New York Real Estate Journal
nyrej
Reprint | nyrej.com | Tuesday, September 27,2022

Alienation Restraints - by Thomas Kearns

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The law has long disfavored perpetual private restrictions on a real property owner's right to sell its property in the future. These restrictions are called restraints on alienation and the rule against perpetual restrictions is called the rule against perpetuities. For example, a parent can't deed property to a child and have a statement in the deed that the child must always keep the property in the family and can't sell it to a third party.

The rationale is that property needs to be freely transferable for the good of society and having lots of restrictions will harm the overall community. Some reasonable restrictions are permitted. Manhattan property records, for example, are replete with deeds for subdivided properties that restrict the use of the adjacent parcels by prohibiting tanneries and other noxious industries. But blanket no sale perpetual restrictions are prohibited. Restrictions limited in time are permissible as are other reasonable restrictions.

Property lawyers, being ever creative, often test the bounds of reasonableness. Two New York decided cases give some guidelines on what is permissible. In Demchick v. 90 East End Avenue Condominium (2005), the Appellate Division overturned a lower court and upheld a restriction on the sale of smaller condominium units (condo units are considered real property unlike co-op apartments) in the building only to owners who owned larger units in the same building. The idea was that the owners of the larger units could house their staff in the smaller lower floor units. One of the unit owners challenged the restriction as an unreasonable restraint on alienation. After winning at the lower court, the plaintiff lost on appeal in a decision that shocked many of us who practice in the field. The court held that the unit owners could always vote to eliminate the restriction.

Another example is the 1986 opinion in Smith v. Smith where a tenants in common agreement had a cross purchase option among the several tenants in common. When one tenant in common tried to start a partition action, the court decided that because the options extended without endpoint past the lifetimes of the current tenants in common, the options were invalid and the partition could go forward.

Now we get to the fun part. Section 9-1.1 of New York's Estates Powers and Trust Law (EPTL) gives statutory limits to the time periods for these options (called future estates in the statute) as 21 years after the named lives in being at the time of creation of the interest plus the lives of any child of the named person conceived before the creation of the option. The measuring lives used do not have to be the actual parties to the agreement as long as the lives designated are not so numerous or hard to determine that proving the end of their lives is too difficult. That is why U.S. presidents and their children have been used as reference lives in legal documents. A recent agreement in our office recited a certain well known New York Giants quarterback much to the consternation of the Jets fans on the deal.

The most well-known case is the opinion that enabled the Symphony Space Theater on Manhattans' Upper West Side to profit significantly from an unenforceable option. A thoroughly negotiated modern agreement handled by otherwise competent lawyers was held to contain an unenforceable option. The seller sold the building to the theater so that the theater could claim a not-for-profit tax exemption and kept a $10 repurchase option. No lives in being were recited so the base 21-year statutory period controlled. The terms of option, however, permitted an exercise of the option 24 years later—bingo—the option was invalid, and the theater got to keep its very valuable estate for not very much money at all.

These rules are simplified above but are very complex in the application to real world situations. The area is fertile grounds for law professors to add complex questions to exams about the rules, so lawyers understandably tremble at the recollection of learning the rules in school. What should a businessperson do? If you have an option that is important, ask your lawyer, "Is my option/restriction valid under the rule against perpetuities and are you sure it's not an unreasonable restriction on alienation?" The lawyer will no doubt pause, catch his or her breath and will likely say—"I'll get back to you on that." Now that you have braved this article you will not be surprised to see a clause buried in the fine print of your document about lives in being. A simple sample: "The option set forth herein must be exercised no later than 21 years after the last to die of Eli Manning, George W. Bush and Barack Obama and their currently living descendants."

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