LEGALLY SPEAKING

Wills, Trusts & Estates: Plain And Simple

Inheriting Contaminated Property: What Are The Options?

By **Patricia C. Marcin**, Esq. ©2016

Mom and Dad owned valuable commercial real property that they rented to various tenants, including a dry cleaner and a gas station, over the last 40 years. No one had any idea about whether the underlying property had been contaminated or not, and Mom and Dad had not investigated the possibility of contamination during their lives. Upon the death of both parents, the property is bequeathed to their two children, Sam and Matt. Receiving a bequest of real property can be more difficult than receiving cash or securities. Someone has to manage a commercial property, sibling rivalry can cause issues, and one sibling may want to cash out their interest in the property, rather than keep it. A good estate plan should address these common issues. When environmentally contaminated property is involved, the issues get much bigger – and expensive.

Even if Mom and Dad had nothing to do with the pollution caused by the dry cleaner and/or the gas station tenants, the clean-up of the property could cost Sam and Matt, as the beneficiaries of the property, even more than the property is worth. When Sam and Matt seek to sell the property, the buyer will inevitably request that an environmental study be done and, if there is contamination, will likely want it remedied before following through with the purchase.

Under federal and New York State law, anyone in the chain of title may be held liable for the contamination, regardless of whether or not they knew of the contamination or were the actual polluters. Tenants (past and present) can also have liability for the contamination. These former owners and tenants may no longer exist, or may have little or no assets to pay for the remediation. As a result, the current owner may be stuck and have to pay for the clean up without being able to recover the costs from these other responsible parties. Even if you own only a small part of the property (for example, ten percent), you still could be held responsible for the entire clean up, if you're the only viable "deep pocket."

Even if a buyer doesn't do an environmental study and agrees to buy the property "as is," or more likely does the study and demands a deep discount on the purchase price because of the findings in the environmental study, that doesn't let Sam and Matt off the hook. Future owners may uncover historical contamination, and Sam and Matt could still be on the hook for the clean up costs because they owned the property for a period of time. Nearby neighbors of the property could sue in the future for damage done to their health; for instance, they could allege that toxic waste percolated through the groundwater and caused diseases to their families. Or they could claim that plumes of contamination migrated from the site and caused off-site property damage.

So, what are Sam and Matt to do? If the property had been sold during Mom and Dad's lifetimes, Sam and Matt would not inherit the site, would not be in the chain of title and should not have any future liability for the site. Alternatively, if the property had been placed in a separate trust or held in a corporate entity, the liability would have been limited to the assets of the trust or the corporation. If the site is heavily polluted, Sam and Matt should consider whether it would make sense to "disclaim" the property within nine months of the death of the second parent to avoid environmental liability. Another alternative could be to accept the bequest, but make sure they purchase environmental insurance, although such insurance can be quite costly and may contain limitations on pre-existing conditions.

If there is a trusts or estates topic that you would like to know more about, please feel free to email me at pmarcin@farrellfritz.com with your suggestion and I will do my best to cover it in a future column.

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