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Equity Agreements

When a married couple decide to go their separate ways, complex and well established principles of divorce law come into operation to address the division of their assets. Even where the couple have signed a prenuptial agreement or similar before they were married, the Royal Court has an unfettered discretion and will divide the married couple's assets in accordance with well established provisions of matrimonial law.

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1. Both Qualified

The position of an unmarried couple can be less clear as it is not so well regulated. Should their relationship come to an end, any home that they may have bought will usually be their most significant asset. An unmarried couple who both have qualifications under the Consent of Housing and Work (Jersey) Law 2012 can buy in their joint names and each will have the security of owning their home jointly with the other. Couples who are contributing significantly different amounts may decide to record in a short agreement that the sale proceeds are to be divided in accordance with their contributions. There is no need to make provision in an agreement enabling them to bring about a sale of their home because Jersey law has the procedure of "Licitation" which enables any co-owner of a property to obtain an order of the Royal Court forcing a sale of a jointly owned freehold property if the other owner refuses to sell.

2. One Qualified

The position of an unmarried couple where only one of them is qualified to buy is more difficult. In the case of a freehold property only the qualified partner can own the property and the unqualified partner cannot have the comfort of having title to the property in their name. As Jersey law prohibits the holding of freehold property by one individual in trust for another, any arrangement whereby the qualified partner seeks to own property for the benefit of unqualified partner is unenforceable and potentially a criminal offence. It is therefore important that an unmarried couple in this situation considers entering into an "equity agreement" to protect the position of the unqualified partner so far as is legally possible. It is perfectly proper for the couple to enter into an agreement which provides that if the couple do separate the unqualified partner be repaid their contribution towards the initial purchase, and should share in the balance of the sale proceeds after mortgage and other deductions. This type of agreement usually provides that the unqualified partner can require the qualified partner to sell the property (and repay any mortgage which has been taken out in the joint names of the couple), or to remove the unqualified partner from the mortgage, in each case on the basis that the unqualified partner receives their agreed share of the proceeds. It can also provide that upon the unqualified partner gaining qualification or upon the marriage of the couple the property will be conveyed into their joint names.

3. Flynn -V- Reid

In the case of Flynn -v- Reid in 2012, the Royal Court considered the role and validity of equity agreements for the first time. It was made clear that the arrangements in an agreement must accurately reflect the true intentions of the couple; any "off the shelf" document without proper thought having been given to contributions, current circumstances and future intentions is likely to be disregarded. The Royal Court has made it clear that it has a wide and flexible discretion in cases involving any relationship falling short of marriage or civil partnership. In the case, for example, of a couple without children who enter into an agreement purely based on their financial investment in the property, the arrival of children and the change in circumstances that this brings could mean that the Court would find that the terms set out in the agreement could no longer apply.

4. What Should Be Done

One thing which should always be done (even if the couple decide not to enter into any form of equity or other agreement) is for the qualified partner to sign a properly drawn up will leaving the property (or an agreed share of it) to the unqualified partner. This is a simple but essential step to protect the interests of the unqualified partner. It is important to discuss the preparation of such a will with your lawyer because certain formalities must be observed for it to be effective; a home-made will is likely to be invalid.

The position is simplified somewhat if the qualified and unqualified partner jointly acquire a share-transfer property. The law does not prevent unqualified individuals buying shares in companies which own property in Jersey. Accordingly, with a share transfer property it is possible for shared ownership to be in place from the outset. The parties may still decide to enter into an agreement enabling one partner to compel the sale of the shares and for division of the sale proceeds to be made in agreed proportions.

The information and expressions of opinion contained in this guide are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

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