

Consent of Trustees Is Not Necessary for the Division of Commonly Owned Encumbered Goods in a Trust

Department of Registries and Notaries Ruling, dated 8 November 2015

In a ruling issued by the Department of Registries and Notaries (DRN), the Property Registrar of Villanueva de los Infantes refused to register a ruling concerning the division of common property (consisting of an estate), the estate being partly subject to a trust.

The ruling itself did not refer to the trust, but only to the divisible nature of the estate. The division thereof was accepted and it was proposed that it be divided into equal parts between the plaintiff and the defendants.

The Property Registrar based his refusal on the following:

- Firstly, there was no proof that the legal period for the defaulting party to be able to exercise the segregation had elapsed.
- Secondly, the Registrar states that there was no proof that the municipal licence authorising division of the estate had been obtained.
- Thirdly, the precise surface area which each of the parties would own was not stated, and neither was the value specified for each of the parts into which the estate must be divided to adequately qualify the legal business carried out so as to ensure that both parties would receive fair payment and, accordingly, that there would be no excess adjudication to one, to the detriment of the other.
- Finally, the ruling had declared one of the defendants to be in default and the Registrar had indicated as a defect that not only the current owners of the estate (in this case the fiduciaries) should have provided their consent for its division, but also the future owners (the trustees), so that the defaulting defendant should have ratified the division, since, not having intervened in the process, the defendant might have suffered harm. Nevertheless, the DRN revoked this defect, expressing that the consent of the trustees, ratifying the division, was not necessary.

Given the Registrar's refusal to complete the registration, the decision was appealed in respect of three of the four points to which the Registrar referred, and, following ratification, the matter was conveyed to the DRN, which refused the appeal, agreeing with the Registrar of Villanueva de los Infantes on all points except for the last one:

- With regard to the first defect, the DRN ratified the Registrar's decision and indicated that, although the ruling was final, to be able to register it, the period established in the Spanish Law of Civil Procedure (LEC) must have elapsed, which was not the case here.
- With regard to the third defect identified by the Registrar, the DRN argued that the surface area of the estate was an essential element of the qualification, since it is an indispensable requirement that there be an accurate and thorough description of the buildings to be registered, so that the latter may be clearly identified. However, the need to determine the value in order to be able to qualify a potential excess adjudication was revoked, as it was an underlying matter of the ruling which the Registrar could not enter into.
- With regard to the fourth and final defect, the DRN established that the fiduciaries (in this case, the defendants, two of whom acquiesce) had the duty to conserve the goods and, should they wish to dispose of them, the consent of the trustee was absolutely necessary. Nevertheless, in certain specific cases, such as, for example, the need to maintain the estate, the DRN explained that the trustee's consent was not required. Accordingly, the problem posed in this case was to ascertain whether the ruling was binding upon the trustee, and, therefore, whether or not registration was possible.

In this regard, the DRN concluded that, although the trustees are interested parties and must intervene in the proceedings, in this case their consent was not required to divide the estate, since the right of the communal land owners to cease in the indivision of commonly owned goods must prevail, since the existence of joint ownership should not undermine the power to require termination of the joint ownership of the joint owners.