

# Family trusts law problem question



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BUSTER**

This question concerns the law of trusts in the family home. Specifically, Mary requires advice on two questions: whether Philip is entitled to a share in the property, 8 Emerald Way, and whether she is able to sell the house now that she and Phillip have split up.

### TRUST OF THE HOME

The starting point in any case is the identity of the legal owner. Here, the property is in the name of Mary. The prima facie position is that she also controls the beneficial interest[1].

Phillip has two arguments that could be used to claim part of the beneficial interest. The first, and stronger, is that there was an agreement that they should beneficially share the ownership. The second is that he has made direct contributions which lead to a presumption of a resulting trust.

### CONSTRUCTIVE TRUST

This argument centres on a claim that when the title was put into Mary's name, there was a common intention to share the beneficial ownership. Phillip has only one way of demonstrating such an intention; the reason given for placing the property in Mary's name.

In *Eves v Eves* [2] the man put the property in his name, giving as an excuse that the female was under 21. Likewise another man claimed reasoned that it would prevent adverse effects on her divorce proceedings[3]. In these cases it was held that, but for the excuse, the property would have been registered jointly.

Here, the excuse given was that to place it in Philips name would leave a trail for creditors to follow should his business run into trouble. This would appear to satisfy the *Eves* [4] and *Grant* [5] authorities except for a distinguishing feature. It appears that it was Philips suggestion and as such there may be a counter-argument stating that this is not a proper excuse case. The rationale of the authorities suggest that the courts would find that there was an intention that both would have ownership and that only the excuse prevented both being entered on the legal title.

Philip would also have to show that he acted to his detriment. The courts have been imprecise on the requirements to satisfy this point. In *Grant* [6] a partner had contributed to the general expenditure which freed up money to pay the mortgage instalments. She was entitled to a share. In *Lloyds Bank v Rosset* [7] the House of Lords [8] said that merely maintaining the house would not entitle a partner to a share. In *Hammond v Mitchell* [9] the partner acted as an unpaid assistant to the business which again was an indirect contribution that was rewarded with a share of the beneficial interest.

In this case Philip has paid for the new car; paid expenses for the house, and paid for the holiday to Corfu. While none of these are direct payments to the mortgage, all of them are payments which allowed Mary to pay the mortgage payments. Therefore, Phillip has a strong case under *Grant* [10] that he should be entitled to a share in the beneficial interest.

## RESULTING TRUST

If the court were to find against Philip on either of the above points, he may still claim that a resulting trust arose. He would have to establish that he

contributed money to the purchase price of the house. In *Springette v Defoe* [11], the court ruled that either an original contribution or contributions to the mortgage will suffice.

In this case he has not contributed directly to the mortgage. When the house was initially purchased, the couple paid a 5% deposit, in real terms £5, 000. If he contributed anything towards this then he will be able to establish a direct contribution which will entitle him to a beneficial interest.

#### THE SPLIT OF THE BENEFICIAL INTEREST

Mary should also be advised on the possible divide that the courts will make should Philip prevail in demonstrating a beneficial interest.

Traditionally, for a financial contribution the courts tended to follow the division of the contributions. Since *Drake v Whipp* [12] this has been less certain with the courts adopting, in their own words, a “ broad brush” approach. In that case, a 20% contribution was rewarded with a 33% beneficial interest.

In *Drake* [13] the distinction between a common intention trust and a resulting trust was emphasised, with an equal split being more likely in the former. She should be warned though that it is possible for Phillip to be awarded an equal share of the property.

#### THE PROBLEM OF SALE

If Phillip has a beneficial interest Mary will be a trustee for herself and Phillip. Phillip's reaction to an attempted sale will be important. If he consents then naturally there will be no difficulties.

If Phillip objected then the crucial point would be the existence of one trustee. Mary would be unable to use the overreaching rules contained in the Land Registration Acts[14]. Mary could still attempt to sell the property but Phillip could attempt to block the sale by seeking relief under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. This gives the court a wide discretion to grant an injunction.

Given the discretion, it is difficult to predict whether Mary would prevail. The court would take into account the original intention of the parties when purchasing the parties, as well as individual factors that are case dependent.  
[15]

## CONCLUSION

Mary should be advised that it is likely that Phillip will be awarded a share in the beneficial interest, either by way of common intention trust, or a resulting trust. If Phillip objects to the house being sold, he could seek an injunction pursuant to section 14 of TOLATA.

## BIBLIOGRAPHY

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Drake v Whipp (1997) 60 MLR 420

Hammond v Mitchell (1991) 1 WLR 1127

Lloyds Bank v Rosset (1991) 1 AC 10

Eves v Eves (1975) 1 WLR 1338

Gissing v Gissing [1971] AC 886

Grant v Edwards (1986) Ch 638

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### **Footnotes**

[1] Gissing v Gissing [1971] AC 886 at 900

[2] (1975) 1 WLR 1338

[3] Grant v Edwards (1986) Ch 638

[4] *ibid* n2

[5] *ibid* n3

[6] *ibid*

[7] (1991) 1 AC 107

[8] *ibid.* obiter

[9](1991) 1 WLR 1127

[10] *ibid* n3

[11] (1993) 65 P & CR 1

[12] (1997) 60 MLR 420

[13] *ibid*

[14] 1925 and 2002 Acts

[15]