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Are same-sex married couples in New York entitled to automatic survivor ownership of their co-op shares if one of them dies?

BACKSTORY A co-op in New York City that has always had set policies regarding how stock in apartments may be held had an interesting question arise regarding how stock should be held by two same-sex individuals now that the Marriage Equality Act had passed, granting same-sex couples the right to marry. The policy of this co-op is to require all shares with more than one shareholder listed on them be held as joint tenants with right of survivorship. However, the co-op will make exceptions

when shareholders complete an application and explain the basis for a different form of ownership. Normally, the exception that arises is for the stocks to be held by married couples as Tenants by the Entirety.

With the passage of the Marriage Equality Act, an issue arose at this co-op when two long-term same-sex shareholders wished to change the stock for their apartment. They had held stock as Tenants in Common without any right of survivorship, which they wanted

to change into a Tenancy by the Entirety. The board of directors had no objection, but realized that the issues created by the Marriage Equality Act affected all shareholders and the co-op's policies regarding how stock could be held. In addition, the board wanted to ensure that it did not inadvertently create a discriminatory policy or violate any of the federal or state human rights laws.

Tenancy by the Entirety, which is ownership of property by a married couple, creates an automatic right of survivor ownership. This is to say that when one of the individuals to the marriage dies, his or her interest automatically passes to the surviving spouse. This right, under marriage, has its basis in English Common Law, but did not apply to cooperative shares until January 1, 1996, with the passage of the New York State Estates, Powers and Trusts Law (EPTL). The EPTL uses the gender-specific titles of husband and wife, but is legally interpreted to mean a married couple, which now under New York law includes same-sex couples. Therefore, married, same-sex couples would be deemed to have ownership as Tenants by the Entirety, which includes the automatic passage of ownership of the interest of a deceased spouse to the surviving spouse. Accordingly, boards of directors and their managing agents should be aware of the nuanced changes this creates in dealing with ownership of stock when a spouse dies.

In this particular case, the issue of how to deal with ownership was resolved in a fairly straightforward manner. Both shareholders of record

had been owners of the stock and proprietary lease prior to January 1, 1996, and therefore the Marriage Equality Act, deeming them a married couple, had no real effect and would not create a Tenancy by the Entirety. The couple owned their shares without any liens or security agreements, and the matter was resolved by simply reissuing the stock in their names, denoting them to be Tenants by the Entirety, with a stock issuance date of this year.

However, in the great majority of these cases, the stock will have been issued after January 1996, creating a Tenants by the Entirety issue, and it is likely those shares will be burdened with liens and security agreements making reissuance difficult.

COMMENT Boards should be aware of the issue of stock ownership and its consequences. Specifically, it is important that boards understand the various ways title to stock may be held, and equally important that they understand the consequences of that ownership. Boards that understand and take preemptive action on how stocks are held, and create policies for dealing with stock transfers – especially at the time of death – often reap huge benefits. It has been our experience that both boards and shareholders suffer when this issue is not addressed in advance. The co-op often expends considerable time and money to deal with resolving stock ownership when a shareholder dies; and more importantly, the surviving shareholder and family members often suffer financial and emotional hardships. ■