Problems of Co-ownership, Occupation and Inheritance

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Property lawyers are frequently required to advise their clients on the legal consequences of owning property in joint names. An all too common scenario arises where two people, say A and B, decide to purchase a house together and, at the same time, want to make provision for the devolution of the property in the event of their deaths. Both A and B already have children from previous marriages (or relationships) and are keen to ensure that, in the event of either of their deaths, their joint interest in the house should pass to the respective issue from their former unions. How can this be achieved?

Legal and equitable ownership

In law, co-owners can only hold the legal title to property as joint owners.[1] In equity, however, owners can hold the equitable title as joint tenants or as tenants in common. Under a joint tenancy, all of the owners own all of the equitable title together. There is no question of the individual owners being entitled to a specific share of the equity. Moreover, neither owner, unless he or she severs the joint tenancy,[2] can unilaterally dispose of his or her interest in the land, for example, by leaving it by will. By contrast, under a tenancy in common, each of the owners holds his or her own individual (and quantifiable) share of the land which can be disposed of by selling or gifting it, or leaving it to a beneficiary in a will.

Married co-owners will, no doubt, prefer to hold the equitable title as joint tenants because, when property is held in this way, the right of survivorship will operate so that, if one of the joint tenants dies, the surviving joint tenant becomes entitled to the entirety of the equitable interest in the property. Unmarried couples, on the other hand, may prefer to hold the equitable title as tenants in common thereby avoiding the operation of the right of survivorship. As mentioned earlier, under a tenancy in common, each party will retain their own share of the property allowing him or her to

[1] Section 1(6) of the Law of Property Act 1925.

[2] Section 36(2) of the Law of Property Act 1925 provides for the severance of a joint tenancy by notice in writing served on all of the joint tenants. Thus, even if A and B have already purchased their home as joint tenants in law and in equity, s.36(2) provides them with the ability to sever the joint tenancy in equity and convert it into a tenancy in common.

dispose of it as he or she chooses. In terms of our scenario, therefore, this would be the preferred option allowing A and B to fulfill their wish, in the event of either of their deaths, to pass their equitable interests in the property to their respective children.
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Express trust

At first glance, an express trust, on the standard Land Registry Forms TR1/FR1, declaring that A and B hold on trust for themselves as beneficial tenants in common may offer the most practical solution. The trust, coupled with a will being made by both A and B leaving their respective shares in the realty to their issue will ensure that, in the event of A or B's death, the deceased's share will pass to *that* party's children. Thus, by way of example, if A had two children (C and D) and B had two children (X and Y), on A's death, C and D would take A's interest jointly by virtue of A's will. An obvious difficulty, however, may arise when either A or B dies (say A) and the children of the deceased (C and D) wish to realise their inherited share despite understandable opposition from the survivor (B) who wants to remain in the property. What measures can be taken to avoid this potential conflict?

Underlying purpose of the trust

If C and D remain adamant that they desire sale and B continues to remain in occupation, the former may well be tempted to make an application, under sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996, for an order for sale.

The pre-1996 Act case law, on the old trust for sale, placed great emphasis on the concept of the "underlying purpose of the trust". If the original purpose of the trust continued, a sale would be refused. On the other hand, if that purpose had ceased, then sale would usually be ordered in the absence of any other counter-balancing factors. Since 1996, however, the trust for sale has been replaced by the "trust of land" as the standard conveyancing tool for co-ownership of land. The judicial discretion conferred by sections 14 and 15 of the 1996 Act deliberately removes any bias towards a sale, encouraging a more broad-based and flexible approach. Thus, it will often now be reasonable for one party to desire sale and the other to resist it. In such cases, the court is obliged to fall back on the criteria specified in section 15 of the 1996 Act, which enable the court to assess the specific circumstances affecting the trust relationship. In this connection, the purposes for which the land is held on trust (i.e., the motivation underlying a co-operative living arrangement) can still be hugely relevant.

In *Stott* v *Ratcliffe*,[3] a pre-1996 case, the original purpose of the trust had been to provide a home for two elderly people living during their joint lifetimes and, thereafter, for the surviving co-owner. The Court of Appeal declined to order sale at the behest of the personal representatives of the deceased tenant in common, the explicit object of the acquisition of the co-owned property having

[3] [1982] 1 WLUK 467.

been to secure a home for the survivor.[4] Lord Denning MR stated:[5]

> 'In the case of a trust for sale for two people in equal shares as tenants in common it is said that you should allow the trust to continue – and there should be no sale – so long as the purpose of the trust continues – that the house should be used as a home for the two of them. But when the purpose of the trust comes to an end the house should be sold . . . Mrs Ratcliffe should be able to stay on in this house indefinitely for the whole of her life, if she so wishes. If she dies it may well be another matter. The purpose of the trust will then be completely fulfilled. It may well be that the house would have to be sold and the proceeds divided between the descendants of Mrs Ratcliffe, on the one hand, and Mrs Stott, or her descendants, on the other.'

Where, therefore, the trust is aimed at providing a home for the lives of A and B (as in our scenario), the courts have tended to refuse an order for sale while that purpose remains substantially capable of fulfillment - sale only being permitted where the residential purpose has been exhausted or frustrated, for example, by a breakdown in the relationship.[6] Thus, in our scenario, it seems unlikely that A's children (C and D) would be able to claim a sale over the wishes of B. The matter can be put beyond doubt if the parties expressly agree that no sale should take place pending the joint lives of the parties.[7] To this end, section 15(a) and (b) of the 1996 Act declares that:

> " . . . the matters to which the court is to have regard in determining an application for an order under section 14 *include*[8] … (a) the intentions of the person or persons (if any) who created the trust and (b) the purposes for which the property subject to the trust is held…"

Although there is an inevitable overlap between these paragraphs, it seems clear that an express statement in the transfer or trust deed[9] to the effect that the property is to be a joint home and used to house a co-owning survivor, would suffice to pre-empt any court application for sale. Further, it is possible that, in certain circumstances, the element of underlying purpose can operate like an estoppel in precluding a sale on the death of a co-owner. In *Jones (AE)) v Jones (F)*,[10] for example, a father had induced his son to give up his employment and to contribute money towards the purchase of the father's house on the basis of a reasonable expectation, encouraged by the father, that the son could live in the property for the rest of his life. The Court of Appeal held that the father's widow (who later succeeded to the father's interests under the relevant trusts) was

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[4] See also, *Power v Brighton*, unreported , 14 November, 1984. By contrast, in *Grindal v Hooper*, unreported, Times, 8 February 2000, a sale was ordered where no mutual intention to house the survivor existed.

[5] [1982] 1 WLUK 467, at 468.

[6] *Jones v Challenger* [1961] QB 176 and *Grindal v Hooper*, unreported, Times, 8 February, 2000.

[7] *Re Buchanan-Wollaston's Conveyance* [1939] Ch 217.

[8] Emphasis added. A range of other factors may, of course, influence the court in refusing an order for sale such as the poor health, disability or age of the parties.

[9] Typically, in Panel 11 ('Other Provisions') of the TR1 Form. Such a statement may also be contained in the parties' respective wills reiterating their shared intentions and purpose regarding the property.

[10] [1977] 1 WLR 438.

estopped from obtaining an order for sale, the Court considering it inequitable to defeat the purpose originally contemplated by the parties, which was to provide long-term housing for the son.

Creating life interests and remainders

An alternative way forward would be to employ an express trust which declares that A and B hold the property on trust for themselves for their joint lives remainder to all their children in equal shares. This way, A and B acquire an immediate joint life interest in the property vested in possession, whilst the children have the benefit of a vested remainder with possession postponed until the death of the survivor of A and B.

On the death of A, the survivor (B) will succeed to the life interest and will, therefore, be entitled to remain in the property. The possessory rights of all the children remain postponed during B's lifetime, but will fall into possession as soon as B dies. They will then become absolutely entitled in equal shares. For the purposes of section 15 of the 1996 Act, the underlying purpose of the trust would be self-evident in that A and B would have interests for their joint lives in the property, whilst the children would have to wait to inherit their shares.

Lease for joint lives

At first glance, the mechanism of a lease for joint lives may appear to provide an attractive alternative to the grant of joint life interests. Normally, a lease determinable with a life is automatically converted, under section 149(6) of the Law of Property Act 1925, into one for a fixed period of 90 years, if it is granted at a rent or a premium.[11] If no rent or premium is payable, however, the lease for life takes effect under a trust and, for most purposes, is virtually identical to a life interest under a trust because there is no statutory conversion under the 1925 Act.

The inherent problem, however, in applying this mechanism to our scenario is that the parties to a lease must be different persons, so that A and B cannot legally grant a lease of the property to themselves.[12] The rationale is that a lease creates a division of ownership between landlord and tenant. If the landlord and tenant is one and the same person, there is a merger of freehold and leasehold estates and no division of ownership can occur. By way of statutory exception, however, it is possible for A (the legal owner) to grant a lease to A and B. Similarly, A and B can grant a lease to A (or B).[13]

The only way to avoid this problem would be for A and B to transfer the legal title to their property

[11] The device of statutory conversion will not save a lease for life under which no rent or premium is payable: Binions v *Evans* [1972] Ch 359, at 370 and 372.
[12] *Rye v Rye* [1962] AC 496 and *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395.
[13] See, s.72(4) of the Law of Property Act 1925.

(assuming they are already joint owners) in favour of their respective children, C, D and X,Y by way of a simple transfer by way of gift (discussed more fully later) and for the latter then to grant a lease for lives to A and B at a mutually agreed (say, nominal)[14] rent or premium,[15] thereby conferring on A and B security of occupation for a fixed term of 90 years. The effect of such a lease would be that the term would be terminable after the death of the survivor of A and B by at least one month's written notice given to determine the lease on one of the quarter days applicable to it, or if none, then on one of the usual quarter days.[16] Needless to say, such a lease would also have the advantage of binding any purchaser of the property if A and B's children were minded to sell the property to a third party against A and B's wishes. Being a legal estate by statutory conversion, the lease would be registrable with its own title in the charges register against the freehold title of the property.[17] In order to formalise the position of the parties regarding responsibility for outgoings on the property pending the duration of the lease, suitable covenants could be incorporated into the lease regarding the payment of council tax, energy bills, etc., and liability for the cost of repairs and maintenance of the property.

One final point. If the property is the subject of an existing mortgage, A and B would not be permitted to go ahead with a transfer of the legal title to their children without the formal approval of their lender. Assuming such approval was forthcoming, careful thought would also need to be given as to who should continue to bear responsibility for the mortgage repayments during the currency of the lease.

Mutual wills

Wills, as we all know, are inherently revocable. However, they can become irrevocable through the application of the doctrine of mutual wills which arises where two parties (usually husband and wife) make identical wills, pursuant to a legally binding agreement, in each other's favour on terms that the survivor will not revoke his will without the consent of the other. Normally, revocation will give rise to a claim for breach of contract during the joint lives of the parties, but when one party has died, if the survivor revokes, the deceased can no longer maintain an action for breach of contract. Instead, a constructive trust is imposed in equity on the survivor from the moment of the death of the first to die for the benefit of those entitled under the deceased's estate in

[14] It should be noted, however, that no inheritance tax advantage will be gained by virtue of this arrangement unless A and B occupy the property to the exclusion of their children in return for a market rent: see further, footnote 23, below.
[15] In *Skipton Building Society v Clayton and Ot*hers (1993) 66 P & CR 223, it was held that sitting tenants who, in return for a discounted purchase price, had been granted a licence to occupy a flat rent-free for the rest of their lives, had in reality been given a lease and not a licence and that the lease was caught by s.149(6) of the Law of Property Act 1925 and duly converted into a 90-year term on the basis that the section states that: 'any lease at a rent or in consideration of a fine for the life or lives . . . shall take effect as a lease . . . for a term of 90 years determinable after the death of the survivor . . . of the original lessees . . .' The word 'fine' was regarded as an old-fashioned way of meaning 'premium', which was held to have been paid on the facts.
[16] Section 149(6)(d). In *Bistern Estate Trust's Appeal* [2000] EGLR 91, the lease was held to be determinable by the landlord only after the death of the tenant and his wife.
[17] Section 2(a)(i) of the Land Registration Act 2002.

order to prevent an equitable fraud.[18] As Morritt J stated in *Re Dale*:[19]

> '. . . the doctrine of mutual wills is to the effect that where two individuals have agreed as to the disposal of their own property and have executed mutual wills in pursuance of the agreement, on the death of the first, the property of the survivor, the subject matter of the agreement, is held on an implied trust for the beneficiary named in the wills. The survivor may thereafter alter his will, because a will is inherently revocable, but if he does his personal representative will take the property subject to the trust.'

The rationale for imposing a constructive trust in such circumstances is that equity will not permit the survivor to perpetrate a fraud by reneging on his agreement. Because the survivor receives the property on the basis of the agreement not to revoke his own will, it would be unconscionable for him to take the benefit without complying with his promise and thus equity intervenes to prevent this fraud. In this connection, the constructive trust operates as a form of floating trust on the death of the first testator which prevents the survivor disposing of the property by will in a manner inconsistent with the mutual wills. It seems, however, that the survivor can dispose of the property during his lifetime so long as this does not defeat the purpose of the trust. Upon the survivor's death, the trust crystallises and attaches on the remaining assets in accordance with the terms of the mutual wills.

In order, however, for mutual wills to bind the parties, there must be clear evidence (for example, statements included in the wills) of a legally binding contract not to revoke, rather than just a mere moral obligation so to do.[20] The decision in *Healey v Brown*,[21] has gone further and suggested that section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 applies to a contract relating specifically to land made between testators making mutual wills so that it is void at law unless each will was signed by both parties or the wills are in absolutely identical terms and duly exchanged. Apart from the decision in *Healey*, there is also a suggestion in *Taylor v Dickens*,[22] that *all* agreements for mutual wills where land is involved must comply with s.2(1) regardless whether other property (other than land) is included in the residuary estate.

Turning to our scenario, A and B already hold title to the property as tenants in common in equity. Let us assume that they execute identical wills leaving their respective shares in the property to each other for life, remainder to the their issue. What will be the effect of this arrangement? In the event of A's death, for example, the constructive trust will take effect to protect the terms of the

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[18] *Gray v Perpetual Trustee Co Ltd* [1928] AC 391 and *Charles v Fraser* [2010] WTLR 1489.
[19] [1993] 4 All ER 129, at 132.
[20] See, *Re Dale* [1993] 4 All ER 129, *Goodchild v Goodchild* [1997] 3 All ER 63, *Re Hagger* [1930] 2 Ch 190 and *Re Cleaver* [1981] 2 All ER 1018.
[21] [2002] WTLR 849. Interestingly, in *Re Walters (Deceased), Olins v Walters* [2008] WTLR 339 Ch D, Norris J rejected an argument that the parties' agreement was void under s.2(1) because it related to a house acquired by the survivor under his wife's will. His Lordship distinguished *Healey* on the ground that, in the case before him, the mutual will had made no mention of the house (by way of specific devise), but devolved under the deceased's residuary estate.
[22] [1998] 1 FLR 806.

parties' agreement, giving B a life interest in the house over A's share with remainder (after B's death) to A's children. When B dies, B's own children will become entitled to B's share and A's children will obtain the interest in remainder in A's share. One of the obvious drawbacks, however, of using mutual wills in this way is their inherent inflexibility – unless there is a consensual variation or later remarriage during the joint lives of the parties, both parties are locked into a restrictive arrangement (subject to either party withdrawing from the agreement by giving notice to the other party) which may, in time, no longer adequately reflect their altered circumstances or financial needs. Indeed, concerns over the extent of the assets covered by the constructive trust and the responsibilities of the survivor in relation to such property (in particular, where there are other commitments towards new partners or children) are likely to cause problems if not foreseen or anticipated at the time of the execution of the wills.

Transfer by way of gift

Assuming A and B have already purchased the property in their joint names, a more radical solution (as we have already seen) would involve the gifting of the legal title to their respective children, C,D and X,Y, by means of a transfer by way of gift using Land Registry Forms TR1 and AP1.

There are, of course, potential risks involved with gifting the property in this way. Once the transfer is made, A and B will no longer be the legal owners of the property and they will have no way of reversing their decision unless there is a specific caveat to the transfer allowing for this to happen. Here again, if the property is subject to a mortgage, formal approval for the transaction would need to be obtained from the lender. Moreover, in order to safeguard the interests of A and B, it would be necessary for the parties to arrange for the execution of a deed of trust under which the trustees (C, D and X, Y) would hold the property (together with all its contents) on trust for A and B (and the survivor of them) for life subject to the latter paying all outgoings in respect of the property (including any mortgage repayments assuming the property is mortgaged) and keeping the property in good repair. The overall effect of this arrangement, therefore, would be to grant A and B a life in interest vested *in possession* under which they would have the benefit of continued occupation and enjoyment of the property during their respective lifetimes.[23] A and B's children,

[23] It should be noted, however, that no inheritance tax advantage is gained by such an arrangement. If a person makes a gift of an asset during their lifetime but continues to derive benefit from it (for example, if a parent gifts their house to a child but continues to live in it) or if the recipient of the gift does not enjoy possession of the gift, then it will be a gift with reservation of benefit. In such circumstances, the property subject to a reservation is treated as still owned by the donor, and so remains part of their estate for inheritance tax purposes. There are some exceptions to these rules in respect of land. Thus, where there is gift of a share where the land is owned by the donor with another or others as tenants in common, for example, where a husband and wife each own a 50% share in the land rather than the whole land jointly) and a benefit is retained by the donor, then the rules will apply as normal unless: (1) the donor occupies the land to the exclusion of the donee in return for a market rent; or (2) the donor and the donee occupy the land together and the donor does not receive any significant additional benefit (for example, where a parent gives half of their house to their child who still lives at the property with them); or (3) the donor does not occupy the land (for example, because the land is rented out): see, s.102A of the Finance Act 1986.

on the other hand, would hold a vested joint interest *in remainder* with a right to future possession and enjoyment of the property after A and B's death. In terms of A and B's continued occupational security against third parties, A and B's life interests would be protected as overriding interests (or, alternatively, by notice or restriction on the register) so as to bind any purchaser of the property if A and B's children were minded to sell the property against their wishes.[24]

It should be borne in mind, however, that even without the formality of such a trust, equity may deprive a transfer of its full effect by imposing a constructive trust so that the original owners (in our scenario, A and B) retain the equitable interest in the property transferred. In *Bannister v Bannister*,[25] for example, Mrs Bannister sold two cottages to her brother-in-law for one-third less than their full market value. He promised orally to let Mrs Bannister stay in one of the cottages rent-free for the rest of her life, but four years later, he sought to evict her. The oral promise could not be enforced as a contract since it was not (or proved) in writing pursuant to s.40 of the Law of Property Act 1925. The Court of Appeal, however, held that, in view of the promise that the brother-in-law had made, he acquired the cottage as trustee during the lifetime of Mrs Bannister. Accordingly, he could not evict her so long as she wished to stay in the cottage. Scott LJ[26] described the relevant principle as:

> ' . . .the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest . . . [it is not] necessary that the bargain on which the conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another."

More recently, in *Costello v Costello*,[27] the husband and wife purchased their council house, the purchase price being provided by the husband and his son. The son protected his interest in the property by means of a trust deed which permitted the husband and wife to occupy the property rent-free for the remainder of their lives. After the death of the husband, the son sought to have the property conveyed into his sole name, arguing that the trust deed granted the wife only a licence to occupy the property. She, on the other hand, contended that she was a tenant for life under the Settled Land Act 1925 and, therefore, entitled to sell the property and require the trustees to use the proceeds of sale to acquire another property in which she would acquire a similar interest. The Court of Appeal held that, on the true construction of the trust deed, the wife was accorded a life interest in the property which was consequently limited in trust for persons by way of succession.

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[24] If, however, the purchase price is paid to two or more trustees (as would be likely in our scenario given a sale by all four of A and B's children), A and B's equitable interests would be automatically overreached: see, s27(1) and (2) of the Law of Property Act 1925 and Sch 3, para 2, to the Land Registration Act 2002. See further, M Pawlowski and J Brown, "Cohabitees and the Problem of Unoverreached Beneficial Interests: Time for a Rethink?", [2021] TLI 35/2, 112.

[25] [1948] 2 All ER 133. See also, *Binions v Evans* [1972] 1 Ch 359.

[26] [1948] 2 All ER 133, at 136.

[27] [1995] 70 P & CR 297. See also, *Ungurian v Lesnoff* [1990] Ch 206 and *Chandler v Kerry* [1978] 1 WLR 693.

In the words of Dillon LJ:[28]

> 'As I see it, the provision we have in clause (2) of this deed is indistinguishable from the form of agreement to permit occupation for life in *Bannister v Bannister* . . .'

It followed that a settlement was created under which the wife was beneficially entitled as a tenant for life under the terms of the 1925 Act.

Conclusion

The scenario posed in this article is not an uncommon one, given that more and more couples are now in second-time relationships following a failed first marriage or previous relationship involving children. The parties will be naturally anxious to secure a home for their joint lives as well as providing financially for their respective issue upon death.

The obvious approach is to rely on the standard form of declaration of trust in the transfer document expressly declaring that the parties hold on trust for themselves as beneficial tenants in common. If, however, the parties then make wills leaving their respective shares in the property to their issue, there is the potential for conflict where a surviving co-owner wishes to remain in the property and the children want a sale in order to realise their inheritance. Although, as we have seen, a simple statement in the transfer document that the property is a home for the parties' joint lives would probably thwart any attempt at a forced sale, the matter would not always be free from doubt.

An alternative approach is to create life interests in favour of the parties with remainders to their respective issue. As noted earlier, for the purpose of the 1996 Act, the "underlying purpose" of such a trust would be self-evident in that the parties would have joint life interests in the property whilst the children's entitlement would be postponed automatically until the death of the survivor.

The third solution, as we have seen, would be to arrange for a transfer by way of gift of the property to A and B's children who, in turn, would grant a lease for lives to A and B at a nominal rent or premium, thereby securing them continued occupation of the property (as legal tenants) for a fixed term of 90 years determinable by written notice after the death of the survivor of A or B. Being a legal estate by statutory conversion, the lease would be registrable with its own title against the freehold title of the property held by A and B's children. Suitable covenants could also be incorporated into the lease regarding the payment of council tax, energy bills, etc., and liability for the cost of repairs and maintenance of the property.

Another (perhaps, more preferable solution) would be to adopt the mechanism of mutual wills which allows the surviving co-owner to retain a life interest in the property over the deceased's share until his (or her) death. Here again, the remainders in favour of the children would not fall into possession until the survivor's death.

[28] [1995] 70 P & CR 297, at 305.

Finally, assuming A and B have already purchased the property in their joint names, a more radical solution would involve the gifting of the legal title to their respective children, C,D and X,Y, by means of a transfer by way of gift subject to the execution of a deed of trust granting A and B a life interest in the property. Under such a trust, as we have seen, the trustees (C,D and X,Y) would hold the property (together with all its contents) on trust for A and B (and the survivor of them) for life (subject to the latter paying all outgoings in respect of the property and keeping the property in good repair) with the remainder interest thereafter passing to A and B's children.

On balance, and in terms of simplicity, the writers preferred option would be for the use of an express trust declaring that A and B hold the property on trust for themselves as beneficial tenants in common coupled with a will being made by both A and B leaving their respective shares in the property to their issue so that, in the event of A or B's death, the deceased's share would pass to that party's children. The matter can be put beyond doubt if the parties expressly agree that no sale should take place pending the joint lives of A and B (and the survivor of them) unless the latter consent to the sale.

This article is an updated and much expanded version of the writers' joint article published in the Property Law Journal: 'Solutions for an Increasingly Common Conundrum', (2006) 176 PLJ 8.