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Estate of Carl Rucker

Excerpt from Walker's Treatise on Life Estates

The owner of real property, by deed effective immediately or by will, can create successive ownership interests in the realty. An interest created in a person currently entitled to possession for that person's life is called a life estate, and that person is called a life tenant; an interest created in a person whose right to possession arises only after the death of the life tenant is called a remainder. Life estates and remainders can be created in one or more persons.

Life Tenant: A life tenant has absolute and exclusive right to use of the property during his or her lifetime. Life estates can be held by one or more persons, such as spouses or siblings. The life tenant is entitled to possession of the property during his or her life or to rents from the property should the life tenant rent it to another. The rights of a life tenant expire automatically upon the death of the life tenant. The life tenant is responsible for real estate taxes, insurance, and maintenance costs related to the property.

Generally, the life tenant can sell or otherwise transfer that interest. However, any transferee from a life tenant can have an estate only for so long as the life tenant lives. Similarly, if the life tenant mortgages the life tenant's interest, that mortgage expires when the life tenant dies. However, a deed or will can empower a life tenant to sell or mortgage the property from which the life estate is carved without the consent of the owners of the remainder interest.

Remainder Owner: The owner of the remainder following a life estate automatically becomes owner of the real estate immediately upon the death of the last life tenant. The remainder owner has no right to use of the property or the income from the property during the life tenant's lifetime. Remainders may also be created in one or more persons.

Considerations

Creating a life estate in real property while the owner is alive (as opposed to one created by the owner's will) can be accomplished by executing a new deed from the owner of the property to the life tenant(s) and remainder owner(s). It is generally advisable to record the deed. However, the decision to transfer the property to a life estate is almost always irreversible. If the owner changes his or her mind, a change cannot occur without the consent of all life tenants and remainder owners. Their mutual consent may be difficult to obtain.

All owners, including remainder owners, must agree to sign a deed to sell the property in fee or to sign a mortgage to borrow money secured by the full value of the property. Disagreement among the owners severely restricts the marketability of the property and may make it nearly impossible to borrow money to make major repairs or improvements to the real property.

If a life estate in real property is created while the owner is alive, then upon the death of the last life tenant, the real property automatically belongs to the remainder owner, with no need for probate of that property, avoiding the costs and delays of probate. A life estate is worth less than full ownership in the same property.

The remainder owner cannot affect the life tenant's interest in the property. For example, if a parent who owns real property gives her children a remainder interest and retains a life estate in the property for herself, neither the children nor the children's creditors can affect the parent's possession. If the life tenant's actions or neglect harm the property, the remainder owners can sue the life tenant (or the life tenant's estate) for the damage in an action for waste.

The risk of litigation should be considered, especially for life estates created by a will. In addition to the time and costs of litigation, there is a risk that the court could award the monetary value of the life estate to the life tenant instead of possession of the property. Such a result would defeat the testator's wishes to permit the life tenant to live in the residence. Transferring property by deed, as opposed to by will, minimizes this risk.

Elective share

Creating a life estate by deed in the owner's spouse may have implications for the distribution of the owner's probate estate. Franklin law permits a surviving spouse to claim a percentage share of the deceased spouse's "augmented estate" (the deceased spouse's probate estate increased by, among other things, lifetime gifts to the surviving spouse). This share is called the "elective share." For many years, it was unclear what should happen when the surviving spouse held a life estate transferred by deed from the deceased spouse while alive. Recent cases have clarified that the value of such a life estate should be included in calculating the elective share of the surviving spouse.

No requirement of spousal consent

Some states limit the ability of one spouse who has sole title to a residence to transfer that residence to anyone without the other spouse's consent. Franklin law does not recognize this limitation with respect to a residence titled solely in one spouse's name prior to the marriage. Nor is Franklin a community property state. Thus, in Franklin, a spouse who has sole title to a residence may transfer a life estate to anyone without the other spouse's consent.

In re Estate of Lindsay
Franklin Court of Appeal (2008)

Joseph Lindsay, spouse of the decedent, Nancy Lindsay, filed a petition in the probate court seeking to take his elective share of the decedent's estate. The probate court determined that Mr. Lindsay's elective share had been satisfied by a life estate transferred to him by the decedent and an outright bequest in the decedent's will and that Mr. Lindsay was not entitled to anything further from the decedent's estate. Mr. Lindsay appeals from that determination.

The decedent and Joseph Lindsay were married on June 16, 1990. Mr. Lindsay was the decedent's second husband. The decedent had two children by a prior marriage, both of them adults at the time of her second marriage. The decedent owned a residence and 25 acres of surrounding land, acquired before her second marriage. On July 20, 2005, the decedent transferred this real property to herself and Mr. Lindsay as life tenants, granting a remainder interest to her two children. Joseph Lindsay's life estate was valued at $200,000. The assets of Nancy Lindsay's estate that would pass by will (stocks, bonds, savings accounts, and other personal property) totaled $900,000, of which Joseph Lindsay was bequeathed $400,000. Mr. Lindsay elected not to receive this bequest and instead to claim the elective share.

Franklin law states that Joseph Lindsay is entitled to claim an elective share equal to 50% of the "augmented estate" or, in the alternative, what was bequeathed in the will. Franklin Probate Code § 2-202. The question before the court is whether the value of the life estate should be included in the augmented estate, in addition to the assets passing by will, when determining the elective share. We hold that the value of the life estate should be included.

The percentage size of the surviving spouse's share depends on the length of time the surviving spouse had been married to the decedent. *Id*. A spouse like Mr. Lindsay, who was married for 15 years or more, is entitled to claim a 50% elective share of the augmented estate. Permitting a surviving spouse to claim an elective share of a deceased spouse's augmented estate protects that spouse from the harsh effects of the decedent's decision to leave the spouse little or nothing through probate. The purpose of the elective share is to give the surviving spouse a fair share of the economic partnership maintained by the couple before the decedent's death.

An augmented estate, according to Franklin law, includes four categories of assets, only three of which are relevant here: (1) the net assets held in the probate estate, Franklin Probate Code § 2-204; (2) the assets transferred by the decedent to the decedent's spouse before death, Franklin

Probate Code § 2-206; and (3) the surviving spouse's own assets and pre-death transfers, Franklin Probate Code § 2-207. Using these three provisions, the probate court calculated the value of the "augmented estate," described earlier, at $1.1 million.

Petitioner Lindsay's calculation: exclude value of life estate from augmented estate and claim 50% elective share

Mr. Lindsay claimed his elective share of the estate pursuant to Franklin Probate Code § 2-202. As Mr. Lindsay calculates his elective share in the augmented estate, he claims to be entitled to 50% of the $900,000 probate estate (or $450,000). He also claims that the value of the life estate (worth $200,000) should be disregarded in computing the elective share. If he is correct, he would receive a total of $650,000 of benefits: $450,000 as his elective share plus the earlier transfer of the life estate worth $200,000.

The personal representative's calculation: include value of life estate in augmented estate

The personal representative of the decedent's estate agrees that the elective share is 50% of the augmented estate. However, the representative takes a different view of how that share is calculated, claiming that the value of the augmented estate includes both the probate estate *and* the value of the life estate. By including Mr. Lindsay's life estate, the "augmented estate" totals $1,100,000: the $200,000 life estate plus the $900,000 in probate assets. Therefore, the 50% elective share equals one-half of $1,100,000 (that is, $550,000). Because Mr. Lindsay has already received the $200,000 life estate, he would be entitled to receive only $350,000 of the probated assets via an elective share.

We agree with the personal representative that Mr. Lindsay's life estate should be included in the calculation of the augmented estate for determination of his elective share. In addition, the court correctly used the value of the life estate, or $200,000, and not the full fair market value of the house, in calculating the elective share.

Accordingly, we affirm the probate court's decision.

Manford v. French
Franklin Court of Appeal (2011)

On January 27, 1997, Opal French and her husband, George, executed a single will that recited only that it was a "joint" will. This will would have transferred all the property of the first spouse to die to the survivor; then, upon the death of the survivor, all the survivor's property, including the property acquired from the first spouse to die, was to go to Mary Elizabeth Manford, their only child. George predeceased Opal in 1998. Opal received all property held by him pursuant to the joint will.

In 2004, Opal French drafted a new will, expressly revoking the 1997 joint will. This new will transferred all of her property to her two children by a previous marriage. It also expressly disinherited Manford. The will stated that Opal had "given Mary Elizabeth Manford her part of the estate before my death, through significant loans that she has not repaid. I forgive these loans, but she has received enough."

Opal died in February 2010. Her children from the previous marriage, acting as co-executors, offered the 2004 will for probate. Manford contested, claiming that (1) the 1997 joint will was intended to be contractually binding; (2) Opal could not revoke the 1997 will after she had benefited from its probate; and (3) because of this fact, her 2004 will was invalid. Manford sought specific performance of the 1997 will, or in the alternative, money damages.

Manford filed an affidavit maintaining that Opal and George had conducted a family meeting in 1996 and expressed a plan to execute a will that would devise the estate to Manford after their deaths. The parties filed cross-motions for summary judgment. The trial court ruled for the co-executors. Manford appealed.

We must decide whether Opal had any contractual obligation to George arising from the 1997 will that prevented her from revoking that will after George's death and thereby preventing Manford from receiving all her mother's estate. This question depends on whether the creation of a joint will on its own creates such a contractual obligation.

An individual who receives an unrestricted bequest under a will has complete freedom to dispose of the property he or she receives. She can sell the property, mortgage it, or dispose of it by will. Given this, some spouses seek to restrict the ability of the surviving spouse to dispose of property in a will, especially where one or both spouses have children by a previous marriage.

Two methods exist to accomplish such a restriction. First, the spouses may enter into a contract to make a will, one that restricts the right of the surviving spouse to alter an agreed-upon testamentary disposition. A contract to make a will requires the survivor not to change the terms of an already-agreed-upon will, but it does not prevent the survivor from transferring the property during the survivor's lifetime. The survivor could sell the property or encumber the property with debt without breaching the contract, provided the agreed-upon will remains the same. *Kurtz v. Neal* (Franklin Sup. Ct. 2005).

Second, spouses can restrict the rights of the survivor through a joint will or a mutual will that reflects a contractual agreement between them. A joint will is one will, signed by two or more testators, that deals with the distribution of the property of each testator. Mutual wills are separate wills of two or more testators that make "mirror-image" dispositions of each testator's property.

Franklin Probate Code § 2-514 provides in general terms that any contract to make a will or not to revoke a will must be in writing:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract.

This statutory provision resolved a long-standing line of cases that dealt with questions about "oral contracts to make a will." As specified in the current statute, there must be some written evidence of the existence and terms of such a contract. This requirement assures that the parties' intentions can be determined and minimizes the risk of future litigation over the contract. Breach of a contract to make a will or not to revoke a will gives rise to two possible remedies: specific performance of the contract or money damages.

Manford claims that the mere fact of drafting a joint will provides written evidence of both the existence and terms of a contract binding both testators to the terms of the joint will. Whatever the merits of this proposition in general, Franklin Probate Code § 2-515 undercuts it: "The execution of a joint will or of mutual wills does not create a presumption of a contract not to revoke the will or wills." The 1997 will executed by Opal and George French is a joint will. The fact of its execution, standing alone, does not create an obligation that Opal may not revoke it and make a new and different will.

In the alternative, Manford claims that the terms of the joint will imply the existence of a contract not to revoke a will and that the family meeting in 1996 provides "extrinsic evidence proving the terms of the contract." Franklin Probate Code § 2-514(ii). This argument fails for two reasons. First, the statute requires "an express reference . . . to a contract" in the joint will; no such reference exists. Second, the "family meeting" described in Manford's affidavit entails little more than a statement by George and Opal that they planned to make a will at some point in the future, *not* that they had executed or intended to execute a contract to do so.

Thus, the 1997 will imposed no contractual obligation on Opal not to execute a new will revoking the 1997 will's terms. George and Opal could have entered into a contract binding Opal not to do so, but nothing in the record indicates that they did so or that such a contract was reduced to writing.

Affirmed.