" materially limits the personal representative's power to invest in real estate except in situations in which the prime consideration is the income to be produced from the investment rather than the possible increment in value of the land.

The Florida legislature has been careful to point out that the provisions of the prudent man rule statute may not be used to give

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[29]FLA. STAT. §733.25 (1957).

[30]Glidden v. Gutelius, 96 Fla. 834, 120 So. 1 (1928).

[31]FLA. STAT. §518.12 (1957).

[32]See Garesche v. Levering Inv. Co., 146 Mo. 436, 48 S.W. 653 (1898).

the fiduciary a power of sale that he otherwise would not have; likewise the wording of the statute does not form the basis for any departure from the express terms or limitations of the instrument creating the fiduciary relationship.[33]

Conveyances by Guardians

Sales by Florida Guardian for Resident Ward

The procedure for the sale of real property by the guardian of an incompetent is in general the same as that for the sale of real property by an administrator or executor operating without benefit of power to sell. The Florida Guardianship Law provides:[34]

> "When the guardian of the property deems it expedient, necessary or for the best interest of the ward for part or all of the property to be sold, he may sell at public or private sale, but no title shall pass until the sale is authorized or confirmed by order of the county judge . . . ."

The requirements of the guardian's petition for leave to sell are very similar to those of the administrator's petition.

There is no statutory requirement that a guardian give notice of the hearing on his petition to sell real property, "unless the county judge deems it necessary or desirable, and then only such notice shall be given, personally or by publication, as the county judge may direct."[35] When no notice is required, the county judge may hear and determine petitions for the sale of the ward's property ex parte. At the hearing the judge may, in his discretion, require a new appraisal of the property.[36]

The requirements of an order authorizing a guardian's sale of real property are embodied in section 745.09:[37]

> "[T]he order shall describe the property; and if the property is authorized to be sold at private sale, the order shall fix the price and the terms of sale. If the sale is to be public, then the

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[33]Fla. Stat. §518.11 (1957).
[34]Fla. Stat. §745.05 (1957).
[35]Fla. Stat. §745.07 (1957).
[36]Fla. Stat. §745.08 (1957).
[37]Fla. Stat. §745.09 (1957).

> order shall state the minimum price for which the property is to be sold and shall specify that the sale shall be made to the highest bidder above such price, if any. The order may also determine whether an additional bond is required, . . . shall fix the amount thereof, but no such bond shall be required when the guardian is a bank or trust company. . . . An order of sale may provide for the sale of any of the property described therein, either publicly or privately, in parcels or as a whole."

If a guardian is directed to sell at public sale he must give such notice as the order authorizing the sale requires, but if he is directed to sell at private sale no notice is necessary unless the county judge so orders.[38]

The county judge may authorize a guardian to sell his ward's real property upon terms; the limitations and effect of a sale upon terms are as follows:[39]

> "If credit is given, it shall not be for more than seventy-five per cent of the purchase price nor for longer than five years. . . . The deferred purchase price shall be evidenced by the negotiable promissory note of the purchaser payable to the guardian and secured by mortgage or pledge, which shall be a first lien upon the property sold, or by such other security as may be approved by the county judge in any case."

It is interesting to note that a guardian may sell upon more liberal terms than an administrator.

The guardianship law governing the sale of a ward's interest in realty and the probate law relating to the sale of the same type of interest by a personal representative are substantially the same (1) when the interest is subject to a contract to sell made by the ward, and (2) when the interest is subject to a mortgage.[40]

Sales by Foreign Guardian for Nonresident Ward

The nonresident guardian of a nonresident ward may sell the ward's Florida realty in the same manner as provided by law for the

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[38]FLA. STAT. §745.10 (1957).
[39]FLA. STAT. §745.11 (1957).
[40]FLA. STAT. §§745.18-.19 (1957).

sale of real property by a resident guardian, with two additional requirements:[41]

> (1) The foreign guardian must file in the office of the county judge a sufficient transcript of the foreign proceedings, with a designation of a resident agent for the service of process.
>
> (2) The county judge may require of such foreign guardian a bond for the proper application of the funds arising from the sale in such an amount as he deems necessary to protect the interests of the ward and to protect the Florida creditors of the ward.

Under the Florida Guardianship Law it would appear, even upon a careful examination, that a foreign corporation can act in its representative capacity as guardian of the property of a nonresident ward and sell realty located in Florida. There is a specific statute prohibiting foreign corporations from acting as guardians for resident incompetents,[42] but this section of the guardianship act does not mention foreign corporate guardians of nonresident wards. Examination of the banking laws of Florida, however, discloses the existence of a statute which provides:[43]

> "All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state, as follows:
>
> ". . . .
>
> "(2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not."

This section was adopted by the 1953 Legislature; it superseded section 655.27 of Florida Statutes 1951, which had been a part of the statute law of Florida since 1937 and contained the same prohibition as to foreign corporations acting as guardians in Florida.

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[41] FLA. STAT. §744.17 (1957).
[42] FLA. STAT. §744.27 (1957).
[43] FLA. STAT. §660.10 (1957).

The Florida Guardianship Law was enacted in 1945, and the guardianship code would seem, inferentially at least, to permit foreign corporate guardians to manage or sell the property of a nonresident ward even when the property is located in Florida.

To reach the construction that a foreign corporate guardian could sell the Florida property of a nonresident ward, it would be necessary to adopt the position that the Florida Guardianship Law repealed by implication section 660.10 of Florida Statutes 1957, which clearly prohibits a foreign corporation from acting as guardian of the property of a resident Florida incompetent. It seems unreasonable, therefore, to assume that the legislature intended foreign corporations to have the privilege of managing, selling, mortgaging, and leasing Florida property belonging to a nonresident incompetent. This is particularly true in view of the long-standing policy of the legislature of prohibiting foreign corporations from exercising any fiduciary powers in Florida, whether as trustee, executor, administrator, or guardian.

An irreconcilable conflict between the provisions of the Florida Guardianship Law and the prior law prohibiting a foreign corporation from acting as guardian in Florida, which is necessary to a repeal by implication,[44] does not appear. The Florida Guardianship Law may well be construed as permitting foreign personal guardians to manage, sell, mortgage, and lease Florida property of nonresident wards without granting similar privileges to foreign corporate guardians. There is nothing in the Florida Guardianship Law which clearly indicates that the legislature intended foreign corporate guardians to have such privileges – there is only the omission of expressly prohibiting foreign corporate guardians from having such privileges.

Form of Conveyance

Since no executor, administrator, or guardian ordinarily has power to bind the estate by covenants of general warranty,[45] he should make conveyance of real property by executor's or administrator's deed. This form of conveyance is in effect a limited warranty that the deed conveys all the *estate's* interest in the property and that

[44]*E.g.*, Tamiami Trail Tours v. City of Tampa, 159 Fla. 287, 31 So.2d 468 (1947).

[45]*E.g.*, Denman v. Payne, 152 Ala. 342, 44 So. 635 (1907); Hall v. Marquette, 69 Iowa 376, 28 N.W. 647 (1886); see *In re* Schulz's Estate, 159 Neb. 247, 66 N.W.2d 557 (1954) (warranties will at most bind the fiduciary personally); Arnold v. Donaldson, 46 Ohio St. 73, 18 N.E. 540 (1888).

nothing has been done by the grantor in his representative capacity to impair that title.

The deed should, of course, describe the testamentary power or court order under which the deed is made. The omission of this recital does not invalidate the deed, the general rule being that a deed by an estate's personal representative need not recite the authority under which it is executed.[46]

As a general rule, an administrator's, executor's or guardian's deed is not subject to collateral attack,[47] but there is an exception to this if there is a lack of jurisdiction on the part of the court to authorize or confirm the sale.[48]

The deed of a personal representative or guardian of property should be signed by him "as executor," or "as administrator," or "as guardian of the property." In the majority of jurisdictions the omission of the word *as* between the name of the party and his representative capacity is immaterial; it is sufficient if his title is inserted after his signature.[49] In Florida, however, a fiduciary's deed executed without the word *as* preceding the title of the fiduciary could well be held invalid; under a long line of cases, the fiduciary's title could be held to be merely *descriptio personae*.[50]

Some states have statutes prescribing the manner in which the decedent's real property shall be transferred of record to the particular heir or devisee. In Ohio this is done by written application of the personal representative for a "Certificate of Transfer," which is granted by court order in the form of a journal entry setting forth the legal description of the real property and the name of the particular heir or devisee who takes it. The corresponding certificate of transfer

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[46]*E.g., In re* Messmore's Estate, 290 Pa. 107, 138 Atl. 81 (1927); Bartlett v. Bartlett, 34 W. Va. 33, 11 S.E. 732 (1890). In some states such a recital is required by statute, *e.g.,* Clemmons v. McDowell, 5 S.W.2d 224 (Tex. Civ. App. 1927).

[47]Goldtrap v. Mancini, 86 So.2d 141 (Fla. 1956); Taylor v. Merwin, 145 Fla. 252, 198 So. 827 (1941).

[48]Mitchell v. Bogue, 142 Fla. 787, 196 So. 306 (1940); Flitcher v. Rickey, 114 Fla. 563, 154 So. 147 (1934).

[49]*E.g.,* Burton v. Jones, 212 Ala. 353, 102 So. 807 (1925); Babcock v. Collins, 60 Minn. 73, 61 N.W. 1020 (1895); Cohea v. Johnson, 69 Miss. 46, 13 So. 40 (1891).

[50]Clonts v. Cline, 100 Fla. 1449, 131 So. 321 (1930); State *ex rel.* Palmer v. Gray, 92 Fla. 1123, 111 So. 242 (1927); see Evans v. Tucker, 101 Fla. 688, 135 So. 305 (1931); Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927); *compare* Brown v. Indian River Orange Lands, Inc., 131 Fla. 466, 179 So. 789 (1938). See also Game, *Examination of Abstracts,* 6 U. FLA. L. REV. 77 (1953).

is then filed with the county recorder, who is the recorder of deeds.[51]

A number of prominent title attorneys favor the adoption by this state of a practice similar to that utilized in Ohio. Florida has no such requirements, possibly on the theory that neither the personal representative nor the court has actual title to the estate's real property and that the present records of estate administration are sufficiently clear and effective.

CONCLUSION

Probate conveyancing falls into two rather well-defined classes: (1) sales made by the fiduciary under a power contained in the instrument creating the fiduciary relationship, and (2) sales made by the fiduciary under authority of an order of the court of competent jurisdiction.

An examination of the statutes pertaining to administrators' sales and guardians' sales reveals a marked similarity, and the principles applicable to one generally apply with equal force to the other.

When examining the personal representative's or guardian's deed careful scrutiny and attention must be given to the prior administrative proceedings, because the authority of the fiduciary to execute the deed is based entirely upon the validity of his appointment and administration.

[51]OHIO REV. CODE §2113.61 (1953).