

A Will is Not Enough: The Joint Tenancy Trap for Practitioners

Risk management topics:

Practice Management

Wills and Estates



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The District Court decision of *Lofts v Lawcover Insurance Pty Limited* [2026] NSWDC provides a good reminder that a will cannot override survivorship.

Where estate planning depends on altering proprietary interests, a failure to properly advise and implement necessary steps can expose solicitors to significant liability. Estate planning solicitors must look beyond the drafting to the ownership structure of property.

Summary of the Judgment

In *Lofts*, the Court found a solicitor negligent for failing to advise on the effect of a joint tenancy and the need to sever it to give effect to the client's testamentary intentions.

The plaintiff was a disappointed beneficiary, who succeeded in his claim against the solicitor and was awarded \$510,000 for loss of his expected remainder interest.

The deceased intended his de facto partner to have a life interest in their home, with his share ultimately passing to his son, the plaintiff.

However, the subject property was held as joint tenants. On death, survivorship operated so the property never formed part of the deceased's estate, thereby defeating the intention under the will.

His Honour reaffirmed the principles in *Hill v Van Erp* and *Badenach v Calvert* that a solicitor retained to prepare a will owes a duty, not only to the client but, in a confined sense, to an intended beneficiary to take reasonable care to give effect to the client's testamentary intentions.

The scope of the duty extended to steps integral to the will making process, including severing the joint tenancy where necessary to implement the will.

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Practical risk management guidance

- **Identify property ownership** and confirm whether property is held as joint tenants or tenants in common. Do not assume that clients understand survivorship.
- Identify and explain **if intended gifts cannot take effect** due to survivorship.
- Where necessary, **advise on and implement severance**. If severance is required to implement instructions, it is not optional advice but part of competent performance.
- Offer to **prepare and lodge** the necessary transfer (unilateral or bilateral).
- **Document advice** on survivorship, options and client instructions.
- Ensure any **necessary property steps** are contemplated and/or are completed, not just the will.
- Provide **clear warnings** and document risks **if the client declines severance**.

His Honour held that a competent lawyer would have explained that joint tenancy defeats testamentary disposition and advised on, and taken instructions regarding, severing the joint tenancy.

The solicitor's failure to provide this advice constituted a breach of the duty of care owed to the plaintiff.

His Honour was also satisfied that causation was established, with reference to sections 5D and 5E of the *Civil Liability Act 2002* (NSW).

The client had a clear intention to benefit the plaintiff and, had proper advice been given, the client would have severed the joint tenancy, unilaterally if necessary.

This was not treated as a loss of chance case, but as a loss of identified benefit.