

70317 Real Property FINAL EXAMS

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Topic 4: Co-Ownership

What is co-ownership?

- **When two or more persons hold interests together in the same parcel of land.**
 - An example: two persons holding the estate in fee simple of a residential block of land in NSW.
 - Most common example is of a married couple:
 - Possible to co-own other property (lease, mortgage) other than an estate in fee simple.
- No matter how many co-owners you have or the extent of the interests in the property. All co-owners have the right to possess the property. One co-owner cannot exclude other co-owners, without legal consequences.
- **Essence of co-ownership:** both have right of possession, right of use and enjoyment of property.

Two types:

1. **joint tenancy**
 2. **tenancy in common**
- Each type of co-ownership has the benefit of the possession of the whole.

Joint Tenancy:

Each joint tenant owns the whole of the entire interest, subject only to the rights of the other JT's. Must have all four unities:

Four unities:

1. **possession,**
 - in order for it to be co-ownership every joint tenant must have the right to possess the entire property.
 2. **interest,**
 - Each joint tenant interests must be the same.
 3. **title,**
 - All joint tenants must derive their title from the same instruments
 4. **time.**
 - Timing must be the same. (if no unity in time; tenancy in common)
 - Time and title go together
- **right of survivorship** (*jus accrescendi*)
 - Joint tenant cannot dispose of their property by will. If they die without their will, their property is not distributed.
 - Right of all the joint tenants to having their interests being enlarged upon the death of another joint tenant.
 - Therefore, if a joint tenant dies, they cannot pass on their ownership. Their ownership simply dies.
 - Right of survivorship will **override** any will left.
 - A joint tenant's interest **cannot** be passed on to heirs after death
 - A joint tenant may however transfer her interest while still living (*inter vivos*).
 - They can sever the joint tenancy in respect to their shares. (potential shares)
 - Presumption of survivorship, **CA: s 35** (presumed that the younger owner survives the older)

Tenants in common (TiC):

- TiCs hold an “undivided fixed” share
- only requires unity of possession (other unities may also be present)
- No right of survivorship: TiC’s interest will be distributed according to TiC’s will (or by rules of intestacy).
 - They can pass ownership on once they die.

Creation

General: Co-ownership interests can be created at law and in equity.

- Law = formal title
 - Who holds formal title → who is the registered proprietor?
 - Equity = beneficial ownership
 - Who has the rights to the benefits of the property?
 - Trustee holds legal title: They hold title on behalf of beneficiary (who holds equity)
- ***Always check status of co-owners at law AND equity (JT or TiC?)**

At law:

Statutory presumption of tenants in common:

s 26(1) *Conveyancing Act 1919*:

“In the construction of any instrument...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”

- This reverses historical presumption of joint tenants in law → no tenants in common.

Unless expressly stated to take as joint tenants:

Section 26(1) does not apply where the instrument creating co-ownership expressly states that the persons are to take as joint tenants: *Section 26(2) Conveyancing Act*.

- S 26 CA applies to law and equity (see *Delehunt v Carmody*)

At Equity:

Equity always follows the law unless one of these exceptions apply:

1. co-owners contribute unequal amounts to purchase price
2. co-owners advance money on a mortgage (whether in equal or unequal shares)
3. property is acquired by a partnership or joint business venture

Then (in these situations): **equity presumes tenants in common.**

Example:

Assume two sisters, Rachel and Clare are registered as joint tenants, but Rachel paid 70% of the purchase price and Clare paid 30% of the purchase price.

- Instrument (Transfer) expressly states that they are to be registered as joint tenants. Therefore, the presumption does not apply and they are joint tenants at law.

At law: they are joint tenants because they are registered as joint proprietors.

In equity: The sisters are tenants in common in 70/30 shares. (based on their respective share of contributions to purchase price).

What happens if Rachel dies? Apply the right of survivorship.

- Right of survivorship: at law Claire would become sole proprietor, she would hold that property on trust for herself and for Rachel’s heirs.

1. co-owners contribute unequal amounts to purchase price

Cummings v Cummings

- HC held: despite unequal contributions the party clearly intended equal ownership to property, with equal ownership comes the right to survivorship.
- Subsistence of matrimonial relationship supports the joint tenancy with the rights to survivorship. Therefore in some instances you can bring evidence to show, that even though you made unequal contributions to the purchase price you still intended for you and the other co-owner to share the property equally and for the right to survivorship to prevail.

2. co-owners advance money on a mortgage (whether in equal or unequal shares)

e.g.: Rachel lends her father 500k and Claire does so too. Father buys property worth the combined amount, executes a mortgage in favour of both sisters in order to secure the loan. Rachel and Claire are registered as joint tenants in mortgage. At law they are joint tenants.

BUT in equity Rachel and Claire are tenants in common, as they are co-owners of a mortgage (and they have advance money on that mortgage)

- Applies whether or not they make equal or unequal contributions

Morley v Bird

although they take a joint security, each mean to lend his or own and to take back his or her own. Section 96A and s99 of Conveyancing Act imply a *joint account clause*, this is implied into all mortgages. This does not mean the owners hold necessarily as joint tenants, this is only for the purpose of paying off the mortgage.

- if Claire dies, father can continue paying of the loan, Rachel can discharge the mortgage without needing to get the sign off from the executor of Claire's estate.
- Rachel will hold repaid money for heirs of Claire's estate for her contribution (tenants in common)

3. property is acquired by a partnership or joint business venture

e.g.: Rachel and Claire go into business together, purchase industrial property. Registered as joint tenants. At law they are JT, but in equity, as they purchased the property as business partners they are tenants in common. In proportion to their respective contribution to the purchase price.

Checklist: What kind of co-ownership has been created?

- Start with **legal interest**
 - Presumption of tenancy in common (s26(1) CA), unless expressly joint tenants (s26(2) CA)
- Then work out **equitable interest**
 - "Equity follows the law". So whatever the tenancy is at law, it will also be in equity; UNLESS:
 - One of the three exceptions apply on the facts: unequal contribution to purchase price, advance on mortgage, partnership assets

***Delehunt v Carmody (1986) 161 CLR 464**

- Key case for interpreting s26 as it applies to equitable presumption:

Facts: Miss Delehunt and Mr Carmody (*de facto* relationship) contributed equally to purchase price of a property in Enmore. Mr Carmody on CT as RP. Mr Carmody died without a will. Property went to his wife, Mrs Carmody, from whom he had separated in 1939. Mrs Carmody new RP (regardless of never living on the property and not being Mr Carmody's wife). Miss Delehunt argued that equity presumed a joint tenancy when equal contribution to purchase price – ie that she held the entire beneficial interest by right of survivorship.

- Both women claimed beneficial title to property.

Issue: What was the effect of s 26 CA on equity's presumptions re: tenants in common/joint tenants?

Held: Section 26 CA applies to legal and equitable interests.

Although s 26 CA did not strictly apply in this case (because the transfer was to one person only), it operated indirectly by overturning the general common law presumption of joint tenancies. The general rule is that equity follows the law, and that includes the law in its present state, ie as it stands under s 26 of the CA.

- s26 did not strictly apply. Due to a lack of instrument disposing of property to two people (only registered proprietor's interests)
- HC said s26 have no direct application
 - however indirect effect was evidence of an intention for a preference for tenancy in common over joint tenancy,
 - Mr C and Miss Delahunt held property as tenants in common in equal shares.
 - Mr C interest would go to Mrs Carmody, however Miss Delahunt retained beneficial interest as tenant in common, she was entitled to one half share.

Co-ownership and Torrens

Section 100(1) of the RPA:

"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 [1979]

Held: s100(1) imports the laws of joint tenancy into Torrens. It did not create a presumption of joint tenancy: *NB*: not all features of common law of joint tenancy will necessarily be carried across to Torrens. Eg fraud by one joint tenant will not necessarily "infect" the registered title of another JT : *Cassegrain v Gerard Cassegrain (2015)*

- Language importing provision
- Joint proprietors (See within Torrens system) means joint tenants. All of joint tenancies are imported into Torrens.
- There are exceptions e.g. under Common Law fraud committed by one joint tenant may affect title of other joint tenants. case grain

Severance

- **Severance** = ends a joint tenancy by converting it into a tenancy in common
- Severance occurs when one of the unities destroyed
- The right of survivorship is destroyed (only with regards to the severing co-owner's share)
- Other co-owners cannot prevent severance (unless they can rely on some other contractual or equitable limitation).
- If you want to sever survivorship you must destroy one of the unities to sever the joint tenancy by converting it into a tenancy in common.

An example:

Ned Stark expressly leaves Winterfell to all his children (Rob, Sansa, Arya, Bran and Rickon) as joint tenants when he dies. (they are joint tenants at law because he has expressly stated that in his will.) Sansa sells her interest to Tyrion Lannister, severing the joint-tenancy (in respect of her potential share only).

- Result: Tyrion holds an undivided fixed share of $\frac{1}{5}^{\text{th}}$ as a tenant in common. Other Stark children hold the remaining $\frac{4}{5}^{\text{th}}$ as joint tenants as between themselves, each with a potential $\frac{1}{5}^{\text{th}}$ share.
- All entitled to possess the whole of Winterfell.
- Tyrion's title derives from contract of sale.
- Joint tenancy is only severed in respect to Sansa's share.
- Tyrion's tenancy is a tenancy in common as he therefore does not have a right to survivorship. He holds an undivided fixed share of $\frac{1}{5}$. The remaining children hold $\frac{4}{5}$ as joint tenants between themselves. Therefore, the right of survivorship still attached to the Stark children.

FACT CHANGE- If Rob goes off to work and died: Tyrion still holds his fixed share of $\frac{1}{5}$. The remaining children's shares have been enlarged to the extent of Rob's when he dies.

Severance can be effected in six ways:

1. unilateral act by one joint tenant
2. mutual agreement by joint tenants
3. course of dealing by joint tenants
4. court order
5. unlawful killing
6. bankruptcy.

Unilateral act by one joint tenant

- severance allows joint tenant to leave property to their heirs.
- **Unilateral act by one joint tenant can occur in three ways:**
 1. Transfer to third party
 2. Transfer to self
 3. Declaration of a trust.

NB: Severance may operate at law or in equity

Unilateral act by one JT – alienation to 3rd party

- Will be effective at law when the legal interest is transferred:
 - For Torrens, upon registration of the transfer (s42 RPA).
 - **Transfer to third party must be registered.**

- Registration destroys unity therefore converting joint tenancy with respect to that joint tenant share into a tenancy in common.
 - Failure to register does not allow severance at law!
- For OST, where deed used to transfer the interest (s23B(1) CA).
- Will be effective in equity where JT has entered into a specifically enforceable contract to transfer her share to a 3rd party.
- The result: the original JT will hold legal title on trust for the purchaser as a tenant in common: *Wright v Gibbons (1949) 78 CLR 313*

Will equity recognise severance of the joint tenancy?

- Purported transfer of property will sever joint tenancy if they can argue existence of specifically enforceable contract. That transfer will give purchaser equitable interest in tenants share. → must look at laws of equity combined with requirements under conveyancing act.
- Must look for a contract of sale [for land].
 - If not sale, can be other transfer where you have compliance with s23C. if can prove equity will provide remedy of specific performance to parties.
- E.g. Rachel and Claire own house as JT. Rachel owns into specifically contract for sale with third party. This severs joint tenancy in equity, giving third party fixed undivided equitable interest in a half share in the property. If before settlement and registration Rachel dies, Claire now holds legal title as sole owner of the property, but she holds on trust for third party for the one half share.

Unilateral act by one JT – gift to third party

- Equity recognises gift of real property when the person giving the gift has done everything they can do to make the gift effective.
- If legal title transferred = severance
 - But if no registration (TT) or no properly executed deed (OST)...

Corin v Patton (1990) CLR 540 *(Severance)

Facts: both held property as joint tenants. Mrs Patton was terminally ill and executed deed of trust and will in which she left her share in property to her two children. Patton intended to leave share of prop to her children rather than Mr Patton ending up as sole owner of property. No severance at law as Ms Patton dies before registration of legal title transferred to her brother Mr Corin.

Issue: Ms Patton is attempting to sever the joint tenancy.

- Was the transfer (of gift) effective in equity?

Held: In order to give a gift in real property, the donor must do all that she can do to transfer the property to affect the transfer. Will need a signed registrable instrument of transfer and the CT (CT has to accompany transfer to be registered). For the transfer to be effective in equity, she would have had to called bank to produce the CT (As they were holding it for them).

- No severance at law and no severance at equity, as she did not have the CT (did not do everything in her power in order to affect the transfer)
- → Mr Patton became sole owner at law and at equity (As she did not sever her interests).

Unilateral act by one JT – transfer to self

Section 97 RPA permits a JT to register a transfer to herself to sever the joint tenancy.

- Allows joint tenant to transfer their interests in property to themselves and to convert their interest from a joint tenancy to a tenancy in common.
- Under this section no need to produce CT.
- **Notice** is given to other tenants before registration of transfer goes ahead
- If there is no registration, severance fails (in law and in equity)
- Must register the instrument in order to effectively sever
 - Registration or nothing (equity cannot assist if no registration)

McCoy v Caelli [2008] NSWSC 986 - Can assure to self under OST: ss 24 and 44(2) CA

Facts: terminally ill son is joint tenant in property with mother. He wishes to leave interests in property to his son. He signs form under s97 and gives to solicitor. However, he dies before the transfer is registered. Had that transfer been registered it would have severed joint tenancy at law.

Argued: joint tenant who wants to gift property share to his son. He has done everything he can to affect the gift → court said no.

Held: s97 is a procedural provision which allows you to change status of co-ownership from a joint tenancy to a joint tenancy in common. No transfer to third party happening here, only to themselves. No conscience to be bound as they are transferring to themselves. Cannot hold trust for themselves. S97 there is no fall-back position in equity. Either registration to be effective to sever or nothing.

Unilateral act by one JT

- Will severance occur if a JT creates a **mortgage** over their interest?
 - (Tip: depends on whether OST or TT land, see text book p 445)
 - if a joint tenancy creates a mortgage on Torrens land this will not sever joint tenancy. Under Torrens the form of a mortgage is registered charge on property. There is no charge over underlying legal title. No severance of formed unities. Joint tenant still remains holder over fee simple.
- Will severance occur if a JT grants a **lease**?
 - No. It only suspends the JT for the duration of the lease: *Frieze v Unger*
 - E.g. Rachel and Claire: Rachel lease her interests to M for period of 6 months. During lease period Rachel dies. Claire acquires Rachel's reversionary interests in land but M rights under lease are preserved for duration of the lease. Once lease finishes Claire becomes sole proprietor under survivorship.

Unilateral act by one JT – declaration of trust

Declaration of a trust may effectively sever joint tenancy if it complies with s23C(1)(b) CA.

- By declaring trust is separating legal ownership from beneficial/ equitable ownership.

Joint tenant can declare the trust: 2 ways

To declare someone else as trustee and then declare yourself to beneficiary under trust.

1. Declare someone else as trustee

- *Corin v Patton*, for this to be effective at law the transfer must be registered. If not severing joint tenant must have done everything in their power to 'perfect the gift', including authorising CT.