



GIVING REAL PROPERTY SUBJECT TO CONDITIONS: PART 2

By Suzana Popovic-Montag - June 2023

Picking up from where we left off with last month's Solicitor's Tip, this month we return to the topic of conditions that a testator can place on a gift of real property. This month, we explore whether a testator can make a gift of real property conditional on a beneficiary: a) living in the property, or b) using the property in a particular way.

Conditions May Be Imposed on a Limited Property Interest

To reiterate a point from last month's Solicitor's Tip, conditions can be placed only in respect of a gift of real property if the beneficiary is given a limited interest in the property. If a testator gives a beneficiary an absolute interest in a piece of real property, conditions cannot be placed on that gift, as a full interest in real property is inalienable.¹ Accordingly, a testator may require a beneficiary to live in a property given as a gift, or require the beneficiary to use a piece of real property in a particular way, as long as the gift is of a temporary nature and the property is subsequently given to an ultimate beneficiary, or otherwise disposed of in another manner.

Gifting a Temporary Home

There are two types of proprietary interests that a testator may give if the testator wants a beneficiary to temporarily live in his or her home: either a life interest in the property, or a licence to live in the home. A licence does not confer on, or vest in, the licensee any title or estate in the property, whereas a life interest gives a beneficiary the right to possess and use the property, subject to restrictions articulated by the donor.²

Care ought to be taken when drafting a will to make it clear whether the testator is giving the beneficiary a life interest in the property or simply a licence. If the type of interest given is unclear after the testator is gone, the court will determine the nature of the gift based on a contextual analysis and an examination of the language used in the will.³

When drafting the testator's will, care also ought to be taken to ensure that the conditions pertaining to living on the property are clear, otherwise they may not be enforceable. In that case, the consequences that follow will depend on whether the beneficiary was given a life interest in the property or a licence. If the condition is unenforceable because it is vague, the recipient of a life interest may receive an unencumbered life interest in the property, contrary to

¹ See, for example, Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) [Waters] at 8.IV – Trusts Contravening Rules of Law Restricting Certain Modes of Disposition, where the authors note: "The right to alienate, for instance, by sale or gift, is one of the attributes of having an absolute interest."

² See *Barsoski v. Wesley*, 2020 ONSC 7407 at para. 19, quoted in *Barsoski Estate v. Wesley*, 2022 ONCA 399 [Barsoski CA] at para. 9.

³ *Ibid.* at paras. 38-39, quoting *Lecky Estate v. Lecky*, 2011 ABQB 802 at para. 153.

the testator's intention. On the other hand, if a condition placed on a licence to use the property is unenforceable because it is vague, the condition will fail and the licence will be unenforceable. Both potential outcomes were addressed in *Barsoski Estate v. Wesley*.⁴

Stipulating How Property Is to Be Used

Similar to stipulating that a beneficiary live in a home given through a bequest, a testator can also use a trust to impose a requirement that a beneficiary use a piece of property in a specific way. For instance, a testator may give a beneficiary a piece of farmland subject to the condition that the beneficiary continue to farm the land.

When a bequest hinges on the beneficiary using a piece of real property in a specific way, however, the testator cannot direct that the gift be used for a purpose that is illegal or contrary to public policy. The testator also cannot impose a condition that is impossible to perform.⁵ Under such circumstances, the gift will fail. For example, if a testator gives an interest in a property subject to a condition that the property be used in a specific way, such as requiring a building to be used as an apartment complex, the gift may fail if the condition is impossible to perform, such as if the property cannot be zoned for use as apartments.

It also warrants noting that, even if a bequest is valid and the testator has not instructed the beneficiary to use the property in a way that is impossible, illegal, or contrary to public policy, enforcement of a gift of this nature can be problematic. Unless someone takes an interest in ensuring that the trust property is used in accordance with the testator's directions, any condition relating to the use of the property may go unheeded. As noted by Donovan Waters:

A purpose is not a legal personality, and from this a number of consequences flow. It cannot compel the trustees to carry out the terms of the trust, it has no capacity to deal with its beneficial interest ... A corporation never dies, unlike the lot of human beings, but being a legal personality and capacitated it can deal with its interest as it wishes. A purpose cannot do that.⁶

⁴ See *Barsoski CA*, *ibid*.

⁵ See Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (loose-leaf) at §§ 16.43, 16.57.

⁶ *Waters*, *supra* note 1 at 8.IV – Trusts Contravening Rules of Law Restricting Certain Modes of Disposition.