Joint tenancy v tenants in common – what is the difference?

It may be a surprise to learn that land ownership rights can cause real problems in Wills and estate planning. Most people assume that because they are on the Title for the land, it is theirs to do with as they like. However, that is not necessarily true.

When you make a Will, clearly you can only give away what you actually own. It is not possible to give someone else's asset away in your Will. That is perfectly logical.

However, from time to time and especially when it comes to land, people attempt to do just that, without even knowing that they are doing it.

The reason is that assets which are jointly owned with someone else cannot be gifted in a Will to anyone other than the other joint owner(s).

So, for instance, if you are the joint owner of your home, or money in the bank, or an investment property or vehicle or indeed any other asset, and you attempt to gift that asset to another person (other than the other joint owner) then that gift in your Will shall fail.

The reason is that the “law of survivorship” says that assets which are jointly owned do not have a defined interest for the each of the joint owners. Nobody owns a specific “share” in the assets. Everyone owns it together, and the last surviving owner of the asset will own it absolutely. At that point, they can gift it in their Will to a third party.

There is a way to get around that.

An asset owned by more than one person can also be owned in defined shares (called a “tenancy in common”).

Tenants in common have defined shares and interests in assets. In real estate, one tenant may have 30% of the land and the other tenant 70% of the land. The percentages are described on the Certificate of Title. If no percentage appears in that document, then the land is held as joint tenants.

Tenants in common are free to dispose of their share of the land as they see fit under their Will. The surviving tenant in common has no say over that, and will not automatically get that land under the law of survivorship if the other tenant in common dies.

A joint tenancy can be severed into a tenancy in common if the parties wish. There are consequences which flow from that and legal advice should always be sought. There are good reasons to own property as joint tenants, and there are equally good reasons to own property as tenants in common, particularly in the case of second marriages where there are children from a first marriage.

The best time to decide how you are going to own land (or any other asset) is when it is purchased. Unfortunately, often the topic is not raised by agents or conveyancers and the result is that the land is automatically purchased as joint tenants, which is often the “default” position.

How can Andersons help?

Andersons Solicitors undertake **conveyancing**, but unlike conveyancers, are able to provide structured legal advice about the best method of owning an asset and the consequences that will have on **estate planning** and the later disposal of that asset (including tax implications).

If you are considering purchasing land or any other significant asset, legal advice should be sought or at least consideration given to how that asset is to be held and what the long term effect of that may be.

If you would like any further information please contact today’s writer **Felix Hoelscher** on 8238 6666 or email enquiry@andersons.com.au