

Survivorship Agreements



By Brian Madigan LL.B.

Is it possible to have a survivorship agreement? In fact, one just like joint tenancy but without all the joint tenancy issues.

Here's a common question:

In the event of joint tenancy, if three owners agree that one of them can sell their interest and a new third person becomes an owner, is the title of the property still considered joint tenancy or is it now considered tenants-in-common? If it is the latter, upon the death of one or both of the original owners does their portion of ownership now pass to their estates?

This type of question frequently arises in the settlement of an estate. For example, three of four children may have been left to share in the family cottage. But, one of them moves away, so they can never fully participate, so they want to change things somewhat, but leave the original intention in place.

You have to remember that joint tenancy is a common law doctrine. The only way it can be created is with the **four unities**:

Time: it must arise at the same time (vesting must occur simultaneously)

Title: all parties may get title from the same document

Interest: all parties must have equal shares

Possession: all parties must be entitled to undivided possession of the property (equal right to occupy)

The question really is not sufficiently precise to give an accurate answer, since it is not clear how the third owner became an owner.

If A, B and C hold title as joints tenants, and B sells to D, then D holds title with A and C as tenants-in-common. A and C continue to hold title as joint tenants as between themselves.

But, if there was an agreement to enter into a joint tenancy, that is among all three, A, B and D, and they did so by one conveyance, then they all would be joints tenants because the four unities would be present.

There is one further matter to consider. You could have all three agree, but for some reason, perhaps D is unable to sign a simple conveyance. All three could

enter into an arrangement by way of a contract that in effect provided a result that was exactly the same result as joint tenancy. But, it wouldn't be joint tenancy because joint tenancy is a common law doctrine requiring the four unities. It would be a contractual agreement that would be enforceable by the Courts, and the net result would be the same, but technically it would not be joint tenancy.

So, the result is:

- 1) no agreement by A and C, means: tenants-in-common,
- 2) agreement by all three, A, C and D, with a DEED: joint tenancy
- 3) agreement by all three, A, C and D, without a deed (or the four unities) means: no joint tenancy, but an enforceable contract with the same result as if there were a joint tenancy.

This opens up an opportunity to create a new and amended document dealing with all the appropriate issues, not just inheritance upon death of one of the parties. Nevertheless, all the same benefits that can be achieved with joint tenancy can be recreated and form part of a negotiated agreement. Of course, that assumes that all the children get along!

Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty
905-796-8888
www.OntarioRealEstateSource.com