



## WILL DRAFTING THAT SELLS: WHEN TO USE AN OPTION TO PURCHASE VERSUS A RIGHT OF FIRST REFUSAL

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While estate planning often focuses on testamentary gifts, it can also be used to anticipate and direct the sale of estate assets after the testator has passed away. If a client wants to give a specific person (or persons) an opportunity to purchase an asset, the will can be drafted to give them either a right of first refusal or an option to purchase.<sup>1</sup> This month's Solicitor's Tip focuses on the difference between these two types of rights, and how to assist clients in choosing between an option to purchase and a right of first refusal when creating an estate plan.

### What is the Difference Between an Option to Purchase and a Right of First Refusal?

A right of first refusal and an option to purchase are similar and may be easily confused, but they are in fact two distinct types of rights.<sup>2</sup> On one hand, a promise not to convey property without giving the holder of a right of first refusal an opportunity to purchase it is a contractual or personal right – it does not create an immediate interest in the property. The property owner only agrees to allow the right holder the first opportunity to acquire the property should the owner decide to sell. In comparison, an option to purchase creates an immediate interest in the affected property, such that the optionee can compel a conveyance of the property to themselves.<sup>3</sup>

Accordingly, if a will includes an option to purchase, the estate trustee must sell the affected property and give the optionee the first opportunity to purchase it in accordance with the terms of the option. If the estate trustee does not comply with the terms of the option, the optionee could turn to the courts to compel the estate to sell the asset in light of their interest in the property. A right of first refusal, in comparison, cannot be enforced in the same manner unless the estate trustee proceeds to sell the affected property and accepts an offer of purchase from a third party.<sup>4</sup> Under these circumstances, the right of first refusal would be converted into an option to purchase and would then be enforceable as an equitable interest in the affected property.<sup>5</sup>

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<sup>1</sup> For more information regarding options to purchase related to the sale of a business, see Suzana Popovic-Montag, "Drafting Tips for Wills that Include an Option to Purchase Clause" *Solicitor's Tip* (July 2024), online: Hull & Hull LLP <<https://hullandhull.com/2024/07/solicitors-tip-july-2024/>>.

<sup>2</sup> In *Yurkiw Estate*, 2011 ABQB 97 at para 23, Justice Veit observed that "even the decisions of some courts fail to distinguish between an option and a right of first refusal."

<sup>3</sup> *Kadyschuk v Sawchuk*, 2006 MBCA 18 at paras 19-20, quoting Paul M. Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70 Can Bar Rev 1 at 2. See also *Benzie v Hania*, 2012 ONCA 766 at para 67 [*Benzie*]; *2284064 Ontario Inc v Shunock*, 2017 ONSC 7146 at paras 36-39 [*Shunock*]. These cases address options to purchase and the right of first refusal with respect to land.

<sup>4</sup> *Shunock*, *supra* note 3 at para 39. See also *Brookside Farms Ltd., Re*, 1988 CanLII 3243 (BC SC) at para 11.

<sup>5</sup> See *Benzie*, *supra* note 3 at para 67. In fact, if the property was transferred in breach of the right of first refusal and the transferee took it with notice, the transferee would be liable to be joined and bound by an order of specific performance requiring the owner to transfer the property to the party holding the right of first refusal.

## When to Use a Right of First Refusal

It is advisable to give a right of first refusal in a will if the testator does not want the right holder to have an immediate interest in the affected property, or if it is uncertain whether they want the estate trustee to sell the property. As such, a right of first refusal may be advisable if, for example, the client:

- wants the estate trustee to have the power to sell the property – to pay debts owed by the estate, for example – but otherwise wants the property included in the estate residue;
- wants to make the sale of the affected property conditional on another event occurring, such as a beneficiary disclaiming a testamentary gift that includes the property;
- wants to delay selling the property. For example, before the property can be sold, the client may want to give another beneficiary a life interest in the property;<sup>6</sup> or
- wants to provide multiple persons with the right to purchase the estate property, but also wants to provide this power to each individual one at a time.<sup>7</sup>

## When to Use an Option to Purchase

To give a purchaser an immediate interest in estate property, an option to purchase should be included in the will. For example, an option to purchase would be advisable if the client:

- wants to give one person, such as a spouse, an opportunity to purchase the property;<sup>8</sup>
- only wants to sell the affected property to one person, and otherwise wants it to be divided amongst other beneficiaries as a testamentary gift, if the option is not exercised;<sup>9</sup> or
- wants to give multiple persons an equal right to purchase the affected property simultaneously, such that they can even purchase the property together as co-owners.<sup>10</sup>

If a client wants to be able to delay a sale of estate property indefinitely, an option to purchase is not advisable, since options to purchase are subject to the rule against perpetuities.<sup>11</sup>

## Conclusion

Counsel should take care when advising clients whether to include a right of first refusal or an option to purchase in a will, depending on the client's wishes. If the client does not want a potential purchaser to have an immediate interest in the estate property, or may not want the property to be sold, granting a right of first refusal may be preferable over an option to purchase. On the other

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<sup>6</sup> While an option to purchase could also be utilized in this scenario, it may be advisable to grant a right of first refusal instead to ensure that there are no competing interests in the property during the life tenancy.

<sup>7</sup> There is case law where the testator provided multiple persons an option to purchase an estate asset: see *The Estate of Ingrid Loveman, Deceased*, 2016 ONSC 2687. However, it would make more sense to provide one person with an option to purchase and to provide subsequent persons with a right of first refusal, if the client does not want all parties to have the right to purchase the property simultaneously.

<sup>8</sup> Such an option to purchase was included in the will in *Estate of Shirley Ann Dufour*, 2024 ABKB 525.

<sup>9</sup> See the will before the court in *Yurkiw*, *supra* note 2 at para 26.

<sup>10</sup> See the will before the court in *Janicek v Janicek*, 2018 ONSC 681, *aff'd* 2018 ONCA 679.

<sup>11</sup> An option to purchase is subject to the rule against perpetuities, whereas a right of first refusal is not. See *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409 at para 24.

hand, if the client wants estate property to be sold to only one person and wants that person to have an immediate interest in the property, an option to purchase can be more suitable.