

SELLER DISCLOSURE ACT RESPONSIBILITIES OF NON-OCCUPANT SELLERS

In a recent Michigan case, the sellers of a home, the Zimmermans, were suffering from dementia and living in an assisted living facility.¹ Their daughter, Lynn, who lived out of state, had her parents' power of attorney and was handling the sale of the home on their behalf. As part of that transaction, the daughter filled out the seller's disclosure form despite the fact that she knew "practically nothing about the home." On the seller's disclosure form, Lynn answered many of the questions "unknown" and, despite the form's instructions, left several questions blank.

The eventual buyers of the home discovered a number of defects after they moved in and sued, claiming that the information in the seller's disclosure form had been fraudulent. Interestingly, and presumably because the daughter had signed the seller's disclosure form in her capacity as attorney-in-fact, the court looked for evidence that "anyone in the Zimmerman family" had been aware of the alleged defects. Since the buyers had no evidence that any family member was aware of any of the alleged defects, the buyers' case was thrown out.

While the sellers prevailed in this case, the court's analysis could have led to an unfair result. Suppose that prior to their illness, the parents had been aware of one or more of the defects, but that this information was unknown to Lynn. Would it then be the case that the Zimmermans would be liable because their daughter unknowingly failed to disclose the information in the seller's disclosure form?

The daughter in this case was not required to fill out a seller's disclosure form just because she had her parents' power of attorney. The power of attorney gave her authority to act on her

¹ *Locher v Estate of Bradley M. Zimmerman*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2020 (Docket No. 346566); 2020 WL 815781.

parents' behalf; it did not give her the authority (or ability) to make representations on their behalf. And, of course in this instance, her parents were in no position to complete the seller's disclosure form themselves. While the Seller Disclosure Act does not address this latter situation, if it is known to you that your seller is not competent to testify, then do not ask them to complete the seller's disclosure form. Indicate in the MLS that the form is "unavailable" and (very) briefly explain the situation to potential purchasers. Again, there is no express exception under the statute in the case of legally incompetent sellers; the legal analysis is simply that in this situation, performance is impossible.

Suppose that the Zimmermans died before their home was sold. If their estate sold the home, then the transaction would be exempt from the Seller Disclosure Act. No form is required in the case of a transfer by a nonoccupant fiduciary in the course of administering an estate.² (Nor is the estate required to provide a form indicating that the sale is "exempt.")

On the other hand, suppose Lynn Zimmerman herself took title to her parents' home after her parents died. Lynn's subsequent sale of the home is not exempt even if she never moves in and puts it up for sale immediately. Could Lynn simply fill out the seller's disclosure form indicating that she "has never lived in the home and knows nothing about the condition?" Yes, but only if it is actually true that she knows nothing about the condition of the home. Just because a seller has never lived in a home does not excuse the seller from disclosing what he or she does know. So, for example, if one of Lynn Zimmerman's parents had complained to her about the leaking basement, she would have an obligation to disclose that information. Likewise, if the basement had leaked while she was visiting. Note that in this instance, the focus would not be on

² MCL 565.953(d).

what the parents had known about the condition of the home but what Lynn Zimmerman herself had known.

When completing a seller's disclosure form, sellers (and Realtors®) must remember that it is fraudulent to assert that you have no knowledge as to the condition of something if, in fact, it is not true. If, for example, the sellers know that their roof leaks, it is fraudulent to represent that it does not leak. It is no less fraudulent for the sellers to represent that they do not know if the roof leaks. Both statements are false.

To summarize, remember that the fact that sellers have never lived in the home does not relieve them of their obligation to provide a seller's disclosure form. It is not enough to say that they have never lived in the home as these sellers would still have an obligation to complete the seller's disclosure form. Such sellers could indicate that they have never lived in the home and that they know nothing about the condition of the home, so long as that statement is actually true. It would seem to be a rare instance in which a seller who has never lived in the home would have absolutely no knowledge as to the answers to any of the questions on the seller's disclosure form. A landlord who has never lived in a home, for example, is nonetheless likely to know quite a bit about the condition of a home. A seller who has purchased a home for the purpose of renovation and resale is also likely to know quite a bit about the condition of the home.

And lastly, no one, not even a person with the seller's power of attorney, should ever fill out a seller's disclosure form on the seller's behalf.