

NEWSLETTER

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JOINT TENANTS VS. TENANTS IN COMMON

In New Zealand, when purchasing a property personally with another party you can choose to own the property as Joint Tenants or Tenants in Common. Property can also be registered under the Joint Family Homes regime, however a Bill is currently before Parliament to repeal the Joint Family Homes Act 1964, so this option may no longer be available.

Deciding which form of ownership to use depends entirely on your personal circumstances. The differences between Joint Tenants and Tenants in Common are explained briefly below.

JOINT TENANCY

Joint tenancies arise when two or more people ('joint tenants') buy a property together and their shares in the property are undivided and undefined.

One important feature of a joint tenancy is the right of survivorship. This means that when one of the joint tenants dies, their share in the property will transfer to the surviving joint tenant(s). The interest in the property therefore is not available for disposal under a Will or under an intestacy. Joint Tenancy ownership is most commonly seen in purchases by a husband and wife who intend on owning the property equally and passing their share to the survivor in the event of death.

TENANTS IN COMMON

Tenancy in Common allows for owners to hold a distinct share of a property. There is no requirement that a Tenancy in Common must result in equal shares of ownership. The amount of a person's interest in the property will most likely be recorded on the title, for example: "*Mark Smith as to a 1/3 share and Jane Brown as to a 2/3 share*".

One major advantage of owning property as a Tenant in Common is that the owners are able to dispose of their share in the property in accordance with the terms of their Will. If a person does not have a Will, their share in the property will be distributed in accordance with the provisions of the Administration Act 1969. It is therefore important that owners have a valid Will in place that clearly sets out how the property is to be dealt with after their death.

SEVERANCE

A Joint Tenancy can be severed unilaterally to become a Tenancy in Common. This may be opportune in the event of bankruptcy of one of the joint tenants or the

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breakdown of a relationship. Where a relationship ends, it is often crucial that an existing joint tenancy is severed to prevent a share of the property being transferred to an ex-spouse in the event of either spouse's death prior to resolution of relationship property matters.

SUMMARY

For couples wanting to buy a property together, it is

DEFAMATION

Defamation claims have been a topic of interest lately with high profile figures such as Chris Cairns and Judith Collins taking legal action against attacks made on their reputations. A brief summary of defamation law in New Zealand and the main points that are needed to pursue or defend a defamation claim are set out below.

WHAT IS DEFAMATION?



Defamation in New Zealand is governed by the Defamation Act 1992 and an entrenched body of case law. It is an area of law that is designed to protect a person's reputation against unjustifiable attack. Providing such protection requires a fine balance between the protection of reputation and the freedom of expression as contained in Section 14 of the New Zealand Bill of Rights Act 1990.

PROVING DEFAMATION

A defamatory statement can be in either written or verbal form. To be successful, the plaintiff must prove they have been defamed by proving the following three elements:

1. a defamatory statement has been made,
2. the statement was about the plaintiff, and
3. the statement has been published by the defendant.

Publication is a crucial aspect of this test. It must be proven that the defamatory statement was published to at least one person other than the plaintiff. If the statement was published to the plaintiff alone then the test for publication will fail. Publication of defamatory statements includes the making of verbal statements.

ABOLISHMENT OF GIFT DUTY AND IMPACT ON TRUSTS

The abolishment of gift duty in October last year has changed the nature of asset and estate planning by making it possible to gift unlimited amounts directly to a trust in one transaction. There are however, certain

important to consider the effect each type of ownership will have on them. Relationship property and family protection implications are significant. It may be an option to enter into a contracting out agreement under the Property (Relationships) Act 1976 or a property sharing agreement to set out more detailed terms and provisions regarding the ownership of the property.

DEFENDING DEFAMATION

The four defences in a defamation case are:

1. **Honest opinion** - the defendant must provide the factual basis on which their opinion is based. This defence will not succeed if the defendant simply got the information wrong,
2. **Truth** - a complete defence is provided if the defendant can satisfy the court that the defamatory statement was true, or not materially different from the truth,
3. **Privilege** – privilege provides immunity to certain groups of society for statements or reports made by them. "Absolute privilege" will serve as a complete defence; an example is where politicians often defame each other in parliament but are protected by parliamentary privilege. "Qualified privilege" however can be defeated if the plaintiff is able to show that the defamatory statements were motivated by malice. Qualified privilege usually attaches to the requirement for fair and accurate reporting by, for example, the media or someone with a social, moral or legal duty or interest to report something,
4. **Consent** - a complete defence is available if it can be established that the plaintiff consented to the publication of the defamatory material.

DEFAMATION AND THE INTERNET

Given the prevalence of the internet in our daily lives, caution must be taken to ensure that statements made online are not defamatory. The recent English case of Chris Cairns against Lalit Modi was the first of its kind in England where a 'tweet' made on the social networking site Twitter was held to be defamation. The resulting award in damages was equal to approximately £3,750 per word for a 24 word publication. Although this case was decided in England, it provides a valuable lesson in terms of publications on social networking sites. (At the time of writing, it was reported that Mr Modi would be appealing the decision).

consequences that donors (people making a gift) need to be mindful of when considering the amounts they wish to gift. Some of these are discussed below.

RESIDENTIAL CARE SUBSIDY ENTITLEMENT



Despite the changes to gift duty, the eligibility requirements for a residential care subsidy have remained the same. One of the eligibility tests for a means assessment is that the donors do not

deprive themselves of assets for the purposes of qualifying for a residential subsidy. Deprivation of property includes:

- gifts in excess of \$6,000 per year in the five year period prior to applying for a residential care subsidy, and
- gifting that exceeds \$27,000 in any 12 month period prior to the five year period.

If you wish to avoid jeopardising your eligibility for a residential care subsidy, the amount gifted per year will need to be calculated carefully.

SOLVENCY AND CREDITOR PROTECTION

The ability to gift unlimited amounts at any time provides donors with a greater degree of creditor protection than before. However, donors should be aware that any gifts that are made with the intention to defeat creditors can be set aside at any time under the Property Law Act 2007.

Assessing the solvency of a donor at the time of gifting is also important in the event of a donor becoming bankrupt. Under the Insolvency Act 2006, a gift may be cancelled if it was made within the two years immediately prior to the donor's bankruptcy (Section 204).

If a bankrupt donor is unable to pay their debts, any gifts made between two and five years immediately before bankruptcy may also be cancelled (Section 205).

A donor wishing to preserve their entitlement for a residential care subsidy who also desires to protect their assets faces a tricky conundrum. Gifting large amounts/assets to a trust may jeopardise a donor's entitlement for a residential care subsidy. Certain balances must therefore be struck to achieve the intended outcome.

ACCESS TO TRUST ASSETS

Under the previous gifting regime, transferring an asset to a Trust usually created a debt which was written off over a period of time. The debt was an asset of the transferor, and could be called upon at any time by the donor if they needed access to funds. Gifting an asset in its entirety on the other hand has the effect of a donor relinquishing complete control over that asset. You cannot simply 'unwind' the gift. In this regard, adhering to traditional gifting regimes and leaving a loan outstanding in relation to the asset may give some donors greater leverage and will assist in ensuring that there are monies available to the donor personally if needed.

SUMMARY

There are numerous other considerations that a donor should be aware of before any significant amounts are gifted. The impact of gifting on relationship property and family protection for example, are two such considerations. It may be wise to discuss your goals with a lawyer and accountant to assess how best to achieve them.

THE DARK SIDE OF MORTGAGEE SALES



While our economy recovers from the recent global recession, signs of economic lags continue to make its presence felt through increasing numbers of mortgagee sales. Figures reveal that by November last year, 1,535 properties

were brought to market as mortgagee sales compared to just 571 in 2007. The prevalence of mortgagee sales provides an opportunity for some buyers to potentially "grab a bargain". However, buyers should remain vigilant as the risks attached to mortgagee sales are significant.

DIFFERENCES IN AGREEMENTS

Agreements used in mortgagee sales usually differ from standard Sale and Purchase of Real Estate Agreements whereby amendments are made to greatly favour and protect the mortgagee. For mortgagee sales, vendor warranties that are contained in standard agreements are usually removed, as is the obligation to provide vacant possession. There have been cases where previous

owners or tenants have refused to vacate the property even though it has been sold. In such situations, the issue of removing unlawful occupiers becomes the new owners' problem.

REMOVING UNWANTED OCCUPIERS

The options for removing unwanted occupiers include obtaining and enforcing a trespass notice pursuant to the Trespass Act 1980 and/or a possession order pursuant to the Residential Tenancies Act 1986 ('the Tenancies Act'). Section 65 of the Tenancies Act provides that a legal owner of a property can apply to the Tenancy Tribunal for a possession order that can then be enforced to evict unlawful occupiers. While in theory the process seems straightforward, the reality remains that whilst the buyer is obtaining a possession order, the risk of the property being damaged by the unlawful occupants is significant.

PROTECTION AGAINST DAMAGE

Mortgagee sales often leave behind disgruntled mortgagors (previous owners) and it is not uncommon for properties to be vandalised after the mortgagee has sold the property and prior to possession. Obtaining insurance

cover for the property upon signing the agreement for its purchase is therefore highly recommended. If purchasing at auction, insurance should be arranged before bidding so that insurance cover is effected immediately upon the sale taking place.

CHATTELS

It is important to note that chattels (such as stoves, light fittings, curtains and carpet) are not included in mortgagee sales. This means that the previous owner is well within their rights to remove such items from the

property, as they retain ownership of the chattels despite the mortgagee sale.

CONCLUSION

The lesson here is simple - know the terms of a mortgagee sale well and be aware of the risks. There are numerous other matters that a buyer should be conscious of beyond those discussed above. It would be wise to consult a lawyer prior to signing the purchase agreement - particularly when dealing with unit titles or cross leases. Doing so may prove a worthy investment considering the potential headaches it could save in the future.

SNIPPETS

CHANGES TO BUILDING LAWS

A comprehensive review of the Building Act 2004 during 2009-2010 resulted in the enactment of the Building Amendment Act 2012 ('the Act'). The Act received royal assent on 12 March 2012 and is aimed at lifting the overall performance of the building and construction sector. Some provisions that immediately came into effect on 13 March 2012 include:



- new provisions (sections 90A - 90D) that relate to Owner-Builder Exemption from Restricted Building Work,

- new provisions (sections 14A-14F) that clarify the responsibilities of the parties involved in building work,
- changes to the compliance schedule and Building Warrant of Fitness regimes that affect councils and building owners, and
- a clarification of some aspects of the Licensed Building Practitioners Scheme.

Further provisions of the Act will come into force at a later date to be appointed by the Governor General.

For more information please visit <http://www.dbh.govt.nz/building-amendment-act-2012>

DOG TALES

Congratulations to Daniel and Camille Smith on the birth of their first child, Cooper Mason Smith, on 5 March 2012 weighing 6lb 5oz. Daniel and Camille are also celebrating their 10th wedding anniversary in July and will be flying to Singapore for 10 days R & R.

Pearl's sister Raewyn organised an Art Auction as a fundraising event for the Salvation Army at Albany, which was held on 7 June 2012. We were pleased to provide some sponsorship in support of this event.

Tony and Pamela have just returned from a wonderful holiday, where they spent a week in a small village in France close to Avignon and then three weeks visiting the main cities of Spain. They have qualified with honours for visiting historical buildings and cathedrals and have a degree in queuing for those sights.

Sue McColl has been on leave following diagnosis of breast cancer and an operation for removal. Sue is to undergo a course of chemotherapy. We wish Sue and her family the very best and offer our support during this difficult period.

Denise Cheese has recently returned from an overseas holiday on which she travelled through parts of Europe from London to Amsterdam, Nice, Naples and Lake Como with her sister Deirdre, who lives in London.

Sarah Muirhead and her husband Ross have bought a sign writing business and are off to Florida in June, for a seminar and to find out more about the running of the business. We wish them every success. They are then flying to Hawaii to meet up with family for a week.

Phyllis Weaver and her husband Randy have won a holiday in Tuscany courtesy of Auckland Philharmonic Orchestra and its sponsors, APN News.

Jake has fitted in well to Brigid's family and is progressing well at school.

Congratulations to Kristina Kimber who has recently become engaged to Dean. They are busy planning their wedding later this year and have signed an agreement to buy their first home.

If you have any questions about the newsletter items please contact us, we are here to help:

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