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TRUSTS and ESTATES and REAL ESTATE

**Representing Buyers and Sellers in Estate Transactions
and Estate Planning Involving Real Property**



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Definitions of “Estate” and “Trust”

- Estate – An entity created at death with assets in the decedent’s name alone. Court appointed executor and trustee, if any. Court supervision at all times. Controlling person is executor
- Trust – An entity created during the life or at death of the Grantor. No court supervision. No court issued letters to trustee.

Revocable vs Irrevocable Trust

- Different tax consequences
- Revocable trusts provide no estate tax savings
- Irrevocable trusts can be taxed as grantor trusts and incomplete gifts.
- Irrevocable trusts can be completed gifts whereas it is out of the decedent's estate.
- Irrevocable trust provisions have to be reviewed carefully to determine whether or not the trust is a completed gift or incomplete gift.

Basis

- Gift – Donee receives donor's basis
- Death inheritance – Donee/beneficiary receives step-up in basis valued at date of death value of inherited assets. Donee gets date of death value new basis.

Revocable Trust (no estate tax savings)

Reasons to make a revocable trust

- Reason 1 – Difficult probate.
- Reason 2 – Out of state real property to avoid ancillary probate proceeding.
- Reason 3 – Secrecy reason, as trust is not of public record.
- No court supervision.
- No delay in probate.

Irrevocable Trust (completed gift or non-completed gift)

- Can be used for completed gifts.
- Can be used for incomplete gifts.
- Used to house life insurance before it matures.
- Used as Qualified Personal Residence Trust.
- Used as Charitable Remainder Annuity Trust

Gifts and Estate Tax Examples

- Example 1 – Mom owns a house which she bought in 1950 for \$30,000. Mom gifts house during her lifetime to son. Son's basis is \$30,000. House value is not included in Mom's estate when Mom dies. If son sells house, he will pay a capital gains tax on \$970,000, if house is not his primary residence and is sold for \$1,000,000.

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- Example 2 – Mom dies with house that she bought in 1950 for \$30,000. Date of death value of house is \$1,000,000 and is included in Mom's estate. Mom's estate pays an estate tax on gross estate which is eliminated by the NY exemption. Son inherits house at \$1,000,000. Son will pay no capital gains tax if son sells house tomorrow for \$1,000,000.

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- Example 3 – Estate vs. Gift choices
- If Mom's estate exceeds \$4,187,500, the estate will pay a NY Estate tax. If Mom's estate exceeds \$5.45 million, Mom's estate will pay a 40% Federal estate tax.

Does the Executor Have the Power to Sell Property?

- EPTL § 11-1.1(b)(5) and EPTL § 11-1.1(b)(5)(B)
- Fiduciary does not have authority to sell property “specifically disposed of” by Will or Testamentary Trust
- Fiduciary has authority to sell property on such terms as in the opinion of the fiduciary are most advantageous to those interested in the estate.
- Exception – Real property held in a revocable trust is not probate property and the Executor/Administrator has no power to sell such property

Overview of the Federal Estate Tax

- The 2012 Tax Act was signed into law on January 2, 2013 and applies to decedents dying on or after December 31, 2012
- Basic Exclusion amount is \$5 million indexed for inflation
- Federal Estate Tax Exemption for 2016 is \$5,450,000 & 2015 is \$5,430,000
- (2014 -\$5,340,000 and 2013- \$5,250,000)
- 40% estate tax rate
- Federal Estate Tax Return (Form 706) due date is 9 months from Date of Death

New York State Estate Tax

- Exclusion – \$1 million --New York Tax Law § 951 (a) (Prior to 4/1/14)
- Exclusion - \$2,062,500 for deaths 4/1/14-3/31/15
- Exclusion- \$3,125,000 for deaths 4/1/15-3/31/16
- Exclusion- \$4,187,500 fro death 4/1/16-3/31/17
- Exclusion- \$5,250,000 for deaths 4/1/17-12/31/18
- Exclusion- same as the Federal Exemption on or after 1/1/19
- NYS Estate Tax Return due date is 9 months from Date of Death
- A NYS Estate Tax closing letter or discharge letter will be issued after the NYS Estate Tax return is approved by the Department of Taxation & Finance.

New York Surrogate's Court Proceeding

Probate proceeding - Letters Testamentary issued to Executor under Will who has authority to collect and sell real and cooperative personal property.

Court only has jurisdiction and control over probate assets which are assets in decedent's name alone.

Trustee of Revocable Trust

- A Trustee has the authority to sell property held in a revocable trust
- No Court issued Letters of Trusteeship
- No Court approval of Letters of Trusteeship
- Attorney should obtain copy of trust agreement to verify if the trustee has the power to sell property out of the trust
- Attorney should obtain a copy of all amendments to the trust, if any
- Where there are multiple trustees make sure all trustees consent to sale

Use of a Power of Attorney by a Fiduciary

- A fiduciary cannot delegate his or her duties as fiduciary
- As a general rule, “[t]o qualify as a fiduciary is a serious matter and if one lacks the time or inclination necessary to devote to the affairs of an estate, he should refrain from accepting his nomination or resign. The facts in each estate will determine whether or not the retention of agents is warranted.”
- Review the Will to see if All Fiduciaries are Required to Sign Documents
- Exception - A fiduciary may delegate duties that are considered ministerial in nature

Transfer of Real Property

- Determine who owns the property by obtaining a copy of the recorded Deed of record (ACRIS – public system search)
- Probate property- if record owner is one person then court issued letters must be obtained and you are dealing with an estate
- Non-probate property- if record owner is an entity then you are dealing with the entity's fiduciary
- Non-probate property- if record owner is more than one person and the title to the property is by right of survivorship and not as tenants in common then you are dealing with the surviving person who now owns the property

Who can Sell the interest in real property when the Record Owner Dies?

An Executor/Administrator has authority to sell the real property if it is held in the decedent's name alone (check deed)

A Trustee has the authority to sell if the real property was owned by the Trust

A Partner has the authority to sell if the real property is managed by a buy/sell agreement.

Federal Release of Lien – Form 792 US Certificate Discharging Property Subject to Estate Tax Lien

Required Documents

- Copy of first page of Form 706
- Form 4422 signed by the Executor
- Copy of Death Certificate
- Original Letters Testamentary
- Copy of Contract of Sale
- Copy of Last Will and Testament
- Copy of Form 2848

Federal Release of Lien – Form 792 US Certificate Discharging Property Subject to Estate Tax Lien

- A Federal Release of Lien cannot be obtained if the Estate is not required to file a Federal Estate Tax Return
- You Do Not Have a Contract of Sale

Requirements to Transfer Interest in an Apartment Building

- Death Certificate with raised seal (original).
- Attorney certified copy of Last Will and Testament and any Codicils
- Rent Roll
- All building violations cleared on title report
- Affidavits submitted to undertake to clear any violations
- If Apartment Building is owned by two or more persons with rights of survivorship no fiduciary letters will be required.
- Executor letters (Letters Testamentary)

Requirements to Transfer Apartment Building (Continued)

- Administrator (Letters of Administration) dated within six (6) months of closing (original)*
- Affidavit of Debts and Domicile executed by an Executor or Administrator (original)
- US Certificate Discharging Property Subject to Estate Tax Lien (Form 792, original) or IRS Estate Tax Closing Letter Original proprietary lease
- NYS Release of Lien of Estate Tax (Form ET-117, original)
- If decedent died prior to February 1, 2000: NYS Estate Tax Waiver (Form ET-99, original) or a NYS Estate Tax Closing Letter
- *It is good practice to update Letters if dated more than 30 days from closing date

New York State Release of Lien – Form ET-117

- Obtained through NYS Department of Taxation & Finance
- Must be filed with either a Form ET-706, ET-30 or ET-85
- Obtain forms from NYS Dep't of Taxation & Finance website
- Usually takes about 5 weeks to obtain
- No requirement for a signed Contract of Sale

- Non Probate Assets

- Buy-Sell Agreement
- Between Co-Partners
- Review Exit Strategy for Death of Co-Partner
- Surviving Co-Partner of business has right of first refusal to purchase deceased co-partner's interest in business

- Non-Probate Assets

- Limited Liability Company
- Operating Agreement- terms will be spelled out as to what happens on the death of a member
- Member managed
- Manager managed
- Review Exit Strategy for Death of Member/Manager
- Surviving members should have right of first refusal to purchase deceased member's interest in business

Non Probate Assets

- Trust Agreement
- Trustee runs the trust and manages the trust assets
- Obtain Trust Amendments, if any
- Review Exit Strategy for death of Trust Beneficiary
- Surviving Trust Beneficiaries of business have right of first refusal to purchase deceased Beneficiary's interest in business to ensure continuation of business



- Purpose of Buy/Sell Agreement
- Solidify what happens upon death of partner
- Ensure continuation of family business
- No court supervision
- Determine under buy/sell agreement the methodology of valuation of deceased partner's business interest



- Purpose of Creating LLC/FLP
- Solidify what happens upon death of member/partner
- Ensure continuation of family business
- Creditor protection
- No court supervision



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Important Things to Consider when an Estate is the Seller

- DBA: “Don’ t Be Afraid” to discuss issues with estate counsel and/or the title company in advance to get an overview of the estate and get pertinent documents reviewed
- Intervening Transfers – are they necessary and what documents need to be prepared ?
- Talk to Executor to find out what, if anything they know about the property as this will affect the level of reps and warranties given in a contract
- Title Insurance – the ultimate “Belt and Suspenders” (even for co-ops)
- Timing – estate transactions may take longer than standard ones
- Attorneys for buildings need to be aware of estate issues and logistics

Contract of Sale– Seven Common Issues

I. Who is the Seller?

- Seller should be “John Doe, as Executor of the Estate of Jane Doe” or “John Doe, as Trustee of the John Doe Trust Under Agreement Dated (“u/a/d “) _____, 2011. [Use EIN not SS#]

Suggested Contract Language:

- *Purchaser acknowledges that John Doe is only acting in his capacity as executor of the Seller in connection with this transaction. Accordingly, Purchaser, for themselves and their heirs, successors and assigns hereby releases, relinquishes and waives any and all recourse against John Doe in his individual capacity.*

(BUYER TO ADD: “...except for those claims as may be made pursuant to Section 11-4.7 of the New York Estates, Powers and Trust Law”)

Contract of Sale– Seven Common Issues

II. PCDA Not Applicable on Fiduciary Transactions

- NY Real Property Law Section 463(7) states that the \$500 Property Condition Disclosure Act (PCDA) credit is not applicable in “transfers by a fiduciary in the course of administration of a decedent’s estate, a guardianship, a conservatorship or a trust” (Note: may not be applicable for grantor trusts)
- Fiduciary is generally not in a position to make representations or disclosures about the condition of Property so why should they be required to give a credit?

Contract of Sale– Seven Common Issues

III. Representations and Warranties

- “Take it or Leave it “
- Most Fiduciaries have not lived in the property to be able to make customary reps that a seller would otherwise be able to make such as leaks, noise complaints, etc.
- Credits vs. Repairs—Always opt for credits
- Without representations Buyer must conduct greater level of due diligence and engage brokers to do more heavy lifting

Contract of Sale– Seven Common Issues

III. Representations and Warranties

SUGGESTED CONTRACT PROVISION

It is understood and agreed that (i) no equipment, furnishings, furniture or personal property are included in this sale, except as is specifically set forth in Paragraph ___ of the printed form of Contract, and (ii) Seller is not obligated to install any equipment or appliances in the Unit or otherwise make any repairs or improvements to the Unit or to the appliances, equipment and fixtures contained in the Unit.

Contract of Sale– Seven Common Issues

III. Representations and Warranties

ANOTHER SUGGESTED CONTRACT PROVISION

Purchaser acknowledges that the floors, doors, walls, ceilings and other surfaces at the Unit are being sold in their “AS IS” conditions and Purchaser agrees that Seller shall not be required to repair, repaint or refinish the floors, doors, walls, ceilings or any other surface at the Unit. Purchaser shall accept the walls in the Unit subject to minor chips, holes and/or indentations as are ordinarily created by the removal of hanging pictures and other removable items being taken by the Seller.

Contract of Sale– Seven Common Issues

III. Representations and Warranties

AND ANOTHER SUGGESTED CONTRACT PROVISION

Seller represents and warrants that (i) Seller has all right, title and interest to the [Property] and has the authority to enter this Contract, and to transfer ownership of the Property, (ii) all debts and claims of the estate of John Doe (the “Estate”) have been provided for, (iii) all estate, transfer, death and other taxes of the Estate shall be paid from funds of the Estate and (iv) all tax proceedings will be timely completed. Seller agrees to indemnify and hold Purchaser harmless, including reasonable attorney fees, from any debts, expenses and liens against the Property that are or may be owed by the Estate. This provision shall survive Closing.

Contract of Sale– Seven Common Issues

IV. Storage/Servant's Room - Is there an Affirmative Ownership Interest?

SUGGESTED CONTRACT PROVISION

At Closing, Seller shall transfer to Purchaser whatever rights and interests, if any, Seller may have to the storage area/servant's room located at the Premises. No additional consideration will be paid by Purchaser for the acquisition of the storage area/servant's room

Contract of Sale– Seven Common Issues

V. Estate Documents To Be Provided

- Death Certificate
- Last Will and Testament Certified as True and Correct
- Letters Testamentary within 6 Months of Closing Date (30 days is best practice)
- IRS/NYS Lien Waivers (or applicable Affidavits)
- Affidavit of Debts and Domicile

Contract of Sale– Seven Common Issues

V. Estate Documents

SUGGESTED CONTRACT PROVISION

When Representing a Seller:

Seller will provide Purchaser with (i) a certificate of letters testamentary concerning the Seller dated within 6 months of the Closing Date, (ii) a copy of the Last Will and Testament of John Doe certified by estate counsel as being a true and correct copy, (iii) a copy of the death certificate of John Doe and (iv) any other documents that (the managing agent/title company as applicable] may deem reasonably necessary to effectuate the transfer of the Property.

Contract of Sale– Seven Common Issues

V. Estate Documents

SUGGESTED CONTRACT PROVISION

When Representing a Purchaser

Seller will provide Purchaser with (i) a certificate of letters testamentary concerning the Seller dated within 6 months of the Closing Date, (ii) a copy of the Last Will and Testament of John Doe certified by estate counsel as being a true and correct copy, (iii) a copy of the death certificate of John Doe, (iv) a release of lien with respect to the Property, issued by the New York State Department of Taxation and Finance, (v) a Federal release of lien issued by the IRS or an affidavit confirming that no such release is required and (vi) any other documents that [the managing agent/title company as applicable] may require to effectuate the transfer of the Property and/or the issuance of the Title Company's Title Policy.

Note that Schedule B of a Title Report may ask for additional documentation

Contract of Sale– Seven Common Issues

VI. Coop Leasehold Insurance Policy

With Coop Apartments Always Suggest Coop Leasehold Insurance – Belt and Suspenders

SUGGESTED CONTRACT PROVISION

Purchasers' obligations to Close title to the Unit, Shares and Lease shall be contingent upon the issuance of a title policy or a binding commitment for same (the "Title Policy") at Closing upon concurrent payment of the standard premium therefor, insuring Purchasers' title to the Unit, Shares and Lease in the amount of the Purchase Price subject to no Judgments, Liens, Claims, Encumbrances or other matter not expressly permitted by this Contract; the Title Policy shall be the title company's current form of Coop Leasehold Insurance Policy with any endorsements required by Purchasers, if any, as are then customary and available in New York.

Contract of Sale– Seven Common Issues

VII. Domicile of Decedent

- Get a representation that the Decedent was a NY Domiciliary or it may raise out-of-state probate issues
- IT 2663/2664 Estimated Income Tax Return may come into play

Suggested contract provision:

- *Seller represents and warrants that at the time of his death, John Doe was a domiciliary of the State of New York. This representation shall survive the Closing.*

The Closing

- Get all relevant estate documents together and over to the applicable parties as soon as possible to address any issues
- Timing of signatures when you have multiple fiduciaries– for deeds, transfer tax returns and related documents, chances are all executors must sign so be cognizant of preparation and turnaround times
- Try to get as many documents as possible pre-signed (even do a Seller's pre-closing)
- Power of attorney not permitted except for ministerial documents
- Deed must recite actual consideration not just the standard \$10
- In co-op transactions, make sure executor has stock/lease
- Closing proceeds instructions



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