Post-Death Occupation of Estate Property: Legal and Practical Considerations

Summary

1) A personal representative ("PR") should ensure they regularise a beneficiary's terms of occupation as a priority following a grant.

2) A beneficiary in occupation cannot rely on the consent of beneficiaries to their occupation, even if one of said beneficiaries later obtains a grant of representation.

3) PRs should be careful to avoid inadvertently licencing occupation and barring mesne profits by acquiescing in a beneficiary's occupation.

4) Equally, PRs should not assume that they can simply say nothing and later claim mesne profits for the period during which the beneficiary was in occupation.

Introduction

1. This article explores the legal and practical dynamics of a common but deceptively complex scenario, namely the occupation of a deceased's home after their death. The following scenario is typical:

Our Premise

An individual ("A") lives in a large property together with one of their adult children ("B") having two further children who live elsewhere ("C"). B was looking after A in their later years and was permitted to live in the family home rent free. A dies and B remains in occupation.

2. In this article we will explore the complexities as between intestate and testate succession and the additional difficulties that emerge when (i) no executors are names, (ii) executors renounce, and (iii) where the validity of a Will is in dispute.

The Practical Context of the Problem

3. The writers regularly act for professional executors and beneficiaries involved in this type of scenario, which more often than not seems to result in a protracted dispute. In our experience, this often leads to one or more of the following practical difficulties.

3.1 Delays in Selling the Property

The delay may be caused by a dispute about the validity of a Will (if any) or the suitability of the person or persons who wish to take out a grant of representation to administer the estate. In our premise, we often see C wanting to sell immediately and B wanting to delay the sale. Depending on the composition of the estate, selling the property might be the most cost-effective to riase funds to settle liabilities such as an inheritance tax bill.

3.2 The Desire to Charge Rent/Mesne Profits

In our premise, we often see C wanting B to pay rent for their occupation of the property, both because they feel it will pressure B into vacating the property and out of a sense of fairness. This will almost always be compounded by the fact there was no formal agreement between A and B governing B's occupation of the property. There may also be a dispute about what constitutes market rent.

3.3 The uncertainty that arises post-death when beneficiaries are in discussion (or not)

A professional executor or administrator faced with this situation would generally prefer B and C to reach an agreement. If the beneficiaries are not speaking, it may be impossible to broker an agreement. If they are speaking, they may have reached one or more informal agreements previously. which may or may not have been followed, and which may or may not have been communicated to the personal representative.

3.4 Promises to buy that later fall through or are delayed

In our premise, B will often offer to buy the property. We regularly see scenarios where the sale is delayed or falls through either because of a lack of funding, or because B has little incentive to proceed quickly. This is often compounded by the fact many unrepresented beneficiaries misunderstand the difference between having a beneficial interest in a property and being a beneficiary of an estate.

3.5 Inability for professional administrators to get paid

In our scenario, it is common for the property to be

the largest single asset in an estate, with there being very little liquid funds available. The risk for professional administrators is that they will be unable to settle estate liabilities – let alone their own professional charges. This will be a particularly high risk if the estate becomes embroiled in litigation.

3.6 Evicting the occupier

It is common for B to refuse to vacate the property, or alternatively to break any commitments they made to assist with the marketing and sale process and to vacate once a buyer has been found.

3.7 Damage to the property caused by the occupier/ letting the asset waste away

Another common scenario involves B letting the property waste away or, less commonly, intentionally damaging the property. This could be through lack of care or in the hope of lowering the sale price. In this scenario, C will often expect the professional administrator to take urgent action to preserve the estate's value.

3.8 Chattels

Disputes over chattels are just as common as they are likely to be disproportionately expensive. This can range from disputes about the existence of chattels (when a family heirloom or valuable artwork cannot be located), to disputes about the valuation of chattels (for example, where B is accused of taking chattels from the property and selling them at an undervalue, whether or not they account to the estate).

4. These practical difficulties can cause difficulties for any of the stakeholders, but they are often especially challenging for professional PRs whose objective is to finalise the estate, avoid any litigation or personal risk, and ensure they are compensated fairly and promptly for their work.

The Foundations - Licences, Occupation and Trespass

5. In our premise, the context before A's death is familial and informal. B was occupying the family home to care for their parent and did so rent free as a gratuitous licensee. No terms were set and no rent was paid. B was not a contractual licensee nor a tenant of their parent. The picture is a familiar one.

6. What is less familiar is the status of the bare/gratuitous licence post-death. The leading (albeit strictly only highly persuasive) authority is Terunnanse v Terunnanse [1968] 2 W.L.R. 1125[1] a decision of the Privy Council on appeal from Sri Lanka (as it is now known).

7. The Board decided briefly and without reference to prior authority

   "The licence which was granted to him in 1942 was clearly a revocable one. A revocable licence is automatically determined by the death of the licensor or by the assignment of the land over which the licence is exercised."

8. Terunnanse sets the scene for the problem that arises in the premise above. B's licence terminates automatically upon A's death and, unless an alternative right to occupy is located, B will become a trespasser. A trespasser is chargeable with mesne profits (generally at market rent).

9. An entry is not a trespass if it is justifiable. Justification may be afforded either by operation of law, or by the act of a claimant or of their predecessors in title[2]. As B's original source of justification has terminated, one is largely in search of a replacement.

10. However, the timing of B's conversion to a trespasser is of particular importance in the post-death context. B does not become a trespasser immediately, but only after the expiry of a reasonable period of time. As held in Minister of Health v Bellotti [1944] K. B. 298:

    "The true view is that where a licence is revoked, the licensee has, in spite of the revocation, whatever in the circumstances is a reasonable time to enable him to remove himself and his possessions from the scene of the licence. I have already said that in the circumstances of this case such a reasonable time must extend to whatever is a reasonable time to find alternative accommodation."

11. Determination of a "reasonable period" is a question of fact which in the particular circumstances of post-death occupation may potentially provide a sufficient period of time to bridge any gap before the terms of B's occupation are formally regulated by an agreement/new licence. It might be considered particularly unjust if B, having lived rent free in the property for many years, is immediately charged for their occupation as a trespasser, particularly if they stand to inherit an interest in the house itself.

12. The "reasonable time" for vacating before trespasser status applies will bridge a gap, but how long that gap will be is uncertain in any given case and inevitably one must look elsewhere to justify longer term occupation. This is likely to take the shape of a licence to occupy, be it express or implied.

1 See Megarry & Wade: The Law of Real Property 10th Ed at 33-003 for coverage of bare licences including footnote 32 for *Terunnanse*.
2 Clerk & Lindsell on Torts 24th Ed at 18-32.

Express Licence

13. In the simplest scenario, A dies leaving a Will naming an executor and said executor grants a formal express licence post-death. B's occupation is regularised and justified by the terms of the licence. B is no longer, if they ever became depending upon timing, a trespasser.

Implied Licences

14. We are more concerned to examine implied licenses. The authors of Rossdale on Probate write (without citation of authority) at 48-030:

    "Continued occupation of the deceased's property by someone who was living there prior to the deceased's death is not unlawful, as they are treated as occupying with the permission of the personal representatives. Such a person is not liable to pay occupation rent unless or until permission is terminated."

15. The authors respectfully doubt whether this form of deemed licence is correct in such wide terms. The point is made quite starkly where there is no executor deriving title from A's Will but either an intestacy or a need to apply for a grant of letters of administration with Will annexed. The fiction falls away when the deemed grantor of a post-death licence does not exist.

16. It appears, as covered in James E. Petts' article "Licences, death, Wills and trespass"[3] , that HHJ Monty KC sitting in Central London County Court hearing Eccleston v Lambert (unreported 19 May 2023) also took the view that there is no necessarily implied or deemed licence post-death. It remains to be seen however whether an unreported County Court judgement will have any persuasive value in practice.

17. One must therefore look for a genuinely implied licence. As to which the test is as framed by Kim Lewison QC then sitting as a Deputy High Court Judge in Bath & North Somerset District Council v Nicholson[4] applying the following dicta from Etherton J's decision in London Borough of Lambeth v Rumbelow[5] :

    "in order to establish permission in the circumstances of any case, two matters must be established. First there must have been some overt act by the landowner or some demonstrable circumstances from which the inference can be drawn that permission was in fact given. Secondly, a reasonable person would have appreciated that the user was with the permission of the landowner?"

18. Whether any licence arises by implication is necessarily fact-sensitive. The degree of interaction between the personal representative and the would-be licensee will require consideration. Again, the post-death context is peculiar in that B did not come to the land as a trespasser seeking an implied licence. Nor was B's licence intentionally and freely terminated by A; rather the termination is automatic and inevitably undesired given death is the trigger. These factors, it might be thought, could lead to a more ready inference of a licence for B.

19. In our view, PRs once in post should make regulating the terms of occupation a priority. Acquiescing in B's occupation for example, particularly where it is known B is paying bills and maintaining the property, is likely to result in an implied licence and no right to mesne profits.

20. PRs should be mindful that C might well feel aggrieved that a period of mesne profits has been lost by inaction and might claim the PRs are in breach of their fiduciary duty, breach of their duty of care, or liable for devastavit. See for example Re Cadogan [2019] EWHC 1577 (Ch) where a reasonably competent administrator ought to have rendered land income generating. Where a PR not only fails to positively agree a charge for occupation but also licences what is otherwise chargeable trespass, losing any mesne profits entitlement, the same point will apply[6].

Capable Grantors - The Problem of the Absent Executor

21. An express licence can be readily given by a named executor willing to act. The potential to find an implied grant, including from a sufficient degree of knowing acquiescence by an executor, can equally avoid falling into the fiction of deemed licences.

22. These routes to justified and regulated occupation by B do not exist (or at least not immediately) where A dies intestate, leaves a Will without a named executor, or where an executor renounces. Here no one has a right to act for the estate before taking a grant. What considerations arise in such a case? We shall focus upon two nuances here namely estoppel and relation back.

Estoppel

23. Those entitled to apply for a grant of letters of

3 P.C.B 2023, 5, 169-172
4 22 February 2002, unreported.
5 (unreported) 25th January 2001 - see Colin Dawson Windows Ltd v Kings Lynn and West Norfolk BC [2005] EWCA Civ 09
6 As the authors of Lewin on Trusts 20th Ed note at 37-063 where a beneficiary is in occupation without charge they obtain the equivalent of a de facto life interest, which the Will may not provide to them.

administration are identified in the Non-Contentious Probate Rules[7]. An applicant is generally going to be interested in (succeeding to) the estate of A. In our premise, it may be one of A's two other children ('C'). What if the child who later goes on to extract a grant tells B she can remain in the house before obtaining said grant?

24. Before being clothed with the authority of personal representative, any such representation is made by a beneficiary with limited rights in the estate[8]. The representor may (as in our premise) be only one of a wider class of beneficiaries. At this point in time, there is no guarantee they will go on to successfully extract a grant in their sole name. The same is true where a named executor agrees to occupation but the Will in which they are named is later found invalid[9].

25. B may wish to assert that their sibling C's representation that they were permitted to remain was binding by way of estoppel when they later obtained the grant of representation; i.e. that the grant validates those representations and binds the estate. On present authority however, B will not be able to advance such an argument. See Metters v Brown 158 E.R. 1060[10]:

"the plaintiff, who sues as administrator of his mother, must be considered in the position of a stranger, and therefore the rule as to estoppel does not apply; for whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger."[11]

26. In our context, the law treats words spoken by a beneficiary as having been spoken by a different person once that beneficiary goes on to become PR. One can see the justice of the point where a singular beneficiary amongst many makes a statement and happens later to become PR. The case is likely to be different where all beneficiaries concur in B's continuing occupation or, arguably, sufficiently acquiesce in the same. Why should all of the beneficiaries be able to stand behind the legal fiction of separate personalities in such a case? The point is however, to our knowledge, untested.

27. B cannot therefore safely rely on agreement by anyone other than the current PR[12] , but even then this may be precarious where a grant is revoked.

Relation Back

28. A linked point (but from a reversed perspective) is on what basis can a later appointed PR claim against B for their time in occupation pre-grant. Again, with an executor, no such issue arises, as the grant simply confirms the title derived from the Will. The delayed appointment of an administrator on the other hand brings us to the doctrine of "relation back."

29. In sum, letters of administration generally do not relate back to death. Where relation back would objectively be for the benefit of the estate however, the grant shall so relate, allowing the administrator to claim for post-death and pre-grant events. Trespass to land in particular has been addressed and permitted by statute per S.2 of the Administration of Estates Act 1925.

30. The judges of the Privy Council in Jogie v Sealy [2022] UKPC 32 reached differing views on whether the "wide view" of relation back was correct; namely whether relation back could apply so as to permit a later appointed PR to also validate prior acts as well as pursue claims arising post-death (but prior to the grant of letters of administration being issued). In any event, it is likely to be difficult to argue that granting a bare licence objectively benefits the estate so as to allow relation back even on the wider view.[13]

31. One might perceive an injustice contrasting the position of the estate versus the occupying beneficiary. The former can avoid being bound by licences "given" by a beneficiary or beneficiaries and yet can sue for mesne profits in the same period. Conversely, B may not obtain a right to occupy from a consenting beneficiary and yet may be subject to later claims for a period of what they considered safe (and free) occupation.

Beneficiary Rights?

32. What if B is to inherit a share of the property, does this help resist the charge of trespass?

33. The textbook starting point is the decision of the Court of Appeal in Williams v Holland [1965] 1 W.L.R. 739. The executor sought possession against two beneficiaries in occupation of the family home. The court held that the claim to possession was ultimately irresistible, but that trespass (and hence mesne profits) ran from the

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7 Non-Contentious Probate Rules 1987 (SI 1987/2024)
8 See Hughes v Howell [2021] EWCA Civ 1431
9 Neither S.27 nor 37 of the Administration of Estates Act 1925 providing any protection as the licensee is a volunteer. Nor would S.39(1)(iii) if the licence is gratuitous and not a contract. B may need to explore claims against the former PR, for example in proprietary estoppel if there is relevant detrimental reliance.
10 And more recently see Mills v Anderson [1984] Q.B. 704.
11 See too Spencer Bower and Handley: Res Judicata at [9.21]
12 See Morgan v Thomas (1853) 8 Exch 302 for similar facts to the present example
13 See Morgan v Thomas (1853) 8 Ex. 302

date of a notice to quit, not from the date of death. The case repays careful reading.

34. The case started life with a construction summons in which Plowman J held[14]:

"the house was held upon trust to pay and divide the net income of the property equally between the four defendants to that summons, and was unlimited in duration and, accordingly, carried the capital of the property or the proceeds of sale thereof in equal shares."

35. The rights of the children (including those in occupation) were thus:

"Now the property was given to the testator's four children. The plaintiff is one of them and the second defendant is another, the first defendant being her husband. Therefore, subject always to the claims of the executor for the purposes of administration, the second defendant, having regard to the declaration of Plowman J., is entitled in equity to one fourth part of the proceeds of sale of the property." (emphasis added)

36. The house in Williams needed to be sold because estate cash had been exhausted and the mortgage was in arrears. The executor genuinely needed the property for administration properly so called (i.e. the payment of estate debts). The court held:

"as executor comes to the court and says that he desires possession in order to sell the property for the purposes of administration. To that application there can, it seems to me, be no conceivable answer at all."

"no beneficiary can compel him to make any assent subject to the mortgage"

37. The trust had not arisen, the land was needed for administration and there was no answer to a possession order being made. As for mesne profits, the court said this:

"The defendants were not in possession as trespassers: they were in there as persons who, subject to the claims of administration, could properly say that, under a trust for sale, they were entitled in equity to a one-fourth part of the proceeds of sale and the rents and profits until sale. They were in possession at the date of death, and they claim that they are not trespassers but that they are entitled to remain in possession until the property comes to be sold."

38. Hence, the principle expressed in the textbooks that the occupier is not yet a true beneficiary, has no interest in the property, but is a not a trespasser.

39. It may be said that the Trusts of Land and Appointment of Trustees Act 1996 ("the 1996 Act") has changed the landscape and does not permit an automatic right of occupation[15]. Lord Upjohn in Williams made no express reference to the beneficiaries' future rights of occupation under the trust post-administration in reaching his decision, referring only to the future enjoyment of the proceeds of sale.

40. It was held in Eccleston[16] that Williams was based upon the Defendant being a beneficiary under an express trust which explicitly gave the right to occupy by directing the trustees to permit occupation rent free until a sale. We respectfully doubt the conclusion in Eccleston on the basis that (i) Lord Upjohn made no reference to rights of occupation, (ii) the analysis relies upon the headnote and terms of the Will not the result of the construction summons which were different and (iii) any trust for sale or occupation never arose as the property was needed for the purposes of administration.

41. Perhaps the more convincing challenge to Williams is simply that in order to avoid trespass, one must have a right of occupation. A beneficiary pending the completion of administration has a right to due administration and to be paid their share of the residue once ascertained. Neither right goes to occupation. Depending upon the terms of any Will trust and the operation of the 1996 Act, the beneficiary in occupation may not even have a S.12 right in the future either so the authors query how occupation is not a trespass unless licenced.

42. For the time being however and pending a decision of a higher court, Williams remains good law subject to attempts to distinguish it or limit its scope, likely by reference to the 1996 Act. C may therefore have a further ability to resist mesne profits before being served with a notice to quit.

Residual Questions

43. If a PR seeks possession qua PR, it will aslo be vital to consider:

43.1 whether the property is actually needed for administration;

43.2 whether the PR is properly suing as PR or whether they ought to be claiming as trustee;

43.3 if the latter, whether they have assented the property to themselves in that capacity or can be forced to do

14 As recorded in Lord Upjohn's judgment
15 The requirements of S.12 of the 1996 Act must be satisfied.
16 Eccleston v Lambert (unreported 19 May 2023)

so if they have not, given the distinction impacts upon whether beneficiary rights will have arisen under the 1996 Act[17]; and

43.4 what is the difference in tax treatment between the property claimed and sold in administration versus as trustee.

Conclusions

Factors to Consider

44. The patchwork of rules and principles which apply to the administration of estates and dealings with land have a particularly unhappy interaction for a situation occurring so regularly. Factors that advisers will need to consider are:

44.1 How long has elapsed since death?

44.2 What is a "reasonable period" before an occupier becomes a trespasser?

44.3 Is there a named executor or not? Is there a grant, or not? If so, when was the grant obtained?

44.4 Has the occupier relied upon representations as to the security of their occupation and, if so, from whom and in what capacity?

44.5 Can an express or implied licence be established? Is there a PR in office to have given the licence?

44.6 Is the property actually needed for administration? Can administration be expedited or possession resisted pending the commencement of the Will trusts?

Practical Takeaways

45. For professionals who encounter this all-too-common scenario, we would suggest several practical takeaways which vary based on whose interests they are representing.

46. An occupier ('B' in our scenario) should avoid relying solely on assurances made by an individual beneficiary, even if it is expected that beneficiary will go on to obtain a grant of letters of administration. Instead, B will likely benefit from seeking an express consent to their continued occupation of the property from each of the beneficiaries, preferably with some sort of written record and potentially indemnities against any later claims. If B foresees the estate administration will be contentious, seeking such agreement promptly and before relations deteriorate could be key.

47. B may have some luck with delaying tactics (such as entering a caveat) if for example they are used to buy time to raise funds to purchase the property, but they should be warned of the risks of 'relation back'.

48. Finally, B should be cautious when defending applications to sell the property where the property rightly needs to be sold to complete the administration. The aspect of Williams confirming that a PR's need for possession will trump B's occupation remains unassailable.

49. When advising non-occupier beneficiaries ('C' in our scenario), care should be taken to manage their expectations of what can realistically be achieved. Following Williams, an occupier has several potential bases for resisting claims of trespass and mesne profits. Trespass claims may be especially difficult if C has previously consented to B's occupation, whether tacitly or expressly. Beneficiaries may instead find more success in ensuring a grant is issued as promptly as possible, and thereafter ensuring the personal representative serves a notice to quit.

50. Finally, in our view these situations are particularly challenging for anybody acting as, or advising, a professional PR. In our experience, delays to the sale of a property are commonplace. This can be for any number of reasons ranging from belligerent occupier beneficiaries, to non-occupier beneficiaries refusing to engage unless the personal representative will provide assurances that mesne profits will be sought. PRs may quite understandably be reluctant to incur the costs of litigation and may wish to explore alternative options to resolve disputes (e.g. mediation or encouraging beneficiaries to take legal advice) or to raise funds for the estate (e.g. borrowing from a beneficiary or seeking a loan). In some scenarios however, PRs have little option but to involve the court, and at least for the time being, personal representatives should be reassured by the pragmatic and realistic approach favoured by the courts in cases such as Williams.

51. By way of practical suggestions for PRs:

51.1 We would encourage combining any residential property valuation obtained with an appraisal of market rent to ensure an accurate figure for daily charges.

51.2 If making a positive claim for mesne profits is undesirable, perhaps because of concerns as to proportionality of costs, the PR can explore the use of the estate's right of retainer to satisfy any occupation charge: see Cherry v Boultbee 41 E.R. 171.

51.3 The PR should as a priority ascertain from all other interested beneficiaries ('C' in our scenario) whether they object to B remaining in occupation without charge. The PR will be protected from criticism by

17 See the controversial decision in Re King's WT [1964] Ch 452 as to the need for an assent before a PR holds land as trustee.

concurrence and may avoid igniting a contentious situation by seeking to charge unnecessarily.

51.4 It is best to discuss any charge, or lack thereof, at the commencement of administration rather than seeking to reflect such charges only at the point of final distribution.

51.5 In our experience, PRs contemplating litigation will often do well to seek advice from specialist Counsel.

NICHOLAS CHOINIERE – Senior Associate, Clarion

JAMES SAUNDERS – Barrister, New Square Chambers

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Clarion Solicitors Limited

Elizabeth House

13-19 Queen Street

Leeds

LS1 2TW

Nicholas Choiniere
Senior Associate, Contentious Private Client
E: nicholas.choiniere@clarionsolicitors.com
T: 0113 336 3349
M: 07388 227 952

Nicholas Choiniere is a Senior Associate in the contentious private client team at Clarion. He specialises in private wealth disputes and acts for professional trustees, executors, beneficiaries and other stakeholders. He has acted at the High Court, County Court and Court of Protection.

Nicholas has a broad range of experiences and notably has experience working in two jurisdictions (England and Wales and Canada) and two languages (English and French). Nicholas works for both local and international clients and has a particular interest in trusts litigation.

James Saunders
Barrister, New Square Chambers
E: James.Saunders@NewSquareChambers.co.uk

James is a Rising Star of the Trusts and Probate Bar (Legal 500, UK Bar 2023) and has been described as "down to earth with excellent communication skills. He is bright, responsive and thoughtful." James is regularly involved in contentious probate claim, contentious executor removal applications, 1975 Act proceedings and all manner of claims by and against trusts and estates. To his core trust and estates practice James adds extensive knowledge of fiduciary issues in an insolvency context, asset recovery, real property and trusts in commerce.