

## **BACKGROUND**

Joint tenancy and tenancy in common are forms of concurrent ownership of estates in land. Joint tenancy is characterized by the right of survivorship and by the four unities of possession, interest, title and time (in other words, "joint tenants must have the same interest, accruing under the same conveyance, commencing at the same time and held under the same undivided possession"). (1) Tenancy in common has no right of survivorship and has only the unity of possession.

A tenant in common can deal with his interest independently of the other co-owners, including the disposition of the interest by will. The interest of a joint tenant cannot be disposed of by will as the right of survivorship passes the interest automatically on death to the other joint tenant(s). With respect to other dispositions by a joint tenant, the common law recognizes the right of a joint tenant to unilaterally sever the joint tenancy and thereby create a tenancy in common. (2) Section 65 of the Land Titles Act, R.S.A. 2000, c. L-4, provides that a transfer which has the effect of severing a joint tenancy is registrable if it is consented to or executed by all joint tenants or proof is provided that all the joint tenants have been served with written notice of the intention to register the transfer.

While tenants in common hold undivided proportionate interests ("undivided" means possession of the property is not divided as each tenant is entitled to possession of the whole parcel), it is inconsistent with the unity of interest to ascribe proportionate interests to joint tenants. However, it is permissible for a defined undivided proportionate interest to be held in joint tenancy so that the joint tenants of the proportionate interest are tenants in common with the holders of the other undivided proportionate interests (e.g., A as to an undivided 1/3 interest, B as to an undivided 1/3 interest and C and D as joint tenants as to an undivided 1/3 interest).

## **REGISTRATION PROCEDURE**

1. **Tenants in Common** - When land is granted, transferred, conveyed, assigned or bequeathed to two or more persons, other than as executors, administrators or trustees, in fee simple or for any lesser estate, legal or equitable, and the tenancy is not specified in the document creating the estate, the co-owners hold as tenants in common. (3)

a) **Failure to Define Proportionate Interest** - No allocation of proportionate interests is to be indicated on title unless they have been specifically defined in the document creating the tenancy in common. It cannot be presumed that the tenants in common hold equal shares. The tenants in common may subsequently declare their proportionate interests by way of a statutory declaration signed by all of the co-owners.

In this situation, a transfer is not appropriate as the proportionate interests are only being clarified. This procedure is only acceptable when the tenants in common declare that they have always held the interests being designated.

When the proportionate interests have not been defined, one of the co- owners may mortgage or transfer all of his interest without clarifying his interest provided he indicates that he is mortgaging or transferring all of his interest. Fees for a transfer are charged on the total value of the property. A separate title is not to be issued for an undefined interest. If one already exists, the proportionate interests should be defined through a declaration before it is dealt with.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Statutory Declaration

The code used for registration at Land Titles is: STAT

b) **Changing Proportionate Interests** - Where tenants in common wish to change their proportionate interests, a transfer must be used. For example, if A and B each hold an undivided one-half interest and they wish to change to a 25 - 75 arrangement, A could transfer an undivided one-quarter interest to B, or A and B could execute a transfer giving an undivided one-quarter interest to A and an undivided three-quarters interest to B. Fees should be charged on the value of the proportionate interest being transferred; in the above example, fees would be based on one-quarter of the value of the property.

c) **Transferring One Tenant's Interest** - If the interests of more than one tenant in common are held under the same certificate of title and one of them transfers his interest, the certificate of title is cancelled in full and a new title is issued in the names of the remaining tenants and transferee. A separate title is not issued for the transferee unless separation is specifically requested for defined interests.

Where a tenant in common is transferring part or all of his interest to another tenant in common, there must be some evidence in the transfer verifying that the transferee is the other tenant in common before the interests are combined. Requests to combine interests can also be done by way of solicitor's letter or request on the Document Registration Request form. If the interests are held under different certificates of title, an application for consolidation is required if the transferee wishes to combine the interests in one title.

## 2. **Severing a Joint Tenancy**

- a) A joint tenancy may be severed by the registration of a transfer (4) if:
- (i) it is executed by all the joint tenants, or
  - (ii) all the joint tenants, other than those executing the transfer, have given their written consent to it, or
  - (iii) an affidavit of service is provided establishing that all the joint tenants who have neither executed the transfer nor given their written consent to it have been served with written notice of the intention to register the transfer either personally or substitutionally pursuant to the terms of a court order. If service is effected pursuant to the terms of a court order, a certified copy of the order must also be provided.

If there are two joint tenants, and one of them is severing the joint tenancy by transferring to himself (5) or to a third party, the new title is issued to the co-owners as tenants in common, each as to an undivided one-half interest. A transfer to a third party must comply with dower requirements unless there is evidence establishing that the joint tenants are not married to each other. If not available a Fiat addressing its absence is acceptable. Also, a Judges Order severing joint tenancy does not require compliance with section 191 of the Land Titles Act, as it does not dispense with an interest, merely changes the interest. If there are more than two joint tenants and one of them is severing the joint tenancy, the severing tenant acquires an undivided proportionate interest determined by dividing 100 by the number of joint tenants and the other joint tenants hold the remaining undivided proportionate interest as joint tenants (e.g., if A, B and C are joint tenants and A severs by a transfer to himself, the new title issues to A as to an undivided 1/3 interest and B and C as joint tenants as to an undivided 2/3 interest).

If there are two joint tenants, a transfer from one joint tenant to the other joint tenant does not need to comply with the above requirements. There must be evidence in the document verifying that the transferee is the other joint tenant.

When a transfer of land, severing the joint tenancy is registered, ensure that the address for service that is entered on the new title for the registered owner or owners that have not signed or consented to the transfer is the address shown on the old title.

- b) The interest of a joint tenant is severed when he becomes a bankrupt. (6) Writ proceedings against an enforcement debtor's interest as a joint tenant of land sever the joint tenancy when a civil enforcement agency has entered into an agreement to sell the debtor's interest.(7) If the trustee in bankruptcy does not request title to issue in his name, the designation that the bankrupt and the other co-owner(s) hold the land as joint tenants is amended on the certificate of title. The format of the amendment to the co-ownership designation and the format for the co-ownership designation on a new certificate of title where the trustee requests ownership in his name are the same as for the severances outlined in item (a) above.

3. **Changing From One Tenancy to Another** - Where co-owners wish to change the form of co-ownership (i.e., from joint tenancy to tenancy in common, or vice versa), a transfer signed by all the co-owners must be registered. Where co-owners hold equal shares and are effectively transferring the same proportionate interests, the nominal transfer fee listed in [Tariff item 3](#) is charged. Where the proportionate shares are being changed, fees are charged on the value of the proportionate interest being transferred. The original transfer is checked and fees are charged on any increase of value.

4. **Dower** - Where a transaction is only altering a co-ownership arrangement amongst the same co-owners, dower requirements do not apply. (8)

### STATUTE AND CASE REFERENCES

1. Henry Campbell Black, *Black's Law Dictionary*, (4th rev. ed., 1968), p. 1634 and *Schofield v. Graham* (1969) 69 W.W.R. 332 (Alta S.C. TR. DIV.)
2. *Stonehouse v. Attorney General of B.C.* (1961) S.C.R. 103 (S.C.C.); *Schofield v. Graham, supra*
3. s. 8, Law of Property Act, R.S.A. 2000, c. L-7. This statutory presumption against a joint tenancy reverses the common law rule, which presumed in favour of a joint tenancy.
4. s. 65, Land Titles Act, R.S.A. 2000, c. L-4
5. s. 12, Law of Property Act
6. *Re White*, [1928] 1 D.L.R. 846 (Ont. S.C.); see procedure on Bankruptcy [BAN-1](#)
7. s. 76(1), Civil Enforcement Act, S.A. 2000, c. C-15
8. s. 25, Dower Act, R.S.A. 2000, c. D-15; see also *Scott and Cresswell v. Cresswell and Registrar for North Alberta Land Registration District et al.* [1975] 3 W.W.R. 193 (Alta. C.A.) at p. 222