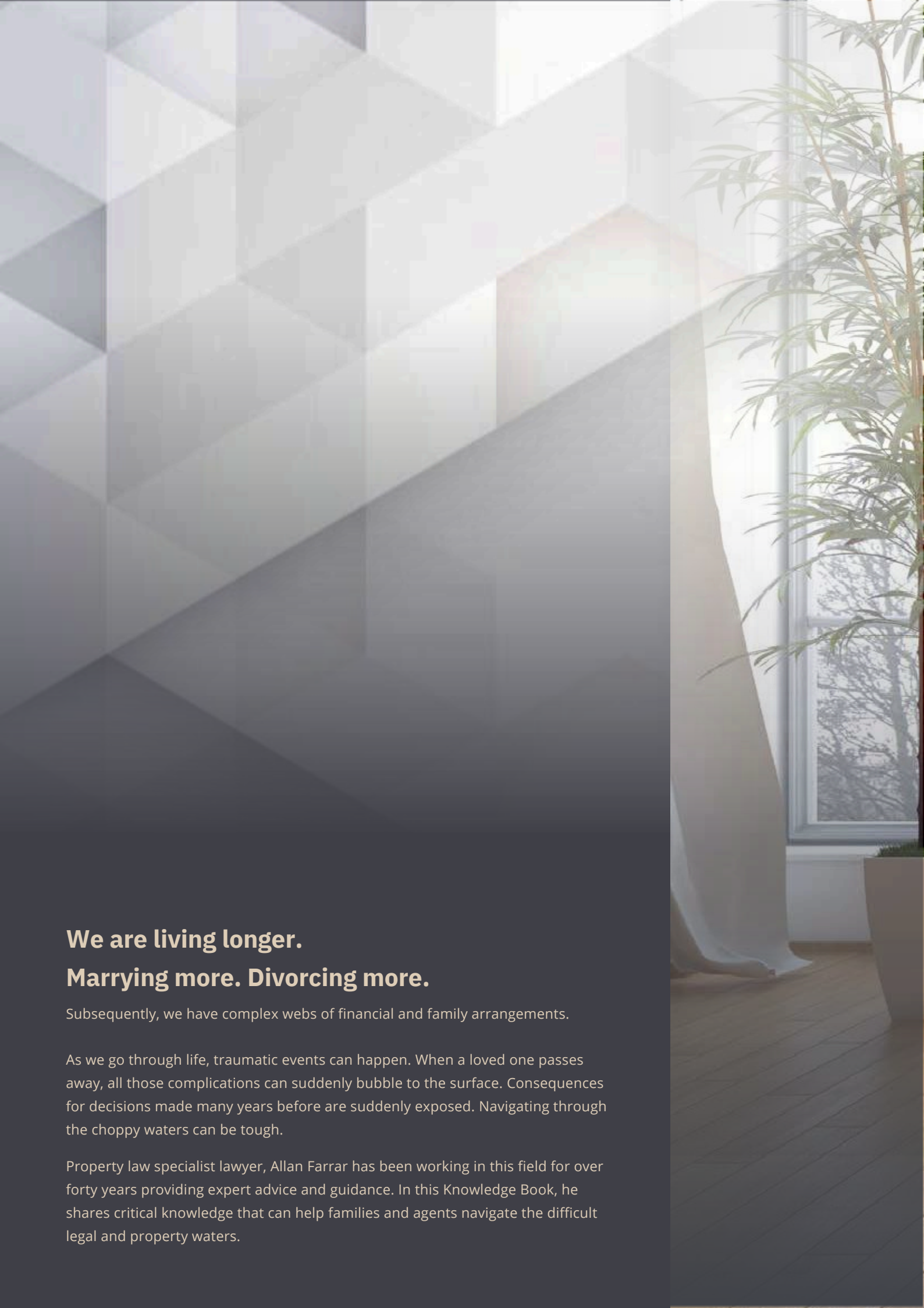
# Selling in unexpected CIRCUMSTANCES



## We are living longer.
## Marrying more. Divorcing more.

Subsequently, we have complex webs of financial and family arrangements.

As we go through life, traumatic events can happen. When a loved one passes away, all those complications can suddenly bubble to the surface. Consequences for decisions made many years before are suddenly exposed. Navigating through the choppy waters can be tough.

Property law specialist lawyer, Allan Farrar has been working in this field for over forty years providing expert advice and guidance. In this Knowledge Book, he shares critical knowledge that can help families and agents navigate the difficult legal and property waters.

## Preventing heartache

Hindsight is a powerful thing. Unpleasant as it is to consider, and no matter how we all like to pretend that we are immortal, at one point or another, we all transition to death.

The aftermath of a loved one passing away is made that much easier if important conversations and the sharing of information and intentions are made clear beforehand.

As people mature, it is prudent to discuss with family members the nature of their assets. Usually, by the time parents are in their later years, children have a fair idea of what the assets are because they may have helped their parents over the years. They may have taken them to banks. They may have taken them to solicitors.

One would hope that parents haven't been too secretive as to their company shareholdings or their bank accounts because it can be difficult to identify assets after death.

To make the process easier:

- Draw up a will.
- Share bank account details, names of lawyers and lists of assets with a trusted person.
- Communicate between family members. Keep a folder at home with legal papers, wills, financial documents, names of solicitors and so on.

In addition, you should consider having an Enduring Power of Attorney and Enduring Guardians as both of these can save a lot of issues to your family.

## When a loved one passes away

Determine who is the executor/s of the will.

If you are the executor of a deceased's estate, you will need a copy of the death certificate of the deceased to verify the departure of the loved one and also the will to indicate that you have been appointed the executor of the estate.

With these documents you can:

a) Advise the deceased's legal representative of the deceased's passing. The lawyer, in due course, will prepare documentation for the granting of probate or the release of assets. In a perfect world, the executor would provide the lawyer with:

- a list of all the assets and liabilities
- a list of the beneficiaries, their dates of birth and their addresses and
- a list of shares in public companies with the SRN details. The SRN is the Security Register Number ie the number on the top of the dividend stipends which varies between companies.

b) Notify institutions of the loved one's passing and cease payment of pensions.

c) Notify banks or other institutions that hold any assets of the deceased's estate so they can be aware of the death and deal with the assets. It depends on the nature of the assets as to how far and how much detail you need to go into. Typically your solicitor or legal representative would write to the bank saying, "We act on behalf of John Smith. His parents or father or mother have died. We believe he held a bank account with your bank institution. Would you please advise? We enclose a copy of the death certificate to verify of the departure of the parent". The banks in most cases would then respond to those letters saying either, "Yes, we've identified Person X, his account. He lived at such and such address". The bank would then say, "Bank accounts are so and so. The requirements to release those monies are whatever". The size of the bank account forms what the requirements would be.

**Dealing with debts**

Dealing with debts is more difficult. Obviously, you can put an advertisement in the Government Gazette or call upon any creditor to put a claim against the estate. There is a process when someone dies to try to crystallise those debts and crystallise whether there are any claimable rights after a certain period. If these procedures are adopted in the private application and in the distribution, the executor's liability can be curtailed for the debts. Not that the executor was ever liable personally but as executor of this type of debt, he/she could be liable to payment to that extent it can be transferred down the line to the beneficiaries.

**If there is no will**

A person who dies without a will is known as intestate.

Again, depending upon the nature of the assets of the deceased, if the amount is relatively small, you can normally put an application to the banks. If it's a small amount of $20,000 or less, sometimes the banks will agree to release the money to a next of kin provided the next of kin signs an indemnity form and produces evidence that they are the next of kin and that there are no other equal or better next of kin who can put in a claim.

If it's a large estate, then you may need to apply to the Supreme Court for a grant of Letters of Administration. You would need to produce evidence as to who the children of the deceased are, who the spouse, de factos are and so on. That application would need to be lodged with the Supreme Court to verify:

- That the assets of the estate were under the deceased's name
- Who the entitled beneficiaries are and then what proportion they're entitled to.

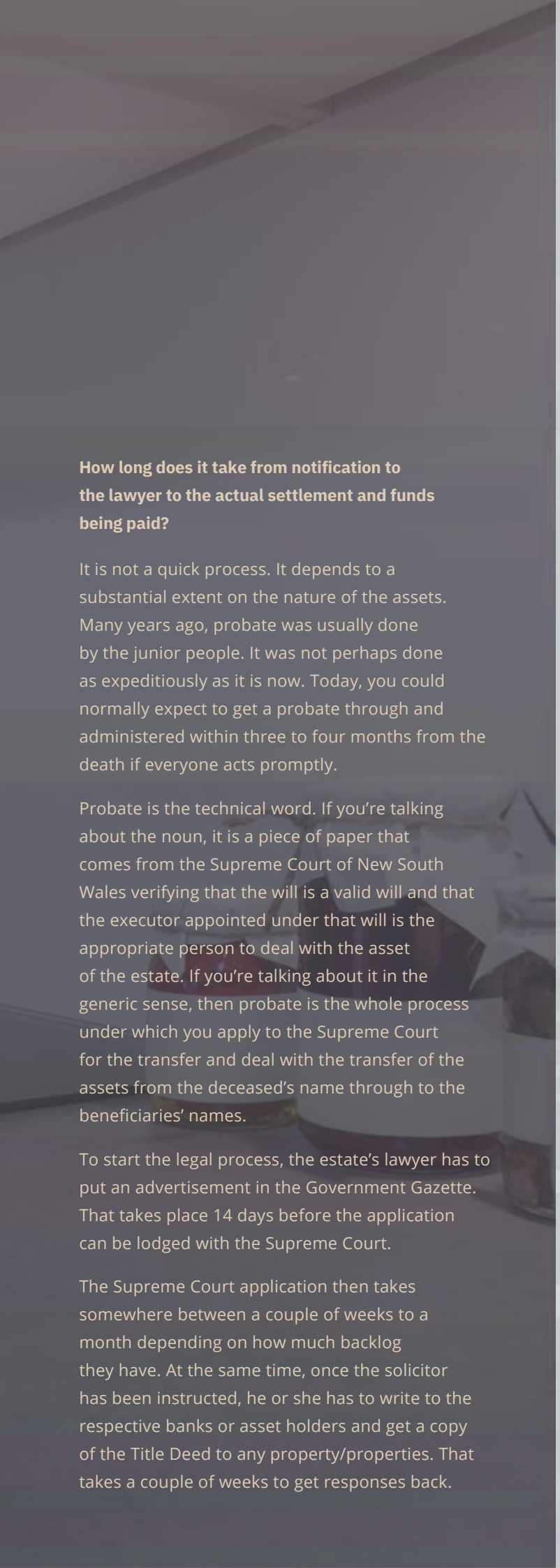
**What about power of attorney?**

Power of attorney obviously stops on death. It has to be operating prior to death. Once the person has departed, the power of attorney is revoked in 99% of the cases. The nature of the document needs to be reviewed to determine whether it was an unlimited power of attorney, a limited power of attorney, enduring power of attorney and so on. Identify the nature of the document and the authority given to the attorney under that document.

**Who has the right to claim on the estate of the deceased?**

"To claim" is a very broad term. Obviously, children, spouses and de facto partners all have the right to claim on an estate. There is a definition in the Act which sets out who has the right to put their hand up and say, "Hang on. I'm involved and I want to get my two pennies worth out of Dad's, Mum's or whoever's estate you're talking about".

Outside of those parameters, it's fairly hard to get a claim lodged unless there are evidentiary reasons why you could have a claim. If the deceased said, "If you do this, I promise I'll do that," you would have to provide proof. It's typically fairly hard to prove.



**How long does it take from notification to the lawyer to the actual settlement and funds being paid?**

It is not a quick process. It depends to a substantial extent on the nature of the assets. Many years ago, probate was usually done by the junior people. It was not perhaps done as expeditiously as it is now. Today, you could normally expect to get a probate through and administered within three to four months from the death if everyone acts promptly.

Probate is the technical word. If you're talking about the noun, it is a piece of paper that comes from the Supreme Court of New South Wales verifying that the will is a valid will and that the executor appointed under that will is the appropriate person to deal with the asset of the estate. If you're talking about it in the generic sense, then probate is the whole process under which you apply to the Supreme Court for the transfer and deal with the transfer of the assets from the deceased's name through to the beneficiaries' names.

To start the legal process, the estate's lawyer has to put an advertisement in the Government Gazette. That takes place 14 days before the application can be lodged with the Supreme Court.

The Supreme Court application then takes somewhere between a couple of weeks to a month depending on how much backlog they have. At the same time, once the solicitor has been instructed, he or she has to write to the respective banks or asset holders and get a copy of the Title Deed to any property/properties. That takes a couple of weeks to get responses back.

Once probate has been granted, to deal with a property asset for example, the transfer of a property from the estate's name to the executor or beneficiary can take approximately a week to 10 days.

It can take another couple of weeks to get the bank money back in, prepare a plan of distribution, get approval of the plan of distribution from the executor and then distribute the monies. That's in a perfect world. Quite often perfect worlds don't occur. Quite often you don't get responses as quickly as you'd like to. Sometimes you can have situations where for example, banks don't respond for two or more months. Obviously that blows out the timeline.

**What about disputes?**

It's very important to keep all beneficiaries informed. Most of the issues that occur in a family are because of lack of information and communication. They may feel that the executor hasn't told them what's going on. They may feel the executor may be doing something that is underhanded. If you keep people informed, a lot of the issues go away.

On the other side of the coin, sometimes issues never go away because there's great distrust between beneficiaries, executors and other members of the family. Again, with information and with the ability to tell them what's happening and why, the situation can become a little less problematic because if they do object, they will normally put their hand up fairly quickly. If they don't object, then it's possible, although not with total immunity, to go down the path of saying, "Okay well, they know what I'm doing. I'm doing it in accordance with what I believe are the executor's duties," and proceed down that path, hopefully with reasonable comfort.

## Dealing with property assets

In the event of the passing of a loved one and dealing with the distribution and sale of property assets, what has to be established first is the nature of the ownership of the property.

**Determine if the property is held in joint tenants or tenants in common**

There are two substantive issues to be considered. Was the property purchased as joint tenants or tenants in common?

If a property was purchased as joint tenants, it was purchased in equal shares. The right of survivorship applies to that property. If one of the owners have died, the property automatically without consideration of the will or intestacy goes to the surviving spouse or partner on the title.

Tenants in common, on the other hand, does not have to be in equal shares. It can be equal or it can be in different ratios. Quite often you find professional people not wanting to buy property in their own name, who do not want substantial assets in their own name. They quite often put 99% of the property into the wife's name and 1% into their own name. That presupposes the husband is the main breadwinner. That would obviously restrict the liability if the husband was sued. Therefore, he has less exposure from third parties.

Tenants in common is quite often used for people who had a commercial transaction existing from a personal relationship.

Once ownership has been established, the property is transferred out of the estate's name to the executor or beneficiary. The executor or beneficiary then has the legal right to deal with the property. The property is in their name and they can instruct the real estate agent accordingly.
Once it is known who the executor is and that he or she has the right to deal with the property, they can then instruct an agent to list the property for sale. The contract, which would be prepared by the solicitor or conveyancer, if they wish to sell, should be made subject to and conditional upon the grant of probate and allowing the property to be transferred into the name of the beneficiary or executor.

**What do you do when the subject property to be sold is actually tenanted? There's a lease on the property and the tenant is saying, "I don't want to move out". Yet you're saying, "It's going to be sold". What happens there?**

It depends on the nature of the tenancy.
If the tenancy has expired, then the executor can give 30 days' notice once the contract is exchanged and sell the property with vacant position and require the tenant to exit. If s/he doesn't, the executor can apply to the court for an order for the tenant to be removed. Whether the tenant likes it or not, if his or her lease has expired, he or she has less rights. If the lease is still in place, then obviously s/he is entitled to stay in the property until the lease does expire. You could sell the property with the existing tenant in situ.

**Will insurance companies still insure the property now that the owner is deceased?**

In most cases yes, because hopefully the deceased would have had an insurance policy on the property. The issue that needs to be dealt with is that some insurance companies have a 30-day or a 90-day period after which, if the property is vacant, they will not be prepared to cover the property for insurance. You need to make sure that someone physically goes to the property each period of time so that the property hasn't been left as vacant. Make sure that the insurance company is aware that the property may not be fully occupied during that period because you have different claims such as fire, theft, and so on. It depends on the nature of the claim and the policy you've got as to what is applicable.

**Should an Independent valuer be brought in for the property?**

Independent valuation benefits the executor if there's an issue of undue influence or undue undervalue. You can refer to the independent valuation and say, "The property was valued at X thousand dollars and I've sold it for not less than X thousand dollars". On the other side of the coin, it again depends on the nature of the will. In general, putting the property to auction resolves the question of the property value.

**What if the beneficiaries can't agree that the property should be sold?**

Normally an executor wouldn't sell a property if one of the beneficiaries is saying, "No, no, no", because it would potentially leave the executor liable for exposure and potential claim.

However, if the executor had put the property on the market by auction, had a reasonable auction program and the auction process had been fulfilled, it would be fairly hard for a beneficiary to say that he or she did not get a reasonable value for the property. The question that could arise is if there's an interpretation issue on the will as to whether the executor should sell or shouldn't sell - that's a more difficult question.

**Is public auction a good choice for selling a property?**

Selling a property through public auction obviously makes it far easier for the executor to say, "I did it appropriately". There will be no issue of a sale to a relative at an undervalued price.

Everyone had the right to bid, provided there has been reasonable advertisement and a reasonable period of time to make sure the public is informed about the property. As far as private treaty is concerned, some beneficiaries may wish to reach agreement with the executor to buy a property. The executor has to assess whether he or she can deal with the sale that way and not offend other beneficiaries. The simple way to deal with that would be to write to all the beneficiaries and say, "I'm proposing to sell property A to his son for X thousand dollars. Do you have any objection?". If they all agree, then the executor's hands are clean.

**If the property sells and settles, what are the taxation issues?**

First of all, a property couldn't settle until the property has been transferred into the name of the beneficiary or executor. You need to get the grant of probate finalised before you can deal finally with the land or property. The question of taxation liability, in New South Wales, at this point of time there are no death charges, therefore, there is no tax formally on the sale of a deceased property. However, you still have capital gains tax which may be payable depending upon the nature of the property and when it was purchased. You have the obligation to account back for that capital gains tax to the Australian Taxation Office as if it's an income of the deceased in the year of sale.

**Does capital gains tax have to be paid?**

It depends on the nature of the asset - when it was acquired and what is the purpose of the property. Obviously, your normal residential home and/or occupier is normally exempt from capital gains tax. If a property was purchased pre-1985, it also may be exempt from capital gains tax. Other property which does not comply with those two requirements would more than likely be liable to capital gains tax and could, subject to other exemptions, incur some liability. You should speak to your solicitor or accountant to confirm any liability.

## Dealing with superannuation

Superannuation is a totally separate asset and can form part of the estate or may not form part of the estate depending on the nature of the superannuation fund and whether it's held on a property managed superannuation fund or a commercially managed superannuation fund. The superannuation trust deed deals with how those assets are to be dealt with.

Normally when you're filling an application to invest in the superannuation fund, you put in a direction to the trustee as to what you wish to happen to the fund in the event of your death. The trustee normally complies with that direction but under the trust deed, he or she usually has a substantial discretion as to who would be entitled. It may well be that if the trustee feels that you have been unduly influenced to make a nomination or the nomination may be forged or whatever, he or she would have the discretion to pay the money in accordance with the trust deed which could be to relatives of the nominated beneficiary.

**Allan Farrar runs his legal practice, Farrar Legal Pty Ltd, from East Gosford in NSW.**
**His address is Level 1, 36-40 Victoria Street, East Gosford and phone number is 02 4324 4211.**



161 Esplanade Aldinga Beach SA 5173
**P.** 08 8556 6001 **E.** shelley@c21southcoast.com.au
**www.century21southcoast.com.au**

**Shelley Bezuidenhout**
**Director & Real Estate Expert**
**0468 383 747**