

# irongroup lawyers

July 2009



## Life interests and estate planning

### • Life Interest in the home

Leaving a life interest to a beneficiary has become an increasingly popular option for Willmakers. These are usually established where a Willmaker has "competing interests" for whom they wish to provide. For example, if they have a second spouse as well as children from a previous relationship, they may wish to allow their second spouse to live in the home for a period of time, with it then passing to the children. They can also leave a life interest in an investment for example, to provide income for their spouse's lifetime however here we will focus particularly on providing a residence for the spouse's use. The life interest in this scenario usually also includes the right to use of the household goods and chattels.

### ...or 'Right to Occupy'

It should be noted that there is an alternative to the life interest solution mentioned above, which we have found some Willmakers prefer. That alternative is a "right to occupy" the home rather than a life interest in it and is preferred where the Willmaker wants to implement an added asset protection strategy. The rationale is that a life interest is an asset that can be used to generate income and as such if the spouse living in the home was bankrupted, a bankruptcy trustee could force them out of the house and rent it out to provide rental income to pay creditors. However if the spouse has a "right to occupy", they cannot be forced out of the home. Whether it's a "right to occupy" or a life interest in a home, other estate planning considerations need to be taken into account to avoid problems with potential claims.

### It's not enough to leave an interest in the home (1) Flexibility is required

In *Court v Hunt* [1987] the NSW Supreme Court found that a life interest only was not considered proper provision for the widow. At the very least, the testator should have considered the fact that if the widow did survive him for a number of years, her health position meant that she needed flexibility in her accommodation. Consequently the Will should have allowed for the beneficiary of the life interest to be able to have the property sold and be substituted with an alternative, so that they could move if necessary eg if they need to go into an aged care facility.

Key questions	Underlying issues
<b>Life interest vs Right to Occupy</b>	<b>Is asset protection required?</b>
<b>Is life interest in home enough?</b>	<b>Need flexibility &amp; a "nest egg"</b>
<b>Is it always appropriate?</b>	<b>Will the arrangement "work"?</b>
<b>Will special conditions hold?</b>	<b>For lifetime or until remarriage?</b>

### It's not enough to leave an interest in the home (2) Must also provide a "nest egg"

In *Gigliotti v Gigliotti* [2002] the Victorian Supreme Court noted that a widow requires not only a roof over her head, but also what was referred to as a "nest egg". In this case the widow, who was the second wife, not only received a life interest in a home but also provision for a sum for her own use out of which she was to pay the outgoings and

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maintain the house. In this instance, the estate was worth approx \$225,000 with the court setting aside \$150,000 for the purchase of a house and relocation with \$50,000 fixed as the amount of her “nest egg”.

## How much is enough? “Style to which she is accustomed ...”

In *Luciano v Rosenblum* [1985] the NSW court held that as a broad general rule, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to a) ensure that she is secure in her home, b) ensure that she has an income sufficient to permit her to *live in the style to which she is accustomed*, and c) to provide her with a fund to enable her to meet any unforeseen contingencies.

## Is a life interest always considered appropriate?

In *King v White* [1992] the court found that ownership of the home outright was preferable to a life interest as it provided better protection against “inflation, future vicissitudes and uncertainties”. Uncertainties surrounding other provisions may also contribute to the court over-turning a life interest as found in *Downing v Downing* [2003]. In this Victorian Supreme Court case, the court decided uncertainties as to future income, extent of the additional “nest egg” and again the need to provide security, contributed to the decision that provision of capital assets was more appropriate.

## It’s also important for the executor and beneficiary to “get along” if a life interest is to work ...

In *Coller v Coller* [1998] VSC a contributing factor was the finding that relations between the executor appointed by the deceased and his widow were “not good”. For a life estate to be feasible, there must be a satisfactory relationship between the life tenant and the executor as they have to work together to deal with the problems that can arise in the administration of a life estate.

## Conditions on the length of the “life interest”?

Depending on the length of a marriage (or relationship) it may not be acceptable to impose a condition on the enjoyment of a life interest such that it ends upon the re-marriage of the spouse. This was a factor in the case mentioned earlier (*Downing v Downing* [2003]) where the plaintiff had been married to the deceased for over 30 years.

This case also addressed the ‘conundrum’ around dealing with family trusts. The Willmaker had directed all of the income from the family trust be given to his wife for her lifetime however the Court noted this direction was not binding on the trustees of a Family Trust via a Will and an alternative had to be found.

If your clients are looking for advice in planning their estates, we would be pleased to help. After consultation, our experienced lawyers will provide advice on the best solutions to suit their needs. Contact us for more information on our services or fixed fees.

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### 1. Irongroup Lawyers training for Advisers

We offer lunchtime seminars and full day workshops. See below or visit [www.irongroup.com](http://www.irongroup.com)

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If your clients need estate planning or business succession advice, email their name and phone number to [referrals@irongroup.com](mailto:referrals@irongroup.com) and we will contact them obligation free to discuss our fixed fee services.

### 3. Irongroup Lawyers Alliance Partner advice model

We work with Advisers around Australia who, having licensed our system, are now offering in-house estate planning and/or business succession planning service. If you would like more information please email us on [info@irongroup.com](mailto:info@irongroup.com) or call 03 8621 9000.

## IRONGROUP LAWYERS TRAINING

### Full day Comprehensive Estate Planning Workshop

When: Friday 30th July 8.45am - 5pm  
Venue: Level 4, 45 William St, Melbourne.

### Comprehensive Business Succession Planning Workshop

When: Wednesday 22nd July 8.45am - 5pm  
Venue: Level 4, 45 William St, Melbourne.

### Lunchtime Seminars 12noon - 1.30pm - refer website for next sessions

Estate Planning, Business Succession Planning, Asset Protection  
Venue: Level 4, 45 William St, Melbourne.

FPA Accreditation: 10.5 CPD Points (7 hours)

Cost: \$1100 inc gst

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FPA Accreditation: 11.25 CPD Points (7 hours)

Cost: \$1100 inc gst

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