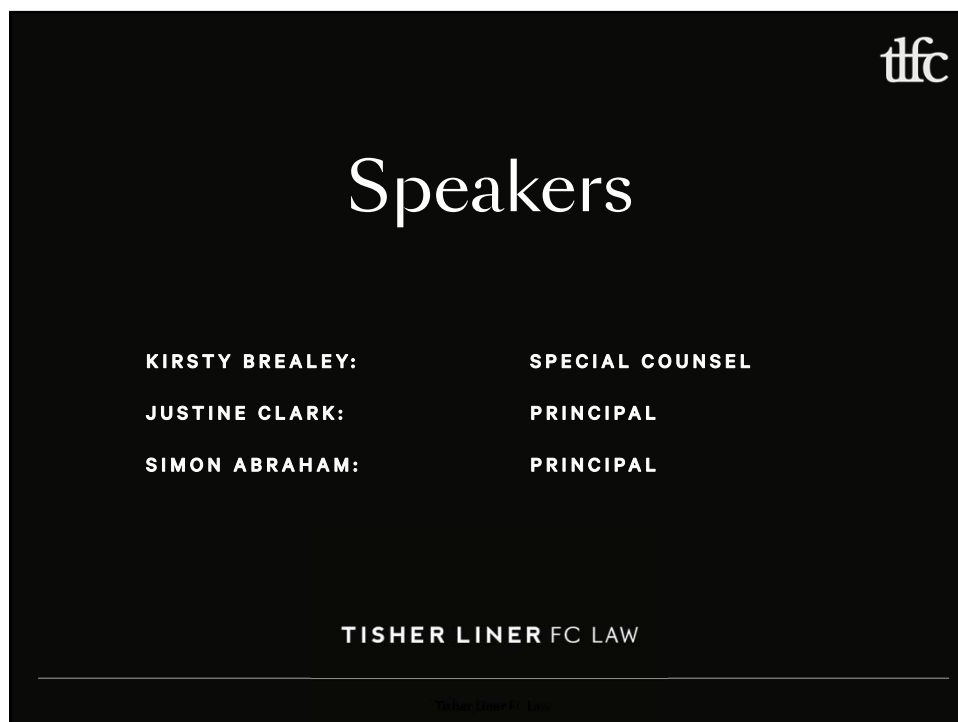


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1st D of Property: Death

KIRSTY BREALEY

SPECIAL COUNSEL

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Selling property for a critically ill vendor

- It's essential to clarify who is giving the instructions. Are decisions being made by the Vendor personally or on the Vendor's behalf by a representative?
- If by a representative, in what capacity, i.e., is there a valid Enduring Power of Attorney appointing the representative as attorney?
 - Are there any limitations or conditions stated within the Attorney document?
 - When does the power begin?
 - If it begins upon incapacity, has the Vendor lost capacity, does he/she meet the requirements for decision making capacity?
 - The Power of Attorney Act 2014 says that a person is presumed to have decision making capacity unless there is evidence to the contrary.
 - A person has capacity to make a decision about a matter if they are able to:
 - Understand the information relevant to the decision and the effect of the decision
 - Retain that information to the extent necessary to make the decision
 - Use or weigh that information as part of the process of making the decision
 - Communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

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Selling property for a critically ill vendor (continue)



- Is there a potential conflict between the instructions being given by the vendor and the representative?
 - In the absence of an Enduring Power of Attorney, is there an order from Victorian Civil and Administrative Tribunal ("VCAT") as to the administration of the Vendor's affairs?
 - Upon death, the power conferred by an Enduring Power of Attorney or VCAT Order ends.
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Selling property for a deceased estate



- I am often asked –
 - whether a sale can proceed upon death of the vendor.
 - whether a property can be put on the market following the death of the Vendor.
 - In both circumstances, to settle the sale, a Grant of Representation (Letters of Administration where there is no Will or Grant of Probate where there is a will) is required to give the legal personal representative legal authority to sign the necessary transfer documents.
 - In the later situation, contracts prepared after death but before a Grant of Representation is available should contain special conditions making the contract subject to the Grant of Representation being made.
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6

Selling property for a deceased estate (continue)



- Where there's a Will –
 - the ability to intermeddle with estate assets is only available to an executor named in the Will and is not available to a person who may intend to apply for a Grant of Letters of Administration of a deceased estate as such an appointment is very much within the discretion of the Court.
 - This means that the named executor can make arrangements with respect to the real property prior to the Grant of Probate being made.
 - Named executors have a duty to prove the Will and should, where possible, make an application for a Grant of Probate within 6 weeks of the date of death.
 - From July 2020, applications for Grants of Representation are submitted and granted electronically and on average, successful applications are made within 3-5 days.
 - Where there's no Will –
 - The estate property vests with State Trustees pending the granting of Letters of Administration.
 - there can be no intermeddling with the estate until Letters of Administration are made. Strictly speaking, the property cannot be dealt with in any way until the Grant is made by the Court.
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Selling property for a deceased estate (continue)



- What if the Grant of Representation is delayed?
 - Probate can be delayed for many reasons, such as a challenge to the validity of a will, issues with the executor or administrator, etc.
 - Where delay is unlikely to be remedied in a timely manner, the legal personal representative of the estate may apply to the Court for a special limited Grant of Representation, known as 'Ad Colligenda Bona'. This Grant give the representative limited powers to deal with the sale of the real property pending the making of the formal Grant of Representation.
 - What if transfer documents have been signed by an attorney under power when the donor/vendor has died?
 - the easy solution might be to rely on existing documents (particularly if the transfer of land has been signed by the Vendor in anticipation of settlement), however such action is fraught with danger.
 - Such settlements may be challenged by estranged family members or any other unexpected potential beneficiary of the deceased's estate who find that the main asset of the estate has been disposed of and distributed on the basis of a transfer which took place after the death of the deceased.
 - If any of the above situations arise, Vendors should touch base with TLFC for advice as the sooner they leave it to settlement, the greater the problems they could have (especially if there are feuding relatives or claims over the estate).
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8

Selling property for a deceased estate (continue)



- What if the deceased died in the house?
 - Generally, the legal personal representative has no duty to bring the death to the attention of a prospective purchaser but it has been suggested as good practice to bring to the attention of a prospective purchaser that a death has occurred in unusual circumstances in the property. In circumstances like murder (particularly recent murder) and drug labs, the incident should be disclosed. A vendor proposing to sell such a property might consider including a special condition in the contract to the effect that the purchaser is aware that the former owner died while residing in the property and that the death occurred in unusual circumstances.
- Who is entitled to ownership and have the ability to sell where one joint tenant dies after the parties have separated?
 - Generally the doctrine of the rules of survivorship would apply (the survivor claims the whole of the property by way of survivorship), however that may not be the case where the beneficiaries of the deceased argue that the separation of the parties severed the joint tenancy, and that survivorship does not apply.
 - This type of dispute will often arise in the context of family law.

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2nd D of Property: Divorce



JUSTINE CLARK

PRINCIPAL

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Sale of Property & Divorce



- Exercise caution – separated (Family Law) clients may be irrational, challenging & volatile
 - Parties may attempt to:
 - Sell real properties without the other party's consent
 - Delay / frustrate the sale of a real property
 - Seek to purchase the real property at arms length on an off market transfer (and attempt to avoid paying you any commission)
 - Today we will discuss what you need to know as an Agent to ensure:
 - You have authority to act in relation to a sale (and receive your commission)
 - You are able to market a property for sale
 - If you sell the property (or there is an off market transfer), you receive your commission if there is a dispute
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Divorce – Background, Law & Context



- Section 79 / 90SM *Family Law Act* 1975 (Cth) – alteration of the parties interest in property
 - Family Law Courts only have jurisdiction in relation to property of relationships that are 'de facto relationships' or arise out of a marriage
 - Court considers the parties legal and equitable interests in property
 - How is the real property held? (i.e. by one party as SRP, by both parties as RP or TIC, by a company or trust, with a third party)
 - Constructive trust interests
 - Third parties – section 90AE FLA
 - Court has extensive powers to deal with the parties interests in property
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Divorce – Unilateral Sales & Remedies

- Parties should not sell property after separation, even if held by that party as SRP, but they do
 - If a party to a marriage or de facto relationship places on the market for sale / sells a real property without the other party's consent, then the options open to the other party are:
 - Consent to the sale
 - Lodge a caveat
 - Issue proceedings seeking injunctions, and possibly to set aside the transaction
 - Section 106B FLA – allows the Court to set aside instruments and transactions made or proposed to be made to defeat existing property settlement claims
 - Court generally will not set aside a sale if a third party purchaser for value without notice will be impacted / prejudiced
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Divorce – Orders & Financial Agreements

- Difficult to obtain interim orders for the sale of a real property unless by consent
 - Court, generally, will not sell real property on an interim basis if opposed, as a result real property is often sold once parties have agreed to final property orders or following a trial
 - Interim and Final Orders & Financial Agreements should have clear provisions in relation to the sale of any real properties, clients or solicitors can provide you with these terms (some parties will be sensitive about providing these, but if high conflict, it is worth obtaining them and solicitors will generally assist to effect compliance)
 - Orders may also provide for default sale provisions
 - Orders will usually (if properly drafted) deal with the withdrawal of caveats
 - Orders will usually (if properly drafted) include a section 106A FLA provision (about the execution of documents if one party defaults and refuses to execute a contract)
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Divorce – Orders (Example - Joint)

1. *That on or before the Date the parties do all acts and things necessary and sign all documents required to place on the market for sale the Kew Property, on the following terms and conditions ("the Sale"):*
 - (a) *The Wife nominate three real estate agents within seven (7) days, with the Husband to select one (1) of the nominated agents within a further seven (7) days to be engaged to act as the selling agent ("the Agent");*
 - (b) *The method of sale be as agreed between the parties in writing and in the absence of agreement initially by private sale for a period of thirty (30) days and within a further seven (7) days by auction ("the Auction");*
 - (c) *The reserve price be \$ 1,780,000 (one million, seven hundred and eighty thousand dollars) or as otherwise agreed between the parties;*
 - (d) *The contract of sale be an unconditional contract of sale providing for a settlement period of not more than sixty (60) days;*
 - (e) *The parties ensure that the Kew Property is kept in good condition and vacate and allow access to the Kew Property as required by the Agent for inspections and the conduct of the Sale;*
 - (f) *The Wife nominate three conveyancers within seven (7) days, with the Husband to select one (1) of the nominated conveyancers within a further seven (7) days to be engaged as the conveyancer ("the Conveyancer").*

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Divorce – Orders (Example - Default)

1. *That if the whole of the Payment is not made to the Wife by the Date, within a further seven (7) days, the parties do all acts and things necessary and sign all documents required to place on the market for sale the Toorak Property ("the Default Sale"), with the Wife to have the sole conduct of the Default Sale.*
 - The joint sale order clearly sets out the terms and makes clear both parties are to have the conduct of the sale. This means you need to communicate with both parties about the provisions of the sale. Generally it is wise to copy both parties into emails about the sale to avoid any suggestion they were not aware of an issue or request.
 - The default sale order provides for the Wife to have sole conduct of the sale. This empowers you as the agent to take instructions and direction solely from the Wife in relation to all issues. Take care to ensure the deposit covers marketing, commission and all outlays in this sort of situation.
 - If Orders are silent on an issue (i.e. reserve price) obtain clear instructions from both parties, and in the event of a dispute contact both solicitors.

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Divorce – Authorities



- Agents should ensure:
 - An executed authority is in place
 - If the property is held in the name of one party (or a company or trust they control) ensure they have authority / agreement from the other spouse to proceed with the sale (or at least attempt to get that in writing)
 - If the above cannot be provided consider pressing a request for the other party to execute the authority
 - If the property is held jointly, both parties will be required to execute the Authority
 - Ensure your authority is enforceable against the spouse that executed it and that it encompasses the payment of a commission if the property is sold or if there is an off-market transfer between spouses.
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Divorce – Terms and Conditions



- Agents should ensure there is agreement as to the Sale Terms and Conditions:
 - Is there agreement to the advertising / marketing campaign? Is the sale to proceed by private sale or auction?
 - Is there a tenant – has notice been provided? If a party lives in the property – will they vacate for inspections?
 - Is there agreement to any repairs / ongoing maintenances (i.e. gardening / dressing the property during the sale)?
 - Is there agreement to the reserve price?
 - Is there agreement to the duration of the Contract of Sale?
 - Is there a conveyancer appointed?
 - Ensure, insofar as is possible that everything is signed / approved by both parties in writing.
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Divorce – Summary



1. Beware a spouse / de facto attempting to have the sole conduct of the sale of a property after a separation, particularly if:
 - The client does not confirm the sale is agreed or is evasive about their spouse / de facto partner's details or whereabouts (i.e. spouse consistently and mysteriously absent or 'away')
 - There are no orders or financial agreement in place
 2. Ensure you have an executed authority which is enforceable against the spouse that executed it if the property is sold or there is an off-market transfer between spouses (to ensure your commission is paid)
 3. Agents should ensure there is agreement as to the Sale Terms and Conditions with both spouses unless one spouse has the sole conduct of the sale
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3rd D of Property: Debt



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Overview



- Certain types of transactions are void which means that it never took place. As an agent, that means commission and other expenses will most likely have to be returned.
 - Types of voidable transactions
 1. Undervalued transactions, transfer of assets and exempt transactions (section 120)
 2. Transfers to defeat creditors (section 121)
 3. Consideration to a third party (section 121A)
 - Relevant provisions in the *Bankruptcy Act* 1966 (Cth) ('the Act')
 - Bankruptcy and the home
 - Bankruptcy and ownership
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Bankruptcy and the Home



- A home is not a "protected asset" under the Act. Protected assets include:
 - Motor vehicles up to the value of \$8,100;
 - Tools used to earn income up to the value of \$3,800; and
 - Superannuation payments.
 - If there is equity in the home after paying out the mortgage and selling costs, the trustee is obliged to realise the property.
 - The trustee must have the property valued to determine the equity. If there is no equity in the property, the mortgagees may sell the property.
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Bankruptcy and Ownership



- If the bankrupt owns the entire property, the estate will receive the entire amount of the sale proceeds after any mortgagee and selling costs are disbursed.
 - If the bankrupt co-owns the property, the trustee will share the surplus with the co-owner (non-bankrupt) as per the deed of title.
 - A co-owner is defined as someone with an interest in land or good with one or more persons as joint tenants or tenant in common.
 - If the parties are married or in a de facto relationship, then the Family Court will have jurisdiction to deal with the dispute. If not, the parties may apply to VCAT for an **order for sale and division of proceeds or physical division** or combination of both pursuant to section 225 of the *Property Law Act 1958 (Vic)*.
 - An example is where a brother and sister are joint tenants of a property. The brother may want to sell the land and the sister does not. The brother can apply to VCAT for an order for sale.
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Voidable Transactions



- Trustees of bankrupt estates and personal insolvency agreements may use provisions to **void transactions**, however, must give the trustee the right to recover money.
 - The type of voidable transactions are:
 1. undervalued transactions under section 120 of the Act;
 2. transfers done with the intention to defeat creditors under section 121 of the Act; and
 3. transfers where the consideration was paid to a third party under section 121A of the Act.
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Undervalued Transactions (section 120)



- Undervalued transactions are asset transfers at less than market value. A debtor may sell or transfer assets to a third party before their bankruptcy to make the transaction look commercial.
 - This type of transaction may look like the following:
 1. A sale for less than the asset's market value then moving a valuable asset to another party; or
 2. A purchase of something at a greater consideration than its value then moving the money to another party.
 - A trustee can void property transfers within five years before the bankruptcy's commencement.
 - Advertising the property will usually satisfy any concern of undervaluing the property.
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Transfer of Assets (section 120)



- The Act protects some transfers from becoming void when all three following conditions are met:
 1. Transfer occurred over two years prior to the bankruptcy's commencement;
 2. Transfer did not involve a party related to the debtor; and
 3. Debtor was solvent at the time of the transfer and remained so after the transaction.
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Exempt Transactions (section 120)



- Some transfers under the Act will **not** be void. For example, the Act protects:
 1. Payments made under family law agreements;
 2. Payments made under debt agreements pursuant to part 9 of the Act.
 - A transfer is exempt when it is:
 1. a tax payment under Commonwealth, State or Territory law;
 2. a transfer to meet all, or part, of a liability under a maintenance agreement or order a transfer of property under a part 9 debt agreement;
 3. a transfer of a kind described in the Bankruptcy regulations; or
 4. a transfer made under maintenance agreements or orders made in the Family Court of Australia.
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Transfers to Defeat Creditors (section 121)



- Property may be transferred primarily to protect it from creditors. The Act allows these transfers to be voided where the bankrupt's intention was to prevent, defeat or delay divisible assets becoming available to creditors.
 - These types of transactions must involve:
 1. Property that would have become part of the estate or been available to creditors and is made unavailable to creditors and is made unavailable to trustee of the transfer; or
 2. Intention of making that property unavailable to creditors, temporarily to permanently.
 - However, the Act will protect transfer where the transferee acted in good faith.
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Consideration to Third Party (section 121A)



- Third parties who are not directly involved in a transaction between a bankrupt and another party may be subject to a trustee's recovery actions.
 - Section 121A allows a trustee to collect money from a third party where that party received money that should have been paid to the bankrupt.
 - The payment of consideration to a third party will be examined (not whether the transaction was undervalued or an attempt to delay creditors).
 - The Act deems the consideration to a third party to be viewed as a transfer of property by the bankrupt.
 - Section 124 of the Act will protect an innocent and unknowing party.
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Summary



1. It is important to understand when a transaction may become void under sections 120, 121 and 121A of the Act.
 2. Be informed of the role of requirements of trustees in conducting bankruptcy sales. This will assist in detecting where a transaction may be unlawful.
 3. Actions under the Act may start at any time after the trustee discovers the transaction.
 4. If the circumstances of a sale seems calculated or risky, seek legal advice. This may save a sale and in turn, your commission.
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Any Questions?

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