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WIDDIFIELD ON EXECUTORS AND TRUSTEES, 6TH EDITION

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This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in This Update:

This release contains amendments and updates to the commentary in Chapter 2 (Assets); Chapter 5 (Bequests and Beneficiaries); Chapter 14 (Passing Accounts); Chapter 15 (Resignation, Removal and Appointment of Trustees); Chapter 17 (Dependants' Relief Claims and Spousal Property on Death); and Words and Phrases.

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Highlights of This Release, Include:

Real Property — Gift — Life Interest versus Licence — At the time of her death in January 2017, the testator was the registered owner of property. On July 10, 1998, the testator signed a Form A Freehold Transfer purporting to transfer the Property into joint names with herself and her daughter N (the "Form A Transfer") and a will on September 17, 1998 (the "Will") provided *inter alia*, the following for her son W who had physical and mental disabilities:

> IN THE EVENT my daughter, Nataline Swift [N], has not obtained my house & property known as Parcel A, District Lot 2088, Kootenay District Plan 530651, by right of survivorship (hereinafter referred to as "Parcel A"), then I GIVE, DEVISE AND BEQUEATH all right, title and interest in Parcel A to my daughter, NATALINE SWIFT, for her use absolutely and forever, subject however, to the right of my son, WALLACE Nazaroff [W], to occupy the premises in such circumstances and for such time as may be required when he has no other permanent residence, provided, however, that my son, WALLACE NAZAROF, shall be responsible for all expenses, including taxes, utilities and upkeep(maintenance) while he resides on the property."

Although in registrable form, the Form A Transfer was not actually registered in the Land Title Office prior to the death of the testator. Instead, the testator stored it in a safe at the Property. N admitted in her evidence that she raised the failure to register the transfer with the testator approximately 18 years later. This was not long prior to the testator's death but a time at which the testator still had requisite capacity to manage her personal affairs. The testator told N not to register it at that time but to instead have it registered when she died. It was never registered. Some months after the testator's death, W moved into the property accompanied by his sister H and her husband. N argued that the Form A Freehold Transfer was effective the date it was signed by the deceased and carried with it the right to apply for registration of the transfer even after her death. The court did not agree. The court noted that while this did not change the fact that the testator still intended N to obtain ownership of the Property as set out in her Will, by keeping the Property within her Estate she continued to make provision for W, as might be required, in accordance with the terms of her Will. Interpreting the Will, the court concluded that the Will granted W a life estate in the Property versus a license. It quoted the following paragraph from *Barsoski Estate v. Wesley*, 2022 ONCA 399, 2022 CarswellOnt 6728, 469 D.L.R. (4th) 165, 76 E.T.R. (4th) 1 (Ont. C.A.):

> 43 Indeed, the context surrounding testamentary bequests often weighs heavily on the court's interpretation. In *McColgan* [*McColgan, Re* 1969 CarswellOnt 151, [1969] 2 O.R. 152, [1969] O.J. No. 1306, 4 D.L.R. (3d) 572], for example, Keith J. found that a life estate was "much more consistent in the circumstances peculiar to this will and the persons involved": at p. 578. In *McKay v. Henderson*, [1991 CarswellNB 355, [1991] N.B.J. No. 118, 113 N.B.R. (2d) 308, 25 A.C.W.S. (3d) 196, 285 A.P.R. 308] Stevenson J. interpreted a testamentary gift according to its terms, "the relationships and the circumstances of the parties": at p. 316. Thus, the context or circumstances frequently provide the distinctions that the words of the will cannot reconcile.

Specifically, it concluded that the language " . . . subject however, to the right of my son, W NAZAROFF, to occupy the premises in such circumstances and for such time as may be required when he has no other permanent residence" was intended by to give W the right to live on the Property, for his lifetime, as may be required due to his circumstances. This interpretation of the Will was consistent with the testator's testamentary intention to ensure that W would always have a place to reside during his lifetime and with the court's conclusion that if the testator intended to transfer the Property to N free from W's life estate interest she would have done so. Further the court concluded that nothing in the language in the Will precluded W from having third parties reside on the Property with him to provide him with assistance in his day to day living functions. Again, such an interpretation would not be consistent with the testator's intentions to ensure that W was looked after. The court noted that this was also not a situation where W was generating rental revenue from the Property. While H and her husband did receive a benefit from residing on the Property, W was not profiting from this arrangement: *Swift v. Nazaroff*, 2023 BCSC 1602, 2023 CarswellBC 2673 (B.C. S.C.).

Appointment of Trustees — Institutional Trustee — In this case, where the Estate had a single asset, a piece of real property that was subject to a life interest, the court refused to appoint an institutional estate trustee as this would have eroded the value of the asset. The court noted that there was no evidence of liquid assets owned by the Estate to fund an institutional estate trustee and that the real property might need to be mortgaged or sold which could impair or impact the life interest. The court appointed a residual beneficiary as estate trustee acknowledging that his interest would be realized sooner if the property were sold; however, the court accepted his submission that he was committed to the preservation of the property both for the purposes of the beneficiary of the life interest and for the benefit of all of the residual beneficiaries: *Vario v. Vario*, 2023 ONSC 5110, 2023 CarswellOnt 14092 (Ont. S.C.J.[Estates List]).

Life interest — Insolvent estate — Abatement — In this case, the court had to consider whether the life interest contained in the testator's will, allowing the applicant to take up residence in a property owned by the estate, would abate if the estate was *de facto* insolvent. The court found that it would. It found that the proceeds available in the estate's bank account appeared insufficient to satisfy the estate's liabilities. The estate's only substantial asset was the property. To avoid a sale of the property in favour of the life interest could render the estate insolvent and expose the personal representatives to personal liability for the outstanding debt. As the passing of accounts had not yet occurred, it was found to be too early to determine the solvency of the estate. However, the court stated that if, once the accounts are passed, the property was the only asset, the bequest might be considered abated. The court stated that abatement affected a life Interest no differently than any other bequest: *Daye v. Daye Estate*, 2023 NSSC 305, 2023 CarswellNS 782 (N.S. S.C.).

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