

Issues to Be Considered When A Retirement Village Contract Ends

Retirement Villages Act 1999
Retirement Villages Regulation 2009

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The Retirement Villages Act was amended in March 2010 and the amendments generally apply to all existing contracts.

Let us assume that one of your relatives has either died, or moved out of a retirement village into a nursing home. When he entered the village on 28 March 2006 he paid \$250,000 to go in and was told that when he left the village the operator would deduct 5% a year for a maximum of five years. He left the village on 28 August 2010 and the village has found a new resident who wants the unit and is prepared to pay \$375,000.

The village operator has given you a document setting out the calculation of the amount which the village says is to be returned to your relative. The calculation is attached to this paper. How do you understand the document that you have been given? This paper will consider each of the items in the document and the underlying law behind each item.

I emphasise that this is an example and in each case you have to look at the village contract to work out how much the resident or their estate should receive. Sometimes the departure fee is based on the amount of the ingoing contribution being paid by the next resident rather than the ingoing contribution paid by the departing resident.

Retirement Village

Section 5 of the Retirement Villages Act defines a "retirement village" as:

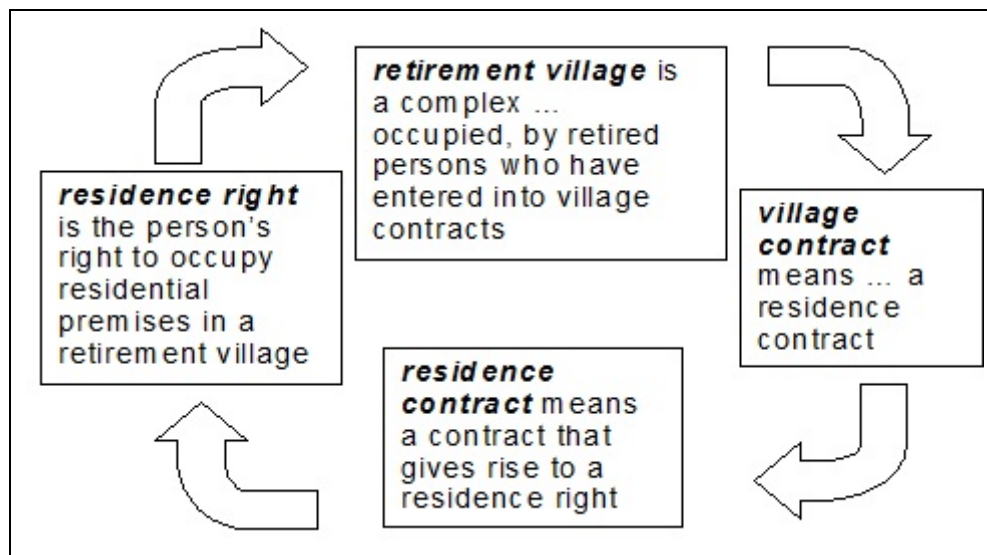
A complex containing residential premises that are

- predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied
- by retired persons
- who have entered into village contracts with an operator of the complex

There are various exclusions including accommodation:

- under the Aged Care Act 1997
- under the Residential Parks Act 1998
- for Aboriginal Housing
- in a boarding-house or lodging house
- for employees who are not residents of the retirement village
- in any residential premises the subject of a residential tenancy agreement in the form prescribed under the *Residential Tenancies Act 1987* to which the operator of a retirement village is a party and that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement.

A "resident" must be a "retired person" which is defined as being over 55 or retired. In theory you could have a village occupied by dot com retirees in their 30s.



The definition of a retirement village is circular, but it works in practice.

We will assume that Springfield Retirement Castle satisfies the definition.

Because it is a retirement village, the Retirement Villages Act and Regulation determine how the financials are to be worked out.

The Premises

What kind of residency can you have in a retirement village?

Invariably the resident is in occupation under a lease or a licence, although some villages are strata and some company title. However, in most cases it will be a lease or a licence of a unit, and/or a garage, and sometimes a storage unit. Most not-for-profit villages use an unregistered licence instead of a lease. However it is described, if the document gives exclusive occupation, it is a lease. Because the terms of occupation are prescribed in detail in the Retirement Villages Act and Regulation, from a practical point of view, it doesn't matter much what you call it.

There are quite a few strata villages but none have been set up for many years. This is because under the Retirement Villages Act you must have certain financial structures and, in most cases, a residents committee. Under the Strata Schemes Management Act there is superimposed another financial structure that has to comply with that Act as well. In addition the Act creates an owners Corporation which has to operate in conjunction with a Residents Committee if there is one. It becomes virtually impossible to manage both structures satisfactorily. So, the most common retirement village arrangement is the lease or licence coupled with a loan.

Ingoing Contribution

In the lease or licence and loan model a resident lends to the village an amount of money which is called in the Act an "ingoin contribution".

Section 6:

(1) *For the purposes of this Act, an "ingoin contribution" is:*

- (a) *any money payable to the operator under a residence contract, or*
- (b) *any other money, regardless of how it is described, that is paid to the operator of a retirement village in consideration for, or in contemplation of, the person by whom (or on whose behalf) the payment was made becoming a resident of the village, regardless of whether the payment is made in a lump sum or by instalments.*

"Ingoing contribution" does not include the purchase price of strata title or company shares.

The resident is given a lease or a licence to occupy the premises and when they leave they get back the ingoin contribution less an amount of money deducted by the village. The deducted amount is called a departure fee or a "deferred management fee". In some cases the resident also gets a share of capital gain. Section 7A defines capital gain as being the difference between the ingoin contribution the resident pays when they go in, and the ingoin contribution which is paid by the next resident after the first one leaves. In our example the capital gain is the difference between the \$250,000 ingoin contribution paid by the departing resident and with \$375,000 being paid by the new resident.

If the unit is strata, there is no ingoin contribution because the resident has bought the unit from the previous owner. The operator generally records a charge on the title to secure the payment of levies and any other monies payable to the operator. The charge must be discharged and removed from the title before the premises can be sold to the next resident.

It is now becoming common for part of the ingoin contribution to be non-refundable. One of the reasons for this is to help the operator to recover some of the costs if the resident leaves early.

Registered Interest Holder

We now need to look at the concept of registered interest holder.

Section 7:

A resident is a registered interest holder if they are:

- the registered proprietor of land,
- the owner of a strata lot or community title lot,
- the owner of shares in a company title scheme,
- the holder of a registered lease for a term of at least 50 years that includes a provision that entitles the person to at least 50% of any capital gain.

Whether or not the resident is a registered interest holder impacts on when the departing resident is repaid the ingoing contribution and whether they are liable for wear and tear on the premises. There used to be other differences between a registered interest holder and other residents but they have been gradually eroded.

Departure Fee

What is the departure fee, and how is it calculated? It was originally called by the industry a "Deferred Management Fee" but the Act changed the terminology to "departure fee". Many people in the retirement village industry still call it a Deferred Management Fee or DMF.

A **departure fee** is:

- any amount of money payable under a village contract that is calculated in relation to the period during which the former occupant had a residence right in the village. [Section 156]
- deducted from the former occupant's ingoing contribution or, if a registered interest holder, out of the sale proceeds. [Section 157]
- not payable to the extent that it is calculated in respect of a period after the former occupant permanently vacated the premises. [Section 158]

If a resident moves to other premises in the village they are taken to have a continuous residence right. This means that you do not have to pay a departure fee if you move from one unit in the village to another.[Section 156]

Note that you cannot have a departure fee without an ingoing contribution. In strata villages there are no ingoing contributions because the resident buys the strata unit from the previous resident.

The calculation statement shows that the resident first took occupation on 28 March 2004, they gave vacant possession on 28 September 2010 and had been in occupation for 1,614 days. Section 156 of the Act says that the departure fee must be calculated on a daily basis from occupation until the date that the resident permanently vacated the premises. There are some provisions in the Act dealing with contracts entered into before 1 July 2000. You will have to look at the particular provisions where you are dealing with a contract before that date.

"Permanent Vacation" of the Premises

The calculation of the departure fee depends on the date on which the resident permanently vacates the premises. Section 8 of the Act says that permanent vacation is:

Section 8 **"Permanent vacation" of residential premises**

a person is taken to have **permanently vacated** residential premises in a retirement village when:

- (a) the person (or another person on behalf of the person) delivers up vacant possession, or

- (b) the executor or administrator of the person's estate delivers up vacant possession, or
- (c) the Tribunal makes an order declaring that the residential premises were abandoned by the person, or
- (d) if the person is a registered interest holder the person dies or moves out of the premises.

The relevance of the definition of "permanent vacation" is that the departure fee ceases on the resident giving permanent vacation, levies cease 42 days after permanent vacation and the refund of the ingoing contribution is in some cases related to the date of permanent vacation.

Today most villages take the view that you have not given vacant possession unless you have handed the key in.

Calculation of Departure fee

We can now work out the amount of the departure fee. Sometimes the departure fee is based on the amount of the ingoing contribution being paid by the next resident rather than the ingoing contribution paid by the departing resident. Where that happens you need to insert the new ingoing contribution into the formula.

In this case the contract said that the departure fee was 5% pa for a maximum of 5 years. The period in occupation was 1,614 days and the Act says that the departure fee is calculated on a daily basis. Here is the calculation.

Ingoing Contribution (Loan)	\$250,000.00
Maximum Departure fee (DMF) - 5 years @5%pa	62,500
Occupation Date:	28/03/2006
Date of permanent vacation:	28/08/2010
Days in occupation	1,614.00
Departure fee	\$55,273.97

You will see some village contracts with variable percentages, for example, 8% in the first 2 years then 3% for the next 4 years. There is no fixed arrangement. But remember that the interest rate is fixed when the resident signs the contract, so they should be clearly advised at that time what the potential deduction could be.

Date of Repayment to the Resident

The Act specifies the date on which the ingoing contribution is to be repaid, less any amounts due to the village. The date depends on whether or not the resident is a registered interest holder.

Registered interest holder:

Section 180: Payment is to be made following the sale of the premises, within 14 days after the operator enters into a new arrangement with a new

resident, such as signing a lease, or a residential tenancy agreement or letting a new resident take up residence, unless the contract provides for earlier payment.

Not registered interest holder:

Section 181: Payment is to be made within 14 days after the operator enters into a new arrangement with a new resident, such as signing a lease, or a residential tenancy agreement or letting a new resident take up residence, unless the contract provides for earlier payment, **but no later than 6 months after** the resident otherwise delivered up vacant possession of the premises.

If you are not entitled to at least 50% of the capital gain the operator has to pay the refund within a maximum period of 6 months after providing vacant possession, whether or not the premises have been resold. In that case the village pays the ingoing contribution less any departure fee. If the premises are sold after that date any adjustment of the capital gain has to be made at that time. However, it is uncommon for a village contract to provide for a capital gain of less than 50%.

Consequences of not Repaying the Ingoing Contribution on Time

If a payment is not made by the required date Sections 180 and 181 provide:

- You may apply to the Tribunal for an order directing the operator to make the payment.
- Interest is payable at the rate prescribed by the Regulation (UCPR rate).
- If a payment made was not properly calculated, or the conduct of the operator has unfairly had a negative financial impact on the former resident, you may apply to the Tribunal for the operator to recalculate the amount.

Conduct of the operator that may unfairly have a negative impact on a former occupant includes entering into a village contract with a subsequent resident that contains terms that:

- are substantially different from those contained in the village contract to which the former occupant was a party, and
- will have a negative financial impact on the former occupant to the benefit of the operator.

Occasionally an operator will offer a contract to a new resident at a higher percentage departure fee, or introduce a non-refundable part of the ingoing contribution. That may affect the saleability of the premises and if the operator does that so that the premises are harder to resell you would need to consider whether the operator has engaged in conduct that may unfairly have a negative impact on the former occupant.

Date Recurrent Charges Cease

General services

general services means services provided, or made available, by or on behalf of the operator, to all residents of a retirement village.

Note. Examples of general services are management and administration services and gardening and general maintenance.

Registered interest holders:

General services cease when the resident permanently vacates after a new arrangement is entered into, unless an earlier date is agreed. After 42 days shared in the same proportion as capital gain. [Section 153]

Other residents: Cease 42 days after the resident permanently vacates after a new arrangement is entered into, unless an earlier date is agreed. [Section 153]

Optional services

optional services means optional services made available, by or on behalf of the operator, to individual residents of a retirement village.

Note. Examples of optional services are the provision of meals, laundry services and the cleaning of the residents' residential premises.

Optional services cease when resident moves out or dies. [Section 151(1A).]

Repayment Calculation

We need to look at the non-refundable part of the ingoing contribution and the 50% of the capital gain together.

Hayes v Fernbank Developments P/L[2006] NSWCTTT 394

There was a registered lease for 60 years. The lease said that the resident was entitled to 50% of the capital gain less:

- \$5,000.00,
- the lessor's costs,
- the departure fee,
- any other amount payable by the lessee to the lessor, and
- 10% of the premium (ingoing contribution) payable by the new lessee.

There was no definition of "capital gain" in the Act before 2010.

The Tribunal said:

In the absence of any definition in the legislation of capital gain, I take it to be any increase in value, as shown by any increase in the premium payable by an incoming lessee from that paid by the previous lessee. The premium is, after all, the purchase price of the leasehold. In reaching that figure, it is appropriate to deduct the costs of sale. It is also appropriate to allow deduction of other sums owing, whether by way of outstanding fees or a departure fee. That leaves the question of the deductibility of the \$5,000.00 and the 10% of the premium payable by the incoming lessee.

Taking all of that into account, the Tribunal said that if in your calculation you

deduct from the capital gain any amount such as the non-refundable ingoing contribution, or the 10% of the premium, then the resident necessarily received less than 50% of the capital gain. In our case this would mean that the resident is not a registered interest holder which, as we have seen, impacts on when the refund is due and when payment of the recurrent charges cease.

A definition of capital gain has now been put in the Act:

Section 7A:

... any increase between the amount that the resident paid for the residence right for the relevant premises and the amount that the next resident pays for a residence right for the same premises, less any costs associated with the subsequent sale or lease of the premises.

The definition does not address the *Fernbank* issue.

Refurbishment - Repair

Section 164 of the Act says:

A former occupant of residential premises in a retirement village ... is not liable to refurbish (or pay for the cost of the refurbishment of) the premises.

"Refurbishment is defined in Section 162 as:

*In this Division, **refurbishment** of residential premises the subject of a residence contract means any improvement of the premises in excess of that required to reinstate the premises to the condition they were in (fair wear and tear excepted) at the commencement of their occupation by the resident under the contract.*

The Act says that the operator of the village cannot require a resident to pay to do anything to the premises to improve them to a condition better than fair wear and tear.

The reverse of this is that the operator can require a resident **who is not a registered interest holder** to leave his or her residential premises as nearly as possible in the same condition (fair wear and tear excepted) as the premises were in at the beginning of the residence contract, as set out in the condition report, and to bear the cost of any repairs to the premises that are necessary because the former occupant did not leave the premises in the required condition.[Section 165]

Note that if you are a registered interest holder (registered lease and 50% or more of capital gain) there is no obligation to do anything to the premises, regardless of the condition they are in. This is because the registered interest holder will be receiving at least 50% of the capital gain on the resale of the premises.

There is nothing wrong with an operator agreeing with the resident or the executors after the resident vacates that the premises be refurbished at their

joint cost on the basis that refurbishment of the premises will increase the sale price, with the operator and the resident sharing that increase. This is commonly done. It is when the operator tries to unilaterally impose refurbishment charges that the practice is unlawful.

You will have to look at any situation as and when it comes up: Here is a summary of what to look for.

- Was the resident a registered interest holder?
- If not, the operator cannot claim for a refurbishment other than to bring the premises up to the standard they were in when the resident entered the village, less fair wear & tear from the condition as set out in the condition report.
- What did the condition report say?
- Was there an agreement between the operator and the resident, either in the contract or otherwise, that the resident would contribute to a refurbishment?

Selling Fee

As with any other property, if a resident in a retirement village is entitled to receive a share of the capital growth on the value of the property, they will want to maximise the opportunity of getting the best price. To do that, you have to find a way to market the property in the most effective way. In the past, operators have found that most new residents choose a village because it is local, or is near their support group, or because they already know a resident in the village. Agents rarely came into the picture. However, there is a developing group of agents who specialise in selling units in retirement villages.

The Act in Sections 166-173 allows a **registered interest holder** to appoint an agent and set the selling price for the unit if they wish to do that. There is a comprehensive procedure set out in those sections.

How can the selling fee in the calculation come about? First we need to consider what is being sold.

Section 129 - Summary

- A residence right of a registered interest holder (other than a long term registered lease) terminates only on the completion of the **sale** of the premises. Strata and company title. [Section 129(1)]
- A residence right arising from a residence contract that is in the form of an assignable lease terminates on the assignment of the lease. [Section 129(1A)]. There are very few of these.
- Other residence contracts, including a long term registered lease, terminate [Section 129(2)] :
 - (a) on the date on which the resident permanently vacates the premises, or
 - (b) on the death of the last surviving resident under the contract.

Strata title

The resident can appoint an agent to sell the unit. The residence right terminates on completion of the sale.

Assignable lease

If the resident is a registered interest holder the resident can appoint an agent to sell the lease of the unit. The residence right terminates on completion of the assignment.

Long term registered lease

if a resident dies or vacates, the resident is no longer a registered interest holder. However, by a convoluted process, the Act gives them the right to appoint an agent and set the price.

- The right to appoint an agent and set the price under Sections 166-173 applies to a "resident". [Section 166]
- "Resident" is a person who has a "residence right" or is a "former occupant".[Section 4(1)]
- Sec 129(2) says the resident right terminates on death or permanent vacation.
- Sec 150(2) In this Part, a reference to the sale of residential premises is taken to include a reference to the sale of the residence right in respect of [*a long term registered lease of*] the premises.
- Even if the "resident right" has terminated, a former occupant who was a registered interest holder has a right to appoint an agent and set the price.

Some leases provide that if the operator finds a new resident, the outgoing resident will pay a fee of, say, 3% of the new ingoing contribution. So long as the operator is not acting as agent for the resident that provision in the village contract (and the payout calculation) is acceptable. However, if you are advising a client who is moving into a village under a lease with that kind of provision, you should, when negotiating the lease, ask the operator what it will do to entitle them to payment of 3% of the new ingoing contribution.

If the agent is independent of the operator, the agent is only entitled to commission if the resident has signed an agency agreement under the Property, Stock & Station Agents Act.

Costs

Section 31 of the act says that the legal and other expenses incurred by the operator in connection with the preparation of a village contract are payable by the operator and are resident in equal shares up to a maximum amount. That amount is prescribed as \$200. However, there is no prohibition on what is charged on the termination of the lease. Accordingly where the lease is registered most villages charge in the order of \$550 for processing the Surrender of Lease plus stamp duty which is normally the minimum \$50.

Involuntary Departure

We have so far considered the situation where the resident has died or has chosen to leave the village. From the point of view of calculating the payout, it doesn't matter if the resident leaves willingly or not. However, it may be helpful to look at areas where the resident does not leave voluntarily.

Sometimes residents do not realise that they cannot live independently any longer. At that point they, but more commonly their family, arrange for the resident to move into an aged care unit. If the resident is reluctant to move, the village has certain options available to them.

Section 133 of the Act gives the operator the right to apply to the Consumer Trader and Tenancy Tribunal for an order terminating the residence contract on medical grounds. The Tribunal can terminate the residence contract:

... if it is of the opinion that the residential premises occupied by the resident are unsuitable for occupation by the resident because of the resident's physical or mental incapacity.

The procedure is set out in Section 133 of the Act.

Termination for breach

The operator may also apply to the Consumer Trader and Tenancy Tribunal under Section 134 for an order terminating a residence contract if the resident:

*... breaches any village contract between the resident and the operator or breaches a village rule, or
has intentionally or recklessly caused or permitted, or is likely intentionally or recklessly to cause or permit:
(a) serious damage to any part of the village, or
(b) injury to the operator or an employee of the operator or any other resident.*

There are few cases on either Section 133 or 134, which probably indicates that villages manage the issue well.

Presbyterian Aged Care NSW & ACT v Buchan [2009] NSWCTTT 583

Mr & Mrs Buchan left rubbish on common areas in the village and their premises were filthy. On 29 May 2009 Gosford City Council wrote to the Presbyterian Church Property Trust following an inspection of the premises and said that conditions were such as would justify the council serving an order under the Local Government Act requiring Mr & Mrs Buchan:

- 1. To do or refrain from doing such things that are specified to ensure that the land is or premises are placed or kept in a safe and healthy condition.*
- 2. Remove all accumulations of waste material including but not limited to used furniture, used household items, papers, food boxes and materials that are being stored in the open carport area, the open*

walkway and the landings on the first floor adjacent to Unit 21 and within Unit 21, which are or are likely to be harbouring vermin, from the premises to an approved waste disposal facility.

The Tribunal said:

I am satisfied that the Respondents are in breach of Clause 30.4 of the Residential Tenancy Agreement which requires them to keep the grounds and garden areas tidy and free from rubbish.

I am satisfied in the circumstances of the case that termination of the contract is justified in accordance with Section 134(3)(a) I am further satisfied that the Respondents have been guilty of persistent breaches of the Resident's contract within the meaning of Section 134(3)(b) and I am satisfied that the circumstances of the case justify termination of the contract.

In considering termination CTTT must have regard to:

- the nature of the breach;
- whether the breach was serious or whether behaviour or likely behaviour of the tenant would continue to subject neighbours or other persons or property to unreasonable risk in the even of failure to terminate;
- any serious adverse effects "the tenancy" has had on neighbours or other persons;
- the landlord's responsibility to its other tenants;
- whether there has been a breach of an order of the Tribunal; and
- the history of the tenancy.

Baptist Community Services v Buchan [2010] NSWCTTT 624

The operator sought orders:

That Mr and Mrs Buchan had breached the terms of the agreement being clauses:

- 5.5 (c) in that they caused or permitted damage due to the accumulation of clutter
- 5.6 (b) that they had interfered with the reasonable peace, comfort and privacy of other residents, through a failure to remove refuse and allowing a foul odour to emit from the unit, and
- 16.1 failure to pay rent in advance.

The Tribunal said:

I am satisfied that the breach, and the persistency of the breaches, was such as justify termination of the contract - see section 134 of the Act as set out below"

It is interesting that the Buchans had a history. They had some years before been in the Land and Environment Court.

Buchan and Anor V. Ryde City Council [1996] NSWLEC 154

The court said:

Mr and Mrs Buchan are elderly people, who are also in poor states of health. There is ample evidence before the Court of their various ailments and problems. They have accumulated a vast amount of material on their premises. Assessor Nott said he had no hesitation in finding that the premises were in an unhealthy state and constituted a threat to the health and safety of the public, but in particular to Mr and Mrs Buchan and, to a lesser but nonetheless not an insignificant extent, to adjoining neighbours.

The Presbyterian and Baptist village operators had taken on Mr & Mrs Buchan who clearly had an unsatisfactory history. Operators try to assess how potential residents might fit into their village but it is obviously a very difficult task.

See also: **Buchan v Betta Storage Containers & Engineering** (General) [2007] NSWCTTT

Contractual Provision

Some contracts have a provision such as the following:

The Resident indemnifies the Operator against any injury or damage to any resident in the village, or any employee or contractor of the Operator or any resident, or to the village itself arising through the actions (or inactions) of the Resident in circumstances where the Resident (or the Resident's family) has failed to notify the Operator of any deterioration in the mental or physical condition of the Resident which may affect the Resident's ability to maintain a successful independent lifestyle in the village.

The intent of clauses such as this is to try and persuade children of residents who have lost their ability to maintain a successful independent lifestyle to have their parent moved to more suitable accommodation. The threat of the cost of paying an indemnity out of their parent's funds if the parent causes damage seems to tip the scales.

Can A Person Leave Their Retirement Unit in Their Will?

Strata and company title

Section 129 says that a residence right in respect of strata terminates on the completion of the sale of the premises. "Sale" is not defined in the Act.

If the strata premises are left in a Will the entitlement to occupy the premises as part of the village ceases on the sale. You will need to look at the village contract to determine what right the beneficiary may have to access the facilities in the village. If strata premises in a village were left in a will to a beneficiary, the executor or beneficiary would sell the property in the normal way. If the beneficiary wishes to live in the village they would have to satisfy the requirement that they be over 55 or retired.

On the rare occasion that there is an assignable lease, that could also be sold if it is bequeathed to a beneficiary.

Other interests

Other residence contracts, including a long term registered lease, terminate:

- (a) on the date on which the resident permanently vacates the premises,
or
- (b) on the death of the last surviving resident under the contract.

[Section 129(2)]

If an interest under a lease or licence is bequeathed in a will there is nothing that can be transferred to the beneficiary because the lease or licence has terminated on the death of the testator. If you are drafting a will and the testator wishes to leave premises to a particular beneficiary you would need to consider that the estate / beneficiary is entitled to receive the payout amount from the village (ie the ingoing contribution less departure fee and any other payments). You would need to consider whether there should be an apportionment between the estate and the beneficiary of recurrent charges that arise after the date of death.

If the beneficiary wishes to occupy the premises, there would be a new occupation of the premises by the beneficiary. In that case the beneficiary would receive the payout, which would in most cases be considerably less than the new ingoing contribution, and funds would have to be provided for the difference to make up the amount of the new ingoing contribution. The Will drafter would have to take all of this into consideration.

Springfield Retirement Castle

Resident:	Homer
Premises:	Unit 38
Ingoing Contribution (Loan)	250,000.00
Non-refundable part of ingoing contribution	5,000.00
New Ingoing Contribution	375,000.00
Maximum Departure fee (DMF) - 5 years @ 5%pa	
Occupation Date	28/03/2006
Date of permanent vacation	28/08/2010
Days in Occupation	1614.00
Date Recurrent Charges cease	9/10/2010

Repayment Calculation

Outgoing resident's ingoing contribution	250,000.00
50% capital gain	62,500.00
	\$312,500.00

Less

Non-refundable part of ingoing contribution	5,000.00	
Departure fee	55,273.97	
Resident's share of repair costs	5,271.00	
Selling fee 3%	11,250.00	
Recurrent charges and/or personal services	1,000.00	
Legal costs - Surrender of Lease	550.00	
Registration fee	97.00	
Stamp Duty on Surrender of Lease	50.00	78,491.97
Balance refundable		\$234,008.03