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## Transiting Real Estate to Your Children: Jack Pays More Than the Share He Receives

“Nothing is to be had for nothing.”

**Epictetus** (fl. AD100),  
“Discourses” bk. IV, Ch. 10

As the quotation suggests, fairness dictates that one should not gain where one has not contributed. The flip side to this is that one should not get less than one’s contributions.

But all’s not fair in love and war, many parents know. And thus they worry that their child’s spouse may gain at their child’s expense.

In a *Divorce Court*, the last thing parents want is to see their child robbed of a gift or inheritance from them. How this can be prevented has been addressed in a [previous article](#)<sup>1</sup> by the writer.

But it is not always the case that a couple will seek to divorce. In this scenario, an in-law can pursue a claim of ownership of the property through a *Civil Court*, but the basis for determining ownership and share is different from that in the *Divorce Court*.

This article sets out a *Civil Court’s* basis for allotting shares in the property and offers some pointers.

### *The Hills fable - continued*

By now, we know the Hills well. Mr and Mrs Hill are formulating their estate plans. Thus far they have been most keen to give Jack, their son, the family home. Jill, their daughter, had already received a considerable amount of money when she married. But the Hills hesitate because they do not like Diane, Jack’s girlfriend. They find her scheming. Jack may marry her one day. Diane may lay claim to the Hill’s house. What are her chances of succeeding, they wonder?

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<sup>1</sup> “Transiting Real Estate to Your Children - The Hills and the Challenge of an In-law’s Claim” (July 2015).

### *The Hills' concerns - Jack pays more but gets less*

Here is a possible scenario where Diane may lay claim to ownership of the property in a Civil Court:

Jack and Diane are now married. Because of the Hills' gift to Jack, his real estate plans are affected. Jack now owns a residential property. Under the ABSD regime, this happy situation could become a burden if Jack or Jack and Diane want to buy another residential property. ABSD is payable as long as Jack has some form of ownership in the new home. If Jack is a Singapore Citizen, the ABSD for the (second) new home is 7%. Diane's position as a non-owner of residential property is affected by Jack's ownership of the Hills' house if Jack is to be a co-owner of the new home. This in turn prompts Jack and Diane to consider having Diane become the sole owner of the new home, although Jack will contribute 80% of the purchase price. Consequently, Jack's financial contribution is not fairly reflected in his ownership in the new home. Jack is excluded from legal ownership altogether.

### Resulting trust

The Hills are worried that if Diane becomes the sole owner of the new home, Jack will not be entitled to any share in the new home. However, if Jack had made financial contributions to the purchase of the second home, he can argue that he has a beneficial interest in the new home. Here, since Jack had contributed 80% of the purchase price, the law may presume that Diane holds Jack's beneficial ownership in the new home on a *resulting trust*.

But first Jack must prove 2 things:-

- Jack must prove the nature and amount of the actual contributions made by him towards the acquisition of the new home. Where Jack has some legal ownership, he must show that his legal share is less than his contributions; and
- Jack must prove that there is no reason why a resulting trust should not be presumed. Here, what Jack *actually intended* is crucial. For example, if Diane could show that Jack had made a gift of his share or contribution to her, she would not hold the new home on a resulting trust as Jack did not intend to have a beneficial interest in the home. To support her case, Diane can rely on the *presumption of advancement* to rebut the presumption of a resulting trust i.e. that Jack had intended to advance his share to Diane by virtue of their special relationship as man and wife. This presumption can be raised in favour of a wife, *but not a husband*. To prove this presumption, the Courts would require evidence as to the nature of Jack and Diane's relationship and the state of the marriage. For example, Diane may have a stronger case if Jack is the sole bread-winner and morally obliged to take care of Diane who looks after their home and children, *and* they were happily married at the time of the acquisition.

### Constructive trust

If, however, there is clear evidence that the *common intention* of both Jack and Diane was that they should hold beneficial interests in the new home in a 80:20 proportion, the Court may resolve the dispute by imposing a *constructive trust*. Whereas a resulting trust focuses on what *Jack intended* when making his financial contribution, a *constructive trust* focuses on the *common intention* of both Jack and Diane.

## *Ascertaining intention*

Intention is therefore key to determining beneficial ownership in the new home. If there is insufficient evidence of Jack's actual intention or the common intention of both Jack and Diane, the legal ownership as shown in the title deed will be conclusive evidence that Diane is the sole owner, regardless of Jack's financial contribution.

Accordingly, every piece of evidence brought before the Court to indicate intention will be considered. The weight the Court places on the evidence will depend on its relevance and credibility. Naturally, any documentary evidence bearing the signature of both owners and witnessed by a legal counsel is best, as it suggests the making of an informed choice.

Having in place relevant and credible evidence of intention is therefore crucial, the Hills realise.

Here are some pointers:

- *Who is the "Purchaser" in the contract to purchase?*

Why was Diane chosen by the couple to be the sole owner? The reason(s) would go towards ascertaining the couple's common intention.

If the Option-holder is different from the person who exercises the Option, the reason(s) for this arrangement can be evidence of the couple's common intention. Hence, if Jack is the Option-holder, but Diane exercises the Option to Purchase, the reason for this could be significant.

The clauses in the Option too can be relevant. For example, a clause enabling the purchase to continue in the name of one spouse (where both contracted to purchase) if specific approval is not given, is the reason for the remaining spouse becoming the sole owner.

- *Manner of holding*

Unequal contributions are best reflected by holding the property as tenants-in-common in shares reflective of their respective contributions. The title deed showing the shares held as tenants-in-common is good evidence of common intention; there is no need to seek the Court's determination of ownership in such a scenario. Where the property is held as tenants-in-common, making a will is important. Diane can select anyone, including a third party, to be the beneficiary for her share.

But like many couples, it is more likely that Jack and Diane would opt to hold the new home as joint tenants. Under the law, this means that they are presumed to have equal shares. Jack immediately has a lesser share in the ownership of the new home than his financial contribution. The joint tenancy will be reflected in the title deed and the couple will be presumed to have equal shares in the legal ownership despite their unequal financial contributions.

With the right of survivorship in a joint tenancy, Diane's share in the new home automatically becomes Jack's upon her passing. There is merit in being joint tenants in the transition of the property between spouses.

- *Challenging the manner of holding*

The choice made and reflected in a title deed can be challenged in Court. A relevant consideration is evidence that the choice as to the manner of holding was voluntary and informed. It may come in the form of the conveyancing lawyer's advice. It could also be written evidence of the couple making a decision on the manner of holding and instructing their lawyer accordingly.

- *Cash contribution not a loan*

Any payments made to Jack after he has paid cash towards the purchase price can be *prima facie* evidence of loan repayments to him. When Jack's contribution is construed to be a loan from him to Diane, it does not translate to Jack's beneficial ownership. The loan is merely a personal debt owed by Diane.

- *A loan secured by a mortgage*

Like most couples, Jack and Diane may probably take a loan from a bank to partly pay the purchase price for the new home. This loan would be secured by a mortgage over the new home repayable by periodic payments of principal and interest over a specific period. Any agreement between the couple as to who should pay the loan translates the loan amount to the payer's share in the property. Hence, if Jack makes the repayments, the loan amount translates to his contribution towards the purchase price.

- *Matrimonial home*

Where the house is purchased as the couple's matrimonial home, Diane has a strong case to argue that the presumption of advancement should operate in her favour.

- *State of the marriage*

A loving marriage is relevant in raising the presumption of advancement. Evidence of the state of marriage can be given by a third party.

- *Financial support*

Another relevant factor in raising the presumption of advancement is the financial dependence of one party to the marriage on the other. For example, if Diane looks to Jack for financial support so that she can focus on the home and their children, and not pursue her own career, this factor would be in Diane's favour.

### *Declaration of trust*

Not surprisingly, because it is not always easy to prove intention, executing a Declaration of Trust at the time of acquisition of property would be a better option for Jack, as the proportions in which the new home is to be held will be stated in the Declaration. In this way, an express trust is created, unlike a resulting trust or a constructive trust which Jack needs to prove in court.

A word of caution - the beneficial ownership created by a trust is impacted by several laws in Singapore such as:

- If Jack is not a Singapore citizen, where the new home is landed property (as opposed to an apartment), approval from the relevant authorities is required if he has beneficial ownership. The fact that Diane is the sole legal owner and a Singapore Citizen is not enough. The identity of the beneficial owner is crucial.
- Likewise, under the ABSD regime, the stamp duty payable is influenced by who has beneficial ownership. Hence, where Jack already owns a residential property, ABSD is payable on the acquisition of the new home if he is to be a beneficial owner of it. The fact that Diane is the sole legal owner (and Jack has no legal ownership) does not change this position.

### *Conclusion*

Realising that their plans to benefit Jack could go awry and affect Jack's own real estate plans, the Hills see that they need to understand Jack's own plans, as well as to get to know Diane better. If a marriage is likely, the Hills may want to wait and see how that progresses before making any irreversible plans in transferring the ownership of their house.

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