

Question MPT – July 2019 – Selected Answer 1

To: Attorney

From: Examinee

Date: July 30, 2019

Re: Carl Rucker

I. Introduction

Mr. Rucker would like to ensure that, if he dies first, Mrs. Rucker can live in the house for the duration of her life, with the property passing in fee simple to his two sons after her death.

You have asked me to prepare a memorandum comparing two possible approaches for Mr. Rucker to dispose of his property after his death: (1) creating a life estate in the house for Mrs. Rucker while she is alive, with the remainder to his sons; and (2) contracting with his wife to write wills that leave the house to his sons after both he and Mrs. Rucker have died.

In comparing these two approaches, you have asked me discuss which of them will best accomplish Mr. Rucker's stated goals: (1) to assure that Mrs. Rucker can live in the house for the rest of her life, (2) to assure that his sons receive the house after she dies, and (3) to minimize the risk of litigation between them.

The house's fair market value would be roughly \$ 250,000, the present value of a life estate for Mrs. Rucker would be \$80,000. In addition to the house, Mr. Rucker has \$200,000 in certificates of deposit that he intends to leave for Mrs. Rucker after he dies. We have also been informed that Mrs. Rucker and the two sons do not get along. Mr. Rucker is concerned that, if able, Mrs. Rucker may prefer to leave the property to charity rather than letting it pass to the two sons. Similarly, if legally able, the two sons would likely not allow Mrs. Rucker to remain on the premises for the duration of her life.

What follows is an analysis of each approach in turn that discusses how well each approach would accomplish Mr. Rucker's stated goals.

II. Life Estate Approach

A. Advantages

The issue is considering the comparative advantages and disadvantages that the creation of a life estate may have in accomplishing Mr. Rucker's goals.

An owner of real property can create successive ownership interests in the reality. This may be accomplished (1) by deed effective immediately; or (2) by will. 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 arise only after the death of the life tenant is called a remainder. The remainder owner cannot affect the life tenant's interest in the property. For example, if a parent 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. 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. 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. Walker's Treatise.

Here, such an arrangement would further Mr. Rucker's stated goal of ensuring Mrs. Rucker can live in the house for the rest of her life without interruption or removal by her sons, while simultaneously ensuring that the Mrs. Rucker cannot dispose of the property and prevent the sons from taking ownership in fee simple after her death. The fact that there is no need for probate of that property would also further Mr. Rucker's goal of avoiding the risk of costly litigation.

B. Disadvantages

Although 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 marketability of the property and may make it nearly impossible to borrow money to make major repairs or improvements to the real property.

Here, these disadvantage, are mitigated by the fact that Mr. Rucker plans to leave her \$200,000 worth of certificated of deposit when he dies, in the event any unexpected repairs or emergencies are required.

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. However, creating a life estate by deed in the owner's spouse can have implications for the distribution of the owner's probate estate. Franklin law permits a surviving spouse to claim an elective share of a certain percentage of the deceased spouse's "augmented estate" or in the alternative, what was bequeathed in the will. Recent cases have clarified that the value of an "augmented estate" should include the value of a life estate transferred prior to the decedent's death. in calculating the elective share of the surviving spouse." A spouse who was married for 15 years or more, is entitled to claim a 50% elective share of the augmented estate. Walker Treatise.

Here, although it might seem at first blush to be disadvantageous to Mrs. Rucker to have a life estate transferred to her by deed with respect to her claim to the "augmented estate," such a concern may not be applicable to her under these facts. A life estate to Mrs. Rucker would be worth \$80,000. Additionally, Mr. Rucker intends to leave her \$200,000 worth of certificates under the will. Thus, under applicable precedent, the augmented estate would be worth \$280,000, of which she would be entitled to take either 50% (\$80,000 life estate, and \$60,000 of the certificates) as a spouse who has been married for 15 years or more, or alternatively opt for what was bequeathed in the will. She will almost certainly opt or what was bequeathed in the will as she would receive the life estate, and \$200,000 worth of certificates.

Thus, the disadvantage with respect to Mrs. Rucker's claim under the elective share is inapplicable here, because she would opt to take what was bequeathed in the will anyway, rather than take her elective share. Nevertheless it may be advisable to apprise Mr. Rucker of the effect that transferring a life estate to Mrs. Rucker, as opposed to by will, will have with respect to Mrs. Rucker's elective share, in the event he changes his mind about how to dispose of the \$200,000 worth of certificates. Furthermore the life estate approach by deed would effectively further all three of Mr. Rucker's stated goals.

III. Contract-Wills Approach

The issue is whether a contractual arrangement would be better suited to fulfill Mr. Rucker's stated goals.

Spouses may enter into a contract to make a will, "that restricts the right of the surviving spouse to alter an agreed-upon testamentary disposition," either through (1)

a contractual arrangement; or (2) a joint or a mutual will that reflects a contractual agreement between them. French. Franklin Probate Code § 2-514 provides that:

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.

Accordingly, such contracts must be evidenced in a signed writing. Further, Franklin courts have been reluctant to infer the existence of contract to make a will or not to revoke a will merely from the existence of a joint will alone, such joint wills must make express any contractual obligation not to execute a new will or revoke the terms of a prior will.

While a contract to make a will requires the survivor not to change the terms of an already-agreed upon will, it does not prevent the survivor from transferring the property during the survivor's lifetime. The survivor can sell the property or encumber the property with debt without breaching the contract, provided the agreed-upon will remains the same.

Here, one initial problem of the contract-wills approach for Mr. Rucker is that the skeptical stance that Franklin courts take towards implying the existence of such contracts, may make validity and enforceability of contract could be more vulnerable to challenge and costly litigation than a deed transfer of a life estate issue would be. Although, with sufficiently express language we will likely be able to completely mitigate that concern. A second more serious concern is that although Mrs. Rucker would contractually bound not to revoke her will, she would still be able to dispose of the property however she wanted to during her lifetime, thus raising the concern that she would simply donate the property to charity before she dies which would frustrate Mr. Rucker's stated goal of ensuring his sons eventually get the property. Moreover, even if a valid contract not to revoke a will is created, and Mrs. Rucker does not dispose of the property during their lifetime, property that is disposed of through a contract-wills approach rather than through a life estate approach will likely need to be probated, which can involve costly litigation and may substantially delay when the sons will be able to receive the house after Mrs. Rucker passes away. This, again, would substantially frustrate Mr. Rucker's stated goals of avoiding litigation and ensuring the sons receive the property (presumably, he wants them to receive the property as promptly as possible).

IV. Conclusion

In conclusion, the course of action that would best accomplish Mr. Rucker's stated goals would be for Mr. Rucker to dispose of his property by creating a life estate for Mrs. Rucker by deed, rather than by will. This approach (1) avoids the costly litigation that a contract-wills approach might entail, (2) provides the most assurances that Mrs. Rucker will actually retain possession of the property for the rest of her life uninterrupted by her sons, and that a court will not simply award the monetary value of the life estate to the life tenant instead of possession of the property; and (3) ensures that the property will pass to Mr. Rucker's sons rather than being given to charity by Mrs. Rucker during her lifetime.

Question MPT – July 2019 – Selected Answer 2

MEMORANDUM

TO: Dana Carraway

FROM: Examinee

RE: Carl Rucker

I. INTRODUCTION

Mr. Rucker would like his wife, Mrs. Sara Rucker, to have the right to live in his property after his death, for the rest of her life. He would also like his sons, Fred and Andrew Rucker, to gain the property after her death. However, his wife and sons do not get along. Therefore, he needs to find a means to convey the property that will achieve both these goals, while also achieving his third goal of minimizing risk of litigation between them. Franklin law provides him two major options: 1) a life estate in his wife, with remainder to his sons; and 2) a contract to will, requiring his wife to convey the property to his sons upon her death. A life estate created by inter vivos transfer is recommended as the best means for him to achieve his goals. Both options will be discussed below.

II. DISCUSSION.

A. LIFE ESTATE.

Creating a life estate in Mrs. Rucker with a remainder in Mr. Rucker's two sons will have many benefits, but also some risks. He can create a life estate in two ways: 1) by creating a life estate to Mrs. Rucker in his will, with remainder to his sons; or 2) by a lifetime transfer creating a life estate in himself and his wife, with remainder to his sons. These two methods will be considered in light of both the advantages and disadvantages of the life estate in achieving Mr. Rucker's stated goals.

The life estate will satisfy Mr. Rucker's goals, by giving Mrs. Rucker the right to live in the property during her lifetime; conveying the property to his sons after her death; and reducing some risk of litigation. As a benefit, Mrs. Rucker, will be able to live in the home for the rest of her life. A life tenant has absolute and exclusive right to use of the property during her lifetime. See Walker's *Treatise on Life Estates*. The remaindermen have no right to use the property during the life tenant's lifetime or transfer the life tenant's interest. See *id.* Therefore, Mr. Rucker's sons will not be able to remove Mrs. Rucker from the house as he fears they might. Further, even though the life tenant can transfer her interest by sale or otherwise, she can only transfer the life estate. See *id.* Therefore, whatever interest she transfers will only last for the duration on her death, at which point the remaindermen, Mr. Rucker's sons, will gain the property for themselves. She will not be able to transfer the house to a charity upon her death rather than to his sons, as he had feared she might. In addition, the remaindermen will automatically gain their interest upon her death without the property going through the probate system, which will save time and money of probate-related litigation. See *id.* Thus, the life estate will achieve his goals by establishing firm rights in Mrs. Rucker as life tenant and the sons as remaindermen.

However, the life estate will also bring the significant disadvantage that the probate court must determine how to convey the life estate Mr. Rucker creates in his will. The probate court may undermine Mr. Rucker's intent by awarding the monetary value of the life estate to Mrs. Rucker instead of giving her possession of the property. See Walker's *Treatise on Life Estates*. In that situation, she would only receive \$80,000, the value of the life estate according to our appraiser, Jill Baker. To minimize that risk, Mr. Rucker should consider using an inter vivos transfer, creating a life estate in himself and his wife, with his sons as remaindermen. Life estates can be held by multiple persons, including spouses. See *id.* By using an inter vivos transfer instead of creating the life estate in his will, Mr. Rucker can avoid having the probate court undermine his intent upon his death to leave his wife with a life estate in the property.

One downside of an inter vivos transfer would be that the value of the life estate, \$80,000, would reduce Mrs. Rucker's "elective share" as Mr. Rucker's surviving spouse if she chose the elective share of the augmented estate instead of what he bequeathed

her in the will. As a surviving spouse who has been married to Mr. Rucker for 15 years or more, Mrs. Rucker is entitled to 50% of the elective share of the augmented estate. See Franklin Probate Code § 2-202. The Franklin Court of Appeals has held that a life estate transferred by the decedent during his lifetime to the spouse counted against the surviving spouse's elective share. See *In Re Estate of Lindsay*. This would only apply to an inter vivos transfer, not to a life estate created in his will. Therefore, Mrs. Rucker should choose to accept the bequeathment of the certificates of deposit instead of attempting to choose her "elective share" of his augmented estate.

Regardless of whether Mr. Rucker conveys it in a will or inter vivos, the life estate will also bring the risk that Mrs. Rucker will face costs that exceed her ability to pay. As life tenant, Mrs. Rucker will be responsible for the real estate taxes, insurance, and property maintenance costs. See Walker's *Treatise on Life Estates*. The maintenance costs of the property may increase over the years as the house ages. Mr. Rucker explained that Mrs. Rucker will not have any income beyond her Social Security, and the only assets he will pass to her will be \$200,000 of certificates of deposits. As she ages, she may need to spend the certificates of deposits and any of her separate assets on health expenses or other personal needs. Further, the real estate taxes in the area may increase since according to our residential appraiser, Jill Baker, the property market is rebounding. Therefore, it is possible Mrs. Rucker will have difficulty affording to pay to maintain the life estate. If she fails to do so, the remainderman, Mr. Rucker's sons, may sue her for waste.

As a related disadvantage, Mrs. Tucker as life tenant can only mortgage her own life estate, which is currently valued at approximately \$80,000 according to our appraiser, Baker. If she needs additional funds, she will not be able to mortgage the full value of the property, \$250,000, without the consent of the remainderman. As discussed above, it is unlikely she will be able to come to an agreement with the sons on a mortgage for the full value due to their poor relationship with her. Further, the value of her life estate may decrease as she ages because her expected remaining lifetime will be shorter, giving her fewer resources at a time when she may need the funds more desperately for end-of-life medical expenses.

Another disadvantage of the life estate will be that once Mr. Rucker creates it, he will not be able to alter or revoke the conveyance without the agreement of all life tenants and remainder owners. See Walker's *Treatise on Life Estates*. Therefore, if he conveys a life estate to him and his wife during his lifetime, but changes his mind about how he wants to dispose of the property, he will have to get his sons and wife to agree on any changes. Based on their current relations, it seems unlikely he will be able to convince them to agree, bringing a risk of litigation to resolve the matter.

Therefore, he should not execute this inter vivos conveyance unless he is certain that he will not change his mind.

Therefore, a life estate brings strong advantages and some disadvantages. It is recommended that he create a life estate by inter vivos conveyance to himself and his wife, with remainder in his sons, rather than conveying a life estate for her in his will.

B. CONTRACT TO WILL

As an alternative to conveying a life estate, Mr. Rucker may contract with his wife to write wills that leave the house to his sons after they both have died. He can accomplish this agreement either by 1) a contract to make a will requiring the surviving party to not change the terms of an already-agreed-upon will, or 2) executing with Mrs. Rucker a joint or mutual wills. See *Manford v French*. A joint will is a single will purporting to dispose of both parties' estates. The mutual wills are separate wills that refer to one another and mirror each other. The advantages and disadvantages of both the contract approach and the joint/mutual will approach will be discussed below; neither option will achieve Mr. Rucker's goals with the same degree of certainty as a life estate would.

Both the contract to make a will and the joint or mutual will approach carry the downside that the conveyance must go through the probate system. The probate system takes time and money. Further, other interested parties, such as heirs and beneficiaries, which would include Mr. Rucker's sons, can challenge the will in court and any associated extrinsic contracts. This litigation could frustrate Mr. Rucker's goals of conveying the property without litigation. Further, the litigation could frustrate the testator's intent in the will. His will leaving his property to his wife could be challenged, and she might only receive the money value of the property instead of the property itself. Her will leaving the property to his sons may be challenged by her other beneficiaries and heirs, defeating his intent to leave the property to his sons.

A contract to make a will requires the survivor not to change the terms of the already agreed-upon will. Therefore, Mr. Rucker could leave his house and assets to his wife, while requiring her to leave her assets upon her death, if he is already deceased, to his sons. If Mrs. Rucker changed her will, even after he died, to leave the house to the charity or another party, she would be in breach of contract. The sons, as intended third-party beneficiaries, would then have standing to sue to enforce the contract. If Mr. Rucker decides to use this option, the contract must be in writing, because it cannot be enforced without "some written evidence" of its existence and terms. See *Manford v French* (citing *Franklin Probate Code* § 2-514).

One downside with the contract to make (or not revoke) a will is that Mrs. Rucker, if she survives Mr. Rucker, will still have the power to transfer the house within her lifetime. See *Manford v French*. She could sell it or encumber its full value. She could even demolish it. She will have no obligation to preserve it for her will beneficiaries. If she transfers the property during her lifetime, it cannot pass to his sons upon her death because it will no longer be part of her assets. Therefore, Mr. Rucker is risking the possibility that the sons will not receive the home upon her death, even if Mrs. Rucker complies with the contract and does not revoke her will. He also risks the possibility that they will receive it deeply encumbered by mortgages or in a great state of disrepair. They will have no rights to protect until the property has passed to them through the probate system upon her death, so they will have no ability to protect the house during her lifetime from waste, disrepair, mortgage, or transfer.

Another disadvantage of the contract to make a will is that the remedy of specific performance is not guaranteed. In the event of a breach of this contract, the court may award money damages instead. See *Manford v French*. In that situation, the sons will not receive the home even if Mrs. Rucker changes her will in breach of the contract. Instead, they will only receive money damages. Further, the money damages might be measured by its value at the time she transferred the property. If she had allowed the property to fall into disrepair or heavily encumbered the property with a mortgage and then transferred it subject to the mortgage, the property might have had little value when it was transferred, as measured by its sale price.

The mutual or joint wills must expressly refer to a valid contract executed between Mr. and Mrs. Rucker where they promise not to revoke their wills. See *Manford v French*. Otherwise, after Mr. Rucker dies, Mrs. Rucker will be able to revoke the will because a joint will, standing alone, creates no obligation to refrain from revoking the will and creating a new one with different provisions. The Franklin Court of Appeals has allowed a surviving spouse to revoke a joint will that would have transferred all of her property to the couple's child upon her death. See *Manford v French*. The Court allowed the revocation because the joint will lacked an express reference to a non-revocation contract, and the will itself did not imply the existence of such a contract. See *Manford v French*.

Therefore, a contract to make a will or a mutual/joint will both carry downsides of failing to protect Mr. Rucker's intent to pass the property to his sons after Mrs. Rucker's death as strongly as a life estate would. Further, it risks litigation through the probate system.

III. RECOMMENDATION AND CONCLUSION.

The life estate and contract to convey property both carry advantages and disadvantages. However, a life estate more firmly establishes the right of Mrs. Rucker to retain the property throughout her lifetime, while preserving the sons' right as remaindermen to get the house after her death. The best method would be for Mr. Rucker to convey a life estate inter vivos to himself and his wife, with remainder to his sons. That way, the life estate to his wife would not face any challenges in the probate system, reducing litigation that a conveyance by will might face. Further, the remainder will pass to his son outside the probate system, preventing the probate court from defeating his intent or his wife from altering the conveyance in her will.

Question MPT – July 2019 – Selected Answer 3

Memorandum

To: Dana Carraway

From: Examinee

Date: July 30, 2019

Re: Carl Rucker

I have looked into the options for Mr. Rucker's will as you have asked. Because Mr. Rucker is not interested in creating a trust, the two best options are to create a Life Estate for Mrs. Rucker with the Remainder interest in his children or to contract with Mrs. Rucker to create wills leaving the house to his children after both Mr. and Mrs. Rucker have died. Through this Memorandum I explain the general nature of each option along with the advantages and disadvantages each presents, I then discuss the nature of the elective share and why it likely will not affect either option, finally I recommend the life estate option as best servin Mr. Rucker's goals.

Mr. Rucker's intention for the property is for his wife to remain in possession of the house for the remainder of her life and then for the house to go to his children. In doing so, he wishes to minimize the risk of litigation between them while ensuring that the house is distributed according to his wishes. Ultimately, I believe a Life Estate will best serve Mr. Rucker's stated goals.

I. A Life Estate will allow Mrs. Rucker to live in the house for the rest of her life while ensuring that it passes to the children after her death.

The first option to consider is a life estate. To create this we would write Mr. Rucker's will to create a life estate in his wife with the remainder interest in the sons. A life estate is a present possessory interest in property in which the life tenant (Mrs. Rucker) is granted possession of the house for the remainder of her life and, upon her death, the house would automatically pass to the holder of the remainder interest (the sons).

This option presents several advantages, including certainty over the property ownership at any point, ensuring that the sons receive the property, and minimizing the time and costs upon Mrs. Rucker's death.

This option would ensure that the house passes according to Mr. Rucker's wishes because it would be his will that creates the successive ownership interests in the house. Mrs. Rucker would be entitled to possess the property for the remainder of her life. She could live in the house just as she does now (with some limitations for waste discussed below). Neither the sons, nor any creditors they may have, would be able to kick her out of the house because any interest they may have would be a future possessory interest. One note, however, is that if Mrs. Rucker were to fall behind on the property taxes, that would affect the sons' future interest. While they would be her responsibility, if they are not paid then the government may take the property in fee simple, extinguishing the sons' future interest. Therefore, if she falls behind on her property taxes, the sons may need to pay them to ensure they receive the property at her death.

This option also ensures that the sons receive the value of the house upon Mrs. Rucker's death. As a life tenant, Mrs. Rucker would be able to encumber the property or dispose of it but only to the extent of her interests, the life estate. If she were to borrow against the property or try to sell it, those actions would not affect the sons' interest. Upon her death they will receive the property free of any mortgages she may take out or from whomever she sold the property. To effectively encumber or sell the property, Mrs. Rucker would need approval from the sons.

Furthermore, this option would allow the property to pass free of Mrs. Rucker's probate estate. Her sons would be able to receive the property without the time and expense of waiting for her estate to be probated.

This option does have some disadvantages, however. The most important are the risk of litigation over waste, Mrs. Rucker's difficulty borrowing against the house if necessary, and the risk that if litigated, a court may award money damages for the value of the life estate.

A life tenant is not permitted to commit waste on the property, including any action or neglect that harms the property. If Mrs. Rucker takes action that harms the property, including building on it, cutting down trees, or changing the character of the house in any way, the sons may bring a suit against her for waste. If Mrs. Rucker and the sons are as antagonistic as Mr. Rucker believes, then this is a significant risk of litigation because the sons may view ordinary actions as wasteful while Mrs. Rucker may believe that she can do what she wishes without concern for the sons actions. Furthermore, if there are property tax issues, that could also lead to litigation between the parties.

Furthermore, if Mrs. Rucker finds herself in financial difficulty, she may not be able to borrow against the house. As the life tenant, Mrs. Rucker would be responsible for upkeep of the property, payment of the property taxes, and insurance on the property. There is no mortgage on the property so there are no mortgage payments that she would be responsible for making. As mentioned above, any action Mrs. Rucker takes to encumber the property would be extinguished upon her death so any attempt to borrow against the house or sell it would be nearly impossible. Because Mr. Rucker is concerned that she may not be able to afford unexpected repairs or emergencies, this could be a serious problem. I would recommend discussing with him further how her finances are and see how big of a risk this presents.

Finally, this options presents a risk of litigation at the outset that may defeat Mr. Rucker's wishes. If the life estate is created in his will, and Mrs. Rucker or the sons challenge it, the court may choose to award Mrs. Rucker monetary damages for the value of the life estate, rather than grant her the life estate. This would defeat his goal of allowing her to live in the house until her death. However, if the life estate were created during his lifetime through a deed, the risk of such litigation would be lowered.

B. A contract would give Mrs. Rucker more freedom over the property but risks the property not passing to the sons.

A contract to make a will is a method of passing property in which the parties agree to restrict the rights of a surviving spouse to alter agreed upon testamentary dispositions. It can be created in two ways. *Manford v. French*, (Franklin Court App. 2011). First, it can be created they may enter into the contract to make separate wills that reflect the agreed upon disposition. *Id.* Second, the spouses can create a joint will that reflects the contractual agreement between them. *Id.* Both options require certain formalities to be effective.

To be effective, the contracted will must comply with the requirements of Franklin Probate Code §2-514 which requires that the contract to make or not revoke a will must be in writing. The contract may be established by provisions of a will stating the material provisions of the contract, an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or a writing signed by the decedent evidencing the contract. *Id.* An oral agreement to make a will is ineffective. *Manford*. Furthermore, the mere execution of a joint will or of mutual wills does not create a presumption of a contract. *Id.* (citing Franklin Probate Code §2-215).

In this option, Mr. Rucker would enter into a contract with his wife where they both agree in their wills that the house will pass to the sons upon both of their deaths. Mr. Rucker's will would provide that the house passes in Fee Simple to Mrs. Rucker and upon her death to the sons. Mrs. Rucker's will would also include that if Mr. Rucker predeceases her, then upon her death the house passes to the sons.

This option has several advantages, including Mrs. Rucker's ability to borrow against the house if she runs into financial difficulty and the decreased risk of litigation over waste. Because Mrs. Rucker would own the property in fee simple, it would be much simpler for her to mortgage the property if she faces unexpected repairs or emergencies as Mr. Rucker fears, although this presents its own problems discussed below. Furthermore, the sons would not be able to sue Mrs. Rucker for waste because they do not own a remainder interest but rather would be third party beneficiaries to the contract between Mr. and Mrs. Rucker. Because their rights would be in contract rather than interests in property, there is no concern for litigation over waste.

This option does present several disadvantages, however. These include the risk that the sons will receive nothing, the fact that it is more likely to be challenged, and that it is more difficult to create.

As mentioned above, Mrs. Rucker would own the house in fee simple and be able to encumber or dispose of the property as she sees fit. Doing so would not be a breach of the contract. *Manford* (citing *Kurtz v. Neal*, Franklin Sup. Ct. 2005). Mrs. Rucker could sell the property to a friend or take out a mortgage decreasing any equity in the house without breaching the contract with her husband. The sons would only receive the house if she still possessed it at her death and would take it subject to any encumbrances she created on it. Because of how antagonistic Mr. Rucker believes his wife and sons to be, we should discuss with him whether she is likely to disregard his wishes in this way.

Furthermore, this option is riskier and more likely to be challenged. Although the courts state that the purpose of the contract is to minimize the risk of future litigation (See Manford), it still presents the possibility of litigation over the terms of the contract, the effectiveness of the contract, and over Mrs. Rucker's eventual will. If Mrs. Rucker chooses to leave the house to charity in her will, as Mr. Rucker fears, the sons will be forced to bring suit at that time to determine whether the contract was effective. Mrs. Rucker will have passed and so may not be concerned over this litigation because it will not affect her. If the sons bring suit, there is no guarantee that they will receive the house either. The court may award specific performance or money damages. Manford.

C. The elective share would not be affected by either option.

As you requested I have looked into the elective share. Under Franklin Property Code § 2-202, a spouse who was married for 15 years or more is entitled to claim a 50% elective share of the augmented estate. The augmented estate includes the net assets held in the probate estate the assets transferred by the decedent to the decedent's spouse before death and the surviving spouse's own assets and pre-death transfers. In re Estate of Lindsey, (Franklin Ct. App. 2008); Franklin Property Code 2-204, 06-07. 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. In re Estate of Lindsey. The value of the elective share would depend on whether Mr. Rucker creates a life estate or contracts with his wife.

If Mr. Rucker creates a life estate, then the value of the augmented estate would be \$280,000 (\$80,000 for the life estate and \$200,000 for the CD). Mrs. Rucker's elective share would be \$140,000. Because Mr. Rucker is leaving her the CD, she will receive more than the elective share and so the elective share would result in her receiving less than under the will.

If Mr. Rucker contracts with his wife the result will likely be the same. I am unsure how the contract would affect the valuation of her interest in the house but assuming that, because she receives it in fee simple, the value is not affected, the value of the augmented estate would likely be \$450,000 (\$250,000 for the value of the house and \$200,000 for the value of the CD). Therefore, under the elective share she would be entitled to \$225,000. Because she receives the entire estate, she would again not choose the elective share.

D. The Life Estate better serves Mr. Rucker's purposes.

The life estate would better serve Mr. Rucker's stated goals. It would ensure that the sons cannot kick Mrs. Rucker out of the house during her life and would ensure that Mrs. Rucker cannot prevent the sons from taking the house upon her death. Although it has a slightly higher risk of litigation during Mrs. Rucker's life, the risk is not so much greater that it would outweigh the certainty that this option presents. However, as I mention above, the risks of litigation depend on how antagonistic the relationship between Mrs. Rucker and the sons continues to be so the risk of litigation under either option may be greater or lesser than I suggest.

Question MPT – July 2019 – Selected Answer 4

Question Presented

Whether a life estate or a contract to make a will is a better way to ensure that the surviving spouse can remain on the property for life, but the property will pass to the decedent's children of a previous marriage after the spouse's death.

Statement of Facts

Carl Rucker has been married to Sara Rucker for 18 years and has two adult children from a previous marriage. Sara does not get along with Carl's sons. Carl is the sole owner of the house in which he and Sara reside and he has owned the house 45 years. Upon his death, Carl would like his wife Sara to be able to remain in the house for the rest of her life, and upon her death, he would like the house to pass to his sons. Carl is especially concerned with avoiding litigation over the house. There is some concern that Sara's limited income would prevent her from making necessary repairs to the house or being able to afford unexpected emergencies.

Analysis

1. Life Estate

Carl should deed the property by life estate to himself and Sara during his lifetime and give his sons the remainder interest. A life estate is an interest created in a person currently entitled to possession for that person's life. [Walker's] The person holding a remainder has a right to possession that arises only after the death of the life tenant [Id.] The life tenant has an exclusive right to use the property during her lifetime and the life tenant's rights expire automatically upon her death. [Id.] The life tenant is responsible for taxes, insurance, and maintenance costs related to the property. [Id.] This accomplishes exactly what Carl is asking. If Carl gave himself and Sara a life estate in the property, they would be entitled to occupy it exclusively until the last one

of them died. Carl's sons could do nothing to oust Sara from the property during her lifetime. A life tenant has no power to transfer or mortgage more than her interest in the property (unless otherwise empowered by the deed or will granting the life estate), so Sara would not be able to affect the sons' interest either.

The life estate can be created by deed or by will. Here, Carl's better option is to execute the life estate by deed during his lifetime. Creation of the life estate while the original owner is alive avoids the need to probate the property. It should be noted that the decision to deed a life estate is generally irreversible as a change cannot occur without the consent of all life tenants and remainder owners. [Walkers]. Consequentially, Carl should consider the possibility that if Carl and Sara separated during their lifetimes, Sara would still have an interest in the property that Carl could not unilaterally extinguish. However, even with this drawback, a deed is a superior means of transfer to accomplish Carl's purposes. Creation of a life estate by will increases the risk of litigation, which Carl is keen to avoid. [Walkers]. Furthermore, if there is 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. This would completely defeat Carl's intent to have Sara remain in possession of the house for her lifetime.

Creating a life estate could have negative implications for the distribution of the owner's probate estate. Under Franklin law, a surviving spouse is entitled to claim an elective share of the augmented estate in place of what the spouse was bequeathed by will. [Lindsay] A marriage lasting longer than 15 years entitles the spouse to 50% of the augmented estate. [Id.] Because Carl and Sara have been married for 18 years, Sara would be entitled to 50% of the augmented estate should she choose that in place of taking what she was bequeathed by will. The augmented estate includes 1) the net assets held in the probate estate, 2) the assets transferred by the decedent to the decedent's spouse before death, and 3) the surviving spouse's own assets and pre-death transfers. Franklin case law holds that the value of a life estate given by one spouse to the other is included in the calculation of the augmented estate. [Lindsay]. This generally has the effect of reducing the elective share the spouse receives, because the value of the life estate is added into the total assets that the spouse gets 50% of, but then the value of the life estate is deducted from the 50% the spouse is entitled to receive. Essentially, the spouse loses half of the value of the life estate. Here, the value of the life estate is \$80,000. However, the elective share calculation should not affect Carl's choice here. It only becomes relevant where the spouse chooses to take an elective share instead of what they have been bequeathed in the will. If Carl sufficiently provides for Sara in the will, there is no reason the elective share would be relevant. The only assets other than the house he has mentioned are his \$200,000 long-term certificates of deposit, which he claims he plans to leave to

Sara. If this is true, there is no reason she would choose to take an elective share anyway.

An additional drawback to using a life estate is that all owners (including remainder owners) must agree to mortgage the property. [Walkers] Because of this, it would be difficult for Sara to borrow the money necessary to make repairs or improvements on the property. And additionally, if the life tenant's neglect of the property causes harm to it, the remainderman can sue the life tenant for waste. It is possible that if Sara and the sons continue to have such a bad relationship, they could refuse to allow Sara to borrow money on the house to make repairs and then sue her for the resulting neglect.

2. Contract to Write a Will

Although contracting to write wills will serve some of the ends Carl wishes to accomplish, it is far from the best option. A person can restrict his surviving spouse's ability to dispose of property granted by will through a contract to make a will. This contract prevents the survivor from changing the terms of an already agreed upon will, but it does not prevent the survivor from transferring the property during the survivor's lifetime. [Manford]. The survivor can sell or encumber the property with debt without breaching the contract, provided the will remains the same. [Kurtz]. Here, this would be helpful in that Sara could mortgage the property should she need to pay for any repairs, but it is also the fatal aspect of this choice. Sarah would have the ability to sell the property during her lifetime and prevent the sons from getting it when she died. Carl is concerned Sara may give the property to charity, so this is relevant. Additionally, the remedies for breach of a contract to make a will may not be sufficient for Carl's purposes. Breach of the contract results in specific performance or money damages. Because it is important to Carl that his sons receive the house and not merely the value of the house, Sara could thwart Carl's intent even if she breached the contract. Because of this aspect, this is not the best choice for Carl.

If, despite all of this, Carl decides to use the contract to make a will method, he should note that merely drafting a joint will will not be sufficient. The existence of a joint will does not create a presumption of a contract not to revoke the will. [Fr. Probate Code] It can be established only by 1) a written will stating the material portions of the contract, or 2) a will with an express reference to a contract and extrinsic evidence proving the terms of the contract, or 3) a writing signed by him evidencing the contract.

Conclusion

For the reasons listed above, Carl should execute a deed giving himself and Sara a life estate in the property and giving the remainder to his sons.