



Transferring property to a spouse or partner after death

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If you own property in NSW and intend for the title in the property to pass to your spouse in the event of your death, the process of ensuring this occurs is different depending on how the property is owned. In this blog we explore some of the processes for transferring a property to a surviving spouse in the event of death, including if the property is owned:

- (a) by both spouses as joint tenants; or
- (b) by only one spouse; or
- (c) by both spouses as tenants in common.

Difference between joint tenants vs tenants in common

If the property is held in both spouse's names, then it would either be owned as joint tenants or tenants in common. The difference between the two forms of ownership is:

1. **Joint tenants** – this means that the couple both own the whole property jointly, and if either individual passed away, then the ownership would pass to the survivor in full.
2. **Tenants in common** – this means that the couple would each own a share of the property (this could be 50% of the property each, or some other percentage) and if either individual passed away, then their share of the property would be dealt with under [their Will](#).

Your [lawyer or conveyancer](#) will be able to search the title of your property to determine which of the above applies.

Where the property is owned as joint tenants

If the property is owned by the couple as joint tenants and one individual passed away, then the interest in the property would not be dealt with under the Will of the first party to die. A [Grant of Probate](#) would not be required to arrange for the property to be transferred to the survivor upon the death of one of the joint tenants.

If a joint tenant passes away, then to bring the title into the survivor's name solely, a Notice of Death must be registered with NSW Land Registry Services. There is **no** [stamp duty payable](#) for a Notice of Death.

If there is a mortgage registered on title, then your bank/mortgagee would need to consent to the registration of the Notice of Death, and may impose further requirements before registration is permitted.

Your lawyer or conveyancer will be able to assist in registering the Notice of Death through PEXA; the online platform for property transfers.

Standard NSW Land Registry Services registration fees would apply.

Where the property is owned solely or as tenants in common

If the property is owned by only one individual who has passed away, or by the couple as tenants in common and one of the individuals passed away, then the Will of the deceased would apply for the gift of their interest in the property.

If the deceased died without a Will, then the [laws of intestacy will apply](#).

A Grant of Probate is required for the property to be transferred in accordance with the terms of the Will.

Transmission applications

If the property is included in the Will as a gift to the surviving spouse, or if the whole of the Estate is gifted to the surviving spouse, then a Transmission Application will need to be registered on title to transfer the interest in the property to the surviving spouse.

The Transmission Application must be registered with NSW Land Registry Services.

Stamp duty payable where property is owned solely or as tenants in common

Nominal stamp duty must be paid to Revenue NSW for a Transmission Application, transmitting the property to the beneficiaries entitled under a Will.

For example, if a Will gifts a property to a surviving spouse, then stamp duty of \$50.00 must be paid before the property is transmitted to the spouse.

There can be stamp duty payable if the surviving spouse is only entitled to part of the interest in the property under the terms of the Will, and the Will does not specify that the surviving spouse has a right to acquire the other part of the interest in the property that the deceased owner held.

Consider this scenario

- An individual dies with a property as the sole asset of their estate;
- Their Will gifted their property 50% to their spouse and 50% to their child;
- The Will is relatively simple, dividing the property as stated above and does not include any specific provision that allows the spouse to purchase the child's 50% interest;
- The spouse decides that they want to retain the property alone (as the sole owner) and offers to buy-out the child's 50% interest in the property for market value;
- The spouse would incur nominal stamp duty (referred to earlier) for the 50% interest in the property that they receive under the Will.;
- The spouse would incur stamp duty at full rates on the market value of the 50% interest that the spouse acquires from the child;
- The acquisition of 50% of the property from the child is treated as though the spouse purchased 50% of the property. A valuation would be required to determine this market value.

Stamp duty may be reduced if the Will stated that the spouse has the right to purchase the child's interest in the property from them and specifies how that purchase is to take place.

Your lawyer will be able to assist in advising further as to any stamp duty implications, and registering the Transmission Application through PEXA; the online platform for property transfers.

If there is a mortgage registered on title, then your bank/mortgagee would need to consent to the registration of the Transmission Application, and may impose further requirements before registration is permitted.

Standard NSW Land Registry Services registration fees would apply.

Property that has a mortgage

For either the Notice of Death or the Transmission Application to be registered with NSW Land Registry Services, the Certificate of Title will be required. If there is a mortgage on the title, then the bank/mortgagee would need to consent to the document that is proposed to be registered and produce the Certificate of Title for registration.

The mortgagee may also impose further requirements before they consented to registration. For example, if the property is to be transferred to an individual who was not previously been on the title of the property, then the bank/mortgagee would require the property to be re-financed.

Get help from a property lawyer

Ownership of a property can be transferred from a deceased spouse but different processes apply depending on how the property is held/owned.

Should you require assistance in navigating the legal process, or to understand which process applies to you, advice from a properly qualified practitioner should be obtained.

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

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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- [Stamp duty exemptions when transferring property to include a partner or spouse](#)
- [Do you need a property co-ownership agreement?](#)
- [At what point of my NSW property transaction will stamp duty be payable?](#)

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact E&A Lawyers.