



Barsoski v. Wesley: Case Comment

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The recent decision of *Barsoski v. Wesley* has caused will drafting lawyers to take pause after the Court analyzed the ambiguous language in the Will of Diane Barsoski ("Diane").

Briefly, Diane's Will provided that her house and its contents were to be held for her friend, Robert Wesley ("Robert"), to use as a home during his lifetime or for such shorter period as Robert desired. Upon the earlier of (i) Robert advising the trustees that he no longer wished to live in the home, (ii) Robert no longer living in the home, (iii) Robert's death, or (iv) Robert predeceasing Diane, the trustees were directed to sell the home and its contents and the proceeds of the sale were to be added to a gift to the charity, St. Stephens House of London.

The Will directed that a fund be set aside to ensure that the home was maintained while Robert occupied it, and that if Robert was no longer living in the home, then the fund was to be used for Robert's living expenses or to pay for his nursing or retirement home care or funeral expenses. The remainder of the fund would be paid to St. Stephens House of London.

A question arose as to whether Robert was in fact living in the home as required by the terms of the Will. The trustee brought an application for the Court's direction with respect to the nature of Robert's proprietary interest in the home and whether Robert's interest in the home had expired given that Robert had not been living there. The Court's decision turned on the distinction between a life estate, and a license to use a property.

A life estate is an interest that a person is given in real or personal property while he or she is living. After the income beneficiary's death, the asset then passes to a different beneficiary or set of beneficiaries, the capital beneficiaries. A life estate is a way to preserve an asset or its proceeds for the capital beneficiaries.

The Court explained a licence as a privilege to use premises for a certain purpose, but which does not operate to confer on, or vest in, the licensee any title or estate in such property.

The Court found that the Will granted Robert a license subject to a condition subsequent, and not a life interest. The Court considered the terms of the Will and relevant surrounding circumstances. Additionally, the fact that the fund set aside was not exclusively for the maintenance of the home but for Robert's living expenses, irrespective of where he lived, supported the conclusion that the proprietary interest was a license.

The license would expire if Robert was "no longer living in the house". The Court found that based on the terms of the Will, it was impossible to define what it meant to "live" in the home. The terms of the Will did not include any objective bases for measuring this act, including what Robert needed to demonstrate that he was "living" in the home or any time periods. The condition subsequent was void for uncertainty, with the result that the gift of the house for Robert's use failed.

Diane intended to update her Will to include time periods for "living" in the home, but an updated Will was not executed. It is noteworthy that the Court did not consider the drafting solicitor's notes in this regard admissible.

TAKEAWAYS FOR DRAFTING LAWYERS:

- Ensure that you understand the testator's intentions and have tested their parameters. Some examples of questions in this case to probe the testator (some of which were contemplated): (1) who should be responsible for the payment of expenses as between the estate and Robert, and which expenses, (2) whether Robert should have the right to use the household contents, (3) whether Robert should have the right to rent or lease the home, (4) the period during which Robert should have the right to live in the home and the time period he had to physically occupy the home and a clear formula for when his rights would terminate, (5) whether Robert should have the option to purchase the home.
- Ensure that the nature of the proprietary interest is clear. For a life interest, use explicit language, such as for the use, occupation, enjoyment and/or benefit of the life tenant on a rent-free basis. For a license, use explicit language including that the interest is in the nature of a license and no interest has been created or will vest. The less room for interpretation, the better!
- Consider providing the trustees with discretion to choose the date the house and contents are to be sold. That way, if the trustees, acting reasonably, weigh various factors including the interests of the beneficiaries, the costs to maintain the home and market conditions, the trustees could exercise their discretion to sell the home.
- If including any conditions for a gift, make sure they are clear and unambiguous.
- When a client provides instructions to update his or her Will, move forward in a timely manner to update his or her Will and arrange for execution, because until the updated Will is validly executed, the intentions of the testator may be for naught.

Most importantly, always use great care and caution when drafting a Will because otherwise this could lead to significant problems and potentially litigation for those left to carry out the provisions of the Will.

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