

## **A Day in the [After] Life Where There's No Will, There's A Way (Part Two)**

In November's *UPDATE*, we outlined the procedure to obtain possession of an apartment after a tenant dies without a will. We also advised how to get the Surrogate's Court to appoint the Public Administrator so that the owner can get the apartment back.

There is an alternative method for obtaining possession of an apartment when a tenant dies intestate. This method allows an Owner to commence a nonpayment proceeding in Housing Court pursuant to Real Property Actions and Procedures Law ("RPAPL"). RPAPL §711 (2) provides:

"...Where a tenant dies during the term of the lease and the rent due has not been paid and no representative or person has taken possession of the premises

and no administrator or executor has been appointed, the proceeding may be commenced after three months from the date of death of the tenant by joining the surviving spouse, or if there is none, then one of the surviving issue or if there is none, than anyone of the distributees." (Emphasis added).

Bringing a non-payment proceeding in Housing Court can be a faster remedy than having the Public Administrator appointed. By bringing the nonpayment case when no one has taken possession of the apartment and the tenant has passed away more than three months before, an Owner can potentially get possession of

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## **Non-Primary Residence Holdover Proceedings against Section 8 Tenants**

When an Owner believes (and has evidentiary support) that a tenant is not actually occupying a rent stabilized or rent controlled apartment as a primary residence, the Owner can bring a non-primary residence holdover proceeding in Housing Court.

In order for a Owner to win a non-primary residence holdover proceeding, the Owner needs to show that the tenant does not occupy the rent stabilized or rent controlled apartment as a "primary residence." The courts have defined primary residence as "an ongoing, substantial, physical nexus with the controlled premises for actual living purposes." In simpler terms, this generally means is that the tenant physically occupies the regu-

lated apartment for more than half of the year.

In certain circumstances, a tenant may still be found to occupy a regulated apartment as a primary residence when the tenant can show a valid reason for being away from the apartment for more than half of the year (such as caring for a sick relative or attending school or traveling for work). However, generally, a tenant must actually physically occupy the apartment 183 days in the prior year for the apartment to be considered a primary residence.

Discovery can be obtained via stipulation or court order in order to obtain further evidence as to the tenant occupy-

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### **Special Points of Interest:**

- State's highest court prohibits DHCR from reviewing amended tax returns in Luxury Deregulation Proceedings after the agency's initial verification of the tenant's income.
- HPD proposes new filing fees and penalties concerning J-51 applications.
- Condominiums may have "Right of First Refusal" with regard to leasing of unit.

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the apartment back within twelve weeks from when the case is brought.

The statute first requires that “the rent has not been paid and no representative or person has taken possession of the premises.” Owners cannot collect rent from any person on behalf of the tenant and then bring a non-payment proceeding to get the apartment back. Also, if some one has taken possession of the apartment after the death of the tenant without any right to take possession, then the appropriate proceeding is a holdover proceeding, not a non-payment proceeding.

The second element requires an Owner to ascertain whether an administrator or executor has been appointed. This information can be obtained by searching the Surrogate’s Court records in the appropriate county to determine if letters of administration have been filed or some one has been appointed a lawful representative of the estate. The Surrogate’s Court of the county where the deceased tenant resided should be examined, as well as any other counties where the Owner believes a will may have been filed. If no executor or administrator exists, the Owner may proceed to the next step. If

there is a court-appointed administrator or executor appointed under a will, then surrender of the apartment can often be obtained by a simple surrender agreement.

Next, an Owner must determine whether a surviving spouse, issue (children, grandchildren, etc.), or distributees (other relatives who are permitted by law to share in the estate) exist. Owners may not have such information in the decedent’s rental application or tenant file. In such circumstances, it is important to get a certified copy of the Death Certificate. The Death Certificate can be obtained from the Department of Vital Statistics. The deceased’s date of death, name, social security number and address are needed in order to get the Death Certificate. The Death Certificate will usually list the name of the decedent’s parents, as well as the person who reported the death. It will also list the address(es) of those person(s) who are necessary for service of the rent demand and Notice of Petition and Petition in the nonpayment proceeding. Many times we are able to get such person to voluntarily surrender the apartment.

Once all the necessary information has been obtained to meet the requirements under

RPAPL §711(2) (assuming we have not gotten a surrender), an Owner can commence the nonpayment proceeding. The steps are the same as a nonpayment proceeding against a live tenant. The Owner must first serve a rent demand and Petition on the surviving spouse, issue or distributee. If the representative answers, a court date is scheduled. At this point BBW&G is usually able to negotiate a stipulation of settlement to obtain possession of the apartment, either by a surrender agreement or by warrant of eviction. After the lawful eviction or surrender, the Owner is free to re-let or sell the apartment (if it is a condominium or cooperative apartment).

*This article was written by Martin Meltzer and Jordi Fernandez, a partner and an associate in BBW&G’s Litigation Department. If you have any questions relating to this article, please telephone Mr. Meltzer or Mr. Fernandez.*



Jordi Fernandez & Martin Meltzer

## Tenants Who Amend Their Tax Returns to Evade Luxury Deregulation May Be In For A Surprise

Owners may file petitions for luxury deregulation with DHCR every year if their tenant’s legal rent is \$2,000 or more per month. DHCR will issue an Order of Deregulation if the agency determines that the tenant’s aggregate household annual income, (federal adjusted gross income of all persons living in the apartment as a primary residence other than employees or subtenants as

reported on New York State income tax returns), is \$175,000 or more in each of the two calendar years preceding the date that the Owner files its petition.

BBW&G handles hundreds of luxury deregulation petitions for our clients each year. We have observed tenants try to beat the system to ensure that they continue to pay a monthly rent substantially below market for the apartment in

which they reside.

For example, tenants may falsely allege that DHCR should not verify the income of one or more household members because the individual lives elsewhere. Other tenants shift their income from year to year or pay themselves through corporate entities which are excluded from the Rent Stabilization Code’s definition of annual

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## Relocation of Regulated Tenants

Owners often find themselves in situations where they have agreed to relocate rent regulated tenants to an alternate location to accomplish or facilitate a larger goal or project. If the Owner does not own or have access to other properties, Owners may retain a real estate broker to assist in finding alternate housing for the tenant who is being relocated. One type of relocation housing is a coop or condo apartment that the Owner purchases with the intent to rent to the tenant who is relocated. The tenant being relocated may insist on being granted a "life estate" -- that is, a lease whose term is defined by the life of the tenant being relocated.

From a practical standpoint, due to the restrictions imposed by coops upon its shareholders and their subletting, it is usually preferable to try locate an apartment in a condominium. Historically, condominiums have had fewer restrictions upon the rental of units by its owners. However, many mistakenly believe that condos, as a matter of 'law' cannot restrict rental of units by their owners; this is not true. While many condos do not

restrict the rental of units, condos are not prohibited from acting as gatekeepers when owners attempt to rent their units. In addition to the well known and understood "right of first refusal" of the condo to purchase a unit when it is being sold, many condos have the same "right of first refusal" with regard to the leasing of units.

Owners who seek to purchase a unit with the intent of providing alternate housing for a tenant who is being relocated are well advised to carefully review the bylaws of the condominium where they intend to purchase a unit to determine what restrictions, if any, are contained in the bylaws which would prohibit rental of the unit. Many condo boards view the purchase of a condo unit differently when the intent to purchase the unit is for relocation of a tenant who may live in the unit indefinitely and/or who may not pay a market rent. In contrast, purchasing a unit, with the intent to rent the unit for a "customary" term of 1 or 2 years, is more common and better understood. Purchasing a unit, with the intent to use it to relocate a tenant for an indefinite term,

presents additional issues to the condo. For example, what if the long term tenant is or becomes troublesome or a nuisance? Condo boards are suspect of inheriting an Owner's problematic tenant in an effort to accommodate a purchaser who has no connection to the condo and who may lack the same interests in maintaining the status of the condo and the building that an owner-occupant would possess.

Owners contemplating the purchase of a unit to relocate a tenant are well advised to engage in a thorough review of the bylaws and minutes of the condo where they are contemplating a purchase and to consult with their counsel to address these and other relevant issues. One risk of failing to perform an adequate due diligence investigation is forfeiting the down-payment posted under a contract of sale, or perhaps even worse, purchasing an apartment that cannot be rented to the intended party which then becomes an additional burden upon the Owner.

*This article was written by Craig Ingber, a partner in BBW&G's Transactional Department.*

## New Proposed Filing Fees for J-51

New rules are being proposed by HPD (New York City Department of Housing Preservation and Development) regarding the fees required for the filing for a J-51 application. As we go to press, we have learned that the proposed rules will be enacted on December 30, 2004.

Any owner who intends to apply for a J-51 tax exemption/tax abatement must file a Notice of Intent form with the Department of Finance which describes the work for which the tax benefits will be claimed. This form must be filed not less than 45 days prior to the beginning of work.

At the present time, if an

owner fails to file this Notice of Intent, the "penalty" at the time HPD issues the Certificate of Eligibility and Reasonable Cost ("CRC") is \$100 plus an **additional** 4/10 of 1% of the amount stated on the CRC.



HPD is now proposing to change these financial requirements. HPD is proposing that an owner who fails to file a Notice of Intent

must pay a penalty of \$500 plus an **additional** 1% of the amount stated in the CRC. These fees are in addition to the normal filing fees. We have been advised that this change will be applied to pending J-51 applications, for which certificates will be issued in or after January, 2005

In addition, HPD is changing the non-refundable application filing fee from \$100 to \$500. This change is to go into effect on February 1, 2005.

If you wish to discuss any aspect of the J-51 Application filing process, please speak to Martin Heistein or Paul Kazanecki.

### ***Non-Primary Residence Holdover Proceedings against Section 8 . . .***

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ing some other abode as a primary residence.

If it becomes necessary to do a trial in the Housing Court proceeding, the Owner and its attorney will need to show the Housing Court Judge, through documentary evidence (such as the tenant's banking, credit card records or tax records), and testimony from witnesses with first hand knowledge, that the tenant does not occupy the regulated apartment as a primary residence. The Owner may try to show which address is actually occupied by the tenant as a primary residence.

In a recent case handled by BBW&G, the tenant occupied a rent stabilized apartment and had a total of three additional addresses. The Judge wanted to know which of the various addresses associated with the tenant was the one which she occupied as her primary residence. It quickly became apparent that one of the apartments occupied by the tenant was in a project based Section 8 building. This

meant that the tenant was receiving a Section 8 rent subsidy from the Federal Government which covered most of her rent for that apartment.



In order for a tenant to receive a project based Section 8 rent subsidy, the tenant must annually certify, under oath, both the amount of income and the fact that the tenant occupies the project based Section 8 apartment as his/her residence.

The Judge advised the parties that the Judge believed that the tenant occupied her Section 8 apartment as her primary residence -- not the subject rent stabilized apartment. The tenant agreed to settle shortly after the trial be-

gan and agreed to vacate the rent stabilized apartment.

This same line of reasoning was recently echoed by the Appellate Term, First Department in *Jane Goldman v. Olga Lensky*, where the Appellate Term affirmed the decision of a Housing Court Judge who determined that the tenant did not occupy a rent stabilized apartment as her primary residence. The Court gave great weight to the fact that one of the additional addresses associated with the tenant was a project based Section 8 apartment. The Court found that the tenant's filling of annual certifications as to both her occupancy of the Section 8 apartment and her income weighed heavily in the Court's decision finding in favor of the Owner. In essence, the Appellate Term found a presumption that the tenant actually occupies the Section 8 apartment as her primary residence. This can prove to be a vital tool for Owners, when they learn that their tenants have a nexus to Section 8 housing.

*This article was written by Brian Haberly, an associate practicing in BBW&G's Litigation Department.*

### ***Tenants Who Amend Their Tax Returns . . .***

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income – but which may run afoul of the federal or state revenue laws.

Fortunately, at least one technique used by tenants to evade luxury deregulation has been removed by New York's Court of Appeals. Tenants may no longer belatedly amend their old tax returns, report lower income levels and expect the DHCR to deny an Owner's high income petition based upon "new" evidence.

In *Classic Realty, LLC v. DHCR*, the Court of Appeals held that DHCR cannot accept a tenant's amended tax returns after the agency's initial verification of the

tenant's income. In *Classic Realty*, the N.Y.S. Department of Taxation and Finance ("DTF") verified a tenant's household income as exceeding the threshold necessary to deregulate an apartment. When given an opportunity to comment on the verification, the tenant advised DHCR that since she had filed an amended tax return, the DHCR should re-verify her income. Based upon the tenant's comments, DHCR re-verified the tenant's income with the DTF. Big surprise – upon re-verifying the tenant's income, DHCR found the tenant's income to be below the threshold amount required to deregulate an apartment. Based upon the verification of the tenant's new income, DHCR denied the

Owner's luxury deregulation petition.

Both the Supreme Court and the Appellate Division ruled in favor of the tenant on judicial review. The Court of Appeals, however, reversed and held the following:

Here, tenant filed an amended tax return after DTF verified that the tenant's income exceeded \$175,000. The tenant never challenged the accuracy or validity of the original verification that had been submitted, which reflected that the income was over \$175,000 for the subject years. Rather, tenant utilized the statutory comment period to bring the

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amended tax return to DHCR's attention. Tenant simply noted that an amended tax return would support her assertion that the apartment was not eligible for deregulation. She did not provide an explanation as to why an amended return had been filed or how the amended return differed from the return on file at the time of DTF's original verification. Tenant's Answer essentially amounted to a request for a "Do-over," rather than a comment on DHCR's proposed order."

DHCR's ruling cannot stand as it invites abuse of the luxury decontrol procedures which

contemplate a single verification, the result of which is binding on all parties unless it can be shown that DTF made an error." (Emphasis added.)

BBW&G believes that the Court of Appeals decision was correct, but does not consider another scenario: What will happen if DHCR verifies that a tenant's income is below the two-year-\$175,000 threshold, but then the tenant later amends its return (voluntarily or via Internal Revenue Service ruling) so that the income now exceeds the threshold amount necessary for DHCR to issue an Order of Deregulation? In such a situation, the tenant's false initial filing protects regulated rights to which the tenant is not entitled, and

effectively defrauds both the owner and New York State. Perhaps the legislature will take notice of the Court of Appeals ruling and close the gaps that permit tenants to evade luxury deregulation.

*This article was written by Joshua Losardo, an associate in BBW&G's Administrative Law Department.*



Joshua Losardo

## BBW&G News

Both *The Real Estate Weekly* and *The Journal News* reported BBW&G Transactional Department partner **Howard Wenig's** appointment to the Business Development Board of **Hudson Valley Bank**.

Administrative Law Department Partner **Sherwin Belkin** was quoted in the *New York Times' Sunday Real Estate Section* "Q&A" column regarding the relationship between the unambiguous terms of a lease, and contrary representations that may have been made by a leasing agent. Mr. Belkin, who is a Certified State Instructor, also lectured at **The Real Estate Board's** broker's qualifying course on rent regulation and fair housing laws.

**Magda Cruz**, BBW&G Appeals Department partner, will be a featured speaker at the **Rent Stabilization Association's** spring seminar. Ms. Cruz will discuss the rights, rules and obligations pertaining to owner occupancy proceedings against rent regulated tenants.

Appeals Department associate **Jay Berg** has been invited to act as a judge in **Yale Law School's** International Mock Trial Tournament.

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