

Real property exam notes

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Co-ownership

- When two or more persons hold interests together in the same parcel of land
- Co-ownership in the estate in fee simple...
- **Two types:** joint tenancy (JT) and tenancy in common (TiC)
- *Thrift v Thrift*: each type has benefit to possession of the whole (cannot exclude someone from the property)

TYPES OF CO-OWNERSHIP:

Joint tenancy

- Closest form of joint tenancy → almost one person in the eyes of the law
- Each JT owns the whole of the entire interest, subject only to the rights of the other JTs

The four unities for a JT to exist: if these do not exist, no JT → may be TiC instead

- **1) Possession:** must have the right to possess the entire interest (equally to each tenant)
- **2) Interest:** each JT's interest must be the same (e.g. 50% each)
- **3) Title:** all JT must derive their title from the same instrument (written document)
- **4) Time:** each JT's interest vests (comes into effect) at the same time

Right of survivorship:

- The right of all JT to have their rights in the property enlarged on the death of another JT
- A JT's interest is extinguished when they die
 - **Cannot be passed on to heirs after death/cannot leave their interest by will**
- A joint tenant may however transfer/alienate her interest while still living (*inter vivos*)
 - Severance is a way you can get out of this JT (then you can leave in will)
- **Presumption of survivorship CA: s 35:**
 - Death is presumed to happen in order from oldest to youngest (if time of death can't be established)

Tenants in common

- TiC hold an "undivided fixed" share
- Only requires unity of possession (but 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)

CREATION:

- Co-ownership interests can be created at law (formal title) and in equity (beneficial ownership)
- **Always check status of co-owners at law AND equity** (start with legal then figure out equitable interest)

Creation at law

- There is a **statutory presumption that co-owners are deemed to be TiC's** not JT's (s 26(1) CA)
- **This statutory presumption does not apply where the instrument creating co-ownership expressly stated to take as joint tenants (s 26(1) CA)**

Creation at equity

- *Delehunt v Carmody* (1986) 161 CLR 464: equity follows the law (i.e. presume TiC s 26 CA) unless:
 - 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

CO-OWNERSHIP AND TORRENS:

- **Section 100(1) 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]:** does not create a presumption of JT (still subject to s 26)
- **Acts of fraud by one JT won't necessarily carry over to the other JT:** *Cassegrain v Gerard Cassegrain (2015)*
 - Fraud needs to be bought home to each RP, not just one in the case of co-ownership

SEVERANCE:

- Severance = ends a joint tenancy by converting it into a tenancy in common (can operate at law or equity)
- 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 another contractual/equitable limitation)
- **An example with 5 joint tenants:**
 - Ned leaves house to his children (Rob, Sansa, Arya, Bran and Rickon) as JT's when he dies
 - Sansa sells her interest to Tyrion, severing the JT (**in respect of her share only**)
 - **Result:** Tyrion holds an undivided fixed share of 1/5th as a TiC. Other children hold remaining 4/5^{ths} as JT's as between themselves, each with a potential 1/5th share (all entitled to possess whole of house)
- **Does not affect the other JT's (they have the same % of the property as they did before one party severed)**
- Severance does not occur if a JT grants a **lease** → a lease only suspends the JT for its duration: *Frieze v Unger*
- Will severance occur if a JT creates a **mortgage** over their interest?
 - If person who granted to mortgage died first = mortgage seizes to exist
 - If person who didn't grant mortgage died first = mortgage now applies to both interests

SEVERANCE CAN BE EFFECTED IN SIX WAYS:

1. Unilateral act by one joint tenant

Alienation/transfer to third party:

- Effective at law when the legal interest is transferred:
 - For Torrens, upon registration of the transfer (s 42 RPA)
 - For OST, where deed used to transfer the interest (s 23B(1) CA)
- Effective in equity when JT has entered into a specifically enforceable contract to transfer share to a 3rd party
- **The result:** original JT holds legal title on trust for purchaser as a TiC: *Wright v Gibbons (1949) 78 CLR 313*

What if it is transferred as a gift to a 3rd party?

- If legal title transferred = severance
- But if no registration (TT) or no properly executed deed (OST) equity will not assist a volunteer:
 - *Corin v Patton (1990) CLR 540:* how much is enough in equity to transfer your interest?
 - **“If an intending donor...has done everything which is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift”**
 - Therefore to have valid gift in equity donor MUST: sign a transfer form (provide that document), provide the CT or give authority for the CT to be handed over to someone else

Alienation/transfer to self: notice must be given to other tenants before registration of transfer goes ahead

- **S 97 RPA** permits a JT to register a transfer to herself to sever the joint tenancy (no need to produce CT)
- *McCoy v Caelli [2008] NSWSC 986:* if there is **no registration, there can be no severance** under this section
- *Corin v Patton (1990) CLR 540:* even if you do everything you can, **no registration = no severance at equity**

Declaration of trust:

- Declaration of a trust may effectively sever joint tenancy if it complies with s 23C(1)(b) CA (OST and TT)

2. Mutual agreement by all joint tenants

- If all JTs agree to hold as TiC, the JT is severed in equity: *Lysaght v Edwards (1876) 2 Ch D 49*

- A written agreement that they no longer want to be JT but tenants in common. But what form will suffice?
 - S 54A CA; *Lyons v Lyons*: agreement in writing as per s54A or part performance
 - *Burgess v Rawnsley*: doesn't need to be in writing, oral agreement is sufficient
- Court takes broad view, somewhere in middle (more evidence i.e. writing and part performance, the better)

3. Course of dealing by all joint tenants

- Must be conduct of ALL JTs
- Discussions about how to sever will not sever: *Magill v Magill* (1997)
- Need to have conduct that shows that all the co-owners **agreed and assumed** that each held an undivided proportionate share and no right of survivorship: *Williams v Hendsman* (1861)
 - **Need to show that all co-owners now believe they are tenants in common rather than JTs**

4. A court order may effect severance

- Under the *Family Law Act 1975 (Cth)*, the court has powers to make orders in relation to property, that may expressly or by implication, sever the joint tenancy
- Also, power of court to end co-ownership (discussed below) under s 66G CA

5. Unlawful killing

- **Homicide**: if one JT murders other JT, perpetrator hold's on trust for victim's heirs (can't profit from crime)
 - If Alice murders Betty, Alice retains the legal estate by right of survivorship, but in equity the estate is held by Alice and Betty's heirs at TiC (forfeiture rule)
- **In cases of unlawful killing (but not murder)**: ss 4 and 5 of the *Forfeiture Act* give the Supreme Court power to vary the forfeiture rule if justice requires it

6. Bankruptcy of a JT will sever the JT

- Occurs at law when the JT's property vests in the trustee: s 58 *Bankruptcy Act 1966 (Cth)*
- Occurs in equity from moment JT is declared bankrupt: *Holland*

ENDING CO-OWNERSHIP:

1. By action of the parties

- For TiC, when one co-owner acquires the shares of the other co-owners
- For JT when one co-owner remaining after death of other JTs
- Also when all co-owners together transfer their interests to a third party
- By partition – dividing the property physically to reflect their shares

2. By order for sale or partition by the court

- Any of the co-owners can apply to court to hold property on statutory trust for sale or partition: s 66G CA
- Statute makes it clear that sale is the primary remedy under s 66G
- But partition (subdivision) is allowed in special circumstances: *Re Cordingley* (1948) 48 SR (NSW) 248
 - Onus is on you to argue partition should be done → must show no hardship of the other co-owners
 - *Segal v Barel* (2013) 84 NSWLR 193: emotionally investment to property is not a valid argument:
 - Partition concerned with clearly identifiable things e.g. value, cost etc.