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Transiting Real Estate to Your Children—The Hills and the Challenge of an In-law's Claim

"In olden times sacrifices were made at the altar – a custom which is still continued."

Helen Rowland (1876 – 1950) in B. House,
From Eve On

One never knows if sacrifices were made until well into a marriage. It is unfortunate that parents cannot predict if their child will live happily ever after. The character and ambitions of an in-law worry parents and feature prominently in discussions on transiting their real estate. Real estate is after all a big ticket item which parents pay particular attention to. The question often asked is under what circumstances their child's spouse can lay claim to a gift of real estate.

This article addresses a parent's concern and offers some pointers.

The Hills fable - continued

Previously, we came to know the Hills and their challenges in transiting real estate under the current stamp duty regime. Mr and Mrs Hill had decided then to give Jack, their son, the Hills' family home. Jill, their daughter, had already received a considerable amount of money when she got married. Much hesitancy in giving the Hills' house to Jack has since arisen because of Diane, the girl Jack is serious about. He might marry her one day. They find her scheming.

Without doubt, if the house is given, it will be to Jack solely. But can Diane still claim it, they wonder?

A broken marriage

If their marriage does not work out, Jack and Diane will seek to divorce. A Divorce Court will decide how their assets should be divided. To qualify for the division pool, an asset must be a "matrimonial asset", a term defined in the law on divorce contained in the Women's Charter.

The basis for dividing a matrimonial asset is *what the Court regards* as being “just and equitable”. Many aspects of the marriage will be looked at, such as:

- the extent of contributions each party has made in terms of money, property and work, to acquire, improve and maintain the matrimonial asset;
- any debt owing or obligation incurred or undertaken for their joint benefit or for the benefit of their child;
- the needs of the children;
- the extent of contributions of each party to the welfare of the family. This is where looking after the home and caring for the family or aged weigh in; and
- the giving of assistance or support by one party to the other, including that which aids the other party in carrying on his/her occupation or business.

All in all, it is only after looking at all the facts and circumstances that the Court will decide how much each party should have in the house, or if one party should have the whole house.

The Hills realise that a Court’s decision is uncertain as no one can predict what circumstances may present itself in the future. The prudent strategy would therefore be to make sure that the house does not become a matrimonial asset in the first place.

The Hills realise that having Jack registered as the sole owner is not enough.

Marriage as consideration for the gift

In a [previous article by the writer](#)¹, the Hills were considering giving the Hills’ house to Jack as a wedding gift. The attraction was that they would not have to pay any stamp duty on the transfer of ownership, Jack’s marriage being the consideration. It is a cost efficient option therefore, and Jack would be able to enjoy the house with his wife, during the Hills’ lifetime. But the huge downside is that the house immediately becomes a matrimonial asset. Diane, the happy bride, immediately has a claim to it. This is despite the house being in Jack’s sole name.

Wisely, the Hills stay clear of this option.

How not to turn the Hills’ house into a “matrimonial asset”

Ordinarily a gift or inheritance to one party of the marriage does not fall into the pool of matrimonial assets. But this can change if the couple subsequently treats it as one. This would involve two sets of facts being proved by the other spouse; viz.

- That the house was used or enjoyed by the couple or any of their children (while they were still together) as their home or for education, recreation, social or aesthetic purposes; and
- That the other spouse (i.e. Diane) or both of them had “substantially improved” the house during their marriage.

What would qualify for this second limb is a question of fact. Undoubtedly, it must involve the cost, nature and extent of the improvements and the degree to which the value of the house is enhanced as a result. At one end of the continuum would be a total rebuild. At the other would be cosmetic works to address fair wear and tear.

¹“Transiting Real Estate – The Hills and the Stamp Duty Challenge” (May 2015).

The Hills realise that it is ultimately not within their control as to whether the house will become a matrimonial asset. But there are some things the Hills can do now to reduce the risk that the house will become a matrimonial asset, for instance:

- persuading Jack to rent out the Hills' house and buying a home with Diane for the couple to live in;
- ensuring that the house is in good condition when the gift is made; and
- setting aside some cash for Jack to improve the house as and when he needs to so that the couple do not have to dig into their own resources.

All these seem like helpful actions that will be regarded in a positive light by a young couple.

The Hills wonder also if the timing of the gift would impact Diane's claim for ownership. Ordinarily it would not. A gift or inheritance is not matrimonial property unless the two limbs above are fulfilled. The Hills can time the gift according to their own personal plans.

However, when the gift is made, it must not be misconstrued as being made to the couple jointly, even if only Jack becomes the sole owner. Hence timing it to coincide with their engagement, wedding or other couple celebrations should be avoided. And when the gift is made, the Hills' intentions should be documented.

A gift of cash instead

In a conversation with Jack, the Hills learn that Diane does not like the Hills' house very much. They are relieved to hear that she would rather buy her own home with Jack. The Hills thus explore the possibility of having the Hills' house sold and giving Jack a gift of cash from the sale proceeds instead.

The immediate advantage is that the Hills can see Jack enjoy the benefits of their gift during their lifetime. Also there is no stamp duty on the gift of cash, unlike a gift of the house itself during their lifetime.

But the Hills worry that it may be easier to misconstrue the cash as being a gift to both. Unlike the house whose title deed will show Jack as the owner, there is no similar title deed for the cash. Once again the Hills realise that the need for documentation as to their intention is important, as is the timing of the gift.

An acquisition before marriage

Surely if Jack buys the new house before, rather than during, marriage, it would not be regarded as a matrimonial asset, the Hills believe. Ordinarily it would not, *but* if Diane can prove that *either* of the facts below exists, the new house may be a matrimonial asset.

- That the house was subsequently used or enjoyed by the couple or any of their children (while they were still together) as their home or for education, recreation, social or aesthetic purposes; *or*
- That Diane or both of them had substantially improved the house during their marriage.

The Hills once again realise that they can help Jack avoid these circumstances from happening in the first place.

The suggestion of a prenuptial agreement

A prenuptial agreement could address how Jack and Diane's assets are to be divided in a divorce.

But such a suggestion may create tension between the Hills and Jack, and between Jack and Diane.

Also, a prenuptial agreement on division of assets is only one of the factors the Court will consider in deciding what is a "just and equitable" basis for division of matrimonial assets.

Nevertheless, if Diane sees the agreement as a safety net in ensuring that she is adequately taken care of, she may like the idea of a prenuptial agreement.

The Will Trust - revisited

[Previously](#)², the Hills considered the option of transiting ownership in the house using a trust. The trust would have the advantage of addressing Jack's circumstances at the time the gift is received.

The Hills were inclined towards a Will Trust. It would come into effect upon the testator's passing, once the Will is proved to be valid and enforceable, upon the issuance of the Grant of Probate.

Can the Will Trust shield the Hills' house from Diane's claim?

It can if Jack's beneficial interest in the house does not become a matrimonial asset. The same two-limb test will apply. Also the trust can serve as another layer of protection if Jack is entitled to the house for life with the remainder being reserved for another ascertainable entity-person.

Hence, Jack could have the house for his lifetime and thereafter to his children.

There being certainty in the identity of the first owner and the second, the trust is a fixed one. There is no stamp duty in the transfer of legal ownership via the Will to the trustees of the Will Trust and the transfer of beneficial ownership through the same avenue vesting in Jack.

The Hills are also excited by the prospect that they are able to control the transition of the house through two generations.

Conclusion

Transiting real estate requires much planning. Concerns about a potential claim by an in-law to a gift of real estate should be addressed in advance. This approach will not only give effect to a parent's intentions, but will also help avoid further disputes down the road.

² "Transiting Real Estate – The Hills and the Stamp Duty Challenge" (May 2015).

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