

PROPERTY LAW GUIDEBOOK

SECOND EDITION

CHRIS DAVIES

CHAPTER 6

PROBLEM QUESTION 2

Oscar, who was a barrister, bequeathed Monarch Estate, a farm and mansion, to his three daughters, Peace, Quia and Rosa 'jointly and to share amongst themselves'. Since childhood the three girls had quarrelled incessantly, although Peace and Rosa could tolerate each other. As adults an uneasy truce prevailed between them. However, in an effort to spurn Quia, Peace and Rosa devised a scheme by which each transferred her interest to the other without the knowledge of Quia. Since the relationship between Quia and her two sisters remained frosty, Quia decided to move out. Two years later Quia decided to buy herself a flat. She mortgaged her interest in Monarch Estate to Toogood Bank to raise the purchase price of the flat. Unbeknown to Quia, Peace and Rosa had also moved out a year ago and leased Monarch Estate to Unus Pty Ltd for a term of ten years. While driving to a movie last Saturday, Peace and Rosa were killed in a motor accident. Neither Peace nor Rosa had made a will.

Discuss all the relevant legal issues in relation to Monarch Estate.

SUGGESTED ANSWER

The issues in this problem are:

- 1 What type of co-ownership has been created?
- 2 Has severance occurred?
- 3 Can Quia claim occupation rent for the years she was not living on the property?
- 4 Can Quia mortgage her interest in the property?

5 Can Peace and Rosa lease out the property, and is Quia eligible for some of the rental income?

6 Who will now inherit Peace and Rosa's share in the property?

In regard to the first issue, it should be noted that the word 'jointly' has been used, which may indicate a joint tenancy. However, the words 'share amongst themselves' are also present, and in *Robertson v Fraser* it was held that any words that suggest a sharing of the property will indicate that a tenancy in common has been created. While the common law favours a joint tenancy in both NSW and Queensland, the relevant statutes (s 26 *Conveyancing Act 1919* (NSW) and s 35 *Property Law Act 1974* (Qld) respectively) now have a presumption in favour of a tenancy in common. It should also be noted that the property has been left in a will, which means that the intention of the testator must be considered. The facts here are similar to *Re Barbour* where a farm was left to two brothers and a sister 'to share and share alike as joint tenants'. In that case it was held that the intention was to create a joint tenancy in order to keep the farm as a single unit, since otherwise the farm would not have been viable. In the present case, the property in question is also a farm so that it could also be concluded that Oscar's intention was to leave it to his daughters as joint tenants. In NSW and Queensland, however, the relevant statutes may mean that it would be considered to be a tenancy in common.

The second issue is whether the joint tenancy has been severed by Peace and Rosa, though it should be noted that if a tenancy in common was created, this will not be an issue because severance only applies to a joint tenancy. The facts in this case are similar to *Wright v Gibbons*, where two sisters and a sister-in-law were joint tenants of a number of properties in Hobart. The two sisters then transferred their interests in the estate to each other without the knowledge of the sister-in-law, and this was held to have severed the joint tenancy. This was because the four unities were no longer present as there were now three different documents completed at different times in relation to the estate. Therefore, in the present case it would appear that Peace and Rosa have severed the joint tenancy and created a tenancy in common, with the main significance of this being that there is now no right of survivorship.

Regarding the third issue, the general rule is that one co-owner cannot claim occupation rent from another (*Luke v Luke*) unless there has been an agreement or a co-owner has been wrongfully excluded from the property, since the unity of possession entitles each co-owner to occupy the whole property. There has clearly been no agreement, so in order to claim occupation rent Quia would need to prove that she was wrongfully excluded. In *Dennis v McDonald* occupation rent was charged since the co-owner had left because of violence and it was therefore unreasonable to expect her to stay and exercise her rights as a co-owner. In *Beresford v Booth*, occupation rent was also charged because a co-owner was excluded from a house after the locks on the doors were changed. However, in the present case Quia has only left because of the 'frosty relationship', which appears to have been present since their childhood, which Quia was used to. She has therefore voluntarily left the co-owned premises and has not been wrongfully excluded; therefore she is not eligible for any occupation rent.

As a co-owner Quia has an interest in the property and can use this as security to obtain a mortgage from the bank.

Likewise, Peace and Rosa own the property in fee simple and can therefore lease the property. The only issue is whether they have to give Quia a third of the income from the rental returns. Under common law there is no requirement for one co-owner to account for profits that are made to any other co-owner. However, under equity there is a duty to account for profits with this also having been enacted as s 43 of the *Property Law Act 1974* (Qld). In *Henderson v Eason*, it was held that for a co-owner to claim a share of the profits they had to contribute to the capital and labour. Quia has contributed to the capital simply by having a share in the house, and as the labour involved in renting out the property is very minimal, it is likely that she will be able to claim a third of the rental income.

As to the issue of inheritance, even if a joint tenancy had been created under the will, this had been severed by Peace and Quia. There is therefore no right of survivorship and each of their one-third share in the property will be inherited by their heirs. However, both Peace and Rosa have died intestate, that is, they have not made a will, and therefore their interests in the property will be inherited by their next-of-kin. From the facts given this is likely to be Quia since there does not appear to be any other next-of-kin.

COMMENTS ON THE ANSWER

In this problem, all the issues have been listed at the beginning of the answer due to the fact that there were a number of them. Having them listed at the beginning provides you with a checklist and informs the marker that you have recognised all the issues, even if you did not have sufficient time to address all of them. Since all the issues are effectively separate in this problem, the rules for each issue have been presented, then applied and a conclusion in regard to that issue has then been made. The answer to the problem therefore effectively consists of a number of 'little IRACs'.

Note, too, that after reaching a conclusion to the first issue of whether the ownership was a joint tenancy or a tenancy in common, a good answer would have explored both possibilities when looking at the second issue. Thus, even if you had concluded that it was a tenancy in common for the first issue, your answer should still have explored the severance issue.

Another perfectly acceptable structure for the answer would have been to discuss survivorship, or the lack of it, on the deaths of Peace and Rosa immediately after this severance issue. In this problem no headings have been used and instead the first sentence of each new paragraph has essentially contained the words that would have been in headings had they been used. Given the nature of this problem, this is probably the better approach than splitting the answer up with headings.