

## Severing Joint Tenancy ownership of property pursuant to Section 66G of the Conveyancing Act 1919 (NSW)

This article examines how a co-owner in a Joint Tenancy of property can force the other co-owners to sell the property by obtaining a court order.

### What is a Joint Tenancy?

Two or more persons can simultaneously hold an interest in land under either a Joint Tenancy or a Tenancy in Common. Thus a Joint Tenancy is a form of co-ownership of property.

A distinguishing feature of a Joint Tenancy compared with a Tenancy in Common is the right of **survivorship**. This means that when one Joint Tenant dies, the whole of the Estate remains with the surviving Joint Tenants. So long as the co-owners remain as Joint Tenants this right to survivorship cannot be defeated. It should also be noted that a Joint Tenant's interest cannot be bequeathed or willed to a beneficiary. Therefore when one Joint Tenant dies, his or her share passes automatically to the remaining co-owners without any need for a will or probate. Because of this feature of smooth transition of ownership many co-owners choose Joint Tenancies over Tenancies in Common to hold their interests in property.

In the case of Tenancies in Common, each person has a distinct share of the property and there is no right of survivorship. Thus the share of a Tenant in Common can be bequeathed to a beneficiary named in his or her will.

What happens when one Joint Tenant wishes to exit from the Joint Tenancy? This usually happens when there is a breakdown in the relationship between the co-owners. One party then seeks to end his or her ownership of the property or to sever the Joint Tenancy.

A Joint Tenancy may be severed during the life time of the Joint Tenants. There are several ways of doing this such as by alienation, by conversion, by declaration or by application to court for an order of sale.

### Application for an Order of Sale

A Joint Tenant may apply to the Supreme Court for an order to sell the property pursuant to a provision in **Section 66F to Section 66I of the Conveyancing Act 1919 (NSW)**, in particular under **Section 66G**.

**Section 66G** refers to Statutory trusts for sale or partition of property held in co-ownership. The provision can be summarised as follows:

Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners appoint trustees of the property and

vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.

Where the court grants the application, trustees are appointed and the property is vested in them upon the statutory trust for sale. The court will only refuse an application under Section 66G in special circumstances. For example, there is an agreement with the other co-owners not to do anything to sever the Joint Tenancy or not to act in relation to the property except with the consent of all the co-owners or if there are contractual or fiduciary obligations which the court feels ought to be honoured. It goes without saying that there must be evidence before the court in support of these contentions.

It should be noted that severance by application for sale is time consuming and may take months to two years to be determined with the attendant legal costs and fees. In cases of urgency however an application can be made for expedition.

### Conclusion

A co-owner has the right to seek severance of a Joint Tenancy by applying to court for an order of sale. However, the process in so doing may be drawn out and time consuming and subject to challenge by the other co-owners. This would equally apply if other modes of severance are adopted to bring the Joint Tenancy to an end.

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*Comasters can assist a co-owner in applying to court for an order to sell a property held under Joint Tenancy.*

**Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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