

### 3. Co-ownership

#### Types of co-ownership

##### Joint tenancy

- The four unities
  - Unity of title – joint tenants must have received their interests in land from the same source, by the same transfer/instrument
  - Unity of time – joint tenants must receive their interest simultaneously
    - Exception is beneficiaries receiving from trust e.g. transfer when 18
  - Unity of interest – joint tenants must have the same interest in land
    - One can't hold a life estate and the other a fee simple
    - Equal proportion of the land (2 halves, 3 thirds, 4 quarters, etc.)
  - Unity of possession – joint tenants are entitled to 'occupy the whole'
- The right of survivorship – when one joint tenant dies, their interest in the land ceases to exist and the interests of the other joint tenants correspondingly enlarges
  - Immune/protects property from wills and debts
    - As interest in the land automatically goes to joint tenant
- Same as tenancy in common whilst parties are living
  - Processes and rights are only different once a party dies, or when the property is sold
- All joint tenants dying together (i.e. from the same incident)
  - Presumed the older tenant dies first *Conveyancing Act* s 35

##### Tenancy in common

- Only unity in possession applies
- Can create problems as strata schemes usually allow all tenants to co-own common facilities
  - Cannot exclude from usage even if there is a failure to pay strata levies

#### Law

- If deeds did not specify the type of co-ownership
  - Old common law presumed people owned as joint tenants
  - *Conveyancing Act 1919* (NSW) s 26(1) presumed as tenants in common
  - Now it must be specified, or the Register will refuse the transfer *Real Property Regulation 2014* (NSW) reg 6

**Equity**

- Legal titles are prima facie correct
- If different equitable titles are found, it is held that the legal proprietors hold the correct equitable distributions on trust for the equitable holders

*Baumgartner v Baumgartner* [1987] HCA 59

- |   |
|---|
| <ul style="list-style-type: none"> <li>• De-facto couple bought a property in which Leo had contributed the proceeds of the sale of his home unit and the remainder (mortgage) was paid by the couple's pooled resources in which overall Eileen had contributed 45% and Leo 55%</li> <li>• Leo had held full legal title and on the breakdown of the relationship, Eileen argued that he held half the property on constructive trust for her as they had 'common intention' that she would own the house too</li> </ul>                                     |
| <ul style="list-style-type: none"> <li>• HCA held that Leo had held on trust for the proportion Eileen had contributed subject to a charge in Leo's favour for the net proceeds of the home unit <ul style="list-style-type: none"> <li>◦ Leo had to share the sale proceeds in accordance with the 55/45 equitable title</li> </ul> </li> <li>• Constructive trust (not resulting trust) was found because Eileen had not contributed to the initial purchase price but contributed via mortgage payments</li> <li>• Held: Eileen (de-facto wife)</li> </ul> |

Resulting trusts (only if parties contributed to the initial purchase price, not applicable to mortgage repayments)

- Presumption of resulting trust/a declaration of trust *Anderson v McPherson*
  - Applied to voluntary conveyances of title or purchase in the name of another and where the legal title held in a proportion is different to the contribution of the price
  - Absence of any contrary evidence *Martin v Martin*
- When presumption of resulting trust does not apply
  - Presumption of intention can be displaced by actual positive evidence
    - Onus is on the recipient to rebut
    - Evidence which reveals the objective intention of the transferor that they intended to transfer all beneficial interest to recipient

- Presumption of advancement
  - The relationship between the parties may describe a set of facts to which the presumption of resulting trust is held to not apply
  - ‘where the purchaser is under a species of natural obligation to provide for the nominee’ *Murless v Franklin*
  - Parent-child relationships and spouses
  - Parent and daughter-in-law held not *Anderson v McPherson*

<i>Ryan v Dries</i> [2002] NSWCA 2
------------------------------------

- |   |
|---|
| <ul style="list-style-type: none"> <li>• Registered as tenants in common in 1/7 (Ms Dries) and 6/7 (Mr Ryan) shares</li> <li>• Property was for Mr Ryan's business and residence, Ms Dries only stayed one or two nights a week</li> <li>• Both parties were liable to the mortgage but Mr Ryan intended to (and did) make all of the mortgage repayments</li> </ul>  |
| <ul style="list-style-type: none"> <li>• Because Ms Dries was liable for the mortgage, and the court held that there was a resulting trust in her favour, reflecting her contribution to the initial purchase price           <ul style="list-style-type: none"> <li>○ \$30,000 cash + 50% (\$120,000 loan) = \$90,000</li> <li>○ \$90,000 was 43% of the \$210,000 purchase price</li> </ul> </li> <li>• The parties held their legal title to the property as tenants in common in 1/7 and 6/7 shares on trust for themselves as tenants in common in equity in 43% and 57% shares</li> </ul> |

## Recapturing ownership from mortgage payments

- Constructive trust *Baumgartner v Baumgartner*
- Through ‘equitable accounting’
  - Process of adjusting the final proportions of the division of money when a co-owned property is sold
  - It takes into consideration money that might have been paid or received by individual co-owners over the course of owning the property
  - Types of claims
    - A claim at law for having discharged another’s liability for a loan
    - A claim in equity for an ‘improvement’ to the property

Assuming ‘tenants in common’ relationship

- Presumption of resulting trust
- Joint business venture or partnership
  - Equity will presume they are tenants in common in proportion to their contributions
- Joint mortgagees

Overriding statutes

- Ordinary rule of statutory application that common law and equity continue to operate to the extent that they are not expressly or impliedly overridden by statute
- Property disputes between married or de facto couples that are co-owners are regulated by the *Family Law Act 1979* (Cth)
- Property disputes between de facto couples that are co-owners can also be regulated by *Property (Relationships) Act 1984* (NSW)
  - Includes people who are in a ‘close personal relationship’
  - Defined as a relationship between two adults ‘whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care’ s 5
- Court may make ‘such orders as it considers appropriate’ altering the parties’ interests in property *Family Law Act 1979* (Cth) s 79
- More flexible in the allocation of property rights
- Can take other relevant factors into consideration (which traditional property law and equity does not)
  - Non-financial contributions to a relationship such as child-rearing and home-making
  - Best interests of children

**Ending a co-ownership**

Severance of a joint tenancy

- Unilateral severance – free to sell or give away their share without needing the others’ consent
  - Exceptions
    - Cannot gift their land via will because of the right of survivorship
    - Contractual agreements that prohibit co-owners from selling their share without the agreement of all co-owners
      - Arbitration can be sought if an agreement is not reached
      - Common for commercial co-owners e.g. property developers

<p>The severing joint tenant can transfer their share to themselves (which severs unity of time and title)</p>	<p>The severing joint tenant can transfer their share to a trustee who then declares a trust of that share back in favour of the severing joint tenant</p>
<p>V                  ↓ transfer to A and B as joint tenants                  A and B joint tenants                  ↓ transfer from A to A                  A and B = tenants in common</p>	<p>A and B = joint tenants at law                  ↓ transfer from A to trustee who registers                  Trustee and B = tenants in common at law                  ↓ declaration of trust by trustee in favour of A                  A and B = tenants in common in equity</p>

<p><i>Corin v Patton</i> [1990] HCA 12</p>
<ul style="list-style-type: none"> <li>• Joint tenancy between Mr and Mrs Patton</li> <li>• But Mrs Patton wanted to leave the property for her children after her death instead of her husband (joint tenancy means Mr Patton would automatically gain Mrs Patton’s interest)</li> <li>• Mrs Patton declared her intention and filled in the transfer form but had not got certificate of title</li> <li>• For transfer to her brother Mr Corin in an attempt to sever the joint tenancy</li> <li>• Mrs Patton dies before the legal transfer was executed</li> </ul>
<ul style="list-style-type: none"> <li>• No legal assignment because transfer was not executed</li> <li>• No equitable assignment as she did not do all that she could’ve done to make the assignment effective</li> </ul>

- She made no attempt to retrieve the CT from Mr Patton so that they could lodge the transfer
- Held: Patton (not an equitable assignment)

- Complicated and unnecessary methods that will also trigger stamp duty or land transfer duty for trusts (~2.5%)
- Joint tenants can now register a transfer to themselves to sever a joint tenancy *Real Property Act 1900 s 97*
  - Which is not subject to *ad valorem* land transfer duty
  - Other joint tenants will be notified of the severance
  - Joint tenants subsequently become tenants in common at law
- Severance by agreement
  - Agreements in relation to land interests usually must be in writing *Conveyancing Act s 54A*
  - Severance by agreement does not have to be in writing *Abela v Public Trustee* [1983] 1 NSWLR 308
  - If agreement is in place before registration they will be joint tenants at law holding on trust for themselves as tenants in common at equity
  - Common circumstance when couple is divorcing and have started making agreements and arrangements to sever the joint tenancy but one dies before registration – other joint tenant will argue right of survivorship and beneficiaries will argue they have an equitable interest
- Severance following a course of dealing
  - The parties have behaved as though they are tenants in common
  - Difficult to establish
  - Example in *Abela v Public Trustee*, held that the agreement by a divorcing couple to sell a matrimonial home owned as joint tenants, and the parties' action of paying the proceeds into separate bank accounts constituted severance by a course of dealing
- Severance by homicide
  - Forfeiture rule – killer does not get benefit from right of survivorship
  - Holds legal title on trust for himself/herself and their deceased partner's estate as tenants in common

- Court can apply exceptions (discretionary) e.g. mental illness, negligent driving, and self-defence or provocation in the face of domestic violence
- Applications can be made by ‘any interested person’ to the Supreme Court to modify the forfeiture rule if ‘justice requires the effect of the rule to be modified’ *Forfeiture Act 1995* (NSW) s 5(2)
- Court can consider the conduct of the offender and the deceased, the effect of the rule on the offender and any other person, as well as any other matters the Court considers material s 5(3)
- Act does not apply if the unlawful killing constitutes murder s 4(2)
- Severance by declaration of bankruptcy
  - Automatic severance (once Court makes bankruptcy order) to ensure that their share of the property is available to creditors

#### Sale

- When parties no longer want to co-own
  - Sell share to co-owner (not always financially viable)
  - Sell share to stranger (but half share of a house is not particularly marketable)
  - Partition/physically divide the land (not realistic or permissible for suburban housing)
  - Agree to sell the land and divide proceeds according to proportions held
- If agreement cannot be reached, Court application can be made under *Conveyancing Act 1919* (NSW) s 66G for the appointment of a trustee to sell the property
  - The trustee will sell the land and then distribute the purchase money in accordance with the titles on the register, or court order in relation to correct equitable interest proportions
  - Almost impossible for a co-owner to prevent a court ordered sale
    - Can bid at auction on special terms such as no deposit (subject to court approval s 66I)