

Smith Buss & Jacobs LLP

How to Handle Transfers – Current Issues Facing Co-op & Condo Boards

Kenneth Jacobs, Partner
Eric Blaha, Partner
Ryan Houck, Associate

Estate Transfers

- ▶ You learn that the sole shareholder / unit owner has died. What should the Board do?
 - Secure the Apartment
 - Consider rights of current occupants
- ▶ Can you accept payment of maintenance / common charges from a third party?



Who Has Authority?

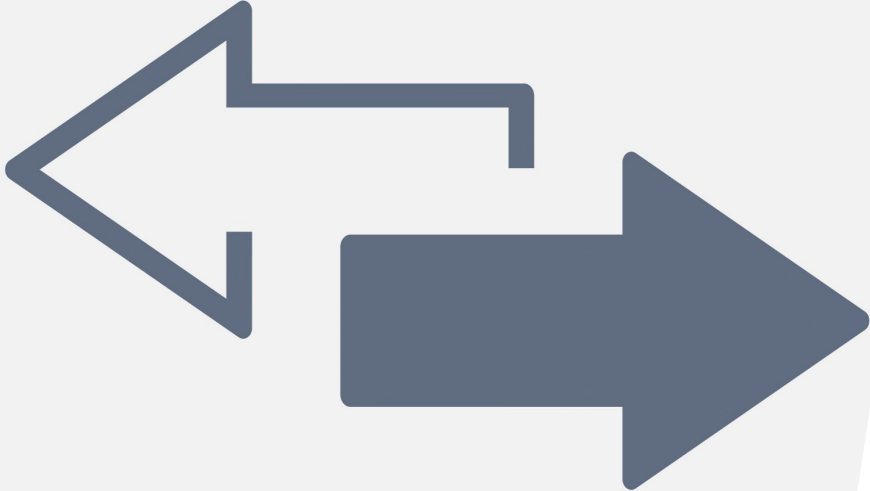
1. You need to find someone with the authority to act on behalf of the decedent.
2. People with wills appoint Executors with authority. People without wills have to petition a special court called “Surrogates Court” to be appointed Administrators.
3. What do you do if No one is stepping up? The Co-op Needs to file a petition with Surrogates Court to Appoint an Administrator.
4. Once an Administrator is appointed (either private or public), converts to a standard transfer.

Documents To Be Supplied for an Estate Transfer

- a) Letters Testamentary or Letters of Administration
- b) Certified Copy of Will
- c) Certified death certificate
- d) If person died before 2000, waiver or release of lien from NYS
- e) If estate likely to exceed \$11,750,000, [Good luck!] - release or waiver of lien from IRS.
- f) If neither (c) nor (d) applies, letter from executor or accountant certifying that either (i) estate is not subject to federal or state estate or inheritance tax, or (ii) sufficient funds will remain in the estate after the transfer to pay any estate tax likely to be due.
- g) Affidavit of Domicile by Executor regarding domicile of decedent at death. [If the will is being probated out of state, you may need ancillary letters testamentary authorizing the executor to act in NYS.]
- h) Judgment and lien search against the decedent.

ADVICE: Send around requests for shareholders to update you with information regarding next of kin, name of attorney. Keep with shareholder file. Avoids major problems when the inevitable happens.

Why would you transfer your apartment to a Trust or LLC?

- 
- ▶ Estate Planning
 1. Revocable Living Trust
 2. Irrevocable Trust (like a QPRT)
 3. Medicaid Trust
 4. Family LLC, allowing you to gift pieces of the LLC to your heirs at reduced values.
 - ▶ Limiting Liability
 1. LLC – Commercial or professional use.

Issues for Association

- ▶ Who will occupy the unit? “Owner and members of the Owner’s family?” But Trusts and LLC’s don’t have families.
- ▶ Who will own? Can’t monitor transfers of company interests under the radar. Big Deal Realty case. BOARD OF DIRECTORS OF BIG DEAL REALTY ON GREENE STREET, INC. v. 60G 133 GREENE STREET OWNER, LLC, 129 N.Y.S.3d 706 (2020).
- ▶ Bypassing the Condo’s rights of first refusal, even if they are simply glorified notice provisions.
- ▶ Who has authority to act on behalf of the Trust? Trustee? Grantor? Occupant? Any Officer or Director?
- ▶ What if the Trust or LLC has no assets except the apartment? Harder problem for Condo, since Condo’s lien is behind the bank’s.

Occupancy Agreement

- ▶ Addressing all of these issues. Goal is to put the Co-op or Condo into the same position as if the owner were an individual.
 - a. Specify to whom the Trust or LLC can transfer the apartment to other entities, and how:
 - i. Incorporate the same exceptions to the right of first refusal in the Condo By-laws.
 - ii. Incorporate the same exceptions to requiring Co-op consent if transferee entity would be controlled by a spouse or (after death) to a “financially responsible member of the immediate family.”
 - iii. Limit transfers of interests in the entity without Board consent or triggering the Right of First Refusal.
 - b. Specify who has the right to occupy the apartment.
 - c. Specify who has the right to give instructions to the Association.
 - d. Bar changes to the Trust documents that will adversely affect the Association’s rights.

How do you protect the financial remedies of the Association?

- ▶ Co-op - Require a personal guarantee from a financially responsible person. Usually can be Grantor. Special problems with Medicaid Trust.
- ▶ Harder to demand guaranty in a Condo, since there is no requirement that any purchaser be solvent. But still ask.
- ▶ Legal Justifications for Demanding Personal Guarantee and other Documents
 - Easy for Co-op, since has a right to approve almost all transfers.
 - Harder for Condo, since the Board can't reject transfers. But same occupancy issues - how can a trust or LLC "occupy" anything without the individual occupant being considered a tenant, triggering the right of first refusal?

Section 10.02: Spendthrift Provision

[Plain English]

- ▶ Sample Clause: “Neither the income nor the principal of any trust created under this agreement may be assigned, anticipated, encumbered, alienated, or otherwise voluntarily transferred in any manner by any beneficiary. In addition, neither the income nor the principal of any trust created under this agreement is subject to attachment, bankruptcy proceedings or any other legal process, to the interference or control of creditors or others, or otherwise subject to any involuntary transfer. This section does not restrict a beneficiary's right to disclaim any interest or the exercise of any power of appointment granted in this agreement.”
- ▶ Associations Concerns:
 - a. If a beneficiary is a trustee, might claim that you are barred from taking action against the beneficiary due to the spendthrift clause.
 - b. Trust may contain a waiver against any invasion of Trust assets.
 - c. Need waiver of spendthrift clause and other limits when applied to actions of Co-op.
 - d. Ideally, insert language into the Trust document to be enforceable. If you can't, you can try putting it into the Occupancy Agreement as a “contract” agreement.
 - e. Note: Creditors can pierce the Spendthrift clause restrictions in Revocable Living Trusts. Clause not enforceable.

Evolution of NY Laws on Co-op Purchase Applications

- ▶ NY Human Rights Laws - 80 years
- ▶ Business Judgment Rule
- ▶ Boardroom autonomy (pre-2009)
- ▶ “Unfettered” discretion on applications: denial for any reason or no reason

A Minor Revolution

- ▶ Buyers (and brokers) thought Qualified Buyers were being unlawfully rejected
- ▶ Suffolk County “invades” the board room (Local Laws, Ch. 391)
- ▶ “TIMING”: 2009 Suffolk introduces “TIMING” restrictions: Board has 10 days to notify applicant if application is incomplete or incorrect
- ▶ “REASONS”: also now, the first time Boards were required to give a reason for rejection

Westchester County Adopts REASONS and TIMING, and more ...

▶ TIMING:

- 15 days for the Board's response to the Applicant;
- 60 days to approve/decline

▶ REASONS:

- Board must give purchaser the REASON in writing
- Within 15 days the Board shall notify the WC Human Rights Commission

**MODEL REJECTION NOTICE FROM THE WESTCHESTER COUNTY HUMAN
RIGHTS COMMISSION PURSUANT TO SECTION 700.21-a OF
THE WESTCHESTER COUNTY FAIR HOUSING LAW
(ALL INFORMATION MUST BE PROVIDED)**

INSERT APPROPRIATE LETTERHEAD

Insert Date

Re: Cooperative: Full Legal Name including d/b/a, Address
Applicant(s): Full Name, Address, Telephone #, Email Address
Seller(s): Full Name, Address, Telephone #, Email Address
Unit Address: Address and Unit Number Applied For

Dear _____:

The Board has rejected your application for the following reason(s):

- | | |
|---|--|
| <input type="checkbox"/> Credit Score is Too Low | <input type="checkbox"/> Insufficient Income |
| <input type="checkbox"/> Debt-to-Income Ratio is Too High | <input type="checkbox"/> Insufficient Savings |
| <input type="checkbox"/> Unsubstantiated Financial Information Provided | <input type="checkbox"/> Insufficient Financial Assets |
| <input type="checkbox"/> Inadequate Job History | <input type="checkbox"/> Bankruptcies/Foreclosures/Evictions |
| <input type="checkbox"/> Provided False Information on the Application | <input type="checkbox"/> Poor/No References |
| <input type="checkbox"/> Criminal Background Check | |

☐ Unacceptable Purchase Price/Down Payment (must include details):

☐ Other Financial Reasons (must include details): _____

☐ Impermissible Intended Use of Unit (must include details): _____

☐ Other Non-Financial Related Reasons (must include details): _____

Signature,
Authorized Signatory
Printed Name

Model Rejection Notice

Source: Westchester County,
Human Rights Commission

Model Rejection Notice Cont.

Receipt of Initial Application: [INSERT DATE]
Acknowledgment of Receipt of Initial Application: [INSERT DATE]
Receipt of Completed Application: [INSERT DATE]
Acknowledgment of Receipt of Completed Application: [INSERT DATE]
Interview: [INSERT DATE IF APPLICABLE]

Applicant's Attorney: Full Name, Address, Telephone # and Email
Seller's Attorney: Full Name, Address, Telephone # and Email
Applicant's Broker: Full Name, Address, Telephone # and Email
Seller's Broker: Full Name, Address, Telephone # and Email
Property Mgmt Company: Full Legal Name, d/b/a, Address, Telephone # and Email

cc: Westchester County Human Rights Commission

Westchester County Adopts REASONS and TIMING, and more ...

- ▶ Training - Board members must obtain 2 hours of Fair Housing Training every 2 years
- ▶ Standardized Application with Minimum Financial Requirements
- ▶ 2021: PENALTIES FOR NON-COMPLIANCE:
 - First: \$1,000; Second: \$1,500; All Others: \$2,000
 - BRI Statistics show **45% INCREASE** in purchase application rejections
 - A chilling affect: boards unwilling to take chances at the risk of making mistakes

NYC COUNSEL INTRO 914

- ▶ Standardized purchase application; Minimum financial requirements, 10-day acknowledgment
- ▶ 45-days upon receipt of any information: Board must notify if
 - Application is approved unconditionally
 - Application is approved conditionally
 - Application is denied
 - 45-day Time Period is tolled/suspended from time of notice of incomplete application to time of corrected and completed submission
- ▶ Purchaser may treat failure to notify in 45-days as a DENIAL

NYC INTRO 914: Remedies

- ▶ Buyer or Seller private right of action
- ▶ Violations for non-compliance:
 - \$1,000 (10-day)
 - \$5,000 (standardized application & list of requirements)
 - \$10,000 (failure to notify in 45-days)
 - HRC Investigation: award civil penalties of \$1,000 - \$25,000

NY State Legislature Reasons and Timing

- ▶ Assembly Bills Introduced
 - Assembly 2685, 1064: 30-DAYS to notify buyer of REASONS
- ▶ Condominiums
 - 6241: NY RPL 339-mm: Residential Condo Bill of Rights
 - Transparency: Disclosures