HEWITSONS

THE SALE OF PROPERTY HELD IN TRUST/JOINTLY

The sale of land that is held in trust is far more common than one might imagine. That is because **any property owned by more than one person is held by those owners on a "trust of land".** The options for joint ownership (and the terms of these trusts) is the subject of Our Guide to Joint Ownership and we ask all clients who are buying Residential Property jointly to confirm which option applies to them, after they have read that Guide.

The purpose of this Guide is to highlight some of the issues which can arise when dealing with the sale of a property held in trust.

What are the responsibilities of a trustee?

The legal responsibilities of any trustee are onerous, however straightforward the terms of that trust are. Put simply, a trustee must ensure that the terms of the trust are complied with and that any property which is the subject of that trust is dealt with in accordance with those terms. For the purposes of this Guide, that generally means distributing the sale proceeds to those who are entitled to receive them.

If trustees fail to comply with these responsibilities, they will be held personally liable to compensate any one who suffers loss as a result.

What if one of two joint owners has died?

If those owners held the property on trust for themselves as "joint tenants", the position is straightforward. That is because the survivor will have become the sole owner and a death certificate can either be sent to the Land Registry or provided to the buyer's conveyancer. It is also recommended that the transfer document includes a declaration that the survivor is the only person with an interest in the property.

If the owners held the property on trust for themselves as "tenants in common", the position is more complicated. That is because a restriction will have been registered against the title to ensure that the deceased's interest in the property is protected.

These are the most common scenarios:

- The deceased left his/her interest in the property to someone other than the survivor (or possibly on trust for others). It is then necessary to appoint someone else to be a trustee of the property with the survivor and both must then execute the transfer document. That second trustee must establish what is to happen to the deceased's share in the property and that the sale proceeds are distributed correctly.

- Although they did not hold as joint tenants, the deceased nonetheless left all of his/her interest in the property to the survivor. Again one can appoint a second trustee to execute the transfer. However, the better thing to do is for the executors of the deceased to assent the property to the survivor (who can then be registered as the sole owner) before it is sold.

NOTE: in appropriate circumstances a partner of Hewitsons will agree to be appointed as a second trustee PROVIDED we have established how the proceeds should be distributed and will make that distribution. This will incur a cost.

What if there are more than two joint owners and one has died?

It is unusual for more than two joint owners to hold as joint tenants but, if that were the case, exactly the same position applies as in 2.1 above.

If the joint owners held as tenants in common then, provided there are at least two remaining joint owners, it is assumed that (because they are trustees) they will ensure that the interest of the deceased in the property will be distributed in accordance with his/her wishes (and the terms of the original trust of land). There is therefore no need to appoint another trustee to execute the transfer.

What if the property is held by trustees of a different type of trust?

It is common for property to be owned by trusts which are not mere trusts of land arising from joint ownership. Examples include: trusts created under a Will, discretionary trusts and bare/nominee trusts. In these cases the title of the property will be held in the names of the trustees of that trust (who may themselves have no interest in the property – unless they also happen to be beneficiaries of the trust).

If one of these trusts is selling a property, some of the issues that can arise are:

What if one of the trustees has since died?

- Provided there are still at least two trustees remaining, a death certificate will have to be produced but nothing more.

What if one of the trustees has since retired?

- The Deed of Retirement will have be produced.

What if a new trustee has since been added?

- The Deed of Appointment will have to be produced.

What if there is only one trustee remaining?

- A new trustee must be appointed (there must always be at least two trustees in order to sell a property).

What if a trustee is very ill or has lost mental capacity?

- A new trustee should be appointed and (if possible) the incapacitated trustee should retire. Specific advice should always be taken where there are mental capacity issues.

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This document is written as an outline guide only and any action should not be based solely on the information given here. Appropriate professional advice should always be taken in specific instances.

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