

# Difficulties concerning the succession of shares under a bare trust

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**T**he bare trust in relation to the shares of a Cyprian company is probably the most common and straightforward of express trusts that exist in Cyprus given the number of companies incorporated for non-residents and having nominee shareholders.

The trust itself is sometimes referred to as a 'simple trust' or nominee trust and confers on the beneficiary the right to both income and capital, together with the right to control the property and to take actual ownership of the property specified in the trust instrument. Moreover it also confers the right to trace the trust property in accordance with the equitable rules of tracing in the event of impropriety. It is a property right *In Rem* meaning that the beneficiary has the right to ask the court to order that any misappropriated trust property be returned rather than simply be awarded damages for any loss.

## Succession in the event of death

A problem can arise if a beneficiary dies suddenly, however. The trust instrument typically bars the trustee from any independent action other than perhaps an ostensible duty to seek to transfer the absolute ownership to the beneficiary's personal representative.

So, during the beneficiary's lifetime the administration of a bare trust, holding shares in a Cyprian private limited company incorporated under CAPI 13, does not present any extraordinary challenges. However, in the event of the beneficiary's sudden or unexpected death, the corporate service practitioner finds himself looking at more involved legal issues.

As one would expect, the circumstances of the trust, for example, its financial worth or complexity, would suggest to the trustee what course he should take. So for instance ought he to take legal advice? Moreover, given that many of these trusts are related to non-residents, there are likely to be questions

about the international laws of succession not to mention client confidentiality. Again the practitioner ought to proceed with caution.

## Domicile and international issues

As an overview, the law of succession in Cyprus is similar to most other commonwealth nations inasmuch that it looks to the deceased person's domicile or habitual residence at the time of death when determining the proper law to be applied (save in respect of immovable property). Evidently the determination of domicile (where applicable) could of itself represent a challenge given its appraisal being a function of either the father's or mother's domicile at the time of birth. There can also be formalities regarding *inter alia* foreign creditors or safeguarding the rights of minors or dealing with intestacy. Finally, it is important to be aware that the succession process can take quite some time making it wise to manage the expectations of those who expect to become the new owners.

## Planning alternatives and joint tenancy

Many readers are aware that it is common practice to deliver to the beneficiary, along with the bare trust instrument a matching share certificate in the name of the trustee and an undated blank instrument of transfer. In this way the beneficiary can transfer the legal and beneficial ownership to any other legal person. In the case of shares of a company this would also be subject to the relevant corporate articles of association. Although some may argue that the practical way around the problem of unexpected death would be to simply transfer the shares to the next of kin by completing the aforementioned documents: one is bound to question whether this would be appropriate in ethical or professional terms. What if there are minors from an earlier marriage of the beneficiary, for instance? If there are complications then, this raises important points about conscience and business risk.

Of course, rather than use bare trusts from the outset, there are conventional solutions in the form of either express trusts that grant the trustee powers and discretions or corporate foundations operating in a similar vein but under civil law or contractual principles of common law. These could certainly be apposite but in many cases such as where an entrepreneur is just starting up, they often do not meet the requirements of time frame, simplicity and control that the client is looking for.

Fortunately though, Cyprian law incorporates features of English property law. In the case of personality the forms of 'joint tenants' and 'tenants in common', based upon English common law, are both possible. Moreover, as well as English common law, the germane doctrines of equity thereto are also applicable in appropriate circumstances making it possible to separate the legal and equitable estates of property. In this way the trustee may hold the equitable/beneficial interest upon a bare trust in either of the two aforementioned forms.

The form of particular interest here is that of joint tenants and its features are as follows:

- all of the beneficial owners as joint tenants own the property and any income or sale proceeds belong to all the beneficial owners as one;
- there are no separate shares although there is a unilateral right to make an act of severance converting joint tenancy into shares being then a tenancy in common;
- only tenants in common may leave their share in a will;
- if a joint tenant dies then the survivors inherit his share by operation of property law not the laws of succession; and
- the term tenant is not the same as that which is used in connection with the possession of immovable property.

Accordingly, where there is a joint tenancy of a beneficial interest, were only one of the tenants to die without notice there would be an automatic transfer of the joint tenancy to the survivor(s). Only upon the death of all of the tenants would there be a transfer of property under will or intestacy. In terms of generational planning then, this presents a genuine opportunity for practitioners in order to ease the transfer of ownership to the deceased owner's next of kin.

There is no single arrangement that fits all; for clients are all different. However, it is incontrovertible to say that it would be far sighted and beneficial to regularly review the arrangements regarding corporate shares in the light of succession law, especially given the inherent weakness of the bare trust.