



## Estate and Incapacity Planning Tools and Issues that Board Members of a Community Association Should Know About

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In the event a unit owner passes away, becomes ill or incapacitated or is placed in a nursing home, it is critical that the Association be in a position to protect its income stream. To accomplish this, each member of the Board of Directors should be familiar with, and make the unit owners aware of, certain estate and incapacitation planning tools and issues. Towards the same goal, the Board of Directors may wish to regulate to whom a unit may be transferred by will or gift, a right not often provided for in an Association's governing documents. A brief discussion of some of these estate and incapacitation planning tools and issues follows below.

### 1. Transfers of a Unit for Estate Planning Purposes.

The potential for conflict and litigation is particularly present when an Association challenges an owner's desire to transfer ownership of a unit by will or gift to a family member or to a trust for estate planning purposes. In one recent case, although an Association's governing documents required Association approval of a "purchase" or "sale" of property, the governing documents did not regulate gifts. The court rejected the Association's argument that the language in the governing documents should be interpreted to include the transfers of gifts, holding that if a restriction in a covenant is ambiguous, the covenant is to be construed against the Association. Therefore, if an Association wishes to regulate the non-sale transfer of a unit, such as a gift between family members

for estate planning purposes, this must be expressly stated in the Association's governing documents.

2. **Durable Power of Attorney.** A durable power of attorney is a lifetime document that allows the principal to designate a representative, known as an "attorney in fact," to step into the shoes of the principal and perform certain actions should he or she become ill, incapacitated or otherwise unable to manage his or her affairs. Without a power of attorney, the principal's spouse or other loved one(s) would have to endure the delay and expense of seeking approval from the court to carry out needed financial transactions. With a power of attorney in place, for example, the attorney in fact could pay any assessments and/or dues owed to an Association immediately upon the incapacitation of the principal.

3. **Revocable Trust.** A revocable living trust is often the central instrument in planning for disability and death and may offer the most comprehensive, cost-effective, and flexible planning tool available to administer an estate. Such trusts are often referred to as will substitutes in that they dispose of assets held in the trust at death without the need for probate administration, which can be time-consuming and costly. In addition, revocable trusts play an important role in disability planning because they can provide a mechanism for the management of assets if the

owner becomes incapacitated, without the need for a conservator to be appointed to manage the assets. In this way, planning that incorporates the use of a revocable trust not only benefits the grantor and his or her heirs, but also an Association in that its income stream is not disrupted by probate, in the event of death, or the need for a conservator to be appointed to manage financial affairs, in the event of incapacitation.

**4. Legal Form of Ownership.** The legal form in which title to property is held is extremely important because it indicates how the property will pass upon the death of an owner and who is responsible for upkeep of the property and payment of taxes, maintenance, insurance and other costs of ownership. Joint ownership of property is sometimes suggested as a useful tool in disability planning under the theory that the competent joint tenant can manage the property during the incapacity of the other joint tenant. The 3 basic forms of co-ownership are as follows:

- a. **Tenants in Common.** A tenancy in common is one in which each tenant owns an undivided fractional share of the entire property. Each tenant has the right to deal with his or her share and to dispose of that share without the knowledge or consent of the other tenants. Tenants in common do not have rights of survivorship; upon the death of a tenant in common, his or her share passes by will or intestacy like any other individually owned property.
- b. **Joint Tenancy.** A joint tenancy is one in which each joint tenant owns the entire property subject to a right of survivorship in the other tenants and the rights of the other tenants. All joint tenants have equal rights, and each joint tenant shares a non-exclusive right of possession with the other tenants. Each joint tenant may cause a judicial partition, and each has the right to sell his or her share of the property without the consent of the other tenants, although such a disposition will sever the joint tenancy. When one joint tenant dies, the property passes immediately to the surviving joint tenants by right of survivorship, i.e., by operation of law, not by will or intestacy.
- c. **Tenancy by the Entirety.** A tenancy by the entirety is a joint tenancy between husband and wife that exists only during marriage and terminates upon divorce. Neither spouse acting alone can terminate the tenancy or convey the property. As in a joint tenancy, the property subject to a tenancy by the entirety passes by right of survivorship, i.e., by operation of law, to the surviving spouse immediately upon the death of the other spouse.

For additional information on this or any other tax and estate planning issue, please contact Andrew Berger, an attorney in the Corporate, Tax, & Securities Law Practice Group of Becker & Poliakoff, P.A. He can be contacted at 954-364-6074 or [aberger@becker-poliakoff.com](mailto:aberger@becker-poliakoff.com).