

GIVING AWAY PART OF THE FAMILY HOME TO AVOID IHT WHILST CONTINUING TO LIVE THERE

by Patrick Soares

One of the major problem areas in inheritance tax (IHT) planning is the family residence. How can the taxpayer give it away and continue living there?

The answer lies in FA 1986 s102B(4).

WILLY AND HIS MOTHER

Let us assume that Green Manor is owned by the mother (M) of Willy (W) and she lives in the same. She is aged 75 years and in good health. W is in his early 30s. He has a flat in London and is there for the working days of the week. M gifts a 50% share of Green Manor to W and she continues to pay for the upkeep of the property. After the gift the two would occupy the Green Manor albeit W has and continues to use his London flat.

THE RELIEVING SECTION

The *gift of the undivided share* in Green Manor to W will avoid the gift with reservation of benefit (GROB) provisions if

- the **donor and donee occupy** the land
- the donor does not receive any benefit, other than a negligible one, which is provided by or at the **expense of the donee** for some reason connected with the gift.

This provision has effect from 9/3/1999, and the position prior thereto was governed by a *Hansard Statement* by Peter Brooke of June 10, 1986 col 425.

HMRC refer to the legislation setting “out in statutory form the practice which had already been adopted” but the two do differ in certain respects as dealt with below.

ANALYSING THE SECTION

Occupation

Under the proposal the two will occupy the house even though W may only spend weekends or most weekends there and some holidays. W will leave possessions at the property and has his own bedroom, and it is open to him at all times. With regard to his London flat he should consider TCGA 1992 s222 (5). There is no clear HMRC guidance here, but HMRC give a wide meaning to occupation in the pre-owned assets tax (POAT) provisions in FA 2004 Sch 15. Storage and a right to use with minimal actual occupation may well constitute occupation for those purposes. If the taxpayer has the right to occupy the premises as a 50% owner in common, treats it as his home, is physically present there most weekends and for some holidays, has an earmarked bedroom and study, keeps some of his possessions there and has the keys to come and go as he pleases, and he is not just a guest or temporary visitor, he is in occupation for the purposes of s.102B(4). There should be no problems in M living in part only of Green Manor and W doing the same. M may occupy an entire house, although her son W has his own room and study. M can enter the rooms as she pleases and store things there, and she may go into the rooms to hear music or for some quiet when W is out, or to chat to W when he is there. They both occupy the rooms. The old Peter Brooke statement limited the relief to occupation as a “family home.” That is not a requirement of the legislation.

If the donee gives up occupation

If W gives up occupation after the proposal has been implemented the property falls back into the estate of M for IHT purposes.

Note that if M (and W) sell the property, 50% will belong to W, and the full CGT residence relief will not be available on W's share. W must consider his capital gains tax (CGT) position as he has two main residences.

Note because M is caught by the GROB rules POAT is not in issue (see FA 2004 Sched 15 para.11(5)(a)).

No benefit to be provided at the expense of the donee

This is an odd requirement. W must not overpay for his use of the property. Indeed the safest course is for M to pay all the running costs – council tax bill, gas and electricity, cleaning, TV licence, maintenance – and the capital outlays also. The capital outlays may be gifts in themselves (of those capital outlays as to 50%), sending another seven years running with respect to those outlays. But little turns on that: the main prize is to take – say – half of the property out of charge after seven years.

The HMRC manual refers to the need for both parties to “share the outgoings” (IHTM14360), but what they have in mind is W not bearing all the outgoings or more than his share of the same.

Under the old statement, the sharing of outgoings was envisaged, and also each person enjoying a separate part of the house; neither points are relevant to the statutory requirements.

There must be a gift

M must do a deed of gift in favour of W. The gift will be a potentially exempt transfer within IHTA 1984 s 3A.

Note in calculating the fall in value the part retained is discounted to reflect the fact of joint ownership. On M's death this discount is reflected in the value of her estate, reducing

the IHT payable on her death on the share retained: a half of a house is worth less than 50% of the total value of the house.

Undivided Share

The gift should be of a tenancy in common interest.

POAT

Generally the proposal is within the ambit of POAT, but there is an exclusion in FA 2004 Schedule 15 paragraph 11(5)(c), if the property interest given to the son “would fall to be treated as property which is subject to a reservation of benefit” but for s.102B(4).

CONCLUSION

This is one of the great IHT reliefs.