

[Home](#) [Board Operations](#) [The Rights of Succession](#)
[Home](#) [2002](#) [2002 Oct](#) [The Rights of Succession](#)

The Rights of Succession

Inheriting Your Own Stake in the Family Co-op

By Debra A. Estock

It is not uncommon for a precious commodity such as season tickets to the Yankees, Giants or Knicks to be handed down from father to son or from grandfather to grandson. So, in today's marketplace, it's easy to see why an apartment owner would want their exclusive Manhattan real estate to be passed down from generation to generation.

That is where inheritance rights or the rights of succession come into play. And what rules the roost, so to speak, in that area, are the proprietary lease, bylaws, and the governing documents of the building, according to attorney Adam Finkelstein of the Manhattan-based law firm of Wagner, Davis and Gold, P.C.

Co-op Versus Condo

There are distinct differences in how succession works in co-op apartments compared to a condo, Finkelstein explains.

"In a condo, for the most part, a unit owner via their will or intestacy can pass down an apartment with very little restrictions - if any - by the board or managers," says Finkelstein. "In a co-op, you're in a whole different world. In a co-op, obviously, a person living in an apartment is just a tenant of the building and they happen to be a shareholder of the corporation that owns the building, so you have to look to the proprietary lease and bylaws - the governing documents of the corporation - to determine who can take over an apartment."

In most cases, Finkelstein says, the proprietary lease will allow a spouse - husband or wife - to take over the apartment of a deceased spouse, even when that person is not named on the stock certificates. Generally, he says, a wife can take over a deceased husband's apartment because the standard proprietary lease usually contains a provision that "no consent" is needed on behalf of a spouse or their children.

"The proprietary lease will dictate who can get a free pass towards succession. Spouses almost always are a free pass - sometimes, children. Sometimes, it's children as long as they show financial responsibility, and usually it's the management that would review that," says Finkelstein.

Other relatives, friends, or neighbors become a bit more complicated, Finkelstein says. "Let's say you have a distant cousin you want to give the apartment to, or a friend - that almost always will require board approval. And then it's the same as any type of application."

In that instance, boards will conduct an interview, review financial statements, and decide if certain conditions have to be imposed upon the ownership of the apartment. "So, you have to look carefully at the proprietary lease, and that will tell you who and how; who can take over and how they can take over," Finkelstein adds.

Co-ops boards, by their very nature, are extremely choosy about prospective shareholders, says Attorney **Eric Gonchar** of Kane Kessler P.C. "There was a time when co-op boards concluded that if a bank had given a prospective buyer a loan, then the board would consent to the sale of an apartment. Co-op boards have since become much more concerned and selective about their future neighbors," says Gonchar. "Co-ops were created to promote stability in a building, and accordingly, a co-op board can determine who may and may not become a shareholder."

According to Attorney Marc Luxemburg of Snow Becker Krauss, P.C. in Manhattan, a typical proprietary lease does allow for transfer to a spouse or a financially responsible member of the deceased shareholder's family, but some leases often contain provisions outlawing subletting an apartment to another person.

A condo would have fewer restrictions, but the board could exercise a right of first refusal should it disapprove of a transfer or sale, according to Finkelstein. "But as a general rule, when you own a condo, you're free to give it to whoever you want to give it to. It doesn't happen all that often that a condominium board exercises a right of refusal to prevent that. Normally, it's just a free pass. You die, you can give your apartment to your friend,

your Army buddy, your cousin, your sister, your brother, your parents. That's a principle of condominium ownership that people like. There's free transfers and you don't have a board looking over your shoulder."

Charities and Other Unusual Bequests



What if someone wishes to donate their apartment to charity? That is permissible, says Finkelstein, but certain conditions do apply. "Let's say someone wants to give their apartment to the Audubon Society. The Audubon Society can't come in and say: "'Well, we're going to use this as our offices or as our corporate apartment.' But let's say the apartment's worth \$250,000, the Audubon Society has a right to sell, or the apartment will be sold and the Audubon Society will have the rights to the proceeds of the sale," says Finkelstein.

Board approval would be required for anyone other than specifically prescribed individuals named in a proprietary lease. The charity can't own the apartment outright, but the organization is entitled to the proceeds of any transaction, he adds.

Sometimes people desire to leave their apartments to their beloved dogs, cats, parakeets or other members of the animal family. Consider the recent case involving late fashion designer Bill Blass. He not only left the bulk of a \$70 million fortune to friends, family, and organizations like the Metropolitan Museum of Art, the Fashion Institute of Technology and the New York Chapter of the American Society for the Prevention of Cruelty to Animals, but he bequeathed \$100,000 to care for Barnaby, his yellow Labrador.

Such a request is not unusual, says Finkelstein, but an animal cannot be an actual owner. Most often, a trust is set up for the animal and they will benefit from the proceeds of any sale of the apartment. A person is usually established as a trustee to manage money set up in the animal's behalf, he says. "You wouldn't have an animal taking ownership interest in an apartment directly. It can't be done."

Other Types of Living Arrangements

In today's politically correct society, many different types of living arrangements have become common. New York City has laws legalizing the union of domestic partners, so many proprietary leases are now in the process of being amended to establish a registered domestic partner as equivalent to that of a spouse, Finkelstein says. Luxemburg, who has developed a model proprietary lease and shareholder's agreement for the Council of New York Cooperatives and Condominiums (CNYC), says that leases today should be worded to broaden the definition of family so that it "goes beyond the concept of blood or marriage." That could include two roommates, as well as legalized same-sex domestic partners, he says. But, says Robert Grant of Midboro Management, a board may be very selective in approving transfer to a roommate. The key question is the person's relationship to the principal tenant and ensuring that the new owner would be financially stable, he says.

While legalizing non-traditional living arrangements is a city standard, co-ops are generally governed by state law, according to the provisions of Business Corporation Law (BCL). Additionally, all offering plans fall under the purview of the state Attorney General, Finkelstein notes. "A lot of shareholders and buildings always make a complaint to the attorney general. The attorney general, really, their role in co-ops and condos is only to ensure that the offering plans - the statements being made to the public are accurate and the plans reflect the risk. They have no involvement, once the co-op is up and running, with governance type issues." And the BCL, he says, doesn't regulate succession rights at all.

Co-ops have wide discretionary power under the "business judgment rule" handed down in *Levandusky vs. One Fifth Avenue Corp.*, in deciding whether they should approve or deny the sale or transfer of an apartment, according to Gonchar.

Other variables, such as evidence of prior occupancy, may influence succession of a rent-controlled apartment or a Mitchell-Lama apartment, according to Finkelstein. In a Mitchell-Lama situation, the shareholder is viewed strictly as a tenant and the apartment's sale is governed by the corporation and by state law. "In Mitchell-Lamas, which are regulated by either the city or the state, there's a whole set of regulations that will govern. And I believe in either case, you have to show occupancy. You have to have been in the apartment for a number of years - I think it's two - meeting certain financial criteria as a household in order to succeed to a shareholders' rights." In a non-rent regulated situation, an occupancy requirement would be an unusual circumstance, Finkelstein believes.

Not surprisingly, says Gonchar, the co-op board has the final say in most cases. "Co-ops use the scrutiny of reviewing prospective purchasers' applications as a way of protecting the shareholders from those who do not fit the financial and social profile of a building. Unless specifically excepted with exact language in the proprietary lease, a transfer of shares to an apartment cannot take place without board consent," says Gonchar.

Bankrupt in Brooklyn, Divorced in Douglaston

Certain types of transfers, such as bankruptcies and divorce actions, would also require board approval - but within the parameters of the law, says Luxemburg. In the case of a bankruptcy, foreclosure or transfer of an estate where a receivership is appointed, any economic gain from the sale of an apartment would go to the legally-authorized individual. "The co-op can't stop the person with the legal rights from owning the economic interest in the property, but what the co-op can control is who is going to be living there. They can control the occupancy," says Luxemburg.

In a divorce action, says Grant, the "board has to be satisfied and the divorce decree has to be very clear in who's being awarded the apartment." The board will also have wide latitude to review the financial ability of that occupant, he says.

"All roads pass through the co-op board," adds Finkelstein, "and in a bankruptcy situation, even though the bankruptcy court has broad authority, the bankruptcy court's only worried about the money."

In either case, Finkelstein says that the court can require that an apartment be sold but they cannot overstep the board's authority in reviewing the sale or overriding the governing documents of the corporation.

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