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N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

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Table of Contents

Message from the Section Chair

Greetings, everyone! In January we enjoyed another successful Annual Meeting with a fantastic CLE program put together by Steve Alden, Esq., the Chair-elect of the Section. Thanks, Steve, for all of your hard work!

Our business meeting welcomed Leon Sawyko, Esq. as the new Secretary of the Section. Congratulations, Leon! We look forward to enjoying all the wisdom and experience you will bring as an officer of the Section. It was also our pleasure to give the 2012 Real Property Law Section Professionalism Award to Karl Holtzschue, Esq. Karl, an alumnus of Dartmouth College and Columbia Law School, is a former chair of the RPLS and a prolific writer and lecturer on real estate topics. He currently chairs the Legislation Committee of the Section and was virtually single-handedly responsible for growing the Section's involvement in legislation and establishing us as a source of information and guidance for legislators on matters affecting real estate. More importantly, Karl is a man of unmatched integrity. An award well deserved, Karl!

After the CLE at the Annual Meeting, our luncheon speaker was none other than Darcy Stacom, vice chairman with CB Richard Ellis and dubbed the "Queen of Skyscrapers." Her insight into the commercial real estate market in New York City was invaluable. We thank her for taking time out of her busy schedule to join us.

Finally, we bid a sad farewell to our very own James Pedowitz, Esq. who left our earth on January 26, 2012 at the young age of 96. A renowned real estate attorney and the father of real estate title law in New York, his book *Real Estate Titles* is still considered the subject's bible. We were lucky to have had him as an active member of the Section, a past chair, and the first recipient of the Real Property Law Section's Professionalism Award, which he was given in 2001. You will be greatly missed, Jim. We are all better attorneys for having had you in our profession.

As I write this I realize that all of the folks mentioned in this column are not only at the top of their profession, but they are highly respected people with the utmost integrity. I am proud to know each of them, which would not be possible without my involvement in the NYSBA RPLS. Give it a try; you never know who you will get to rub elbows with! Look for future incentives to encourage others to join the Section. We will be rolling out a new membership drive in the near future—more details to come!

As always, if you need anything or have any comments, feel free to contact me at hrogers@davidsonfink.com or 585-546-6448.

Heather C.M. Rogers

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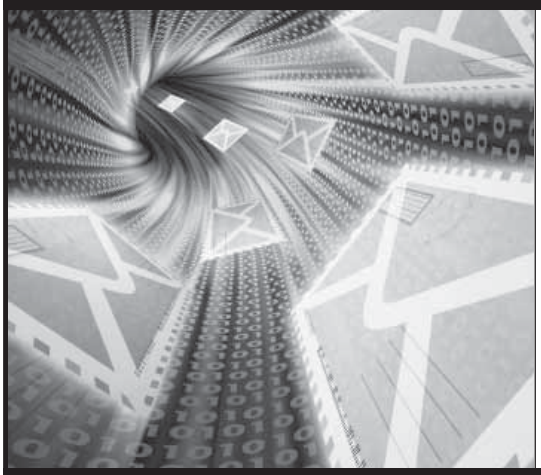

If you have written an article and would like to have it considered for publication in the *N.Y. Real Property Law Journal*, please send it to one of the Co-Editors listed on page 46 of this *Journal*.

Articles should be submitted in electronic document format (pdfs are NOT acceptable) and include biographical information.

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Title Insurance and Same-Sex Marriages

By Marvin N. Bagwell

Hardly ever are matters before the New York State Legislature accorded live television coverage. However, on the evening of June 24, 2011, the world was watching. As most people now know, that evening, the New York State Senate joined the State Assembly[1] in passing the Marriage Equality Act (hereinafter, the "Act"). Governor Cuomo signed the Act that very same evening. As a result, thirty days later, on July 24, 2011, same-sex marriage became the law of the land in the State of New York.[2]

The Act's operative provisions are not complex:

1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law shall differ based on the parties to the marriage being of or having been of the same sex rather than a different sex.[3]

The Legislature's primary statement of intent is likewise straightforward: "[i]t is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law."[4] As same-sex couples have rushed to take advantage of this new civil right, questions have arisen in the title arena as to how we are to treat these new marriages. In general, we know the conveyancing rules and how they apply to opposite-sex couples. How do we apply those rules to same-sex couples? No pun intended, but the quick and easy answer is, the same. What follows are the answers, in the author's opinion, to a baker's dozen of the basic questions concerning how to insure titles which are to be held by or which are held by same-sex couples.

1. How should a same-sex couple take title?

In the world of title conveyancing, we are familiar with taking into account 400 years of jurisprudence. Now, as required by the Legislature, we can promptly discard much of that history. The answer to Question 1 now, in effect, is, "Anyway they want!" In the Act, the Legislature specifically stated its intent:

> The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.[5]

EPTL Section 6-2.2(b) provides that a conveyance to a husband and wife creates in them a tenancy by the entirety unless the grantor specifies otherwise. Therefore, upon marriage and thereafter, both opposite and same-sex couples may come into title as tenants by the entirety as long as the deed so provides (explicitly or as per EPTL Section 6-2.2 explained in the answer to Question 4 below). Tradition, that very old-fashioned word, also stands in favor of same-sex couples taking title as tenants by the entirety. Now that the marriage laws are gender neutral, there is no legal reason preventing a same-sex couple from identifying themselves on a deed as husband and husband, wife and wife, husband and wife, or spouse and spouse as well as the more traditional tenants by the entirety, if they so wish. However, same-sex couples should be advised against taking title on a deed as partner and partner. That may raise confusion in later transactions as to whether the couple's intention was to create a partnership or a tenancy by the entirety.

2. Suppose the same-sex couple is married in another state or country that permits same-sex marriage? Are they married in New York?

Yes, same-sex couples who were married in other states and nations that permit same sex-marriage are considered as being married in New York. New York gives full faith and credit to marriage certificates granted by other states and nations. New York also does not have a residency requirement. Same-sex couples can come to New York over a long weekend, tie the knot, and go back home. Over the next few years, the courts in certain unnamed states will be tying themselves in knots trying to undo the Equal Protection Clause.

For reference, as of this date, the states and nations that have legalized same-sex marriage are as follows:

> **States**: New York, Connecticut, Massachusetts, Vermont, New Hampshire, Iowa and the District of Columbia.
>
> **Countries**: Argentina, Belgium, Canada, Iceland, Mexico (Mexico City only), Netherlands, Norway, Portugal, South Africa, Spain, and Sweden.[6]

3. Suppose a same-sex couple holds themselves out as being married, takes title in a deed as tenants by the entirety but are not really married?

Since a same-sex couple is to be treated exactly the same as an opposite-sex couple, the law has a ready statutory answer. EPTL 6-2.2. 2(d) creates a rebuttable presumption that an opposite-sex couple holds title as joint tenants with the right of survivorship. Under the Act, the same presumption would apply to a same-sex couple as well.

4. Suppose the deed is silent? The conveyance is to Mary and Joan or to Mark and Peter, but with no designation that would lead a title examiner to conclude that the couple is married. How do we certify title?

Title should be certified as found in Mary and Joan or Mark and Peter. At this point, the title company will not know if the parties are a couple by means of clergy or because of a familial or even a business relationship. The title company should raise an exception in Schedule B requesting the couple, if so married, to produce a copy of their marriage certificate. If the couple is married, then EPTL Section 6-2.2 automatically creates in them a tenancy by the entirety.

5. Let us say that the real property being insured is a co-op apartment. What rules apply?

Pursuant to EPTL Section 6-2.2(c), the answer to Question 4 applies to the acquisition of shares of stock of a housing cooperative corporation. When a same-sex couple takes title to a co-op apartment, they take title as tenants by the entirety. For the purist, when a same-sex couple takes title to the shares of stock in a housing cooperative corporation which gives them the right under the proprietary lease to reside in a certain apartment as designated by the lease, the couple takes title as tenants by the entirety.

6. Suppose two people comprising a same-sex couple marry in New York. One spouse owns real property and the other spouse is a pauper. Does the non-real estate owning spouse come into title to the richer spouse's real estate automatically upon the issuance of the marriage license?

In the case of opposite-sex couples, if one member of the couple holds title to real property, the other member of the couple does not come into title to that property automatically upon marriage. The member of the couple that owns the real property must convey the property to both members of the couple for both members to hold title to the real property as tenants by the entirety. The concept that tenants by the entirety are a unity requires that they take title as a unit simultaneously. The foregoing applies to a same-sex couple as well.

7. How does a married same-sex couple deed out title?

As more fully discussed below regarding money judgments, a marriage is a unity. Each party to the marriage has only a survivorship interest in any real property acquired by the couple during their marriage. As stated by an unnamed wag, the party which survives the marriage takes full title to the entire estate. Before then, each party only has a current interest in the estate subject to divesture by the other spouse's survival of the deceased spouse's passing. Either of the spouses can convey or mortgage their current interest in the real property owned by the married couple, but if the non-conveying or non-mortgaging property owner survives the spouse who sold his or her share to the buyer from or the lender of the deceased spouse, then the unfortunate buyer or lender takes nothing. With his or her death, the interest of the deceased party in the estate disappears or dissolves and there is no interest left to which the purchaser or lender's deed or mortgage can attach.

Practically, and for title insurance purposes, neither party can by acting alone break the legal unity. It takes two to tango. In order to convey out title both members of the couple must execute the deed. One member of a married couple cannot convey out his or her 50% interest because the member does not have a 50% interest but a survivorship interest in the entire 100%. This also means that even when conveying to one spouse, both spouses must join in on the conveyance and both must execute the deed. Guess what? The same rules now apply to same-sex married couples. However, as discussed immediately below, there is an exception to this rule.

8. If a same-sex couple acquires title to real property after their marriage as tenants by the entirety, how to they hold title to the property if they subsequently divorce?

In the case of opposite-sex marriages, the statistics tell us that what God has bound together, spouses will tear asunder—at least fifty percent of the time. While the sample size may be too small to predict that half of all same-sex marriages will end in divorce, undoubtedly, some will. Just as in the case of an opposite-sex couple, the same-sex couple will hold title as tenants in common, each holding an undivided 50% interest in the property.

When an opposite-sex couple divorces, the event is rarely so amicable that both spouses will agree to calmly execute a deed placing the title to their previously jointly held dream home into one spouse. As any family law practitioner or title closer will tell you, in order to avoid the disturbing specter of clenched hands around a throat or blood-encrusted letter openers at a closing, in order to avoid unnecessary and unsightly bloodshed it is best to keep the once-enamored–with-each-other couple out of the same room and perhaps even out of the same zip code. It is highly unlikely that the spouse who feels the most aggrieved will voluntarily obey the court's order and execute a deed to the spouse that "won" the house. More likely, the aggrieved spouse will not sign anything. The court will have to issue a further order directing the County Sheriff to execute a deed on behalf of the recalcitrant spouse conveying his or her dream home to the winning spouse. So it shall be in the case of same-sex couples. Either the losing spouse will convey to the other spouse or the court will order the sheriff to execute a deed of conveyance to the winning spouse. In this instance, it is normal for one spouse, either in person or by proxy, to convey to the other spouse. Your title company will insure such a conveyance. In fact, when a title reader sees a deed from both spouses to one spouse, especially when judgments start to come on record against the

out-of-title spouse, the reader will begin to wonder whether the divorce was real or a convenient device to protect the former couple's assets by keeping the assets beyond the reach of the out-of-title spouse's creditors. War stories on how far spouses are willing to go to protect assets from creditors will fill several volumes. It is best to stop here.

9. At closing, can we require that the same-sex spouses produce their marriage license?

If a same-sex couple is coming into title as tenants by the entirety, we cannot ask them to produce a marriage license. Since we normally do not ask an opposite-sex couple to produce a marriage license at the time they come into title, it would be discriminatory if we asked a same-sex couple to do so. However, if because of the death of one spouse, the other spouse is conveying title out as the surviving tenant by the entirety, we can ask the surviving spouse to produce a copy of her or his marriage certificate and an affidavit that the two spouses were married and not divorced at the time of the deceased spouse's death, just as we would in the case of an opposite-sex marriage. Since we are treating both same-sex and opposite-sex marriages the same, there is no discrimination.

Also, in the case where the tenancy on a deed is silent, the situation demands clarity in order to insure, and the title company may appropriately ask the couple to produce their marriage license as in the situation set forth in Section 4 above.

10. Suppose one of the same sex-spouses is a deadbeat and has judgment liens filed or docketed against his or her name after the two purchase real property as tenants by the entirety. Do the judgments attach to their jointly owned real property?

Married couples are treated as a unity in New York. As in Merry Old England, married couples hold title *per tout et non per my* (in other words, by the whole and not by the part). Therefore, when a lien or judgment is placed against one member of the couple, the lien does not attach to the couple's real property but to the judgment creditor's survivorship interest. If the member of the couple against whom the judgment is filed dies first, then the surviving member of the couple takes title free and clear of the judgment. However, if the judgment debtor survives the passing of the non-judgment debtor spouse, then the judgment attaches to the judgment debtor's now entire interest in the property. The same rules will now apply to married same-sex couples.

Note that for opposite and for same-sex couples, the Internal Revenue Service (Sections 6321 and 7403) and the Bankruptcy Trustee (Bankruptcy Code Section 363(h)) have the statutory right to break the sacred unity of the married couple, which permit either, respectively, to break the tenancy to sell the property to satisfy a tax lien or to satisfy the creditors of the bankrupt's estate.

11. How should we treat estate taxes when one of the two same-sex spouses dies?

Same-sex couples are treated the same under New York's estate tax laws as are opposite sex couples. That means that the surviving member of the same-sex couple will be able to claim the marital deduction and take title to the couple's real property free of New York estate taxes.[7] However, that is not true of Federal estate taxes. Because of the Defense of Marriage Act ("DOMA") which defines marriage for all federal purposes as a union between one man and one woman,[8] two members of a same-sex couple will not receive the same tax benefits as the opposite-sex couple. Upon the death of one member of the same-sex couple, Federal estate taxes must be paid on the deceased's spouse estate provided, of course, that the size of the deceased person's estate exceeds the Federal minimum, which in 2012 is $5,120,000. The title company will require an affidavit at closing to the effect that the estate was not subject to Federal estate taxes because the estate was too small or proof of payment of the Federal estate tax.

12. Who inherits title after the first to die of a same-sex tenancy by the entirety?

Upon the death of the first of the spouses to die, the surviving spouse, by operation of law, will succeed to the title of the property previously held by both spouses as tenants by the entirety.

13. And who succeeds to the title after the second spouse dies?

And here is the complexity upon complexity that was referenced in the first part of this article. At this point in human history, science has not come up with a way for a same-sex couple to have children, which are the biological offspring of both parents. Given the family permutations that are possible and indeed likely (children of one spouse, but not of the other, children born before the marriage; children conceived through surrogates or in vitro fertilization; children who are legally adopted versus those who are not adopted or informally adopted, etc., etc.), the one thing that can be said with any certainly is that the courts will be grappling with the inheritance questions for years to come. Entire forests will be leveled to provide the paper on which to print the various bar journals containing articles on the subject. Several sections so the State Bar (such as the Family Law, Elder Law, Trusts and Estates Law, Real Property Law Sections and probably others) will have to develop protocols defining the inheritance status of children from same-sex marriages. The very complexity of the subject is staggering.[9]

At this point, the only advice which can be given to same-sex couples is to do some estate planning and draw up a will. Otherwise, title companies will have to require orders issued by Family and/or Surrogates Courts ruling upon heirship matters before such companies will be in any position to insure title in intestacy situations. Just as in the case of opposite-sex couples, the procedures will consume both time and money, but

more so for same-sex couples because the questions may be so novel and given some family dynamics, more vituperative. For now, and probably for a long time in the future, stay tuned.

Endnotes

1. The State Assembly adopted the Act on June 15, 2011 as A8354, which is the same as the Governor Program #14, *available at* http://assembly.state.ny.us/leg/?defaultfld=&bn=A08354&term=2011&Text=Y.
2. Marriage Equality Act, ch. 95, 2011 N.Y. Laws (codified at N.Y. Domestic Relations Law §§ 10-a, 10-b) ("D.R.L.").
3. N.Y. D.R.L. § 10-a.
4. Ch. 95, § 2, 2011 N.Y. Laws.
5. *Id.*
6. Robert R. Lyons, CPA, New York City Bar Center for CLE, "Marriage Equality in New York," November 9, 2011.
7. *See Implementation of the Marriage Equality Act Related to the New York State Estate Tax*, N.Y. Dep't Tax & Fin. Taxpayer Guid. Div., TSB-M-11(8)M (July 29, 2011), *available at* http://www.tax.ny.gov/pdf/memos/estate_&_gift/m11_8m.pdf.
8. 1 U.S.C. § 7 (1996).
9. The New York City Bar Center for CLE's handbook for its seminar, "Marriage Equality in New York: The New Legal Landscape for Same-sex Couples," presented on November 9, 2011 in New York City, contains several excellent articles and outlines on the complexities which same-sex couples with children face and will continue to face even when the persons within the couple "tie the knot." Any attorney contemplating working the same-sex marriage area would be well advised to obtain a copy of and to consult the City Bar's seminar handbook.

Marvin N. Bagwell is the Vice-President and Chief New York State Counsel for Old Republic National Title Insurance Company, which is based in Westbury, NY.

This article is dedicated to the memory of the late Mel Mitzner who came to the conclusion that equal protection under the law required the legalization of same-sex marriage and who virtually single handedly convinced the Executive Committee of the Real Property Law Section of the State Bar to support same-sex marriage as well.

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Commercial Credit Line Mortgages

By Michael J. Berey

A business is borrowing to fund and perhaps even expand its operations by obtaining a revolving line of credit. The borrower can post as collateral a parcel of real property it owns in New York State. However, mortgage recording tax in New York will have a major impact on the economics of the loan. For example, if the property being mortgaged is in New York City, the applicable tax rate is 2.80% when the amount secured is $500,000 or more. Paying mortgage tax on the aggregate amount of money advanced and re-advanced over time under the credit line can therefore be very expensive. As noted in a 1953 Opinion of New York State's Attorney General,[1] a re-advance secured by a mortgage represents a new and further indebtedness and is subject to mortgage tax, payable on the recording of a further instrument evidencing the re-advance.

As discussed by this author in a long ago published article,[2] the amount of mortgage tax that is due and payable can be limited by securing only a portion of the overall indebtedness. The mortgage can secure only a portion of the loan, on which amount mortgage tax is payable, and include a so-called last dollar provision pursuant to which only the last dollars of the loan to be repaid, below a capped amount on which tax is paid, are secured.[3] Only the unsecured portion of the loan above the cap will revolve and the secured amount becomes, in effect, a term loan.

For example, a line of credit of $20 Million is secured by a mortgage expressly securing a maximum amount of $5 Million, on which amount mortgage tax is paid. With a last dollar clause in the mortgage, so long as the indebtedness outstanding remains above that secured amount the borrower can borrow, repay and obtain re-advances of the loan in excess of the $5 Million, and mortgage tax will have been properly and fully paid on recording on only the amount secured.

The last dollar safe harbor can be useful, particularly when the value of the mortgaged property is less than the full amount of the loan. However, it provides little assistance for smaller commercial revolving credit loans. Accordingly, Subsection 1-a to Tax Law Section 253-b ("Credit line mortgage") was amended effective November 6, 1996[4] to allow re-advances secured by a mortgage on commercial property (other than property principally improved or to be improved by a one-to-six family owner-occupied residence or dwelling)[5] to be made without the payment of mortgage tax on any re-advances, provided that the mortgage secures less than $3 Million and the advances are not made under a building loan contract.

According to a letter dated July 17, 1996 from the New York State Bankers Association to the Counsel to then Governor Pataki, this legislation was needed because "[u]nder current law, the mortgage recording tax makes it impractical for small businesses to take out lines of credit secured by commercial property. As a result, this type of financing has not been readily available in New York State. In other states it has proven to be quite helpful in financing new and expanding business plants and locations." The letter further suggested that by making commercial lines of credit more readily available, substantial additional mortgage tax revenue would be realized.

Similarly, according to a Memorandum of Support accompanying the legislation, the preferential treatment of re-advances secured by commercial credit line mortgages as provided for in the legislation "should enhance the ability of small businesses to address capital" and "the bill should have a positive fiscal impact by encouraging businesses to utilize credit line mortgages, which would generate mortgage tax revenues for localities."

With a need in the present economic environment for New York's small businesses to access capital, and also a need for cash strapped local governments to receive more revenue, it may be appropriate to examine the manner in which the statute has been applied.

The State regulation on credit line mortgages (20 NYCRR 647.1) provides little guidance. However, in 1999, New York State's Department of Taxation and Finance ("Department") issued "Application of the Mortgage Recording Tax to Commercial Credit Line Mortgages."[6] Also issued in 1999 were an Advisory Opinion[7] and a "Declaratory Ruling Relating to Credit Line Mortgages."[8] While the Advisory Opinion and Declaratory Ruling deal specifically with credit line mortgages on one-to-six family dwellings, they will most likely be applied by the Department to commercial credit line mortgages. Further, since 1999, the Department has informally advised this author on a number of related issues.

First, assume that XYZ LLC obtains a revolving line of credit of $2,999,999 secured by a mortgage on its commercial property. This mortgage falls within the safe harbor of Section 253-b. Mortgage tax is paid on a stated maximum amount secured and no mortgage tax is due on the making of any re-advances. If, however, the mortgage secures part of a larger credit line, such as $5,000,000, the mortgage tax safe harbor of Section 253-b will not apply; without a last dollar clause in the mortgage, tax will be payable on each re-advance as it is made, in addition to tax being paid at recording on the amount stated in the mortgage as being secured.

Assume, alternatively, that XYZ LLC's revolving line of credit for $2,999,999 is secured by a mortgage made by its affiliated entity. Since the mortgage is not being made by the obligor, the Department takes the position that Section 253-b does not apply, regardless of the amount secured. A last dollar clause will be necessary to avoid the taxing of each re-advance. Again, the line of credit, to the extent of the amount secured by the guarantor's mortgage, becomes, in effect, a term loan; only the amount of the loan above that secured by the mortgage

may revolve. The making of a secured, revolving credit loan in these instances may not be practical.

Similarly, informal advice has been received from the Department that the obligors under a revolving line of credit and the mortgagors of the mortgage securing that credit line need to be the same to obtain the benefits of Section 253-b, except when a husband and his wife execute a mortgage to secure the revolving credit obligations of either one of them.

What if the borrower has a revolving line of credit for $2,999,999 and a term loan with the same lender? According to the Department, if both loans are secured by the same mortgage, the safe harbor of Section 253-b will not apply. If the loans are secured by separate mortgages, whether Section 253-b applies may depend on whether each loan is under a separate loan agreement. If not, and the total of the amounts secured by the mortgages is $3,000,000 or more, the revolving credit mortgage will not obtain the benefits of Section 253-b.

There can be an issue even when the revolving credit and term loans each stem from a separate loan agreement. For example, assume a term loan made in 2002 secured by a mortgage on which mortgage tax was duly paid. In 2011, the same borrower and lender enter into an agreement to fund a revolving line of credit in the amount of $2,999,999 also secured by a mortgage. The credit line mortgage is cross-defaulted with the term loan or recites that it is also given as additional collateral security for the term loan, or both. The credit line mortgage will not receive the benefits of Section 253-b.

What if, instead, a borrower and its lender decide to convert a mortgage securing a term loan having a reduced principal balance of $2,999,999 to a credit line mortgage? According to the Department, a term loan cannot be converted to a credit line mortgage receiving the benefits of Section 253-b. Under that Section, the mortgage must be an eligible credit line mortgage at its inception.

Although the above referenced Advisory Opinion[9] and Declaratory Ruling[10] deal with credit line mortgages on property improved or to be improved by a 1-6 family owner-occupied residence or dwelling, these rulings appear in concept to apply to revolving credit mortgages on commercial property as well. The Advisory Opinion indicates that Section 253-b will not apply to a mortgage when the advances are to reimburse the borrower for expenses incurred in making improvements to real property, even when a Building Loan Agreement has not been filed. Under the Declaratory Ruling, when an extension of the draw period is not provided for in the original mortgage ("explicitly" or by reason of a "change in terms" provision), the recording of an agreement extending the draw period will be treated as evidencing a new or further debt or obligation, and mortgage tax will be payable on recording of that agreement computed on the amount recited as being secured. Accordingly, if the draw period under a $2,999,999 revolving line of credit expires and is then extended, mortgage tax may again be payable on the principal amount secured when the extension agreement is recorded.

Enhancing the ability of small businesses to obtain credit, while at the same time increasing mortgage tax revenue to localities, is more important now than when Section 253-b was amended in 1996 to allow preferential treatment to commercial credit line mortgages securing less than $3 Million. Toward that end, amendments to the statute mandating a more expansive application would be appropriate.

In any event, consideration should be given to increasing Section 253-b's safe harbor for commercial credit line mortgages to mortgages securing substantially more than $3 Million. What might have been a practical amount in 1996 may not, fifteen years later, sufficiently encourage the making of commercial credit line mortgages, which was the reason for the change in the law.

Endnotes

1. N.Y. Att'y Gen. Form. Op. No. 1953-198 (Dec. 28, 1953), 1953 WL 78235.
2. *See* Michael J. Berey, *Last Dollar Endorsement and Capping a New York Mortgage*, N.Y. L.J., Oct. 11, 1995, at 9. The discussion of last-dollar does not apply to the Conditions of the 2006 ALTA Loan Policy.
3. *See* Paul B. Coburn, N.Y. Dep't Tax & Fin. Tech. Servs. Bur. Adv. Op., TSB-A-93 (15) R (Sept. 3, 1993), *available at* http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a93_15r.pdf.
4. Ch. 489, §1-a, 1996 N.Y. Laws 1095; Ch. 490, 1996 N.Y. Laws 1096.
5. Favorable mortgage tax treatment is afforded property principally improved or to be improved by a one-to-six family owner-occupied residence or dwelling by Subsection 1 of Tax Law Section 253-b. The application of Section 253 discussed in this article also apply to those credit line mortgages. N.Y. TAX LAW § 253-b (McKinney 2008).
6. *See Application of the Mortgage Recording Tax to Commercial Credit Line Mortgages*, N.Y. Dep't Tax & Fin. Tech. Servs. Bur., TSB-M-99(1)R (June 25, 1999), *available at* www.tax.ny.gov/pdf/memos/mortgage/m99_1r.pdf.
7. *See* John W. Bartlett, N.Y. Dep't Tax & Fin. Tech. Servs. Bur. Adv. Op., TSB-A-99(2) R (April 7, 1999), *available at* http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a99_2r.pdf.
8. *See Declaratory Ruling Relating to Credit Line Mortgages*, N.Y. Dep't Tax & Fin. Tech. Servs. Bur., TSB-M-99(3)R (Nov. 10, 1999), *available at* www.tax.ny.gov/pdf/memos/mortgage/m99_3r.pdf [hereinafter *Declaratory Ruling*].
9. *See* Bartlett, *supra* note 7.
10. *See Declaratory Ruling*, *supra* note 8.

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A Modest Proposal: Suggestions to Bring Greater Consistency to Land Use Procedures in New York

By Gregory R. Alvarez

New York's municipal land use system is broken. Suffering from a lack of cohesiveness and limited state interest, the day-to-day process of applying for and receiving zoning approvals and permits across the state requires reform. Aside from underdefined legislation, and attempts by courts to interpret the same, municipalities are permitted to create highly specific and varied procedures which neither assist in making the process smoother for applicants nor relate to the reasoned analysis and review required of any land use application. With the current state of economic conditions, it only intensifies the need to provide the most open, clear, consistent and expedient zoning processes to allow "shovel ready" development to proceed. Below are a few starting points to discuss the path toward more straightforward land use procedures.

A Fragmented Landscape

New York State has a total of 1,549 local municipalities: 62 cities, 932 towns and 555 villages.[1] On Long Island, which is an instructive microcosm of the entire state,[2] there are 110 cities, towns and villages behind which the invisible lines of fragmentation produce a variety of management styles and personalities. On a square mileage basis, that means that on average, each municipality governs slightly less than seven square miles of the land acreage encompassing Nassau and Suffolk Counties.[3] Practitioners who navigate through the halls of these localities on a daily basis understand that to be successful, one requires a nuanced and complete understanding of local laws and ordinances, but, more importantly, of the people who occupy the positions of responsibility. This emphasis on knowledge is balanced toward personalities versus the law, and becomes very acute in the realm of land use, especially when conducting applications on behalf of developers and residents seeking approvals to improve their properties.

Currently, New York's City, Town and Village Laws provide for a basic framework to guide municipalities in structuring their land use boards and mechanisms to process applications for site plan review, subdivision, special permit and variance approvals, among other modes of relief.[4] These provisions are part and parcel to the general enabling act which, among other things, grants municipalities the ability to control their zoning decisions.[5] Nonetheless, aside from these general guidelines, which have not been significantly updated since the early 1990s,[6] localities are left to configure how the process will work on a day-to-day basis. Despite the fact that municipalities must have a zoning board of appeals, localities are not required to have a planning board.[7] The Town of Hempstead, in Nassau County, the largest town in the country, by population,[8] does not have a planning board.[9] Further, cities, towns and villages are left to determine how to provide their board(s) with supporting professionals and administrative personnel.[10] Whether municipalities hire planners and other people with particularized expertise is in the hands of local elected officials.

Variation Is the Rule

The result of this fragmented system is a land use arena where every municipality over time has developed processes peculiar to each respective locale. Certainly, one of the hallmarks of the American federal system is that from state to state, and even municipality to municipality, everyone may experiment with different approaches and ways of getting things done. However, in New York, the various ways to file a special use permit application illustrates the complexity of the situation. For instance, the Town of Brookhaven, in Suffolk County, requires everything to route through its Planning Department. From there, the special permit request is referred to the Town's Board of Zoning Appeals, with a quick stop-over in the Building Department for a denial of a building permit application. If you earn an approval from the Board of Zoning Appeals, the matter returns to the Planning Department for final review, and perhaps, an appearance before the Planning Board. After you sort out any other administrative approvals, like Division of Fire Prevention sign-off, then you may return to the Building Department for your building permit to complete the process.[11] It should be noted, however, that depending on the type of use being sought, the special permit may alternatively be approved by the Planning Board, or even the Town Board. Therefore, depending on the type of use, jurisdiction over the same type of relief is in the hands of one of three separate boards.

Looking elsewhere in Suffolk County, in the Town of Southold, it is the Planning Board that grants special permits, as is the case in the Town of Babylon and the Town of Southampton.[12] In the Town of Huntington, it is the Zoning Board of Appeals which generally administers special permits. Moreover, in the event site plan relief is also required by the Planning Board in Huntington, this step will take place after the Zoning Board of Appeals hearing.[13] In Babylon, it is the exact opposite: Planning Board first, Zoning Board of Appeals thereafter.[14] Hempstead, the aforementioned largest town in the country, requires special permits to

pass through its Board of Zoning Appeals.[15] Further complicating matters, even the names of land use boards vary among municipalities.

Similarly, villages have their own individual way of processing zoning applications. For instance, the Village of Babylon first requires a building permit denial, followed by an appearance before the Planning Board, which refers the special permit request to the Village Board of Trustees, the governing body of the municipality. If you require a variance, a stop must first be made before the Village Zoning Board of Appeals. Provided approval is granted by these boards, a building permit may then be obtained from the Village Building Department.[16]

Further, cities also have constructed their own systems for reviewing land use proposals. For instance, New York City utilizes its own City Charter to guide its land use processes, in particular the procedure set forth in New York City Law § 668. For example, special permits generally require an application to be filed with the Board of Standards and Appeals ("BSA"), which then refers it to the applicable local community board for review and recommendation. Additionally, in the event that the affected land falls into more than one community district, the Borough President and Borough Board have the opportunity to provide further recommendations to the BSA. Thereafter, the BSA may hold a public hearing, after which it acts on the application. Building permit approval may then be obtained from the City Department of Buildings. Finally, it should also be noted that New York City's Zoning Resolution requires that certain special uses also seek approval from the City Planning Commission.[17]

Examples Elsewhere

These different permutations of procedures contrast with how things are done in certain other states. For instance, in neighboring New Jersey, the state legislature adopted a comprehensive land use statute which governs all 566 municipalities within its borders. Originally adopted in 1975, the Municipal Land Use Law ("MLUL")[18] has been modified over the ensuing third of a century subject to the practical needs of municipalities and applicants alike. Each locality is governed by the MLUL, which includes some particularly instructive requirements for each of the municipalities and land use boards within the state, including: (1) planning boards and zoning boards of adjustment each are assigned specific duties;[19] and, (2) in the event of site plan and variance approvals being sought by an applicant as part of the same proposal, only one board is required, with either board (depending on the circumstances) being able to assume ancillary jurisdiction over the other request for relief.[20] These simple dictates result in uniformity in jurisdiction for each municipality's boards, without having to know the peculiar historical practices in each locale. Of course, this does not mean that each locality has not honed its own particular procedures. However, the basic mechanics of an application will be the same, whether you are in Newark or Toms River.

Why Consistency Matters

Certainly, it does create more work for the land use professional (be it attorney, architect, engineer or expediter) to have individualized methods governing each municipality.[21] Only the "local knowledge" had by these "connected" individuals will help guide confused applicants through the maze of permitting. Nonetheless, despite the argument that there are virtues in such a fragmented, egalitarian landscape, the problem oftentimes is that municipalities are left with significant discretion in forging "rules" that are either unwritten, or liberally interpreted from written dictates.

A particularly egregious example arises from a telecommunications case, *Omnipoint Communications, Inc. v. Town of LaGrange*, where the wireless carrier, Omnipoint Communications, Inc., d/b/a T-Mobile ("T-Mobile"), was sent on a six-year odyssey to obtain approvals for a cellular site within the Town.[22] Although lengthy, a detailed description is instructive of the twists and turns land use applications may take.

Starting with a pre-application meeting with the Town's Planning, Zoning and Building Department in 2003, T-Mobile decided to propose a new pole in a salvage yard. A month later, T-Mobile filed its initial application with the Town, and appeared before the Planning Board four months after that. At the hearing, T-Mobile was advised that additional approvals may be required, despite the fact that the Town had approved a taller tower at the same site seven years earlier (the approved tower was never built). Sensing the anticipated resistance, T-Mobile chose to revise its plans, and instead co-locate on a nearby tower which was recently approved as part of a litigation settlement between the Town and Nextel, another wireless carrier. One year later, T-Mobile withdrew its previous application, and filed a new application proposing to locate its antennas on the other pole, which had not yet been built. Two months later, at a Planning Board work session, T-Mobile was advised that the other carrier needed to remove a pre-existing radio tower and replace some fencing before T-Mobile would be permitted to proceed. Six months after that, the issues had been resolved, and, T-Mobile appeared before the Planning Board at a public hearing. During this public hearing, residents complained about potential health effects (a common complaint from objectors to such applications).[23] Three months later, the Town Building Department issued a new letter to T-Mobile, requiring variance relief because the tower is located within 500 feet of residences, and, pursuant to Town Code, necessitates signatures from all surrounding residents consenting to the proposal. T-Mobile knew that the residents would not consent.[24]

Over a year later, Nextel finally received its use permit to proceed with the approved tower as part of the prior litigation. Thereafter, T-Mobile asked the Planning Board to continue its own application. A month after T-Mobile's request, at the public hearing, the Planning Board reiterated the need for a variance from the 500-foot requirement. In addition, the Planning Board recommended that T-Mobile consider returning to the original location for its tower, in the salvage yard. Despite its growing impatience, T-Mobile did file with the Town's Zoning Board of Appeals, and appeared before this board approximately two months after the Planning Board hearing. T-Mobile first objected to the need for the variance, in light of the settlement of the prior litigation permitting the underlying tower approval, and in the alternative, the variance as requested. The Zoning Board of Appeals noted its concerns with health, and that the approved tower was a "mistake." In the meantime, a month later, T-Mobile was successful in obtaining from the Planning Board a negative declaration under SEQRA[25] for its proposal. The next month, T-Mobile returned to the Zoning Board of Appeals, during which this board declined to consider whether a variance is necessary, instead assuming it was so. Thereafter, the board determined that a variance should not be granted, and T-Mobile's application should be denied. T-Mobile promptly filed its lawsuit. As a result of the litigation, the Town was directed to issue all of T-Mobile's required approvals and permits immediately—six years after the process began.[26]

Twelve Things to Think About

In light of such experiences as that faced by T-Mobile in the Town of LaGrange, which, in varying degrees, is not particularly uncommon, below are a few suggestions to bring clarity to the land use system in New York, and bring further definition within which boards must operate when hearing and acting upon land use applications. Based on the New Jersey example, it appears that the time may be ripe for a more comprehensive state statute which assists in increasing consistency and tuning expectations as to how localities will process applications. Nothing changes in terms of how municipalities will be able to scrutinize proposals. If New Jersey is any indication, contentiousness in land use decisions will continue for time immemorial. Moreover, this proposal does not impinge on the continued value in local practitioners' knowledge in working with the personalities that populate municipal halls across the state. The only difference, and need, is to offer not only citizens the ability to understand the land use process more clearly, but also to ensure that procedures are concrete and consistent, and help to create more certainty in how Towns will treat each application, regardless of the level of controversy associated with the proposal.

Below is a twelve-step program that a new land use statute could target in bringing better uniformity to New York's land use processes:

1. Hire an attorney for each board, and have that attorney at every hearing

This seems obvious, but, especially in smaller villages, it is not always the case that an attorney representing the board's interest will be in attendance at hearings. This leaves boards, particularly inexperienced ones, unable to conduct their hearings without this vital resource. It is a common occurrence where a question of law arises, in which a board is left to rule on the matter. Of course, it is often the case that there is a representative, or representatives on the board who are familiar with legal principles associated with the land use process. Sometimes, they are lawyers who practice in this arena. However, independent counsel offers board members the ability to seek input from an individual charged with the duty of understanding the municipality's codes, and standard practice of boards.

2. Have other professionals attend board hearings

The same would seem to apply to board engineers and/or planners, along with any other professionals who assist boards. In certain municipalities, this is the norm, particularly when planning staff attend hearings to provide their input and expertise on applications. Perhaps it does not make sense to pay for these participants at every hearing, but certainly for those that would involve complex issues which would benefit from professional input. In some municipalities, particularly smaller villages that do not have full-time planning or engineering representatives, the applicant is required to pay for these professionals to appear. In those instances, it would appear that municipalities should have no objection to this request. Still another solution would be to require that a board member with either an architectural or engineering background (or members from both disciplines) sit on the planning board.

3. Create a system of ancillary jurisdiction to prevent the multi-board process

The need to obtain approvals from multiple municipal boards of a single municipality can often reach comical proportions. It is not uncommon, when factoring in an architectural review board, that three different boards may be required for a single application. The facts in the *Omnipoint Communications* case stand out for the seeming absurdity in permitting too much latitude in constructing zoning processes in each of New York's municipalities. The purpose of more certain land use processes is to avoid instances such as the above.

4. Make boards vote in public at hearings

After concluding a hearing, it is not unusual for a board to advise applicants that they will get the decision "in the mail." If a board is asked when a decision may be rendered, oftentimes the response is that the

board is subject to the 62-day limit imposed by New York law, and will reply accordingly.[27] Shouldn't this most important part of any hearing be conducted *at the hearing*? Currently, New York Town Law and New York Village Law do not require that a vote be taken in public.[28] However, any board action should be in public view, requiring boards to make the tough decisions which they have been charged to render.[29]

5. Require more specific resolutions of approval

It is often the case that, even for the most complex of applications, boards will issue written decisions which lack specific findings of fact when rendering decisions. State law, as currently constituted, requires that the "[t]he decision of the [board] on the appeal shall be filed in the office of the town clerk within five business days after the day such decision is rendered, and a copy thereof mailed to the applicant."[30] Aside from this directive, boards are largely left to determine how to set forth their decisions in written form.[31] In an effort to create more complete municipal records, and as a way to protect boards in the case of any potential challenges to their decisions, it would appear that requiring more particularized findings would benefit boards. Detailed decisions preserve their integrity against collateral attack, whether the board issues a denial or an approval.

6. Reduce the power of civic associations to dictate the zoning process

Obviously you cannot limit their right to participate. Moreover, the public should always have a right to be heard. However, boards should not allow these organizations to hold applications hostage, seemingly permitting civic associations to make decisions for boards. Sometimes, unfortunately, this does occur. The applicant has the right to be heard as well, in a timely fashion. Planning boards shall conduct public hearings, when required, within 62 days of an application being referred to them.[32] Awkwardly, there is no similar state statute which sets a time frame for applications to zoning boards of appeals. This issue will be discussed in further detail below.

Any attempts by civic associations to stall the process should not be tolerated. A public hearing is for the benefit of all sides to voice their positions. By allowing civic associations to effectively "kill" applications before applicants have the chance to present their cases effectively defeats the whole purpose of discussing land use decisions in a public forum. Moreover, a recent decision has rejected municipal attempts to require civic association meetings prior to formal public hearings before duly constituted boards, declaring the practice unconstitutional.[33] Confirming the primacy of municipal boards would effectively encourage localities to hear applications in a timely fashion.

7. Require the Mayor, Town Supervisor or a designee and a municipal legislator to sit on the planning board

Currently, governing board members are explicitly prohibited from sitting on planning boards.[34] This suggestion would keep elected officials deeply involved in the land use process, and ensure that the general performance of a board will be an intimate part of the political process on Election Day. Bolstered by stronger time frames to make decisions, the tendency to forgo tough decisions until the latest election cycle could also be prevented.

8. Draft better ordinances

This recommendation is a constant theme, as quality drafting must be present for municipalities to have strong criteria upon which to base their land use decisions. All municipalities have capable legal counsel which can assist in performing periodic reviews of their zoning ordinances in order to ensure that they remain current with the needs of their communities, and the best practices of neighbors and other similarly sized localities. Those municipalities with full-time planning staff also have this valuable resource to assist in this most integral of processes. From the applicant's perspective, carefully constructed ordinances will provide further clarification and certainty as to what issues must be addressed and presented in order to achieve approvals for their proposals.

9. Incorporate stronger planning principles into municipal codes

Planning seems to get lost in many municipalities, specifically long-term goals to be sought and achieved for livability in communities, and which take into account all of the available planning concepts and apply them to the particular needs of the area. So often it seems the minutiae of applications gets in the way of the big picture, and the benefits an application may bring to a site and surroundings in need of redevelopment are too easily forgotten. It is unfortunate that these considerations often get lost in the specifics of a matter. Currently, New York Law does not require municipalities to prepare a master plan for its community.[35] New York Town Law 272-a(1), and its companion New York Village Law § 7-722(1), extol the virtues of long-term community planning. However, as § 272-a(1)(h) concludes, "[i]t is the intent of the legislature to encourage, but not to require, the preparation and adoption of a comprehensive plan." If it is as important as the statute suggests, perhaps it would be advisable to require municipalities to plan better for the future.[36]

10. Impose more deadlines on municipal actors

Certainly, there are a number of deadlines imposed on municipal actors during the land use process. However, often these dictates are clearly stretched, with time periods unilaterally extended without due consideration to the law. In addition to this problem, there are certain

points in the land use process which have no specific deadline written into state law.

One of the biggest gaps is the absence of any deadline for a municipal official, be it the Building Commissioner, the Building Superintendent or the Plans Examiner, who issue "denials" of applications requiring further relief from municipal boards. Typically, an application is filed with these gatekeepers, who interpret their municipal codes, and indicate in written form why the proposal does not meet certain zoning requirements. This written determination triggers an applicant's ability to file with the necessary board for the required relief. However, there is nothing in current law which prevents such municipal actors from simply "sitting" on an application for an indefinite period of time. The only requirement is that such an administrative decision is filed with the municipal clerk's office within five days of issuance.[37] This is further perplexing because there are statutory deadlines within which an applicant must appeal such decisions.[38] In addition, as noted above, zoning boards of appeals are not required to schedule a public hearing within a prescribed time period.[39] Therefore, absent municipal code provisions governing this process, the same issue exists, permitting zoning boards to prolong the process by which hearings will be scheduled.

11. Bring more consistency to public noticing

A general lack of consistency also exists in connection with noticing that must be provided to surrounding property owners when a public hearing is to be held on a land use application. Generally, state law provides only for public noticing which must be undertaken by municipalities, in terms of publication of notices in local newspapers.[40] However, it is typical for jurisdictions to require that applicants mail notices to property owners (and sometimes occupants) of parcels in the immediate area around the site that is the subject of a land use application to be heard at a public hearing. However, the requirements vary greatly. For instance, the radius to which mailings must be made, the time frames in which they must be mailed, and the size and locations of notice signs posted on the subject property fall within a wide spectrum of requirements. For mailing radii, they can range from 100 to 1,500 feet, depending on the application.[41] For time frames within which the mailings must take place, they can range from 10 to 35 days prior to the hearing. Similarly, notice signs range from no sign at all, to enormous 24-square-foot signs which must be prepared to particular standards by the applicant.[42] The concept of noticing is uniformly accepted. However, the mode of this noticing certainly could be better served by having uniform standards.

12. Require corporate entities to be represented by an attorney before land use boards

It is not unusual for a board to be thankful when an attorney is present to guide a land use presentation. This is not to take anything away from other professionals who ably represent clients on applications. However, with the presence of legal counsel before a board, it not only brings further consistency and familiarity with local and state requirements, but ensures that the "bigger picture" is preserved, particularly in more complex matters which require multiple layers of approvals, whether before one board or several.

Conclusion

The above suggestions are just some simple thoughts to consider as both municipalities and users of the land use system struggle with better ways in doing things. The above are modest proposals, particularly when one navigates through processes that, at times, seem endless and arbitrary. The land use process should be about openness, clarity, consistency and expediency. It would seem that these goals are not too much to ask of the government machinery that has been constructed to serve and protect us all, and is charged to assist in any way possible to lift us from the current economic conditions facing us all.

Endnotes

1. *See List of Cities in New York*, Wikipedia, http://en.wikipedia.org/wiki/List_of_cities_in_new_york (last visited Feb. 7, 2012); *List of Towns in New York State*, http://en.wikipedia.org/wiki/List_of_towns_in_New_York; *List of Villages in New York*, http://en.wikipedia.org/wiki/List_of_villages_in_New_York.
2. "Long Island," for purposes of this article, as well as common parlance, does not include the boroughs of Queens and Brooklyn, which technically also reside on the glacial remnants comprising the protuberance from the mainland. Long Island is used in this article as the author's practice primarily focuses on working with the municipalities in this area.
3. Nassau County is comprised of 287 square miles of land area; Suffolk County is comprised of 912 square miles of land area. *See Nassau County, New York*, Wikipedia http://en.wikipedia.org/wiki/Nassau_County,_New_York (last visited Feb. 7, 2012); *Suffolk County, New York*, http://en.wikipedia.org/wiki/Suffolk_County,_New_York.
4. *See* N.Y. Gen. City Law §§ 81-83-A (McKinney 2003); New York, N.Y., Charter of 2004 ch. 8, §§ 191-205; N.Y. Town Law §§ 261-285 (McKinney 2004); N.Y. Village Law §§ 7-700-7-742 (McKinney 1996 & Supp. 2011).
5. *See* N.Y. Stat. Loc. Gov't § 10 (McKinney 1994 & Supp. 2011).
6. *See, e.g.*, 2 Patricia E. Salkin, New York Zoning Law and Practice § 25.03 (4th ed. 2011) (describing the few changes to the site plan review structure).
7. *See* Town § 271(1), and Village § 7-718(1), for zoning law provisions stating that the municipal governing body "*is hereby authorized* by local law to create a planning board consisting of five or seven members" (emphasis added). *But see* Town § 267(2), Village § 7-712(2), for less permissive language stating that a governing body "shall" create or "shall" appoint a zoning board of appeals.
8. According to the Town's Office of Tourism website, "[t]he Town of Hempstead is proud to be America's largest Township. With a population of just under 770,000 people, Hempstead Town is bigger than six states. The Town encompasses more than 142 square miles, containing 51 unincorporated areas and

22 incorporated villages, more than 65 parks and marinas, and 2,599 miles of town, county, state, and federal roads." TOWN OF HEMPSTEAD, LONG ISLAND, NEW YORK, http://www.toh.li/tourism (last visited Feb. 7, 2012).

9. *See* TOWN § 274-a(2), for the Town of Hemsptead's authorization to designate the Town Board as the reviewer of site plans.

10. *See* TOWN § 271(2); VILLAGE § 7-718(2) (stating that the "planning board shall have the power and authority to employ experts, clerks and a secretary and to pay for their services, and to provide for other such expenses as may be necessary and proper….") *See also* TOWN § 267-a(3); VILLAGE § 7-712-a(3) (stating that the zoning board of appeals "shall have the authority to call upon any department, agency or employee of the town for such assistance as shall be deemed necessary and as shall be authorized by the town board….").

11. *See generally* TOWN OF BROOKHAVEN, N.Y., CODE §§ 85-45, 85-28.

12. *See generally* TOWN OF SOUTHOLD, N.Y., CODE § 280-131; TOWN OF BABYLON, N.Y., CODE § 186-6; TOWN OF SOUTHAMPTON, N.Y., CODE § 330-181.

13. *See generally* TOWN OF HUNTINGTON, N.Y., CODE §§ 198-112, 198-116.

14. *See generally* TOWN OF BABYLON, N.Y., CODE §§ 186-6, 186-15.

15. *See generally* TOWN OF HEMPSTEAD, N.Y., CODE § 272.

16. *See generally* VILLAGE OF BABYLON, N.Y., CODE §§ 365-32, 365-36.

17. *See generally* New York, N.Y., ZONING RESOLUTION § 74-01.

18. *See* N.J. STAT. ANN. §§ 40:55D-1-40:55D-22 (West 2011).

19. *See id.* § 40:55D-25(b)-(c) (allowing for a municipality having a population of 15,000 or less to utilize a combined planning board and zoning board of adjustment). *See also id.* § 40:55D-60 (providing for planning board review in lieu of a board of adjustment).

20. *See id.* § 40:55D-25 (outlining ancillary powers of the planning board); § 40:55D-76 (outlining ancillary powers of the zoning board of adjustment).

21. *See* N.Y. TOWN LAW § 267-a(7); N.Y. VILLAGE LAW § 7-712-a(7) (stating that in the zoning board of appeals context, on behalf of an applicant at the public hearing, "[a]ny party may appear in person, or by agent or attorney"). Curiously, no similar language is provided for planning boards.

22. Omnipoint Comm., Inc. v. Town of LaGrange, 658 F. Supp. 2d 539, 543 (S.D.N.Y. 2009).

23. *See Omnipoint*, 658 F. Supp. 2d at 549. Under the Telecommunications Act of 1996, "[n]o State or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv) (West 1996).

24. *See Omnipoint*, 658 F. Supp. 2d at 556-57.

25. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 2005).

26. *Omnipoint*, 658 F. Supp. 2d at 565.

27. *See* N.Y. TOWN LAW § 274-a(8), and N.Y. VILLAGE LAW § 7-725-a(8), for planning board time limits. *See also* TOWN § 267-a(8), and VILLAGE § 7-712-a(8), for zoning board of appeals time limits.

28. *See* TOWN § 274-a(8), and VILLAGE § 7-725-a(8), for planning board voting requirements. *See also* TOWN § 267-a(13)(a), and VILLAGE § 7-712a(13)(a), for zoning board of appeals voting requirements.

29. *See* N.Y. PUBLIC OFFICERS LAW § 100-107 (McKinney 2011), for the Open Meetings Law, which it should be noted, fails to specifically discuss actions taken by public bodies during hearings.

30. TOWN § 274-a(8); VILLAGE § 7-725-a(8).

31. *See* SALKIN, *supra* note 6, at §§ 28.29-.32 (describing a long line of case law that has attempted to further define the requirements of decisions, requiring a reliance on substantial evidence; despite these directives, many land use boards still issue decisions that fall short of this standard).

32. *See, e.g.*, TOWN § 274-a(8); VILLAGE § 7-725-a(8).

33. *See Ribeiro v. Town of Brookhaven*, No. 07-20844 (Sup. Ct. Suffolk Cnty. Mar. 16, 2009) (Spinner J.) (stating that "[t]he Court further finds that to go before a Civic Association, a nongovernmental body, which does not keep records and makes no Findings cannot be Constitutionally supported").

34. *See* TOWN § 271(3); VILLAGE § 7-718(3) (stating that no person who is a member of the town or village board, respectively, shall be eligible for membership on such planning board).

35. *See* TOWN § 263; VILLAGE § 7-704 (stating, curiously, that zoning regulations shall be made in accordance with a comprehensive plan). *But see* SALKIN, *supra* note 6, at § 4.03. (discussing how case law has interpreted this seeming requirement as not necessarily requiring a written plan to accomplish its objectives).

36. *See* SALKIN, *supra* note 6, at § 9.01 (discussing a long history of attempts to create state-level planning frameworks, all of which failed to pass the legislature). Nonetheless, such regional ventures as the Adirondack Park Agency and the Central Pine Barrens Joint Planning & Policy Commission have been implemented for specific, environmentally sensitive areas.

37. *See* TOWN § 267-a(5); VILLAGE § 7-712-a(5).

38. *See* TOWN § 267-a(5)(b); VILLAGE § 7-712-a(5)(b) (stating that an appeal shall be taken within sixty days after the filing of any order, decision, interpretation or determination of an administrative official).

39. *See generally* TOWN § 267-a; VILLAGE § 7-712-a.

40. *See* TOWN § 274-a(8); VILLAGE § 7-725-a(8) (providing that the planning board shall give public notice in a newspaper of general circulation at least five days prior to a hearing). *See also* TOWN § 267-a(7); VILLAGE § 7-712-a(7) (providing that the board of appeals shall give public notice in a newspaper of general circulation at least five days prior to a hearing).

41. Both provisions actually refer to current and past requirements in the Town of Hempstead.

42. Again, the 24-square-foot requirement applies in the Town of Hempstead to certain applications.

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The Executor and the Real Property

By Francisco Augspach

solus Deus heredem facere potest, non homo.

Glanville, VII 1

I. Introduction

Title to a decedent's real property vests in his heirs or legatees at the time of death.[1] Yet, the executor has extensive powers over it: He may sell it, mortgage it, lease it, collect rents, make repairs, and evict occupants, among other powers. Even where there is no dispute as to who the rightful heir is, and there is no dispute that the heir took fee simple at the time of death, the executor may still demand rent from the owner and evict him. But if the estate is otherwise solvent or if the testator specifically devised that real property, the executor may have no powers over that real property.[2] The law governing the relationship between the executor and the decedent's real property is counter-intuitive. This article explains the historical accidents leading to our current law and proposes a test to determine whether an executor has a specific power. Despite the existence of a modern statute listing the powers of executors, it appears that, as to real property, the powers are very much construed by the courts in light of their history. The reasons for this, whether due to a persevering atavistic tendency or an intrinsic notion of fairness—if there is such a distinction—are beyond this article.

II. Succession to Land at Common Law

In the twelfth century, Glanville, the first jurist of the common law, boasted that, unlike the laws of the Continent, there was no law in England which prohibited a man from disposing of his property by will. What he meant, however, was that a man could bequeath one-third of his *personal* property—the other two-thirds being reserved for his widow and heir-at-law, respectively—*and none of his real property*.[3]

As to the personal property, the policy that one-third passed to his widow and another third to the heir-at-law is easily understood. Practically every jurisdiction in the United States today protects the surviving spouse against disinheritance, and some, New York among them, continue to dedicate the same one-third of the decedent's estate to the surviving spouse.[4] The underlying policy hardly differs from Glanville's time.[5] While some states and many court decisions protect children against disinheritance, this does not seem to be the same policy that protected the heir-at-law. The heir-at-law in England was usually the eldest son,[6] or if there was no son, the daughters jointly. But more importantly, the heir-at-law continued the person of the decedent. He became liable for the decedent's debts (originally, without limitation) and acquired the right to enforce and collect on his contracts. The reservation of one-third to the heir-at-law was primarily meant to allow the heir-at-law to continue the person of the decedent, lest he inherit the debts but no means to pay them. This was necessary not only for the protection of the decedent's heir, but also for the benefit of society.

Real property passed at the time of death by operation of law to the heir-at-law for the same reason why he received one-third of the personal estate: to continue the person of the decedent. But unlike ownership of personal property, ownership of real property defined one's place in society and continued to do so for most of the history of the common law.[7] In the original feudal model, all land was owned by the feudal lords who allotted it to their tenants (and the tenants to their sub-tenants) in exchange for their oath of fealty and other covenants. Common covenants were military aid, personal services, or rent (often in the form of produce or cattle).[8] This feudal structure encases principles that are worth expanding on. The triangular organization is akin to a modern corporate structure. An allotment of land implies rights and duties on the holder similar to filling a position in a modern corporate structure. The specific individual may change from time to time, be it on his performance or the whim of the feudal lord, but the position itself—*i.e.*, the space or slot in society for someone to cover those rights and duties—is eternal. Feudal society, seen this way, is no different from the modern office. One person leaves and the next one comes in to take over the same desk and undertake the same duties with the same (or lower) pay. The allotment of land coupled with the oath of service or rents determined the individual's role in society. The specific individual may change from one day to the next, but the position itself does not. This notion that holding real property carries certain rights and duties that attach from one holder to the next is the origin of what we today call the *privity of estate*: that fiction by which the current owner is the same person as his predecessors in title. The individual is accidental, the position, eternal. It also explains why land had to vest in the heir-at-law at the time of death. Otherwise, the position would be vacant. Neither the feudal lord would receive his rent or services, nor would the family of the decedent benefit from the allotment of land or be entitled to the feudal lord's covenant to protect his tenants.[9] So settled in the feudal mind was the heirship at death by the eldest son that in 1272

the same principle of private law was unquestionably applied to the succession of the English Crown. In 1272, Henry III died in England while his son Edward I was absent in the Holy Land. Edward I began ruling from the distance and was not required to wait until his formal coronation in 1274 to be recognized as king. Although there was no litigation, these facts settled the questions of whether there could be an *interregnum* (*i.e.*, a time between kings, when royal law and royal dues phase out because there is no king), and whether the coronation itself with the anointment by the Church constituted the king or whether it was merely a formal act.[10] To this day in the State of New York, the common law cannot tolerate land without an owner and title to real property vests in the successor at the time of the owner's death, even if it might take us years to determine who the successor is.[11]

III. The Law of Wills, the Executor and the Influence of the Church

So in the early common law, a man could make a will disposing only of one-third of his personal estate and his heir-at-law was his successor, the residuary beneficiary, and the party in charge of distributions under the will. Needless to say, this was a conflict of interests: What the heir-at-law might fail to distribute remained part of the residuary and his property. More importantly, if the heir-at-law was, for legal purposes, the same person as the testator, how could a will beneficiary enforce a gift without consideration? Couldn't the heir-at-law, being the same person as the testator, change his mind and decide not to make the gift?

The law of succession was dissatisfactory to the Church, which, like most religious organizations today, realized that its flock was most generous when facing death. It did not like heirs-at-law who failed to distribute gifts. As countermeasures, the Church arrogated to its Courts Christian (or "church courts") jurisdiction over probate matters and imported from the Continent the institution of the executor. The executor would be chosen by the testator and appointed by the Courts Christian. His only duty would be distributing specific gifts under the will. He was not a personal representative; he was only a trustee with instructions to make specific distributions. Since the right of an executor to sue the heir-at-law to recover property for distribution was uncertain, the testator might, at times, give the executor the property during his lifetime to deliver to the beneficiary upon his death. The universal representative continued to be the heir-at-law. A man's heir—his successor and personal representative—was chosen by God, not man.[12]

Another import of the Church from the Continent was the institution of the trustee and the usufructus (or *use*) to avoid the prohibition against devising real property.[13] The usufructus, drawn from Roman Law,[14] is the concept that the right to benefit from a thing (the usufructus or use) is separable from its legal title or *nuda proprietas* (the corresponding term in modern law would be *reversion*[15]). A landowner could transfer his legal title to a trustee, but retain the unrestricted right to use and enjoy. The right to use, much like a lease today, was considered *personal* property, therefore transferable by will.[16] To prevent any challenges that might ensue upon the death of the legal owner, legal ownership was placed in the hands of the trustee by *inter vivos* transfer. While the individual trustee may die, the trust would remain in place with successor trustees, thus avoiding the passing of title by death.[17] To summarize, one could place the property in trust by *inter vivos* conveyance reserving the use, and then convey the use by will, thus avoiding the prohibition against conveying real property by will.[18]

IV. The Statutes of Henry VIII

Although the above concepts and practice were introduced in twelfth century England by cannon lawyers, over four centuries uses and trusts spread throughout the kingdom for secular purposes, too. The king was not pleased. The fact that estates were held in trust meant that the king was deprived of the dues owed to him upon the death of the owner.[19] It also appears that uses may have been used to defraud creditors by creating uncertainty as to the ownership of land[20] and to deprive widows of their right of dower.[21] In response, Henry VIII pressed Parliament to pass the Statute of Uses. "By the Statue of Uses of 1536 [Henry VIII] boldly put a stop to the fiction that the man in enjoyment of the land was not its legal owner. Wills again became impossible, and the common law heir was restored. Land could not be devised away from the male heir…."[22] In effect, the informal conveyances by uses and trusts, which had only been recognized by Courts Christian and courts of equity, became reviewable by courts of law as legal conveyances, and thus could not devise land by will.[23] The Statute of Uses, in many ways, would have reverted property law back to the eleventh century, but for the landed opposition, which was not willing to give up the ability to devise real property. Two years later, in 1538, Henry VIII relented and allowed the Statute of Wills to pass, by which most land became devisable by will. Uses and trusts remained valid, but limited, and *title* to land (as opposed to only *uses*) could now be devised by will.[24]

V. The Common Law at the Time of the American Colonization

By the time the English began settling in America in the early seventeenth century, the first part of our inquiry was settled. Real property passed at death to the heir-at-law, unless it was devised by will. By a legal fiction created by the interplay of the Statute of Uses and the Statute of Wills, a devise operated legally (and continues to operate legally) as a deed delivered to the devisee at the time of death. The executor, being concerned only with personalty, took no part in the distribution of real property. "When a person died in England, the property left behind was under the regime of two quite

different set of rules. Common law rules and courts governed the land; church law and courts the personal property. If the deceased left no will, the common law gave the land to the eldest son; the church courts divided the money and goods in equal shares among the children."[25]

By the seventeenth century, the executor had secured his position in the common law. He had won his long battle with the heir-at-law over the representation of the decedent. After centuries of conflicting case law, the law became settled that creditors of the decedent had recourse against the executor and that the executor, in turn, could sue the heir-at-law to recover assets for the payment of debts and bequests. The executor was the personal representative and had fiduciary duties, not only to make distribution under the will, but also to see the decedent's debts paid.[26] However, real property remained beyond the executor's reach. Real property preserved its aura of sanctity, as something meant to pass from generation to generation within the family. Although it was possible to convey and devise real property, and even to mortgage it, unsecured creditors could not reach real property. The remedies available to creditors allowed them to reach rents and profits, and, if necessary, obtain temporary possession of a portion of the debtor's land to generate income to repay the debt. It was unthinkable, however, that creditors should be able to seize and auction off their debtors' real property. Only personal property was liable to be sold to satisfy debts. Even when the debt was secured by a mortgage, courts could be persuaded not to allow the foreclosure if it seemed that the debt could be repaid by other means, such as income from the land, or sale of personalty.[27]

Needless to say, there were other ways of losing title to real property, such as failure to comply with the covenants due to the feudal lord (e.g., military aid, fealty or rent). For example, treason was punishable by divestment of the title of the traitor because it implied disloyalty—*i.e.*, breach of the covenant of fealty.[28] Because this punishment affected not only the criminal but also deprived his heirs of their birthright, the punishment was called *corruption of the blood*.[29] The U.S. Constitution, Article III, Section 3, expressly forbids Congress to pass this form of punishment, presumably because it affected innocent heirs.[30]

VI. Colonial Law

Despite many experiments by early settlers to create a new law for the New World,[31] the colonies largely followed—or eventually reverted to—English real property law. A real property law developed to protect aristocratic interests—*i.e.*, the preservation of estates—in England, where land was scarce, became the law of the land in the new vast largely unpopulated continent. It is no surprise that the protections of real property embodied in English law were challenged in America. The surprise is that the challenge did not come from the colonists, but from the English Parliament.

As much as the English merchant and aristocratic classes enjoyed the protections of real property law, they did not feel the same way about them when they were the creditors. English merchants[32] could not bear their debtors to live in poverty while owning large estates. They could not hope to amend the laws in England, where the interests of members of Parliament would be affected, but the new continent was another matter. After unsuccessful attempts to persuade colonial governors to pass statutes to facilitate debt collection, English merchants complained to Parliament. In 1732, Parliament enacted the *Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America* (the "Debt Recovery Act"), which in essence declared that real property in America would be treated as personal property for the purposes of debt collection. Creditors would now be able to seize and conduct public auctions of their debtors' real property, just as they might bring execution against personal property.[33]

More important for our topic, the Debt Recovery Act disrupted the feudal structure by subordinating the interests of heirs to those of unsecured creditors. As we have seen, by 1732 the executor had become the decedent's personal representative and had the recognized duty to see the decedent's debts paid, but had still nothing to do with the real property. Some colonies, like New York, interpreted the Debt Recovery Act as allowing execution of the decedent's real property for the payment of debts, just as the creditors of the decedent might bring actions to execute the personal property of the decedent. Other colonies read the Debt Recovery Act more broadly and interpreted that real property was now in the hands of the executor to distribute and not just for the payment of debts.[34]

VII. The American Revolution

Years after the passing of the Debt Recovery Act, the English government attempted to placate the colonists' indignation to the Act by pointing out that the Act had resulted in greater credit availability and greater economic development—not to mention a more flexible land market—in comparison to other English colonies.[35] Indeed, shortly after the American Revolution, the new states and commonwealths re-enacted the Debt Recovery Act in an attempt to foster economic growth.[36] New York passed its own Debt Recovery Act in 1787.[37] About one hundred years later, England followed suit and went one step further: By the English Land Transfer Act of 1897 the decedent's title would henceforth vest in the executor to ensure the payment of debts and legacies.[38]

VIII. The Executor in New York

i. A Brief History of the Surrogate's Court

The rest of our inquiry follows the development of the executor's powers over real property in New York. The reader should bear in mind that what follows is a discussion of the default rules. Even if the law at

any time did not *per se* give the executor the power to act on real property, the testator could stipulate otherwise in his will. The testator could, and many did, charge his real property with the payment of debts and legacies and grant his executor fee title or a power of sale. Such will covenants have always been honored in New York.[39]

The Debt Recovery Act introduced the notion that real property was subject to a sheriff's execution in the same manner as personal property. A creditor could bring execution against the executor *as if* he owned the real property, but the executor did not enjoy any powers over the real property. As will be seen, it was not until the twentieth century that the executor was vested with powers over real property as an incident of his appointment. Before that time, the notion persisted that real property belonged to heirs and devisees. An executor who saw it necessary to reach the real property to satisfy debts and legacies had to make an application to the surrogate for an order directing him to act on the real property. But who is the surrogate? There was no Surrogate's Court in England and, in any event, the English courts having jurisdiction over probate, the Courts Christian, had no jurisdiction over real property by operation of the Statute of Uses. We will briefly review the history of the Surrogate's Court as it stands as a landmark between the notion that real property is the birthright of the descendant and the notion that real property is available for the payment of the decedent's debts and legacies.

As we have seen, in England jurisdiction over probate (and administration) was in the Courts Christian. Even after the separation of the Church of England from the Holy See in 1533 (also under Henry VIII), jurisdiction over estates remained in the Courts Christian, but with final appeals to the Archbishops of York and Canterbury instead of the Holy See. Jurisdiction over probate was not turned over to lay courts until 1847 when it was given to the Supreme Court of Judicature, renamed in 1981 the Supreme Court of England and Wales, and known today, subsequent to the 2005 constitutional reform, as the Senior Courts of England and Wales.

In the Province of New York in the seventeenth century things were different. There was no more than one court per each one of the four jurisdictions: the Mayor's Court for New York City, and a Court of Sessions for each of the three ridings that comprised the rest of the province. These courts attended to all matters, including probate. In 1686 Governor Dongan received a letter of instructions from King James II (formerly, the Lord Proprietor, the Duke of York) which, among other things, charged his office with the discharge of probate and other "ecclesiastical" matters. The governor began monitoring probate and soon, by 1691 under Lieutenant Governor Ingoldsby, the governor's office took over the issuance of letters testamentary and of administration, the hearing of accounts and the final discharge of personal representatives.[40]

Until 1778, jurisdiction over probate was with the governor and was organized as follows. The governor appointed a deputy to discharge this office, and the deputy, in turn, appointed a delegate for each county. The delegates were little more than notary publics. They would receive evidence and testimony regarding probate and forward them with their certificate to the governor's deputy (whose office was originally in New York City and since the War of Independence in Albany). The deputy would examine the evidence and return letters testamentary or of administration executed under the Great Seal of the Province (and later the State). If the will or the administration was contested, the entire proceeding had to occur before the deputy. First the deputy and then his local delegates came to use the title of *Surrogate* to indicate that they were exercising an office in lieu of someone else (the governor). Following English nomenclature, the office of the deputy became known as the Prerogative Court (which was the name of English ecclesiastical appeal courts) and the probate records held by the secretary of the colony, as the Registry of the Prerogative. Shortly after the Revolution, in 1778 the Legislature created a judicial court, the Court of Probates, which took over the duties of the Prerogative Court, except the appointment of local surrogates.[41]

In 1786, the Court of Probates was given the power to order the sale of the decedent's real property if the personal estate was insufficient to pay its debts. Beginning in 1787, this and other powers (such as the powers to hold hearings, issue letters testamentary and of administration, and discharge personal representatives) were transferred from the Court of Probates to the local county surrogates. By 1819 the Court of Probates had become mostly an appeals court, and in 1823 it was abolished, with any remaining jurisdiction it might have held transferred to the Court of Chancery.[42]

Significantly, county surrogates were legislative courts: they were created by and existed at the pleasure of the Legislature. Even when they were first included in the New York Constitution in 1846, they were described merely as an office ancillary to the county judge[43] and with no specified jurisdiction.[44] By implication, the Legislature reserved the ability to define their jurisdiction, which it did by the Judiciary Act of 1847.[45]

But despite the inclusion of the surrogates in the New York Constitution and the enabling acts of the Legislature, the surrogates' jurisdiction over real property was limited. Every New York Constitution, including the very first of 1777, guaranteed that all actions that were subject to trial by jury at common law would continue to be subject to trial by jury.[46] The common law was protective of real property and dictated that divestitude of real property was subject to trial by jury. The surrogate, however, was an independent office and

not a court of law. Any decisions it might render concerning the ownership of real property were subject to review by a court of law sitting with a jury as to the portions relating to real property, but not the portions relating to personal property.[47] The constitutional objection persisted beyond the nineteenth century, as indicated by the worthy commentator Robert Ludlow Fowler in his annotated Decedent's Estate Law of 1911: "The surrogate's probate of a will of real property is not conclusive and unfortunately cannot be made so, as that would be to deprive a person claiming under or against a devise of the old common-law right of trial by jury."[48] The objection was finally cured in 1914 when an extensive revision of the Code of Civil Procedure finally gave the surrogate the power to hold jury trials.[49] Our current Constitution, passed in 1938, recognizes the surrogate's court as a court of law and gives it jurisdiction over estates, among other matters.[50]

To sum up, the powers of the surrogate over real property are not based in the common law. Its English ancestor, the Courts Christian, did not have any authority over real property. Real property passed by will or intestacy at the time of death and without probate. If any questions of title arose, they would be resolved by the courts of law, not the Courts Christian. The powers of the surrogate over real property in New York are based on a long succession of statutes, commencing with the 1786 statute that allowed the Court of Probates to order the sale of real property. For present law, this history has an important implication. The jurisdiction of the surrogate's court is defined by statutes and, at least as to real property, there is no common law to shed light as to whether a question may be entertained by the surrogate.[51] For the purposes of this article, this history serves a more practical purpose: if the powers of the executor and the surrogate over real property are based on statute, then the statutes will be our stepping stones as we follow their history.

ii. By Order of the Surrogate: The Revised Statutes and the Code of Civil Procedure

The Revised Statutes of 1829 may illuminate where the law stood in the nineteenth century.[52] In the relevant sections, they provided:

> §1….[I]f the [executors or administrators] discover the personal estate of their testator or intestate, to be insufficient to pay his debts, they may…apply to the surrogate for their authority to mortgage, lease or sell so much of the real estate…as shall be necessary to pay such debts.
>
> §14. The surrogate shall make no order for mortgaging, leasing, or sale of real property…, until he shall be satisfied [that the debts are just and the personal estate insufficient].
>
> §15. The surrogate, when so satisfied, shall in the first place inquire and ascertain whether sufficient moneys for the payments of such debts can be raised, by mortgaging or leasing….
>
> §20. The order shall specify the lands to be sold. […] If it appear that any part of such real estate has been devised,…the surrogate shall order that the part descended to the heirs, be sold before that so devised;…[53]

There are five important points here. First, unlike today, the executor could not take possession of the real property or collect rents. Not even the surrogate could place the executor in possession. Second, also unlike today, the executor did not have the power to sell, mortgage or lease, except pursuant to a specific order of the surrogate and for the payment of debts only (not legacies). Third, the execution of real property was only available if the personal estate was insufficient. Fourth, the powers to mortgage and lease were offered only as limitations to the power of sale.[54] Land should not be sold if the debt might be paid by mortgaging or leasing. The point was to strike a balance between the competing interests of heirs and creditors. Lastly, and like today, real property passing by intestacy was to be sold before property devised. Notably, the statute distinguished between property passing by *descent* and by *devise*. There is no mention of *specific devise*.[55]

The notion that the surrogate could allow the executor or the administrator to enter into possession of the real property and collect rents was only introduced decades later, in the 1914 revision of the Code of Civil Procedure.[56] The comments of the commission justifying the new provision illuminate the policy:

> It has always worked out as an injustice to creditors that the heir or devisee should be able to collect rents for many months from real estate which equitably belonged to the creditors. It has also worked injustice to resident and competent part owners that their interests should be sold when a few months' rent would have discharged all the debts. Therefore, it has seemed to be wise and just, and within the power of the court, to authorize the representative to enter into possession of the real estate, when all of it may eventually be required to be mortgaged, leased or sold, and to collect the rents and bring them into court upon his judicial settlement to be accounted for and applied as may be necessary. This plan will also put someone in charge of real estate owned by nonresidents, absentees or incompetents,

where now no one has the right to collect the rents.[57]

The ability of the executor or administrator to enter and remain in possession of the real property depended on whether the decedent's personal estate was insufficient to pay its debts. A party having an interest could deliver to the surrogate a bond covering the debts and the executor or administrator would be excluded from possession.[58] The debts chargeable on the estate, however, as determined by the Code of Civil Procedure, were lifetime debts, funeral expenses, administration expenses, transfer taxes, and any legacies made a lien on the land by the will, but not general legacies.[59]

In 1920, upon the recommendation of the Joint Legislative Committee on the Simplification of Civil Practice, the Legislature passed the Surrogate Court Act. The provisions relating to the surrogate were substantially transcribed from the Code of Civil Procedure into the Surrogate Court Act.[60] This was part of a larger plan to simplify the civil practice code which culminated in the Civil Practice Act of 1921, which was the predecessor of the current Civil Practice Law and Rules (passed in 1962). In 1921 the Surrogate Court Act was amended to be renamed the *Surrogate's Court Act* "to meet the requirements of the Constitution of the State of New York, article VI, § 16, which recognizes and perpetuates 'Surrogates' Courts,' but not 'Surrogate Court.'"[61]

iii. Possession by the Executor Is Tested: *In Re Mould's Estate*

The power to take possession of real property, even if subject to the approval of the surrogate, was an important departure from the common law in 1914. It was tested in *In re Mould's Estate*.[62] In *Mould*, the testatrix made several bequests of personal property to her family and bequeathed and devised the residue to a friend. The friend quickly transferred the real property to a third party before the will was probated. Upon the probation of the will, the executor sought an order pursuant to CCP § 2701 to be placed into possession of the real estate. The executor showed that the personal estate would be insufficient to pay the cash legacies and alleged that the will gave him a power of sale over the real property. However, whether the will indeed charged the land with the payment of the legacies was a question pending in a separate action. The transferee challenged that the property had already been transferred by the devisee, that the land had not been charged with the payment of legacies, and that therefore the surrogate was without jurisdiction. The surrogate disagreed and granted the order on the basis that the purpose of CCP § 2701 was to preserve, and that if it was later ruled that the land was not charged with the legacies, then the order could be set aside.

On appeal, the Appellate Division, Second Department, noted that there was no decision construing the new statute and that the reviser's notes (transcribed above) only referred to the protection of creditors. Nevertheless, the court held that the statute also applied to protect legatees, and further that it could be invoked to preserve the *status quo* pending a determination of the interests of all parties concerned.

iv. The Decedents Estate Law: Victory of the Executor

A. The 1929 Statute and the 1947 Amendment

Ostensibly, the Legislature in 1929, with the enactment of Decedent Estate Law ("DEL") § 13,[63] intended to give to the executor the power to enter into possession, manage and collect rents from real property without specific order from the surrogate.[64] The same power was given to administrators the same year with the enactment of DEL § 123. But because of unclear drafting, the statute was construed to require executors, but not administrators, to procure an order of the surrogate prior to taking possession. This was resolved by an amendment in 1947.[65] Case law between 1930 and 1947 conflicts as to whether the executor may enter into possession without order of the surrogate, while administrators do enjoy that power.[66] DEL § 13, as amended in 1947 and in the relevant portions, read as follows:

> 1. Notwithstanding the absence of a valid power therein, every will…shall be construed to give the executor or trustee…the power to take possession, collect rents, and manage, and to sell, mortgage and lease all of the real property, and any interest in any real property, owned by the decedent at the time of his death….
>
> 2. Such power to take possession, collect rent, and manage, and to sell, mortgage or lease, shall not be exercised, however, (a) where the will expressly prohibits the exercise thereof; (b) or as to such real property as the will expressly provides shall not be sold, mortgaged or leased; (c) and shall be deemed to include property as has been specifically devised…; (d) except that the power[s]… may be exercised, in the case of property devised and within subdivisions a, b, and c of this subdivision, where such power is necessary for the payment of administration expenses, funeral expenses, debts, or transfer or estate tax, upon approval by the surrogate….
>
> 3. This additional grant of power to sell, mortgage and lease shall not be deemed to affect any existing authorization or judicial proceeding….

This statute went beyond the ability to enter into possession: it also gave the executor the power to

lease, mortgage and sell real property without court order, with a few limitations.[67] The result was substantially the law as we know it today in our current statute.[68]

B. Heirs and Devisees Owe Rent

Case law gave the executor another important victory during the same period. The common law vests title at the time of death in the distributee or devisee. If the devisee or distributee is the owner, should a distributee or devisee in occupancy pay rent to an administrator or executor? In the more common scenario, there is more than one devisee or distributee (usually siblings) and the one who is not in possession wishes the other to pay rent. But the common law is also well-settled that one tenant-in-common does not owe rent to the other, except as to commercial uses or in the event one co-tenant excludes the other from the enjoyment of the property,[69] neither of which exceptions necessarily applies to estate distributions. Are owners and co-tenants subject to the payment of rent to the executor or administrator?

The Appellate Division, Second Department, answered this question in the affirmative in *Limberg v. Limberg*.[70] In that case, an administratrix brought an action to collect rents against a son of the decedent (i.e., a co-tenant by intestacy), who was in possession of the real estate. The Court wrote:

> The defendant's resistance to paying rent to the administratrix is solely on the ground that he is one of the heirs at law of the decedent and as such has title to the property. […] The language of the statute expresses no exception to the administratrix's power, such as would indicate that it was intended to exempt defendant from the payment of rent; and we believe it must be construed to mean that upon the administratrix's making a demand, she is exercising the power conferred by statute, and that the title of the heir at law in possession is, during the administration, subject to the representative's power to possess, manage and collect rents of realty.[71]

Curiously, notwithstanding the different statutes for executors and administrators, courts did not resolve the same question as to executors and devisees until 2006, where in *In re Seviroli*, the court relied upon the authority of *Limberg*.[72]

The personal representative's power to collect rents reached its zenith in *Johnson v. Depew*.[73] In that case, two tenants in common owned real property, apparently in equal shares. One died and his administrator brought an action against the survivor to collect rents. Needless to say, the defendant had not acquired her title through the decedent. Nevertheless, the Court ruled for the administrator:

> The language of the statute expresses no exception to the administrator's power to collect the rentals where the tenant is not a distributee but merely, as here, a surviving co-tenant. If the Legislature had intended to carve out an exception premised on the status of the tenant in occupancy, it would have said so clearly in the statute.[74]

v. Decedents Estate Law § 127 and the Estates, Powers & Trusts Law

A. The Fiduciaries' Powers Act

In 1961 the Legislature created a new temporary commission with the stated purpose, once again, of simplifying the law of estates.[75] The commission completed its work in 1966 with the legislative enactment of two major consolidated statutes: the Estate, Powers & Trusts Law ("EPTL") and the Surrogate's Court Procedure Act, which replaced the Decedent Estate Law and the Surrogate's Court Act, respectively. But before the commission prepared and recommended these new Consolidated Statutes other laws were passed on its recommendation.

In its Third Report to the Legislature, dated March 31, 1964, the Commission recommended the codification of the powers of executors, administrators and trustees under one single "Fiduciaries' Powers Act."[76] The recommended statute was passed in 1964 and became DEL § 127.[77] But, the statute's life was short because in 1966 the EPTL was enacted,[78] and DEL § 127 was recodified into the current EPTL § 11-1.1 with few changes. This means that the legislative history of our current fiduciaries powers statute—*i.e.*, EPTL §11-1.1—is in fact in the legislative history of DEL § 127—*i.e.*, in the Third Report.

With respect to real property, neither DEL § 127 nor EPTL § 11-1.1 appear to have been intended to alter the powers of the executor from where they stood in 1947. The innovation appears to have been mostly in powers over securities. As to real property, the EPTL simplified a few things. For example, prior to the EPTL case law conflicted as to whether a devise could be considered "specific" if made to more than one person.[79] The EPTL settled the question in the affirmative. The EPTL also settled the question of the extent of the executor's leasing power to three-year leases.[80] But by codifying the powers the EPTL has also brought some confusion, which we will review below.

B. Power to Mortgage but Not to Borrow

The EPTL does not give to the executor the power to borrow. The Third Report notes that fiduciaries do not have the power to borrow and expressly recommends against granting that power by statute.[81] With respect to the power to mortgage, the Third Report merely notes that this power was already given in 1930 by enactment of DEL §§ 13 and 123, and that prior to 1930 real property

could be mortgaged by order of the surrogate.[82]

The only plausible reading is that the executor may mortgage only to pay existing obligations. For example, the executor could cash out equity to pay debts and legacies, or refinance an existing mortgage to benefit from a lower interest rate. This reading is consistent with the history of this power. As shown above, the power to mortgage was introduced as a limitation to the power of sale, as a way to balance the interests of creditors and heirs-at-law. If the debts could be paid by mortgaging, then the surrogate would order the property mortgaged rather than sold, thereby preserving the property in the decedent's family or devisees. The statute as drafted is a potential trap for both lenders and fiduciaries because the executor may lack the power to mortgage or borrow for any purpose other than paying or consolidating existing debts.

C. Power to Grant Options for the Sale of Real Property

EPTL § 11-1.1(7) gives the executor the power "to grant options for the sale of property for a period not exceeding six months." "Property" by definition includes real property.[83] What is odd about this power is that, unlike the power of sale in the same statute, it makes no exception for specific devises.[84] On the face of it, the statute gives the power to sell by option what the fiduciary cannot sell directly. The Third Report does not explain this. It merely indicates that the purpose of including that power is to derogate common law that prohibits fiduciaries from granting options.[85] It may be argued that this section does not enlarge the power of sale, but allows for its exercise by way of option.

D. Power to Make Ordinary Repairs

A similar question arises under the power "to make ordinary repairs to property of the estate or trust."[86] It does not except property subject to a specific devise. That could be explained following the decisions in *Mould* and *Johnson v. Depew*, commented above: Executors should be allowed to reach and protect all real property while the questions of whether there was a specific devise and who are the beneficiaries are pending with the courts. This view has been adopted by the courts.[87]

This reading, however, is not supported by the legislative history. The Third Report, in the relevant section, reads: "An executor lacks authority to repair or improve real property at the expense of the estate which is not under his management, but he may repair personal property comprising the estate and the real property which he has power to sell or manage."[88] The Third Report shows no intention of granting the power to repair specifically devised property.

E. Power to Settle Claims over Real Property

The EPTL grants the power to contest, compromise or otherwise settle any claims in favor or against the estate.[89] However, nothing in the EPTL or other related enactments has revoked the common law rule that real property vests in the distributee or legatee at the time of death. The Commission was well aware of this rule.[90] Hence, what actions over real property, if any, may the executor bring or settle? The legislative history offers no help as it does not address real property claims, but personal claims.[91] It appears that the intention of the Commission was merely to codify the law rather than to expand it.

To determine what actions the executor may bring or settle we must look elsewhere. Notably, the Real Property Actions and Procedures Law recognizes that the executor is not the title owner, and therefore the executor is declared a necessary party to most actions by force of statute.[92] As for all other actions, there is no answer. It appears that the best approach is to turn the question around and focus on his powers and assume that every power is enforceable. For example, if the executor can manage property, then we can also expect him to be able to enforce a right of way to access it.[93] If he succeeds to a realty purchase contract, he can sue for specific performance. If the estate includes property that the decedent acquired by adverse possession, then he can act on it, even if the executor is not mentioned in Article Five of the RPAPL (adverse possession).[94] In short, the statutory language is cryptic and broad. In the absence of any other controlling statutes, we should concentrate on his powers to determine what actions he may have.

vi. Defining the Executor's Powers and Limitations

A. General

The executor's powers over real property are vast and include some of the most important incidents of ownership. But the executor is not the fee simple owner and he does not enjoy every incident of ownership. The common law that vests title in the distributee or devisee at the time of death is still good law in New York. Between the executor's powers and fee simple ownership, between the statute and the common law, falls the shadow. In this last section we will attempt to define his powers and limitations.

To begin with, the executor is a fiduciary. Whatever powers he may hold he can only use for the benefit of someone else. He can take possession and manage real property, for example, but he cannot take occupancy himself without owing rent.[95] This point is important because the identity of the ultimate beneficiaries (*i.e.*, creditors and devisees) is not always known at the time the executor commences his administration. The executor can hardly know whom he will have to account to for his actions. Straying from the statutory powers and duties, even with the consent of the presumptive beneficiaries, can be a risky practice.

The history we have reviewed shows that the executor holds two powers over real property: the power to liquidate it for the payment of

debts and legacies, and the power to take possession and manage it during his administration. These two powers have distinct origins and purposes. Every other power we may come across can be recognized as an incident of one of these two.

B. Power of Sale

The power to liquidate real property—*i.e.*, the power of sale—has its origin in a long line of statutes commencing with the colonial 1732 Debt Recovery Act. Its purpose is the satisfaction of monetary debts and legacies, not distribution in kind. It follows, then, that the executor cannot transfer property, or exercise any incident of this power, for no consideration.[96] Title insurers today correctly object to executor's deeds made for no consideration.[97] There appears to be an exception for circumstances where a conveyance for no consideration may increase the aggregated value of the estate. For example, dedicating title to proposed streets to the local municipality may allow the executor to sell subdivided lots at a higher aggregated price than the unsubdivided parcel.[98] More importantly, despite the express policy of the EPTL to treat all personal and real property in equal manner,[99] courts allow distributees to prevent executors from selling family homesteads when it is not necessary for the payment of debts and legacies.[100]

As shown above, the powers to lease and mortgage were introduced as alternatives to selling. They were introduced to allow the satisfaction of debts and legacies where funds might be raised without divesting the distributees of their title. In effect, they are incidents of the power of sale. As to the power to mortgage, nothing suggests that it may have evolved into something in and of itself. On the contrary, the Third Report expressly recommended against giving the executor the power to borrow. The executor can only mortgage to pay existing obligations.

The power to lease, on the other hand, appears to have changed its purpose. There is little doubt that it was introduced to settle estate debts either by giving the creditor temporary use of the property, or assigning temporary rents therefrom.[101] However, in our day, and especially given the limitation of the leasing power to three years, as introduced in the EPTL,[102] leasing can hardly be considered a means of settling debts. It would appear that it is no longer an incident of the power of sale, but of the power to take possession, manage and collect rents during his administration.

C. Power to Take Possession, Manage and Collect Rents

The power to take possession, manage and collect rents came into existence with the 1914 amendment to the Code of Civil Procedures. Its primary purpose is the preservation of estate assets, including future rents. The executor may collect rents as a measure to preserve estate assets even if the estate is solvent. However, there is case law that prevents the executor from taking possession if there is no legitimate estate purpose. To illustrate, what is the point of taking possession, if the property vested in the ultimate distributee at the time of death, if that distributee is already collecting rents or in occupancy, and the estate can meet all of its obligations without recourse to the real property? There is no point in entering into a fight with the distributee over possession if there is no doubt that the executor would only hold the asset and any associated rents solely for the benefit of that distributee.

The law appears to be settled that the power to take possession and manage real estate is discretionary, depending on the needs of the creditors and beneficiaries of the estate.[103] In 2006, the Appellate Division, Second Department, ruled: "[n]onetheless, merely because a fiduciary, here the executrix, is "authorized" to take possession of real property, the statute cannot be read to compel a fiduciary to take possession in every case where real property is devised as part of the residuary estate."[104]

An important implication of this is that rents may not be owed until the executor demands them, if ever. Hence, if an executor demands rents from an occupant, the occupant may owe rents from the date of the demand, and not necessarily from the time of the death or the appointment of the executor.

D. Scope, Incidents, and Limitations of the Powers

The difficulty in defining the two powers of the executor over real property is two-fold. On the one hand, the powers are usually interpreted broadly. The executor can displace the fee owner,[105] create easements,[106] and even deed for no consideration in limited circumstances.[107] On the other hand, the interpretation often goes against the plain reading of the statute. The executor can take possession, but only for a legitimate estate purpose. He can sell property, but he sells subject to liens that may have attached to the distributees as fee owners.[108] He can mortgage property, but not borrow except to pay off existing obligations. The statute gives him no powers over property specifically devised, but yet he can reach it in certain cases.

The interpretation of the powers, however, is not arbitrary. It generally follows the historical intent. It appears that whether the executor has any given power over real property may be determined through the following test: *Is the power reasonably necessary for the preservation of the decedent's property (during administration and pending distribution) or for the liquidation of the decedent's property for the payment of debts and legacies?* An affirmative answer suggests that the power exists.

The powers to collect rents, evict occupants and make ordinary repairs, for example, are necessary for the preservation of estate assets. They are not necessary for liquidation: the executor can sell subject to them. The power to take possession is not necessary for preservation, if the property is already in the hands of the correct distributee and the estate

is known to be solvent. The power to create a right of way easement is not necessary for preservation, but it may be necessary for liquidation, as a sale of a lesser property interest, or if it is incidental to the sale of land-locked property.[109] The power to build out, develop, materially alter or change the legal use of property, on the other hand, is neither necessary for preservation nor liquidation. An executor might be allowed to apply for a building permit to cause ordinary repairs (preservation), but not for a building permit to alter the property. And yet there is one instance where the executor might have that power: if the contract purchaser requires the executor as seller to join in a building permit application prior to the closing, for example, the executor would very likely have the power to join in the permit application as "contract vendee," even if the executor would not have had the power to apply for such permit *in motus proprio.* In that case, the execution of the permit as "contract vendee" could be deemed necessary for the sale (liquidation).

IX. Conclusion

Our objective was to discover the nature of the executor and his relationship to the decedent's real property. The executor was introduced in the early medieval common law to distribute legacies, which duty the heir-at-law neglected for his own benefit. Over centuries later, the executor took charge of the entire personal estate. He collected and paid the decedent's debts, and could even sue the heir-at-law to recover the decedent's property. But this was all only as to personal property. According to English law at the time of the American Colonization, real property passed at death by a different set of rules and the executor did not have any title, interest or powers over real property whatsoever.

By a colonial 1732 English statute aimed at facilitating debt collection in the American colonies, a creditor could sue the executor and foreclose on the decedent's real property *as if* it was personal property in his general administration. After the American Independence, the new State saw the market benefits of facilitating debt collection and expanded on the executor's powers. In the early nineteenth century the surrogate was given the power to cause the sale of real property for the payment of debts (but not legacies) upon application of the executor. Beginning in 1914, the surrogate could place the executor in possession of real property and collect rents pending administration and distribution of the estate. In 1947, the executor was given the powers to sell and to take possession without application to the surrogate, except in limited instances. Notably, while the executor may be rooted in the common law, his powers over real property are statutory in nature. More importantly, no statute has given the executor title to the decedent's real property. Title to real property vests at the time of death in the distributees *subject to* the powers of the executor.

In 1965, the Legislature attempted to simplify the powers of executors, administrators, and trustees by creating one single "Fiduciaries' Powers Act" (today, EPTL § 11-1.1). As to the executor, the powers listed in that statute appear to have been and continue to be construed in light of his two historical powers over real property: the power to liquidate to pay obligations and the power to take possession to preserve assets. As a consequence, the statutory powers tend to be construed broadly when echoing either historical power. For example, the statute does not give the executor the power to create easements, but it appears no case has questioned it when necessary for the partial sale of the decedent's real property, notwithstanding the encumbrance they may cause on the distributee's remaining real property.

If our reading is correct and the interpretation of the executor's powers over real property is guided by their history, then it would follow that the powers of trustees, even though governed by the same statute, will be interpreted differently. It should be remembered, for example, that trustees generally do hold title to real property, while executors do not. Therefore, the powers over real property listed in EPTL § 11-1.1 have a twin-nature: they are a *codification* of the common law as to trustees, but a *modification* of the common law as to executors. The notion that they may be interpreted differently as to trustees and executors is only offered for discussion. We have not compared the powers of executors with those of trustees in this article.

Endnotes

1. *See* Waxson Realty Corp. v. Rothschild, 255 N.Y. 332 (1931); In Re Seviroli, 31 A.D.3d 452, 818 N.Y.S.2d 249 (2d Dep't 2006); DiSanto v. Wellcraft Marine Corp., 149 A.D.2d 560, 540 N.Y.S.2d 260 (2d Dep't 1989); Limberg v. Limberg, 256 A.D. 721, 11 N.Y.S.2d 690 (2d Dep't 1939), *aff'd,* 281 N.Y. 821 (1939); Estate of Horton v. Comm'r of Internal Revenue, 388 F.2d 51 (2d Cir. 1967).
2. *See* N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5) (McKinney 2011).
3. R.J.R. Goffin, The Testamentary Executor in England and Elsewhere 37 (1901).
4. *See* N.Y. E.P.T.L. § 5-1.1-A. The actual election in New York may vary depending on circumstances, but the one-third rule remains the default rule.
5. Although this paragraph addresses only personal property, it should be remembered that the common law recognized the right of dower, which New York only abolished in 1930. The right of dower was a tenancy for life for the benefit of the widow over one-third of the decedent's real property. Hence, the widow at common law received ownership of one-third of the decedent's personal property, and life tenancy over one-third of the decedent's real property. In effect, she enjoyed one-third of the estate.
6. Primogeniture, though the most familiar English rule of succession, was not applicable in all of England. Even in the Middle Ages some communities maintained a different immemorial custom, such as equal distribution among sons. *See* 1 Sir William Blackstone, Commentaries on the Laws of England II *214-15. The Dutch in America did not agree with primogeniture. Article XI of the Articles of Capitulation on the Reduction of New Netherland (to the English forces led by the Duke of York in 1664) translates to read: "The Dutch here shall enjoy their own customs concerning inheritances."
7. *See generally* Eileen Spring, Law, Land & Family: Aristocratic Inheritance in England, 1300-1800 (1993), for a historical discussion of the social effect of the rules of inheritance.

A passage in *The Importance of Being Earnest*—where Jack is examined by Lady Bracknell to determine whether he can be a suitor to Gwendolen—illuminates how ownership of land was losing its status by the end of the 19th century:

> LADY BRACKNELL….What is your income?
>
> JACK. Between seven and eight thousand a year.
>
> LADY BRACKNELL. In land, or in investments?
>
> JACK. In investments, chiefly.
>
> LADY BRACKNELL. That is satisfactory. What between the duties expected of one during one's lifetime [*i.e. property taxes*], and the duties exacted from one after one's death [*i.e. death taxes*], land has ceased to be either a profit or a pleasure. It gives one position, and prevents one from keeping it up. That's all that can be said about land.

Oscar Wilde, *The Importance of Being Earnest*, act 1, pt. 2 [emphasis added].

8. *See* BLACKSTONE, *supra* note 6, ch. 4-5, for an account of the early feudal system and tenures in land.

9. *See generally* OLIVER WENDELL HOLMES, THE COMMON LAW, lectures X-XI (Little, Brown and Company 1881), for a discussion of the development of the privity of estate from feudal to modern times.

10. *See* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES 328 et seq. (7th prtg. 1997) (1957).

11. *See generally* Waxson Realty Corp. v. Rothschild, 255 N.Y. 332 (1931).

12. *See* GOFFIN, *supra* note 3, at 35-40.

13. "But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised frequently, and the devisee of the use could in chancery compel its execution." BLACKSTONE, *supra* note 6, *375.

14. *See* J. INST. 2.4.

15. The terms "reversion" and "remainder" are often confused. A reversion is the residuary ownership interest reserved by the grantor. A remainder is a residuary ownership interest conveyed by the grantor. If A conveys land to B for a certain time (e.g., a lease or life estate), but reserves the rest, A holds a reversion. If A conveys land to B for a certain time, but grants a successor fee simple to C, C holds a remainder. *See* N.Y. EST. POWERS & TRUSTS LAW §§ 6-4.3, -4.4.

16. 1 ROBERT F. DOLAN, RASCH'S LANDLORD AND TENANT 5-6, 8 (4th ed. 1998).

17. *See* SPRING, *supra* note 7, at 31. *See also* ROBERT LUDLOW FOWLER, REAL PROPERTY LAW OF THE STATE OF NEW YORK 32-33 (3rd ed. 1909).

18. The Church had a broader motive to introduce uses and trusts in England. Medieval law not only prohibited devising property. It also prohibited any *inter vivos* transfer to the Church or any other corporation. Lands that came into the ownership of the Church were said to fall in the "dead hand" because the feudal lord effectively lost the benefit of it. *See* BLACKSTONE, *supra* note 6, *375-76 (statutes of mortmain). Interestingly, uses and trustS had also been used in the Continent to avoid the prohibition of ownership of land by Jews. *See* GOFFIN, *supra* note 3, at 26.

19. *See* BLACKSTONE, *supra* note 6, *64 et seq.; SPRING, *supra* note 7, at 31.

20. *See* FOWLER, *supra* note 17, at 33.

21. *See* SPRING, *supra* note 7, at 42 et seq.

22. See *id.* at 31. This summary of the Statute of Uses suffices for our present purposes. The complete intent and actual effect of the Statute of Uses is a complex topic and exceeds the scope of this article.

23. It has also been suggested that the real purpose behind the Statute of Uses was an attack on the Holy See, an incident of the quarrel that culminated in the severance of the Anglican Church from Rome. By having courts of law take cognizance of uses and trusts, the jurisdiction of Courts Christian was effectively undercut. *See* ROBERT LUDLOW FOWLER, DECEDENT ESTATE LAW OF THE STATE OF NEW YORK 13 (1911).

24. According to Blackstone the Statute of Wills was the cause for the passing of a more familiar statute.

> Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the hand writing of another person were allowed to be good wills within the statute. To remedy which, the statute of frauds and perjuries, 29 Car. II., c. 3, directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a similar solemnity is required for revoking a devise.

BLACKSTONE, *supra* note 6, *376.

25. *See* LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 65 (2d ed.1985). The reader may remember that we started off saying that the rule at common law was that personal property was not divided equally, but descended one-third to the widow, one-third to the heir at law, and one-third to the will beneficiary, or to the heir-at-law as well, if there was no will. In the 1680s, the time period commented on by Friedman, the statute 22 & 23 Car. II, c. 10 was passed which mandated equal distribution of the *personal* estate among the children of the decedent. *See* BLACKSTONE, supra note 6, *515.

26. *See* GOFFIN, *supra* note 3, at 62 et seq.

27. Claire Priest, *Creating American Real Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385, 398-408 (2006).

28. *See generally* FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 61 (1913) (stating that the property of felons was confiscated if convicted).

29. Corruption of the Blood. In English law, the consequence of *attainder*, being that the attainted person could neither inherit lands or other hereditaments from his ancestors, nor transmit them by descent to any heir, because his blood was considered in law to be corrupted. *See* BLACK'S LAW DICTIONARY *126-27 (6th ed. 1990). *See also* Avery v. Everett, 65 Sickels 317, 324, 110 N.Y. 317, 324, 18 N.E. 148, 150 (1888), for a historical account of the development of this punishment.

30. U.S. CONST. art. III § 3, cl. 2. "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of the Blood, or Forfeiture except during the Life of the Person attainted."

31. For example, the Puritan colony of Massachusetts Bay originally did not adopt the common law, but based its law on the Bible. *See* FRIEDMAN, *supra* note 25, at 34.

32. Under 17th and 18th century mercantilism colonies were only allowed to trade with their mother country.

33. The history and politics behind the Debt Recovery Act is thoroughly explained in PRIEST, *supra* note 27, at 408-427. Interestingly, Priest points out that the Debt Recovery Act actually had some support among American merchants for the same reasons advanced by English merchants.

34. *See id.* at 429.

35. *See id.* at 427.

36. *See id.* at 440.

37. *See* Waters v. Stewart, 1 Cai. Cas. 47 (1804).

38. "Before 1898, the rule [in England] was that an executor took no estate or interest by virtue of his office in any of his testator's real estate; any devise of such real estate was entirely independent of the executor's assent or interference; and, as we have seen, a will of real estate, as such did not require probate." 1 CYPRIAN T. WILLIAMS, TREATISE ON THE LAW OF VENDOR AND PURCHASER OF REAL ESTATE AND CHATTELS REAL 186 (1906) (internal citations omitted). Although English executors were properly vested with

decedents' real property beginning in 1898 by the Land Transfer Act of 1897, a practice had previously evolved for testators to grant their executors the power to dedicate their real property to the payment of debts and legacies. This practice was upheld by the courts and facilitated by Lord St. Leonards' Act of 1859, which removed some of the common law barriers to the divestment of the heir-at-law's title. *Id.* at 187.

39. *See generally* In re Fitzpatrick's Will, 252 N.Y. 121, 169 N.E. 110 (1929); Coann v. Culver, 188 N.Y. 9, 80 N.E. 362 (1907); In re Ballesteros, 20 A.D.3d 414, 798 N.Y.S. 131 (2d Dep't 2005); *see also* N.Y. Decedent Estate Law § 110.

40. For a detailed history of the Surrogate's Court see In re Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. N.Y. Cnty. 1862) (Daly, J., Acting Surrogate).

41. *See id.*

42. *See id.*

43. "There shall be elected in each county of this state…one county judge, who shall hold his office for four years. He shall hold the county court and perform the duties of the office of surrogate." N.Y. Const. of 1846 art. 6, § 14.

44. *Id.*

45. *See* Ch. 276, 1847 N.Y. Laws. For a history of the jurisdiction of the surrogate, *see* In Re Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. N.Y. Cnty. 1862).

46. *See* N.Y. Const. of 1777 art. XLI; N.Y. Const. of 1821 art. VII, § 2; N.Y. Const. of 1846 art. I, § 2; N.Y. Const. of 1938 art. I, § 2.

47. In 1825, the Court of Chancery, resolving an appeal from the surrogate, wrote:

> Thus, a will of personal and real estate may be there adjudged both valid and void, by different tribunals. This result of an artificial division of jurisdictions can never be proper, where it may be avoided. That a will should be adjudged valid, because the testator who made it, was sound of mind; and that the same will should be adjudged void, because the same testator was insane, is a result which should never take place under one system of laws.

Vanderheyden v. Reid, 1 Hopk. Ch. 408 (N.Y. Ch. 1825), *rev'd*, 5 Cow. 719 (1826). In that case, the Chancellor was resolving an appeal from a decision of the surrogate concerning both personal and real property. The Chancellor concluded that he had jurisdiction to resolve both issues, but was reversed on other grounds.

48. *See* Fowler, *supra* note 23, at 40. *See also* Bowen v. Sweeney, 89 Hun. 359, *aff'd*, 8 E.H. Smith 780, 154 N.Y. 780, 49 N.E. 1094 (Sup. Ct. Gen. T. 1st Dep't 1898); Corley v. McElmeel, 3 E.H. Smith 228, 149 N.Y. 228, 43 N.E. 628 (1896); Wallace v. Payne, 14 A.D. 597, 43 N.Y.S. 1119 (2d Dep't 1897).

49. "The jurisdiction of the Surrogate's Court is enlarged, so that a final determination may be made in that court of all matters pertaining to the affairs of a decedent. Provision is made for trial by jury of any controverted question of fact in the adjudication of which any party has a constitutional right to such trial." General Note, Report of the Commission to Revise the practice and procedure in surrogate's court (Feb. 9, 1914) (discussing the changes to Article 18 of the Code of Civil Procedure). *See also* Ch. 443, 1914 N.Y. Laws.

50. "The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law." N.Y. Const. art. VI, § 12(d).

51. For an example of a modern jurisdictional challenge, *see* Estate of Piccione, 57 N.Y.2d 278, 288 (1982) (deciding that the surrogate has jurisdiction to resolve a summary eviction proceeding pursuant to RPAPL Art. 7, and even though one of the parties is not an estate beneficiary); *see also* Real Spec Ventures, LLC v. Estate of Deans, 87 A.D.3d 1000, 1002, 929 N.Y.S.2d 615, 617 (2d Dep't 2011).

52. The Revised Statutes were an attempt to codify, systematize and simplify the entire law of the State of New York, presumably following the lead of the pandectist movement in Europe. *See* Robert Ludlow Fowler, History of the Real Property Law of New York: An Essay Introductory of the N.Y. Revised Statutes (New York, Baker, Voorhis & Company 1895) for a history of the Revised Statutes. "This they thought would reduce the statutes then in force to half their extent; it would render them so concise, simple, and perspicuous as to be intelligible not only to professional men, but to persons of every capacity . . . ." *Id.* at 92.

53. 2 N.Y. Revised Statutes, pt. 2, ch. 6, tit. 4, §§ 1, 14, 15, 20 (1829), *available at* http://nysl.nysed.gov/uhtbin/cgisirsi/?ps=XBOG1Iojyi/NYSL/304240061/523/82110.

54. In 1810 the Legislature had passed a statute that allowed the surrogate to order the leasing or mortgaging of real property, in lieu of selling, *if the decedent had left any infants*. *See* In re Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. N.Y. Cnty. 1862).

55. The Revised Statutes also altered the nature of executors and administrators. Where before they may have been simply personal representatives, by the Revised Statutes they became trustees

> …and the property in their hands is a fund, to be disposed of in the best manner for the benefit of creditors, and not liable, as it once was, to be dissipated in bills of costs, created by the anxiety of creditors to obtain a first judgment, and thus secure the payment of their debts to the prejudice perhaps of others. Now a more equitable rule prevails. No preference is given among debts of the same class.

Dox v. Backenstose, 12 Wend. 542, 543 (N.Y. Sup. Ct. of Judicature 1834) (Savage, C. J.).

56. "An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive rents thereof." N.Y. Code of Civil Procedure § 2701 (1914) ("C.C.P.").

57. *See* Reviser's Note to § 2701, Supplement to Bliss Annotated N.Y. Code of Civil Procedure and Stovers' Annotated Code of Civil Procedure of New York 538 (Frank B. Gilbert et al. eds., 1919); *see also* Ch. 443, 1914 N.Y. Laws.

58. *See* N.Y. C.C.P. § 2704.

59. *See* N.Y. C.C.P. § 2703.

60. *See* N.Y. C.C.P. §§ 2701, 2702, 2703, and 2704. These provisions became N.Y. Surrogate Court Act §§ 232, 233, 234, and 235, respectively. *See* Ch. 928, 1920 N.Y. Laws 634.

61. *See* L. 1921, ch. 438, § 1; *see also* Clevenger's Surrogate's Court Practice (American Law Publishers 1922) (containing Editorial Notes to art. I, § 1).

62. 113 Misc. 602, 605, 185 N.Y.S. 250, 252 (Sur. Ct. Westchester Cnty. 1920), *aff'd*, 195 A.D. 822, 187 N.Y.S. 355 (2d Dep't 1921).

63. Ch. 229, § 13, 1929 N.Y. Laws 499. The N.Y. Decedents Estate Law was a codified statute passed in 1909 and was replaced by the N.Y. Est. Powers & Trust Law in 1966. The original § 13 addressed property devised to aliens and was repealed in 1913. The above-mentioned § 13 was introduced in 1929 and amended in 1947.

64. "Every power to be exercised under this section is subject to the control of and subject to approval by the surrogate except the power to [take possession, manage, and collect rents from real property], which power may be exercised without prior approval." N.Y. Decedent Estate Law § 13 (McKinney 1949) (quoting

Notes to § 13 from 1929 Decedent Estate Commission).

65. "Its purpose is to make more effective the grant of statutory power which was intended to be conferred by section 13 of Decedent Estate Law. Such grant is found in subsection 1 but the first sentence of subsection 3 effectively negates the power since it requires that it be exercised under the supervision of the court…." *See id.* (quoting Note of Commission—1947 Amendment).

66. *Compare* In re Coyne's Estate, 269 A.D. 853, 55 N.Y.S.2d 915 (2d Dep't 1945); Limberg v. Limberg, 256 A.D. 721, 11 N.Y.S.2d 690 (2d Dep't 1939), *aff'd*, 281 N.Y. 821 (1939); *and* In re Siegel's Will, 191 Misc. 323, 78 N.Y.S.2d 790 (Sur. Ct. Queens Cnty. 1948); *with* In re Merrill's Estate, 165 Misc. 161, 163, 300 N.Y.S. 671, 674 (Sur. Ct. Kings Cnty. 1937); *and* In re Ryan's Estate, 161 Misc. 313, 315 291 N.Y.S. 668, 670 (Sur. Ct. Bronx Cnty. 1936).

67. One of those limitations was the introduction of the *specific devise*, as it exists in our current statute, where all prior statutes had only differentiated between land passing by descent and by devise. The 1947 amendment to N.Y. Decedent Estate Law § 13 subtly subjected the interests of general devisees to the payment of legacies. Before 1947 the decedent's land could only be sold pursuant to a court order. The order, as we have seen, would only be granted if the sale was necessary for the payment of debts, funeral expenses, administration expenses, taxes, and any legacies made a lien on the land by the terms of the will, but not for the payment of general legacies. After 1947, the executor could sell any property that was not "specifically devised." This meant that the executor could, effectively, sell devised (but not "specifically devised") land for the payment of general legacies, even if the surrogate lacked the authority to grant a similar order. This is, apparently, the first and only instance where the powers of the executor exceeded those of the surrogate.

68. *See* N.Y. Est. Powers & Trusts § 11-1.1 (b)(5) (McKinney 2011).

69. *See* Jemzura v. Jemzura, 36 N.Y.2d 496, 503, 369 N.Y.S.2d 400, 407-08 (1975) (acknowledging that tenants in common cannot exclude one another, absent paying rent to the excluded tenant); *Limberg*, 256 A.D. at 722; Zapp v. Miller, 109 N.Y. 51, 57-58 (1888); Misk v. Moss, 41 A.D.3d 672, 673, 839 N.Y.S.2d 143, 145 (2d Dep't 2007); *see also* H & Y Realty Co. v. Baron, 160 A.D.2d 412, 554 N.Y.S.2d 111, 113 (1st Dep't 1990) (finding that the excluded tenant is not liable for expenses, including real estate taxes).

70. *Limberg*, 256 A.D. at 722.

71. *Id.*

72. 31 A.D.3d 452, 454, 818 N.Y.S. 249, 251 (2d Dep't 2006) (holding that the decedent's son was liable to pay the executrix of the decedent's estate).

73. 38 A.D. 675, 327 N.Y.S.2d 183 (4th Dep't 1971).

74. *Id. at* 676-77 (referring to N.Y. E.P.T.L. § 11-1.1, the current collection of rents statute), *but cf.* (Witmer, J., dissenting) (stating that the statute was not intended to disturb the relationship of the decedent with his lifetime co-tenants, but only that of the estate distributees).

75. Ch. 731, § 1, 1961 N.Y. Laws 2063 (creating the Temporary State Commission on the Modernization, Revision and Simplification of Estates.)

76. Third Report of the Temporary State Commission on the Modernization, Revision and Simplification of Estate to the Governor and the Legislature, Report No. 6.4C, at 484 et seq. (1964) (Leg. Doc. No. 19) [hereinafter *Third Report*].

77. Ch. 681, § 14, 1964 N.Y. Laws 1794. The statute became effective as of June 1, 1965.

78. Ch. 952, 1966 N.Y. Laws 2761. The statute became effective as of September 1, 1967.

79. *Compare* Matter of Coyne, 269 A.D. 853, 853, 55 N.Y.S.2d 915, 915 (2d Dep't 1945); *and* In re Wolpert's Estate, 33 Misc. 2d 1080, 1081, 227 N.Y.S.2d 218, 219 (Sur. Ct. Nassau Cnty. 1962); *and* In re Heuss' Estate, 14 Misc. 2d 408, 409-10, 179 N.Y.S.2d 767, 768-69 (Sur. Ct. Nassau Cnty. 1958); *with* In re Ryan's Estate, 161 Misc. 313, 314-15, 291 N.Y.S. 668, 669-70 (Sur. Ct. Bronx Cnty. 1936).

80. N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5)(C).

81. *See* Third Report, *supra* note 76, at 505, 518-519.

82. *See id.* at 490.

83. N.Y. E.P.T.L. § 1-2.15.

84. *cf.* N.Y. E.P.T.L. §§ 11-1.1(b)(5)(B), 11-1.1(b)(7).

85. *See* Third Report, *supra* note 76, at 494, 529.

86. N.Y. E.P.T.L. § 11-1.1(b)(6).

87. After enactment of the N.Y. E.P.T.L., *see* Matter of Estate of Payson, 132 Misc. 2d 949, 506 N.Y.S.2d 142 (Sur. Ct. Nassau Cnty. 1986); Johnson v. Depew, 38 A.D. 675, 327 N.Y.S.2d 183 (4th Dep't 1971). Prior to enactment, *see* In re Mould's Estate, 113 Misc. 602, 185 N.Y.S. 250 (Sur. Ct. Westchester Cnty. 1920), *aff'd*, 195 A.D. 822, 187 N.Y.S. 355 (2d Dep't 1921); In re Ledyard's Estate, 21 N.Y.S.2d 860 (Sur. Ct. Nassau Cnty. 1939), *aff'd*, 259 A.D. 892, 20 N.Y.S.2d 1006 (2d Dep't 1940); In re Levine's Estate, 158 Misc. 116, 285 N.Y.S. 754 (Sur. Ct. Kings Cnty. 1936).

88. *See* Third Report, *supra* note 76, at 491, 527. *See also* Estate of Burke, 129 Misc. 2d 145, 148, 492 N.Y.S.2d 892, 895 (Sur. Ct. Cattaraugus Cnty. 1985).

89. N.Y. E.P.T.L. § 11-1.1(b)(13).

90. *See* Third Report, *supra* note 86, at 484, 487, 493-494, and 521.

91. *See id.* at 499.

92. N.Y. Real Prop. Acts. §§ 641 (recovery of real property), 711(2) (summary proceeding to recover real property), 851 (trespass), 901(5) (partition), and 1501 (action to settle title).

93. *See* Klump v. Freund, 83 A.D.3d 790, 790-91, 921 N.Y.S.2d 121, 122 (2d Dep't 2011), where an executor litigated whether the estate had an easement by necessity.

94. On the other hand, if the ten-year adverse possession period was completed *after* the decedent's death, the executor would not be able to act on the property because it would not be part of the estate. It would have vested only in the hands of the distributee.

95. *See generally* Limberg v. Limberg, 281 N.Y. 463 (1939) (executor failed to account for the value of use and occupancy attributable to his own use and occupancy).

96. *See* N.Y. Est. Powers & Trusts Law § 11-1.1(b)(5)(B) (McKinney 2011), stating that the power "to sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein."

97. *See* Recommended Practices, New York State Land Title Association, Inc. 3 (Revised Oct. 2011), available at http://www.nyslta.org/RecommendedPracticesMarch09-rev8310.

98. *See* U.S. v. Benedict, 280 F. 76, 82-3 (2d Cir. 1922). It should be noted that the cited case dates from the earliest days of zoning law. In our day, causing a subdivision is usually an extensive application procedure before multiple municipal boards and requires an array of experts. Causing a subdivision today is more likely to be seen as an investment of estate assets and not just as an efficient way of liquidating estate assets.

99. *See* N.Y. Est. Powers & Trusts Law §§ 1-2.15, 11-1.1, and 13-1.3.

100. *See* In re Seviroli, 31 A.D.3d 452, 818 N.Y.S.2d 249 (2d Dep't 2006) (stating that the executrix could not sell a condominium unit inhabited by testator's second wife and their infant son). "[T]he executrix made no showing that the sale of the condominium is necessary to the administration of the estate." *Id.* at 455. *See also* Matter of Sherburne, 95 A.D.2d 859, 464 N.Y.S.2d 531 (2d Dep't 1983), where the distributees acting together were entitled to prevent the sale of real property by the executor where the estate was otherwise solvent.

101. Until the early 20th century, assignment of ground rents was a form of investing in real property, much like a mortgage. In

Maryland, Pennsylvania and Ohio they were sometimes traded side by side with mortgages and the case law likened them to oil royalties. See CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 190, n. 12 (2d ed. 1947). The inclusion of the possibility of leasing side by the side with the possibility of mortgaging in the 1829 Revised Statutes (cited above), surely viewed leasing as a means of financing a debt, and not managing an asset.

102. N.Y. EST. POWERS & TRUSTS LAW § 11-1.1(b)(5)(C).

103. *Cf.* Blood v. Kane, 130 N.Y. 514, 517, 29 N.E. 994, 994-95 (2d Div. 1892) (stating that an executor takes unqualified legal title of all personalty not specifically bequeathed, and qualified legal title to that which is so bequeathed).

104. *Seviroli*, 31 A.D.3d at 455, 818 N.Y.S.2d at 251. *See also* Limberg v. Limberg, 256 A.D. 721, 722, 11 N.Y.S.2d 690, 690 (2d Dep't 1939), *aff'd* 281 N.Y. 821 (1939); *In re* Mould's Estate, 113 Misc. 602, 606, 185 N.Y.S. 250, 252-53 (Sur. Ct. Westchester Cnty. 1920).

105. *See Limberg*, 256 A.D. at 722, 11 N.Y.S.2d at 690; Johnson v. Depew, 38 A.D.2d 675, 676 327 N.Y.S.2d 183, 184 (4th Dep't 1971).

106. *See* Carver v. Rippetoe, 43 A.D.3d 627, 841 N.Y.S.2d 394 (3d Dep't 2007); Corrarino v. Byrnes, 43 A.D.3d 421, 841 N.Y.S.2d 122 (2d Dep't 2007); In re Goodell's Estate, 69 N.Y.S.2d 38 (Sur. Ct. Monroe Cnty. 1947). In all three cases the executor created easements upon the sale of a portion of the real property, either benefiting or encumbering other property held by the executor, and the ability of the executor to create the easements was not questioned in any of them.

107. *See* U.S. v. Benedict, 280 F. 76, 80-2 (2d Cir. 1922).

108. *See* DiSanto v. Wellcraft Marine Corp., 149 A.D.2d 560, 562, 540 N.Y.S.2d 260, 262-63 (2nd Dep't 1989).

109. *See generally* Carver v. Rippetoe, 43 A.D.3d 627, 841 N.Y.S.2d 394 (3d Dep't 2007); Corrarino v. Byrnes, 43 A.D.3d 421, 841 N.Y.S.2d 122 (2d Dep't 2007); In re Goodell's Estate, 69 N.Y.S.2d 38 (Sur. Ct. Monroe Cnty. 1947).

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Rent Stabilization Constitutional? Not Now

By Adam Leitman Bailey and Dov Treiman

When looking at Rent Stabilization from a constitutional point of view, two facts clearly emerge. First, as forty-year-old emergency legislation, it is clearly unconstitutional. Second, no judge subject to reelection or reappointment is going to agree with the first point. Thus, if anyone seeks to bring suit to establish the undeniable fact that Rent Stabilization cannot pretend to be constitutional, it will have to be to a federal district court.

A Preview

In *Patterson v. Daquet*, a New York City Civil Court decision from 1969, the court found the Rent Stabilization Law unconstitutional on many grounds, including the non-temporary nature of the so-called emergency. Oddly, the court wrote *without citing to any authority*:

> The Legislature may, in the exercise of its police power, impinge to some extent upon normal constitutional rights and privileges during a temporary emergency in order to safeguard the public health and safety. Once such emergency conditions have terminated, the emergency regulations must also cease immediately.[1]

Amazingly, *Patterson* has quietly vanished into the dustbin of history. And yet, it seems now that it was amazingly prescient.

Origins of Police Power

Neither the Federal Constitution nor the New York State Constitution mentions any so-called police power. Rather, the police power is a completely judicially created idea, which springs from the political philosophies of our founding fathers. It is generally, if inaccurately, attributed to Abraham Lincoln.

> "The Constitution is not a suicide pact" is a rhetorical phrase in American political and legal discourse. The phrase expresses the belief that constitutional restrictions on governmental power must give way to urgent practical needs. It is most often attributed to Abraham Lincoln, as a response to charges that he was violating the United States Constitution by suspending habeas corpus during the American Civil War. Although the phrase echoes statements made by Lincoln, and although the sentiment has been enunciated several other times in American history, the precise phrase "suicide pact" was first used by Justice Robert H. Jackson in his dissenting opinion in *Terminiello v. Chicago*, a 1949 free speech case decided by the U.S. Supreme Court. The phrase also appears in the same context in *Kennedy v. Mendoza-Martinez*, a 1963 U.S. Supreme Court decision written by Justice Arthur Goldberg.[2]

However, the idea of "police power" goes back to an earlier date. In *Brown v. State of Maryland*, the phrase made its debut in United States Supreme Court jurisprudence. In defining the limits of federalism, Chief Justice Marshall's opinion addressed the question of how much the States could regulate an activity that would impact on the Federal government's exclusive competence to deal with interstate commerce and tariffs. Here, without citation to authority, Marshall spoke of the existence of a "police power" of the states to regulate the health and welfare of their citizens.[3] Obviously, however, this "police power" could not be construed an exception to the Fourteenth Amendment rights of due process until after the passage of that amendment two generations later, in the wake of the Civil War, 1868.

It was in the *Slaughter-House Cases* that the Supreme Court gave definition to "police power." It wrote:

> "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.
>
> This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence

> in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another aminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State;… and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."[4]

Rent Regulation as Police Power

It is thus clear that the "police power" does not rest on the existence of an emergency, and allows for regulation of industries for the general well being of a State's populace. Thus, it must be admitted that there are possible forms of rent regulation that are constitutionally permissible.

It is thus possible that Rent Stabilization was constitutional when it was passed. In *Block v. Hirsh*, the United States Supreme Court established that rent controls were constitutional to deal with a *national* emergency. Core to the court's upholding of the rent control system in Washington, D.C. were three factors—that housing in Washington was then under something of a monopoly, that the measure was enacted as a response to the ongoing emergency of World War I, and that the statute was set to expire at the earlier of the end of the war or two years.[5] Critical therefore is Justice Holmes's statement:

> But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present…But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois,* 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. The regulation is put and justified only as a temporary measure. …A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.[6]

Note that according to Justice Holmes, a permanent regulation would not be justifiable, but a temporary regulation may or may not be justifiable under the Constitution. As the New York Court of Appeals stated in *East New York Sav. Bank v. Hahn*, "An extraordinary remedy which is appropriate and legitimate in an exigency resulting from abnormal conditions may be inappropriate and beyond the limits of the power of a State if temporary impairment of the obligation of a contract is continued after the exigency has passed."[7]

Thus, by its permanent nature Rent Stabilization fails one of the first qualifications necessary to allow rent regulation in spite of the due process clause.

However, it must be realized that Rent Control has been historically upheld as a proper exercise of the "police power" of the government. This point is clearly brought home by *Pennell v. City of San Jose*, in which the Supreme Court wrote:

> Appellants do not claim, as do some amici, that rent control is *per se* a taking. We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), that we have "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Id., at 440, 102 S.Ct., at 3178. And in *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), we stated that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." Id., at 252. Despite amici's urgings, we see no need to reconsider the constitutionality of rent control *per se*.[8]

Regulatory and Physical Takings

While the *Slaughterhouse Cases* do not state what the limits of the police power are, and therefore give us no guidance as to whether or not rent stabilization goes too far under the police power, the development of the doctrine of "regulatory taking" does give us that definition. This doctrine is generally regarded as taking its theoretical underpinnings from the writings of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, in which Holmes wrote on behalf of the Court:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.[9]
>
> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They were to the verge of the law but fell far short of the present act.[10]

Holmes's last reference here is to the Court's upholding of rent control under the emergency conditions surrounding World War I. Even in his mention of those cases, he implies that even in an emergency, regulations can go "too far."[11]

Without finding the case before it ripe for determination whether there was a regulatory taking, in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, the Supreme Court wrote:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.[12]

In looking at rent regulation as "takings" law, the decisions divide the situations into "physical takings" and "regulatory takings." Under *Yee v. City of Escondido, California*, "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'"[13] Thus, *Yee* found that there was no physical taking because:

> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. Cal. Civ. Code Ann.

> § 798.56(g). Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.[14]

Note the sharp contrast between the conditions in *Escondido* and the conditions in New York City. Look at this same paragraph rewritten accurate to the facts of New York City rent stabilized apartments:

> But the New York City Rent Stabilization Law, authorizes the very thing. When a person succeeds to an apartment, a landlord is compelled to accept the successor. The State compels landlords, once they have rented their property to tenants, to continue doing so. A rent stabilized landlord cannot evict a rent stabilized tenant except on certain limited grounds. Put bluntly, the government indeed requires physical invasion of petitioners' property. While some tenants were invited by landlords, others are forced upon them by the government.

Yee also states:

> Petitioners suggest that the statutory procedure for changing the use of a mobile home park is in practice "a kind of gauntlet," in that they are not in fact free to change the use of their land. Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how the procedure has been applied to petitioners' property, and we accordingly confine ourselves to the face of the statute. A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.[15]

Needless to say, Rent Stabilization both on its face and as applied does indeed "compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." Yet there is other language in *Yee* that appears to reason to the exact opposite. In *Yee*, the appellants did not properly bring the question of regulatory taking before the Court.[16] Because the value in *Yee* rests entirely on consideration of situations strongly differing from the facts and the procedural context of *Yee*, it must be considered wholly dicta, and, in the end, nothing but a signpost of what the Court's analysis *could* be. Yet, when one looks at the overall development of physical takings law and regulatory takings law, New York's rent stabilization seems to come within both of those categories.

That, however, does not end the analysis.

Inception and Termination of Emergency

It is generally recognized that *all* or *any* of the Constitution's protections for individuals or for the government itself can be suspended in times of national or statewide emergency. The United States Supreme Court wrote in *Home Bldg. & Loan Ass'n v. Blaisdell*:

> [W]hile the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases… even though valid when passed." It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.[17]

In *Chastleton v. Sinclair*, the Supreme Court noted:

> We repeat what was stated in *Block v. Hirsh*, 256 U.S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. In *Newton v. Consolidated Gas Co.*, 258 U.S. 165, a statutory rate that had been sustained for earlier years in *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, was held confiscatory for 1918 and 1919.[18]

From this, we see two important principles: First, the Legislature's declaration of emergency, while owed deference by the Courts, is not binding upon it. Second, the now familiar principle that once the emergency has passed or any other set of facts has arisen not in the original declaration, the law valid when enacted can fall into being invalid for further enforcement.

New York's own Court of Appeals had occasion to weigh in on the ideas of police power and its exercise during emergencies such as the Great Depression. Although calling it "reserved power," meaning powers not surrendered by the States to the Federal government under our dual sovereignty constitutional federation, *People by Van Schaick v. Title & Mortgage Guarantee Co. of Buffalo* defines the exercise of that power in a way that makes it clear that where it involves a taking, the emergency that justifies it must be both acute and of limited duration, writing:

> It has been said that "while emergency does not create power, emergency may furnish the occasion for the exercise of power." (*Home Building & Loan Assn. v. Blaisdell, supra.)* Extraordinary conditions may call for extraordinary remedies. Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the State and whether the remedy adopted by the State is reasonable and legitimate. An individual may not justly complain of a reasonable legislative invasion of his usual rights or a reasonable legislative restriction of his usual liberty for the purpose of averting an immediate danger which threatens the safety and welfare of the community.[19]

The decision implies in dicta that once the emergency ends, so too would the exercise of emergency power, writing:

> True, when normal conditions are restored, when strict enforcement of the obligations of mortgage investments no longer constitutes an imminent danger to the vital interests of the community, further operation of the statute may be unreasonable. On such question we do not now pass. We consider now only whether the present remedy provided for present conditions is reasonable and legitimate. "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." (*Chastleton Corp. v. Sinclair, 264 U. S. 543, 547*.) Failure by the Legislature to limit the operation of the law to a definite term does not render the law invalid so long as the conditions which justify the passage of the law remain.[20]

Thus, even if there was really a housing emergency in 1969[21] or 1974[22] the sheer fact that the emergency, such as it is, has endured for 42 years during which period wars have come and gone, the economy has had its ups and downs, people have fled to New York and from it,[23] neighborhoods have been blighted and recovered, in short life has had its ups and downs, all of this does not bespeak "emergency" at all. The legislation has simply become the normal way of doing business for New York and repeal is simply too politically unattractive for anyone seeking re-election. We do not in this article point to the numerous studies that indicate that Rent Stabilization itself inflates rents and manufactures shortages. Rather, we simply posit that without a war or a Great Depression, nothing that goes on for 40+ years can be called by any true speaker of English "an emergency."

Emergency Defined

One may question whether the police power lies to address a purely local emergency. Amazingly, in the statutes of the State of New York, there are only three references to the powers of the government in a localized emergency and one of those three is the area of rent regulation. The other two are the General Business Law §396-r that prohibits price gouging during a local emergency and Executive Law Article 2B that, *inter alia*, confers emergency power on local executives to issue necessary decrees during emergency situations. However, the wording of the two non-rent statutes give insight into the Legislature's understanding of the word "emergency."

General Business Law §396-r implies its definition of "emergency" as "periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances." Of note in this definition is the use of "severe," mere shortages not constituting an emergency. Also noteworthy is "other extraordinary adverse circumstances," clearly implying that the other listed conditions are also "extraordinary." Yet, one would be hard pressed to argue that any condition that persists for 40 years is "extraordinary." The other conditions in the list by their very nature clearly contemplate something of short duration. It further clarifies the nature of "emergency" where it defines "abnormal disruption of the market" as:

> [R]esulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.[24]

No rational person would argue against the idea that this list presents a fairly decent and comprehensive encapsulation of our understanding of the word "emergency."

Similarly, Executive Law §20(2)(a) describes a disaster as:

> [O]ccurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, radiological accident, water contamination, bridge failure or bridge collapse.

Executive Law §24(1) builds on this definition in §20(2), writing, "in the event of a disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any county, city, town or village, or in the event of reasonable apprehension of immediate danger thereof…." Thus, by it, the Legislature sees "disaster" as previously defined (fire, flood, etc.) as being a "similar public emergency." This is all well and rational as it completely comports with the general public understanding of "emergency." None of these other conditions recognized by the Legislature could extend for a period of forty years.

However, the Iowa Supreme Court observed in *First Trust Joint Stock Land Bank of Chicago v. Arp*:

> Emergency in order to justify the intervention of the reserve police power must be temporary or it cannot be said to be an emergency. If a so-called emergency exists beyond a temporary period then it is no longer an emergency but a status and can furnish no basis or authority for legislative action in contravention of or inconsistent with the provisions of the State and Federal constitutions. The existence of an emergency is necessarily a fact question. While declaration of the executive and pronouncements of the legislature are entitled to great weight and should be carefully considered, yet, the fact question still exists, and this can be determined by record facts, history of current events, and common knowledge and information. In other words, a court, in determining the existence of an emergency, may and should take judicial notice of conditions existing at the time the emergency or its continued existence is questioned.[25]

Thus, does the *First Trust* distinguish between an "emergency" and a "status?" We prefer to think of the distinction as between an "emergency" and "ongoing bad governance."

While the Legislature speaks of a "housing emergency," we have been unable to find anywhere in the legal literature support for the idea that a particular bodily need would constitute an "emergency" from the point of view of governance, takings, and due process, but will allow for the idea. Yet, under *First Trust Joint Stock, supra*, that idea still would only mean that Rent Stabilization could have been constitutional for a limited period. Whatever that period may have been, it has long expired.

Rent Stabilization's Achilles Heel

Perhaps daunting for the attorney who would mount the challenge to Rent Stabilization is the realization that the United States Supreme Court has always accepted the idea that a particular set of rent regulations could constitute an unconstitutional taking, but has never yet found any set of regulations that actually do so. However, New York's own State Court of Appeals has not been so reticent. In *Manocherian v. Lenox Hill Hosp.*, the Court found the perpetual existence of the corporate tenant a reason to declare unconstitutional the conferral on it of the rights of selecting its subtenants in perpetuo because it would mean that the rent stabilized apartments to which it held leases would be under stabilization forever.[26]

Impliedly, therefore, the court recognized that the perpetual existence of rent stabilization presented a problem and only struck down the statute when a particular apartment was *guaranteed* never to come back into the free market. In doing so, it carefully distinguished its own decision in *Braschi v. Stahl Assocs. Co.* that had not only upheld but expanded the right of succession.[27] This, however, brings us back to our first point, to wit, that no State appellate judge would dare find Rent Stabilization as a whole unconstitutional, at least not one seeking re-election or re-appointment.

In any event, there are two features about *Manocherian* that made it a relatively poor vehicle for striking down Rent Stabilization as a whole. First is the doctrine that courts should only decide as much as is before them and no more. Second, at the time of *Manocherian*, the Emergency Tenant Protection Act was only 20 years old and may not have been perceived to be quite as perpetual as it now undoubtedly is. When the law in question approximates the age of some of the judges who are going to decide its constitutionality, it is much easier to see it as a permanent fixture than when it is still in its teen years or barely out of them.

This is brought particularly home by some of the language of *Manocherian* itself where the Court wrote, "[t]he statute vests renewal rights in an entity of unlimited existence, a notion directly contrary to another goal of the RSL and ETPA—to free up apartments, fairly and appropriately, as soon as practicable."[28] One cannot readily imagine anyone saying something of the kind in 2012 with a straight face.

Therefore, there are two aspects of Rent Stabilization that simply cannot withstand takings analysis under any of the cases we have discussed thus far: the right of a spouse to be added to a lease when primarily residing in the apartment with the tenant of record[29] and the rights of family and family-like persons to succeed to apartments.[30] Where these provisions run afoul of the Constitution in a scenario where Rent Stabilization exists forever can be found in the United States Supreme Court literature that actually sustains rent regulation. For example, in *Yee v. City of Escondido, supra,* the Court wrote in sustaining the statute before it, "Petitioners' tenants were invited by petitioners, not forced upon them by the government." This, of course, is true neither of spouses nor of successors.

Yee went on to note, "While the 'right to exclude' is doubtless, as petitioners assert, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance."[31] Of course, the succession regulations in Rent Stabilization do indeed take away that right.[32]

Doctrine of Unfair Burden

In *Armstrong v. United States*, the Supreme Court laid down the much-to-be quoted doctrine that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[33]

Speaking of this standard, *Manocherian* states, "[t]here is no 'precise mathematical calculation' for determining when an adjustment of rights has reached the point when 'fairness and justice' requires that compensation be paid."[34] Thus, for one who seeks to rely on "fairness and justice" to overturn Rent Stabilization, it will be an uphill battle, for, in all fairness, it can be stated with absolute certainty that giving one litigant "justice" is merely to deprive other persons of the same—at least to their own perceptions.[35]

Conclusion

Studies have shown that Rent Stabilization has caused the very disruptions it seeks to alleviate[36] and anecdotal evidence suggests that some landlords have become wealthy precisely because they were able to work the shortages created by Rent Stabilization to their profit. But these all are beside the point. Our Constitution has at its heart freedom of choice. We accept that choices properly become constricted by emergencies, but only by real ones. For this, even if it qualified historically, Rent Stabilization simply no longer does.

Endnotes

1. 62 Misc. 2d 106, 108, 308 N.Y.S.2d 173, 176 (N.Y. Civ. Ct. Kings County 1969).
2. *See* Wikipedia, http://en.wikipedia.org/wiki/The_Constitution_is_not_a_suicide_pact (last visited Feb. 2, 2012).
3. 25 U.S. 419, 443-44 (1827).
4. 83 U.S. 36, 62 (1872) (citations omitted).
5. 256 U.S. 135, 156 (1921).
6. *Id.* at 156-157.
7. 293 N.Y. 622, 627, 59 N.E.2d 625, 626 (1944).
8. 485 U.S. 1, 12 n. 6 (1988) (emphasis added).
9. 260 U.S. 393, 413 (1922).
10. *Id.* at 415-16 (citations omitted).
11. *See id.* at 415. "Too far" has become the buzz phrase in regulatory takings analysis.
12. 473 U.S. 172, 199 (1985). *See also id.* at n. 17.
13. 503 U.S. 519, 527 (1992).
14. *Id.* at 527-28.
15. *Id* at 528 (citations omitted).
16. *Id.* at 526.
17. 290 U.S. 398, 442 (1934).
18. 264 U.S. 543, 547-48 (1924) (citations omitted).
19. 264 N.Y. 69, 94, 190 N.E. 153, 161-62 (1934).
20. *Id.* at 95-96, 190 N.E at 162 (1934).
21. The Rent Stabilization Law was established in 1969 and is a modification and successor regulatory scheme to Rent Stabilization. *See* New York city Rent Guidelines Board, http://www.housingnyc.com/html/glossary_defs.html#dhcr (last visited Feb. 2, 2012).
22. Rent Stabilization's expansion as the Emergency Tenant Protection Act of 1974. *See id.*, http://www.housingnyc.com/html/glossary_defs.html#dhcr (last visited Feb. 2, 2012).
23. The 2010 census, marking a decrease in New York's relative population to other states, required that New York lose two congressional seats. *See* United States Census 2010, http://2010.census.gov/2010census/data/apportionment-pop-text.php (last visited Feb. 2, 2012).
24. N.Y. Gen. Bus. Law § 396-r(2) (McKinney 2011).
25. 225 Iowa 1331, 1334-35, 283 N.W. 441, 443 (1939).
26. 84 N.Y.2d 385, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994).
27. *See* 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).
28. *Manocherian*, 84 N.Y.2d at 399, 643 N.E.2d at 486, 618 N.Y.S.2d at 864.
29. *See* N.Y. Comp. Codes Rules & Regs. tit. 9, § 2522.5(g)(1) (2012).
30. *See id.* §§ 2522.8(b), 2523.5(b).
31. 503 U.S. 519, 528 (1992) (citation omitted).
32. *See* N.Y. Comp. Codes Rules & Regs. tit. 9, § 2523.5(d).
33. 364 U.S. 40, 49 (1960).
34. 84 N.Y.2d 385, 392, 643 N.E.2d 479, 482, 618 N.Y.S.2d 857, 860 (1961).
35. In Joseph Stein's *Fiddler on the Roof*, the beggar upbraids his usual benefactor for being less generous than the previous week, to which the benefactor replies, "I had a bad week." To this the beggar responds, "So, if you had a bad week, why should I suffer?"
36. *See* Peter Salins & Gerard Mildner, Scarcity by Design: The Legacy of New York City's Housing Policies (1992).

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Bergman on Mortgage Foreclosures:
Watch Out for the Settlement Stipulation

By Bruce J. Bergman

One of the good things about a settlement stipulation in a mortgage foreclosure case is that it is enforceable. One of the bad things about a settlement stipulation in the foreclosure case is that it is enforceable. These conflicting statements are not designed to be a literary device but a warning that the language of the agreement must be very carefully considered. While that is perhaps obvious, it was not so apparent to a lender who was tripped up by ineffective language in such an agreement. [*Donnelly v. Large*, 77 A.D.3d 1160, 909 N.Y.S.2d 205 (3d Dept. 2010)]. There, the lender was barred from collecting interest and legal fees!

A bedrock aphorism applying to a settlement stipulation or agreement is that it supersedes the parties' prior agreement and becomes the measure of the obligation—an enforceable contract. This is welcome because it means that a foreclosing lender or servicer can generally assume that its settlement agreements can be relied upon; they mean what they say. [For an extensive review of the enforceability of settlement stipulations in mortgage foreclosure actions see 2 *Bergman on New York Mortgage Foreclosures* §24.09[2], LexisNexis Matthew Bender (rev. 2011.][1]

In what is perhaps the most common form of settlement—the forbearance agreement—the document *supplements* the underlying mortgage contract. The mortgage holder agrees to forbear in prosecuting the foreclosure for some period of time in exchange for certain defined payments with other obligations often required to be fulfilled as well. If there is compliance, the mortgage is reinstated. If there is a default, the foreclosure proceeds and the mortgage documents continue to control. (Of course, there are permutations of such agreements but those should not change the message of this review.)

The new case which presents the warning was a suit on mortgage notes. It was settled by a stipulation. The glitch here was that the plaintiff took as security an affidavit for judgment by confession, no doubt intending to file that so if the borrower defaulted, the judgment would encompass all sums due. As it turned out, the plaintiff forgot the affidavit, and by the time he awakened, the three year statute of limitations on the unfiled confession of judgment had expired.[2] That left the lender with only the stipulation to control the obligation and that is just the point.

That stipulation neither separately provided for payment of interest nor incorporated the provisions of the defaulted note into the stipulation.[3] That left the lender solely with statutory interest.[4]

Nor did the stipulation provide legal fees to the lender. The notes did, but again, those were not part of the stipulation. (The confession of judgment might have made provision for this but that was, as mentioned, barred.)

While this may not be an everyday case, the lesson in the settlement arena is still meaningful. If a stipulation becomes the only controlling document—and sometimes it does—then it must be complete: include all the protections, all the obligations. They will not be implied by a court.

Endnotes

1. In the subject case, in support of the proposition that a stipulation is a binding contract to be construed per the rules of contract interpretation, the Third Department cited *Rainbow v. Swisher*, 72 N.Y.2d 106, 109, 531 N.Y.S.2d 775, 527 N.E.2d 258 (1988); *H.K.S.Hunt Club v. Town of Claverack*, 222 A.D.2d 769, 770, 634 N.Y.S.2d 816 (1995), *lv. denied*, 89 N.Y.2d 804, 653 N.Y.S.2d 543, 676 N.E.2d 72 (1996).
2. CPLR §33218(b).
3. See discussion in the subject case and citation of *H.K.S.Hunt Club v. Town of Claverack*, 222 A.D.2d 769, 769, 634 N.Y.S.2d 816.
4. See discussion in the subject case and citation of *Retirement Accounts, Inc. v. Pacst Realty, LLC*, 49 A.D.3d 846, 847, 854 N.Y.S.2d 487 (2008).

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Student Case Comment: *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.*: The Court of Appeals Decides That Private Actions Are Not Precluded Under the Martin Act

On December 20, 2011, in a succinct but powerful opinion, the Court of Appeals held that "the Martin Act does not preclude a private litigant from bringing nonfraud common-law causes of action."[1] In *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc.*, the Court of Appeals focused on legislative intent, a plain reading of the Martin Act ("Act"), prior decisions interpreting the reach of the Act, and policy concerns to determine whether common-law causes of action for breach of fiduciary duty and gross negligence were preempted by the Martin Act.[2]

The Court concentrated on the importance of legislative intent and a plain reading of the Act.[3] It emphasized how "a clear and specific legislative intent is required to override the common law," stressing that "such prerogative must be unambiguous."[4] The Court noted that there was nothing in the legislative history of the Martin Act that demonstrated a "clear and specific" legislative mandate to abolish common-law claims.[5] Furthermore, "the plain language of the Martin Act, while granting the Attorney General investigatory and enforcement powers and prescribing various penalties, does not expressly mention or otherwise contemplate the elimination of common-law claims."[6]

In addition, the Court of Appeals focused on its prior decisions in *CPC International Inc. v. McKesson Corp*[7] and *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*.[8] In *CPC Intl.*, the Court observed that the Martin Act did not "explicitly authorize a private action."[9] The Court in *CPC Intl.* did not specifically "address whether the Martin Act preempted or abrogated otherwise viable and independent common-law claims."[10] However, it did conclude that plaintiff's common-law fraud cause of action stated a claim and withstood a motion to dismiss. Although the Court has held that the Martin Act did not "create" a private right of action to enforce its provisions, this conclusion does not require the Court in *Assured Guaranty* to conclude that traditional forms of action are no longer available.[11]

Furthermore, the Court distinguished its earlier decision in *Kerusa*, since in that case the plaintiff's "entire claim was premised on a violation of the Martin Act and would not have existed absent the statute."[12] Collectively, *CPC Intl.* and *Kerusa* "stand for the proposition that a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act."[13] However, the Court concluded that an injured party may bring a common-law claim that is not entirely dependent on the Martin Act for its viability,[14] thereby affirming the First Department's finding that "there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this state that supports [an] argument that the Act preempts otherwise validly pleaded common-law causes of action."[15]

The Court of Appeals also focused on considerations of public policy. Recognizing that the overall purpose of the Martin Act is to combat securities fraud, the statute's purpose is not impaired by private common-law actions.[16] In fact, the Court stated that proceedings by the Attorney General and private actions that have a legal basis independent of the statute further the same goal—"combating fraud and deception in securities transactions."[17]

The *Assured Guaranty* case did not involve the offer and sale of cooperative or condominium units, but it is an important decision for this area of law. During the 1960s, the Legislature added section 352-e to the Martin Act, addressing the offer and sale of cooperative and condominiums apartments.[18] The goal of this addition was to prevent fraud in the sale and transfer of such properties.[19] In doing so, section 352-e requires the filing of an "offering statement" or "prospectus" with the department of law before the offering of a sale.[20] As noted above, *CPC Intl.* and *Kerusa* stand for the proposition that a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act.[21] However, section 352-e does not preclude private litigants from pursuing all common-law claims.

Endnotes

1. Assured Guaranty (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc., 2011 NY Slip Op 09162 at *6 (2011), *available at* www.nycourts.gov/reporter/3dseries/2011/2011_09162.htm.
2. *Id.* at *1.
3. *Id.* at *3-4.
4. *Id.* at *4 (quoting Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 39 (1978)).
5. *Id.*
6. *Id.*
7. 70 N.Y.2d 268 (1987).
8. 12 N.Y.3d 236 (2009).
9. *Assured Guar. (UK) Ltd.*, 2011 NY Slip Op. 09162 at *4.
10. *Id.* at *5.
11. *Id.* at *4 (quoting *CPC Intl.*, 70 N.Y.2d at 276-277).
12. *Id.* at *6.

13. *Id.*

14. *Id.* (noting that "[m]ere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies").

15. *Id.* at *2 (quoting Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 80 A.D.3d 293, 304 (1st Dep't 2010)).

16. *Id.* at *6.

17. *Id.* The Court also stated: "to hold that the Martin Act precludes properly pleaded common-law actions would leave the marketplace 'less protected than it was before the Martin Act's passage, which can hardly have been the goal of it's drafters.'" *Id.* (quoting Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 354, 371 (S.D.N.Y. 2010).

18. *Id.* at *3.

19. *Id.*

20. N.Y. GEN. BUS. LAW § 352-e (McKinney 2011).

21. *Assured Guar. (UK) Ltd.*, 2011 NY Slip Op. 09162 at *6 (2011).

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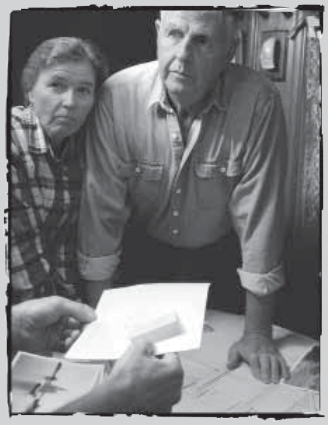

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Student Case Comment:
Ho v. McCarthy: Remote Negotiations Can Suffice When Helping to Establish Long-Arm Personal Jurisdiction

On December 13, 2011, the Appellate Division, Second Department, held in *Ho v. McCarthy*, that an attorney's purposeful conduct in negotiating and concluding the sale of real property by mail and telephone in a state where he was not licensed to practice "established a sufficient basis for the existence of long-arm jurisdiction over [him], consistent with due process."[1]

In *McCarthy*, a New York attorney who was not licensed to practice law in New Jersey negotiated a transaction for his client for the purchase of certain real property located in New Jersey. The attorney never physically entered New Jersey during the transaction; rather, he negotiated with the New Jersey attorney for the seller by mail and telephone. The closing was also conducted by mail and took place in the New Jersey office of the seller's attorney. Plaintiff, the New York attorney's client, subsequently sued the attorney in New Jersey for alleged malpractice.[2] The attorney did not appear or defend the action in New Jersey, and a judgment was entered against him upon his default. The client then commenced an action in Nassau County Supreme Court to enforce the New Jersey judgment, proceeding by motion for summary judgment in lieu of complaint pursuant to N.Y. CPLR 3213.[3] The Supreme Court determined that that the New Jersey judgment was entitled to full faith and credit and granted plaintiff's motion for summary judgment.[4]

On appeal, defendant contended that the New Jersey court lacked jurisdiction; therefore, the New Jersey judgment was not entitled to full faith and credit. The Second Department affirmed the lower court's decision stating that it was consistent with both the full faith and credit clause of the United States Constitution[5] and the due process clause of the Fourteenth Amendment. The full faith and credit clause "requires a judgment of one state court to have the same credit, validity, and effect in every other court of the United States, which it had in the state in which it was pronounced."[6] A sister state's default judgment is also subject to full faith and credit upon determination that the rendering court had proper jurisdiction.[7] If the defendant claims lack of personal jurisdiction, the Second Department will look to the "jurisdictional statutes of the forum in which the judgment was rendered as well as due process considerations."[8] New Jersey's long-arm statute extends the exercise of personal jurisdiction over a nonresident defendant where minimum contacts exist.[9] The "minimum contacts" requirement can be satisfied by showing that "the contacts resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff," and that "the defendant's 'conduct and connection with the forum State' [is] such that he or she could reasonably anticipate being haled into court there."[10] Citing recent New Jersey decisions, the Second Department noted that in certain cases, "the exercise of long-arm jurisdiction is consistent with due process where a nonresident defendant has never physically entered the forum state, based upon the effects within the forum of the defendant's purposeful conduct outside of the state."[11] Applying these principles to the facts in *McCarthy*, the Appellate Division, Second Department, held that "the attorney's purposeful conduct in negotiating a transaction by mail and telephone with the New Jersey attorney for a New Jersey seller of property located in New Jersey" sufficed for proper exercise of long-arm jurisdiction over him, consistent with due process.[12] Accordingly, the trial court properly determined that the New Jersey judgment was entitled to full faith and credit in New York.

Upon a finding of personal jurisdiction over the litigant, New York courts will accord full faith and credit to sister states' default judgments. When representing clients in out-of-state transactions (particularly New Jersey), it is necessary to be mindful of the fact that courts can obtain personal jurisdiction over a New York attorney even if the attorney never physically enters the state and never appears to defend an action.

Endnotes

1. 2011 N.Y. Slip Op. 09093 at *2 (2d Dep't 2011).
2. *Id.* at *1.
3. *See* N.Y. C.P.L.R. 3213.
4. *McCarthy*, 2011 N.Y. Slip Op. 09093 at *1.
5. U.S. Const. art IV, § 1.
6. *Id.* at *1 (quoting Matter of Bennett, 84 A.D.3d 1365, 1367, 923 N.Y.S.2d 715, 717 (2d Dep't, 2011)).
7. *Id.*
8. *Id.*
9. *See* N.J. Ct. R. 4:4-4(b)(1). *See also* Avdel Corp. v. Mecure, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971). "The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over defendant in any state with which the defendant has certain minimum contacts…such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *McCarthy*, 2011 N.Y. Slip Op. 09093 at *2 (citing Calder v. Jones, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984)).
10. McCarthy, Slip Op. 09093 at *2 (citing Lebel v. Everglades Marina, Inc., 115 N.J. 317, 323, 558 A.2d 1252, 1255 (1989); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (internal quotations omitted)).
11. *Id.*
12. *Id.*

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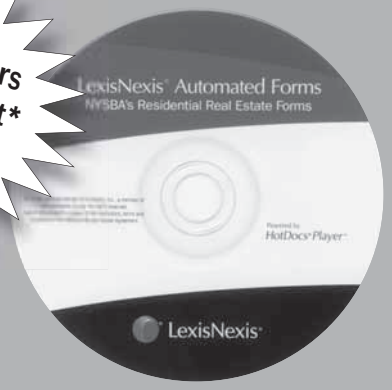

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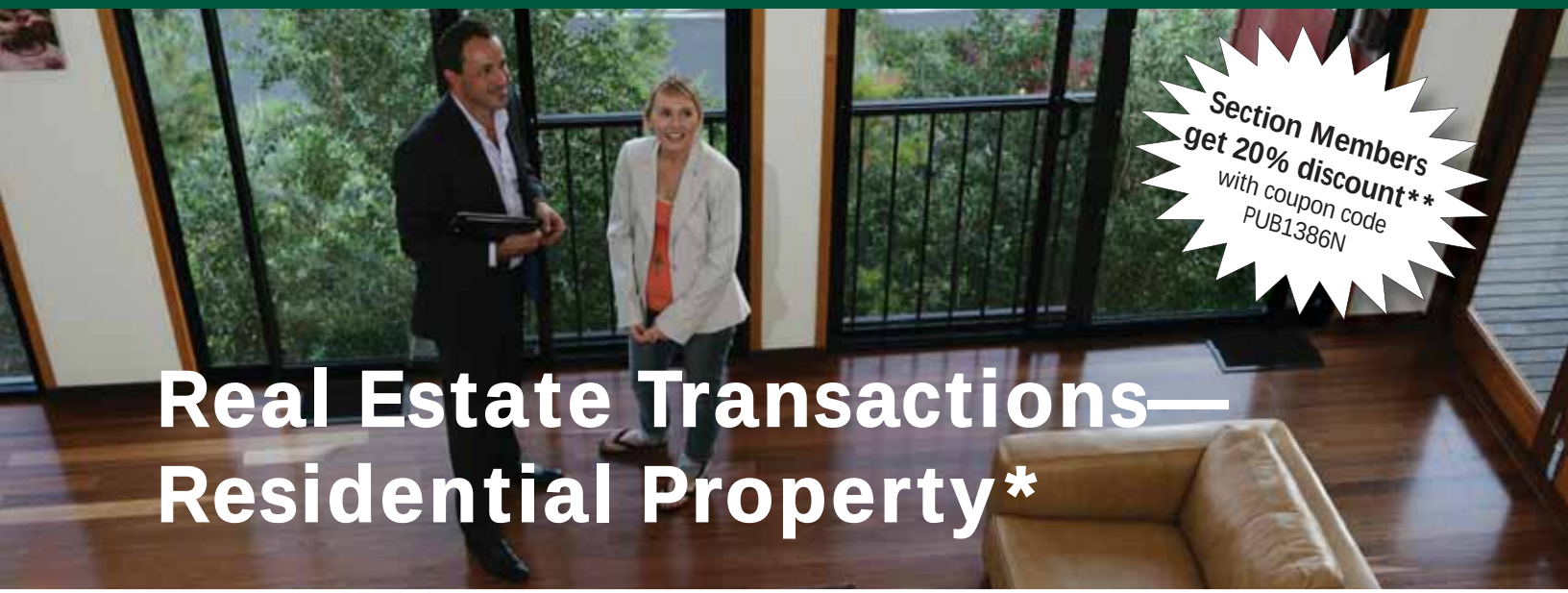

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