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## COOPERATIVES AND CONDOMINIUMS

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### *Co-op Transfers by Estates, Trusts and Other Entities*

**A**NY ATTORNEY who has dealt with transfers of co-op apartments by estates, trusts or other entities has encountered the last-minute scrambling that regularly occurs in order to satisfy the co-op's transfer agent or the purchaser's counsel that the seller has the right and authority to convey good title to the co-op shares and proprietary lease. As counsel to many co-op corporations, we often receive urgent calls from transfer agents requesting guidance where the seller arrives at closing with a stock certificate bearing someone else's name or without the appropriate estate or other entity documentation.

Frequently, the confusion arises because the sellers themselves do not actually know who owns the apartment. John Smith, as the surviving spouse and sole beneficiary of Jane Smith, may think he owns the co-op apartment, but the co-op corporation's records may reflect otherwise. Many an adjourned closing (and the attendant ill will) could have been avoided in the first instance if the seller's attorney had examined the stock certificate and proprietary lease

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(and verified the information with the co-op's transfer agent) before a contract was signed and a closing scheduled.

#### Transfer Agents

Further, most co-op transfers are handled by transfer agents who are typically not attorneys and are not equipped to handle the complexities of the title issues involved. Attorneys for sellers and purchasers frequently place unwarranted reliance on these transfer agents, expecting them to raise objections in the manner of title examiners when there are estates or other entities in the chain of title or inconsistencies between the description of the sellers in the contract of sale and the co-op corporation's records. However, unlike in a real estate transaction, in a co-op transaction there is typically no title insurance company to issue a report, raise objections to title and generally steer the attorneys in the right direction prior to closing. Instead, the co-op corporation acts, in effect, as the title insurer, transferring the shares and lease to the purchaser upon satisfactory review of the seller's documentation. A lack of

consistency in the documentation required by the various co-op transfer agents for transfers involving estates and other entities, causes further confusion among attorneys.<sup>1</sup>

#### Conveying Good Legal Title

This column attempts to clarify who can convey good legal title in frequently encountered situations involving estates, trusts and other entity transfers, as well as the basic documentation that should be required in order for the seller to convey good title to the co-op shares and proprietary lease, free of any estate tax liens.

*Situation A. John Smith is the sole beneficiary of decedent Jane Smith's estate pursuant to a Will or Grantor Trust. The co-op shares and proprietary lease are in Jane Smith's name. Can John Smith individually convey good title to the co-op shares and lease?*

No. John Smith does not have the authority to convey the co-op apartment. Even if the apartment were specifically bequeathed to John Smith by will, title to the shares and lease must be conveyed by the fiduciaries of the estate (executors or administrators) or trustees of the trust and the following documents provided:

- (a) Official Death Certificate
- (b) Attorney- or court-certified copy of the Last Will and Testament or Grantor Trust
- (c) Federal Certificate Discharging Property Subject to Estate Tax Lien (or evidence that none is required)<sup>2</sup>

(d) New York State Release of Estate Tax Lien<sup>3</sup>

(e) New York Estate Tax Waiver (only if decedent died prior to Feb. 1, 2000)<sup>4</sup>

(f) Affidavit of Debts and Domicile<sup>5</sup>

(g) Certificate of Letters Testamentary or Letters of Administration (The Certificate should usually be dated within 60 to 90 days of closing. In certain cases, the Letters will have an expiration date. Confirm that such a date does not precede the closing)

(h) In the case of a Grantor Trust, the additional documentation listed in Situation D below is required

*Situation B. Jane Smith (the decedent) and John Smith both hold title to the co-op shares and lease. Can John Smith individually convey good title to the co-op shares and lease?*

The answer depends on how the parties' names appear on the stock and lease, as well as how they were related and when they took title.<sup>6</sup>

New York Estates Powers and Trusts Law (EPTL) §6-2.2(a) generally provides that a disposition of property to two or more persons creates a tenancy-in-common, unless expressly declared to be a joint tenancy. A tenancy-in-common differs from other methods of co-ownership (e.g., joint tenancy with right of survivorship and tenancy by the entirety) because there is no automatic vesting of title in the survivor(s) on the death of a co-owner.

### Exceptions to the Rule

Two exceptions to this general rule are made under EPTL §§6-2.2(c) and (d) for dispositions of co-op shares made after Jan. 1, 1996. Under §6-2.2(c), the disposition to a husband and wife creates a tenancy by the entirety, unless expressly declared to be a joint tenancy<sup>7</sup> or tenancy in common. Under §6-2.2(d), the disposition of co-op shares to persons who are not legally married to one another, but who are described in the disposition as husband and wife, creates a joint tenancy, unless expressly declared

to be a tenancy-in-common.

Therefore, attorneys need to pay close attention to the wording on the shares and lease as well as the date of issuance, since this will have a significant impact on the authority of the surviving co-owner to transfer the apartment. For example, if prior to Jan. 1, 1996, Jane and John Smith took title as "joint tenants" even without adding "with right of survivorship," then, on Jane Smith's death, title to the shares and lease automatically passes to the survivor, and John Smith has authority to transfer the co-op apartment. Similarly, if Jane and John Smith were married and took title to the co-op after Jan. 1, 1996 without designating the nature of their ownership, John would have authority to convey the co-op apartment following Jane's death.<sup>8</sup>

In each of these survivorship scenarios, the only documentation required by the transfer agent should be an official copy of the Death Certificate, as well as a certified copy of the Last Will and Testament or Grantor Trust (to ensure that there are no conflicting claims of specific legatees). In the case of a tenancy by the entirety, it may also be prudent to require that proof of marriage be provided.

Where the shares and lease are not deemed to be a joint tenancy or tenancy by the entirety, the surviving tenant-in-common will not have the authority to convey the decedent's interest. Such interest must be conveyed by the Executors or Administrators of the decedent's estate, and all of the documentation enumerated in Situation A above must be supplied. This can be particularly troublesome if the deceased tenant-in-common died many years prior to the proposed transfer, and the fiduciaries and documentation cannot be located.

*Situation C. The decedent conveyed the shares and lease to either a testamentary trust or an inter-vivos trust, but the co-op did not (and will not) approve the transfer to the trust. Who has authority to convey to a third party purchaser?*

A co-op is not required to consent to

a transfer to a trust for estate planning purposes or, indeed, any other purpose, absent a provision in the proprietary lease to the contrary. Many co-ops permit and approve such transfers<sup>9</sup> under appropriate circumstances while others have policies that prohibit them or exercise their discretion to reject a particular transfer.

Where the co-op has not consented to the transfer, title to the shares and lease remains in the decedent's estate and must be transferred by the decedent's executors or administrators; all the documents referred to in Situation A above must be provided.<sup>10</sup>

*Situation D. The co-op shares and lease are held by a trust. Who has authority to convey title?*

The trustees of the trust, as the legal owner of the shares and proprietary lease, would normally have the authority to convey title. However, many trust instruments are lengthy and complex, and counsel for the co-op and the purchaser should request and review the following documentation well in advance of closing:

(i) Attorney-certified copy of the trust instrument and any amendments

(ii) In the case of a testamentary trust, a current Certificate of Letters of Trusteeship evidencing who currently serves as Trustee<sup>11</sup>

(iii) An affidavit of the Trustees confirming the continued existence of the trust, the identity of the current Trustees, and their authority to convey the shares and lease

(iv) Where appropriate (such as in instances where the trust instrument is complex), an opinion of legal counsel as to the matters enumerated in (iii) above

### Bahamian Firm Holds Title

*Situation E. Title to the co-op apartment is in the name of a Bahamian corporation. Who has the authority to transfer the shares and lease?*

In the case of a transfer from any domestic corporation, partnership, limit-

ed liability company or other entity, counsel for the co-op and purchaser should request evidence of the following:

1. Proof of the entity's formation (typically a Certificate or Articles of Incorporation)
2. Proof of existence (such as a Certificate of Good Standing)
3. Proof of authority to convey the shares and lease. (This can generally be satisfied by a certificate of an authorized officer, partner or manager, with the appropriate corporate resolutions authorizing the transaction and confirming the authority of the person(s) executing the documents)

Depending on the circumstances and the nature and complexity of the entity involved, further document review may be necessary. Where appropriate (such as in the case of foreign corporations or multiple corporate layers), an opinion of counsel acceptable to the co-op and purchaser's counsel should also be required.<sup>12</sup>

*Situation F. The seller is unable to provide certain required estate/trust/corporate documentation. The purchaser wishes to proceed with the transaction, but the co-op is unwilling to transfer the shares and lease. What can a co-op or purchaser's attorney do when confronted with imperfect documentation?*

One practical way of facilitating such a transaction (or indeed any transaction where title is open to question) would be through the obtaining of co-op title insurance. The co-op would condition the transfer on the purchaser's obtaining a policy of co-op title insurance issued by a reputable title insurance company, thus shifting the risk of transferring the shares and lease without appropriate documentation to the title company. Since the co-op does not itself have an insurable interest and therefore would not be a beneficiary of such title insurance, it is advisable for the co-op to require the purchaser to waive any future claims against the co-op in the event of any claims arising out of the transfer of the shares and lease. Although the title

insurance company cannot waive its right of subrogation, the co-op should also obtain an agreement from the title insurance company that it will not proceed against the co-op in the event of any claims by the purchaser under the insurance policy. The cost of the title insurance premium could be negotiated between the seller and purchaser of the apartment, but typically would be borne by the seller since, but for the title insurance, the seller would be effectively prevented from ever selling the apartment.

As a standard part of their due diligence in co-op purchase and sale transactions, counsel for both the seller and purchaser should ascertain the nature of the seller's ownership interest and determine (in consultation with the co-op's transfer agent and counsel) prior to contract execution, the nature of the documentation that the seller should be required to supply to the co-op and purchaser's counsel prior to closing. This documentation should be obtained and reviewed as far in advance as possible to ensure that there are no unwelcome surprises at closing. In situations where the authority of the seller is questionable, the transfer agent should be encouraged to consult with counsel for the co-op. Finally, where the required documentation cannot be provided, the purchaser may wish to obtain co-op title insurance so as to enable the transaction to proceed.



(1) To add still more confusion, the documentation requested by the transfer agent and the attorney for the purchaser may differ, since their responsibilities are different. For example, in the case of an estate transfer, the transfer agent, whose primary concern is protecting the cooperative corporation from any liability in permitting the transfer, may request only a New York Estate Tax Waiver for decedents dying prior to Feb. 1, 2000. (Under Tax Law §975(e) (McKinney 1999), as applicable to decedents dying after May 25, 1990 and before Feb. 1, 2000, certain transfer agents holding property for decedents could be held liable, among other things, for a certain portion of the decedent's New York estate tax if the agent failed to obtain a Waiver.) On the other hand, the attorney for the purchaser, who wishes to insure that his client purchases the cooperative apartment free of any estate tax liens, may independently request federal and New York releases of lien in addition to seeking the appropriate representations and warranties in the contract of sale.

(2) See Internal Revenue Service Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien. This is likely to be requested by the purchaser's attorney, but not necessarily the transfer agent.

(3) See New York State Department of Taxation and Finance Form ET-30, Application for Estate Tax Waivers/Releases of Estate Tax Lien and Form ET-117, Release of Lien of Estate Tax. The Release of Lien is likely to be requested by the purchaser's attorney, but not necessarily the transfer agent.

(4) Tax Law §975(e) (McKinney 1999), as in effect for decedents dying after May 25, 1990 and before Feb. 1, 2000. See New York State Department of Taxation and Finance Form ET-30, Application for Estate Tax Waivers/Releases of Estate Tax Lien; Form ET-99, Estate Tax Waiver Notice; and Form ET-85, New York State Estate Tax Certification.

(5) This document establishes the decedent's domicile and that the debts of the estate will be satisfied. See, e.g., Form T 39, Julius Blumberg, Inc. Law Blank Publishers.

(6) Est. Powers and Trusts Law §6-2.2 (McKinney 2002), (L. 1966, c. 952), as amended (L. 1975, c. 263 §81,2; L. 1995, C. 480, §2) sets out default rules for the manner in which multiple owners take title to New York property when specificity as to the manner in which title is being taken is absent.

(7) While both a joint tenancy and a tenancy by the entirety provides rights of survivorship, a tenant by the entirety enjoys additional rights and protections not extended to a joint tenant.

(8) This would not be the case, however, if shares were acquired prior to Jan. 1, 1996 and were registered in the Smith names followed either by the words "jointly" or as "husband and wife." These registrations would be presumed to create a tenancy-in-common. However, this presumption may be rebutted. See *Vincent v. Vincent*, 435 NYS2d 775, 80 AD2d 582, (2d Dep. 1981).

(9) Anita Rosenbloom and Richard Siegler, "Housing Cooperatives, Ownership By Trusts/A Retrospect and a Forecast," NYSBA Trusts and Estates Law Section Newsletter, Vol. 34, No. 4 (2002) reprinted in 30 N.Y. Real Prop. L.J. at p. 65 (Spring 2002).

(10) This can be extremely inconvenient in situations where careful estate planning to avoid probate or estate taxes is thwarted by overlooking the need to have the co-op approve the proposed trust transfer and, in the case of inter-vivos trusts (including QPRTs), physically transferring the shares and lease to the trust.

(11) In the case of an inter-vivos trust where no Letters of Trusteeship are issued, the identity of the Trustees must be confirmed by either of the documents described in subsection (iii) or (iv) under Situation D.

(12) Moreover, the lack of knowledge about the laws of a foreign sovereign suggests that a co-op would be ill advised to allow its shares to be registered by an entity not organized under the laws of any state of the United States.

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