PART 1: Property Ownership - Joint Tenants And Tenants In Common

In Australia, where a single asset is owned by more than one person (or entity) it will be owned by them either as joint tenants or as tenants in common.

The distinction between these two ownership types is important for a number of reasons, including the impact from an estate planning perspective.

From an estate planning perspective, it may be necessary to 'sever' a joint tenancy arrangement (that is, convert it to a tenancy in common) so that the owners will can dictate what happens to their individual share in a particular property.

Joint tenants

Under a joint tenancy, each owner effectively owns the whole asset. In other words, each owner shares ownership equally.

If one owner dies, the other owner acquires the deceased owner's interest automatically, irrespective of any contrary directions set out in the deceased owner's will.

In this situation, each owner effectively owns 100% of the asset.

Tenants in common

Where two or more people own an asset as tenants in common each owner holds their share of the asset outright.

Under this ownership structure, there is no need for there to be 'equality'. For example, A might own 60% of the property and B would then own 40%.

If a tenant in common dies, their interest in the property will be distributed in accordance with the directions in their will or in the absence of a will, the intestacy rules. That is, their share of the asset does not pass automatically to the remaining tenant in common.

Consequences of joint tenancy and tenancy in common arrangements

On the death of one joint tenant, the asset automatically passes to the other or others, regardless of the terms of the will of the joint tenant who died.

If a joint tenancy is severed (that is, converted to a tenancy in common) each owner can then direct how their share in the property is passed following their death by making provision in their will.

PART 2: Property Ownership - Joint Tenants And Tenants In Common

Our previous on property ownership identified the legal distinction between owning property as joint tenants as opposed to tenants in common.

To briefly recap, joint tenants share complete, indivisible ownership of an asset, whereas tenants in common each own a discreet, transferable interest in the property.

As a result, if a joint tenant dies the asset automatically passes to the other joint tenant, regardless of the terms of the deceased's will, generally without the consent of the co-owner.

On the other hand, a tenant in common may sell, gift or otherwise divest their interest in the asset under their will.

In this article, two examples are explored highlighting when ownership as tenants in common may be preferable to a joint tenancy ownership structure.

Example 1

Ron and his sister, Sue, bought a small investment property together as joint tenants before either were married. After his marriage, Ron wished to change the arrangement to a tenancy in common so that his interest could pass to his new wife rather than automatically to his sister.

Example 2

Bill and Judy purchased their family home as joint tenants. A few years later, Judy establishes a business and is concerned about losing everything if the business fails.

If Bill dies, Judy does not want the house to be owned 100% in her name. She would prefer Bill's interest to be held via a testamentary trust, where her potential creditors cannot access it. Judy and Bill should sever the joint tenancy arrangement and convert their ownership to tenants in common. In this way Bill can deal with his interest in the property under his will, and better isolate his share from Judy's business risk.

Summary

There can be significant differences in the treatment of real property upon a person's death, depending upon whether their ownership is structured as joint tenants or as tenants in common.

As there is no change in underlying ownership of the property, transfer duty and tax are generally not payable where joint tenants convert their ownership to tenants in common, so long as the ownership interest is exactly equal between each owner.

For example, if there are two owners under a joint tenancy following conversion, they must each have a 50% interest as tenants in common.

The only transaction costs that are generally incurred to change the ownership of an asset from joint tenants to tenants in common are legal fees and Government registration fees.

Any owner of joint property (including real estate, shares, vehicles and cash) should understand if their ownership is as joint tenants or tenants in common in all the circumstances.