

CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY
Revenue Committee

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BY FAX: 01159 743045 [3 pages]

27 March 2006

Dear Mr Murray

What constitutes an interest in possession where land is held in co-ownership?

I hope that you are an appropriate person to whom to direct this enquiry. If not, please pass this letter on to the right person.

The Society's member firms include some with substantial Probate and Trust Administration practices.

1. Following the publication of BN25 on Budget Day, it has become of critical importance to know – not least in the context of taxpayers' position during the transitional period ending on 5 April 2008 - what the Commissioners' views are in relation to when an interest in possession exists in land in England and Wales which is in beneficial co-ownership following the coming into effect of Trusts of Land and Appointment of Trustees Act 1996, on 1 January 1997.
2. This is not a problem of the Commissioners' making because, when the Bill was going through the House of Lords, Parliament was told that it was not anticipated that its enactment would have any fiscal effect. It seems, however, from some of the submissions made and obiter dicta in subsequent cases, and in particular *Eversden* and *Arkwright*, that this may not be the case.
3. Although some clarification (albeit not necessarily to the advantage of the taxpayers in that particular case) might be expected were *Arkwright* actually to be heard by the Lands Tribunal, there have been indications that this case either has been or is almost

certain to be settled before such a Hearing. [In saying this, I appreciate of course that the Office will not be able to divulge the current state of play if the case is still pending.]

4. The areas which have been identified as giving rise to possible interest in possession treatment extending beyond the beneficial absolute share of a co-owner in occupation of the property under TLATA 1996, ss.12 and 13 are as follows and it would be appreciated if Guidance could be published in relation to as many of them as possible as soon as possible, so that practitioners will know where (albeit subject to any subsequent clarification in the Courts) their clients are likely to stand:
 - (a) Blackacre is owned by H and W as beneficially equal tenants in common, and H dies leaving his half to his children absolutely:
 - (1) does W have an exclusive right to occupation by reason of TLATA 1996, s.13(7) for the rest of her life (subject to the possibility of the children applying to Court for a sale under s.15 – a step they are likely to be very reluctant to take in the real world) to the exclusion of the possibility of her having to pay a half rent under s.13(6)(a); and, if so
 - (2) does that mean that she has an interest in possession over H's half from the date of his death?
 - (3) If s.13(6)(a) is applicable, presumably there could be no such interest in possession.
 - (b) Whiteacre is owned by H and W as beneficially equal tenants in common, and H dies leaving his half in trust (either to his children for life or by way of discretionary trust in which W is not a beneficiary):
 - (1) is TLATA 1996, s.22(1) still considered to mean – as it was in the correspondence with the Law Society in 1997 - that the beneficiaries of the trust fund (irrespective of status) are not within the s.12 class, with the result that s.13 is just not in point; and if so
 - (2) does that mean that W has an interest in possession in the whole?
 - (3) What is the effect, as regards that status, if H's Will Trust is terminated during W's lifetime?
 - (4) If W is a member of a discretionary class and s.22(1) does not have the effect suggested, is it to be devined from the Commissioners' reluctance to cite SP.10/79 in either *Eversden* or *Judge*, that that statement of practice's validity has now been accepted as being of questionable validity since (and, as suggested by many commentators, in the light of) *Pearson v. IRC*?
 - (c) Greenacre is co-owned beneficially by B and S in equal shares, but was occupied by S alone as at 1 January 1997 and either:

- (1) the circumstances extant at the time the co-ownership was commenced suggest that, as an issue of fact, only S has s.12 rights (i.e. the generally accepted interpretation of *Bull v. Bull* no longer applied); or, if both have such rights
- (2) S, in her position as a trustee of the legal estate, blocks B's request for a half rent under s.13(6)(a), and B – for understandable reasons - does not feel able to make an application to Court under ss.14 and 15 to have one imposed upon her.

Does S have an interest in possession of the whole in either or both of situations (1) and (2)?

- (3) Would the position under (1) be different if S had only the “right” to occupy for so long as she paid the outgoings, but that if and to the extent that the property was let, the rent would accrue to B and S equally?
- (4) It being apprehended that s.22(1) could not apply to a pre-1997 or initial scenario, would the position under (3) be different if, instead of B “his” half were held by way of A&M for his minor children pending the first's majority?

Yours sincerely

W J de Souza
Chairman



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Dear Mr de Souza

Interests in possession / Trusts of Land and Appointment of Trustees Act 1996

Further to my colleague Mr Murray's fax to you dated 27 March, I have been asked by the head of our Technical Group, Mr McNicol, to reply to your fax of even date. I am sorry it has not been possible to send a reply until now.

Perhaps the first point to make is that at this time SP 10/79 remains the current view of what constitutes an interest in possession, although the current Finance Bill, if enacted, will restrict the occasions when someone owning a beneficial interest in possession in settled property is treated for IHT purposes as owning the underlying asset.

You raise a number of hypothetical scenarios involving when an interest in possession might arise, having regard to the various provisions contained in the Trusts of Land and Appointment of Trustees Act 1996. I regret we cannot give precise answers to each question, but the following clarification may help generally:

1. The provisions of that Act only apply when a beneficiary is beneficially entitled to an interest in possession in land, rather than to a future interest in the land, or to a purely monetary interest.
2. If that is the case then §12 goes on to say in what circumstances that beneficiary may occupy the land the subject of the trust.

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3. One of those must be that the original purposes of the trust were to make that land available for his occupation.
4. So it is always going to be a necessary starting point in any scenario, to establish what the purposes of the trust were. In a recent interesting commentary on co-ownership situations similar to those you outline at (a) & (b) in your letter, the author seems uncertain about whether the purposes of a trust of a family home do in fact survive the death of one co-owner when that interest does not pass to the survivor, and cites cases where the courts have decided that they did, and others where it was decided that they did not. Again it will always come back to the facts, and the original purposes of the trust. The way that the trustees have administered the trust or exercised their powers may also be a relevant consideration.
5. Finally if a right of occupation is established, and if those rights give the beneficiary a present right to present enjoyment of the land, it is likely they will also have an interest in possession within the meaning of SP 10/79.

I hope this is of some general help, but as I said above, we are unable to give detailed answers to all your questions.

Yours sincerely



Andrew Duncan