

LIFE ESTATES AND PERSONAL RIGHTS OF RESIDENCE

By Darryl Browne



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A testator may gift an interest in property, including real estate, in various ways. Apart from an absolute gift, the testator may give a life estate or its enhanced version: a portable life estate, or a personal licence allowing the beneficiary to merely reside in the property. The type of interest conferred by the will always depends on divining the testator's intention. Primary attention must be given to the text of the whole will, although other evidence of the testator's intention is allowed in limited circumstances under s 32 of the *Succession Act 2006* (NSW) and the common law.

Absolute gift

If the will gives an interest in property to a beneficiary with provision for the property to later pass to another beneficiary, it is unlikely that an absolute gift is conferred. This was the case in *Zuleva as executor of the estate of Grizun v Zuleva* [2015] WASC 410, where the (homemade) will stated 'I leave to them [the property] – after my death – while they are alive – and after their death it goes to Vince's son Paul and to his male children'.

The court stated that the words did 'not permit the conclusion that the gift was absolute'.

Life estate

A life estate is a proprietary right. As such, generally it may be transferred, leased or mortgaged. It is a right capable of sustaining a caveat (see for example, *Estate of JA Gilmore, deceased* [2014] NSWSC 1263). It often has significant value.

The words which most commonly signify a life estate are 'occupy' and 'use', either separately or together, including their derivatives (*Re Keenan; Ford v Keenan* (1914) 30 WN (NSW) 214 and *Re Hillier, Primrose v Kewley* [1939] NSWStRp 4; (1939) 39 SR (NSW) 71).

A recent instance is *Finlay v Tucker* [2015] NSWSC 560 where the will

Snapshot

- When construing a will, attention should be given to the whole of the will to ascertain the testator's intention.
- A life estate creates an interest in the property which may be sold, mortgaged or leased. A life estate is usually conveyed by the words 'occupy' and, better still, 'occupy and use'.
- A portable life estate gives the life tenant flexibility to find alternate accommodation if the need arises.
- A personal right of residence is often conferred by words like 'reside', 'live' and 'remain'.

directed 'that my wife shall during her lifetime have the right to occupy any house being the matrimonial home of which I am seized as at the date of my death'.

Testators do not always wish to confer this proprietary right, but before considering a lesser right, three further things can be observed.

Firstly, the use of the word 'occupy' will not always create a life estate. The whole will must always be considered. In *White v Arizon Pty Ltd* [2003] NSWSC 1051 the vital part of the will gave 'the right to occupy the ... property "whether as their place of residence, continuously or otherwise"'. The court decided that the words 'or otherwise' suggested that the testator intended to create something less than a life estate.

Secondly, the fact that expenses usually born by the remainderman are imposed on the beneficiary or the estate, such as maintenance, repairs, rates or taxes

in relation to the property, is not likely to mean a different interest in property is conferred (*Finlay v Tucker*). However, it is preferable for the will to specify the person(s) who bears the burden of these expenses. This aspect should therefore be brought to the client's attention when obtaining instructions for the will. Other questions may then arise, such as 'who monitors compliance?' and 'what are the consequences of breach?'. On the other hand, leaving those expenses to the estate or remainderman will not always produce a utopian outcome. So this aspect deserves particular care when will drafting.

Thirdly, a portable life estate is an enhanced version of a life estate that allows the beneficiary to change the property to which the right attaches when the needs of the beneficiary change.

Portable life estate

The portable life estate (explained above) may attach to a house but be changed to a unit and then a retirement village and the like. In the context of Testator Family Maintenance and Family Provision jurisdictions, a portable life estate is often called a Crisp order (after the decision in which it was first ordered, *Crisp v Burns Philp Trustee Company Ltd* (NSWSC, 18 December 1979, unreported, Holland J)); *Milillo v Konnecke* [2009] NSWCA 109.

An attraction in the setting of family provision claims is that it provides 'adequately for the [beneficiary's] needs in life whilst preserving the essential scheme that the testator clearly desired to take effect' (*Paradis v Kekatos as executor of the estate of Paradis* [2016] NSWSC 220).

Whilst a court will take this into account when formulating a Crisp order, a solicitor should still advise the testator, when obtaining instructions, that a portable life estate is likely to further postpone the date when the life estate falls in and the remainderman inherits.

Right of residence

A lesser right is a personal right of residence. This is a licence. It cannot be sold or mortgaged, and the property to which it attaches cannot be leased. It is said to have no value to anyone but the beneficiary, and therefore it has no value to creditors of the beneficiary (*Re Hoppe (deceased)* [1961] VicRp 64; [1961] VR 381 and *King v King* [2012] QCA 39; [2012] 2 Qd R 448).

However, this does not mean that it has no value to the beneficiary. As *Secure Funding Pty Ltd v George* [2014] NSWSC 1420 demonstrates, a breach of the personal licence may produce an award of substantial equitable compensation.

As with life estates, certain words often signify the creation of a personal licence. 'Reside' is one such word (*Re Hoppe (deceased)*, *Firriolo v Firriolo* [2000] NSWSC 1039 and *Feeney v Feeney* [2008] NSWSC 890).

'Remain' is another (*Davidson v Cameron* [2015] QSC 294 and *Garbett v Bear* [2015] NSWSC 1524.)

'Live' can also indicate a personal right (*Hurley v Hurley* [1947] HCA 22; *Askew v Askew* [2015] NSWSC 192. The context is everything. Similarly, as to whether there is 'a mere irrevocable licence' (*Stevenson v Myers* (1929) 47 WN (NSW) 94) or 'a personal licence determinable at will' (*J v J* [2015] NSWSC 1984).

Possible longevity

To varying degrees, life estates, portable life estates and personal rights of residence postpone the ultimate inheritance.

An example of the consequence of this is *Edmonds v Morrissey* [2016] NSWSC 342. John Morrissey's will was made in 1938. He died in 1948. His will conferred a life estate on his son. It was almost 68 years later that the Court was required to construe the remainder provision.

Another consequence of a greatly postponed inheritance is illustrated by *Application of Harrett and Cutts* [2016] NSWSC 427. There the testator died in 1954. The Supreme Court made family provision orders whereby the surviving

wife could use the matrimonial home during widowhood. When the widow died in 1996 one of the remaindermen could not be found. After 18 years of searching the court made a Benjamin order authorising a distribution in favour of the remaining beneficiaries.

Careful wording is essential

Lastly, *Boettcher v Driscoll* [2014] SASC 86 emphasises the importance of carefully recording a testator's wishes in legally acceptable terms.

The case concerned the significance of a handwritten document allowing the beneficiary to 'have use of the house for as long as he needs it'. The court found the document would have constituted an 'informal will' had it been legally effective, but that the intended gift was void for uncertainty.

To some, will-drafting is tiresomely technical. The truth is that courts endeavour to achieve practical outcomes. And let's not forget that the technicalities of will-drafting are the reason clients engage solicitors to prepare wills. **LSJ**

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