

Topic 1 Co-Ownership

- Co-ownership is simultaneously holding the same interest in one parcel of land
- Different to holding different estates
- Exists at common law and in equity
- The Conveyancing Act 1919 (NSW) applies to old system title and Torrens title
 - Real Property Act means it refers to Torrens Title Land - ASSIGNMENT
- **Joint Tenancy**
 - Salient feature
 - **Four Unities**
 - Unity of Title – derived from the one instrument or event
 - Unity of Interest – must be identical with the others in terms of nature, extent and duration
 - Unity of Possession – entitled to a combined non-exclusive possession of the whole of the property, have the ability to use and enjoy the land
 - Unity at Time of Vesting – interest vests in the land at the same time
 - **Right of Survivorship**
 - The right of survivorship is inherit to joint tenant's and cannot be defeated by a gift or devise under a will
 - Can only be overcome by severing the joint tenancy
 - Order of Death
 - *Hickman v Peacey* [1945] AC 304
 - Members of a household by an explosion
 - Asked to determine whether under the English *Law of Property Act 1925 (UK)* the deaths occurred in order of seniority
 - House of Lords: in the absence of evidence to show whether any of the deceased had survived the others – the younger of the deceased should be deemed to have survived the elder
 - It didn't matter if they died simultaneously for the purpose of the Act
 - *Conveyancing Act 1919 (NSW)*
 - Section 35
 - Provides a means of determining an order of death
 - Provides that death is presumed to have occurred in order of seniority, the younger surviving the elder
 - This section does not apply to the common law presumption of death after 7 years
 - *Halbert v Mynar* [1981] 2NSWLR 659
 - John Charaus marries to Emily Chauras in 1939
 - Had one child Blanka Olga born 1945
 - Blanka married Mirek Mynar in 1971
 - In 1972 John and Blanka disappeared and were not seen or heard from again

- Burden of proving that one person survived another lies upon the person asserting it and is not established by the presumption of continuance of life
 - In absence of proof that either the wife or daughter survived the testator, the estate could not be distributed in accordance with the provisions of the will
- Without these features you cannot have a joint tenancy
- Do hold a potential/aliquot interest
- Separateness of joint tenant's interest is limited only to the concept of inter vivos alienation
- In all other respects – per my et per tout – by every part or parcel and by the whole
- Severing a Joint Tenancy
 - Survivorship
 - Alienation
 - Sell/gift your interest to someone else
 - Joint tenancy between A, B and C
 - A transfers their interest to D
 - D is a tenant in common of 1/3 to B and C's 2/3
 - B and C are still joint tenants between themselves
 - *Wright v Gibbons* (1949) 78 CLR 313
 - Three sisters Olinda, Ethel and Bessie were joint tenants in land in Hobart
 - By memorandum of transfer Ethel transferred her 1/3 share to Olinda and Olinda transferred her 1/3 share to Ethel
 - Certificate of title endorsed to show that they were tenants in common in equal shares
 - Bessie survived Olinda and Ethel and approached the Court for a declaration that the Memorandum of Transfer did not sever the joint tenancy
 - She became solely entitled to the land as a proprietor and that right of survivorship applied
 - Court said the transfer did affect a severance of the joint tenancy and that upon registration of the title Olinda, Ethel and Bessie all became tenants in common
 - Gift – for a gift to be effective as a severance the gift must be “complete” (the owner has done everything necessary to pass the legal title)
 - For Torrens Title the transfer has been registered or there is an immediately registerable title at title which is irrevocably beyond the control of the transferor
 - *Corin v Patton* (1990) 169 CLR 540
 - High Court held that a joint tenant can unilaterally sever a joint tenancy
 - Wife was advised to execute a transfer in favour of her brother and her brother was advised to execute a

declaration of trust stating he held this interest in land on trust for his sister (the wife)

- The gift was not complete
 - They had not done all that was necessary for her to have done to effect the transfer
- Lease – temporary suspension of the joint tenancy
- Trust – can effect a severance
- Unilateral Transfer
 - Section 30 of the Conveyancing Act for Old Systems Title
 - Section 97 of the *Real Property Act 1900* (NSW) – Torrens Title
 - You can alienate to yourself
 - S97(5) & (6) – a notice gets sent to the other party
- Mortgage of Interest
 - Old Systems Title - granting of a mortgage severs a joint tenancy because granting of a mortgage is a legal conveyance of title
 - Torrens Title – a mortgage is only a registered charge and does not effect a severance
- Agreement to Convert
 - Joint tenancy can be severed by agreement
 - Intent does not defeat the right of survivorship
 - Creation of discrete or distinct interests arising from the severance
- Conduct
 - Indicates a commonly held belief or assumption that their interests as co-owners are henceforth held as discrete shareholdings without the right of survivorship
 - Must be mutual conduct by all joint tenants
 - *Abela v Public Trustee* (1983) 983 NSWLR 308
- Merger
 - Severed when a joint tenant acquires an interest in land different to that already held by others with joint tenants i.e life estate
- Unlawful Killing
 - Common law precludes a joint tenant from benefiting from an unlawful killing of the other joint tenant
 - The other holds the interest of the murdered person under a constructive trust
 - *Forfeiture Act 1995 (NSW)*
 - *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 656
 - Granddaughter killed her grandmother while depressed
 - No premeditation, no intention to profit from the killing
 - Court said that by modifying the forfeiture rule in this case it would not move others to commit and would not outrage the community
 - Granddaughter was able to take under the will
- Sale/Partition
 - Partition = sub-division
 - Partition Suit = forced sale

- Joint tenancy can be determined by partition or sale of the co-owned property
 - Section 66G of *Conveyancing Act 1919* (NSW)
- **Tenants in Common**
 - Usually unrelated people have it
 - Each owner has a separate proportional share in the estate or interest in land
 - Each tenant in common is seised of their own individual share rather than being seised of the whole
 - Unfettered freedom of alienation
 - Advantage of tenancy in common is the paperwork
 - Unity of Possession
 - Cannot sue for trespass unless there has been forcible ejectment
 - Cannot sue for waste
 - Rights of Co-owners
 - **Equitable Accounting**
 - Equitable accounting does not affect the beneficial ownership of the property but it will affect the way in which the proceeds of partition or sale suit are distributed
 - *Ryan v Dires* [2002] NSWCA 3
 - Ryan and Dries were romantically involved
 - They purchased a property in 1990 for \$200,000 as tenants in common
 - Proportions were 6/7 and 1/7 respectively
 - Purchase price was funded by Ryan (\$40,000), Dries (\$30,000), Dries' mother (\$10,000) and a bank loan of \$120,000 secured by mortgage in the joint names of Ryan and Dries
 - Resulting Trust: where two or more persons contribute to the purchase of property conveyed to them as co-owners, there is an equitable presumption that they hold the legal estate in trust for themselves as co-owners in shares proportionate to their contributions
 - Concluded that Dries had a 43% share in the property
 - Dries had to deduct an amount from her share in the property due to occupation and improvements
 - **Income and Profits**
 - At common law there was no remedy to compel a co-owner to account for a disproportionate share of income and profits made from the land
 - Position was partially remedied by *Imperial Statute of 1705 – Statute of Ann Section 27*
 - Permitted an account for receiving more than just a proportional share in income
 - Only applied to rent
 - Did not provide remedy for when one co-owner exploited the land

- Equity – order an account incidental to an action for partition or analogous suit
- 1969 – Statute of Anne ceased to apply when Imperial Act *Application Act 1969 (NSW)* came into effect
- *Forgeard v Shanahan* (1994) 35 NSWLR 206
 - Court of appeal held that adjustments of competing claims between two co-owners of property after sale under S66 G
 - “it is a neat illustration of the havoc which can be wrought by high-minded but ignorant people, putting itigants in New South Wales back into the position they would have been in before 1705 in England
- *Ryan v Dries* (2002) BPR 19, 497
 - Still an inherent jurisdiction in equity to order an account as incidental to a partition or analogous suit
 - Holds that equit still applies
- Where a property of part of a property is rented, each co-owner is entitled to receive a proportionate share of the rent: *Ryan v Dries* (2002)
 - In NSW students are expected to discuss whether an account can be taken in law or equity as the position in the state is flux)
- Mortgage payments and council rates are joint debts: *Forgeard v Shanahan* (1994)
- Generally a co-owner is not entitled to income which the other co-owner received by reason of their own initiative, effort, and investment of capital.
 - e.g. solely running a primary production business on the property: *Henderson v Eason* (1851) 17 QB 701

▪ Occupation Fee

- Unity of Possession guarantees that each co-owner is entitled to occupy the whole of the property
- If a co-owner elects to exercise this right he is not liable to pay any fee or “rent” to the other co-owners who do not exercise this right
- Exceptions
 - If there is an agreement to pay rent
 - If the other owner/s have been excluded or ousted from the property
 - Can be an offset for repairs made
- *Callow v Rupchev* (2009) 14 BPR 27
 - You do not have to prove a forceful ouster when there is a domestic relationship that has broken down
 - At 533: the authorities justify the conclusion that a notional occupation fee may be set off against the claim of the tenant in occupation for contribution to expenses or improvements
- Wrongful Ouster
 - Violence or threatened violence

- Denial of title
 - Contrast this with uncomfortable or unattractive situations
- **Claims for Improvements and Repairs**
 - At common law, a co-owner who improves or repairs the property without the consent of the other co-owners cannot sue in debt to recover the contribution towards the cost
- **Contractual Restraints**
- **Rights on Partition or Statutory Sale**
 - Subdivision was traditionally a position under the common law
 - Traditionally a means of terminating co-ownership
 - However, now it is now only allowed if town planning allows it
 - Section 66G of the *Conveyancing Act 1919* (NSW)
 - It is still referred to as the partition section
 - However now looked at as a compulsory sale – statutory trust for sale
 - Once an order is made by the court the owners have a right to be paid their respective share of the net proceeds of the sale
 - Right to occupy the land is also extinguished
 - Section 66I of the *Conveyancing Act 1919*
 - One co-owner can buy the interest of the other co-owner
- Presumptions
 - Common law prefers Joint Tenancy because of certainty
 - Equity prefers Tenancy in Common
 - While property may be held by joint tenants, equity would regard them as tenants in common
 - Unequal contributions to the purchase price (even though held as joint tenants) can have equity step in
 - Business partners who have different interests in the business who buy a property can also have equity step in
 - S26 of the *Conveyancing Act 1919* (NSW)
 - Reversed the common law position and now supports equity
 - Presumption in favour of tenancy in common
 - *Delehunt v Carmody* (1986) 161 CLR 464
 - Courts should follow the lead of the legislature and favour tenancies in common over joint tenancies
 - S100(10) *Real Property Act 1900* (NSW) – Torrens Title
 - Two or more persons who may be registered as joint proprietors of an estate or interest in land shall be deemed to be entitled to the same as joint tenants
 - *Hircock v Windsor Homes (Development No. 3) Pty Ltd* [1979] 1 NSWLR 501
 - Under the *Conveyancing Act 1919* there is a presumption of joint tenants, that's the way it shall apply to Torrens Title land also
 - RPA Regulations require the identification of parties' holding as either joint or tenants in common in specified shares
- Writing Requirement

- The *Statute of Frauds* was enacted in England in 1667 – requires that all land transactions must be reduced to written form
- This is reflected now in Section 23C and 54A of the *Conveyancing Act 1919* (NSW)
- Written requirement does not apply to:
 - Part performance and estoppel
 - Trusts – constructive and resulting
 - Short term oral leases – tenants in possession Section 23D(2) of the *Conveyancing Act 1919* (NSW)
 - Interests in property under Section 23E(c) of the *Conveyancing Act 1919* (NSW)
- Kip Werren's view: what is written down and recorded may not actually reflect the actual beneficial ownership in a property
- Adverse Possession and Co-owners
 - A co-owner who occupies the property adversely to the interests of the co-owners may require a possessory title to the property
 - Section 38 of the Limitation Act 1969 (NSW)
 - Bonifacio v NSW Trustee and Guardian [2015] NSWSC 124
 - Co-owners Adam Woitala, Eva Bonifacio and Giuseppe Bonifacio
 - Adam fraudulently transferred the property in his favour by forging Eva and Giuseppe's signatures
 - Eva and Giuseppe discovered the fraud in 1998 (12 year limitation would have expired in 2010)
 - Legal action not commenced until 2013
 - Adverse possession was found
- Terms
 - **Seisin:** possession of land by a person holding a freehold estate
 - **Jus Accrescendi:** the right of survivorship
 - **Aliquot Interest:** a definite fractional share
 - **Per My Et Per Tout:** by every part or parcel and by the whole