

OWNERSHIP OF ASSETS INCLUDING OWNERSHIP OF REAL ESTATE

We are regularly asked how our clients ought to acquire various assets, and particularly real estate. The first question then is, in what ways can I acquire an asset? The most common ways to acquire assets are as follows:

1. In my own name, as the legal and equitable owner of the asset.
2. In more than one name. This may mean that the two or more owners of the asset are partners. However, it does not necessarily mean that they are partners and they may be joint tenants, or tenants in common.
3. In the name of a company.
4. In a trust. This may be done by me personally acting as a trustee, or by me being a beneficiary of the trust which acquires the asset. An individual or a company may act as trustee.
5. In a superannuation fund.

Dealing first with real estate the two most usual ways to acquire real estate, where there is more than one owner, are either as joint tenants, or as tenants in common. Both forms of co-ownership allow for simultaneous rights to possession of the whole of the property. This means that all of the owners have equal rights to use all of the property. However, there is an important distinction and consequences of each, particularly upon the death of a co-owner.

What is a Joint Tenancy?

A joint tenancy does not hold a specific share in the jointly owned property. Rather, each joint tenant shares a right to the whole of the property that is indistinguishable from his/her other joint tenant(s) (ie an interest of a joint tenant is not differentiated into a distinct allocated share).

This means that a joint tenant is entitled to a right of survivorship upon the death of any one or more of the other joint tenants. In such a case, the remaining joint tenant(s) will automatically be entitled to an undivided share of the whole of the property. Because the interest of a deceased joint tenant is extinguished at the moment of death, any purported disposition of the deceased joint tenant's interest through his/her Will is ineffective. **This means that you cannot leave your interest in the property to anyone, because you cease to own that interest the instant you die.** This also means that the heirs of a deceased joint tenant will have no claim to the interest formerly held in joint tenancy by the deceased.

The most common form of joint tenancy is between husband and wife. However, even if you are married, you should check the Certificate of Title to any property you own, as your property may be held as tenants-in-common.

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What is a Tenancy in Common?

Although both tenants in common and joint tenants share undivided possession of the whole of the property, unlike joint tenants, tenants-in-common have a separate and distinct share.

No right of survivorship exists between tenants-in-common, as each tenant-in-common holds a separate and distinct share from the other tenant(s)-in-common. Accordingly, their separate interests will pass through their Wills to their respective estates upon their deaths.

An example of when the appropriate type of co-ownership would be tenants-in-common is where business partners purchase property for the purpose of their joint business activities. This means that each partner can leave his or her share in his or her Will.

Changing Co-Ownership

It is relatively simple exercise to change a tenancy-in-common to a joint tenancy or a joint tenancy to a tenancy-in-common. In both cases, a Transfer of Land signed by all interested parties will need to be prepared, stating that you now wish for the property to be held as joint tenants or alternatively as tenants-in-common.

A registration fee of \$85.00 (subject to change) will be payable upon lodgement of the Transfer at the Department of Land Information and there is usually nominal stamp duty payable on a property transfer of this type.

Partnership

If you are in partnership with one or more other people it is important to determine whether an asset, and particularly real estate, is purchased as a partnership asset, or simply as an asset of the named owners. There are a number of important distinctions. However, one of the most important is that, as a partner, you are entitled to your interest in the partnership, and not necessarily to any partnership assets.

Companies

It is possible to hold shares in a company which then acquires assets. This means that you have an interest in the company, not a direct interest in the asset. One of the advantages of using a company is that different classes of shares can be issued, with different rights. It is also possible to separate the ownership of the asset from the management of the company. For example, you could establish a company and acquire various assets. You could issue shares to your infant children, while remaining the only director of the company (or a husband and wife each being directors). You could then have the management and control of the asset, while having given an interest in the company, which owns the asset, to other people, and particularly to your infant children.

Trusts

Trusts continue to play an important part in enabling Australians to acquire assets, and to protect those assets, particularly for the benefit of future generations. One of the main advantages of a trust is that the income of the trust can be made available to the beneficiaries (whether they are infant children, or adults) without the beneficiaries automatically having any right to the assets of the trust. Like a company, the control and management of the assets can be separated from the potential ownership. However, there is far greater flexibility as to who will ultimately become the owner of the asset, with a trust, than there is with a company.

Summary

As the law becomes more complex, it is increasingly important that you obtain advice before you acquire assets. We have had many situations where clients have consulted us, after acquiring assets, only to find that they have not acquired the assets in the way they really intended. Assets have often been acquired without adequate consideration being given to what is ultimately likely to happen to those assets.

Consider the following example: a married couple purchased a very valuable investment asset in their own names. The asset increased substantially in value and the couple who owned it now wished to sell the asset. This meant that they were facing the prospect of incurring a substantial capital gain, and paying substantial Capital Gains Tax. They had five adult children, and a number of grandchildren, all of whom could have been beneficiaries of a trust, if the property had been purchased in a trust. In addition, the couple were each earning substantial incomes, and were already paying tax at the top marginal rate. As a result, they were forced to pay Capital Gains Tax which could have been significantly reduced with proper planning before the asset had been purchased.

As another example of the importance of deciding in advance how an asset is acquired, consider the situation where a man and a woman marry late in life, after each having been married (and each having had children) previously. If they acquire a property as tenants in common, then each of them will retain a one-half interest, after their death, and can leave that half interest in their Will.

However, because the half interest will be an asset of their Estate, it is possible for their children to make a claim on their Estate. In other words, if one left his or her half share to the survivor, it would be possible for the survivor to become involved in a legal battle with the adult children of the previous marriage, over the ownership of that half.

On the other hand, if the property had been acquired as joint tenants, then it would automatically have passed to the survivor, without ever having been a part of the Estate of the party who died first, and without it ever having been possible for a claim to have been made on the share of the deceased spouse, under the Inheritance Act. However, this would have prevented the spouse who died first from leaving his or her share to his or her children, if that is what her or she wanted.

If one spouse (or partner) is engaged in a potentially litigious occupation (such as a lawyer, doctor or company director) then he or she may decide that it is safer to purchase an asset in the name of the other spouse (or partner) to avoid the risk of a claim being made on the asset, in the event that he or she is sued, such as for professional negligence.

Consequently, this is a complex area in which we recommend that you obtain legal advice, before acquiring assets.

This is general information only, and does not constitute specific legal advice. If you would like further information in relation to business and estate planning, the acquisition of assets, or any other matters, or if we can assist you, please email us at reception@hhg.com.au

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