



Specialist Debt Advice Service

Spotlight

July 2021

Dealing charging orders on joint property where original debtor is deceased

Assisting a bereaved client can be a challenging process but where the deceased jointly owned property and they had debts, there is an additional challenge to ensure that the bereaved client is not at risk of losing their home.

Due to an increase in enquiries relating to this topic, this month's Spotlight will focus on assisting clients who jointly own property and have been contacted by a creditor who has secured a charging order on the deceased's joint owner's beneficial interest.

Severance of joint tenancy

Generally, most co-owners will be joint tenants. As defined on Shelter [Legal](#), joint tenants hold the property equally, with none of them having a distinct share of the equity. If one tenant dies, their interest passes automatically to the other joint tenant(s) by right of survivorship, regardless of what is stated in a will. This form of joint ownership is commonly used by established couples.

Where a creditor secures a charging order against one of the joint owner's beneficial interest, this severs the joint tenancy and the owners become 'tenants in common'. This means that if one of the joint owners dies, their interest will no longer automatically pass to the other joint owner.

Therefore, it is important to remember that when dealing with a client who has jointly owned property and the joint owner has passed away, if the co-owner has a charging order secured on their beneficial interest, they will be tenants in common and your client will not have inherited the joint owner's interest in the property.

For further understanding on charging orders and types of ownership, you can read Alexa Walker's article in [Housing matters Issue 133 December 2019](#).

What happens to the deceased's beneficial interest if this does not automatically pass to the other joint owner on death?

The beneficial interest of the deceased will form part of their estate. The executor or personal representative will be duty bound to ensure the interest is realised so that all debts and liabilities of the deceased can be settled before beneficiaries can be paid. If your client is executor or PR and they would like general advice on where to start when dealing with the estate, they can seek advice from the [Probate Helpline](#).

Dealing with the charging order

Death of the debtor does not extinguish their liability and as the debt is secured by a charging order, the creditor/claimant will have the option to enforce the order by way of an Order for Sale. If your client is already subject to proceedings for an order for sale, you can find useful advice on dealing with this situation in Alexa Walker's article in [Housing matters Issue 134 February 2020](#).

It is important to note that usually your client, the joint owner, will **not** become personally liable for the deceased's debt but as their beneficial interest now forms part of the estate, the claimant may look to enforce the charge so the debt is repaid. To avoid enforcement, your client will need to negotiate with the claimant. Some clients may argue that they should not have to pay a debt they are not liable for. If your client states they do not wish to repay the debt, they may risk order for sale proceedings.

It is possible for a client to become personally liable for the debt if they are acting as executor/PR and do not carry out the required duties. If your client is being held personally liable, they should seek legal advice from a solicitor specialising in probate law.

If there is already an instalment order in place, you will need to discuss with your client whether they can afford to maintain this. Where there is not an instalment order in place or the instalments are unaffordable, your client can make an application to vary the charging order. In accordance with [s3\(5\) of the Charging Order Act 1979](#) and [Practice Direction 73 \(3A\)](#), a party who has an interest in the property can make an application to vary the charging order. If there are children in the household, the interested party could also ask for conditions to be attached such as, the charging order is not enforced until the youngest child turns 18.

Any party with an interest in the property may also apply to discharge the order if they settle the debt in full or have successfully disputed the debt. An application to vary or discharge the order is made using court form N244 and it is advisable that a witness statement be attached along with a financial statement if appropriate.

If the client is successful in varying the order and attaching conditions such as an instalment order, providing the instalment order is maintained, this will prevent the claimant from obtaining an order for sale.

Insolvency administration orders

Where the deceased's estate has no value or their liabilities exceed the value of the estate they will be considered insolvent ([s421\(4\) Insolvency Act 1986](#) (IA 1986)). A creditor who is owed £5,000 or more may threaten to pursue an Insolvency Administration Order (IAO) pursuant to the Administration of Insolvent Estates of Deceased Persons Order 1986 (DPO 1986). It is worth noting that in practice, these are very rare. Unfortunately, there is no publicly available version of the DPO 1986, if you wish to see the legislation, please submit an enquiry.

In simple terms, an IAO is the equivalent of a bankruptcy order made against the estate of the deceased. The order may be granted by the court following an insolvency administration petition. The petition can be made by another party such as the PR or a supervisor of an Individual Voluntary Arrangement.

When considering whether to make an IAO the court will consider s271(1) of the IA 1986 (modified by the DPO 1986 art 3, Sch 1, Pt II, para 5):

- (a) the debt, or one of the debts, in respect of which the petition was presented is a debt which:*
 - (i) having been payable at the date of the petition or having since become payable, has neither been paid, nor secured, nor compounded for; or*
 - (ii) has no reasonable prospect of being able to be paid when it falls due; and*
- (b) there is a reasonable probability that the estate will be insolvent.*

Schaw Miller and Bailey Personal Insolvency Law and Practice comments at chapter 26:

[26.11]

A 'reasonable probability' that the estate will be insolvent should speak for itself; there is no statutory guidance as to what is required.

Therefore, where the petitioning party can evidence, they have not been paid, future payment is unlikely and the deceased appears to be insolvent, it is likely that the IAO would be granted.

[Chapter 56](#) of the Technical guidance for Official Receivers discusses deceased insolvents and provides a good insight to how the OR will deal with the estate when an IAO has been made.

If the property would have been deemed the family home prior to the debtor's death, their interest in the property will be dealt with in the same manner. This is discussed in [Chapter 28](#) of the guidance.

If your client is approached by the OR to see if they can make an offer to purchase the interest and you have any questions relating to the process, please submit an enquiry with the specifics of your client's case.