

Basic Property Law Refresher for Foreclosure Prevention Advocates

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Overview of Topics (New York Law)

- Estates in Land
- Concurrent Ownership
- Deeds and Other Transfers
 - Forms and Warranties
 - Forgery and Fraud
- Recording

Estates in Land: NY EPTL § 6-1.1

(a) Estates in property as to duration are classified as follows:

- (1) Fee simple absolute.
- (2) Fee on condition.
- (3) Fee on limitation.
- (4) Estates for life.
- (5) Estates for years.
- (6) Estates from period to period.
- (7) Estates at will.
- (8) Estates by sufferance.

Estates in Land: NY EPTL § 6-1.1

(a) Estates in property as to duration are classified as follows:

- (1) Fee simple absolute.

“The fee [simple] is the greatest interest that can be granted in real estate. It includes title, the right of possession, and the right to use for any purpose which may be lawful.”

In re Brookfield, 176 N.Y. 138, 146, 68 N.E. 138, 140 (1903)

Estates in Land: NY EPTL § 6-1.1

(a) Estates in property as to duration are classified as follows:

- (1) Fee simple absolute.
- (2) Fee on condition.

“The fee on condition of subparagraph (a)(2) is an interest in property that is either contingent (subject to a condition precedent) or defeasible (subject to condition subsequent).”

Turano, Practice Commentaries to EPTL § 6-1.1

Estates in Land: NY EPTL § 6-1.1

(a) Estates in property as to duration are classified as follows:

- (1) Fee simple absolute.
- (2) Fee on condition.

Combines both the common-law “Fee Simple Subject to Condition Subsequent” and “Fee Simple Subject to Executory Limitation”

- “To A, provided that A never sells liquor on the premises” (FSCS)
 - Followed by a future interest in the grantor:
 - In New York, a “Right of Reacquisition”: EPTL §§ 6-3.2(a)(1)(C), 6-4.6
 - The future interest must be renewed or lost (converting the fee on condition into a fee simple): NY RPL §345
 - At Common Law, a “Right of Entry” or “Power of Termination”
- “To A, but if A ever sells liquor on the premises, then to B” (FSSEL)
 - Followed by a future interest in B, a grantee:
 - In New York, a “contingent remainder” or “remainder subject to condition precedent”: EPTL §§ 6-3.2(b)(2)(D); 6-4.3; 6-4.10.
 - At common law, an “executory interest”
- The future interest does not automatically become possessory; the owner must take action to assert the interest if the condition comes to pass.
- Unlikely to be encountered in modern residential real estate practice

Estates in Land: NY EPTL § 6-1.1

(a) Estates in property as to duration are classified as follows:

- (1) Fee simple absolute.
- (2) Fee on condition.
- (3) Fee on limitation.

"The fee on limitation of subparagraph (a)(3) is an interest that continues for a stated duration.... Fees on limitation ... are usually created by words that denote time, such as "during," "until," "as long as," or "while." When a grantor creates a fee on limitation without any gift over (that is, alternative gift) on failure of the limitation, his retained interest is a possibility of reverter."

- Turano, Practice Commentaries to EPTL § 6-1.1

- At common law: "Fee Simple Determinable"
- Followed by a future interest:
 - In the grantor: "Possibility of Reverter"
 - In a grantee: "remainder subject to condition precedent"
- Unlike the fee on condition, this future interest becomes possessory automatically upon occurrence of the condition.
- Also subject to renewal requirement under NY RPL § 345
- Also unlikely to be encountered in modern residential real estate practice

Estates in Land: NY EPTL § 6-1.1

(a) Estates in property as to duration are classified as follows:

- (1) Fee simple absolute.
- (2) Fee on condition.
- (3) Fee on limitation.
- (4) Estates for life.

- Life estate: the life tenant's interest ceases upon their death; title automatically passes to the owner of the future interest (a reversion if the grantor; a remainder if a grantee: EPTL § 6-3.2)
- Can be used as an estate planning tool and will substitute:
 - Trusts are more flexible for estate planning and probate avoidance purposes
 - Tax implications of trust vs. life estate vs. devise by will can be complicated
 - Elderly homeowners will sometimes convey a remainder and retain a life estate to reduce the book value of their assets so as to qualify for Medicaid nursing care benefits
- The life tenant cannot alienate or encumber the remainder without the consent of the remainderman—creditors cannot look to the remainder interest to satisfy the debts of the life tenant.
- Conversely: The owner of a fee simple may not deprive a mortgagee of their security interest by conveying a remainder and retaining a life estate; any conveyance will be subject to a pre-existing mortgage on the fee simple.

Concurrent Interests: NY EPTL § 6-2.1

Estates as to the number of persons owning an interest therein are classified as follows:

- (1) In severalty.
- (2) Joint tenancy.
- (3) Tenancy in common.
- (4) [For real estate and co-op apartments only]... tenancy by the entirety.

Concurrent Interests: NY EPTL § 6-2.1

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- Individual ownership

Concurrent Interests: NY EPTL § 6-2.1

Estates as to the number of persons owning an interest therein are classified as follows:

- (1) In severalty.
 - (2) Joint tenancy.
 - (3) Tenancy in common.
 - (4) [For real estate and co-op apartments only]... tenancy by the entirety.
- A form of joint ownership characterized by the right of survivorship: when one joint tenant dies, their interest disappears, and the remaining joint tenants absorb that interest.
 - Another common will substitute/probate-avoidance estate planning tool
 - Any joint tenant may unilaterally sever the joint tenancy, converting it to a tenancy in common, by conveying their interest prior to their own death (including by conveying it to themselves), or by bringing a partition action.
 - But any attempt to sever via unilateral conveyance is invalid unless the severing instrument is recorded prior to the death of the severing joint tenant. (NY RPL § 240-c)
 - Divorce does not automatically sever a joint tenancy if that is the form of ownership of a married couple's real property, though a divorce decree could do so. See Beudert-Richard v. Richard, 72 A.D.3d 101, 105, 894 N.Y.S.2d 22, 25 (1st Dep't 2010).

Concurrent Interests: NY EPTL § 6-2.1

Estates as to the number of persons owning an interest therein are classified as follows:

- (1) In severalty.
 - (2) Joint tenancy.
 - (3) Tenancy in common.
 - (4) [For real estate and co-op apartments only]... tenancy by the entirety.
- Each tenant has a separate fractional but undivided interest in the whole, and accordingly each tenant has a right to possession of the whole.
 - Each cotenant's interest is fractional insofar as it applies to money: income and expenses, proceeds of sale, etc. (with some complications)
 - Each cotenant's interest is undivided in that the rights of ownership (possession, exclusion, use, etc.) apply to the entire parcel.
 - Each tenant's interest can pass by grant, devise, or descent.

Concurrent Interests: NY EPTL § 6-2.1

Estates as to the number of persons owning an interest therein are classified as follows:

- (1) In severalty.
- (2) Joint tenancy.
- (3) Tenancy in common.
- (4) [For real estate and co-op apartments only]... tenancy by the entirety.

- A form of joint ownership available only to married couples.
- Like a joint tenancy, includes the right of survivorship
- Unlike a joint tenancy, it cannot be unilaterally severed and is not subject to a partition action during the marriage
- Divorce severs the tenancy by the entirety, converting it to a tenancy in common

Creation of Concurrent Interests: NY EPTL § 6-2.2

- (a) A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy.
- (b) A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common.
- [(c) – (d): conveyance of a co-op unit to multiple parties creates a tenancy by the entirety if the parties are married; a joint tenancy otherwise, unless expressly declared otherwise]
- (e) A disposition of property to two or more persons as executors, trustees or guardians creates in them a joint tenancy.
- (f) Property passing in intestacy to two or more persons is taken by them as tenants in common.

Creditors' Rights to Concurrently Owned Real Property

- Any tenant-in-common can unilaterally convey or encumber their own interest, but cannot affect the other co-tenants' interests. The creditors of one tenant in common cannot reach the shares of the other tenants-in-common absent their consent.
- In New York, the same is true for joint tenancies, which means creditors must be careful.
 - New York follows the "lien theory" of mortgages: a mortgage by one joint tenant does not sever the joint tenancy, and thus does not affect the non-mortgagor joint-tenant's right of survivorship. When the mortgagor-joint-tenant dies, the interest—and the mortgage—disappear. Smith v. Bank of Am., N.A., 103 A.D.3d 21, 26-27, 957 N.Y.S.2d 705, 709 (2d Dep't 2012).
 - However, if a creditor forecloses on a joint tenant's interest during the life of the debtor joint tenant, the acquirer of that interest may presumably sever or partition.

Creditors' Rights to Concurrently Owned Real Property

- Tenancies by the entirety:
 - A married couple may jointly convey or encumber entirety property. NY GOL § 3—309.
 - Either spouse may unilaterally convey or encumber their own interest, but may not affect the possessory or survivorship rights of the other spouse:
- "[A] conveyance by one tenant, to which the other has not consented, cannot bind the entire fee or impair the nonconsenting spouse's survivorship interest... On the other hand, there is nothing in New York law that prevents one of the co-owners from mortgaging or making an effective conveyance of his or her own interest in the tenancy. To the contrary, each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other. Since the status of a tenant by the entirety is reserved exclusively to those co-owners who are married to each other, the interest acquired by a grantee or mortgagee of such a unilateral conveyance is not denominated a tenancy by the entirety, but rather is labeled a tenancy in common. Nonetheless, the grantee's or mortgagee's rights in the property are essentially the same as those possessed by the grantor or mortgagor: a right to shared possession and ownership subject to the original cotenants' reciprocal rights of survivorship. Since the grantee or foreclosing mortgagee, in effect, steps into the shoes of the grantor or mortgagor, his survivorship rights are measured by reference to the lifetimes of the original parties to the tenancy by the entirety. If the grantor or mortgagor predeceases the spouse whose interest in the property has been retained, the grantee or mortgagee is left with no interest in the property at all. Conversely, if the latter predeceases the former, the grantee or mortgagee acquires full rights to the property, unencumbered by the deceased spouse's former interests."

V.R.W., Inc. v. Klein, 68 N.Y.2d 560, 564-65, 503 N.E.2d 496, 498-99 (1986) (internal citations omitted)

Deeds and Other Transfers

- Transfers by Operation of Law
- Transfers by Devise (i.e., by will)
- Transfers by Descent (i.e., intestate succession)
- Transfers by Deed

Deeds and Other Transfers

- Transfers by Operation of Law
 - Death of a Life Tenant
 - Occurrence of a limiting event (for fee on limitation)
 - Death of a Joint Tenant
 - Death of a Spouse (for entirety property)

Deeds and Other Transfers

- Transfers by Operation of Law
- Transfers by Devise (i.e., by will)
 - Probate of Will
 - Issuance of Letters Testamentary
 - Executor's Deed

Deeds and Other Transfers

- Transfers by Operation of Law
- Transfers by Devise (i.e., by will)
- Transfers by Descent (i.e., intestate succession)
 - Issuance of Letters of Administration

Deeds

- Forms and Warranties
 - NY RPL § 258 sets forth statutory short forms for various instruments conveying interests in real property.
 - Most deeds are distinguished by two criteria:
 - Whether the grantor is an individual or a corporation; and
 - The covenants in the deed:
 - Full warranties
 - Bargain and Sale Deed with Covenants against grantor's acts
 - Bargain and Sale Deed with no Covenants
 - Quitclaim Deed
 - Other forms:
 - Special deeds (executor, referee in foreclosure, referee in partition)
 - Mortgages, releases, satisfactions, and assignments
 - Lease Assignment

Deeds

- Warranties of Title (NY RPL § 258)
 - Full Covenants:
 1. That [grantor] is seized of said premises in fee simple, and has good right to convey the same;
 2. That [grantee] shall quietly enjoy the said premises;
 3. That the said premises are free from incumbrances;
 4. That [grantor] will execute or procure any further necessary assurance of the title to said premises;
 5. That [grantor] will forever warrant the title to said premises.
 - Covenant against Grantor's Acts
 - "And the [grantor] covenants that he has not done or suffered anything whereby the said premises have been incumbered in any way whatever."
 - Bargain and Sale Deed vs. Quitclaim Deed
 - Bargain and Sale Deed must recite and be supported by "pecuniary consideration"; quitclaim need not be (though the short form does recite consideration).
 - Pecuniary consideration matters for purposes of the grantee's enjoyment of the protections of a purchaser for value (especially under the recording act)

Deeds

- **Forgery and Fraud**

- A Forged Instrument is Void: it passes no interest and its grantee can pass no interest.
 - A forged deed is void and conveys no title. “[A] person cannot be a bona fide purchaser through a forged deed” since the forger has no title to convey in the first instance.
 - Yin Wu v. Wu, 288 A.D.2d 104, 105, 733 N.Y.S.2d 45, 46 (2001) (internal citations omitted)
 - Forgery is the false making, completing, or altering of a written instrument with intent to deceive or defraud. See NY Pen. L. 170.00-.15
- Instruments can also be void for other reasons
 - Security for a usurious and therefore illegal mortgage (Bouffard v. Befese, LLC, 111 A.D.3d 866, 976 N.Y.S.2d 510 (2d Dep’t 2013))
 - Transfer of substantially all assets of a non-profit corporation without court approval (Solar Line, Universal Great Bhd., Inc. v. Prado, 100 A.D.3d 862, 863, 955 N.Y.S.2d 96, 98 (2d Dep’t 2012))
- An instrument obtained by fraud is merely voidable: it gives the grantee no rights over the grantor, but the grantee can pass good title to a bona fide (i.e., good-faith) purchaser for value. (NY RPL § 266)

Recording: NY RPL § 291

“A conveyance of real property ... may be recorded in the office of the clerk of the county where such real property is situated.... Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof ... in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and is void as against the lien upon the same real property or any portion thereof arising from payments made upon the execution of or pursuant to the terms of a contract with the same vendor, his distributees or devisees, if such contract is made in good faith and is first duly recorded. Notwithstanding the foregoing, any increase in the principal balance of a mortgage lien by virtue of the addition thereto of unpaid interest in accordance with the terms of the mortgage shall retain the priority of the original mortgage lien as so increased provided that any such mortgage instrument sets forth its terms of repayment.”

Recording: NY RPL § 291

- New York has a “race-notice” recording statute
- A subsequent purchaser or mortgagee will prevail over an earlier purchaser or mortgagee if:
 - The subsequent purchaser/mortgagee gave valuable consideration
 - The subsequent purchaser/mortgagee acquired their interest in good faith
 - The subsequent purchaser/mortgagee wins the race to record

Recording: NY RPL § 291

- The Shelter Rule:

“[A] purchaser from one who is protected by the recording act against a prior unrecorded conveyance is himself entitled to such protection, notwithstanding he purchased with notice of the prior conveyance, or without parting with a valuable consideration.”

Wood v. Chapin, 13 N.Y. 509, 509 (1856)

Recording: NY RPL § 291

- Two Basic Recording Problems:

- | | |
|--|--|
| <ul style="list-style-type: none"> • O mortgages to A • O conveys to B, a good faith purchaser • A records • B records | <ul style="list-style-type: none"> • O mortgages to A • O conveys to B, a good faith purchaser • B records • A records |
|--|--|

- In New York:

- | | |
|--|---|
| <ul style="list-style-type: none"> • A prevails, B owns subject to mortgage in favor of A | <ul style="list-style-type: none"> • B prevails, owns free and clear • A may still have a claim against O |
|--|---|

Recording: NY RPL § 291

- A key issue: what constitutes “good faith”?

- “The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such.”

Chen v. Geranium Dev. Corp., 243 A.D.2d 708, 709, 663 N.Y.S.2d 288, 289 (1997)

- “If the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person, and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed.”

Anderson v. Blood, 152 N.Y. 285, 293, 46 N.E. 493, 495 (1897)

- “This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part.”

Williamson v. Brown, 15 N.Y. 354, 362 (1857)

Recording: NY RPL § 291

- Interaction with NY RPL § 266 (forgeries and frauds):
 - If a purchaser “had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor,” the purchaser will not be protected by the recording act.
 - Courts will follow the equities to avoid unjust enrichment:
 - Where Wells Fargo extended a mortgage on a property still in possession of a prior, elderly grantor who alleged she was fraudulently induced to sign a deed (part of an alleged “foreclosure rescue” scheme), Wells Fargo was properly denied summary judgment on the elderly possessor’s claim to set aside the mortgage on grounds of fraud.
Williams v. Mentore, 2012 WL 3070839 (Sup. Ct. Queens Cty.), aff’d, 115 A.D.3d 664, 665, 981 N.Y.S.2d 763, 765 (2d Dep’t 2014)
 - But: “The doctrine of equitable subrogation applies in New York where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance.”
Arbor Commercial Mortgage, LLC v. Associates at the Palm, LLC, 95 A.D.3d 1147, 1149, 945 N.Y.S.2d 694, 696 (2d Dep’t 2012) (internal quotation marks omitted)