



planning matters

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ESTATE PLANNING & WEALTH PRESERVATION

INSIDE FOR FALL 2017

Disposition of Estate Assets • “As Is” Sales of Real Estate

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Attorneys at Law



disposition of estate assets

REAL ESTATE

David G. Hardin, Esq.

Real estate is oftentimes one of the more valuable assets an individual may own, and thus can comprise a substantial asset in the estate following an individual's death. Typically, it is the personal representative of the estate who has responsibility to dispose of a decedent's real estate.¹ Real estate can either be conveyed directly to one or more of the estate beneficiaries or it can be sold. The disposition of real estate in an estate can be one of the more significant responsibilities for the personal representative. This article will address a number of issues facing a personal representative involved in the disposition of real estate through sale of the property following an owner's death.²

Determining Fair Market Value

The first issue generally faced by a personal representative is determining the fair market value of the property. For purposes of the federal estate tax law, fair market value is defined as "the price at which the property would change hands between a willing buyer and willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas. Reg. §2031-1(b). For New Jersey estate and inheritance tax purposes, tax is "computed upon the clear market value of the property transferred." N.J.S. 54:34-5. See also N.J.A.C. 18:26-8.10. In general, an appraisal of real estate prepared by a member of the Appraisal Institute will be recognized as an acceptable appraisal by taxing authorities.³ An arms-length purchase by an unrelated third party, if completed within a reasonable time period after death, is generally accepted by the taxing authorities as an alternative to an appraisal.

Selling the Property

The actual process of selling real property owned by an estate can also present challenges to a personal representative. Oftentimes a personal representative will wish to minimize the expenditure of funds to "update" an estate property, preferring instead to enter into a contract selling the property in "as is" condition without addressing any repair issues. While this is often an attractive approach, particularly when a personal representative has never resided in the property or has limited or no knowledge concerning

its condition, there are limitations to this approach in New Jersey, which a recent case points out.

In Conclusion

On balance, a personal representative selling real estate must deal fairly with a potential buyer and disclose any known and material defective condition. If a personal representative has no knowledge of the property, because, for example, the personal representative never resided in it or never had any discussion with the owner about the property, a duty to disclose does not exist. A duty to disclose only relates to a known condition. If, however, the personal representative lived in the property as a child or visited the property regularly while the owner resided in it, then knowledge gained during that time cannot be ignored. Personal representatives engaged in the sale of property owned by an estate must be cognizant of their disclosure responsibilities and act in conformity with them, or risk exposure for failing to comply with the established legal principles.

It is now well settled law in New Jersey that a seller has a duty "to affirmatively disclose to the buyer a latent defective condition material to the transaction."

“as is” listings still require disclosures



In an unreported decision in New Jersey, *ABDM Properties, LLC v. Meusz, et al.* (New Jersey Appellate Division, Docket No. A-4556-15T, August 23, 2017) (hereinafter “ABDM Properties”) a buyer of real property entered into a written contract for the purchase of real property.⁴ The property was listed for sale in “as is” condition and seller advised that no repairs would be made. *Id.*, at 6. The seller executed a form Seller’s Disclosure Statement and represented that it was complete. As the court noted, the seller “did not disclose any defects in the property’s foundation.” *Id.*, at 3. Following execution of a contract the buyer performed a home inspection and in the course of the home inspection buyer discovered there was a cover over the crawlspace that made it inaccessible. Buyer’s subsequent effort to inspect the crawlspace prior to the closing was unsuccessful and buyer did not pursue the issue further. The buyer closed title and acquired the property. After the closing the buyer removed the cover preventing access to the crawlspace and discovered several structural defects affecting the foundation. *Id.*, at 3-4.

Upon discovering the structural defects following the closing, the buyer sued the seller, asserting claims of fraud and concealment of a latent defect, specifically the condition of the foundation in the crawlspace. *Id.*, at 3. The seller made a motion to dismiss the buyer’s complaint on the grounds that the sale was an “as is” sale and that the buyer had indicated that all desired inspections had been completed and “no further inspections are required.” *Id.*, at 7. Based on the information before it, the trial court ruled in favor of seller and dismissed the buyer’s complaint.

The buyer appealed the dismissal of the complaint.⁵ On appeal, the court reviewed the applicable law governing “as is” sale contracts. The court recognized that when a buyer is purchasing a property in “as is” condition, the buyer is accepting the property in

its present condition. *Id.*, at 9. The appellate court reviewed the related legal doctrine of “caveat emptor,” known also by its English language equivalent, “buyer beware,” and observed that courts will not apply the principle where there has been concealment or nondisclosure of a latent defect. *Id.*, at 9-10.

In *ABDM Properties*, the appellate court found, viewing the evidence before it in the light most favorable to the buyer, that there were structural defects in the crawlspace; that seller concealed the defect; that the realtor made a misrepresentation by advising the buyer there were no inspection issues in the crawlspace; and buyer was denied access to the crawlspace. *Id.*, at 11. In light of these facts alleged by buyer, the trial court decision to dismiss the claim was reversed and buyer was authorized to proceed with the lawsuit.

Affect on Estates

The *ABDM Properties* case has relevance for personal representatives selling property in an estate because it reminds sellers of real estate of their disclosure responsibilities to potential buyers. Although most sellers would construe an “as is” sale to mean that property is sold in its then current condition and subject to any defects or other physical conditions that may exist, in fact nondisclosure or concealment of a known material defect does not transfer responsibility or risk to a buyer. Indeed, the New Jersey Supreme Court has ruled that “a seller of real estate or a broker representing the seller would be liable for non-disclosure of on-site defective conditions if those conditions were known to them and unknown and not readily observable by the buyer.”⁶ It is now well settled law in New Jersey that a seller has a duty “to affirmatively disclose to the buyer a latent defective condition material to the transaction.”⁷

1. Under New Jersey law, the personal representative of an estate appointed in a will is called an executor, and a personal representative of an estate where there is no will is called an administrator. Reference in this article to a personal representative refers either to an executor or an administrator. See N.J.S. 3B:1-2.
2. For the individual owning real estate, disposition of the real estate can be addressed during lifetime, whether through a lifetime arrangement or through instructions contained in a will. Where real estate is a special asset in an estate, or where the owner has set ideas for its disposition, lifetime planning is generally advised. For example, if the real estate is a vacation home or income-producing property, special arrangements may be appropriate.
3. An appraiser with initials “MAI” following his or her name is a Member of the Appraisal Institute.
4. Pursuant to Court Rule in New Jersey an unreported decision does not constitute controlling precedent or bind any court. See New Jersey Court Rule 1:36-3. Notwithstanding that the decision is available for the public to see, it is binding only on the parties in the case and use in other cases is limited. Notwithstanding these limitations on use, the discussion in the case is instructive.
5. It should be pointed out that the complaint was dismissed as a result of the seller’s motion and before any trial of the issues. This point is significant for two reasons: first, under these circumstances an appellate court is required to review the evidence submitted in the light most favorable to the party opposing the motion; and second, a reversal does not constitute a decision on the merits, it simply reinstates the complaint so the lawsuit continues.
6. *Weintraub v. Krobatsch*, 64 N.J. 445, 454-55 (1974); See *Strawn v. Caruso*, 140 N.J. 43, 59 (1995).
7. *Johnson Machine Co. v. Manville Sales Corp.*, 248 N.J. Super. 285, 306 (App. Div. 1991).

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MEET THE PLANNERS



John R. Blasi, Esq.
Westfield
jblasi@lindabury.com



Jonathan S. Chester, Esq.
Summit
jchester@lindabury.com



James K. Estabrook, Esq.
Westfield
jestabrook@lindabury.com



David G. Hardin, Esq.
Summit
dhardin@lindabury.com



Mary Patricia Magee, Esq.
Red Bank
mmagee@lindabury.com



Elizabeth Engert Manzo, Esq.
Westfield
emanzo@lindabury.com



Anne Marie Robbins, Esq.
Summit
arobbins@lindabury.com



Frederick W. Rose, Esq.
Red Bank
fro@lindabury.com



Robert S. Schwartz, Esq.
Westfield
rschwartz@lindabury.com



LINDABURY

McCORMICK, ESTABROOK & COOPER, P.C.

Attorneys at Law

Westfield • Summit • Red Bank • New York • Philadelphia

lindabury.com

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