

## Creation and Termination of Joint Tenancy



**By Brian Madigan LL.B.**

Joint tenancy is a rather old common law method of property ownership. Essentially, it includes the right of survivorship as one of its provisions.

The basic arrangement would be tenancy in common, that is like partnership property and there are no special rules relating to inheritance.

So, all in all, joint tenancy is quite unique. At common law there were four separate and distinct **conditions** that must be met before joint tenancy was established. They are called **unities** and are:

- (1) **Unity of interest:** the interests of all joint tenants must be identical in duration, extent, and nature. If there are two, then they each have 50%, and if there are four then they each have 25%. Only in a tenancy in common can the percentage interests be different.
- (2) **Unity of possession:** each joint tenant must have an undivided share of the property simultaneously with other joint tenants, and no joint tenant can have exclusive right to possess the whole property. Possession in this context refers to the actual ownership of the property, the dominion or control over the property. You could not have one party who held any separate interest by way of adverse possession or otherwise. Further, possession does not mean occupation. So, it is fine for four joint tenants to lease the property to one of them, thereby parting with possession (occupation). Such a lease does not offend the rule related to the unity of possession. The concept of an undivided share only means that there is no actual division of any kind in the property. From a legal perspective, there is only the whole property, there is no such thing as the east half or the northwest quarter.
- (3) **Unity of time:** the interest of all joint tenants must vest at the same time and for the same period. In other words, they all receive their interests at the same time. If not, and one died, the rule related to the reciprocity of survivorship would be difficult to apply. The concept of time is based on this reciprocal arrangement. And, the time period not only has to start at the same time, it has to finish at the same time. Again, it would be difficult to deal with the reciprocity of survivorship if it were only to apply to one party.
- (4) **Unity of title:** all joint tenants must have an equal title to the property, created by the same instrument. Here, the reference to instrument means the document that actually created the joint tenancy arrangement. So, that could be a Deed, a Will, a Trust declaration, or a Contract. The acquisition of the interest

takes place at the same time, in the same circumstances, and in the same document.

One of the reasons for these complicated rules was that they became easy to enforce. The history goes back to the Middle Ages, and of course, at that time legalities were not that sophisticated, so they had to be simple and basic in nature. The four unities did the trick and solved all the apparent problems.

The next issue, was how do you get rid of a joint tenancy arrangement? From a legal perspective this is called “**severance**” rather than termination. The methods to sever appear to be as follows:

1) **disposition:** if any or all of the joint tenants convey or dispose of their interests in a property to another party, then the joint tenancy arrangement is severed. This cannot be done secretly, the other joint tenants have to know about it. Now, if A, B and C are joint tenants and A conveys his interest to X, B and C are still joint tenants with one another. X holds his interest as a tenant in common with B and C. Also, you couldn't have an arrangement where A sold his interest, yet he still stood to inherit from B and C and they didn't even know about his sale. So, at the moment of the conveyance, the joint tenancy is severed. But, A can only sever it for himself. He cannot interfere with the reciprocal survivorship agreement between B and C. That agreement still continues.

A severance of the joint tenancy may be accomplished by A simply conveying his interest to himself, or by granting a legal mortgage (where the effect is to convey title).

This is a unilateral act by one of the parties to signify to the others that the survivorship agreement is terminated.

2) **mutual agreement:** like most situations, the joint tenancy may be severed by mutual agreement. Here, this only seems fair. Everyone knows about it, everyone consents, and if everyone signs a document to evidence this severance then the deal is done.

3) **conduct of the parties:** inconsistent activities by the parties have been recognized by the Courts as being sufficient to terminate joint tenancies. There seems to be a prevailing preference by the Courts to favour tenancy in common. That is because there are many hardship joint tenancy cases. A parent may leave property to two children as joint tenants only to find that 40 or 50 years later when the Will actually comes into play they are not speaking with one another. Then, they are left with the task of changing over the joint tenancy to tenancy in common. They may even list the property for sale. In many of these situations, the same law firm will be acting for the estate and both beneficiaries. Both children may have made Wills leaving the property to their own children. If a Court views the activities of the parties as being tantamount to a severance, then they will treat it as such. This is only necessary because they never got around to

registering the new Deed. It was in the works, but it was never done. These cases are rare.

4) **partition:** this is accomplished pursuant to the *Partition Act*. Either party may make an application, and the Court has authority to divide the property or sell the property, or transfer the property to one of the parties and order the payment of compensation by the other party. The point here, is that it is not in anyone's interest, that two people be stuck together as joint owners when they don't get along. In fact, the real remedy offered by the Act is the dissolution of co-ownership. However, in some cases, it first may entail a severance of the joint tenancy and then the sale.

5) **judicial sale:** There are many reasons why property in co-ownership might be sold. The first is simply that one of the parties doesn't want to be stuck with an ownership interest when he does not get along with the other owners, and they won't agree to a sale. However, there is also the interest of a creditor who wishes to levy execution against the interest of one of the owners.

6) **bankruptcy:** this is a special arrangement to accommodate creditors, and there are procedures available to terminate joint tenancy, convert the interest, seize that interest and order its sale.

7) **criminal act:** this is very unusual, but some Courts have recognized the dissolution of joint tenancy by reason of criminal activity. So, if A murders B, A really should not be able to inherit B's property. While there are other laws that might come into play, to prevent such an occurrence, nevertheless there is authority for this proposition in real property law.

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