

Joint Tenancy: Statutory Termination



By Brian Madigan LL.B.

You might wonder about the statutory termination of a joint tenancy under the provisions of the *Family Law Act*. It is important to review the Act carefully in order to understand it.

Here is what the *Family Law Act* says:

“If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.” s.26(1)

So, in order to understand its implications let’s consider the following example. Two elderly parents leave their family home to their two sons Bob, 23 and Jim, 15. If anything were to happen to either brother, they would want the surviving son to inherit. That makes sense, but Jim is not old enough to make a Will. So, their estate planner suggests “joint tenancy”. Neither needs to make a Will, and if anything were to happen to Jim, then Bob will inherit and vice versa.

Two years goes by and Bob marries Rose. There is no severance of the joint tenancy, it is still held with Jim. Rose moves into the house and the house becomes their matrimonial home. Still, no severance of the joint tenancy, although you might think that Jim should be getting nervous by now.

On May 15th, Bob is involved in a car accident and passes away on May 16th at 6:12 pm.

In this example, several considerations apply:

- 1) immediately prior to Bob’s death, the joint tenancy was severed, (6:11 pm),
- 2) Bob then held a 50% interest in the property as a tenant-in-common with his brother Jim, (6:12 pm),
- 3) Bob’s 50% interest devolves to his estate (again at 6:12 pm) to be divided as either his Will provides, or according the laws of intestate succession if he has no Will.

There is no information to suggest that it goes to Rose.

Let's consider one further example. After Rose moves in, all three parties get along quite well. In fact, so much so, that both Bob and Jim propose that Rose be placed on title. Jim is still unmarried, so he wants his estate to go to his brother Bob and his sister-in-law Rose. As a result, the title is placed in joint tenancy with all three each owning one-third of the property. Again, Bob meets the same fate.

4) immediately prior to Bob's death, the joint tenancy is held in place, (6:11 pm),

5) Bob, Jim and Rose held title as joint tenants, (6:12 pm),

6) Bob's one-third interest devolves to his surviving joint tenants equally,

7) Jim and Rose continue to be joint tenants with one another, each holding a 50% interest in the property.

You might wish to re-read the provision in the Act, and notice that if Bob's wife, Rose held title as a third joint tenant, then there would be no automatic statutory termination of the joint tenancy.

The reason for this is quite simple. The parties directed their minds to the question of inheritance and the Act does not seek to intervene. In the first example, no one did anything. The thought (somewhat paternalistically) by the legislators and authors of the Family Law Act was that Bob would really have preferred his property to go to Rose and he just never got around to changing the title. Actually, they don't go quite that far. The assumption is really: now that Bob is married, he probably wants to leave his matrimonial home to someone other than his brother, Jim. The next step, namely that his matrimonial home should go to Rose, is a step they don't take. So, they stop in the middle. The joint tenancy will be severed and we'll let the chips fall where they may. If Rose gets the house, then fine; if it goes somewhere else, well, that's fine too.

This is rather interesting from Rose's perspective. Her chances of getting the 50% interest might have been higher if she was not on title at all.

While most practitioners are aware a marriage will interfere with the joint tenancy, few are aware that title will preclude the **statutory severance of the joint tenancy** under the *Family Law Act*.

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