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Successors and assigns: Does it mean what it says?



By Kevin L. Shepherd

Edward R. Murrow once remarked that “[t]he obscure we see eventually. The completely apparent takes a little longer.” Such is the case with a Maryland statute, codified in the Real Property Article of the Annotated

Code of Maryland (“RP Article”), that received no attention by Maryland appellate courts in two recent cases where it could have played a decisive role. This situation has left Maryland real property practitioners at a loss to understand how best to draft real estate documents in light of these cases.

Obviously, a bit of explanation is in order.

This is a curious and perplexing story about a Maryland statute that has been treated by the Maryland appellate courts as though it did not exist. It has been on the books for well over three decades, but from all appearances it has been cited just a single time (and then only in a footnote) by Maryland’s appellate courts.

Unlike other statutes that have been relegated to the dustbin of obscurity, it is a mistake to treat this statute as obscure or obsolete. This statute, rather, suffers from the failure of the bar and the courts to understand its significance and importance in real estate transactions.

The statute in question is §1-103 of the RP Article. This 53-word statute, which originally was codified as §1-104 of former Article 21, provides in full as follows:

Unless otherwise expressly provided, any obligation imposed on or right granted to any person automatically is binding on or inures to the benefit of his assigns, successors, heirs, legatees,

and personal representatives. However, this section is not to be construed to create or confer any rights of assignment where none would exist otherwise.

According to the annotations to §1-103, this statute has been cited just a single time, in 2004, by the Court of Appeals, where it was referenced in a footnote. *Jurgensen v. New Phoenix Atlantic Condo. Council of Unit Owners*, 380 Md. 106, 117 n. 11 (2004). To understand the context of this reference to the statute in footnote 11 in *Jurgensen*, it is necessary to review an earlier decision by the Court of Appeals that seemingly ignored this statute in its entirety.

Park Station: The genesis of the problem

In a 2003 decision, the state’s highest court considered whether the absence of the words “successors and assigns” had any effect on the Rule Against Perpetuities in a paragraph (paragraph 12) that contained a right of first refusal to purchase real property located in Anne Arundel County. *Park Station v. Bosse*, 378 Md. 122 (2003).

The *Park Station* court noted that some paragraphs (namely paragraphs 6 and 7) in the contract contained “successor and assign” language while others did not. The court further observed that the contract contained a paragraph (paragraph 10) stating that the “easements, restrictions, benefits, and obligations” under the contract bind the respective “successors and assigns” of the parties.

Based on this seeming hodgepodge of successor and assign language, the *Park Station* court reasoned that paragraph 10, the “general” successor and assign provision, was intended to apply to those con-

tractual provisions that involved the “day-to-day use” or the governance of the property in question. By contrast, the two paragraphs that contained specific successor and assign language (paragraphs 6 and 7) did not, in the court’s view, concern the daily use of the properties. Rather, these paragraphs dealt with an injunction to restrain a violation of the contract and an amendment to the contract.

In the face of this “daily use” distinction, the court found that the right of first refusal paragraph (paragraph 12), which did not contain specific successor and assign language, fell into the non-daily use category because it “grants an interest which can only vest one time in the future.” As a result, the court ruled that paragraph 12 “was intended to be personal and was not intended to encompass successors and assigns.” *Id.* at 137.

In support of the proposition that rights of first refusal are presumed to be personal and are not ordinarily construed as assignable unless the granting clause refers to successors and assigns or the instrument otherwise clearly shows that the right was intended to be assignable, the *Park Station* court cited a lengthy list of cases from a number of other jurisdictions. But nowhere did the court refer to or cite §1-

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103, a specific Maryland statute dealing with successors and assigns in real estate matters. Why?

Jurgensen, decided less than four months after *Park Station*, provides a partial explanation and interesting insight.

In the course of discussing whether a party's successors and assigns should have exclusive rights to a parking space in a condominium project in Ocean City, the *Jurgensen* court referred to *Park Station* and its analysis of the successor and assign issue in the Rules Against Perpetuities context. The *Jurgensen* court explained in a lengthy footnote that §1-103 was neither briefed nor argued before the *Park Station* court.

Interestingly, the *Jurgensen* court noted that "nothing in *Park Station* was intended to, or did, affect the applicability of that statute." *Jurgensen*, 380 Md. at 117 n. 11. The *Jurgensen* court sought to draw the distinction that *Park Station* simply involved a case where the successor and assign language is present in some paragraphs but absent in others. The *Jurgensen* went on to emphasize that "Section 1-103 remains applicable in all respects wherever, and whenever, it was applicable prior to our discussion in *Park Station*." *Id.*

The boilerplate conundrum

A recent unreported decision by Maryland's intermediate appellate court embraced *Park Station*'s successor and assign analysis in a case involving the Rule Against Perpetuities in the context of a right of first refusal contained in a real estate buy-sell agreement. *Harrison v. Harrison*, Md. Ct. Spec. App. No. 1550, Sept. Term 2004 (decided Jan. 11, 2006). The agreement contained a general successor and assign provision, but the *Harrison* court found that the "boilerplate" successor and assign paragraph did not apply to the right of first refusal:

The reference to "successors and assigns" in paragraph 16 of the Agreement is typical, standard "boilerplate" language found in nearly every written contract. In our full reading of the [A]greement we find nothing to lead us to the conclusion that that language somehow relates to the right of first refusal. The "successors and assigns" terminology is insufficient to overcome the presumption that the right of first refusal is personal; therefore, the parties did not intend to make the right transferable to successors and assigns. *Id.* at pp. 11-12.

Again, as in *Park Station*, the *Harrison* court nowhere mentioned §1-103 in its analysis even though the *Jurgensen* court indicated that it remained alive and well after (and before) *Park Station*.

Park Station and now *Harrison* (albeit an unreported decision having no precedential value to non-parties) raise a serious concern among the Maryland real estate bar about whether a general, omnibus "successor and assign" provision in a real estate contract does not operate to make contractual rights and obligations bind the contracting parties' successors and assigns.

Park Station indicated that practitioners need to analyze whether a particular contractual provision would affect the "day-to-day use of the property." If so, a general successor and assign provision may suffice. But if the provision in question does not relate to the day-to-day use of the property, the practitioner must include specific successor and assign language in the contract provision in question for that provision to bind successors and assigns of the contracting parties.

Left unanswered by *Park Station* is the issue of whether the parties can draft a "super" successor and assign provision that would overcome any presumption that it was not intended to apply to some, but not all, contractual provisions.

How specific and overreaching would such a provision have to be? Would it have to be contained in a separate section in a contract rather than in the miscellaneous section? Would it have to be in capitalized letters in bold font typeface? Would parties have to initial this specific provision? Would the parties have to place the provision immediately before the signature blocks for the parties so as to highlight its importance? Would parties have to formulate specific language to make crystal clear that the successor and assign provision applies to every contractual provision and disclaim that it applies to some, but not all, of them (even if some provisions may contain separate successor and assign language)?

Also left unanswered by *Park Station* and its progeny is exactly why a general successor and assign provision is insufficient to apply to the entire agreement, even when some provisions include specific successor and assign language and others do not? A general successor and assign provision, although dismissively styled by the *Harrison* court as "boilerplate," is not mere ornamental language in a contract. It is to be given meaning and effect as other contractual provisions. No conflict is created within a document that contains a general

successor and assign provision as well as certain provisions that contain separate successor and assign language. Inattentive drafting may be the culprit in these cases rather than some grand design to have the general successor and assign provision apply to "daily use" while not apply to other non-daily use provisions.

The "daily use" analysis is impracticable and will eventually lead to conflicting results. For example, one can imagine a situation where a monthly, quarterly, or annual reporting obligation under a real estate agreement would not be viewed as falling within the "daily use" category. In that situation, *Park Station* would seem to dictate that a general successor and assign provision may be insufficient to apply to that provision. And what if a "daily use" is coupled with a non-daily use in the same contractual provision? What rule governs then?

The artificiality of the distinction is unworkable in practice and will undoubtedly lead to odd and unpredictable results. For those reasons, the *Park Station* analysis is difficult to embrace and understand, both practically and theoretically.

Does §1-103 Apply?

The omission of any reference to §1-103 in *Park Station* and *Harrison* suggests that those courts found that statute inapplicable. Perhaps they were unaware of §1-103, but believed it applies only to statutes in the RP Article, and not to private contracts. But is that the case? Section 1-103 is part of Title 1 of the RP Article and is styled as "General Provisions." By its terms, §1-103 states that "[u]nless otherwise expressly provided," obligations and rights automatically bind on and inure to the benefit of a person's successors and assigns, among others. Unlike other provisions in Title 1, §1-103 does not refer to "in this article" when discussing their applicability. For example, §1-102 states that "*whenever this article* states that a fact is presumed, the presumption is rebuttable" unless otherwise expressly provided. (Emphasis added.)

To like effect is §1-101, which states in pertinent part that "[i]n *this article* the following words have the meanings indicated unless otherwise apparent from context." (Emphasis added.) For that reason, §1-103 was arguably intended to apply to both the RP Article and private contractual agreements. Unlike §§1-101 and 1-102, there is certainly no textual support of the view that §1-103 is

limited to statutory provisions contained in the RP Article.

If §1-103 is to be read into every real estate contract in Maryland, one may question whether it is even necessary to include an omnibus successor and assign provision in such a contract. Because the General Assembly may modify the statute and to reinforce the intent that the entire contract is to bind the parties' successors and assigns, the better practice is to include an omnibus successor and assign provision in every contract. From a drafting standpoint, if a

provision is intended to be personal rather than binding on a party's successors and assigns, the contract should specifically state so.

Conclusion

The "daily use" test minted by the *Park Station* court is unworkable and impractical. The later *Jurgensen* decision tried to explain away the *Park Station* court's oversight of §1-103, but the "daily use" test for successor and assign provisions still appears to be controlling Maryland law despite its glaring short-

comings.

Jurgensen pronounced §1-103 alive and well and that simple statute should be accorded the respect its due. Unless and until the General Assembly limits the scope of §1-103, Maryland courts should be mindful of this statute in the future in any case involving successor and assign provisions in real estate contracts.

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