



A MATTER OF TIMING: PUTTING A DEADLINE ON AN OPTION TO PURCHASE IN A WILL

January 2025

For clients who may wish to include an option to purchase in their will, it is also advisable to set a deadline by which the option must be exercised. Admittedly, an option will not fail if a deadline is not included in the will,¹ but a deadline can be handy for encouraging the timely administration of the client's estate.² This month, our Solicitor's Tip addresses a few considerations to bear in mind when selecting a deadline for an option to purchase, and how a will can be drafted with some flexibility, in case an option to purchase is not exercised until after the deadline expires.

Be mindful of how much time may be needed to comply with the will

The first thing to consider when setting a deadline for an option to purchase is how much time the beneficiary will realistically need in light of how the option must be exercised under the terms of the will.³ For example, not much time may be required if the beneficiary must simply communicate their intent to exercise the option to purchase to the estate trustee. In comparison, more time will be needed if the will requires an offer to purchase to be submitted and accepted before the deadline expires, or for the sale of an estate asset to actually close by a specific date.⁴

It is also advisable to consider giving the beneficiary more time than is technically required, as the option may be delayed by circumstances beyond the beneficiary's control. For example, exercising the option may be delayed if a dispute arises between the beneficiary and the estate trustee,⁵ or the beneficiary and other parties who have an interest in the estate.⁶

Determine when the option period will start running

The second thing to consider when setting a deadline for an option to purchase is when the deadline should begin to run. Option deadlines are often linked to either the issuance of a grant of probate or the death of the testator. Of these two, it is usually preferable to have the deadline expire after probate has been granted, recognizing that "it is not unreasonable for a person who has been granted an option to purchase ... under the will to wait until probate has been granted so that there can be no question about the right itself, about possible competing rights, and about

¹ The court may imply a reasonable time frame within which an option to purchase may be exercised: see *Martin v McNabb*, 1981 CarswellOnt 496 (H.C.); *Baldwin v Van Hout*, 2024 ABKB 220 at para 53.

² An option that does not include a deadline may also encourage litigation. See, for example, *Baldwin*, *ibid*.

³ A client's will should also expressly state what must be done in order to exercise the option, to prevent litigation as to whether the option has been exercised. See, for example, *Estate of Ingrid Loveman, Deceased*, 2016 ONSC 2687.

⁴ See, for example, *Estate of Shirley Ann Dufour*, 2024 ABKB 525 [*Dufour*]; *Deziel v. Deziel*, 2024 ONSC 5279 [*Deziel*].

⁵ See, for example, *Muchmaker Estate (Re)*, 2019 ONSC 59, *aff'd Loran v. Weissmann*, 2019 ONCA 962.

⁶ See, for example, *Dufour*, *supra* note 4.

the identity of the person who purports to act as the estate representative.”⁷ Again, how the beneficiary is required to exercise the option may also be a salient consideration. If, for example, the beneficiary must negotiate a sale agreement with the estate trustee in order to exercise the option to purchase, the deadline should not begin to run until probate is granted.

The deadline for exercising an option to purchase may start running upon the death of the testator, however, if the beneficiary is only required to serve the estate trustee with an offer to purchase or a notice of intention to exercise the option. As noted by the Superior Court of Justice, a beneficiary can take such steps before an estate trustee is formally appointed.⁸

Permitting the deadline to be extended

As previously noted, a beneficiary may not always be able to exercise an option to purchase in compliance with the testator’s will by the deadline set therein. If a client wishes to permit the beneficiary to have extra time to exercise the option, their will could be drafted so that the deadline can be extended. For example, the will could give the estate trustee discretion to change the deadline for exercising the option, or the power to delay a sale.⁹ Alternatively, the deadline could be described in the will using precatory language so that it is not binding,¹⁰ thereby also indicating an intent to permit an option to be exercised after the deadline has passed.

If no such terms are included in the will and the deadline for exercising an option is missed, the beneficiary may still apply to the court for relief.¹¹ However, the court may only be able to extend the deadline if such intent is reflected in the will,¹² or can be inferred through the circumstances surrounding the creation of the will using the armchair rule.¹³ If, for example, the will stipulates that the beneficiary must vacate the property by a certain date if the option is not exercised, the court may decline to extend the deadline.¹⁴ Similarly, the court may dismiss a request to extend the deadline if the beneficiary took no steps to exercise the option before the deadline expired.

Conclusion

When setting a deadline for an option to purchase in a will, there are at least three things to keep in mind. First, clients should be cognizant of how much time a beneficiary may need to exercise the option, depending on what the will clause requires them to do. Second, while an option period can begin to run as soon as the client passes away, it is usually preferable to delay the start of the clock until after probate has been granted. Third, it may be a good idea to draft the will so that the deadline applicable to an option to purchase can be extended, in case the beneficiary cannot exercise the option until after the deadline expires, for some reason.

⁷ *Yurkiw Estate*, 2011 ABQB 97 at para 33.

⁸ *Cambareri v Sorrenti*, 2023 ONSC 4918 at para 39 [*Cambareri*].

⁹ See *Deziel*, *supra* note 4, at paras. 59-60.

¹⁰ For example, in *Dufour*, *supra* note 4, the court found that the deadline applicable to the option to purchase in the testator’s will was precatory. See also *Shearer v Hoegg Estate*, 2024 NSSC 324 at para 69.

¹¹ For example, in *Dufour*, *ibid*, the beneficiary asked the court to rectify the deceased’s will to remove the deadline for exercising the option, and was successful.

¹² Such intent may be inferred if the will does not express consequences as to what will happen if the option is not exercised in time. See *Dufour*, *ibid*.

¹³ *Cambareri*, *supra* note 7, at paras 37-38. See also *Dufour*, *supra* note 4; *Deziel*, *supra* note 4.

¹⁴ *Dufour*, *ibid*.