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Life Estates and Wills *Potpourri*

As Notaries, we are often involved in estate planning—not just the preparation of a Will, but the process of evaluating a person's assets, his or her desire to provide for legal and moral responsibilities, and the plan for the distribution of these assets in a cost-effective manner.

There is no such thing as a "simple Will." Every person has his or her own set of circumstances, assets, and obligations. A prudent Notary will spend a considerable amount of interview time flushing out this information before drafting a Will. Perhaps other documents may be needed to affect the desired outcome.

Serial marriages are commonplace today. Simple "mirrored" Wills (Wills that have the same outcome after both spouses are deceased) are less frequently used because of the need to accommodate the complexities of these new relationships and their resulting children and stepchildren.

One tool that can be used (with caution…see Notes at end of article) to provide for a spouse, without transferring an asset outright, is the *life estate*. A life estate can be granted in a Will or during a person's lifetime. Usually it is granted in the Will because if registered in advance, it can encumber a property unnecessarily.

The following scenario illustrates the problems that can arise. A second-marriage couple registers a life estate for each other in a principal residence they purchased together. They have each paid half the cost of the home and wish to register the title as tenants in common so their interest can be dealt with through their respective Wills. Notwithstanding their desire to pass their equity in the home on to their respective children, they both wish to protect their new spouse from ever being ousted from the nest by disgruntled stepchildren. In a case like this, the couple might register a life estate in favour of each other against their respective interest on title.

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The problem arises when one of the spouses becomes incapacitated through dementia. The property cannot be sold because it is subject to a life estate, which cannot be released until the death of the person with dementia. If the healthy spouse finds it difficult to maintain the house alone and is forced to rent it out, the rental income would have to be shared equally between both parties. If the home is, in fact, a condominium with rental restrictions, it may become an impossible situation for the healthy spouse.

This unfortunate situation could have been avoided if each spouse had granted a specific Power of Attorney to an independent third party who would be authorized, in advance, to release the life estate if certain circumstances arose.

Those circumstances would be laid out in detail in written form so there is a clear understanding of the intent of the document. In this case, if the life estate could be released and the property sold, each spouse would receive half the sale proceeds and presumably, the spouse with dementia would have her share held in an interest-bearing form for her benefit during her remaining lifetime—the amount left over after her death would fall into her estate as planned.

It is important to examine the intent of the parties when considering granting a life estate through a Will. Each party must determine his or her motive and what the desired outcome would be. Whenever possible, I recommend that the testator discuss these issues with family members and come to an understanding of the desired outcome. Then we can prepare documents that will achieve the desired result.

Great care must be taken to determine the intended apportionment of income and liabilities between the *life tenant* and the remaindermen (those people or organizations who will ultimately inherit after the life estate

ceases). The *Trustee Act of British Columbia* provides that, in the absence of contrary intent in a Will, "debts, funeral and testamentary expenses, estate legacy, succession and inheritance taxes or duties, legacies, or other similar disbursements" are to be paid out of the capital.

The specific expenses for which each party is responsible must be made clear. Where it is not expressly written, a life estate in property will require that the life tenant be responsible for routine maintenance, taxes, and utilities. The life tenant is also responsible for interest payments on any mortgage that is on title, but not the capital. The principal balance of the mortgage is repaid by the remainderman when the life estate is finally released.

Repairs, where the benefit will be mutual—such as a new roof, whereby the life tenant stays dry and the remaindermen have an improved asset in the future—are often shared jointly. The residual beneficiaries (remaindermen) are responsible for insurance and improvements. If there is no other residual capital in the estate, these expenses must be met by the remaindermen who may be reluctant to cover these expenses when they have seen no use or enjoyment from the property in question. Indeed, if the life tenant lives a long and hearty life, it may be that the remaindermen, never having had the enjoyment of the property, may be burdened by capital gains if the property grows in value.

While the life tenant is obliged to maintain the property, as the years advance, his or her ability to do so may diminish, causing a great deal of concern and perhaps dissention between the life tenant and the remaindermen. Sometimes, this dissention is legitimate where the life tenant perhaps suffers from substance abuse. At law, the life tenant is responsible for permissive, voluntary, ameliorating, and equitable waste. There could be a very fine line between what is normal wear and tear and what is waste, especially if the lifestyle of the former spouse was equal to that of the life tenant.

When considering the life estate as a planning tool, take care to determine and record who is responsible for the various aspects of the daily expenses, care, and maintenance of the property; try to provide enough direction to avoid conflict between the two parties. For obvious reasons, I recommend that an independent third party be appointed as the executor and trustee in the case where a life estate is provided for in a Will. ▲

Notes

A recent judgment by the BC Court of Appeal has opened the question of whether a life estate is equitable. In some instances, such as first and long-term marriages, it may not be and could be challenged under the *Wills Variation Act*. There is an excellent section in the Notaries Prepatory Course on the subject of life estates, and a very detailed commentary in *The Law of Trusts in Canada* by Professor D. W. M. Waters.

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