



GIVING REAL PROPERTY SUBJECT TO CONDITIONS: PART 1

By Suzana Popovic-Montag - May 2023

During the estate planning process, it is not unusual for a client to want to give a gift with strings attached. Both this month's and next month's Solicitor's Tips will consider conditions that may be placed on a particular type of gift – real property.

If real property is given but not subject to conditions, the recipient will receive an absolute interest in that property which is alienable, meaning that the recipient may dispose of the property as he or she chooses. If, however, a client wants to give land subject to conditions, such as requiring the beneficiary to: (i) keep the property for a specific amount of time before he or she can sell it, (ii) hold the property in trust for the benefit of a third party for a limited time, (iii) live in the property, or (iv) use the property in a particular way, the client ought to be advised as to the validity of such conditions. The circumstances under which a testator who gives real property may "rule from the grave" tend to vary from case to case.

This Solicitor's Tip focuses on the validity of the first two types of conditions described above. The next Solicitor's Tip will focus on the latter two conditions.

An Absolute Interest in Property Cannot Be Subject to Conditions

If the testator gives an absolute interest in a piece of property, he or she cannot, at the same time, impose a condition that would deprive the recipient of a right recognized by law as being part of the essential nature of that property interest.¹ For example, a gift of real property cannot be subject to a condition that the property will not be sold "as long as grass grows and water runs." Such a condition involving an absolute interest in property would be repugnant by restricting the alienation of the real property, and would therefore be void.²

Accordingly, a condition that bars the recipient of real property from transferring or selling the property for a specific period of time ought to be invalid. A testator cannot impose limitations upon the beneficiary after title has vested if those limitations conflict with the legal entitlements of absolute ownership.³

Such a condition would also be a condition subsequent, meaning that the gift would vest after the testator's death, but terminate should a specified event come to pass. As a void condition subsequent, the gift may still be perfected – it would simply vest in the beneficiary without any condition.⁴

¹ See, for example, *Re Malcolm*, 1947 CanLII 335 (ON SC).

² See *McEachern v. New Brunswick Housing Corp.*, 1991 CanLII 2657 (NB KB).

³ See Ian Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Markham, Ontario: Butterworths, 2000) at para. 16.9.

⁴ *Ibid.* at paras. 16.2-16.3.

A Limited Interest in Property May Be Subject to Conditions

The analysis changes if the testator gives an absolute gift of a limited nature. For example, in *Gough v. Leslie Estate*, the Court of Appeal of Nova Scotia confirmed that a beneficiary may inherit real property subject to a secret trust, which requires him or her to temporarily hold the property for the benefit of a third party.⁵ If a trust modifies an otherwise absolute gift in a will, the principle of repugnancy will typically not be engaged, as there is no restraint on alienation if a full interest in the property is not given.⁶ Under those circumstances, the repugnancy principle will only apply if there is a contradiction in what is granted.⁷ For the purposes of this particular example, it also warrants noting that a beneficiary must first accept the obligation imposed by the secret trust for the trust to be enforceable.⁸

In *Bergler v. Odenthal*, the British Columbia Court of Appeal also confirmed that a secret trust may sever a joint tenancy.⁹

Summary

As demonstrated by the examples described in this Solicitor's Tip, the conditions that a testator can impose on a gift of real property depend on the particular circumstances of each individual case and what exactly is being gifted and on what terms, if any. However, as a general rule, if a testator gives an absolute interest in a piece of real property, the testator cannot also impose restrictions on the gift. If, however, a testator only gives an absolute gift of a limited nature, such as a gift subject to a trust, it is possible for restrictions to be imposed. When an estate planning client's instructions are not clear as to the intended nature of a gift and whether any requested conditions are valid, it is important to consider whether a similar situation has been reviewed by the courts and to advise clients of possible implications of a void condition.

⁵ *Gough v. Leslie Estate*, 2022 NSCA 25 at paras. 69-71 [*Gough*].

⁶ See *Cook v. Nova Scotia*, 1982 CanLII 5353 (NS SC).

⁷ *Gough*, *supra* note 5 at paras. 70-71.

⁸ To learn more about secret trusts, see *Gefen Estate v. Gefen*, 2022 ONCA 174 at paras. 45-50.

⁹ *Bergler v. Odenthal*, 2020 BCCA 175 at para. 36.

