

Joint Ownership of Property

There are many reasons why people will own property in joint names with another. Examples are:

- Partners in business together
- Trustees of trusts created by a Will or Settlement Deed
- Investors in an asset, in which they will hold differing shares
- Husband and wife buying their residence
- An unmarried couple buying their residence
- A gay couple in a civil partnership

In these notes, we are concerned only with the last three. References to 'H & W' mean either husband and wife, or civil partners.

H & W buying their residence

In many cases when H & W buy a house in which they will live, very little thought is given by them (and unfortunately often even by their advisers) as to how they should own the property. There are, in fact, two clear choices available to them:

- Beneficial joint tenancy ('BJT'); or
- Tenancy in common ('TIC')

Beneficial Joint Tenancy

This is the situation in which H & W quite simply own the property jointly, with the following consequences:

- The property cannot be sold without the informed signature of both owners.
- Neither H nor W can transfer his or her interest in the property outright to a third party during their lifetimes, or by will.
- Upon the death of either of them, the survivor owns the property outright and title will be transferred into his or her sole name, without regard to the terms of any will.

Tenancy In Common

In the case of TIC, H & W reach agreement that they have separate shares in the property, probably a half share each but not necessarily. Generally, the agreement as to the actual shares will be incorporated in a written document. The result is that:

- Either H or W can transfer their respective share in the property to a third party, either by way of sale or by gift during his or her lifetime.
- Either H or W can give away their interest in the property by will either to the other owner (W or H) or to a third party.
- On the death of either H or W, the property does not automatically transfer to the survivor, but the share of the one who died will be dealt with according to his or her will and could benefit a third party.

Why would one party to a marriage or civil partnership want to gift his or her interest in the family home to somebody else, whether during lifetime or on death? Well, apart from the obvious example of a breakdown of the relationship, there may be perfectly sound reasons which should be acceptable to the spouse, such as:

- A gift by H or W, of his or her share, to their children, for tax planning purposes (subject to severe limitations as referred to below)
- A gift on trust by say H to W so that on W's eventual death his share of the property will definitely pass to their children, and cannot be given away by W to anybody else.

Taxation Treatment

For capital gains tax purposes and inheritance tax purposes, there is no significant difference between the treatment of BJT or TiC as between H & W. In the vast majority of cases, of couples who are both resident for tax purposes in the United Kingdom and domiciled in England, no tax will arise as between the two of them.

The use of the TiC formula does, however, give the opportunity for significant inheritance tax saving by appropriate structuring. Inheritance tax is a heavy tax, calculated at 40% of the value of an asset. Appropriate use of TiC ownership of a house worth £800,000 could result in a reduction of tax of £120,000 or even more; a very significant addition to the family's fortunes.

Owing to technical rules on valuation of interests in a property held by more than one person, a significant discount (up to 15% on the value) can be achieved for inheritance tax purposes in certain situations. This is more easily preserved in the case of TiC ownership than it is with BJT.

However, TiC is *dangerous* for couples who do not have properly drafted Wills; it can *increase* the tax bill if one dies without a Will.

Inheritance tax planning will usually be achieved by a gift of a share in the property to the couple's children, but subject to the following limitations:

- Such a gift is usually irrevocable and should not be undertaken unless H & W are quite certain that they have no need, and will in the future have no need, for the share given away.
- It is no good H & W giving away a share in their residence to their children, whilst they both wish to live there. For tax purposes, this will be totally ineffective because H & W are 'reserving a benefit' in the part of the property given away (in other words, the right to continue living there). However, exceptionally, this can sometimes work if the recipient child lives with H & W and shares the cost of running the home.
- More obtuse arrangements are often necessary, usually through trusts or wills.
- Sometimes it is necessary for the children to buy their shares in their parents' house, and pay cash (which the parents do not then simply give back).

Dealing With Incapacity

Following an accident, or for example, a stroke, H or W might be incapacitated. If an Enduring Power of Attorney has not been executed beforehand, there is no alternative but for the appointment of a receiver under the Mental Health Act 1985, by application to the Office of the Public Guardian.

However, it is always our recommendation that H & W should protect their positions by executing Enduring Powers of Attorney to cover such an eventuality. Under the old law, the powers given by an Enduring Power of Attorney were sufficient to allow H & W to appoint each other, and to allow one of them to sell their home by signing for both.

Although some did argue that this was not possible for very technical reasons, the Land Registry had adopted this practice. Now, however, it is not that simple:

- In the case where H has become incapable, W will still be able to sign the Contract for the sale of the property, both in her own right and for H; but
- There must be another person as well introduced as a trustee, to sign the Land Registry Transfer with W.

The Mental Capacity Act 2005 has introduced the concept of the Lasting Power of Attorney, either for personal welfare decisions or for financial matters, to be available in October 2007. The precise details are currently in consultation.

Enforcing The Sale

It has always been the case that a person with an interest in a property whether BJT or TiC, can seek an Order of the Court that the property should be sold and the proceeds distributed between the co-owners. And it has usually been the case that the Court will refuse such an Order where the property concerned is the residence of the two owners; the Court will not evict the other owner merely so that the applicant can receive his or her share of the proceeds of sale. Under the Trusts of Land and Appointment of Trustees Act 1996, the factors which the Court must take into account have been extended and clarified, and not only the interests of the two co-owners are protected but also the welfare of any minor who occupies (or might reasonably be expected to occupy) the property as his home.

However, subject to the Court's overriding discretion, it is still possible to obtain a sale Order where the original intention and purpose behind the co-ownership has ceased to be relevant.

Unmarried Couples

Many of the principles set out above also apply to unmarried couples, whether heterosexual or of the same sex. Gay couples who enter a civil partnership now enjoy the same tax exemptions as married straight couples. However, there are *no exemptions in respect of capital gains tax and inheritance tax for couples who live together without marriage or a civil partnership.*

Furthermore, in any dispute between such partners in relation to their property, it is important to recognise that the *law does not treat them as married or in a civil partnership*; there is no special process established for determining such disputes and dividing up their property, as there is in the case of divorce. Each partner's rights when they split will depend largely on their contribution to the purchase price of the property, and have little regard for their circumstances or requirements. It is vitally important therefore that they agree between themselves how they hold the property, in particular if they are to own it in different shares; and it would be sensible to discuss and agree wider issues which could arise from a break up, and incorporate them in an appropriate **Cohabitation Agreement**.

For more information or advice

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