

Real Estate Contracts: Right of Assignment



By Brian Madigan LL.B.

The peculiar aspect of executory contracts has a significant effect on the basic common law doctrine.

Ordinarily, contracts are assignable by the buyer without the seller's consent. However, that general principle is subject to numerous conditions.

An executory contract is an agreement which contemplates a closing or completion at a later point in time.

The ability of the purchaser to close at the pre-agreed time is a condition and a risk which the seller has assumed in the agreement. The seller has not agreed to sell at some future point in time to an impecunious assignee. That was not part of the deal.

So, this type of contract could only be assigned upon certain conditions:

- 1) the assignment is with recourse, or
- 2) the full purchase price is paid immediately, and any and all other conditions are otherwise fulfilled.

Nevertheless, the seller still need not execute a conveyance until the actual closing date.

To say that a seller has the right to assign should there be no mention of such a right in the agreement is something of a misnomer. True and proper assignment at law is an assignment without recourse. That right exists only if it is negotiated as part of the agreement.

Upon closing, it is quite common for purchasers to provide a Direction concerning title; that is, what name does the buyer want to have on the Deed. A purchaser might say: put the title in my company's name, put the title in my name and my wife's name as joint tenants, put the title in the name of a partnership between myself, X and Y. These directions, are actually partial assignments. However, they are assignments with recourse, not without recourse.

Consequently, in order to be certain, both parties should properly deal with the matter of assignment in the agreement:

- 1) if the seller wishes to exclude it, the seller should say so,
- 2) if the buyer wishes to include it, the buyer should say so.

In both cases, there are proper forms for use.

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