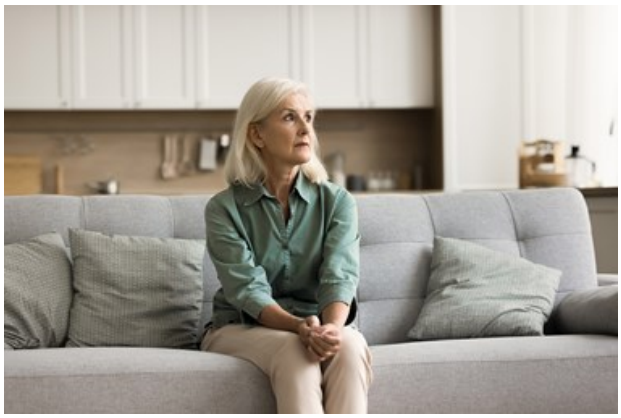


Right to reside clauses in Wills: risks, disputes and considerations in NSW

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A right to reside may be included in a Will where a person wishes to allow a spouse, partner, child or other loved one to continue living in a property after their death. While these clauses can provide some security and stability for the person living in the property while not gifting the property to them outright, they can also create uncertainty and disputes if they are not carefully drafted.

In NSW, right to reside arrangements should be considered carefully from both the perspective of the person receiving the right to live in the property and the beneficiaries who will ultimately inherit the asset once that right comes to an end.

What is a right to reside clause?

A right to reside clause gives a person the right to live in a property owned by an estate, usually for a specified period or until a particular event occurs.

Common examples include:

- A surviving spouse being allowed to remain in the family home for the rest of their life
- A dependent relative being given temporary accommodation after the deceased passes away

Importantly, a right to reside does not usually transfer ownership of the property to the person living there. Ownership commonly remains with the estate or passes to other beneficiaries under the Will, subject to the right to reside.

This distinction can create practical and legal complexities.

The perspective of the person with the right to reside

From the perspective of the person receiving the right to reside, the arrangement can provide important emotional and financial security. Remaining in a familiar home may allow a person to maintain independence and avoid the stress of relocating during a difficult time.

However, it is less secure accommodation than receiving ownership of the property outright. It can also be a very unhappy situation to be in, knowing that the beneficiaries are waiting for the right to reside to end for them to receive the property.

The terms of the clause are critical.

Responsibility for expenses in right to reside clauses

One of the most common issues involves uncertainty about who is responsible for property expenses.

A well drafted clause should clearly address matters such as:

- Council rates
- Water rates
- Insurance
- Repairs and maintenance
- Strata levies (including administrative fund, capital works fund and special levies)
- Electricity, water, gas and other utility bills

Disputes often arise where the Will is silent or unclear. For example, a person with the right to reside may assume the estate or beneficiaries are responsible for major repairs, while the beneficiaries may expect the occupant to pay all costs associated with the property. Depending on the property and the length of the right to reside, these expenses can be significant.

Clear drafting can help to reduce tension and avoid unnecessary conflict.

However, if the person with the benefit of the right to reside is required to incur significant capital costs with respect to the property, and the right to reside ends after the costs are incurred, it can result in the beneficiaries receiving the benefit of the expenses incurred.

Restrictions on use of the property - can conditions be placed on the right to reside?

Some clauses impose conditions on the right to reside. These may include restrictions such as:

- The property must remain the person's principal residence, and they cannot be absent for an extended period of time
- No other occupants may live at the property without consent of the executors
- The property cannot be rented out
- The right ends if the person enters into a new relationship or enters residential aged care

If these conditions are not clearly detailed, misunderstandings can occur. If the conditions are too onerous, then it can be prohibitive for the person with the benefit of the right to reside.

Security of occupation - how secure is a right to reside arrangement?

A poorly drafted clause may create uncertainty about whether the person can be required to leave the property under certain circumstances.

For example, disputes can arise where:

- The property becomes unsuitable for the occupant's health needs
- The property requires substantial repairs
- The estate does not have sufficient funds to maintain the property
- The beneficiaries wish to sell the property

A carefully considered estate plan should address these practical possibilities in advance.

The perspective of beneficiaries waiting to inherit

Right to reside clauses can also create challenges for the beneficiaries who are ultimately entitled to inherit the property once the right comes to an end.

In some estates, beneficiaries may need to wait many years or decades before they receive the benefit of their inheritance. This can create frustration, particularly where the property forms a significant portion of the estate.

Delays in finalising the estate

A right to reside arrangement can significantly delay the final distribution of an estate.

Executors and beneficiaries may remain involved in managing the property for an extended period, particularly where ongoing maintenance or disputes arise.

This can place financial and administrative burdens on the estate and create tension between family members.

Property maintenance and deterioration

Beneficiaries may become concerned if the property is not properly maintained during the period of occupation.

Issues can arise where:

- The property requires works due to normal wear and tear
- The property falls into disrepair
- The occupant cannot afford repairs
- Insurance obligations are overlooked
- The value of the property decreases over time

Disputes about improvements or contributions

Another common source of conflict arises where the occupant contributes financially to improvements or renovations during their occupation.

Disputes can later emerge about whether the occupant should be reimbursed for those contributions or whether the improvements increased the value of the beneficiaries' inheritance.

A beneficiary may ultimately receive the benefit of any improvements, but they would typically not want to incur the cost of such improvements where the right to reside may extend for a number of years into the future.

Careful drafting and proper record keeping can help reduce these risks. The longer the right to reside the greater the likelihood that improvements will be required to the property.

Is a life interest a better option than a right to reside?

In some cases, a life interest trust may be more appropriate than a simple right to reside clause.

A life interest arrangement can provide greater flexibility and allow trustees to manage the property more effectively. For example, a life interest trust may permit the sale of the original property and the purchase of a replacement residence if circumstances change.

This can be particularly important where:

- The occupant may later need to downsize

- The property may become unsuitable due to age or health

The appropriate structure will depend on a variety of factors, including the person's family circumstances, the value and nature of the assets, and the objectives of the Will maker.

The importance of careful drafting

Right to reside clauses are frequently the subject of dispute, and should never be treated as a simple or standard provision in a Will. Every family situation is different, and poorly drafted clauses can create uncertainty, financial strain, and strain on relationships.

A carefully drafted clause should clearly address:

- Who has the right to reside
- How long the right continues
- When the right ends
- Responsibility for expenses and maintenance
- Whether the property can be sold or replaced
- What happens if the occupant needs to move involuntarily, such as a move into aged care
- The powers of the executor or trustee

Proper legal advice can help ensure the arrangement reflects the intentions of the Will maker while balancing the interests of all parties involved.

Summary of key risks of right to reside clauses in NSW Wills

Inappropriate or poorly structured right to reside clauses can create complications for everyone involved. Common issues can include:

- **Unclear Expense Responsibilities** - leading to disputes or uncertainty over who pays rates, insurance, repairs and maintenance.
- **Restrictive Conditions on Occupation** - restrictions that may be difficult or impractical for the occupant to meet.
- **Lack of Security of Occupation** - leading to uncertainty about whether the occupant can be required to leave early.
- **Delays to Estate Distribution** - beneficiaries may be required to wait years or decades to receive their inheritance.
- **Property Maintenance Disputes** - disagreements about who is responsible for the cost of upkeep, deterioration or the cost of repairs.
- **Improvement and Renovation Conflict**s - leading to disputes over whether the occupant should be reimbursed for money spent on the property that may improve the value of the property.

- **Unsuitable Arrangements** - circumstances change, and a clause that works at the time of drafting may become impractical or unsuitable later.

Seeking advice early is important

Right to reside clauses can be useful tools in estate planning, but they require careful consideration and drafting to avoid unintended consequences.

If you are looking to include a right to reside in your Will, legal advice should be sought early to ensure the arrangement is practical, clear and appropriate in the circumstances.

The team at E&A Lawyers can assist with estate planning, Will drafting and estate administration advice tailored to families across NSW.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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