



The Right of Occupancy

by Alan Weinfeld

Many trusts provide that a surviving spouse or another beneficiary has the right to live in a residence rent free for the remainder of his or her life. This type of provision is particularly common in a second marriage when the settlor (the person creating the trust) comes into the marriage with a home that is separate property and wants the surviving spouse to live there before the property passes to the settlor's children or other heirs as remainder beneficiaries.

Many practitioners believe that this type of arrangement grants the beneficiary a life estate in the home, but it does not. The provision creates what is called a right of occupancy. (See *Le Breton v. Cook*, 107 Cal. 410, 419 (1895).) Because California case law is sparse on rights of occupancy, courts have struggled in discerning them from life estates. (See *Peterson v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 844, 849 (2015) (provision stating that "Decedent's wife may reside in the Premises rent free for her lifetime ..." deemed a life estate, and not a right of occupancy).) However, case law does make clear that

those rights of occupancy are different from life estates. (See *Le Breton*, 107 Cal. at 419; *Robbins v. Bueno*, 262 Cal. App. 2d 79, 82 (1968); *Dandini v. Johnson*, 193 Cal. App. 2d 815, 820 (1961).)

Key Distinctions

Unlike a life estate, a right of occupancy does not grant the holder any kind of estate or title to the subject property. During the period of the right of occupancy, title is held by the trustee of the trust. A right of occupancy is personal to the holder, and thus it generally cannot be sold or transferred—especially if the trust has a spendthrift provision, which prohibits the beneficiary from transferring his or her interest. (See *Le Breton*, 107 Cal. at 419; see also Cal. Prob. Code §§ 15300–15301.)

A right of occupancy generally grants the holder an exclusive right to possess the property, although in certain situations if the trust provision is not sufficiently clear and unambiguous, a court could find otherwise. (Compare *Robbins*, 262 Cal. App. 2d at 82 (right of occupancy has many of the attributes of a life estate, including the entitlement "to ... exclusive possession for life") with *Dandini*, 193 Cal. App. 2d at 818–

820 (right of occupancy was not exclusive because instrument was ambiguous and uncertain, did not “expressly reserve a right to exclusive possession,” and extrinsic evidence established that grantor did not intend to provide exclusive right).)

Common Disputes

Unless a right-of-occupancy provision is sufficiently specific to address each of the parties’ obligations and a number of common situations, disputes are likely to arise among the trustee, the remainder beneficiaries, and the person who holds the right of occupancy.

Payment of expenses. One frequent dispute concerns money—specifically, determining who is responsible for the different types of expenses associated with the residence. Unless the terms of the trust are crystal clear on this issue, parties may bicker over who must pay for utilities, property taxes, insurance, homeowner association fees, maintenance, and repairs. The remainder beneficiaries will claim that because the right-of-occupancy holder is receiving the benefit of living in the residence rent free, he or she should shoulder these expenses. The right-of-occupancy holder may have a different view: that his or her rights are similar to those of a lessee of an apartment, who is not typically responsible for these expenses.

In contrast to life estates, no clear authority exists for rights of occupancy dictating

who is responsible for these expenses when the trust instrument is silent on the issue. (See Cal. Civ. Code § 840; *In re Toler’s Estate*, 174 Cal. App. 2d 764, 772 (1959) (life estate tenant is responsible for upkeep and repairs, taxes, other annual charges and “just proportion of extraordinary assessments,” unless instrument provides otherwise); see also *Boggs v. Boggs*, 63 Cal. App. 2d 576, 580 (1944) (life estate tenant responsible for mortgage interest).)

Arguments can be made on both sides of the issue as to whether the life estate authorities apply to rights of occupancy or whether those rights are sufficiently different from a life estate to justify a different rule. On the one hand, a right of occupancy typically has many of the attributes of a life estate, including the right to exclusive, undisturbed possession of the property for life and the right to the fruits of the property. (See *Robbins*, 262 Cal. App. 2d at 82.) However, a life estate tenant can sell and profit from his or her interest, and some would contend that such a life estate tenant should have more responsibility for expenses than a mere right-of-occupancy holder, who generally cannot sell the interest. (Compare *Musson v. Fuller*, 57 Cal. App. 2d 5, 7 (1943) (life estate interest could be sold) with *Le Breton*, 107 Cal. at 419 & Cal. Prob. Code §§ 15300–15301 (right of occupancy is “personal” and cannot be transferred when trust has spendthrift provision).)

Failure to occupy. The right-of-occu-

pancy holder is, of course, not obligated to live in the home. He or she may already own another residence or want to live close to family elsewhere. Or, the right-of-occupancy holder may initially live in the subject residence but later become debilitated and move to a long-term care facility.

In these situations, the remainder beneficiaries may express frustration to the trustee that a valuable trust asset is being wasted, and that the trust could generate income by renting out the property. Even so, unless the right-of-occupancy provision delineates what happens if the residence is not used, the trustee may be hesitant to take action for fear of violating the right-of-occupancy provision. (See *In re Charters' Estate*, 46 Cal. 2d 227, 237–238 (1956) (trustee violated right-of-occupancy provision by selling residence during time period that right-of-occupancy holders had vacated residence); see also *In re Estate of Reynolds*, 836 N.Y.S. 2d 97, 98 (N.Y. App. Div. 2007) (right of occupancy not forfeited based on holder's "temporary, albeit extensive, stay in Tennessee").)

California law is not clear whether the trustee can rent out the residence when the right-of-occupancy holder fails to use it. In one case, the California Supreme Court suggested that the trustee could have rented out the home "when the duration of [the right of occupancy holders'] absences justified such rental" by making "reasonable arrangements" with the right-of-occupancy holders. (*In re Charters' Estate*, 46

Cal. 2d at 237.) However, in an earlier case the court indicated that the trustees "could not rent [the property] during the life of the occupant." (*Le Breton*, 107 Cal. at 419.)

When the terms of the trust fail to address the issue, these conflicting statements may give rise to difficult decision making in the event of a dispute; they all but guarantee that a prudent trustee will have to expend trust resources to petition the court for instructions on how to proceed. (See Cal. Prob. Code § 17200.)

Other occupants. The right-of-occupancy holder may not want to occupy the residence alone, instead preferring to have others (perhaps a spouse, child, parent, or even a boyfriend or girlfriend) live there as well. If the right-of-occupancy holder was the settlor's second spouse, the settlor's children from the first marriage may be angry that their stepparent has a new partner living in their parent's home. The children may well demand that the trustee evict the other person(s) living in the residence, or at least collect rent from that person. One case suggests that it is the right of the occupancy holder, and not the trustee, to collect any rent from others living in the residence. (See *Robbins*, 262 Cal. App. 2d at 82.) However, the law is not clear on whether the trustee can actually preclude others from living in the residence. This issue likely will turn on the precise language used in the trust instrument.

Right to sell. Because a right of occu-

pancy does not provide the certainty of title granted by a life estate, it is normally subject to all of the other terms of the trust, which may grant the trustee considerable discretion to sell trust assets. And unless the mortgage on the residence is fully paid, there could be a dispute regarding who is responsible for paying it off, particularly if the trust was not funded with sufficient liquid assets to pay the mortgage in full.

If trust assets are not available to pay the mortgage, the remainder beneficiaries and the trustee likely will claim that the residence must be sold to avoid being lost in foreclosure. Though such a scenario is entirely plausible, the right-of-occupancy holder will no doubt point to legal authority stating that the residence cannot be sold in this situation. (See 60 CAL. JUR. 3D. TRUSTS § 192, p. 275 (2013); *Wood v. Am. Nat'l Bank*, 125 Cal. App. 248, 253–254 (1932); *In re Charters' Estate*, 46 Cal. 2d at 238; 3 SCOTT AND ASCHER ON TRUSTS, § 18.1.4.1, p. 1307 (5th ed. 2007).)

The resolution of this issue likely will depend on the specificity of the trust regarding the sale of the home. If the right-of-occupancy provision specifically provides that the property may be sold, a court will probably allow the sale. If the trust document does not state whether the property can be sold, and has only a general provision regarding the sale of trust assets, the court will be less likely to allow that to happen.

If the court allows a sale, it will likely

order the trustee to provide the right-of-occupancy holder with a replacement residence. (See *In re Charters' Estate*, 46 Cal. 2d at 233, 238.) If, however, the trust has minimal liquid assets available, the right-of-occupancy holder could well wind up with a far inferior place to live, or worse, without any place to live. Needless to say, the settlor probably did not intend for that to occur.

To avoid this problem, the trustee might consider selling the property subject to the right of occupancy. That is precisely what the California Supreme Court suggested in *Le Breton*, cited above. (See 107 Cal. at 420.) Of course, it is more difficult to find a buyer willing to purchase what is essentially a future interest in the property, and the sale of that interest would generate far less revenue than if the trustee sold the property free and clear.

Drafting Tips

To minimize the types of disputes that can arise when a trust provides a right of occupancy, the drafting attorney should consult with the client as to who will be responsible for property taxes, homeowner or condominium association fees, insurance, utilities, maintenance expenses, and repairs. The trust should make it as clear as possible who is responsible for each of these categories of expenses.

The trust should also specify whether the right of occupancy is “exclusive” to the holder and whether the holder can allow

others to live in the home. If necessary, the trust can specify who else may live at the premises (for example, the holder's spouse or children) the maximum number of occupants, as well as the consequences if there is a violation of trust strictures. However, if a client requests provisions such as these, counsel should advise the client about the difficulty of enforcing them. It goes without saying that it is impractical for the trustee to stop by the property every night (or even once a month) to make sure that no unauthorized persons are residing there.

In addition, the drafting attorney should ask the client what, if anything, should happen if the right-of-occupancy holder fails to use the home for an extended period of time. If the client wants something to happen in that event (or nonevent as the case may be), the trust should state so explicitly.

There is also an important tax issue in play. If the right of occupancy is provided in a marital deduction trust of a high-net-worth settlor, and the surviving spouse is not provided a full, unfettered right to occupy the residence for life, the settlor's estate could lose the marital deduction on the residence property and be subject to estate taxes on it. An example of this is when the right of occupancy would terminate if the surviving spouse does not live in the home or allows others to do so. (See *Treas. Reg. § 20.2056(b)-7*.)

Moreover, the attorney must see that the settlor determines whether the trustee

will be authorized to sell the residence, and if so, under what circumstances. If the settlor wishes to state in the trust that the residence cannot be sold under any circumstances and a significant mortgage remains outstanding, there could well be a future controversy. In that case, the trustee may be forced to petition the court to modify the terms of the trust to permit a sale so that the property won't be lost to foreclosure.

If the client agrees to allow a sale, the trust should clearly specify the circumstances under which that can occur and what type of replacement residence, if any, is to be provided to the right-of-occupancy holder. A provision allowing the home to be sold if it is in the "best interest" of the right-of-occupancy holder will not necessarily prevent a dispute over whether the sale is necessary to prevent foreclosure by a third-party mortgage holder. Furthermore, if the settlor wishes to authorize a sale in the event there are insufficient liquid assets to pay the mortgage, the trust document should clearly spell that out.

Of course, many of these problems can be avoided by providing the trust with sufficient liquid assets to cover the expenses associated with granting the right of occupancy in the first place. 📌

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