



Do you need a property co-ownership agreement?

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With the rising cost of housing, particularly in Sydney, situations of co-ownership of property between multiple persons are becoming more common. In this article, we look at seven scenarios where having a co-ownership agreement in place could be beneficial.

What is a co-ownership agreement?

A co-ownership agreement ("**COA**") is essentially a written agreement that attempts to document the rights and obligations of each joint owner of a property.

As joint owners, you may own the property as joint tenants or tenants in common. If you own the property as joint tenants then ownership of the property is by more than one person where, if one owner dies, his/her interest passes automatically to the surviving owner.

If you own the property as tenants in common then ownership of the property is by two or more parties which may be in equal or unequal shares. Each owner may dispose of their share in the property independently and the shares do not automatically pass to the other owner in the event of death but form part of the deceased person's estate.

A COA is particularly concerned with protecting each of the co-owners from unexpected future circumstances. It is of particular importance when you own the property as tenants in common.

What circumstances may arise where property is jointly owned?

There are seven (7) significant circumstances that could arise when property is jointly owned, where a COA could potentially address any issues arising from that circumstance:

- Death;
- Disability or incapacity;
- Dispute between co-owners;
- Separation from a spouse or de facto partner;
- Bankruptcy;
- Significant damage to the property; and
- General change in circumstances.

1. Death of a co-owner

If one co-owner died prematurely, then without sufficient planning and provision under the COA, the surviving co-owner(s) may find that they own the property with the beneficiaries of the [deceased co-owner's estate](#).

The family members of the deceased co-owner may wish to sell the property prematurely. Death will often be a trigger for the sale of the deceased co-owner's share of the property.

2. Disability or incapacity of a co-owner

Often, this would compromise the disabled or incapacitated co-owner's ability to comply with their obligations under the COA or maintain their payments of rates and expenses. It will also likely be a trigger for the need to sell the co-owner's interest in the property.

3. Dispute between co-owners

When entering a co-ownership arrangement, it is necessary to consider the potential that there is a breakdown of the relationship among the co-owners. If the relationship among co-owners is beyond repair, provision should be made for one or all parties to sell their interest in the property.

4. Separation from a spouse or de facto partner

A family law separation may occur between two co-owners, or between one co-owner and their partner who is not a co-owner.

In either case, the remaining co-owner(s) would not want to be dragged into the middle of their co-owner's family law proceedings. The COA would usually provide for family law proceedings to

trigger the sale of the affected party's interest in the property.

5. Bankruptcy of one of the co-owners

The bankruptcy of one co-owner could have detrimental implications for the other co-owners. To avoid being involved in bankruptcy proceedings, the COA will usually include provision to trigger the sale of the co-owner's interest in the property.

6. Significant damage to the property

There will always remain the potential for unexpected damage to the property to occur. The COA should clearly address the respective obligations of the parties should the property be significantly damaged.

7. A general change in circumstances

A decision to retire, move or simply a wish for a lifestyle change may affect a co-owner's desire to remain in the co-ownership arrangement. The COA should cover how a co-owner is able to leave the co-ownership arrangement to avoid their finances being forever locked bound to the arrangement.

What proportion of the property expenses will each co-owner be responsible for?

Usually, the property expenses will be shared in the proportions corresponding with their share of ownership in the property (for example, three co-owners with a 1/3 share of the property each will typically split expenses in three equal shares). However, this can be varied depending on the intention of the parties.

How will the property be used or occupied?

If all parties will be living in the property, and all areas of the property will be shared, then this is relatively straightforward.

It becomes more complex if:

- not all of the parties will be living in the property, in which case issues such as who will be responsible for the maintenance and upkeep of the property, and the apportionment of rates will need to be considered further; or
- the co-owners are exclusively entitled to different areas of the property. This would be the case if there are separate self-contained living areas on the property to be occupied by different co-owners. In such a situation, it would be necessary to precisely outline the areas that are exclusively the domain of an individual co-owner and which areas remain commonly shared property.

What if one co-owner is unable to pay their share of the rates or expenses?

If one of the co-owners experience financial difficulties, for any reason, then they may not have the ability to cover their share of the rates or the cost of unexpected repairs or maintenance. It is necessary to consider what would happen in that situation.

If one of the other co-owners covers the unpaid share of the rates or expenses, there should be some method for them to be reimbursed and potentially compensated with additional interest chargeable. If the co-owner who is out-of-pocket is not reimbursed or compensated, would this entitle them to acquire a further interest in the property? This can be a major point of contention and a source of arguments between co-owners.

What debt, if any, will be able to be secured against the property?

This is particularly problematic if the co-owners require different levels of borrowings for their interest in the property.

For example, one co-owner requires finance but another co-owner does not require finance for their interest in the property. A bank may require that all persons registered on the title are included in mortgage documents and if that is the case, what protection is given to the co-owner who owns their share outright?

If the bank attempts to force the sale of the property as a result of defaulting on the mortgage, what recourse will one co-owner have against the other if only one co-owner's bank calls upon the security?

If the co-owner with finance is unable to service the payments, will the other co-owner be required to cover the payments?

What if a co-owner wants or needs to sell their share?

The co-owners of a property, particularly when all parties are living in the property, would generally wish to retain some control over the sale of an interest by one of the other co-owners to a third party.

A partial interest in a jointly owned property is often not easily sold on the open market as potential purchasers would not necessarily know the situation they would be purchasing in to.

To address this, a COA will usually include:

- a requirement for the selling co-owner(s) to offer the sale of their interest to the remaining co-owner(s) before the property may be offered to any third party;
- a right of refusal for the remaining co-owner(s) to prevent the sale to an unwanted third party; and
- if the remaining co-owner(s) are unwilling or unable to finance the purchase of the share, then the selling co-owner should have the right to force the sale of the entire property.

The timing of the sale could have a significant impact on all of the co-owners. For example, if the selling co-owner is required to sell out of necessity during a downturn in the market, it may come at a time that is unsuitable for the remaining co-owners.

If a co-owner refuses to agree to sell the property, what can the other co-owner do to require the sale?

If there is no contractual right to sell the co-owner's interest in the property, or force a sale of the whole property under the COA, then the only other avenue available to you is to apply to the Supreme Court.

This would almost certainly be an expensive exercise. It would involve the Supreme Court, if they consider it appropriate, appointing trustees to sell property.

Even where there is a contractual right to sell the property under a COA, there is no guarantee that the refusing co-owner would comply with their obligations under the agreement. It may still be necessary to apply to the Supreme Court to enforce the terms of agreement. Again, this could be costly.

If the property is to be sold, how will the co-owners make decisions?

At the time that the property is being sold, it can often be difficult for the co-owners to make mutually acceptable joint decisions, particularly if the relationship between the co-owners is strained.

Decisions such as selecting an agent, agreeing on a marketing campaign, which solicitor to instruct and agreeing to a price and method of sale will need to be made. If the co-owners are unable to come to a compromise, the COA should provide a mechanism for how decisions are made.

How will decisions be made about what to do with the property?

Without any additional provision within the COA, the starting position at law is that all co-owners must agree on all decisions, regardless of their nature.

The COA may provide that for minor decisions (which would have to be carefully defined), a decision by the majority of the co-owners would be acceptable. For more significant decisions, a consensus may be necessary. Provision would be necessary if there is a deadlock between the co-owners.

Issues may arise if there are unequal voting rights between co-owners. This would also be the case if there are three or more co-owners, with some of those co-owners voting in 'blocks'.

For example, if there are three co-owners comprised of a mother, father and child, the mother and father may naturally tend to vote together as their interests will generally be aligned, to the exclusion of the child.

What insurances should be maintained and who is responsible for paying the premiums?

It is often advisable for co-owners to consider their insurance cover (particularly life, TPD and income protection insurances) before entering into a co-ownership arrangement.

In a situation where one co-owner has borrowings and the other does not, the co-owner without borrowings may also need to consider obtaining insurance over their indebted co-owner to ensure a change in circumstances to the indebted co-owner will not adversely affect them or their interest in the property.

What won't a co-ownership agreement cover?

This blog is general information concerning considerations for the co-ownership of property in NSW with owners who are not married or in a de-facto relationship with their co-owner.

Co-ownership agreements have limited utility if the co-owners are married or in a de-facto relationship. If you have purchased or intend to purchase a property with a spouse or partner, then you may need to seek advice from a properly qualified [Family Law lawyer](#) and a [Binding Financial Agreement](#) may be better suited to your needs.

Get help from a property lawyer

The above information is a short summary of the issues that should be considered before entering into a co-ownership arrangement.

If you wish to discuss establishing a co-ownership arrangement and/or drafting a co-ownership agreement further, please do not hesitate to contact us. We will work with you to structure the co-ownership arrangement to suit your needs and protect your interests. For the preparation and completion of a properly considered and tailored co-ownership agreement, our professional fees start at \$1,245 (excl. GST) (*prices current as of August 2021*).

You can find out more about our [conveyancing and property services here](#).

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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