

Topic 2: Co-Ownership

What is Co-Ownership?

- Co-ownership is when two or more people concurrently (i.e. at the same time) have an interest in property which entitles them to possess the entire property.
- Co-ownership can be created in a variety of ways, e.g.:
 - Joint purchasing of new property
 - Transfer of existing property
 - Bequest under a will
 - Etc.
- Co-ownership is different to successive ownership → co-ownership refers to when both people hold an interest in property concurrently → successive ownership both parties may have interest in the property but it is not concurrent (one after the other)
- Co-ownership is different to subdivision

Forms of Co-Ownership in Australia

1. Joint tenancy: shares the same interest in undivided shares
2. Tenants in common: share the same interest in distinct shares

1. Joint Tenancy

- A joint tenancy must have **four unities**:
 - i) **Unity of possession** - each co-owner is entitled to possession of the whole property
 - ii) **Unity of interest** - each has an interest of the same nature, extent and duration
 - Example: X gives an interest to A and B for the life of A, remainder to B
 - iii) **Unity of title** - each has acquired title under the same instrument or act
 - Example: A and B simultaneously take possession of land and eventually acquire title by adverse possession
 - iv) **Unity of time** - the interests vested at the same time → two exceptions:
 - Any conveyance executed to a trustee for the benefit of beneficiaries may give rise to a JT, even if unity of time does not exist → e.g. To X in fee simple on trust for A and B when they reach 21 years. A and B are JTs of the fee simple.
 - Any disposition in a will may give rise to a JT, even if unity of time does not exist.

Words of Severance

- Even if the four unities are present, if instrument that creates the co-ownership uses words of severance, the parties will be tenants in common not joint tenants
- Words of severance indicate an intention that the transferees will have distinct shares, eg: 'equally'; 'between'; 'among'; 'in equal shares'; 'between A and B'; 'to A and B respectively'; 'to A and B to share and share alike'.
- v) **Right of survivorship** (or 'jus accrescendi')
 - If a joint tenant dies, their interest accrues to the other joint tenant/s

Right of Survivorship

- The right of survivorship is a core feature of a joint tenancy - the only way to avoid the rule of survivorship is to sever the joint tenancy

X's interest is extinguished and thus the interest will pass onto [XXX] as the survivor of the title as per s50

- The right of survivorship is affected by **s50** of the **Transfer of Land Act (TLA)**: Subject to this Act upon the death of any person registered with any other person as joint proprietor of any land the Registrar, on application in an appropriate approved form by the survivor and proof to the satisfaction of the Registrar of the death, shall register the applicant as the proprietor thereof, and thereupon such survivor shall become the transferee of such land and be the registered proprietor thereof

What is JT's die at the same time?

- Under **s184** of the **PLA**, where two or more persons have died in circumstances rendering it uncertain which survived, such deaths shall be presumed to have occurred in order of seniority and the younger is deemed to have survived the elder → whoever dies first

2. Tenancy in Common

- The only unity which must be present for a tenancy in common is that of **possession** (the other unities may be present but do not need to be)
- Unlike joint tenants, tenants in common do have a distinct share in the whole property (shares can be equal or unequal)
- Their shares do not correspond to any physical division of the property
- No rule / right of survivorship
- A tenant in common can sell, gift or devise his or her share, and it can be left to an heir under their will.

Creation of Co-Ownership

- A document creating the interest may specify whether the parties are JTs or TICs
- Consider both the position at law vs the position in equity, as they might be different → E.g, if A has sole legal title to a property, but in equity another person is entitled to a 2/3 share of the property as a resulting trust

Creation of a Joint Tenancy at Law

- Common law favoured a JT and had a presumption that co-owners held their interests as JTs unless there was a clear intention to be a tenants in common → where one of the four unities are present and words of severance are present
- But the presumption would be rebutted if:
 - One or more of the four unities are not present
 - There are words of severance in the grant ('between', 'equally', 'amongst', 'respectively' etc)
- In addition to the common law presumption, the TLA is relevant to Torrens land:

Transfer of Land Act 1958 (Vic) section 33(4): Any two or more persons named in any instrument as transferees, mortgagees, lessees or as taking any estate or interest in land shall, **unless the contrary is expressed**, be deemed to be **entitled jointly and not in shares**. And every such instrument when registered shall take effect accordingly.

Transfer of Land Act 1958 (Vic) section 30(2): States that two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the land as JTs...

Creation of Tenants in Common at Law

- A tenancy in common is expressly created at law by:
 - express words to that effect;
 - through using words of severance;

- through the absence of either the unity of time, title or interest.

Co-ownership in Equity

- Equity prefers a TIC, but normally equity will follow the law.
- Thus, if there is a JT at law, presume a JT in equity → the beneficial interest is owned in the same way as the legal interest
- Equity may stray from JT if an equitable doctrine may apply, e.g. if there is resulting trust due to unequal contribution of purchase price or a joint venture trust
- There are four scenarios in which JT's at law will be treated as TiC in equity: (**Malayan Credit Ltd v Jack Chia-MPH Ltd [1986]**)
 1. Resulting trust arising from unequal contributions to the purchase price
 2. Advance money as mortgagees (equally or not) → people jointly lending money (loaner), even if mortgage is joint, they will be treated as owning that mortgage as TiC to prevent rule of survivorship from operating
 3. Acquire property for a business venture as partners
 4. Hold land for separate business purposes/flexible approach → must operate their business separately and distinctly, e.g. different sections of land or payment of rent separately while sharing an area → must be an interest to separate interests → cannot be interest on A's part and acquiescence on B's part

→ These scenarios are just presumptions that can be rebutted by evidence of intention to hold as JT's

Sole Ownership at Law, Co-ownership in equity?

- Joint tenancy in equity, sole ownership at law – **Vedejs v Public Trustee [1985]**
- Tenancy in common in equity, sole ownership at law – **Baumgartner v Baumgartner (1987)**

Rights and Duties of Co-owners *Inter Se*

- Part IV of the Property Law Act 1958 (Vic) (PLA) has provisions relating to rights and duties that co-owners owe to one another → e.g. when one co-owner must compensate or reimburse another co-owner
 - a) Right to possession
 - b) Improvement to the land
 - c) Rent and profits
 - d) The right to alienate or encumber the land → e.g. leases easements, mortgages
 - e) Adverse possession between co-owners
- Common law principles have developed on these issues but now covered in **Part IV** of **PLA** → common law only used to understand and support terms in PLA

Compensation / Reimbursement / Claims for Account Between Co-owners

| Claim for.... | When can VCAT order compensation / reimbursement? | | Requirements for / limitations on the ability claim |
|--------------------------------|---|---|--|
| | At any time? PLA Pt IV Div 3 | At order for sale / division? PLA Pt IV Div 2 | |
| Improvements to the property | No | Yes: ss 233(1) & 233(2)(a) | S 233(2)(a): "any amount reasonably spent in improving..." → 'Reasonable' → refer to common law, limited to the lesser or actual expenditure or increase in property value |
| Damage to property by co-owner | | Yes: ss233(1) & s233(2)(d) | s233(2)(d): damage caused by the unreasonable use of the land or goods by a co-owner |

| | | | |
|--|-----------------------|-----------------------------|--|
| | | | |
| Occupation rent <ul style="list-style-type: none"> - One co-owner paying rent to the other co-owners because one co-owner is in occupation and the others aren't | No | Yes: ss233(1) & s233(2)(e) | <p>s233(2)(e): in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land</p> <p>s233(3): VCAT must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—</p> <ul style="list-style-type: none"> (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner. |
| Payment of outgoings (rates, mortgage repayments etc) | No | Yes: s233(1) and 233(2)(c) | s233(2)(c): the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or goods for which all the co-owners are liable |
| Maintenance or insurance costs | No | Yes: ss233(1) and 233(2)(b) | S233(2)(b): any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods |
| Account for rents / profits received from 3rd parties <ul style="list-style-type: none"> - Where someone leases out their interest in the co-ownership to someone else entirely - Third party pays rent and thus there is an obligation to share that rent justly and proportionality to co-owners | Yes ss28A, 234 & 234B | Yes: ss 233(1)(b) & 28A | <p>S28A: in respect of the receipt by him or her of more than his or her just or proportionate share according to his or her interest in the property</p> <p>S234B (2)(a): order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or goods to which that co-owner is entitled to account for that rent or other payments to the other co-owners; and</p> <p>(b) make any order it considers just and fair for the purposes of an accounting by a co-owner who has received more than that co-owner's just and proportionate share to the other co-owners of the land or goods</p> |

a) Right to Possession

- Position at common law: Occupation rent not payable, unless:
 - Co-ownership comes to an end and occupier claims for improvements;
 - Agreement between the co-owners for the payment of occupation rent;
 - Occupying co-owner wrongfully excludes other co-owners.
- Under **PLA s233(1)**, when making an order for sale or division of property, VCAT may order that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners.
- In determining whether to order compensation / reimbursement, VCAT must take into account 'whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land.' (**s233(2)(e)**)

s233(2)(e): VCAT must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless-

- (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or
- (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or
- (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner. ...

(5) This section applies despite any law or rule to the contrary

b) Improvements to the Land

- Position at common law: At end of co-ownership, can claim for expenses on improvements, but limited to the lesser of:
 - (a) actual expenditure;
 - (b) increase in property value (**Boulter v Boulter (1898) (NSW); Squire v Rogers (1979) (NT)**)
- Note that improvements are different to maintenance or repairs.
- Generally couldn't claim expenses relating to repairs and maintenance.
- Could claim shares from other co-owners of necessary expenses, e.g. repayment of joint mortgage
- Under **PLA s233(1)**, when making an order for sale or division of property, VCAT may order that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners.
- **s233(2)(a):** In determining whether to order comp / reimbursement, VCAT must take into account 'any amount that a co-owner has reasonably spent in improving the land or goods.'
- What constitutes "reasonable" expenditure is not defined in the PLA: Could the common law principle (i.e. **limited to the lesser or actual expenditure or increase in property value**) provide guidance in applying PLA → however common law cases are not binding authority on interpreting the PLA

PLA s233(1): when making an order for sale or division of property, VCAT may order that compensation or reimbursement, VCAT must also consider other matters listed in s 233(2)...:

- (b) any costs **reasonably incurred** by a co-owner in the **maintenance** or **insurance** of the land
- (c) the payment by a co-owner of **more than that co-owner's proportionate share of rates** (in the case of land), mortgage repayments, purchase money, instalments or other **outgoings** in respect of that land or goods **for which all the co-owners are liable**;
- (d) **damage caused by the unreasonable use** of the land or goods by a co-owner;

c) Rents and Profits

- A co-owner is not liable to share profits earned from their own exertions on the land → e.g. by running a business or farming.
- However, there is an obligation to account to other co-owners for rents or profits received from third parties. (**Henderson v Eason (1851)**)

PLA s28A:

- (1) A co-owner is liable, in respect of the receipt by him or her of more than his or her **just or proportionate share** according to his or her interest in the property, to account to any other co-owner of the property.
 - (2) In this section, co-owner means a joint tenant, whether at law or in equity, or a tenant in common, whether at law or in equity, of any property.
- A claim for liability under **s28A** can be made to VCAT at any time during the co-ownership under **ss234** and **234B**, or as part of an application for sale / division of the property under **s233**

d) Right to alienate and encumber the land

- A tenant in common can alienate their interest in property → e.g. A, B and C are TiC with 1/3 share each. C sells share to D. A, B and D are now TiC
- Can co-owners encumber their property, e.g. through a lease, easement or mortgage? → **Topic 2.5**

e) Adverse possession

- If a co-owner has taken possession of more than their share of the land for their own benefit (cf benefit of all co-owners), this is deemed to be adverse possession:

Limitation of Actions Act 1958 (Vic) s14(4): When any one or more of several persons entitled to any land or rents as joint tenants or tenants in common have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof or of such rent for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of all by such last mentioned person or persons or any of them but shall be deemed to be adverse possession of the land.

- The right of the other co-owners to bring a claim to recover their possession / interest is barred after 15 years (**LAA, s8**), which has the effect of extinguishing their title to the property (**LAA s18**)

Fourniotis v Vallianotos [2018]:

- To establish adverse possession under LAA s14(4) it is **not necessary to demonstrate intention** to adversely possess the land.
- “Thus the words ‘but shall be deemed to be adverse possession of the land’ in s 14(4) of the Limitation Act create a statutory fiction. The effect of that statutory fiction is that if the matters referred to in the subsection are satisfied, including ... receipt by one co-owner of an excess share of rent in respect of land, then this state of affairs is deemed to be adverse possession of the land. This means that an action to recover the land, or the dispossessed share of it, may be taken by the other co-owner”
- Adverse possession was deemed to have occurred under LAA s14(4).
- The period of adverse possession could include successful periods by different co-owners.

Severance of Joint Tenancy

- “Severance” is when a joint tenancy is converted into a tenancy in common
- This **prevents the operation of the right of survivorship**
- Once a joint tenancy is severed each TiC gets an aliquot share → their fractional proportion:
 - E.g. two joint tenants = 50% share each
 - Three joint tenants = 33% share each
 - A, B, C, & D joint tenants → D transfers to E → A, B, C JT's of 75%; E TiC 25%

How does severance of JT Occur?

- A joint tenancy may be severed in three ways:
 1. in the first place, an **act of any one of the persons interested operating upon his own share may create a severance as to that share**. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his interest in such manner as to sever it from the joint fund, losing, of course, at the same time, his own right of survivorship.
 2. Secondly, a joint tenancy may be severed by **mutual agreement**.
 3. And in the third place, there may be a severance by any **course of dealing** sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been affected.

Topics Covered

- (a) Severance by an inter vivos act of one of more of the joint tenants:
 - i. Unilateral actions, including:
 - A. Alienation
 - B. Encumbrance (e.g. lease, mortgage) → suspends but does not sever
 - C. Merger
 - D. Specifically enforceable contract of sale
 - ii. Agreement to sever;
 - iii. Course of dealing
- (b) Severance other than by an act of a joint tenant:
 - i. Bankruptcy
 - ii. Homicide
 - iii. Court order

a) SEVERANCE BY UNILATERAL INTENTION

- In Victoria, unilateral intention is no sufficient to sever a joint tenancy
- In some other jurisdictions, a JT can sever a joint tenancy by written notice or by registration of a notice
- The following unilateral actions a JT may take to sever their own interest from the joint tenancy:
 - A. Alienation
 - B. Encumbrance (e.g. lease, mortgage)
 - C. Merger
 - D. Specifically enforceable contract of sale

A. Alienation

- A JT can alienate (in law and/or in equity) their interest in the property, and this will operate to sever their interest from the joint tenancy.
- Alienation (transfer) can be to:
 - A stranger (i.e. a third party)
 - Another joint tenant
 - To themselves → **s72(3)** of the PLA which allows a person to convey land or vest land in herself or himself
- To transfer interest in law need a formal transfer of land and to register transfer of land with Land Titles Office → joint tenancy will be carved out and will become a TiC upon successful register

B. Encumbrance

- Three kinds of interest granted by a JT and whether they sever the joint tenancy:
 - Mortgages – Lyons v Lyons [1967] VR 169
 - Leases – Frieze v Unger [1960] VR 230
 - Easements – Hedley v Roberts [1977] VR 282

Leases

- What happens if a JT grants a lease to a third party →
- To have a JT need four unities → when leasing you are giving a possessory right to a third party and thus he does not have the second unity
- JT does not have a right to possession during lease to third party → only has a reversionary interest but not active interest of property
- **Frieze v Unger [1960]**: in leases, JT is not severed, but is suspended till lease is over → co-owner and lessee (tenant) become de-facto TiC and lessor has reversion expectant right

At law [A] and [B] were joint tenants, the rule of survivorship would have operated and [X] would have become the sole owner of the property subject to the fee simple interest of the lease

Leasing co-owner survives: The suspension of JT will not operate to protect the lessee if lessor dies

leasing co-owner dies:

- At law, lease is not registered → remain joint tenants and the rule of survivorship operates
- [X] becomes sole owner subject to the lease
- In equity suspension of JT will operate to protect lessee (tenant)

Mortgages

Lyons v Lyons [1967]

- Mr and Mrs Lyons were joint registered proprietors
- Mr Lyons granted a mortgage of his share to Mrs Gray
- Mr Lyons died
- Issues:
 - Did the grant of the mortgage sever the JT? If not, Mrs Lyon becomes sole owner through the right of survivorship
 - What happens to Mrs Gray's mortgage?
- Mr Lyons transferring of mortgage to Mrs Gray does not create a new interest → he is still the holder of the fee simple and still has all the rights of a fee simpler owner

- While there is a new interest in Mrs Gray, Mr Lyons hasn't given up his interest or change the nature of his interest → court held no severance because none of the four unities had been given up by Mr Lyons
- Mrs Lyon becomes sole owner of property
- Mrs Gray's mortgage died with Mr Lyons → when joint tenant dies, the third parties interest is extinguished
- Mrs Gray may have a claim against Mr Lyons' estate for any amount owing to her as a debt but she has lost the mortgage → she has lost security over house as mortgage provided as interest died with Mr Lyon

Easements

Hedley v Roberts [1977]

- What happens if a co-owner grants an encumbrance (e.g. an easement) over the land?
- An easement is a right held by someone to use land belonging to someone else for a specific purpose → Common examples of easements are drainage, sewerage and carriageway easements.
- "A joint tenant, or a tenant in common, may encumber his interest in land so as to compel his co-owner to submit to the encumbrance if that **encumbrance does not interfere with the right of that co-owner to his possession of the land and his other rights with respect to the land.**"
- If encumbrance is granted by a JT, that encumbrance will cease on the death of the JT (because the interest of that JT is extinguished in accordance with the right of survivorship).

C. Merger

- The unity of interest will be broken if one JT acquires a further interest in the subject property.
- Thus, this effects a severance of the joint tenancy.
- E.g. A and B are joint tenants for life, and then A acquires the fee simple remainder.
 - A's life estate merges with the fee simple remainder, and now there is no unity of interest between A and B.
 - JT is severed so that A and B now hold their interests as TiC.

D. Contract of Sale

- Even if legal interest hasn't been transferred through registration, but from the moment of a contract of sale a person has a beneficial interest in the property
- Example: A and B are JT at law. A enters into a specifically enforceable contract to sell her interest to C.
 - Describe the interests of A, B and C at this point in time:
 - A: position at law = JT, position at equity = TiC 50%
 - B: position at law = JT, position at equity = TiC 50%
 - C: position at equity = TiC 50%???
 - What is the position if A dies? B and C still hold equitable interest
 - What is the position if B dies? C may be able to claim equitable interest, B's interest will go to heir (rule of survivorship)

E. Severance by Agreement

Public Trustee v Pfeifle [1991]

- A husband and wife were the joint registered proprietors of 2 properties
- After dissolution of their marriage, they entered into an agreement approved by the Family Court
- The agreement provided for the sale of the properties and division of proceeds, upon the happening of certain events (e.g. if one party ever remarried)

- The mutual agreement to sell the properties and divide the proceeds of sale showed a common intention to immediately sever the joint tenancy, notwithstanding that the events might never occur → agreement also stated that both parties understood they each held a 50% interest in the property
- Court held that the mutual agreement to sell properties and divide proceeds showed a common intention to immediately sever the JT notwithstanding the events that would trigger the actual sale of the property and division of money might never happen
- Court held the act of making the agreement severed the JT to an equal TiC
- Agreement did not sever JT at law because registered title was not changed → but did affect position in equity

F. Severance by Course of Dealing

Williams v Hensman (1861)

- There may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common → **all JT were behaving as TiC even if at law position was a JT** → need all JT to behave as TiC, one JT acting as TiC is not enough
- When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.
- Must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been affected.
- Need conduct by **both / all parties indicating that they view their shares as distinct**, e.g. **Mischel Holdings Pty Ltd (in liq) v Mischel [2013] VSCA**: both act as owning a distinct share as a TiC rather than JT through mortgaging, declaring for tax purposes, etc.
- Affects position in equity not at law

b) SEVERANCE OTHER THAN BY ACT OF JT

A. Bankruptcy

- **Bankruptcy Act 1966 (Cth)** → provision that states if one JT goes bankrupt, there can be a severance → the legislation will affect a severance in property in order for creditors to recover

B. Homicide

- One JT unlawfully kills another JT
- **Rasmanis v Jurewitsch [1968]**: the murdering JT cannot profit from that → the JT that unlawfully kills another JT will not by right of survivorship acquire the deceased JT's share/interest in the property.

C. Court Order

- Court can order a severance of a JT if required for any reason

Termination of Co-Ownership by Proceedings for Sale or Division

- Co-ownership can be terminated:
 1. Through successive operations of the rule of survivorship until one co-owner is left.
 2. Through all co-owners agreeing to sell the property to a third person and to divide the proceeds and end the co-ownership.
 3. Through one co-owner purchasing the interests of the other co-owners.
 4. Through adverse possession of another co-owner's share for the requisite period of time.
 5. Voluntary partition of the property
 6. By court order (e.g. Family Law Act 1975 (Cth))
 7. By VCAT order for sale or division under **PLA Pt IV Div 2**

VCAT Orders for Sale/Division

- All co-owners will be party to VCAT proceedings
- Any co-owner can apply
- VCAT can order the sale of the property → if this is done the proceeding of sales are split depending on the ownership of the property (JT or TiC)
- VCAT can take into account if one co-owner made:
 - Payments for improvements
 - Payments for maintenance
 - Damage to the property through unreasonable use
 - So on, (refer to table in notes above)
- VCAT has a preferred order → prefers order of sale of property
- VCAT can also order division of property → e.g. if there is a business and cannot move or special attachments to the home, e.g. family home