

# TECHNICAL ADVICE

FROM  
THE IPW TECHNICAL PANEL



## Dealing with Property Trust Upon Death

I will cover this week the mechanics of formalising Property Trusts (life interest in a share of a Property) upon death.

Although the Trust is set up on the day of death by virtue of it being included in the Will, best practice would be to undertake the paperwork to formalise the Trust to protect the Trustees interest in the property.

There are more templates of Property Trusts than any other Trust, but typically the Trust leaves the testator's share of their property to a life tenant, usually their spouse/ civil partner, for their lifetime, or until they cohabit or re-marry whichever is the earliest.

At the end of the Trust Period, the share in the property will be passed to the remainderman (ultimate beneficiaries). On that note, do take care when drafting these types of Trusts to ensure that the life tenant and the remainderman are not the same person. If this is the case, the result may be that the interests merge and the Trust may not take effect.

Before turning to the mechanics of formalising the Trust, I will provide a quick recap on the difference between legal and beneficial (equitable) title. It is usual that the property is co-owned between the first to die and the life tenant and this distinction of legal and beneficial title is important in relation to protecting the interests of the Trustees. Legal title of property is always held as joint tenants. The beneficial title can only ever be owned as tenants in common or joint tenants. As such, upon the death of the first to die, the legal title passes by survivorship to the surviving co-owner (for this scenario the co-owner is the life tenant). The co-owner is strictly holding the property upon trust as to 50% for the deceased's estate and 50% for them (of course, the property may not be held 50/50 and it important to check this). The only indication of the beneficial ownership is the usual Form A Restriction on the Land Registry entries - 'no disposition by a sole proprietor.....', or there could be a paper Notice of Severance placed with the title deeds or Will.

The reason for this recap, is that one of the downsides of not formalising the Trust upon the death of the first to die, is that the co-owner could in theory sell the property and never account to the Trustees of the share they hold in the property, although they would be held in breach of trust. The reason that they could sell the property is that the co-owner could 'overreach' the Form A Restriction by appointing a second Trustee and this how the property can be sold. If the solicitor or conveyancer, does not ask questions as to why the Form A restriction is there in the first place, overreaching is a live concern in these situations, albeit it may be an unintentional one.

The mechanics of formalising the Trust therefore are to transfer the ownership of the property to Trustees, or for the share that the property owned. Either the personal representatives would do this (if the property was held in the sole

name of the deceased) or if there is a surviving co-owner the Trustees are reliant on them to transfer the ownership of the property to add the names of the Trustees on the property.

The Form A restriction would remain on the title, but it would be advisable to prepare a Declaration of Trust to reflect the true ownership of the property i.e. that the surviving co-owner owns 50% of the property and the other 50% is owned by the trustees to hold the share upon the terms of the Trust.

On a final note, a common misconception is that if property is held as beneficial tenants in common, a Grant of Probate is required to deal with the title to the property. This is not the case as the Land Registry will remove the name of a deceased by a death certificate so strictly a Grant of Probate is not required. The transfer to the Trustees can also take place without the Grant because the legal title is in the co-owner's name and they are in effect transferring the property to add the Trustees to the title. Applying for a Grant of Probate in this scenario would be best practice as it is proving that the Will is the last Will and Testament of the deceased.

In summary, it is best to advise clients that the Trust will need formalising upon the death of the first to die to protect the Trustees interests. In the same way that you would advise that if they buy a new property to ensure that they purchase it as tenants in common.