

MACFARLANES

CO-OWNERSHIP

REAL ESTATE

There are two ways in which land can be owned jointly - either as "joint tenants" or as "tenants in common". The word "tenant" here has a quite separate meaning from its usual one in the sense of landlord and tenant. The choice made has both financial and property title implications and is therefore important.

JOINT TENANTS

Equal shares

Joint tenants own the land in exactly equal shares. So if there are two of them, they will own 50 per cent each.

This does not mean that the land is physically divided into two halves. It means that both joint tenants own all the land, but if it is sold they will get 50 per cent each of the sale proceeds.

Right of survivorship

Joint tenants have what is known as "a right of survivorship". If one of them dies, his share will automatically pass to the survivor, irrespective of intentions contained in any will he might have left. The transfer of his 50 per cent share in the property will take effect on death, and the death certificate is the only proof needed of the change of ownership. This has the benefit of simplicity and avoids the need to wait for a grant of probate.

TENANTS IN COMMON

Equal or unequal shares

Tenants in common have flexibility in the proportions in which they can share ownership of the land between them be it equally or in any other proportions they like. If they have contributed to the purchase price in unequal proportions, and intend that when they sell the land they will each get back the proportion which they put in, they will have to own as tenants in common.

If you own land as tenants in common, you will need a declaration of trust to set out the proportions in which the land is owned between you. Your respective shares of the property will not be recorded on the legal title and so a declaration of trust is the only proof you will have of what proportions have been agreed between you. Such a declaration is also a useful document to record other arrangements such as one party giving the other a right of first refusal over the share in the property or providing for the obligations to repay borrowing costs.

No right of survivorship

There is no right of survivorship with tenants in common. When one tenant in common dies, his share will pass according to his will (or the intestacy rules, if he did not leave a will). So if a married couple own as tenants in common and the husband dies first, his share (which may or may not be 50 per cent) could pass to the wife under his will, but it could equally pass to their children, or to a family trust for the benefit of the children, or to anyone else. This allows for a greater degree of flexibility in tax planning.

SEVERANCE

A joint tenant can sever his/her share from the other joint tenant(s), without needing their consent. From that point, the parties will be tenants in common and the right of survivorship will no longer apply.

Severance can take place:

- ♦ by a unilateral act, for example if one joint tenant gives a simple written notice to the other joint tenant(s) with immediate effect;
- ♦ automatically, if one joint tenant becomes bankrupt; or
- ♦ by mutual agreement, such as a deed signed by the joint tenants.

Severance can also sometimes be implied as a result of mutual conduct. However, it is important to note that if one joint tenant makes a will leaving their half interest to somebody else, that will not usually be enough to sever the joint tenancy, so survivorship would still apply in that case.

On the other hand, the only way to convert a tenancy in common into a joint tenancy is by mutual agreement.

CONTACT DETAILS

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