

[917] When is a joint tenancy asset not a joint tenancy? When it is a tenants in common asset ...

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An important tax and estate planning issue to understand is the way in which assets are owned jointly.

Background

Where an asset is owned as tenants in common, each owner holds their discrete share of the asset outright. The percentage interests of each owner can be unequal (ie they need not be 50% - 50% as long as the total of all interests equals 100%). When a tenant in common dies, the owners' ownership interests remain unchanged.

The deceased owner's share in the asset passes to the beneficiaries nominated in their will, or in accordance with the intestacy laws.

Under a joint tenancy ownership, the owners share ownership of the asset equally ie each owner effectively owns the whole asset.

Together, all owners own 100% (ie there are no separate interests). When a joint tenant dies, the remaining owners generally acquire the deceased owner's share automatically.

The deceased owner cannot pass their share of the asset under their will, as it automatically passes to the remaining owners. This means the last living owner is entitled to gift 100% of the asset in their sole discretion.

Pursuant to s 108-7 of the ITAA 1997, *individuals who own a CGT asset as joint tenants are treated as if they each owned a separate CGT asset constituted by an equal interest in the asset and as if each of them held that interest as a tenant in common.*

Partnership Acts

Importantly however, where an asset owned on title records as joint tenants is a partnership asset, it will also be deemed to in fact be effectively owned at law (not just

notionally for CGT purposes) as tenants in common.

If this deeming rule applies, then the death of a partner essentially causes the value of their interest to pass under their estate plan, and not automatically by survivorship (as is the case generally with assets owned as joint tenants) to the other owners.

The Partnership Acts in most states codify the rules in this regard.

These rules generally state that unless the contrary intention appears, property bought with money belonging to the partnership is deemed to have been bought on account of the partnership and is considered partnership property.

The rules in this area were perhaps best explained in the case of *Spence v FCT* [1967] HCA 32.

In this case, it was relevantly held:

"It is ... a mistake to say she got it simply by virtue of her joint tenancy. The legal estate devolved in accordance with the joint tenancy.

To that extent the maxim which was mentioned - "ius accrescendi inter mercatores locum non habet" - does not apply: see Lindley on Partnership, 11th ed. (1951), p. 428.

But it is applicable in equity; partners who hold as joint tenants in law hold beneficially as tenants in common.

That is an old rule.

It is more exactly stated today in terms of the Partnership Acts (the relevant provisions are "ss. 30 and 32 in the Western Australian Act") the legal estate devolves according to its nature and tenure but in trust so far as necessary for the persons beneficially interested; and as between partners land which is partnership property is to be treated as personal estate."

The "old rule" reference in the quote above comes from cases such as *Lake v Craddock* (1732) 3 P Wms 158; 24 ER 1011.

High Court authority

More recently, the decision of the High Court in *Commissioner of State Revenue v Rojoda Pty Ltd* [2020] HCA 7 (reported at 2020 WTB 11 [255]) further highlights the way in which these rules operate.

Interestingly, the High Court's decision reversed a decision of the WA Court of Appeal - which in turn had reversed a decision of the State Administrative Tribunal.

The High Court decision relevantly confirmed as follows:

- Australian Partnership Acts, like the 1890 United Kingdom counterpart, reflect the equitable principle that, subject to the terms of any partnership deed, partners hold legal rights to the partnership property on trust for all the partners.
- This means that if property is acquired as partnership property, even if this is done in the name only of 1 partner, it will be held upon trust for the partnership.
- Furthermore, the legal estate or interest in land which is partnership property devolves not according to the general rules of law but "in trust so far as necessary for the persons beneficially interested in the land".
- The rules in this area do not create any new trust in relation to land. Rather, they give statutory recognition to the equitable principle that legal title to partnership property is held on trust for all partners.
- This means that each partner will have a non-specific interest in relation to all of

the partnership freehold titles (as well as all of the current assets of the partnership) with a right, upon dissolution, to compel the sale of the freehold titles in order to realise a fund from which at the conclusion of the winding up of the partnership a vested share can be claimed.

- In the case here, a deed where a partner confirmed that they held freehold titles of a partnership on trust for each former partner or their successors created a fixed trust. This is because the confirmation in the deed extinguished the unique equitable rights of the partners in the landholdings and instead created new fixed trusts.
- The creation of the fixed trusts over land had adverse (and unexpected) stamp duty (ie declaration of a trust) and tax (ie CGT Event E1, being the creation of a trust) consequences.

Conclusion

Owning an asset as tenants in common or as joint tenants can have significant consequences for tax, estate planning and asset protection arrangements.

While it is relatively straightforward to convert ownership from joint tenants to tenants in common, and vice versa with no tax (or stamp duty) consequences of a change, this is dependent on the tenants in common ownership structure being such that each owner has an equal percentage.

The overlay however of the Partnership Act deeming rules are a critical additional factor that often cause significant difficulties for those unaware of the interplay of the various rules.