

Joint Tenancy vs Tenancy in Common – Information Guide

Joint Tenancies

What is a Joint Tenancy?

A joint tenancy is where two or more persons own the same property together. Together, the joint tenants own the whole asset, sharing undivided ownership.

Common examples include real estate, shares and bank accounts. For example, many couples will own their family home as joint tenants and have a joint bank account.

It is not possible to hold property as joint tenants in unequal shares. Each joint tenant holds the entire property, along with every other joint tenant.

What happens on death?

In a joint tenancy, the principle of survivorship applies. Under this principle, the surviving joint tenants remain the owners, and a deceased joint tenant ceases to be an owner on their death.

The survivorship principle applies even if a person's will tries to dispose of a joint asset – the surviving joint tenants automatically inherit.

Only the last surviving joint tenant has an interest which is able to be dealt with as part of their estate.

Where joint tenants die together, it will be the estate of the last surviving joint tenant that receives the asset. If the order of deaths cannot be determined, then the youngest joint tenant is deemed to have outlived the other joint tenants, and the asset forms part of their estate.

Tenancy in common

What is a tenancy in common?

A tenancy in common occurs where two or more persons own a distinct share of an asset. Each tenant in common is able to sell or otherwise dispose of their share of the asset.

The ownership does not need to be equal, for example, one owner may own 60% and the other may own 40%.

None of the tenants in common are entitled to exclusive possession of any part of the asset, without the others.

What happens on death?

If one owner dies, their will regulates where their share of the asset goes. The other tenants in common do not become the new owners automatically. They continue to hold their share of the asset.

What determines whether an asset is held jointly or as tenants in common?

There are a number of principles which determine whether individuals own property as joint tenants or as tenants in common.

For real property (land and buildings), the certificate of title will set out the manner in which joint holdings are held – either as joint tenants, or as tenants in common (and the proportionate holdings).

Otherwise, the law generally presumes that co-owners of property hold that property as joint tenants. Where a share certificate or a bank account is in the names of, for example, two spouses, then they will hold the property as joint tenants, unless there is evidence that they intended to hold as tenants in common.

Severing a joint tenancy

Reasons why it may be important to sever

If an asset is held in a joint tenancy, then that arrangement can be severed, and converted to tenancy in common, with the co-owners holding equal shares.

Following conversion, each co-owner is then able to dispose of their share of the property either during their lifetime or via their will, separately from the other co-owners.

How can a joint tenancy be severed?

In the case of personal property (such as shares or bank accounts) it may be enough for the parties to sign a written declaration that it was their intention at the time of purchase that they hold the property purchased as tenants in common.

An alternative is for the parties to subsequently agree in writing that they hold the property as tenants in common.

Joint owners of real property (land) may also sever a joint tenancy by agreement. That is, they can simply agree that from a point in time they hold the property as tenants in common. Alternatively, a joint tenancy can be severed unilaterally by one joint tenant. The registration of the land is changed to reflect the severance of the joint tenancy and to record the owners as tenants in common in equal shares.

Capital Gains Tax and Stamp Duty

Stamp duty

Most states provide a full exemption for a change in the manner of holding from joint tenancy to tenancy in common in equal shares, or vice versa, on the basis that the value of the interests at the time do not change. Where the tenancy in common is not to be in equal shares, then duty is likely to apply.

Capital Gains Tax

Section 108-7 of the *ITAA 1997* treats a CGT asset that is owned jointly as if that interest is held as tenants in common in equal shares. In other words, each individual who owns a CGT asset jointly is notionally treated as owning a separate asset constituted by an equal interest in the asset.

Provided that there is no change in the beneficial ownership, then the conversion of a joint tenancy to tenancy in common in equal shares, or vice versa, has no CGT consequences.