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Is an Executor's Power of Sale Absolute?

Most estate practitioners are aware that an executor has the power to dispose of real property. Indeed, Estates Powers and Trust Law (EPTL) §11-1.1 says so, many will say. This article will discuss the right of beneficiaries to elect to negate the power of sale as well as the obligations of purchasers for value of estate real property when the purchaser has knowledge that an election has been exercised in whole or in part.

EPTL 11-1.1 (b) (5) (B) states that the fiduciary, except where the property is specifically disposed, shall have the power to sell 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. Even where property is specifically disposed, however, the executor could exercise the power of sale in the event the estate was insolvent. Surrogate's Court Procedure Act (SCPA) §1902; *Estate of Edith Dolores Edwards,* The New York Law Journal, Feb. 18, 2000, p. 33.

But it has long been held that the beneficiaries of the estate can negate the power of sale by electing to take the property in kind. *Matter of Fello,* 88 AD 2d 600, 449 NYS 2d 770 (Sup. Ct. App. Div. 2nd Dept. 1982); *Trask v. Sturges,* 170 NY 482, 63 NE 534 (1902); *Mellen v. Mellen,* 139 NY 210 (1893); *Augustus Prentice et al. v. Mary Ann Janssen,* 79 NY 478 (1879). For ease of discussion I will refer to the right to negate the power of sale simply as the "election" at various points in this article.

A purchaser, when on notice of potential rights of others to subject premises, should have a duty to inquire of all beneficiaries of an estate as to whether or not the election is being made....

Election Formalities

What kind of notice is required in order to make the election? Must the election be in writing? What, if any, are the obligations of the fiduciary to determine the desires of the beneficiaries vis-à-vis the election? Is title taken by third party purchasers affected by the election or knowledge of the election? Should it be?

In *Matter of Fello*, supra, a beneficiary of an estate wrote the executor stating that he and his siblings wanted to take the house in kind from the estate. They were the only two beneficiaries. The executor entered into a contract of sale nonetheless and the Surrogate's Court of Nassau County, after a hearing, granted the application to set aside the contract of sale. The Appellate Division reversed, reasoning that all the beneficiaries had to unequivocally state their intention to negate the power of sale. The court held that the fact beneficiary #1 stated in his letter to the executor that beneficiary #2 also wished to take the property in kind from the estate, was not enough since such a statement was not unequivocal. The decision, all of two pages, simply states that the written notice to the fiduciary from beneficiary #1 stating that beneficiary #1 "was advised" that beneficiary #2 was "equally opposed to the sale" was not unequivocal. What is unequivocal about that language? The other beneficiary was opposed, was he not? The decision does not indicate that the executor introduced any conflicting evidence of the stated intent. The court then goes on to say that "absent a timely election to take the property in kind by both residuary beneficiaries" it did not negate the power of sale. While the court indicated that all the beneficiaries were required to make the election unequivocally it seems to require a certain quantum of proof or perhaps a signed writing from the beneficiaries. Presumably a phone call or other evidence of the desires of the beneficiaries would suffice but of course, proving oral communications is another matter.

Prior case law on the subject held:

> It seems to be well settled that where land is directed to be sold and the proceeds distributed, the parties beneficially interested may, if competent and of full age and the gift is not in trust, elect, before the conversion has actually taken place, to take the land, and where they have so elected and the election has been made known, the power of sale in the executors becomes extinguished and they cannot thereafter lawfully proceed to execute it. This doctrine is said to be founded upon the presumption that such power was given for the benefit and convenience of the devisees and legatees, and was not intended to be imperative so as to prevent the beneficiaries from taking his bounty, except in the precise form in which the property would exist after the conversion. *Trask v. Sturges*, supra.

'Made Known'

In stating that the election should be "made known," the court seems to indicate that no particular form of notice of the election is required. The facts of the case reveal that both the beneficiaries "served upon the Plaintiffs [fiduciary] a notice by which they signified their election." Whether the "they" meant that both beneficiaries signed the notice is not absolutely clear from the decision. If they both did not sign, would the result have been the same as in *Fello*? In the 1893 case of *Mellen v. Mellen*, supra, relied on by the *Trask* Court, Chief Judge Andrew writing for a unanimous Court stated:

> that the expressions or acts declaratory of an inten-

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tion to make an election, though it is said they may be slight must be unequivocal and in *Prentice v. Janssen,* the rule stated in Leigh and Dalzell on Equitable Conversions that a slight expression of intention will be considered sufficient, is quoted with approval.

So, tracking the cases back, one sees that the election to negate the power of sale required only "slight evidence" but the evidence must have been unequivocal. Wasn't the evidence in *Fello* slight? Taking another step further back into the history of this issue, we find that other early courts, explained in greater detail that the existence of the power of sale in the executor converted the real property into personalty and upon the election to negate the power of sale, the personalty is returned to real property classification. *Augustus Prentice et al. v. Mary Ann Janssen,* 79 NY 478 (1879). Relevant to the manner of the notice of election, the Court stated:

> No distinctive and positive act is required for such a purpose, and the rule applicable to such a case is that in the reconversion of real estate, a slight expression of intention will likewise be considered sufficient to demonstrate an election on the part of those absolutely entitled.

So the manner of the election was held to require "no distinctive or positive act." Is *Matter of Fello* consistent with these prior decisions? I will leave you to ponder this question. In *Prentice v. Janssen*, supra, the Court did make plain that the election must be positive and unequivocal but in that case such was found by the actions of the beneficiaries by virtue of their possession and treatment of the property as real estate with the acquiescence (knowledge) of the executors of the estate. There is, therefore, authority for the position that the power of sale can be negated by the actions of the beneficiaries albeit, communicated to the executor. Of course, the cases cited were decided before EPTL 11-1.1(b) (5) (B) and its progenitor Decedent's Estate Law §127, but the wills involved in each contained a power of sale so the current existence of the statute and its grant of authority should not have any significant impact on this analysis.

Does the executor have any duty to ascertain the desires of the beneficiaries? Should an executor have that duty? Arguments can be made on both sides. The case law cited here does not directly deal with that issue. It seems to this author that an executor should not have such a duty since this would create uncertainty in conveyances of title from estates. But what if one, but not all, of the beneficiaries resides in the home at the time of death? Does physical occupancy negate the power of sale? Should it? Before answering, let's consider the many cases that have held a purchaser not to be a "bona fide purchaser for value" if he or she has notice of defects in title or of the outstanding rights of others.

Bona Fide Purchaser

It has long been held:

> In New York where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a bona fide purchaser. *Williamson v. Brown,* 15 NY 354, 362 (1857); *Reed v. Gannon,* 50 NY 345 (1872).

Would the purchaser (not the executor) when faced with the physical occupancy of a beneficiary have a duty to inquire of the other beneficiaries of the estate? The cited cases dealing with the bona fide purchaser issue surely seem to say yes.

Case law relatively recently, states plainly that a purchaser, who fails to act on "inquiry notice" may not be considered a bona fide purchaser. *U.S. v. Orozco-Prada,* 636 FS 1537, 1544 (SDNY 1986) aff'd 847 F2nd 836 (2nd Cir. 1988). Real estate attorneys are surely familiar with the rule of law that actual possession of real estate is sufficient notice to all the world, of the existence of any right that the person in possession is able to establish. *Sanzone v. Niagara Mohawk Power Corp.,* 47 Misc. 2nd 237, 262 NYS 2nd 138 (Sup. Ct. Oneida Co. 1965) aff'd 27 A.D. 2nd 646, 277 NYS 2nd 125 (4th Dept. 1966); *Phelan v. Brady,* 119 NY 587 (1st Dept. 1890).

How does one reconcile these cases with the election to negate the power of sale?

I submit that a purchaser, when put on notice either actually or constructively, of the potential rights of others to the subject premises, should have a duty to inquire of all the beneficiaries of an estate as to whether or not the election is being made even thought the executor might not have had that duty if some, but not all, the beneficiaries unequivocally gave notice of the election. The purchaser would then make his own determination as to whether or not the election is being expressed unequivocally by all beneficiaries.

This rule would, in my view, honor both lines of cases and strike the correct balance among the rights and obligations of the various parties in interest. In the event the determination is not possible or unclear, application could be made to the Surrogate's Court by an executor under SCPA §1901 for authorization to sell the property.