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Week Seven: Co-Ownership

- ❖ Two principal ways to own property in common with other owners:
 - Joint tenancy, and
 - Tenancy in common.
- ❖ Co-ownership entitles each co-owner, in the absence of agreement, to possess the whole of the property.

<u>Joint tenancy</u>	<u>Tenancy in common</u>
<ul style="list-style-type: none"> ▪ <u>Each joint tenant owns the entire interest, subject only to the rights of all other joint tenants.</u> ▪ A joint tenant holds nothing on their own part, but rather holds the whole interest jointly. This level of intimacy is reflected in two distinct features of joint tenancy: <u>the four unities and the right of survivorship.</u> 	<ul style="list-style-type: none"> ▪ Only requires <u>unity of possession.</u> ▪ No right of survivorship → the size of each tenant's share is fixed from the time of creation of that interest or by subsequent dealings. <ul style="list-style-type: none"> ○ On death of a tenant in common, their share passed by will or by intestacy. ▪ A measure of the lesser degree of intimacy of holding by tenants in common is that they are said to hold in 'undivided shares' – <u>they each hold an identifiable fraction of the interest which has not yet been formally divided up between them.</u>

The four unities

<u>Unity of possession</u>	<ul style="list-style-type: none"> ▪ <u>Each joint tenant must be entitled to unity of possession.</u> ▪ Refers to a right of each tenant to enjoy possession of the entire interest. ▪ <u>No co-owner can lawfully exclude the other from occupation of the entire property.</u>
<u>Unity of interest</u>	<ul style="list-style-type: none"> ▪ <u>All joint tenants must hold the same interest in the property.</u> <ul style="list-style-type: none"> ○ For example, cannot be a fee simple to A and a life estate over the same land to B. ▪ Possible for two joint tenants to be given a joint leasehold even if one is also entitled to the reversion. <ul style="list-style-type: none"> ○ Eg “To A and B as joint lessees for 10 years, thereafter in fee simple to B”.
<u>Unity of title</u>	<ul style="list-style-type: none"> ▪ <u>Each joint tenant must acquire their right to possess and their unity of interest by virtue of the same instrument or act of adverse possession.</u>
<u>Unity of time</u>	<ul style="list-style-type: none"> ▪ <u>If the time of vesting the respective interests is different, a tenancy in common, not a joint tenancy, will result.</u> <ul style="list-style-type: none"> ○ Eg “To A and B in fee simple when they reach 18” will result in a tenancy in common if A and B have different dates of birth.

The right of survivorship - *Jus accrescendi*.

- ❖ Right of all joint tenants to have their rights enlarged on the death of a co-joint tenant simply by being freed from the rights of the deceased.
- ❖ Prevents the deceased co-owner leaving their interest by will, as the interest of a joint tenant is extinguished on death and hence does not survive for the benefit of the estate (*Gould v Kemp*).
- ❖ Where there is doubt as to the time of death of joint tenants, the younger joint tenant is presumed to have survived the older, so that the right of survivorship works to the advantage of the younger’s estate (*CA s 35*).

<i>Re Franklin</i>	<ul style="list-style-type: none"> ▪ Raises issues regarding the view that interests of a joint tenant cease immediately on death ▪ Brother and sister were joint tenants, but for more than 15 years the sister had nothing to do with the property. ▪ On the brother’s death, the son claimed that his father had effectively dispossessed his aunt and hence that he, rather than his aunt, should be able to inherit the property. 	<ul style="list-style-type: none"> ▪ Kaye J in the Supreme Court of Victoria agreed. ▪ Acknowledged <u>that there was no property right flowing from the deceased’s joint tenancy once he had died, but concluded that the rights arising from the actual possession still existed and could be bequeathed to an heir.</u>
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Creation of co-ownership

<p><u>General</u></p>	<ul style="list-style-type: none"> ▪ The <u>legal interest</u> may be held separately from the equitable interest. ▪ Simplest case of co-ownership = <i>A and B are legal co-owners of property and entitled to it beneficiary in the same way.</i> ▪ <u>Equitable and legal interest can be held in different ways:</u> <ul style="list-style-type: none"> ○ <i>A and B might hold the legal interest as joint tenants on trust for C and D as tenants in common.</i> ○ <i>A and B might hold legal interest as joint tenants on trust for themselves as tenants in common.</i> ○ <i>A might hold legal interest on trust for B and C as joint tenants or tenants in common.</i>
<p><u>At law</u></p>	<ul style="list-style-type: none"> ▪ <u>Joint tenancy or tenancy in common can be created by special, express words.</u> <ul style="list-style-type: none"> ○ <i>“To A and B jointly”, “To A and B as joint tenants”.</i> ▪ In absence of words demonstrating express intention, <u>the common law presumed a joint tenancy.</u> ▪ Three situations where creation of co-ownership would create a tenancy in common: <ol style="list-style-type: none"> 1. <u>One of the four unities were not present,</u> 2. <u>By using words of severance, or</u> <ul style="list-style-type: none"> • Words of severance = <u>express words that indicate each co-owner is to take a distinct share in the property.</u> <ul style="list-style-type: none"> • <i>“To A and B in equal shares” (Payne v Webb), “To share and share alike” (Heathe v Heathe), “to be divided between” (Peat v Shapman), “equally” (Lewen v Dodd).</i> 3. <u>By otherwise evincing an intention to create tenancy in common.</u> ▪ <u>Consideration of the gift as a whole might indicate that a tenancy in common was intended.</u> <ul style="list-style-type: none"> ○ <i>Surtees v Surtees</i> → property left to sons for life and, on their separate deaths, any rents to which they were entitled should pass to respective male heirs. Court held that the general intention was that the sons should take as tenants in common.
<p><u>In equity</u></p>	<ul style="list-style-type: none"> ▪ Equity would presume a tenancy in common in three situations (see below): <ol style="list-style-type: none"> 1. <u>Co-owners contributing different amounts to the purchase price.</u> 2. <u>Where co-owners advance money on mortgage</u> 3. <u>Partnership assets</u> ▪ Equity would also <u>presume a tenancy in common where circumstances indicate a general intention to hold as tenants in common</u> <ul style="list-style-type: none"> ○ <i>Malayan Credit v Jack Shia-MPH Ltd</i> → holders of a joint tenancy at law agreed to occupy separate, differently sized parts of business premises, and agreed to

	be separately invoiced for rent, were deemed to be tenants in common in equity in shares proportionate to their respective interests.
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1. Co-owners contributing different amounts to the purchase price.

- Co-owners who contribute different amounts to the purchase price will usually hold shares as tenants in common in equity in proportion to their respective contributions.
 - *Eg, land conveyed to A and B as joint tenants, they take at law as joint tenants, but if their respective contributions are $\frac{1}{4}$ and $\frac{3}{4}$ of the purchase price, equity presumes that they hold the legal estate on trust for themselves beneficially as tenants in common with A entitled to $\frac{1}{4}$ and B entitled to $\frac{3}{4}$ (Bull v Bull).*
- Applies regardless of how the legal estate is held.
- If they contribute equal amounts, equity will follow the law.
 - Presumed to be joint tenants in equity (Jackson v Jackson).
- Presumptions are rebuttable.
 - If it's clear that the parties, making different contributions, wished to hold beneficially as joint tenants, no presumption will arise.
 - *Eg "To A and B as joint tenants both in law and in equity".*
 - *Pink v Lawrence* → one transferee paid nothing and had her name on the contract merely to satisfy mortgage but did not activate equitable presumption because the contract contained express declaration of trust.
- *Trustees of the Property of John Daniel Cummins (a bankrupt) v Cummins* → parties to a marriage who contribute different shares to the purchase of the matrimonial home and who are expressed to take as joint tenants can be usually assumed to take equal shares, rather than the proportionate shares that would be required between other parties.

2. Where co-owners advance money on mortgage

- Equity presumes a tenancy in common where two or more co-owners advance money on a mortgage, either in equal or unequal shares.
 - Co-owners in such an arrangement would wish to get back their own investment (*Morley v Bird*).
- A joint account clause is implied in mortgages by *CA s 96A, 99* which makes the mortgagees joint tenants for the purposes of repayment of the loan by the mortgagor.

3. Partnership assets

- Property acquired by partnership, or as part of a joint business venture, is deemed to be held in equity under a tenancy in common (*Lake v Craddock*).

Statutory reform

- ❖ If an instrument fails to provide expressly for a joint tenancy, a tenancy in common will be presumed.
- ❖ **CA s 26(1)** provides:
 - “In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants”.
- ❖ Presumption does not apply where the instrument creating co-ownership “expressly provides that persons are to take as joint tenants” (**CA s 26(2)**).
 - Note that where a document described the parties as joint tenants but they took unequal shares then equity would still deem them to be tenants in common (*Minter v Minter*).
- ❖ Legal and equitable interests
 - *Delehunt v Carmody* → **s 26(1)** held to apply to legal and equitable interests. High Court also held that the provision is broad enough to cover a disposition to A alone where A and B contributed equally to the purchaser price so that they hold beneficially as tenants in common.
 - The provision operates indirectly → by overturning the general common law presumption in favour of joint tenancies, it affects the equitable presumption that, when parties contribute equal sums to the purchase price, they hold as joint tenants.
- ❖ Torrens title
 - **RPA s 100(1)** → “Two or more persons who may be registered as joint proprietors of an estate or interest in land ... shall be deemed to be entitled to the same as joint tenants”.
 - *Hircock v Windsor Homes (Development No 3) Pty Ltd* → the term ‘joint proprietor’ was used as ‘a new statutory expression’ to import law relating to joint tenancies into the Torrens system.
 - Thus, parties registered as ‘joint proprietors’, or joint tenants, would have the same rights as joint tenants at common law.
 - **s 100(1)** does not mean all registered co-owners are deemed joint tenants.
 - Where no express provision is present in the registered instrument, **CA s 26(1)** would operate to imply a tenancy in common.
- ❖ **CA s 26(1)** thus provides a rebuttable presumption in favour of a tenancy in common. Where the intention of the parties is otherwise, a joint tenancy would arise.
- ❖ **CA s 26(1)** also applies to chattels.

Severance of joint tenancy

- ❖ Joint tenant has complete freedom to dispose of their interest inter vivos.
 - Called a 'severance' → fractures the joint tenancy once and for all in relation to the share that is sundered from the other interests.
- ❖ There is still co-ownership → severed share is held in common with the other co-owners.
 - *Where A, B and C are joint tenants and C transfers their share to D, A and B remain joint tenants, and D will hold 1/3 undivided share as tenant in common.*
- ❖ Severing joint tenant confers exactly the same rights on the other joint tenants as they gain by the act. There is no unfairness or hardship that flows from the right of survivorship if it can be readily avoided by severance.
- ❖ Severance can be effected in six ways:

Unilateral act by one joint tenant acting on their own share

- ❖ May occur in three separate ways:
 - By alienation to a third party of part or whole of the joint tenant's interest,
 - By alienation to self,
 - By declaration of trust.
- ❖ Operates at law or in equity.

Alienation to a third party

- ❖ Alienation of the joint tenant's entire estate will be effective at law where the legal estate is transferred.
 - OS → deed must be used to transfer legal estate (*CA s 23B(1)*).
 - TT → legal estate passes on registration of the transfer (*RPA s 42*).
- ❖ In equity, severance occurs where a joint tenant enters into a specifically enforceable contract to transfer their share to a third party because the transaction gives the purchaser an equitable interest in the joint tenant's share (*Lysaght v Edwards*).
 - Does not affect legal estate → remains a joint tenancy but held on trust for the purchaser as a tenant in common.
- ❖ Issues arise regarding severance by means of a gift in equity.
 - "Equity will not perfect an imperfect gift".
 - Mere execution of an instrument in favour of the donee will not be enough to confer an equitable interest.
 - To be effective, the donor must have done all that is necessary to be done on their part to put the donee in a position to acquire the legal title.
 - TT → includes executing a valid transfer, handing over certificate of title or giving irrevocable authority for its production if held by someone else.

<p><i>Corin v Patton</i></p>	<ul style="list-style-type: none"> ▪ Terminally ill joint tenant purported to sever joint tenancy by making a gift of her interest to her brother who was to hold the land on trust. ▪ Failed to give him the certificate of title or arrange its production for the purposes of registration. ▪ Died before these steps were taken. ▪ No registration 	<ul style="list-style-type: none"> ▪ Court held that she had not done everything that was necessary for her to do to put the vesting of the legal estate within the control of the brother. ▪ The gift was imperfect.
<p><i>Costin v Costin</i></p>	<ul style="list-style-type: none"> ▪ Joint tenant executed a transfer and have written and signed authority to the solicitor who had custody of the certificate of title to produce it for the purpose of registration, but died before this happened 	<ul style="list-style-type: none"> ▪ Gift was held not to be severed in equity where the solicitor declined to do so on the grounds that the other joint tenant had not consented in its production. ▪ The donor had not done all that was necessary to arm or equip the donee with the means of securing registration of the transfer by himself.

- ❖ Difficulty has been partly remedied by amendment to *RPA s 97*.
 - Provides that it is now possible for a joint tenant to register a transfer themselves in order to sever the joint tenancy without the need for production of the certificate of title.
 - RG may require the names and addresses of the other joint tenants as well as a statement that the severing joint tenant is not aware of any limitation on their capacity to sever.
 - Gives the non-severing joint tenants an opportunity to raise legal objections to the severance.
 - Notice governed by *RPA s 12A(2), (3)*.
 - RG may refuse to register dealing until the expiration of the notice period for the severance.
 - Once notice period has expired, the person who receives notice has no remedies against RG in respect of the registration of the severing dealing.
 - In cases involving an attempted use of *s 97*, severance is not achieved (even if the RP has done all that they can do) until registration (*McCoy v Caelli*).
- ❖ TT and OS land → gift will be perfect in equity where donor has executed a document which satisfies *CA s 23C(1)(a)* (signed document in writing).

- ❖ Question whether an agreement among joint tenants not to sever the joint tenancy is sufficient to prevent severance.

<p><i>Anderson v O'Donnell</i></p>	<ul style="list-style-type: none"> ▪ Mother and daughter held home as joint tenants and mother filed document severing joint tenancy. ▪ Daughter argued that there was an implied agreement that the tenancy not be severed. 	<ul style="list-style-type: none"> ▪ Court found that there was no such agreement, <u>but implied that, if there was, it might have prevented the severance.</u>
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<p><i>Goyal v Chandra</i></p>	<ul style="list-style-type: none"> ▪ Court held that agreement by one joint tenant with other not to sever would be enforceable. Also found that a <u>course of conduct by one joint tenant that led to the creation of an assumption by the other (relied upon to their detriment) may create by estoppel an equitable right not to have the joint tenancy severed.</u>
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- ❖ Joint tenant is also free to alienate part of their interest rather than the entire interest.

- ❖ Mortgages and OS land
 - The moment of execution of a mortgage of land held by joint tenants, by one of the tenants, unity of title as between the MORs is broken and there is severance at law.
 - The MEE becomes tenant in common at law, so that, if the MOR defaults, the MEE can exercise the power of sale and other available remedies.
 - On re-conveyance after repayment of the loan, the MOR steps into the MEE's shoes to become a tenant in common.

- ❖ Mortgages and TT land
 - Operates as a charge over the land and so the four unities remain intact and the joint tenancy is undisturbed on the execution of a TT mortgage.
 - If the joint tenant MOR dies before the mortgage is discharged, the right of survivorship will take precedence over the MEE's right and the property will cease to be encumbered by the mortgage (*Lyons v Lyons*).

- ❖ Leases
 - Lease granted by a joint tenant does not sever joint tenancy, but rather suspends it (*Freize v Unger*).
 - Effect of the suspension is to defer the right of survivorship to the time the lease terminates if the joint tenant landlord dies during the currency of the lease.

- Where the co-owned property is a lease, the grant of a sublease by one co-owner will sever the joint tenancy for the entire lease (*Freize v Unger*).

Alienation to self

- ❖ *CA s 24, 44(2)* → person may transfer or 'assure' land to themselves.
 - Transfer of their interest in the joint tenancy by the joint tenancy in this way severs the joint tenancy because unity of title will be broken and they will become a tenant in common.
- ❖ Not possible for alienation to oneself to be effective in equity as it is impossible to hold on trust for oneself (*DKLR Holding Co (No 2) Pty Ltd v Comr of Stamp Duties*).
- ❖ OS → requires a deed.
- ❖ TT → transfer effective on registration (*Freed v Taffel*).
- ❖ Severing joint tenant might secretly sever by retaining the deed. The new tenancy in common would devolve by will to the beneficiary of their choice in the event the severing joint tenant predeceases other co-owners.
 - Difficulty addressed in *Re Sammon* → general requirement at common law that a deed be delivered meant that the party executing the deed must show an intention to be presently bound by it.

Declaration of trust

- ❖ *CA s 23C(1)(b)* → a person entitled to an interest in land may by writing signed by him or her make a declaration of trust of any interest in that land.
- ❖ Applies to OS and TT.

A mutual agreement among the joint tenants

- ❖ Joint tenancy will be severed if all joint tenants mutually agree to hold as tenants in common.
- ❖ Joint tenancy severed in equity (*Lysaght v Edwards*).
- ❖ Co-owners continue to hold the legal estate as joint tenancy on trust for themselves as tenants in common.
- ❖ Two views:
 - Agreement must meet general requirements of *CA s 54A* → contract in writing, signed by the party to be charged, or supported by sufficient acts of part performance (*Lyons v Lyons*), or
 - Necessary that the parties are unanimously agreed that the joint tenancy is at and end from the time of the agreement (*Burgess v Rawnsley*).
- ❖ Agreement to make mutual wills will sever joint tenancy (*Re Wilford's Estate; Taylor v Taylor*).

A course of dealing among the joint tenants

- ❖ Severance if there is a course of dealing among all of the joint tenants 'sufficient to imitate that the interests of all were mutually treated as constituting a tenancy in common' (*Williams v Hensmen*).
- ❖ Need not amount to an implied contract but all must participate.
- ❖ Course of dealing need not be evidenced in writing.

<u>Course of conduct sufficient to sever joint tenancy</u>	<u>Course of conduct not sufficient to sever joint tenancy</u>
<ul style="list-style-type: none"> ▪ <i>On v On</i> → two brothers effectively severed joint tenancy by a course of action following the resolution of a dispute between them, when they <u>agreed to take separate shares in the land</u>. ▪ <i>Scott v Scott</i> → <u>treatment of joint assets by a husband and wife as if they were separate held to amount to course of conduct severing joint tenancy.</u> ▪ <i>Abela v Public Trustee</i> → <u>payment of the proceeds of a sale of a joint tenancy into separate bank accounts</u> conduct sufficient to indicate mutual treatment of the interest as tenancy in common. 	<ul style="list-style-type: none"> ▪ <i>Magill v Magill</i> → <u>correspondence between two brothers exploring ways of severing their joint tenancy</u> held not to sever. ▪ <i>Greenfield v Greenfield</i> → <u>mere physical subdivision</u> so that each joint tenant can occupy different parts will not sever joint tenancy.

Severance by court order

- ❖ *Family Law Act* gives the court power to make orders in relation to property, including an order for the severance of a joint tenancy.
 - Mere application under *FLA s 79* not sufficient.
- ❖ Court can order transfer of one joint tenant's interests to another under *s 79* or *s 87* (to give effect to a maintenance agreement) or orders a sale of property, severance will occur, even if one joint tenant dies before the sale is completed.
- ❖ *Public Trustee v Grivas* → former joint tenant remarried but died before ordered sale was complete. Court held that the joint tenancy had been severed and his share of the property had passed to his estate.

Severance in cases of unlawful killing

- ❖ Where a joint tenant would otherwise unconscionably benefit from the right of survivorship, equity will impose a constructive trust to prevent this.

- Eg where A unlawfully kills a co joint tenant, B, A will hold the legal estate by survivorship on trust for themselves and B’s estate as tenants in common in equal shares.

<p><i>Rasmanis v Jurewitch</i></p>	<ul style="list-style-type: none"> ▪ A, B and C were joint tenants. A was convicted of the manslaughter of B. ▪ By survivorship, A and C became jointly entitled to the property at law. 	<ul style="list-style-type: none"> ▪ Court held that in equity there would be a constructive trust imposed to prevent A from holding the benefit which would otherwise flow to him because of the crime. Thus, A and C held B’s 1/3 share on trust for C as tenant in common. As between A and C, they remained joint tenants of 2/3 share so that, if C predeceased A, A would hold as tenant in common with C’s estate in the proportion of 2/3 to 1/3. ▪ This is known as the ‘<u>forfeiture rule</u>’ and applies to all cases where the <u>joint tenant dies as a result of the felonious acts of a co-joint tenant.</u>
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- ❖ The rule covers the case of a wife who killed her husband but was convicted of manslaughter on the grounds of diminished responsibility (*Trovka v Trovja*).
- ❖ Does not apply where the person who kills another is found not guilty on the grounds of mental illness (*Re Plaister, Perpetual Trustee Co v Crawshaw*).
- ❖ Rule has been modified by statute:
 - *Forfeiture Act 1995 (NSW) s 4 and s 5* → in cases on unlawful killings, with the exception or murder the Supreme Court is given power to vary the rule if ‘it is satisfied that justice requires the effect of the rule to be modified’.
 - Can consider the conduct of the offender, conduct of the deceased, consequences of the application of the rule on the offender or any other person, and any other matters the court considered material (*s 5(3)*).
 - Even where a person has not been found guilty of murder by reason of mental illness, the court may in its discretion apply the rule if justice requires it.

Severance on bankruptcy

- ❖ Bankruptcy of a joint tenant entails the vesting of their property in the trustee in bankruptcy (*Bankruptcy Act s 58(1)*).
 - Involuntary alienation.

- ❖ *s 58(2) Bankruptcy Act* → property does not vest in the trustee until registration requirements have been met.
 - Severance occurs in equity from the moment the joint tenant is declared bankrupt.
- ❖ TT land → if a bankrupt dies before registration of the bankruptcy, and the surviving joint tenant becomes registered as the sole proprietor of the property, they will take subject to the equity (*Sistrom v Urh*).
- ❖ On declaration of bankruptcy, all joint tenants hold the legal estate on trust for the trustee in bankruptcy as tenants in common.
- ❖ Law includes provisions designed to prevent a person who is about to become bankrupt from depriving potential creditors of assets by transferring their property with such an aim.
 - At common law, mere severance of joint tenancy does not amount to 'transfer' as all co-owners already have the right to exclusive possession.
 - *s 121(9)(b)* → deemed a transfer to have taken place where a person 'does something that results in another person becoming the owner of property that did not previously exist'.
 - *Peldan v Anderson* → provisions only operate where the property that did not previously exist was carved out of the property of the person who later becomes bankrupt. Did not operate in a situation where one joint tenant had severed the joint tenancy.