



THE FAMILY HOME: JOINT TITLE

KAREN SHUMAN

1. For many couples their home is their largest asset. A property purchased even 5 years ago may have doubled in value and accordingly the available equity may be worth fighting over. The House of Lords, albeit by a majority of 4 to 1, have sought to bring certainty to an increasingly litigious area of law. There is now a presumption that in cases with no express declaration of trust the beneficial ownership will follow the legal ownership: Stack v Dowden [2007] UKHL 17. Will it reduce litigation: I think that very unlikely in the short term. In the words of Baroness Hale 'context is everything'.
2. The approach in joint title cases is:
 - Is there an express declaration of trust? If so absent fraud or mistake (or undue influence) such a declaration is conclusive: Goodman v Gallant [1986] Fam 106. A declaration in the conveyance that the survivor can give a good receipt does not amount to an express declaration of a beneficial joint tenancy.

- If no express declaration of trust, the starting point is that the beneficial interest will follow the legal interest i.e. the parties will hold the home on trust for themselves as joint tenants.
 - If one party claims that it is held differently they must prove so by establishing what the parties 'true intentions' were.
 - The burden on the party seeking to depart from an equal share will be a heavy one. Only in very unusual or exceptional cases will the court be persuaded that equity should not follow the law and that the parties intended something different than equal ownership.
3. How does the court determine the parties' true intentions? Baroness Hale at paragraph 69 emphasised that "context is everything" and provides a non-exhaustive list of factors. Unequal financial contributions may be relevant but alone are not enough to divine the parties' true intentions. Other considerations may be:
1. Any advice or discussions at the time of the transfer which cast light upon their intentions then.
 2. The reasons why the home was acquired in their joint names.
 3. The reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys.
 4. The purpose for which the home was acquired.

5. The nature of the parties' relationship.
6. Whether they had children for whom they both had responsibility to provide a home.
7. How the purchase was financed, both initially and subsequently.
8. How the parties arranged their finances, whether separately or together or a bit of both.
9. How they discharged the outgoings on the property and their other household expenses.

However bear in mind that the inferences to be drawn in each case may differ. Financial contributions may be different because one party can afford to pay more: perhaps the couple have agreed that each will contribute as much as they reasonably can. Frequently it is the mother who stays at home, even for only a few years, to look after the children. The fact that the property is in joint names may therefore have greater significance than if the property was purchased in one party's name. Simply carrying out an arithmetic calculation of who paid for what may be unhelpful and ultimately a futile exercise. The parties' individual characters and personalities may also be relevant. Mercenary considerations may be more to the fore with a cohabiting couple. Then again it should not be assumed that they will always override natural love and affection.

4. Turning to the facts of Stack v Dowden. Were they so very unusual? The couple lived together for 27 years and had 4 children. They purchased a home in joint names. Ms Dowden made a far greater

contribution to the purchase of the home. They planned to reduce the capital balance of the mortgage as soon as possible and again Ms Dowden made a greater contribution. Save for the home and an endowment policy the parties kept their finances strictly separate. The only regular expenditure to which Mr Stack committed himself to was the interest payments on the mortgage and the endowment policy. All other expenditure was undertaken by Ms Dowden. Baroness Hale took the view that the length of the cohabitation coupled with the fact that the parties kept their finances so separate made this an unusual case. Whilst at first instance Mr Stack was successful in claiming a 50% interest in the home the Court of Appeal overturned the decision and ordered that the net proceeds of sale be divided 35% to Mr Stack and 65% to Ms Dowden. The House of Lords dismissed his appeal.

5. What of Lord Neuberger's approach? To a property lawyer Lord Neuberger makes a powerful and persuasive argument that in cases of unequal contribution the resulting trust approach should be the starting point. Interestingly he reached the same result. Unfortunately though it seems unlikely that this approach will be followed unless a party establishes that theirs is an unusual case and the court can not discern their true intention. Indeed in an age when more and more unmarried couples are setting up home together simply approaching each case on the basis of financial contributions to the purchase price may fail to give adequate weight to the domestic arrangements between the parties.

6. Where does the law go from here? On 31 July 2007 the Law Commission published its report to Parliament on cohabitation. It recommends a scheme whereby eligible couples may apply to court for financial relief. The key to the scheme is "economic impact".

An applicant will have to establish that as a result of their qualifying contributions either they have an economic disadvantage, whether present or future, or a respondent has a retained benefit. Contributions are not limited to financial contributions but can include for example caring for the parties' children after separation. A retained benefit may take the form of capital, income or earning capacity. Whilst the Law Commission was at pains in its report to distinguish its approach from that of the court on divorce the orders obtainable from the court including lump sum, property transfers and settlement and pension sharing seem rather familiar. Will this proposal ever become law: no draft bill was included in the report so that is unlikely in the foreseeable future. However bear in mind the recent comments made by Sir Mark Potter, President of the Family Division, *"I share the widespread view of our lawyers and academics that the present state of the law fails to meet the needs of separating opposite-sex cohabitants who have money or property issues to resolve, particularly where children are involved"*. He is in favour of the approach put forward by the Law Commission.

7. For now issues about the beneficial interests in the jointly registered family home fall to be determined in accordance with the principles set out in Stack v Dowden. Remember it is not the court's role to find a 'fair' result but rather on establishing that the case is unusual to divine the parties' true shared intentions. Under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 the court has no power to alter the parties' beneficial interests simply to declare them.

KAREN SHUMAN
1 Chancery Lane,
London WC2A 1LF

www.1chancerylane.com

