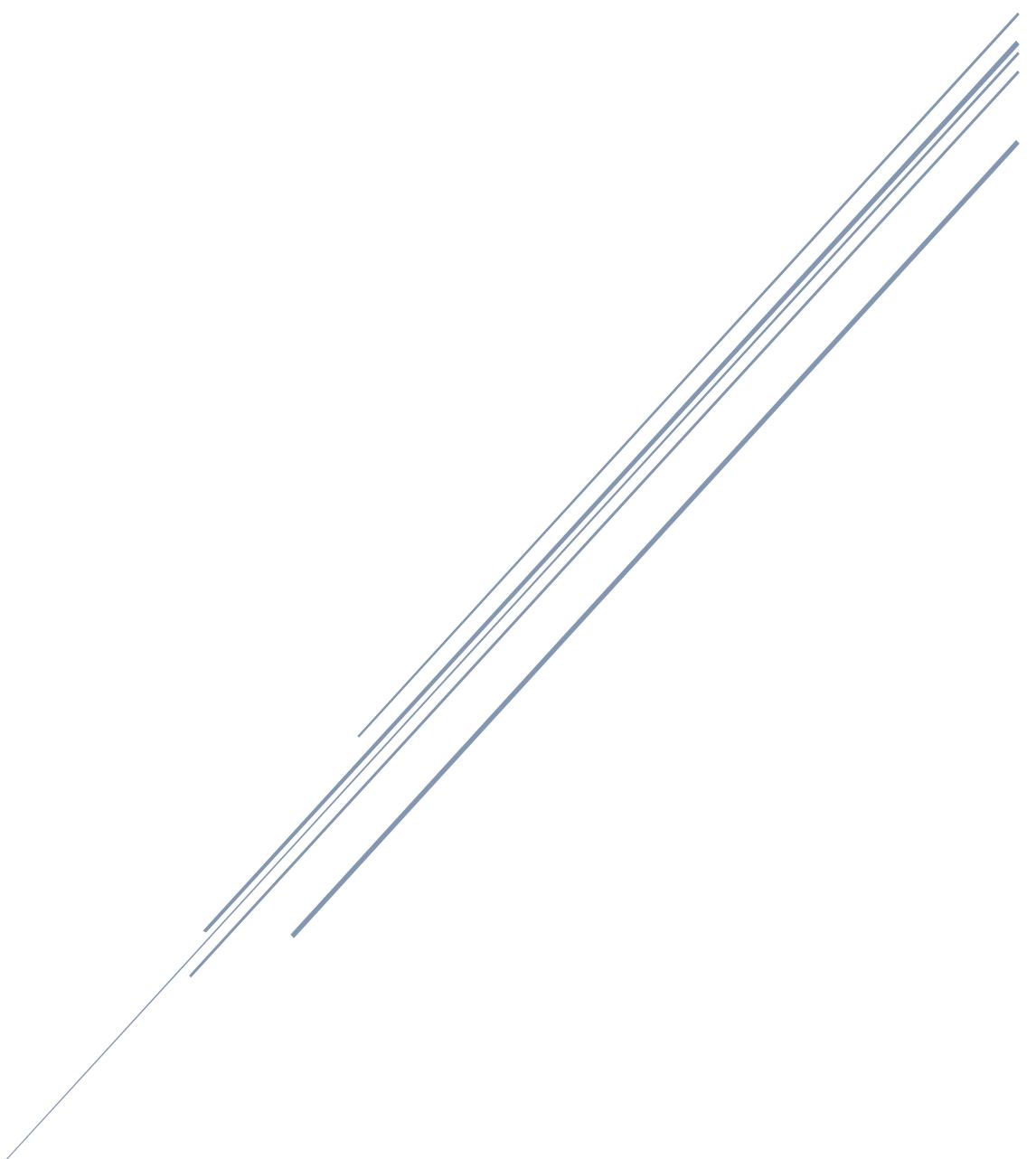


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Concurrent Interests in Property/Co-Ownership

CO- OWNERSHIP

s60 Joint tenants and tenants in common

Two or more persons who may be registered as joint proprietors of land shall be deemed to be entitled to the same as joint tenants; and in all cases where 2 or more persons are entitled as tenants in common to undivided shares of or in any land such persons may receive one certificate for the entirety or separate certificates for the undivided shares

Joint Tenancy

Joint tenants individually own nothing and collectively own the entire interest, the two key features being the right of survivorship ("jus accrescendi") and the four unities (possession, interest, time, and title,

But note **s 39 PLA**.

A company can be a joint tenant (**s 29 (1) PLA**).

Definition: A joint tenancy arises where each joint tenant holds an **identical** right shared with the other joint tenants, to the whole of the property. None of the joint tenants have a distinct or separate interest or title of possession - the interest of each joint tenant is indistinguishable: *Aoun Investments v Chief Commission of State Revenue*.

THE ESSENTIAL CHARACTERISTICS OF A JOINT TENANCY ARE:

- **The presence of the four unities**
- **The right of survivorship**
 - **Definition:** Each joint tenant is subject to the right of survivorship as a matter of law. If one joint tenant dies, their interest is extinguished and the interests of the surviving joint tenants are correspondingly enlarged: *Wright v Gibbons*. The rule operates automatically on the death of a joint tenant. Ultimately, the sole ownership of the property passes to the last surviving joint tenant. The rule can be circumvented during the life of a joint tenant by termination of the joint tenancy.
 - **Does not apply if the joint tenancy has been severed**
 - **S61. Effect of insertion of the words "no survivorship"**

(1) Upon the transfer of any land and upon the lease of any freehold land to 2 or more persons as joint proprietors with the words "no survivorship" endorsed thereon the Registrar shall enter such words in the memorandum of such transfer or lease and also upon any certificate of title registered in the name of such joint proprietors pursuant to such transfer and sign his name thereto.

(2) Two or more joint proprietors of any land or of any such lease or of any charge may by writing, under their hands direct the Registrar to enter the words "no survivorship" upon the certificate of title or instrument relating to the property.

(3) In every case after such words shall have been signed by the Registrar whether under this or any preceding section it shall not be lawful for any persons other than the proprietors registered to transfer or otherwise deal

with the property without the order of the Supreme Court or a judge thereof obtained on motion or petition or the order of the Commissioner.

FOR A JT TO EXIST, THE FOUR UNITIES MUST BE PRESENT:

RIGHT OF SURVIVORSHIP

- When one JT dies, their interest is automatically extinguished and the surviving JTs hold the whole of the interest amongst themselves.
- If all JTs die simultaneously, the law presumes the JTs died in order of their seniority so that the youngest JT will get the whole of the title, which will then pass to their estate
- The only way to avoid the right of survivorship is to sever the JT during their lifetime

Tenants in common

Tenants in common each hold a proportionate undivided share in the property, and the right of survivorship has no

application, unless expressly agreed.

Only unity of possession is an essential element.

- i. Unlike JTs, TIC have a separate, distinct share in the property (***Nullagine***).
- ii. Each of the TIC have a right to possession of the whole of the property.
- iii. Thus, Unity of Possession is the only unity that is required.
 1. The other unities may all be present, and it can nevertheless be a TIC.
- iv. The TIC can hold their share in equal or unequal shares.
- v. There is no right of survivorship since each co-owner has a distinct share.
- vi. A disposition in a will of an interest held as TIC is effective.

WHAT TO LOOK FOR

1. Look for multiple people (could be just 2) buying houses together and being asked what their interest is
2. Look for one party taking a mortgage out over a house that two parties paid for
3. Look for the words "equal contributions"
4. Look for the question asking you how the parties co-own the land
5. Look for a disposition that says parties take as joint tenants
6. Look for parties either being given property OR purchasing property and one makes improvements/repairs to the property, without the assistance of anyone else
7. Look for parties either being given property OR purchasing property
8. Look for the facts telling you how much parties contribute to the purchase of the house
9. Look for one party ousting the other
10. Look for one party wanting to be reimbursed for improvements/repairs etc.

Creation of co-ownership

Co-ownership or concurrent ownership refers to the simultaneous entitlement of two or more persons to the same object of property, either real or personal property.

- For e.g., co-ownership in a horse is examined in ***Denis v Denis***.

Co-owners may be joint tenants at law, while being tenants in common in equity over the same property.

The **common law** prefers a joint tenancy (***Morley v Bird (1798) 30 ER 1192***),

Unless there are **words of severance**, which indicate an intention to create undivided shares, or the 4 unities are absent, but regard must be had to contextual factors.

Do not rely on **s 60 TLA** in presuming any joint tenancy.

i. **Words of Severance**

1. The court would depart from the presumption of JT where words of severance were used.
2. These words of severance must indicate that the co-owners are to take their interests separately.
3. Anything, which in the slightest degree indicates an intention to divide the property, must abrogate the idea of a JT and create a TIC (***Robertson v Fraser***).
4. Examples:
 - a. "in equal shares"
 - b. "to be divided between"
 - c. "to be distributed among them in joint and equal proportions"
 - d. "respectively"
 - e. "among"

Equity will typically presume a tenancy in common where there is an unequal contribution to the purchase price (***Calverley v Green (1984)***)

- Where co-owners advance money on a mortgage whether in equal or unequal proportions (***Re Jackson (1887) 34 Ch D 732***)
- Or where business partners contributed money towards acquiring land for business purposes (***Lake v Craddock (1732)***)

But these categories are not "rigidly circumscribed" such that there may be other situations as well (***Malayan Credit Ltd v Jack Chia-MPH Ltd [1986]***)

RIGHTS AND OBLIGATIONS BETWEEN CO-OWNERS

Unless otherwise agreed, all co-owners have a right of occupation due to unity of possession (***Thrift v Thrift (1975)***)

Where a co-owner is wrongfully ousted such as to deny possession and the title of a co-owner, that dispossessed co-owner may claim occupation rent from the co-owners remaining in possession calculated on the proportionate interest of open market rental for the land, although ouster can be difficult to determine in a domestic situation (***Biviano v Natoli (1998)***)

Co-owners also have a right to rent and profits of the land received from a third party and which rents and profits are not as a result of a co-owner's own individual efforts (***s 27 Statute of Queen Anne 1705, Henderson v Eason (1851)***)

An ousted co-owner cannot claim both occupation rent and an account of rent and profits (***Re Thurgood (1987) Q Conv R 54-239***). Co-owners are not fiduciaries.

In equity, upon termination of co-ownership, a co-owner may by an implied equitable charge (***Brickwood v Young (1905)***) receive credit for improvements and *lasting* repairs (including mortgage repayments) which that co-owner has made to the property, based upon the lower of the improvement costs and the increased value (***Farrington v Forrester [1893]***) if the other co-owners would unfairly benefit from no credit being given (***Squire v Rogers (1970)***)

Again, a claim for improvements and lasting repairs must be set off against liability for occupation rent.

A co-owner is only liable for voluntary waste involving "willful destruction" (***Ferguson v Miller [1978]***) and is not liable for trespass, except to a wrongfully ousted co-owner (***Proprietors of the Centre Building Units Plan No 343 v Bourne [1984]***)

A co-owner has a right to sell or lease or encumber his interest, provided that this does not derogate from the rights of other co-owners (***Hedley v Roberts [1977] VR 282***). Remember that such a disposition may have the effect of severing a joint tenancy.

s120 Devolution of property in cases of simultaneous deaths

Torrens Land – s60 TLA 1893

- Where 2 or more persons are jointly registered as holders in land = JT
- However, there is uncertainty as to what's meant by this provision
- Land Gate (managers of Torrens System in WA) require that instruments be presented for registration, stating whether co-owners are intending to go as JT's or TIC
- Sackville – note that while registration conclusively determines natures of interests as far as 3rd parties are concerned, doesn't prevent JT's establishing in EQ they hold as TIC as between themselves – *Calverley v Green*

ANSWER GUIDE – CO-OWNERSHIP

Step one Identify the legal issues

Step two Identify the nature of the legal estate

What type of co-ownership is present? **If clearly stated, spend little time on this issue.**

- a. Property may be held by 2+ persons as (a) 'joint tenants' or (b) 'tenants in common': **60 PLA**

1. AT COMMON LAW

The presumption at common law will be a joint tenancy unless there is an absence of the four unities, words of severance, or a clear intention to create a tenancy in common. Each joint tenant has a right, shared with the other joint tenants, to the whole of the property. The shares in the property are not conceived of as *separate* shares – both tenants will own the **WHOLE** of the property.

ARE THE FOUR UNITIES PRESENT?

The Four Unities include:

A. UNITY OF TITLE

The owners interest derive from the same source . ***A G Securities v Vaughan [1988]***

- Same conveyance or devise-e.g. A leaves property to B&C will acquire their interest from the same source

If no unity of title

ANSWER:

Here, [A] & [B]'s interests did not derive from the same source. [A]'s interest was derived from [state where it was derived from], whereas [B]'s interest derived from [state where it was derived from]. There is no unity of title.

If unity of title

ANSWER:

Here, [A] & [B] derived title from the same source – unity of title is present.

B. UNITY OF TIME-

Title received at the same time

- Won't exist where interests vest at different times. Eg. Where gift is conditional upon two or more recipients reaching a certain age, then the unity of time will not be there because unity of time will be acquired a succession
- Exception- Where disposition is made by will and perhaps also where conveyance to trustee for beneficiaries ***M'Gregor v M'Gregor***

If no unity of time

ANSWER:

Here, [A] & [B]'s interests vested at a different time. [A]'s interest vested on [date], whereas [B]'s interest vested on [date]. There is no unity of time.

If unity of time

ANSWER:

Here, [A] & [B] acquire interests at the same time – unity of time is present.

C. UNITY OF POSSESSION

Each owner is entitled to possess the whole land enjoyed together with the other co-owners.

- This also exists in tenancy in common
- Without unity of possession there will be no co-ownership

If no unity of possession [UNLIKELY]

ANSWER: