

MANNER OF HOLDING PROPERTY: DO YOUR CLIENTS UNDERSTAND?

Clients who own property jointly may not appreciate the differences that flow from owning property as a joint tenant or as a tenant in common.

LPLC regularly sees claims in conveyancing transactions and estate planning that arise from misunderstandings about how property is legally owned. While these concepts are straightforward for legal practitioners, they may not be clear to some clients.

Diagnose the true legal structure of property ownership

Lay clients are often unfamiliar with legal structures of property ownership when providing instructions. Directors and/or shareholders of small companies can misdescribe property owned by the company (either in its own capacity or as a trustee) as “their” property. Clients who own property jointly may not appreciate the differences and consequences that flow from owning property as a joint tenant or as a tenant in common. In particular, clients may not understand that joint tenants don’t hold individual shares in property with the result that when one owner dies, unless the joint tenancy has been severed, the property will pass to the surviving owner regardless of the deceased’s testamentary intentions. In comparison, if the property is owned as a tenant in common, if the owner dies, the deceased’s share of the property becomes an estate asset and passes according to their will or the laws of intestacy.

Do a title search

LPLC sees claims where practitioners rely on the client’s instructions without checking and obtaining a title search. A title search can be conducted easily, quickly and at low cost and there is no excuse for not obtaining one every time you prepare a will involving real property.

A typical scenario is where the client tells their practitioner that they hold the relevant property as tenants in common. The practitioner does not confirm the accuracy of those instructions and prepares the client’s will providing for their share of property to be bequeathed to the nominated beneficiaries. Many years later after the client’s death, it’s discovered the property was actually held as joint tenants and that the surviving tenant then becomes the owner of the whole property, instead of passing to the client’s intended beneficiaries. The practitioner is then sued by the disappointed beneficiaries for failing to take the necessary steps to sever the joint tenancy before the deceased’s death.¹

Claims also arise where it was later discovered that property to be bequeathed by a client under their will was not personally owned by them as instructed, but by a company controlled by them, or the will-maker only had a right to reside in the property. In most cases these claims could have been avoided if the practitioner had obtained a title search.

Make it simple, but significant

LPLC also sees instances where practitioners have advised on the differences in property co-ownership, but the client has later alleged that the explanation and advice was insufficient and they did not understand it – they had simply relied

on the practitioner to do what they deemed necessary to implement their wishes and protect their position.

Don’t assume that property that is to be acquired by couples is intended to be owned as joint tenants. This can no longer be considered to be the default position on property ownership. There is no such thing, and each matter requires proper instructions to be obtained.

Using simple visual aids such as diagrams and infographics along with practical examples may assist practitioners to explain co-ownership concepts to clients. To this end, LPLC has produced a Joint Tenants and Tenants in Common client explainer handout for practitioner use.²

As well as providing written advice, in person meetings or videoconferences are a good way to identify issues and potential knowledge gaps, and test that the client understands your advice and is making informed decisions.

Risk management takeaways

When you are advising clients in relation to real property, adopt these five simple risk management measures:

1. Ask clients how they hold property, for example, as tenants in common or joint tenants and whether property is held in their own right as an individual or company or as a trustee of a trust.
2. Check the client’s instructions by conducting title searches to confirm if the property is held as joint tenants or tenants in common. Ask clients whether they have any companies and trusts, and request documentary evidence from the client or their accountant as necessary.
3. Provide clear advice to your clients on co-ownership concepts and consequences. Consider the use of simple visual aids and diagrams such as LPLC’s Tenants and Tenants in Common client explainer handout.
4. Confirm that your client has understood the advice.
5. Record your advice in writing and take detailed files notes of any discussions with the client and their instructions. Claims in this area typically come to light a long time after the property transaction or will preparation, when memories have faded and can be difficult to defend without good records of what was said. ■

This column is provided by the **Legal Practitioners’ Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

1. Remember that joint tenancies can be severed unilaterally so that the consent of the joint tenant is not required.
2. lplc.com.au/resources/client-resources/tenants-and-tenants-in-common-client-resource.

