

SELLING AFTER DEATH OF AN OWNER

SPECIAL REQUIREMENTS EXIST TO ENSURE CLEAR TITLE IS CONVEYED IN CO-OPS AND CONDOS.

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There is a general uncertainty within the real estate community with respect to the requirements for conveying clear title to individually owned condominium and cooperative apartments when one or all of the record owners are deceased. This article will discuss what a seller's attorney must do prior to closing to assure that the seller can deliver on his or her obligation to convey clear title at closing, as well as to satisfy the title agent and the managing agent of a cooperative corporation, that all of the necessary documents are in place in order to effectuate a transfer of good and clear title of the unit.¹ At the inception

of the transaction, preferably prior to the preparation of a contract of sale, the practitioner should ascertain: (i) whether title to the property is held individually, by tenants in common, by joint tenants with the right of survivorship, or as tenants by the entirety; (ii) whether one or all of the named owners has died; and (iii) whether the decedent died testate or intestate.

Forms of Ownership

Recall from Property 1 that there are three common ways in which two or more individuals may hold title to real property (including a cooperative apartment): by tenancy in common; by joint tenancy with a right of survivorship; and by tenancy by the entirety. Tenants in Common. If the property is held by tenants in common there is no right of survivorship. In other words, upon the death of one of the tenants in common the decedent's ownership interest in the property will pass under the decedent's will to the decedent's heirs, or to his or

her devisees pursuant to the laws of intestacy. The ownership interest of the surviving tenant(s) in common continues. The estate representative(s) of the decedent, as well as the surviving tenant(s), must join in the conveyance of title. Joint Tenants with the Right of Survivorship. In a joint tenancy with right of survivorship, a decedent's ownership interest in the property vests in the surviving co-tenant(s). The decedent's ownership interest in the property does not pass under the decedent's will or by virtue of the laws of intestacy. The decedent's estate representative does not need to join in the conveyance in order to transfer clear title. Tenants by the Entirety. A tenancy by the entirety is a joint tenancy with right of survivorship between spouses, and affords the couple additional rights, including but not limited to certain protections against judgment creditors and involuntary partition proceedings. As with a joint tenancy with the right of survivorship, title to the property may be conveyed by the surviving co-tenant without the involvement of the decedent's estate representative. A disposition of property to two or more individuals creates an ownership interest as tenants in common unless there is an express declaration that title is to be held as joint tenants (New York Estates, Powers and Trusts Law (EPTL) §6-2.2(a)). However, a disposition of property to a husband and wife will create a tenancy by the entirety unless there is an express declaration that title is to be held as joint tenants or tenants in common (EPTL §6-2.2(b)). It is good practice, before finalizing the contract of sale, to take the time to do the foregoing analysis to ensure that the proper parties are named as the "seller" in the contract of sale. Failure to do so may result in a substantial delay of the closing, or worse, a termination of the contract of sale due to the seller's failure or inability to convey proper title to the property.

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Testacy Versus Intestacy

If a person dies intestate, title to the decedent's property will pass to the decedent's distributees. However, if a person dies testate, title to the property does not automatically pass to the decedent's devisees; the decedent's will must first be admitted to probate. A probate proceeding is required since a will is a revocable instrument and a bequest of property is considered merely an offer which must be accepted in order for title to vest in the devisees. It is an important side note that pursuant to EPTL §3-3.6, title to the decedent's property is conveyed to a distributee or devisee subject to any and all existing liens, security interests, charges or encumbrances.

Co-ops and Condos

A testamentary or intestate disposition of a cooperative apartment to a devisee conveys an ownership interest in the proprietary lease and shares of the cooperative corporation's stock, but does not necessarily convey to the devisee or distributee the right to occupy the apartment. Typically, a devisee or distributee other than a surviving spouse (and sometimes another adult family member) must obtain the approval of the board of directors of the co-op corporation prior to occupying the apartment; each specific co-op corporation's proprietary lease will control. Also typically, a condominium's right of first refusal with respect to a transfer of a condo unit may not apply to a testamentary or intestate disposition to a surviving spouse or other adult family member, but each individual condominium's bylaws must be consulted.

Documentation Required

Death Certificate. An obvious but often overlooked step in handling a conveyance of property from an estate is to establish proof that a person holding title to the property is actually deceased. This is satisfied by reference to the death certificate. It is preferred practice for the seller's counsel to provide a copy of the death certificate and attach it as an exhibit to the contract of sale. The death certificate will not

only establish the death of an owner of property, but it will also establish the domicile of the decedent. This is necessary so that the title examiner will inspect and retrieve records from the Surrogate's Court in the county of domicile and in the county where the property is located. Will/Probate Documents. Prior to reviewing the Surrogate's Court records, and as recommended above, it must be determined whether the decedent died testate or intestate. If the decedent died testate, the practitioner should obtain a certified copy of the will (certified by the Surrogate's Court Clerk) to determine whether there are any provisions that affect the property and whether the executors have powers or restrictions. If the will complies with all applicable statutory requirements and is admitted to probate, title to the property will pass on the date of death and will be governed by the law in effect at the time of death, not by the law in effect at the time of execution of the will (EPTL §1-1.5). A search of the Surrogate's Court records will reveal whether a probate or administration proceeding has been commenced. If such proceeding does exist, it is important to retrieve the file number, date and person to whom letters of administration or letters testamentary were issued. An executor named in a will has no power to dispose of any part of the decedent's estate prior to issuance of letters testamentary, other than to pay reasonable funeral expenses (EPTL §11-1.3). Copies of the letters testamentary should be annexed to the contract of sale as an exhibit since contracts entered into by a nominated executor prior to a probate proceeding and the issuance of letters testamentary is voidable. These letters will expire and become stale after six months of their issue; updated letters should be requested from the Surrogate's Court prior to closing. Although administration or testamentary letters are valid for six months, the seller's attorney should obtain updated letters dated no more than three months prior to the date of closing. If the seller fails to deliver administration or testamentary letters at closing, the transaction should not be consummated unless all parties having an interest in the estate, which could be many, join in a conveyance. If the

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decedent died intestate or if the will does not meet statutory requirements, the decedent's property will pass according to the rules of statutory descent and distribution, commonly referred to as the laws of intestacy. (EPTL Article 4). Where there is intestate succession, the seller's attorney should conduct an investigation to trace heirs of the decedent. Once heirs are established, the parties should submit the results of such investigation to the title insurer to confirm that "heirship affidavits" are acceptable to establish the identity of the distributees of the decedent. These affidavits by distributees should then be prepared and properly executed. If the transaction involves the conveyance of a cooperative apartment, and there is no title company insuring the title of the property, it might be prudent to require the seller to commence a "probate of heirship" proceeding to establish the rights of inheritance. Estate Tax Waivers; Releases. The seller's attorney should, promptly after the contract of sale is executed, obtain a New York State transfer tax waiver as well as New York State and federal releases of lien with respect to the property being conveyed. For state tax waivers, the seller will need to complete and submit New York State Department of Taxation and Finance Form ET-30, Application for Tax Waivers (but only if the decedent died prior to Feb. 1, 2000), and Form ET-117, Release of Lien of Estate Tax. For federal releases of liens, the seller must complete and submit Internal Revenue Service Form 4222, Application for Certificate Discharging Property Subject to Estate Tax Lien. Marriage Certificate. In the case of a tenancy by the entirety, it is prudent to obtain a certified copy of the marriage certificate to prove the marriage. In the absence of proof, one could take the position that in fact the parties owned the property as tenants without a right of survivorship, in which case the surviving tenant in common would not have the authority to convey; rather, the decedent's executor or administrator would have that exclusive right. If a co-op corporation's transfer agent refuses to transfer the stock and lease because some of the necessary paperwork is not obtainable, one possible resolution is for the purchaser

to obtain a fee title insurance policy with a TIRSA (Title Insurance Rate Service Association) cooperative leasehold rider to the policy, which is little-used but typically available. This would insure to the purchaser that he or she is acquiring clear title, and the co-op corporation could condition the transfer on both the seller and purchaser waiving any future claims in connection with the transfer and on the title insurance company covenanting not to sue. The cost of the title insurance, if necessitated by the seller's failure or inability to obtain proper documentation, would seem to equitably be an obligation of the seller although this is certainly the proper subject of negotiation. Power of Attorney. An open question is whether an estate representative may grant a power of attorney to a third person to execute the documents necessary to transfer title. Generally, the fiduciary duties of an executor are personal and cannot be delegated to third parties. A fiduciary may delegate ministerial duties to third parties such as managing real property and collecting rents (41 N.Y. Jur. 2d, Decedents' Estates §1479) but the delegation of the authority to sell the decedent's property pursuant to a power of attorney is beyond the scope of a ministerial act. A beneficiary of an estate may delegate his or her authority to a third person pursuant to a power of attorney provided that the power of attorney is recorded in the office of the Surrogate that granted the administration or testamentary letters (EPTL §13-2.3). It is our experience that many lending banks will not permit the use of general or limited powers of attorney to execute loan documents in these situations, but others, and some managing agents as well, will permit such use. If there is a will, a prudent practitioner should check the language of it to see whether such power was specifically granted by the testator. If it was, the title company, lender and managing agent may accept a validly executed power of attorney. Counsel should not rely solely on title companies and managing agents to raise and investigate these issues, but should independently evaluate the issues and proactively take all necessary steps in a timely manner. By doing so, and raising all issues early in the

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transaction, counsel will be in a better position to ensure a smooth deal. Waiting for title companies or managing agents to raise these issues late in the transaction could well result in substantial delays and even terminated deals.

Conclusion

It bears repeating that all of the legwork should be done as early in the process as possible. Nobody likes surprises, and with the intense pressure on the parties as well as their counsel in this overheated market, it is incumbent on the seller's counsel to fully and timely obtain all necessary documentation and to comply with all specific procedures outlined above. Any issues discovered in this due diligence process can be specifically addressed in the contract of sale. Should issues come up after the contract is executed, they can be dealt with through negotiation and amendments to the contract.

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1. Ownership interest by a corporation or other entity is beyond the scope of this article. Troup.

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