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More Owners, More (Potential) Problems: How to Avoid Disputes Between Co-owners and What to do When They Arise

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Continuing Professional Development

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Introduction[1]

Ownership is a bundle of rights. Real estate owner(s) have the right to (among other things) use the property, profit from its use, exclude others from it, pledge it to secure loans and sell it. These rights can be shared by, or divided among, multiple people. This sharing or division, accomplished by agreement or operation of law, can have many benefits. But people can (and often do) disagree about who holds real property rights and how they should be exercised. These disagreements are more likely to occur, and less likely to be resolved, if the parties have not specified their rights and responsibilities in writing in advance.

This paper seeks to identify some of the difficulties that can occur when multiple people have – or claim to have – an interest in the same property. These difficulties are not confined to any segment of the real estate market. At one end of this spectrum, major real estate developers co-operate on the construction, development and sale of a property. At the other end, parents provide funds so that a young couple can afford to make a down-payment on their first home. At both ends of the spectrum, and in all of the space between, the parties are much better off spending time and money addressing potential issues when the property is purchased and before problems arise. Otherwise, they will have their rights governed by a series of complex – and potentially surprising – rules imposed by common law and equity.

This paper is divided into two parts. The first part addresses shared legal and beneficial ownership of property. Shared ownership is, of course, very common in the residential real estate market. Families routinely pool their resources to purchase property. As real estate prices have increased, co-ownership involving multiple families – or multiple branches or generations of the same family – has become a way for some buyers priced out of the housing market to gain

[1] The author gratefully acknowledges the assistance of Colleen Morawetz, student-at-law.

a foothold on the property ladder. In the commercial context, co-ownership allows multiple owners to spread the risk and capital requirements associated with property ownership between them. However, the law grants relatively few rights and imposes relatively few obligations on co-owners, and therefore parties are likely to benefit from an agreement that specifies their rights and obligations.

The second part of this paper addresses when legal ownership will be divided from beneficial ownership. This can happen if the parties specifically agree that a property will be held in trust. It can also occur without any express agreement between the parties. For example, parents who pay for some or all of a property legally owned by their independent adult children may become the beneficial owners of that property. If this is not what the parties intend, they should say so when the property is purchased. By understanding when and how beneficial interests are created, parties can make informed decisions about whether, when and how beneficial ownership is separated from legal title.

I. SHARED LEGAL AND BENEFICIAL OWNERSHIP

A. Joint Tenants and Tenants-in-Common

When two or more people are the legal and beneficial owners of the same property, they are either joint tenants or tenants in common.[2] The general presumption in Ontario is that co-owners are tenants in common.[3] Owners who wish to take possession as joint tenants must acquire the

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[2] Two additional forms of co-ownership at common law, tenancy by the entirety and co-parcenary, have been rendered obsolete in Ontario by statute: Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed (Aurora: Canada Law Book, 2006) [*Anger & Honsberger*] at s. 14:10.

[3] Trustees are an exception to this Rule, and are deemed to be joint tenants. *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s.13(1) and (2); *Land Titles Act*, R.S.O. 1990, c. L.5, s. 62(3); see also *Anger & Honsberger*, *supra* note 2 at s. 14:20.10.

same rights in the same way (i.e., pursuant to the same document) at the same time.[4] They must also indicate their intention on the conveyance document. As always, careless drafting can cause problems. Merely describing a joint tenancy but not using the term may result in a finding that the owners are tenants in common.[5] Even if unsophisticated parties declare that they intend to hold property "jointly" they may not create a joint tenancy.[6]

One important difference between joint tenants and tenants in common is that when a joint tenant dies, his or her interest in the property passes automatically to the surviving tenant(s). The property does not form part of the deceased owner's estate, which can reduce the administrative cost of transferring the property to the surviving tenant.[7] However, the release of a deceased joint tenant's interest to his or her co-tenant(s) may be treated as a deemed disposition for tax purposes.[8]

By contrast, when a tenant in common dies, his or her interests descend to his or her own heirs, with the same tax consequences as any other testamentary disposition.[9]

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4 This requirement is sometimes referred to as the "four unities": Unity of title (acquiring their estates from the same instrument, whether by will or deed), of interest (enjoying the same quality of estate, e.g., equitable or legal, in the same proportions), of possession (entitling them to the possession of the whole of the property, subject to their co-owners' same rights), and of time (their interests vesting at the same moment). It is possible to create a tenancy that does not meet these requirements if the tenancy is created pursuant to the *Statute of Uses* or by will: *Anger & Honsberger*, *supra* note 2 at s. 14:20.10. See also, *Toronto-Dominion Bank v. Phillips* 2014 ONCA 613.

5 See *Anger & Honsberger*, *supra* note 2 at s. 14:20.10 for a discussion of case law on this point; see also *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 s. 14.

6 *Anger & Honsberger*, *supra* note 2 at s. 14:20.10, citing *Dupont, Re*, [1966] 2 O.R. 419 (Ont. H.C.J.).

7 *Ibid* at s. 14:20.20.

8 Martin Rochwerg & Rahul Sharma, *Miller Thomson on Estate Planning*, vol. 1, (Thomson Reuters, 2014) (loose-leaf revision 2017) at s. 10.20.10.30 [*Miller Thomson on Estate Planning*].

9 *Ibid*, at s. 10.20.10.30.

As long as both owners are alive, tenants in common and joint tenants have similar rights. Among other things, both tenants in common and joint tenants own a share of an entire property and are entitled to use that property or profit from its use.[10]

B. Problems Among Co-Owners

Co-owners are partners, in the colloquial sense. They contribute their time and money towards a shared venture. But co-owners are not usually partners in the legal sense. And compared to partners, the law provides co-owners with relatively few rights and remedies.

As a starting point, co-owners do not owe any over-arching duty of fairness and good faith to each other. Neither joint tenants nor tenants in common owe each other fiduciary duties.[11] They are not automatically obligated to act competently, or even in good faith when managing the jointly owned property.[12] Thus, without a contract, a co-owner has little recourse if their co-owner behaves imprudently or inappropriately, other than an application for partition and sale (which is discussed below).

Similarly, co-owners do not have an automatic duty to pay for the repair and improvement of a property. If one owner voluntarily pays for the cost of repair or improvements to common property while ownership is shared, the costs can typically only be recovered when the property is sold.[13]

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[10] *Anger & Honsberger, supra* note 2 at s. 14:20.120. However, whether a joint tenancy can be severed through a joint tenant's unilateral intention, on the other hand, is the subject of some judicial and commentator debate.

[11] See e.g. *Knollys v. Alcock* (1800), 5 Ves. Jun. 648, 31 E.R. 785; *Anger & Honsberger, supra* note 2 at ss. 14:20.40 and 14:20.130.

[12] *Osachuk v. Osachuk* (1971), 18 D.L.R. (3d) 413 (Man. C.A.).

[13] *Anger & Honsberger, supra* note 2 at 14:20.50, citing *Leigh v. Dickeson* (1884), 15. Q.B.D. 60 (C.A.); see also *Anger & Honsberger, supra* note 2 at 14:20.70, citing *Brickwood v. Young and Minister for Public Works of New South Wales*, [1905] 2 C.L.R. 387. Commentators have noted that upon partition, judicial orders may be

Thus, without a co-ownership agreement, a freeloading co-owner may prove unwilling or unable to pay for repairs and maintenance. The other owner(s) must either pay the necessary expenses on behalf of the freeloader (and wait until the property is sold to recover) or commence an application for partition or sale. This problem can be solved by an agreement requiring that owners contribute their share of the costs for the maintenance of the property. That share is usually based on the proportionate share that each co-owner has in the property.

Prompt payment can be encouraged by specifying a high interest rate or limiting the right of a defaulting co-owner to use the property, receive proceeds from it or participate in decision making until the default is cured.

In addition to whether an owner must pay for expenses, a well drafted co-ownership agreement should address how owners will approve expenditures. Again, the proportionate share that each co-owner has in the property can be the basis upon which these decisions are made. For instance, if one co-owner has a significant majority interest in the property, that co-owner may have the right to approve most of the expenses on its own However, if the percentage ownership is divided more equally between the co-owners, the approval of all co-owners may be required.

In addition to clearly stating their rights, owners should consider how disputes about those rights will be resolved. In appropriate cases, an agreement to arbitrate disputes and an agreement that arbitrated disputes will proceed on an expedited schedule can ensure that disputes about the property are resolved quickly. That said, arbitration is not always appropriate and parties should consider (among other things) whether the amounts likely to be in dispute warrant paying both lawyers and an arbitrator.

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flexibly tailored to the fact situation: “the court may make all allowances and should give such directions as well as give complete equity to the parties”: *Anger & Honsberger, supra* note 2 at 14:20.140.

Even without a co-ownership agreement, the law imposes some limits on what co-owners can do. If the property generates revenue, each owner is entitled to a share of that revenue equal to their proportionate ownership of the property. A co-owner who receives more than his or her fair share of revenue is liable to account to the other owners, and an action for an accounting can be commenced without selling the property.[14] Thus, a co-owner expecting a disproportionate share of the revenue or sale proceeds generated by a property because he or she is managing the property (or for some other reason) must secure the agreement of the other co-owners.

As noted, a fundamental element of co-ownership is that all owners have the right to occupy the entire property. One owner cannot exclude another from the property, or part of the property.[15] If co-owners plan to use or occupy different parts of the same property then they will need to enter into an agreement setting out this division.

That said, a co-owner's right to use and occupy a property is not unlimited. One owner cannot destroy or damage the property without the consent of its co-owners and, in appropriate cases, the court will intervene with an injunction to prevent proposed damage or destruction.[16]

C. Problems between co-owners and third parties

Creditors of joint tenants[17] and tenants in common[18] can look to the debtor's share of the property to satisfy his or her debts. If the parties are joint tenants, the joint tenancy is converted to a tenancy in common when a creditor takes steps to execute against one joint tenant's

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[14] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 122(2).

[15] *Anger & Honsberger*, *supra* note 2 at ss. 14:30.70 and 14:30.100.

[16] *Ibid* at s. 14:30.100.

[17] *Sunglo Lumber Ltd. v. McKenna* (1974), 48 D.L.R. (3d) 154 (B.C.S.C.) [*Sunglo*]; *Sirois v. Breton*, 1967 CarswellOnt 162 (Co. Ct.) [*Sirois*]; *Royal & SunAlliance Insurance Co. v. Muir*, 2011 ONSC 2273 [*SunAlliance*].

[18] *Anger & Honsberger*, *supra* note 2 at s. 14:30.100.

interest.[19] The creditor can then enforce its judgment against the debtor's interest in the property. Although a creditor can only recover from the debtor's share of a property, the sale of the property will often impose significant hardship on the innocent co-owner(s).

Relatively little can be done at the outset of a co-ownership relationship to shield a debtor's interest in real property from seizure. Because of this, parties must consider carefully whether to purchase property with an owner who is, or may be, in financial trouble. For example, when spouses purchase property together and one of them has a substantially higher risk of insolvency (for example, because he or she owns a business and has given personal guarantees), it may be prudent that title be taken in the name of the other spouse. These arrangements provide some protection against creditors, as long as the arrangement is not meant to defeat or delay enforcement by creditors when it is made. However, it is possible that creditors will attack the arrangements as a fraudulent conveyance or seek to claim that the legal owner of the property holds some or all of the beneficial interest in it on resulting or constructive trust for the debtor (which is discussed below).

It is almost always unwise to respond to one owner's financial crisis by transferring ownership to the other owner, or a third party. A transfer made to defeat or delay creditors can be set aside under the *Fraudulent Conveyances Act*, particularly if (among other things) the consideration is inadequate, the property is transferred to a non-arm's length party, the seller is facing financial difficulties and has no other assets, the seller has few remaining assets after the transfer and/or

[19] *Sunglo, supra* note 17; *Siriois, supra* note 17; *SunAlliance, supra* note 17.

the seller continues to enjoy the use of the property after the transfer.[20] Suspicious transfers can involve both the debtor and previously innocent co-owner in litigation.

In the commercial context, co-owners should carefully consider whether they intend to create a legal partnership. A partnership can exist without any explicit agreement between the partners, provided that the parties are carrying on business in common with a view to profit.[21] A finding that co-owners are partners has important consequences: partners owe each other fiduciary duties and are jointly and severally liable for partnership debts. If they want to avoid this result, it should state explicitly in a co-ownership agreement that the co-owners are not partners. Such statements are not determinative, and should be supplemented if possible with other terms including a provision allowing co-owners to operate competing businesses (which is incompatible with the existence of a fiduciary duty)[22] and delegate management to a property manager.

D. Indirect ownership: corporations, partnerships and trusts

Property owners can also choose to hold their interest indirectly. In such cases, the property is held by a company, partnership or trust and the ultimate beneficial owners hold shares, partnership interests or trust units in the entity that holds title. Depending on the size and complexity of the transaction, there may be many layers between the property and the ultimate beneficial owner.

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[20] *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052 at para. 67.

[21] *Partnerships Act*, RSO 1990, c P.5, s. 2.

[22] Jeffrey H. Shore, "Real Estate Joint Ventures" (1 February 2011), Goodmans LLP, online: <http://www.goodmans.ca/files/file/docs/Real%20Estate%20Joint%20Ventures%20and%20Conducting%20a%20Thorough%20Due%20Diligence%20for%20Real%20Estate%20Transactions.pdf>.

The structure chosen for most real estate joint ventures is generally driven by tax consequences. Parties almost always choose the most tax effectives structure, so that taxes will be minimized if all goes well and the property generates revenue and profits. But parties often fail to consider the rights and obligations their chosen structure will impose if all does not go well.

When parties own property through a corporation, partnership or trust, they have all of the rights and obligations that apply to any other corporation, partnership or trust. Although a detailed discussion of these rights and obligations is outside the scope of this paper, it is often worth considering whether indirect ownership is preferable to direct ownership from a legal and tax perspective and what (if any) modifications the parties should make to the legal regime that will govern their relationship.

E. Partition and Sale: Ending the Co-Ownership

If owners cannot co-exist, and cannot agree to an alternate mechanism to resolve disputes, then any owner may apply for partition or sale of the property pursuant to the *Partition Act*.[23] Such an application can be useful in appropriate circumstances, because it provides a way for owners to disengage from each other. But it is also a blunt instrument with sometimes undesirable results. It is important for owners to consider whether they should agree to an alternate termination mechanism more suited to their specific circumstances and expectations.

There are many reasons to provide a mechanism for resolving differences among co-owners without ending the co-ownership. For example, if one or more co-owners are living in the property, selling to a third party and moving to a new property will often be undesirable (because of the disruption caused by the move) or impossible (because an owner's share of the sale proceeds will be insufficient to purchase a new property). In the commercial context, an action for partition and sale can hurt the value of the property if it is brought at an inopportune time, either because of the market or the state of the property.

Even leaving aside these factors, an action for partition or sale is a cumbersome way to solve problems. It requires that the party seeking partition or sale commence and successfully prosecute a court application. This process can consume significant time and resources, particularly if other owners oppose the application.

In the absence of an agreement between the parties, all co-owners are subject to having their property partitioned or sold. The presumptive remedy is a partition, which results in dividing the property between the co-tenants. However, if a sale is more advantageous to the parties or the

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[23] R.S.O. 1990, c. P. 4. See also: *Anger & Honsberger*, *supra* note 2 at s. 14:20.140; *Settled Estates Act*, R.S.O. 1990, c. S.7, s 18(2); *Davis v Davis*, [1954] 1 D.L.R. 827 (Ont. C.A.); *Garfella Apartments Inc. v. Chouduri*, 2010 ONSC 3413 [*Garfella*] at para. 20.

land is not suitable for partition then a sale will be ordered.[24] The existing owners have the right to participate in that sale, but are not entitled to a right of first refusal or other preferential treatment.[25]

A party that opposes partition and sale bears a heavy onus. Absent a contractual agreement to the contrary, every co-owner is presumptively entitled to an Order either partitioning the property (i.e., dividing it between the owners) or requiring that the property be sold and the proceeds divided among the co-owners. If the other owner(s) seek to maintain the status quo and prevent a partition or sale, they must prove that the application for partition is malicious, oppressive, vexatious or will cause hardship amounting to oppression.[26] Evidence that the timing of the proposed sale is poor and that a better price can be obtained by waiting is not sufficient.[27]

Parties who contract out of their right to partition and sale should replace that right with an alternate exit mechanism. Such a mechanism can, for example, take the form of a "shotgun" clause that allows one side to set a price for the property and require the other to buy or sell at that price to the co-owner that exercises the shotgun.[28] Alternatively, the parties can agree in advance to a process for the sale of the property that does not require court intervention (for example, specifying how a real estate agent will be selected and who will instruct that agent) and when that process can be invoked by the parties.

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24 *Garfella, ibid*; *De Felice v. 1095195 Ontario Ltd.*, 2013 ONSC 1 [*De Felice*] at paras. 108-111.

25 *De Felice, ibid*.

26 *Ibid*, at para. 50.

27 *Canadian Imperial Bank of Commerca v. Mulholland Construction Inc.*, 1998 CarswellOnt 340.

28 Donald J. Donahue, Peter D. Quinn & Danny C. Grandilli, *Real Estate Practice in Ontario,* 7th ed. (Markham, ON: LexisNexis, 2011) at p. 87.

II. DIVIDING LEGAL AND BENEFICIAL OWNERSHIP

The previous section discusses what happens when parties share legal and beneficial ownership. This section deals with how legal ownership can be separated from beneficial ownership, and the practical consequences of that separation. The simplest example of this is when one party (the legal owner) agrees to hold a property in trust for another (the beneficial owner). The beneficial owner is entitled to the benefits of the property, but the legal owner is registered on title.

One important difference between legal and beneficial ownership is that there is no easy and reliable way to identify the beneficial owner of a property. In some circumstances, the law will separate legal and beneficial ownership in the absence of an express agreement between the parties. Accordingly, whenever a trust is intended — or may be imposed — the parties will benefit from a clear agreement that specifies the rights and obligations of all involved.

A. Purchase Money Resulting Trusts

A purchase money resulting trust can arise without an express agreement between the parties when one person pays for some or all of the property but another person is the legal owner of that property.

When one person pays for a property that another legally owns, it is generally presumed that a person who pays for some or all of a property meant to be – and is – the beneficial owner of it.[29] The presumption of resulting trust can be rebutted by the legal owner if he or she proves that the purchase moneys contributor intended a gift, loan, or fulfillment of some other obligation.[30]

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[29] *Rascal Trucking Ltd. v. Nishi*, 2013 SCC 33 at para. 1.

[30] See e.g., *ibid* at para. 40, where the nature of the relationship between parties led the Supreme Court to the inference that the contributor had advanced purchase moneys in fulfilment of a moral obligation. Therefore, the presumption of the purchase money resulting trust was rebutted.

Intention at the time of the contribution is determinative, and courts are understandably wary of self-serving after-the-fact evidence about what the parties intended.[31]

An important exception to the presumption of a resulting trust occurs when the legal owner of a property is a dependent child and the payor is the legal owner's parent.[32] In such cases, "presumption of advancement" applies, and is presumed to gift the funds. In this case, it is the paying parent who must prove a gift was not intended. The presumption of advancement does not apply to payments made for the benefit of independent adult children.[33] Nor does it apply between spouses.

When a purchase money resulting trust arises, the beneficial interest conferred is proportionate to the contribution to the purchase price.[34] Thus, a titleholder who received half of the purchase money from a third party presumptively holds half of his or her legal interest in trust for that party. If property values increase, the payor can be entitled to much more than he or she originally paid.

The difficulties that can be created by the doctrine of resulting trust can be illustrated by the simple example used in the introduction. If a parent provides funds so their independent adult child can purchase a home, the parent's contribution can be characterized as: (i) a gift, in which case the parent is entitled to nothing; (ii) a loan, in which case the parent is entitled to be repaid; or (iii) neither a gift nor a loan, in which case the parent is entitled to beneficial ownership of the property in proportion to its contribution. If the parties do not specify the nature of the payment

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31 *Ibid* at para. 2.

32 *Pecore v Pecore*, 2007 SCC 17 at paras. 27-41.

33 *Ibid.*, at paras. 36-38.

34 *Ibid* at para. 1; see also *Hamilton v Hamilton*, [1996] O.J. No. 2634 (Ont. C.A.) at para. 39; *Sampath v Deopersad*, 2017 ONSC 7055 at para. 76; and *Kavanagh v Shils*, 2015 ONSC 5815 at para. 136.

when it is made, there is a risk that complex and expensive litigation will be required to ascertain the parties' intentions long after the fact.[35]

B. Constructive Trust

The doctrine of constructive trust can divide legal and beneficial ownership without the consent (or even the knowledge) of the legal owner. In Canada, constructive trusts fall into two overlapping categories. First, a constructive trust may be imposed to remedy unjust enrichment, even if there is no wrongdoing.[36] Second, a constructive trust may be imposed to remedy conduct contrary to good conscience, including fraud and breach of fiduciary duty.[37]

C. Unjust Enrichment and Proprietary Remedies

The test for unjust enrichment is well established: one party must be enriched, the other must be deprived and there must be no "juristic reason" to justify the transfer of wealth.[38] Unjust enrichment will not always give rise to a constructive trust – there must be a "sufficiently direct connection" between the enrichment and the property.[39]

In the real estate context, constructive trusts are most common when unmarried couples occupy a property owned by one of them. If one partner has had considerable impact on the value of the family property through his or her unpaid labour and a monetary fee-for-service award would both demean and misrepresent the nature of his or her work then that partner may be entitled to an interest in the property that is proportionate to his or her contribution. [40]

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[35] See for example: *Milionis v. Rivas*, 2017 ONSC 5001; and *Greco v. Frano*, 2015 ONSC 7217.

[36] *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 [*Soulos*] at para. 20.

[37] *Ibid* at para. 32.

[38] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

[39] *Peter v Beblow*, [1993] 1 S.C.R. 980 at para. 35.

[40] *Ibid.*

As with resulting trusts, clarity about what (if any) beneficial interest the person not registered on title will have in a property can help parties avoid expensive and difficult disputes if the relationship breaks down.

D. Constructive Trusts and Wrongful Activity

Constructive trusts can also generally be imposed to remedy wrongful acts to "hold persons in different situations to high standards of trust and probity."[41] Thus, a person who takes funds through fraud or breach of fiduciary duty and uses the funds to purchase a property may be found to hold the property in trust for their victim. If a co-owner or purchaser knows, or ought to know, about the wrongful conduct then their interest in the property may also be at risk.[42]

Because of this, and at the risk of stating the obvious, it is a terrible idea to co-own real property (or other property) with a rogue or fraudster.

E. Proprietary Estoppel

Finally, proprietary estoppel could allow for an individual to obtain an interest in land if he or she was promised an interest and relied on the promise to his or her detriment. A claim for proprietary estoppel requires that the claimant establish: first, there must have been a "representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property"; and, second, that he or she reasonably relied on the expectation and experienced a detriment as a result of that reliance. Together, these inquiries determine whether an equity arises.[43]

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41 *Soulos, supra* note 36 at para. 17.

42 Among other things, the previously innocent party may be liable for knowing receipt of trust funds or assisting with the breach of fiduciary duty. There is also a risk that the knowledge will defeat a claim to be a *bona fide* purchaser for value without notice.

43 *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras. 21-23.

Proprietary estoppel is relatively new (having been clarified by the Supreme Court in December 2017) and the test for it is not well developed. To avoid this uncertainty, a party making or relying on promises relating to property should reduce both the promise and the consequence of it to a written agreement.

F. *Bona Fide* Purchasers for Value Without Notice

As equitable interests, beneficial ownership rights are outranked by good legal title. Thus, a *bona fide* purchaser will receive the property free and clear of all encumbrances, and the equitable owner's proprietary interest will be eliminated. This is because Ontario's land titles system relies on a "curtain" and "mirror" principle. The "curtain" draws a line at which potential purchasers can rely on apparent good title, with the registered title "mirroring" legal and equitable entitlements.[44]

In practice, therefore, most property purchasers need not be concerned about constructive and resulting trusts as long as they do not have notice of them. But real or alleged beneficial interests can cause significant problems for vendors.

Because trusts can be extinguished by the sale of a property, beneficial owners can seek to preserve the property until their claim can be determined. The most common preservation mechanism is a Certificate of Pending Litigation ("CPL"). Once a CPL is registered on title (which can only be done pursuant to a court order), anyone purchasing or encumbering the property is deemed to have notice of the claim that it records. Since a purchaser who has notice of a constructive or resulting trust will take title subject to that trust,[45] a CPL relating to a

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[44] *Durrani v. Augie*, [2000] O.J. No. 2960 (S.C.J.) at paras. 40-42, cited with approval in *Lawrence v. Wright* (2007), 84 O.R. (3d) 94 (C.A.) at para. 62.

[45] *Black v. Owen*, 2012 ONSC 400 (Div. Ct.).

potential constructive or resulting trust claim will usually make it impossible to sell the relevant property until the claim is determined.

Even if no CPL is registered, vendors may consider disclosing any known proprietary interests in the land to avoid a finding of the vendor's liability on another basis, including fraudulent misrepresentation, equitable fraud, or bad faith.[46]

Conclusion

This paper has identified multiple risks associated with sharing or dividing legal and beneficial ownership of a property. Virtually all of these risks can be reduced if the parties enter into an agreement in advance stating what their rights will be. The problem is that parties usually do not want to spend the time and money required to address potential problems before they arise. But addressing problems after they arise will invariably require exponentially more time and money. Fixing rights and obligations in a clear agreement is almost always a worthwhile investment, and one that all co-owners should seriously consider.

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[46] See *Outaouais Synergest Inc. v. Keenan*, 2013 ONCA 526, where the finding that the vendor's solicitor was not liable hinged on the fact that the non-disclosed recovery clause that attached to the land in question was not an "encumbrance". In this fact situation, the general proposition that a vendor is under no general duty to disclose defects relating to title or to quality, apart from an express contract, applies. However, this is a fine line that a prudent solicitor likely would not want to walk, since the court found that the vendors in this case "may have been nibbling at the edges of the 'honest fair-dealing' concept" (para. 88).

10.20.10.30 — Joint Tenancy versus Tenants-in-Common

Understanding the differences between holding real property as a joint tenant or tenant-in-common is important in many aspects of estate planning. At common law, a joint tenancy is a type of property ownership where two or more individuals enjoy an undivided and identical interest in property. Importantly for estate planning, where property is held in joint tenancy, each of the tenants enjoys a right of survivorship. Thus, when one tenant dies his or her interest in the land is extinguished and, assuming a joint tenancy with two tenants, the other tenant becomes the sole owner of the real property. As discussed in detail later in this chapter, since the property passes to the surviving joint tenant automatically on death, probate fees can be avoided.

However, holding property as joint tenants will not impact the deemed disposition of the property for a deceased taxpayer under paragraph 70(5)(a) of the ITA. Any joint tenant interest passing to the surviving joint tenant will still be subject to paragraph 70(5)(a) resulting in a deemed disposition at FMV to the deceased. The portion received by the surviving joint tenant will be deemed to have been acquired at FMV.[4] Further, if a taxpayer owns 50 percent of a real estate property as a joint tenant with an arm's length party, the taxpayer will have no option to leave his or her interest in the real estate to his or her spouse since the decedent's interest passes automatically to the surviving joint tenant.

In a tenant-in-common situation, each person owns his or her interest in the property independent of the other owners of the property. There is no right of survivorship and the portion owned by the decedent passes to his or her estate as opposed to passing to the surviving owners of the property. Therefore, the decedent can decide to leave his or her share in the property to pre-determined beneficiaries. For example, if a taxpayer owns 50 percent of a real estate property as a tenant-in-common with an arm's length party, the taxpayer can leave his or her 50 percent interest to his or her spouse. There will be no tax liability on death as under subsection 70(6) of the ITA, any transfer by a Canadian resident to the taxpayer's Canadian resident spouse or common law partner is not subject to the deemed disposition rules under subsection 70(5). However, since there is no right of survivorship, a property held as tenants-in-common may be subject to probate fees on the transfer from the estate to the beneficiaries.

FOOTNOTES

[4] See Ruling 2004-0101971E5, "Disp. of Interest in Property — Joint Ownership", at para. 6.

§14:10 TYPES OF CO-OWNERSHIP

A person who is sole owner of an estate is said to hold it in "severalty", that is, in a state of separation, because the owner holds it in their own right with no one having any interest jointly with the owner.

There may be co-owners of any estate or interest in land, whether present or future. The two main classes of co-ownership are:

> (a) "joint tenancy", in which the co-owners, called "joint tenants", have identical interests in that they take undivided possession of the same property under the same instrument for the same interest which, unless the instrument is a conveyance under the *Statute of Uses*[1] or a will, vests in them at the same time, and the survivor of them takes the entirety; and
>
> (b) "tenancy in common", in which the co-owners, called "tenants in common", have undivided possession of the property, but their interests need not otherwise be identical and the interest of each descends to their own heirs.

At common law, there were two further classes of joint estate, now both obsolete due to statutory amendments. The third class of joint estate was called "coparcenary", in which several persons took property by the same title by descent, and the fourth class was called "tenancy by the entireties", an estate together held by husband and wife during their coverture.

FOOTNOTES

[1] 27 Hen. 8, c. 10 (1535).

§14:20.10 General

A joint tenancy arises by the act of the person who creates the estate. It is distinguished by what are known as the four unities:

> (1) "unity of title", whereby all joint tenants must take under the same instrument;
>
> (2) "unity of interest", whereby the interest of each joint tenant must be identical in nature, extent and duration;
>
> (3) "unity of possession", whereby each joint tenant is entitled to undivided seisin or possession of the whole of the property and none holds any part separately to the exclusion of the others; and
>
> (4) "unity of time", whereby, at common law, the interest of each joint tenant must vest at the same time.[1]

The interests of joint tenants may, however, vest at different times if the joint tenancy is created by conveyance under the *Statute of Uses*[1a] or by devise by will.[2] However, a remainder which is to vest in members of a class only upon the attainment of a specified age cannot be a joint tenancy.[3]

Since the estate of each joint tenant must be the same in nature, there can be no joint tenancy between the holder of a freehold and the holder of a term of years or between the holder of a freehold in possession and the person entitled to a freehold in reversion.[4] Although the interests of joint tenants must be the same in duration, one of the tenants may have an additional several estate. Thus, in the case of a grant to A and B for their lives, remainder to the heirs of A, A and B have a joint tenancy for their lives and A has the remainder in fee simple.

In the case of a limitation to two persons and the survivor of them in fee simple, the reference to the survivor makes a joint tenancy for their lives with a contingent remainder in fee simple to the survivor of them.[5] Joint tenants were said by Littleton to be seised *per mie et per tout*, or in other words "each joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately".[6]

At common law, if land were granted or devised to two or more persons for the same estate, whether freehold or otherwise, without words indicating how those persons were to take, it was presumed that they took as joint tenants.[7] Thus, if the limitation to them was for their lives, they took as joint tenants for their joint lives and, if the limitation were to them in fee simple or for a term of years, they took as joint tenants in fee simple or as joint lessees. It did not matter, in the case of a will, whether the gift was specific or residuary,[8] whether direct or by way of trust,[9] whether to next of kin,[10] relatives,[11]

issue,[12] personal representatives,[13] children,[14] family[15] or parents and children.[16] However, the common law rule that persons took as joint tenants, unless the contrary intention was shown, has been reversed by provincial statutes.

If it is desired to limit any estate as a joint tenancy by conveyance or devise, this should be specifically provided. In practice one frequently finds the expression "as joint tenants and not as tenants in common" but the latter negative words are superfluous.

In Ontario, s. 13 of the *Conveyancing and Law of Property Act*[17] provides:

> 13(1) Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.
>
> (2) This section applies notwithstanding that one of such persons is the spouse of another of them.

The question of whether an intention to take as joint tenants sufficiently appears on the face of the letters patent, assurance or will has caused much difficulty. For example, where a testator devised land to A and B "jointly" it was held that a joint tenancy was created, but where the testator devised land to C "and C's family" it was held that C and C's children took as tenants in common.[18] Yet in a subsequent case a devise to A and B "jointly and individually" was held not to create a joint tenancy.[19] A devise to A and B "to their joint and absolute use" was held to create a joint tenancy.[20] It was relevant in this case that the will had been drafted by a lawyer who could be expected to understand the technical meaning to the use of the word "joint." Likewise, where a devise to A and B "to be owned by them jointly" was likely drawn up by a lawyer, it may be presumed that the word "jointly" was being used in its technical legal sense to mean "joint tenants".[21] However, where there was evidence that a devise had been drafted without the assistance of a lawyer and it appeared that the testatrix had not used the word "jointly" in any "technical legal sense", a devise to A and B "jointly" was held to create a tenancy in common only.[22] A devise to A and B "jointly, and if they decide to sell the property, each of them is to have an equal share in the proceeds of the said sale" created a tenancy in common.[23] If the grantees are described as joint tenants they will take as joint tenants even where the only reference in the deed to joint tenancy is to be found in the description of the grantees.[24] Similarly, where the reference to joint tenancy was found in the *habendum*, a joint tenancy was created.[25]

It has been decided that an agreement of purchase and sale is not an assurance within the meaning of s. 13 of the Ontario *Conveyancing and Law of Property Act* and thus the section is not applicable. Where the purchasers were husband and wife and the agreement was silent as to the capacity or interest that they were acquiring, the court concluded that the surviving wife took the entirety as the surviving tenant of the entirety.[26] Provisions similar to the Ontario statute are found in other provinces.[27]

Equity raises a presumption, quite apart from s. 13, in favour of tenancy in common with respect to partnership property since the right of survivorship has no place in business. However, notwithstanding the equitable presumption, it is still open for the partners to agree that lands will be held in joint tenancy.[28] It is not clear that this equitable presumption applies in Ontario. One 1915 decision found that lands held as partnership property are held in joint tenancy and are not affected by s. 13.[29] However, an Ontario

case decided in 1999 and without any reference to the earlier 1915 decision held that even though the partnership property in question had been originally acquired by the partners as joint tenants, "partnership property is presumed in equity to be held by the partners as tenants in common regardless of how legal title is held".[30]

Although joint ownership can arise by way of promissory estoppel[31] or by application of the doctrines of resulting or constructive trusts,[32] on the face of s. 13, one would presume that the form of joint ownership so arising would be tenancy in common as opposed to joint tenancy.

In Ontario, the *Estates Administration Act*[33] provides that, where real property becomes vested under the Act in two or more persons beneficially entitled under the Act, they take as tenants in common in proportion to their respective interests unless, in the case of a devise, they take otherwise under the provisions of the will of the deceased. The common law rule prevails, however, in the case of executors and trustees who hold as joint tenants because they are excluded from the foregoing provisions of s. 13 of the *Conveyancing and Law of Property Act*.[34] The *Land Titles Act*[35] also provides that, where two or more owners are described as trustees, the property shall be held to be vested in them as joint tenants unless the contrary is expressly stated. Executors and trustees are left as joint tenants for the sake of convenience because, under the rule of survivorship that applies to joint tenancies, the trusts can thus be carried out by the survivors or the last survivor and, in case of the death of the latter, a conveyance of the trust estate can be made by their heir or personal representative to new trustees.

No provision similar to the foregoing provision of the Ontario *Estates Administration Act*[36] appears to have been made in the other provinces but it is provided in New Brunswick and Nova Scotia that every estate vested in trustees or executors as such is held by them in joint tenancy.[37] Also, the trustee legislation in Alberta, British Columbia, Manitoba, and Saskatchewan provides that where an instrument under which a new trustee is appointed to perform a trust contains a declaration by the appointer to the effect that any estate or interest in land subject to the trust shall vest in the persons who by virtue of such instrument are the trustees for performing the trust, that declaration without a conveyance or assignment operates to vest the estate or interest in those persons as joint tenants for the purposes of the trust, and where an instrument under which a retiring trustee is discharged contains such a declaration by the retiring and continuing trustees, the declaration operates to vest the estate or interest in the continuing trustees as joint tenants for the purposes of the trust.[38]

At common law, if two or more persons having no title entered into possession of property in such circumstances as to give them a possessory title under the *Statute of Limitations*, they took as joint tenants[39] unless the circumstances showed that they had separate interests, as where persons beneficially entitled as tenants in common acquired the legal estate by possession, in which case they took it as tenants in common,[40] although if some so entered into possession to the exclusion of the others, they acquired the legal estate in their own shares as tenants in common and in the shares of the others as joint tenants.[41] This acquisition of title by disseisin of the true owner applied where persons in possession under a lawful title remained in possession after the title came to an end, in which case they became joint tenants.[42] In Ontario, however, by s. 14 of the *Conveyancing and Law of Property Act*,[43] where two or more persons acquire land by possession, they are to be considered as holding as tenants in common and not as joint tenants. Similar provision does not appear to have been made in the other provinces.

There are special cases in which the court will declare an estate to be a tenancy in common notwithstanding that documents do not provide for several interests. For example, if purchasers of a property provide the purchase money in unequal shares, they may be declared to be tenants in common notwithstanding the form of conveyance to them.[44] Parol evidence of the circumstances and subsequent dealings is admissible to prove the intent of the parties to hold as tenants in common[45] although apparently statements of the parties are not admissible.[46] On the other hand, if the document indicates on its face the intent to hold as tenants in common, payment by the tenants in equal shares does not change an interest into a joint tenancy.[47] Where a husband and wife purchased land, both signing the agreement, and the wife as well as the husband binding herself to the covenants including the covenant to pay, the husband paying the full purchase price, it was held that the husband, by making his wife a party to the purchase, must be presumed to have made her a gift by way of advancement, that there was no presumption of a resulting trust and that they took as tenants in common.[48] Provisions for children in marriage settlements are, if possible, construed as tenancies in common.[49]

FOOTNOTES

[1] Cited in *Hunt Estate v. Hunt Estate* (2016), 18 E.T.R. (4th) 6 (Sask. C.A.).

[1a] 27 Hen. 8, c. 10 (1535); *Earl of Sussex v. Temple* (1698), 1 Ld. Raym. 310, 91 E.R. 1102; *Stratton v. Best* (1787), 2 Bro. C.C. 233, 29 E.R. 130; *Hales v. Risley* (1673), Pollex. 369 at p. 373, 86 E.R. 578; *Doe d. Hallen v. Ironmonger* (1803), 3 East 533, 102 E.R. 701.

[2] *Oates d. Hatterley v. Jackson* (1742), 2 Str. 1172, 93 E.R. 1107; *Kenworthy v. Ward* (1853), 11 Hare 196, 68 E.R. 1245; *Morgan v. Britten* (1871), L.R. 13 Eq. 28; *Binning v. Binning*, [1895] W.N. 116 (C.A.).

[3] *Woodgate v. Unwin* (1831), 4 Sim. 129, 58 E.R. 50; *Hand v. North* (1863), 10 Jur. N.S. 7.

[4] Co. Litt. 188a.

[5] *Wiscot's Case; Giles v. Wiscot* (1599), 2 Co. Rep. 60b, 76 E.R. 555. And see Co. Litt. l91a; *Van Grutten v. Foxwell*, [1897] A.C. 658 (H.L.), at p. 678.

[6] Co. Litt. 186a.

[7] *Morley v. Bird* (1798), 3 Ves. Jun. 628, 30 E.R. 1192.

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[8] *Morley v. Bird*, *supra*, footnote 7; *Crooke v. De Vandes* (1803), 9 Ves. Jun. 197, 32 E.R. 577; *Walmsley v. Foxhall* (1863), 1 De G.J. & S. 451, 46 E.R. 179 (C.A.).

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[9] *Aston v. Smallman* (1706), 2 Vern. 556, 23 E.R. 961; *Bustard v. Saunders* (1843), 7 Beav. 92, 49 E.R. 998.

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[10] *Withy v. Mangles* (1843), 10 Cl. & Fin. 215, 8 E.R. 724; *Lucas v. Bandreth (No. 2)* (1860), 28 Beav. 274, 54 E.R. 371; *Baker v. Gibson* (1849), 12 Beav. 101, 50 E.R. 998.

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[11] *Eagles v. Le Breton* (1873), L.R. 15 Eq. 148.

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[12] *Hill v. Nalder* (1852), 17 Jur. 224; *Hobgen v. Neale* (1870), L.R. 11 Eq. 48.

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[13] *Walker v. Marquis of Camden* (1848), 16 Sim. 329, 60 E.R. 900; *Stockdale v. Nicholson* (1867), L.R. 4 Eq. 359.

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[14] *Oates d. Hatterley v. Jackson* (1742), 2 Str. 1172, 93 E.R. 1107; *Binning v. Binning*, [1895] W.N. 116 (C.A.).

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[15] *Burt v. Hellyar* (1872), L.R. 14 Eq. 160; *Wood v. Wood* (1843), 3 Hare 65, 67 E.R. 298; *Gregory v. Smith* (1852), 9 Hare 708, 68 E.R. 698.

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[16] *Mason v. Clarke* (1853), 17 Beav. 126, 51 E.R. 980; *Armstrong v. Armstrong* (1869), L.R. 7 Eq. 518.

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[17] R.S.O. 1990, c. C.34.

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[18] *Re Quebec* (1929), 37 O.W.N. 271 (H.C.J.).

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[19] *Re Dupont* (1966), 57 D.L.R. (2d) 109 (Ont. H.C.J.).

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[20] *Re MacGregor Estate* (2001), 191 N.S.R. (2d) 194 (S.C.).

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[21] See *Rafuse v. Borne* (1996), 157 N.S.R. (2d) 118 (S.C.), at para. 35.

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[22] *Sellon v. Huston Estate* (1991), 107 N.S.R. (2d) 6 (S.C.). See also *Re White* (1987), 38 D.L.R. (4th) 631 (Ont. H.C.J.).

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[23] *McEwen v. Ewers*, [1946] 3 D.L.R. 494 (Ont. H.C.J.).

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[24] *Steeves v. Haslam House* (1975), 57 D.L.R. (3d) 357 (Ont. H.C.J.).

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[25] *Humeniuk v. Humeniuk* (1970), 13 D.L.R. (3d) 417 (Ont. H.C.J.).

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[26] *Campbell v. Sovereign Securities & Holding Co. Ltd.* (1958), 13 D.L.R. (2d) 195 (Ont. H.C.J.), affd 16 D.L.R. (2d) 606 (C.A.). It is unlikely that a tenancy by the entirety can still exist, in view of s. 64(1), (2) and (3) of the *Family Law Act*, R.S.O. 1990, c. F.3, which provides:
64(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.
(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.
(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.
For a subsequent consideration of this case see *Demaiter v. Link* (1973), 36 D.L.R. (3d) 164 (Ont. H.C.J.). For an example of the opposite conclusion, *viz.*, that a tenancy by the entirety does not survive married women's property legislation, see *Registrar-General N.S.W. v. Wood* (1926), 39 C.L.R. 46 (Aust. H.C.). See also the *Law of Property Act*, R.S.A. 2000, c. L-7, ss. 5-6.

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[27] *Law of Property Act*, R.S.A. 2000, c. L-7, ss. 5, 6 and 8; *Property Law Act*, R.S.B.C. 1996, c. 377, ss. 11 and 12; *Law of Property Act*, R.S.M. 1987, c. L90 (C.C.S.M., c. L90), s. 15; *Property Act*, R.S.N.B. 1973, c. P-19, s. 20; *Real Property Act*, R.S.N.S. 1989, c. 385, s. 5(1); *Tenants in Common Act*, R.S.N.W.T. 1988, c. T-1, s. 1; *Tenants in Common Act*, R.S.Y. 2002, c. 216, s. 1.

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[28] *Re Sterenchuk Estate; Western Trust Co. v. Demchuk* (1958), 16 D.L.R. (2d) 505 (Alta. S.C. App. Div.).

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[29] *Harris v. Wood* (1915), 7 O.W.N. 611 (H.C.). Followed reluctantly in *Hegeman v. Rogers* (1971), 21 D.L.R. (3d) 272 (Ont. H.C.J.). Also followed in *Higgins v. Orion Insurance Co.* (1981), 135 D.L.R. (3d) 29 (Ont. H.C.J.), revd but not on this issue 17 D.L.R. (4th) 90 (C.A.).

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[30] *Agro Estate v. Agro (Guardian of)* (1999), 26 E.T.R. (2d) 314 (Ont. S.C.J), at para. 39.

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[31] *Stanley v. Stanley* (1960), 23 D.L.R. (2d) 620 (Alta. S.C.), affd 36 D.L.R. (2d) 443 (C.A.), leave to appeal to S.C.C. granted but action subsequently settled 40 W.W.R. 181.

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[32] *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289 (S.C.C.). And see the discussion on matrimonial property in ch. 15, *infra.*

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[33] R.S.O. 1990, c. E.22, s. 14.

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[34] R.S.O. 1990, c. C.34, s. 13(1) and (2).

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[35] R.S.O. 1990, c. L.5, s. 62(3).

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[36] R.S.O. 1990, c. E.22, s. 14.

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[37] *Property Act*, R.S.N.B. 1973, c. P-19, s. 20; *Real Property Act*, R.S.N.S. 1989 c. 385, s. 5(1).

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[38] *Trustee Act*, R.S.A. 2000, c. T-8, s. 17(1) and (2); *Trustee Act*, R.S.B.C. 1996, c. 464, s. 29(1) and (2); *Trustee Act*, R.S.M. 1987, c. T160 (C.C.S.M., c. T160), s. 13(1) and (2).

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[39] *Ward v. Ward* (1871), 6 Ch. App. 789; *Bolling v. Hobday* (1882), 31 W.R. 9.

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[40] *MacCormack v. Courtney*, [1895] 2 I.R. 97; *Marten v. Kearney* (1903), 36 I.L.T. 117.

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[41] *Smith v. Savage*, [1906] 1 I.R. 469.

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[42] *Myers v. Ruport* (1904), 8 O.L.R. 668 (C.A.).

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[43] R.S.O. 1990, c. C.34.

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[44] *Robinson v. Preston* (1858), 4 K. & J. 505, 70 E.R. 211. See also *Lemoine v. Smashnuk*, 2008 ABQB 193. In *Christensen v. Leigh* (2009), 6 Alta. L.R. (5th) 160 (Q.B.), the Alberta Court of Queen's Bench held that in spite of the form of conveyance, which stated that the parties held as joint tenants,

they did not hold as such because they had not provided equal shares in purchasing the property, nor did both have unity of possession. The principles in *Lemoine v. Smashnuk*, *supra*, were applied in *Klein v. Wolbeck*, [2016] 7 W.W.R. 99 (Alta. Q.B.), but in the result the court found that there was an intention to establish a joint tenancy.

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45 *Harrison v. Barton* (1860), 1 J. & H. 287, 70 E.R. 756; *Palmer v. Rich*, [1897] 1 Ch. 134 at p. 143.

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46 *Harrison v. Barton*, *supra*, footnote 45.

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47 *Fleming v. Fleming* (1855), 5 I. Ch. R. 129.

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48 *Re Jay* (1925), 28 O.W.N. 214 (H.C.); *Kearney v. Kearney* (1969), 10 D.L.R. (3d) 138 (Ont. C.A.). For an example of the presumption of advancement operating in such circumstances where the person claiming sole ownership stands *in loco parentis*, see *Young v. Young* (1958), 15 D.L.R. (2d) 138 (B.C.C.A.). In Ontario the presumption of advancement between spouses has been abolished by s. 14 of the *Family Law Act*, R.S.O. 1990, c. F.3, but has been retained between parent and minor children: see *Pecore v. Pecore* (2007), 279 D.L.R. (4th) 513 (S.C.C.), and §11:50.20(b).

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49 *Taggart v. Taggart* (1803), 1 Sch. & Lef. 84 at p. 88; *Rigden v. Vallier* (1751), 3 Atk. 731, 26 E.R. 1219; *Marryat v. Townly* (1748), 1 Ves. Sen. 102, 97 E R. 918; *Re Bellasis' Trust* (1871), L.R 12 Eq. 218; *Mayn v. Mayn* (1867), L.R. 5 Eq. 150; *Liddard v. Liddard* (1860), 28 Beav. 266, 54 E.R. 368.

§14:20.20 Right of Survivorship

The most important incident of a joint tenancy is the right of survivorship, called, since ancient times, the "*jus accrescendi*", the right of surviving joint tenants to have their undivided interests progressively increased by the deaths of other joint tenants, although the survivors continue as joint tenants, the last survivor taking the entirety.[1] This feature of a joint tenancy is the natural consequence of the other incidents of complete unity of title, interest and possession, the interests of joint tenants not only being equal but being one and the same, their combined interests forming one estate. A joint tenancy can be severed and turned into a tenancy in common but, while a joint tenancy continues, all joint tenants have a concurrent interest, no one having a share separate from the others. Hence, if one dies, no person can claim their share by descent because, between such person and the surviving joint tenants, there could not be unity of title or unity of time of vesting and no one can have the right to a separate interest in any part of the property. When one joint tenant dies, there is no gap in the seisin or possession of the survivors or any partial divesting of their interests. The interest of the one who dies is simply extinguished and accrues to the survivors who thus have an increased share of the rents and profits of the property and an increased share on severance of the joint tenancy. If no severance occurs, the last survivor takes the entire estate that was originally created as a joint tenancy, whatever the estate may be. It does not follow, however, that the right of survivorship is of equal value to joint tenants. If, for instance, a joint tenancy is limited to A and B for the life of A, A would take as survivor if B dies first but, if A dies first, nothing is left for B.[2] By reason of the rule of survivorship, the widow of a joint tenant who was survived by another joint tenant had no dower in the property,[3] although a widow of a tenant in common was entitled to dower.[4]

At common law, there can be no joint tenancy between a corporation and an individual or between the Crown and a private person because neither the corporation nor the Crown can die so that the individual could never take as survivor. Also a grant to a corporation is a grant to it and its successors, whereas a grant to an individual is a grant to that individual and their heirs, so that there can never be the blending of interest that is necessary to a joint tenancy. The two consequently take as tenants in common.[5]

In England, however, by statute,[6] bodies corporate are put on the same footing as individuals. In Ontario, the *Conveyancing and Law of Property Act*[7] provides that a body corporate is capable of holding in joint tenancy as if it were an individual and, where a body corporate and an individual or two or more corporate bodies become entitled to property in circumstances which, had the body corporate been an individual, would have created a joint tenancy, they are entitled to hold the property as joint tenants provided the holding by the body corporate is subject to the same conditions and restrictions as attach to the holding of property by a body corporate in severalty and, on the dissolution of the

body corporate, the property devolves on the other joint tenant. Similar provision is made in Alberta,[8] British Columbia,[9] Manitoba[10] and Saskatchewan.[11]

A conflict of principles arises when one joint tenant murders a fellow joint tenant. On the one hand the principle of survivorship compels the conclusion that the victim's share held in joint tenancy devolves upon the murderer by survivorship while, on the other hand, the principle that a wrongdoer is not to benefit from a wrongful act compels the conclusion that the murderer is not to receive the beneficial interest of the victim. To resolve this conflict the court has decided that the victim's share does devolve upon the murderer by right of survivorship but that a constructive trust immediately arises whereby the murderer holds the victim's share as trustee for their estate.[12] However, the murderer's undivided own interest is not forfeited to the victim's estate.[13]

In reaching this result, it is obvious that, in theory in any event, the murderer has benefited to the extent that the murderer's own interest is no longer subject to the right of survivorship. In effect the imposition of the constructive trust "severs"[14] the joint tenancy. However, the courts have accepted this result on the basis that the imposition of the trust interferes less with the rights acquired by the parties and yet does not do violence to the rule of public policy.[15]

Complications arise in the application of the trust when one joint tenant murders one of several joint tenants. In that case it has been held that the beneficiary of the trust is the surviving and innocent joint tenant or tenants.[16] It is important to note that if one joint tenant kills their fellow joint tenant but is found to be not guilty of murder by reason of insanity there is no conflict in the principles as set out here and therefore the living joint tenant takes the property by right of survivorship.[17]

FOOTNOTES

[1] Co. Litt. 191a; 2 Bl. Comm. 183.

[2] Co. Litt. 181b.

[3] *Haskill v. Fraser* (1862), 12 U.C.C.P. 383.

[4] *Ham v. Ham* (1857), 14 U.C.Q.B. 497. Dower has been abolished in all the common law provinces. See §6:40.10, *supra*.

[5] *Law Guarantee and Trust Society, Ltd. v. Governor and Co. of Bank of England* (1890), 24 Q.B.D. 406.

[6] *Bodies Corporate (Joint Tenancy) Act*, 62 & 63 Vict., c. 20 (1899).

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[7] R.S.O. 1990, c. C.34, s. 43(1) and (2).

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[8] *Companies Act*, R.S.A. 2000, c. C-21, s. 9(2), (3) and (4).

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[9] *Business Corporations Act*, S.B.C. 2002, c. 57, s. 31.

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[10] *Law of Property Act*, R.S.M. 1987, c. L90 (C.C.S.M., c. L90), s. 16(1) and (2).

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[11] *Companies Act*, R.S.S. 1978, c. C-23, s. 34(1), (2) and (3).

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[12] *Schobelt v. Barber* (1966), 60 D.L.R. (2d) 519 (Ont. H.C.J.); *Re Gore* (1971), 23 D.L.R. (3d) 534 (Ont. H.C.J.); *Re Pechar; Re Grbic*, [1969] N.Z.L.R. 574; *Singh Estate v. Bajrangie-Singh* (1999), 29 E.T.R. (2d) 302 (Ont. S.C.J.); *Doyle Estate v. Doyle* (2013), 397 N.B.R. (2d) 387 (Prob. Ct.).

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[13] *Re Dreger* (1976), 69 D.L.R. (3d) 47 (Ont. H.C.J.).

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[14] *Kemp v. Public Curator of Queensland*, [1969] Qd. R. 145 (S.C.); *Novak v. Gatien, Hildebrande and Procter* (1975), 25 R.F.L. 397 (Man. Q.B.), at para. 9.

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[15] *Schobelt v. Barber*, *supra*, footnote 12. See also *Doyle Estate v. Doyle* (2013), 397 N.B.R. (2d) 387 (Prob. Ct.).

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[16] *Rasmanis v. Jurewitsch*, [1970] 1 N.S.W.R. 650.

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[17] *Manitoba (Public Trustee) v. LeClerc* (1981), 123 D.L.R. (3d) 650 (Man. Q.B.).

§14:20.30 Release of Interest

Since each joint tenant is seised of the whole estate, the proper method to be followed by one who wishes to vest their interest in the other joint tenants is for this person to release the interest to the others[1] and not grant it to them, although a grant will be construed as a release passing the interest.[2]

If a joint tenant releases their interest to the other joint tenant or tenants, the release does not operate to pass the estate but to extinguish it and the estate then rests exclusively in the other joint tenant or tenants so as to enlarge their interests which they continue to hold as joint tenants under their original title to the whole. However, if there are three joint tenants and one releases their interest to only one of the others, the release operates to pass the estate to the releasee,[3] giving the latter a fresh title to that undivided share, so that the release operates as a severance of that share which will then be held by the releasee and the other tenant as tenants in common, the other two undivided shares continuing to be held by them as joint tenants.[4]

In order for a release, or conveyance, to be effective it must be clear that the releasing joint tenant intends to release their interest. A release for a temporary purpose, with no intention to abandon the interest, will not result in abandonment.[5]

FOOTNOTES

[1] Co. Litt. 9b.

[2] *Eustace v. Scawen* (1624), Cro. Jac. 696, 79 E.R. 604; *Chester v. Willan* (1670), 2 Wms. Saund. 96, 85 E.R. 768.

[3] *Chester v. Willan, supra,* footnote 2.

[4] Littleton's Tenures, ss. 304 and 312.

[5] *O'Bertos v. O'Bertos*, [1975] 2 W.W.R. 86 (Sask. Q.B.).

§14:20.40 No Fiduciary Relation between Joint Tenants

There is no fiduciary relation between joint tenants or tenants in common as between themselves so as to make them subject to the disabilities or liabilities attaching to such a relation[1] and the mere fact that one co-tenant has been allowed to receive the rents, pay interest and taxes and manage the property generally does not create a fiduciary relation.[2]

FOOTNOTES

[1] *Kennedy v. De Trafford*, [1897] A.C. 180 (H.L.).

[2] *Fleet v. Fleet* (1925), 28 O.W.N. 193 (S.C. App. Div.).

§14:20.50 Accounting between Joint Tenants

At common law, there could be no action of account by one joint tenant or tenant in common against another who had occupied the whole property unless the non-occupying co-tenant had appointed the occupying tenant as their bailiff, so as to make the occupying co-tenant liable to account in that capacity.[1] In a court of equity, however, one joint tenant or tenant in common was liable to account in an action by the other co-owners.[2]

By the Imperial statute of 1705,[3] a joint tenant or tenant in common was made liable to account to co-tenants as bailiff if they received more than their just share but not otherwise. It was held that an action of account lay against the co-tenant under the Act whether the co-tenant was in sole occupation or was in receipt of the rents.[4] It has been held that:

> (a) a joint tenant receives more than their just share within the meaning of the statute if they receive money or something else given or paid by another which the co-tenants are entitled to simply by being co-tenants and, if the amount which they receive or keep is more than a proportionate interest as such tenant;
>
> (b) the co-tenant does not receive more than their just share within the meaning of the statute if the co-tenant merely has the sole enjoyment of the property even though by the employment of their own industry and capital the co-tenant makes a profit by the enjoyment and takes the whole of such profit; and
>
> (c) in an action of account, proof of such enjoyment and receipt of the whole profits is not evidence of the occupying co-tenant being bailiff within the meaning of the statute, nor presumptive evidence of the occupying co-tenant having received more than their just share.[5]

It has also been held that:

> (a) the account extends only to whatever was paid or given by the tenants or occupants of the common property to one co-owner in excess of their just share or proportion and that the co-tenant does not receive more than their just share merely by having the whole enjoyment of the property where there was no exclusion or ouster of their co-tenants; and
>
> (b) the co-tenant was not answerable for any profit made out of the property by the use of their industry and capital in tilling and manuring the land or by herding and grazing cattle, or for cutting down trees of suitable age and growth or other acts of waste, or for cutting and taking away a crop of hay, the produce of the property.[6]

No liability arises because of one joint tenant's wilful default in failing to rent the premises.[7]

In Ontario, the *Courts of Justice Act*[8] provides that an action for an accounting may be

brought by a joint tenant or tenant in common, or their personal representative, against a co-tenant for receiving more than the co-tenant's just share. Similar provision is made in Manitoba.[9] Similar express provision does not appear to have been made in the other provinces in which, therefore, the Imperial statute would seem to be in force.[11]

A joint tenant cannot compel the others to contribute to the cost of repairs.[12] In a partition action, however, a co-tenant may be allowed sums properly spent on substantial repairs and improvements[13] and may be charged with excess rents and profits received[14] and, if the co-tenant has been in sole occupation, the co-tenant may be charged with an occupation rent.[15] As each co-tenant is entitled to enter upon the whole property, one who has solely occupied the property is not liable to the others for occupation rent. If the occupying co-tenant performs acts amounting to exclusion of the others, the court may appoint a receiver. If the occupying co-tenant actually receives rent, an account will be ordered. If a joint tenant or tenant in common has been in sole occupation and makes repairs or improvements, they are not entitled to be repaid for them unless they submit to an occupation rent and accounts for the profits received from occupation.[16]

Many of the cases involving an accounting arise when husband and wife own the property as joint tenants. Because of the marital relationship and the possible existence of a gift, the cases must be read with some care.[17] However, certain general principles with respect to accounting for mortgage payments can be stated. First, joint tenants are equally responsible for mortgage payments and, apart from a special agreement, each must accept responsibility for their share of the payments.[18] Second, if one joint tenant mortgages their interest in order to acquire the property, the mortgage only extends to their interest.[19] If the parties make some special agreement as to mortgage payments, that agreement in the normal course will be honoured.[20] Finally, where both joint tenants sign a mortgage in the absence of a special agreement, both are equally entitled to the proceeds of the mortgage.[21]

In British Columbia there is special legislation which permits the court to order that a joint tenant or tenant in common, who pays more than this proportionate share of, *inter alia*, mortgage payments, taxes, insurance premiums, rent, interest, repairs, purchase money instalment, or required payment is to have a lien on the property.[22]

FOOTNOTES

[1] Co. Litt. 186a, 200b; *Pulteney v. Warren* (1801), 2 Ves. Jun. 73, 31 E.R. 944: *Wheeler v. Horne* (1740), Willes 208, 125 E.R. 1135; *Gregory v. Connolly* (1850), 7 U.C.Q.B. 500.

[2] *Strelly v. Winson* (1685), 1 Vern. 297, 23 E.R. 480; *Leake v. Cordeaux* (1856), 4 W.R. 806 (Ch.).

[3] *Administration of Justice Act*, 4 & 5 Anne, c. 16 (1705) (*Statute of Anne*), s. 27.

[4] *Eason v. Henderson* (1848), 12 Q.B. 986, 116 E.R. 1140, revd 17 Q.B. 701, 117 E.R. 1451 *sub nom. Henderson v. Eason*.

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[5] *Supra* (appeal).

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[6] *Re Kirkpatrick; Kirkpatrick v. Stevenson* (1883), 3 O.R. 361 (H.C.J.), citing *Eason v. Henderson*, *supra*, footnote 4 (appeal); *Nash v. McKay* (1868), 15 Gr. 247; *Martyn v. Knowllys* (1799), 8 T.R. 145, 101 E.R. 1313; *Rice v. George* (1873), 20 Gr. 221; *Griffies v. Griffies* (1863), 8 L.T. 758; *Jacobs v. Seward* (1869), L.R. 4 C.P. 328.

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[7] *Osachuk v. Osachuk* (1971), 18 D.L.R. (3d) 413 (Man. C.A.).

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[8] R.S.O. 1990, c. C.43, s. 122(2).

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[9] *Court of Queen's Bench Act*, S.M. 1988-89, c. 4 (C.C.S.M., c. C280), s. 68(2). There was a similar provision in the British Columbia *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 71 providing for an action for account against the personal representative of the joint tenant or tenant in common. Section 150 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 provides generally for proceedings by and against the estate and was intended to carry forward the principle in s. 71.

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[11] See also provisions respecting the granting of equitable relief in *Judicature Act*, R.S.A. 2000, c. J-2, s. 16 (1), (2), (3) and (4); *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 26; *Judicature Act*, R.S.N.S. 1989, c. 240, s. 41; *Judicature Act*, R.S.N.L. 1990, c. J-4, ss. 90-93.

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[12] *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.).

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[13] *Leigh v. Dickeson*, *supra*, footnote 12; *Swan v. Swan* (1820), 8 Price 518, 146 E.R. 1281; *Pascoe v. Swan* (1859), 27 Beav. 508, 54 E.R. 201.

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[14] *Hyde v. Hindly* (1794), 2 Cox. 408, 30 E.R. 188; *Lorimer v. Lorimer* (1820), 5 Madd. 363, 56 E.R. 934.

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[15] *Turner v. Morgan* (1803), 8 Ves. Jun. 143 at p. 145, 32 E.R. 307; *Teasdale v. Sanderson* (l864), 33 Beav. 534, 55 E.R. 476; *Bernard v. Bernard* (1987), 12 B.C.L.R. (3d) 75 (S.C.), supp. reasons 7 A.C.W.S. (3d) 296 (S.C.); *Edwards v. Edwards*, [1997] B.C.J. No. 1858 (QL) (S.C.).

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[16] *Rice v. George* (1873), 20 Gr. 221 at pp. 222, 226; *Irvine v. Irvine* (1959), 67 Man. R. 238 (Q.B.). As to accounts in partition actions, see §§14:20.130, 14:20.140, 14:30.130 and 14:30.140, *infra.*

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[17] See, for example, *Morrison v. Guaranty Trust Co. of Canada* (1972), 28 D.L.R. (3d) 458 (Ont. H.C.J.); and *McCrea v. Berman* (1984), 30 Man. R. (2d) 41 (Q.B.).

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[18] *Irvine v. Irvine*, *supra*, footnote 16.

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[19] *Vermette v. Vermette* (1974), 45 D.L.R. (3d) 313 (Man. C.A.).

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[20] *Shore v. Shore* (1975), 63 D.L.R. (3d) 354 (B.C.S.C.).

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[21] *Porter v. Porter* (1974), 14 R.F.L. 146 (Ont. H.C.J.).

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[22] *Property Law Act*, R.S.B.C. 1996, c. 377, ss. 13, 14; *Re Brook and Brook* (1969), 6 D.L.R. (3d) 92 (B.C.S.C.); *Bernard v. Bernard*, *supra*, footnote 15.

§14:20.70 Acts Enuring to the Common Benefit of Joint Tenants

Since each joint tenant is seised *per mie et per tout*, the estate of joint tenants is one entire estate. Hence, every act done by one joint tenant for their own benefit and the benefit of the others enures to the benefit of all and one cannot prejudice the estate of the others.[1] On this principle of complete unity, it follows that a payment of rent to one joint tenant is a payment to all and that, as regards third parties, delivery of possession to one joint tenant is delivery to all. At common law, possession by one co-owner was possession by all[2] but, in regard to limitations of actions, by the *Real Property Limitation Act, 1833*,[3] possession by co-owners became separate so that, where a husband who was entitled to one moiety remained in uninterrupted possession of the entire property without acknowledging the title of the heir of his deceased wife who was entitled to the other moiety, the heir's claim was barred by the statute.[4]

In Ontario under the *Real Property Limitations Act*[5] where any one or more of several persons entitled to any land or rent as coparcenors, joint tenants or tenants in common has or have been in possession or receipt of the entirety or more than their undivided share or shares of the land, or of the profits thereof, or of the rent for their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by the last-mentioned person or persons or any of them. The effect of the statute is illustrated in *Harris v. Mudie*,[6] where one of several tenants in common entered upon the land and dispossessed a trespasser. It was held that this tenant was, in respect of the co-tenants, in possession simply as a stranger would be and his possession did not enure to the benefit of the co-tenants but, since he so acted by virtue of a legal estate, the act in that respect enured to the benefit of the co-tenants so as to give a fresh starting point for the statute to begin to run against them. Similar provisions are found in Newfoundland and Labrador, Nova Scotia and Prince Edward Island.[7]

In Nova Scotia it was held that, as between co-owners, the exclusive possession of one is to be regarded as adverse to the others and such possession for the period fixed by the *Statute of Limitations* is an absolute bar to the right of partition.[8]

As between spouses who hold as joint tenants, courts have been reluctant to find the necessary *animus* to support a claim of adverse possession.[9]

The British Columbia *Limitation Act*[10] expressly precludes the adverse possessor from gaining any right or title to lands taken by adverse possession. Lands registered under land titles are not subject to the application of the concept of adverse possession.[11]

A co-owner who voluntarily makes improvements to common property may only recover compensation for money expended on a partition or sale in lieu of partition or on other judicial proceedings for a distribution of the common property among the co-owners.[12] The co-owner cannot recover while the property is held in common but the cost of improvements creates an equity that attaches to the land so that on partition the co-owner can recover their expenditure. The equity attaches to the land and passes with it to a purchaser of the co-owner's interest, who may recover the expense of improvement made by their predecessor.[13] The equity may attach in the case of land held by tenants in common or by joint tenancy, but there may be a problem under joint tenancy where the tenant making the improvements dies prior to partition and their interest in the property dies.[14]

The compensation for improvements has been stated to be the amount of increase in the value of the property by the improvement[15] but it may be limited to a maximum of the actual cost of the improvement.[16]

FOOTNOTES

[1] *Tooker's Case; Rud v. Tooker* (1601), 2 Co. Rep. 66b, 76 E.R. 567.

[2] *Ford v. Lord Grey* (1703), 6 Mod. 44, 87 E.R. 807; *Doe d. Thorn v. Phillips* (1832), 3 B. & Ad. 753, 110 E.R. 275.

[3] 3 & 4 Will. 4, c. 27 (1833).

[4] *Ex parte Hasell; Re Manchester Gas Act* (1839), 3 Y. & C. Ex. 617, 160 E.R. 848.

[5] R.S.O. 1990, c. L.15, s. 11. See also §29:60.220; *Tolosnak v. Tolosnak* (1957), 10 D.L.R. (2d) 186 (Ont. H.C.J.).

[6] (1882), 7 O.A.R. 414; *Hartley v. Maycock* (1897), 28 O.R. 508 (H.C.J.).

[7] *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 20; *Real Property Limitations Act*, R.S.N.S. 1989, c. 258, s. 15; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, s. 34.

[8] *McDonald v. Rudderham* (1921), 56 D.L.R. 589 (N.S.S.C.).

[9] *Krause v. Happy* (1960), 24 D.L.R. (2d) 310 (Ont. C.A.); *Gibbins v. Gibbins* (1977), 18 O.R. (2d) 45 (Ont. H.C J.), affd 92 D.L.R. (3d) 285 (Div. Ct.); *Strong v. Colby* (1978), 87 D.L.R. (3d) 589 (Ont. H.C.J.); *Cormier v. Cormier* (1989), 102 N.B.R. (2d) 13 (C.A.); *Gorman v. Gorman* (1998), 110 O.A.C. 87.

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[10] S.B.C. 2012, c. 13, s. 28.

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[11] For a discussion of this topic, see ch. 29.

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[12] *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.); *McMahon v. Public Curator of Queensland and McMahon*, [1952] St. R. Qd. 197 (S.C.); *Brickwood v. Young and Minister for Public Works of New South Wales*, [1905] 2 C.L.R. 387; *Ruptash v. Zawick* (1956), 2 D.L.R. (2d) 145 (S.C.C.).

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[13] *Brickwood v. Young and Minister for Public Works of New South Wales*, *supra*, footnote 12.

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[14] *Re Byrne* (1906), 6 S.R.N.S.W. 532.

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[15] *Brickwood v. Young and Minister for Public Works of New South Wales*, *supra*, footnote 12; *Noack v. Noack*, [1959] V.R. 137 (S.C.).

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[16] *McMahon v. Public Curator of Queensland and McMahon*, *supra*, footnote 12.

§14:20.120 Severance of a Joint Tenancy

A joint tenancy depends on the continuance of the three unities of title, interest and possession and the destruction of any of such unities severs the joint tenancy and creates a tenancy in common or several tenancies.[1] It is the right of a joint tenant to thus sever the joint tenancy. The unity of time of vesting only applies to the original creation of the joint tenancy and cannot, therefore, be affected by any subsequent act.

The unity of title is destroyed if one joint tenant assigns their share to a third person[2] or mortgages their share to a third person.[3] If there were initially only two joint tenants such an act creates a tenancy in common between the assignee and the other joint tenant.[4] If there were more than two joint tenants it creates a tenancy in common between the assignee and the others, although the latter as between themselves continue as joint tenants.[5]

A severance may be effected by one joint tenant executing and registering a conveyance to themself.[6] A severance may also occur when the sale proceeds of land held in joint tenancy are deposited into a joint account and then one of the two joint tenants transfers proceeds to herself and her husband, a third party.[6a] It may also be effected by one joint tenant giving the property to a third person by a valid declaration of trust.[7] It is necessary, of course, that the trust be completely constituted, thereby indicating an intention on the part of the joint tenant to divest themself of their interest.

It has been decided that a mere agreement for sale by one joint tenant to a third party does not, in itself, effect a severance. Thus, where one joint tenant who entered into an agreement of purchase and sale died before the actual sale took place, the remaining joint tenant took by survivorship and the agreement became a charge upon the property.[8] On the other hand, it has also been held that a severance is created once a conveyance is given. It is not necessary that the conveyance be registered to effect the severance even where the applicable recording statute requires that the conveyance be registered to be effective "except as against the person making the same".[9]

The Torrens or land titles legislation[10] does not affect the normal common law incidences of a joint tenancy, one of which is the right to effect a severance by conveying one's share. A transfer under land titles legislation has the same effect as a deed under seal and does not have to be registered in order to sever the joint tenancy.[11] However, the legislation may have an effect on the right of a joint tenant to sever the joint tenancy by way of mortgage. The generally accepted view of a mortgage under the Torrens system is that a mortgage has effect only as security and does not operate as a transfer of the interest or estate charged. If that is the case, the unity of title is not destroyed by the giving of a

mortgage.[12]

A conveyance by one joint tenant to the other of an undivided half of the property puts an end to the joint tenancy. The parties then become tenants in common so that the survivor could devise by will the half that had not been conveyed.[13]

The filing of a writ of execution against the interest of one joint tenant does not in itself effect a severance. Although the joint tenant's estate is severable and their interest can be sold under execution, something more by way of action such as actual seizure or advertisement is required.[14] It has been held that the registration of a judgment against the estate of one joint tenant does not sever the joint tenancy. The owner of the registered judgment has only a charge on the land but that does not constitute an enforceable contract to alienate, which might operate as a severance.[15] The four unities remain undisturbed until the lands are placed in execution by seizure with a view to sale.[16] However, where a joint tenant makes an authorized assignment in bankruptcy, the assignment severs the joint tenancy and turns it into a tenancy in common.[17]

A grant from one of two joint tenants in fee simple to a third person for life severs the joint tenancy as the freehold is in the third person and the other joint tenant under different titles. In that case, they hold as tenants in common.[18] However, the joint tenancy is only suspended and, if the grantee dies during the joint lives, the joint tenancy revives.[19] If during the period of suspension the grantor or the other former joint tenant dies, the joint tenancy is permanently severed because there is no right of survivorship. For the right of survivorship to exist, the land must be held in joint tenancy at the time of the death of the person who dies first.[20]

The effect of a lease, given by one joint tenant to a third party, on the joint tenancy, is not free from doubt. It has been suggested that a lease for years confers a right to possession which arises by separate title and that, thus, the lease effects a severance of the whole estate both before and after the lease.[21] On the other hand, it has been suggested that the lease does not sever the joint tenancy.[22] In *Clerk v. Clerk*[23] the court concluded that if one of two joint tenants in fee simple leases their share for a term of years, the lease does sever the joint tenancy and the lease is binding on the other joint tenant after the death of the lessor, whether or not the lessee enters into possession during the life of the lessor. Against it has been suggested that where one joint tenant leases their share to the other, the joint tenancy is severed.[24]

In an unusual case,[25] three persons were joint tenants as devisees in trust with the power to lease to one of them. A lease was made under the power but it was held that the lease by a joint tenant to themself could not effect a severance. However, the lease by the remaining two would sever the joint tenancy during the term of the lease.

Finally, where the joint tenancy is only for a term of years, a lease by one joint tenant for a term less than the residue severs the joint tenancy.[26]

A second accepted method of severing a joint tenancy is by mutual wills agreed to between the joint tenants. Thus, where two joint tenants agreed to dispose of leasehold property by will and trust for each other for life and for their nieces after the death of the survivor, and the survivor later made a will disposing of the property in a different manner, it was held that the agreement between the joint tenants carried out by the making of the wills severed the joint tenancy, and the property had to be administered as

a tenancy in common.[27] The execution of mutual wills by joint tenants whereby the tenants agree to dispose of their interest severs the joint tenancy and converts it into a tenancy in common.[28] A disposition by one joint tenant under their will would not effect the severance as no common intention could be shown. The will does not take effect until the joint tenant's death at which time the other joint tenant's vested right of survivorship takes effect.[29] However, the execution of mutual wills by agreement does effect a severance.

Underlying the proposition that a joint tenancy may be severed by mutual wills is the principle that a joint tenancy may be severed by mutual agreement or by the conduct of the joint tenants. If joint tenants enter into a mutual agreement to hold as tenants in common the joint tenancy is severed.[30] Thus, where joint tenants agree to sell the property and to divide the proceeds between them, the joint tenancy is severed and the property then is held as a tenancy in common.[31] Moreover, it is not necessary that the agreement to sell be carried through to the point of conveyance before the joint tenancy is severed.[32] Thus, where a husband and wife entered into a separation agreement whereby both parties agreed that each was to have a one-half interest in any proceeds of the sale of the property held as joint tenants, and where the husband gave the wife an irrevocable option to buy his interest, the joint tenancy was severed from that moment. The subsequent purchase by the parties of a second parcel as joint tenants did not alter the severance of the first parcel.[33] However, in *Tavenor Estate v. Tavenor*,[33a] the Newfoundland Court of Appeal held that an agreement providing that the parties were to continue to have an "equal interest" in a holding company that had been held jointly did not affect a severance of the joint tenancy as the circumstances disclosed that the existing arrangement between the parties was to continue.

In order for a joint tenancy to be severed by conduct, the acts of the joint tenants must be such as to preclude the survivor from claiming an interest by survivorship.[34] In the matrimonial context, the mere fact that a couple is separated is insufficient to establish the severance; evidence of a clear intention is required.[34a] When joint tenants by their conduct treat their interests as several, the joint tenancy is severed and it is not important that the joint tenants were unaware that their original interests were joint.[35] However, the mere fact that a trustee realizes part of an estate and pays the proceeds in certain proportions to the joint tenants does not sever the joint tenancy as to the rest of the estate that has not been received by the joint tenants.[36]

A more difficult issue to resolve is whether a joint tenancy can be severed by the unilateral intention of one joint tenant. An attempt to sever a joint tenancy through a will is inffective.[36a] In *Re Draper's Conveyance; Nihan v. Porter*,[37] the court concluded that the issuance of a writ to commence a partition application was sufficient to sever a joint tenancy. The issuance of the writ indicated a clear unilateral intention on the part of one joint tenant to sever the joint tenancy. However, in *Nielson-Jones v. Fedden*,[38] the court concluded that a unilateral declaration by one joint tenant of an intention to sever is incapable in law of effectively severing a joint tenancy. It also concluded that a course of negotiations not resulting in a final agreement between the joint tenants will never constitute a course of dealing capable of effecting a severance. However, that latter case was overruled in *Burgess v. Rawnsley*,[39] where the court concluded that a course of dealing between two joint tenants whereby negotiations were carried on to sever the joint tenancy, even in the absence of any firm agreement, could result in a severance of the joint tenancy. In that case it was sufficient, if there were a course of dealing in which one of the parties made clear to the other the desire that the joint tenancy should be severed,

for a severance to result. Several Canadian cases illustrate this confusion. In *Rodrique v. Dufton*[40] the court concluded that a severance was not effected by the bringing of a partition application or by a unilateral declaration of an intent to sever. Similarly, in *Munroe v. Carlson*[41] the court concluded that the bringing of a Partition Act application that was discontinued did not effect a severance.

However, in *Walters v. Walters*[42] the court concluded that there was a course of dealing between the joint tenants that amounted to voluntary partition. In that case, the matrimonial home was held in joint tenancy. The parties separated and the wife commenced a divorce action, together with a motion under the *Partition Act*[43] and a motion under the *Married Women's Property Act*.[44] Thereafter, the parties began negotiations on the basis that the wife was entitled to an undivided one-half interest in the matrimonial home. Mutual offers to purchase were presented between the joint tenants. Before the hearing of the partition application, the husband died and the wife claimed entitlement to the whole of the matrimonial home. The court concluded that the husband and wife had established a course of dealing to sever the joint tenancy by mutual agreement. In reaching that conclusion the court expressly stated that it was not sufficient to rely on a unilateral intention.[44a]

The unity of interest is destroyed so as to sever the joint tenancy if one of several joint tenants for life acquires the fee simple by purchase or descent.[45] Similarly, there is a severance of the joint tenancy if there is a life estate to A with remainder in fee simple to B and C as joint tenants and thereafter A grants their life estate to B. In that case, B holds the one undivided share in fee simple and the other undivided share for the life of A with remainder to C in fee. However, it is otherwise if A merely surrenders their life estate to B because the surrender inures to the benefit of both B and C and as the life estate merges with the fee B and C become joint tenants in fee simple and possession.[46] In a surrender, the smaller estate is given up to and merges in the greater estate.[47]

It is worthwhile at this point to emphasize the distinction between the original limitation of a remainder in fee simple to one of several joint tenants for life and the subsequent acquisition of the fee by one to whom it was not originally limited. As indicated earlier,[48] one of several joint tenants may have an additional estate in severalty limited to them by the same instrument that created the joint tenancy, as in the case of a grant to A and B for their lives with the remainder to the heirs of A, in which case A and B have a joint tenancy for their lives and A has the remainder in fee simple.[49] It is only when the remainder or reversion in fee simple is not originally limited to a joint tenant for life but is otherwise subsequently acquired by them that this life estate is merged so as to sever the joint tenancy.

The unity of possession is destroyed and the joint tenancy severed if the property is partitioned by the joint tenants either by mutual agreement or by compulsion under statutory proceedings. At common law, the joint tenants could only partition by mutual agreement and none could compel the others to partition.[50]

A statutory right to compel partition was conferred by the Imperial Statutes of Partition[51] under which the court had no power to refuse partition or to order sale in lieu of partition but, by the Partition Acts,[52] wide powers were conferred on the court to order sale in lieu of partition if the nature of the property and the interests of the parties made it desirable. It is not possible in this work to deal with all of the voluminous references in provincial statutes to real property and this is particularly true of the references to

powers of the courts, under provincial rules of practice and statutes, to deal with the property of persons who are not *sui juris* or are absentees or under disability of some nature. Therefore, with the exception of the following notations, further discussion of the topic of severance will be confined to partition by agreement and partition or sale by court order.

Under s. 18(2) of the Ontario *Settled Estates Act*[53] where two or more persons are entitled as joint tenants, tenants in common or coparcenors, any of them may apply to the court to exercise the powers conferred by the Act.

It is also to be noted that where an application was made to the court on behalf of an infant, one of two joint tenants, to authorize a sale of the property and division of the proceeds between the infant and the adult joint tenant, the sale was sanctioned on the grounds that a sale was in the interest of both parties but upon the condition that the proceeds were to be paid into court to remain until the infant attained majority.[54]

If land held by joint tenants is sold for taxes, any of them may redeem the property, it being unnecessary that all join in redeeming.[55] If one of several joint tenants purchases land at a tax sale without any prior agreement that the purchase is to be for their joint benefit and no fraud is involved, that joint tenant is entitled to hold the land for their sole benefit[56] and the rule is the same if they are one of several tenants in common.[57]

FOOTNOTES

[1] 2 Bl. Comm. 195.

[2] *Partriche v. Powlet* (1740), 2 Atk. 54, 26 E.R. 430.

[3] *York v. Stone* (1709), 1 Salkeld 158, 91 E.R. 146; *Re Pollard's Estate and South-Eastern Ry. Co's Acts* (1863), 3 De G.J. & S. 541, 46 E.R. 746; *Re Sharer; Abbott v. Sharer* (1912), 57 Sol. Jo. 60; *Canada Life Assurance Co. v. Kennedy* (1978), 89 D.L.R. (3d) 397 (Ont. C.A.).

[4] *Partriche v. Powlet*, *supra*, footnote 2.

[5] Littleton's Tenures, s. 294. See *Jansen v. Niels Estate*, 2017 CarswellOnt 5545 (C.A.).

[6] *Murdoch v. Barry* (1975), 64 D.L.R. (3d) 222 (Ont. H.C.J); *Horne v. Evans* (1987), 39 D.L.R. (4th) 416 (Ont. C.A.), at p. 421: "Clearly a deed from a joint tenant to himself or herself destroys the unity of title essential to the continuance of a joint tenancy and operates to create a tenancy in common." See also *Bank of Montreal v. Bray* (1997), 36 O.R. (3d) 99 (C.A.), at p. 107. See also *Duschl*

(Attorney of) v. Duschl Estate (2008), 39 E.T.R. (3d) 229 (Ont. S.C.J.). But see *DeLong v. Lewis Estate* (2012), 321 N.S.R. (2d) 398 (S.C.), affirmed 2013 CarswellNS 424 (C.A.) (putting an invalid deed in the registry did not act to sever).

6a *Zeligs Estate v. Janes* (2016), 402 D.L.R. (4th) 88 (B.C.C.A.).

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7 *Re Mee* (1971), 23 D.L.R. (3d) 491 (B.C.C.A.).

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8 *Foort v. Chapman* (1973), 37 D.L.R. (3d) 730 (B.C.S.C.). But see *Brown v. Raindle* (1796), 3 Ves. Jun. 256, 30 E.R. 998; *Partriche v. Powlet* (1740), 2 Atk. 54, 26 E.R. 430.

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9 *Stonehouse v. British Columbia (Attorney General)* (1961), 31 D.L.R. (2d) 118 (S.C.C.); *Havlik v. Havlik Estate* (2000), 262 A.R. 88 *sub nom. Havlik v. Whitehouse* (Q.B.), affd [2002] 1 W.W.R. 270 (C.A.), supp. reasons [2002] 4 W.W.R. 420 (C.A.). See also H.R. Raney, "Commentary", 41 Can. Bar Rev. 272 (1963).

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10 Such as the *Land Titles Act*, R.S.O. 1990, c. L.5.

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11 *Re Cameron* (1957), 11 D.L.R. (2d) 201 (Ont. H.C.J.). See also *Felske Estate v. Felske Estate*, [2008] 2 W.W.R. 154 *sub nom. Alberta (Public Trustee) v. Felske Estate* (Alta. Q.B.), affd [2009] 11 W.W.R. 37 *sub nom. Alberta (Public Trustee) v. Felske Estate* (C.A.).

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12 *Lyons v. Lyons*, [1967] V.R. 169 (S.C.).

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13 *Doe d. Eberts v. Montreuil* (1849), 6 U.C.Q.B. 515.

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14 *Power v. Grace*, [1932] 2 D.L.R. 793 (Ont. C.A.); *Sirois v. Breton* (1967), 62 D.L.R. (2d) 366 (Co. Ct.); *Bank of Montreal v. Pawluk*, [1991] 5 W.W.R. 57 (Alta. Q.B.), affd 88 D.L.R. (4th) 570 (C.A.); *Maimets v. Williams* (1997), 11 R.P.R. (3d) 276 (Ont. C.A.); *Royal & SunAlliance Insurance Co. v. Muir* (2011), 9 R.P.R. (5th) 104 (Ont. S.C.J.); *Toronto-Dominion Bank v. Phillips* (2014), 376 D.L.R. (4th) 566 (Ont. C.A.) (debtors consented to order, authorizing payment to execution creditor which completed execution and severed joint tenancy).

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15 *Re Young* (1968), 70 D.L.R. (2d) 594 (B.C.C.A.); *Maroukis v. Maroukis*, [1984] 2 S.C.R. 137 at p. 142.

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16 *R. v. McDonald* (1969), 8 D.L.R. (3d) 666 (B.C.S.C.). For an example of the step necessary to sever, see *Sunglo Lumber Ltd. v. McKenna* (1974), 48 D.L.R. (3d) 154 (B.C.S.C.). See also *Royal & SunAlliance Insurance Co. v. Muir*, *supra*, footnote 14.

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17 *Re White*, [1928] 1 D.L.R. 846 (Ont. S.C.); *Re Butler's Trusts; Hughes v. Anderson* (1888), 38 Ch. D. 286 (C.A.); *Re Chisick* (1968), 62 W.W.R. 586 (Man. C.A.); *Royal Bank of Canada v. Oliver (Trustee of)* (1991), 85 D.L.R. (4th) 122 (Sask. C.A.), leave to appeal to S.C.C. refused 88 D.L.R. (4th) vi.

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18 Co. Litt. 191b.

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19 Co. Litt., 193a; *Power v. Grace*, [1932] 2 D.L.R. 793 (Ont. C.A.).

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20 Co. Litt., 188a.

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21 Megarry and Wade, p. 494.

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22 Co. Litt. 185a. See also *Power v. Grace*, *supra*, footnote 19, at p. 796: ". . . a lease for years, by one of two joint-tenants in fee, of his share, does not sever the tenancy".

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23 (1694), 2 Vern. 323, 23 E.R. 809; *Sorensen v. Sorensen* (1976), 69 D.L.R. (3d) 326 (Alta. S.C.), revd on other grounds 90 D.L.R. (3d) 26 (C.A.).

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24 *Cowper v. Fletcher* (1865), 6 B. & S. 464 at p. 472, 122 E.R. 1267. But see *Sorensen v. Sorensen*, *supra*, footnote 23, where it was concluded that a lease to one of the joint tenants did not sever the joint tenancy.

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25 *Napier v. Williams*, [1911] 1 Ch. 361.

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26 Co. Litt. 192a.

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27 *Re Wilford's Estate; Taylor v. Taylor* (1879), 11 Ch. D. 267; *Re Gillespie* (1968), 3 D.L.R. (3d) 317 (Ont. C.A.).

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28 *Heys Estate; Walker v. Gaskill*, [1914] 111 L.T. 941 at p. 942; *Szabo v. Boros* (1967), 64 D.L.R. (2d) 48 (B.C.C.A.); *Bryan v. Heath* (1979), 108 D.L.R. (3d) 245 (B.C.S.C.).

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29 2 Cruise's *Digest of the Laws of England Respecting Real Property* (London: Butterworths, 1804), tit. 18, c. 2, s. 19.

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30 *Frewen v. Relfe* (1787), 2 Bro. C.C. 220, 29 E.R. 123; *Williams v. Hensman* (1861), 1 J. & H. 546, 70 E.R. 862; *Tompkins Estate v. Tompkins* (1992), 86 D.L.R. (4th) 759 (B.C.S.C.), affd 99 D.L.R. (4th) 193 (C.A.); *Pearlson Estate v. Pearlson* (2001), 41 E.T.R. (2d) 49 (B.C.S.C.), reasons as to costs 2001 BCSC 1569, affd 35 R.F.L. (5th) 433 (C.A.).

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31 *Schofield v. Graham* (1969), 6 D.L.R. (3d) 88 (Alta. S.C.).

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32 *Schofield v. Graham*, *supra*, footnote 31; *Ginn v. Armstrong* (1969), 3 D.L.R. (3d) 285 (B.C.S.C.); *Sampaio Estate v. Sampaio* (1992), 90 D.L.R. (4th) 122 (Ont. Ct. (Gen. Div.)); *Feinstein v. Ashford*, 2005 BCSC 1379; *Belbin Estate v. Belbin (Guardian of)* (2005), 247 Nfld. & P.E.I.R. 267 (Nfld. & Lab. S.C.T.D.); *Obradovic Estate v. Obradovic*, 2013 CarswellAlta 1461 (Q.B.); *Corbett Estate v. Corbett Estate* (2015), [2016] 6 W.W.R. 578 (Man. Q.B.).

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33 *McKee v. National Trust Co.* (1975), 56 D.L.R. (3d) 190 (Ont. C.A.), revg 49 D.L.R. (3d) 689 (H.C.J.). See also *Walters v. Walters* (1979), 84 D.L.R. (3d) 416*n* (Ont. C.A.); *Ginn v. Armstrong* (1969), 3 D.L.R. (3d) 285 (B.C.S.C.); *Jurevicius v. Jurevicius* (2011), 4 R.F.L. (7th) 403 (Ont. S.C.J.), addt'l reasons re custody, access and costs 15 R.F.L. (7th) 122 (S.C.J.); *Hansen Estate v. Hansen* (2012), 347 D.L.R. (4th) 491 (Ont. C.A.).

33a (2008), 272 Nfld. & P.E.I.R. 299 (Nfld. & Lab. C.A.), affg 262 Nfld. & P.E.I.R. 1 (T.D.).

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34 *Re Wilks; Child v. Bulmer*, [1891] 3 Ch. 59; *Walker v. Dubord* (1992), 92 D.L.R. (4th) 257 (B.C.C.A.); *Berry Estate v. Berry* (2001), 90 B.C.L.R. (3d) 347 (S.C.). See also *Hansen Estate v. Hansen*, *supra*, footnote 33; *Jansen v. Niels Estate*, 2017 CarswellOnt 5545 (C.A.).

34a See *Re Walters* (1977), 79 D.L.R. (3d) 122 (Ont. H.C.), affirmed 84 D.L.R. (3d) 416 (note) (C.A.); *Sampaio Estate v. Sampaio* (1992), 90 D.L.R. (4th) 122 (Ont. Ct. (Gen. Div.)); *Jurevicius v. Jurevicius* (2011), 4 R.F.L. (7th) 403 (Ont. S.C.J.), additional reasons 15 R.F.L. (7th) 122 (S.C.J.); *Su v. Lam* (2012), 77 E.T.R. (3d) 278 (Ont. S.C.J.); *MacNeil Estate v. Bower* (2016), 135 O.R. (3d) 90 (S.C.J.). See also *Siwak v. Siwak*, [2016] 9 W.W.R. 61 (Man. Q.B.).

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35 *Williams v. Hensman*, *supra*, footnote 30.

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36 *Leak v. Macdowall* (1862), 32 Beav. 28, 55 E.R. 11.

36a *Felske Estate v. Felske Estate*, [2009] 11 W.W.R. 37 *sub nom. Alberta (Public Trustee) v. Felske Estate* (Alta. C.A.), affg [2008] 2 W.W.R. 154 *sub nom. Alberta (Public Trustee) v. Felske Estate* (Q.B.).

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37 [1967] 3 All E.R. 853 (Ch.).

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38 [1974] 3 All E.R. 38 (Ch. Div.).

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39 [1975] 3 All E.R. 142 (C.A.); cited in *Chafe v. Hunter* (2013), (*sub nom.* Re Hunter Estate) 340 Nfld. & P.E.I.R. 317 (N.L. T.D.), affirmed 357 Nfld. & P.E.I.R. 324 (C.A.).

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40 (1976), 72 D.L.R. (3d) 16 (Ont. H.C.J.); *Walker v. Dubord* (1992), 92 D.L.R. (4th) 257 (B.C.C.A.); *O'Connor v. Lindsay* (1987), 51 Man. R. (2d) 65 (Q.B.); *Davison v. Davison Estate*, 2009 MBCA 100; *Gorski v. Gorski*, [2011] 10 W.W.R. 386 (Man. Q.B.). And see *Thorsteinson v. Olson*, [2014] 10 W.W.R. 768 (Sask. Q.B.), affd [2017] 2 W.W.R. 11 (C.A.).

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41 (1975), 59 D.L.R. (3d) 763 (B.C.S.C.). See also *Sorensen v. Sorensen* (1976), 69 D.L.R. (3d) 326 (Alta. S.C.), revd on other grounds 90 D.L.R. (3d) 26 (C.A.).

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42 (1977), 79 D.L.R. (3d) 122 (Ont. H.C.J.), affd 84 D.L.R. (3d) 416*n* (C.A.); followed in *Sampaio Estate v. Sampaio* (1992), 90 D.L.R. (4th) 122 (Ont. Ct. (Gen. Div.)). See also *Sowka v. Sowka* (2014), 54 R.F.L. (7th) 371 (Ont. S.C.J.).

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43 R.S.O. 1970, c. 338.

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44 R.S.O. 1970, c. 262.

44a But see *Tavenor Estate v. Tavenor* (2008), 272 Nfld. & P.E.I.R. 299 (Nfld. & Lab. C.A.), affg 262 Nfld. & P.E.I.R. 1 (S.C.).

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45 *Wiscot's Case; Giles v. Wiscot* (1599), 2 Co. Rep. 60b, 76 E.R. 555; Co. Litt. 152b.

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46 Co. Litt. 182b, 183a.

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47 2 Bl. Comm. 326; Co. Litt. 336b, 50a.

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[48] See §10:20.10, *supra*.

[49] 2 Bl. Comm. 181; *Wiscot's Case; Giles v. Wiscot*, *supra*, footnote 45.

[50] Littleton's Tenures, ss. 290, 318.

[51] 31 Hen. 8, c. 1 (1539); 32 Hen. 8, c. 32 (1540).

[52] 31 & 32 Vict., c. 40 (1868); 39 & 40 Vict., c. 17 (1876).

[53] R.S.O. 1990, c. S.7.

[54] *Re Laws* (1912), 6 D.L.R. 912 (Ont. H.C.J.).

[55] *Ray v. Kilgour* (1907), 9 O.W.R. 641 (Div. Ct.).

[56] *Janisse v. Stewart* (1925), 28 O.W.N. 446 (H.C.J.).

[57] *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (C.A.), affd [1897] A.C. 180 (H.L.).

§14:20.130 Joint Tenancy — Partition by Agreement

Parties who are *sui juris* may agree to partition the property and the agreement is mutually enforceable by and against them and persons deriving title under them in an action for specific performance.[1] Land of any tenure, including leaseholds,[2] and all corporeal hereditaments and estates therein, including reversions and remainders[3] and even mere expectancies,[4] may be partitioned by agreement. Easements may usually be exercised by the separate owners if the dominant tenement is partitioned[5] and, as against the servient tenement, the ordinary rule will apply that no greater right may be enjoyed than if there had been no division.[6] The division into parts may be made by the parties themselves or by some person nominated by them and, in either case, the allotment of the parts among the parties may be determined by their choice, by lot or by the award of the nominated third party.[7] Where the division is by a nominated third party, that person must be impartial and consider the interests of all parties.[8] Where joint tenants in tail made an agreement for division of the property and thereafter enjoyed their allotments for 36 years, specific performance was ordered in an action then brought.[9]

In England, under the *Real Property Act* of 1845,[10] a deed is necessary to effectuate a partition. In Ontario, under the *Conveyancing and Law of Property Act*,[11] a partition of "land" (defined in s. 1 to include messuages, tenements, corporeal or incorporeal hereditaments and any undivided share in land) is void at law unless made by deed. Similar provision is made in the *Property Act* of New Brunswick.[12] Equity will, however, enforce an agreement not made by deed if the agreement is capable of specific performance.[13]

FOOTNOTES

[1] *Knollys v. Alcock* (1800), 5 Ves. Jun. 648, 31 E.R. 785; *Pearson v. Lane* (l809), 17 Ves. Jun. 101, 34 E.R. 39; *Heaton v. Dearden* (1852), 16 Beav. 147, 51 E.R. 733; *Paine v. Ryder* (1857), 24 Beav. 151, 53 E.R. 314.

[2] *North v. Guinan* (l829), Beat. 342.

[3] *Oakley v. Smith* (1759), Amb. 368, 27 E.R. 245.

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[4] *Beckley v. Newland* (1723), 2 P. Wms. 182, 24 E.R. 691; *Wethered v. Wethered* (1828), 2 Sim. 183, 57 E.R. 757.

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[5] *Newcomen v. Coulson* (1877), 5 Ch. D. 133 (C.A.), at p. 141. Adopted in *Locke v. Scharfe* (1958), 17 D.L.R. (2d) 51 (Ont. H.C.), at p. 57; *Golisky v. Romaniuk*, [1951] O.W.N. 401 (C.A.), at p. 403; and *Northern Agency Limited v. Army and Navy Department Store Limited*, [1939] 1 W.W.R. 21 (Alta. S.C. App. Div.), at p. 27.

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[6] *Menzies v. MacDonald* (1856), 2 Jur. N.S. 575 (H.L.).

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[7] Littleton's Tenures, 243, 244, 246. For an interesting case on this point, see *Cooper v. Deggan* (2003), 16 B.C.L.R. (4th) 248 (C.A.), affg with clarification as to costs 30 B.L.R. (3d) 99 (S.C.).

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[8] Co. Litt. 166b.

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[9] *Graham v. Graham* (1858), 6 Gr. 372.

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[10] 8 & 9 Vict., c. 106 (1845), s. 3.

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[11] R.S.O. 1990, c. C.34, s. 9.

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[12] R.S.N.B. 1973, c. P-19, s. 11(1).

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[13] *Walsh v. Lonsdale* (1882), 21 Ch. D. 9 (C.A.).

§14:20.140 Joint Tenancy — Partition or Sale by Court Order

In Ontario, provision is made by the *Partition Act*[1] for the partition or sale of land. The provisions may be summarized as follows. Land is defined to include lands, tenements and hereditaments and all estate and interests therein. All joint tenants, tenants in common, coparcenors and other persons interested in land may be compelled to make partition or sale of the land or any part thereof, whether the estate is legal and equitable or equitable only. Any person interested in land, or the guardian of a minor entitled to the immediate possession of an estate therein, may take proceedings for the partition of land or for its sale under directions of the court if the court considers a sale to be more advantageous to the parties but, if the land is held in joint tenancy, tenancy in common or coparcenary by reason of a devise or intestacy, no proceedings may be taken until one year after the death of the testator or intestate in whom the land was vested. If any person interested in the land has not been heard of for three or more years and it is uncertain whether such person is living or dead, the court may, upon the application of anyone interested in the land, appoint a guardian to represent the absentee and those who, in the event of the absentee's death, would be entitled to their interest. The acts of such guardian are binding on all those represented by the guardian, including minors, as if they were done by the absentee or those persons. If proof of absence affords reasonable ground for believing the absentee to be dead, the court may, on the application of the guardian or of anyone interested in the estate represented by the guardian, deal with such estate or the proceeds thereof and order payment of the proceeds or the income thereof to the person who, if the absentee were dead, would be entitled thereto. In any action or proceeding for partition or sale in lieu of partition, if there is a life tenant who is a party, the court may determine whether the life estate should be sold or exempted from sale, having regard to the interests of all parties. If a sale including the life estate is ordered, all interest of the life tenant passes thereby, no conveyance or release by the life tenant to the purchaser is necessary and the purchaser is freed from all claims respecting the life estate whether it be in an undivided share or in the whole or any part of the premises sold. The court may also, out of the purchase money, direct payment to the life tenant of a gross sum deemed, on the principles applicable to life annuities, as sufficient satisfaction for the life estate, or may direct payment of an annual sum or of the income as seems just and, for that purpose, order investment of the purchase money or any part thereof as may be necessary. Partition or sale by the court is as effectual for partitioning or conveying the estate or interest of a minor or mentally incompetent person who is a party as of a person who is competent to act.

In British Columbia, the *Partition of Property Act*[2] provides that all joint tenants, tenants in common, coparcenors and other persons interested in land may be compelled to make partition or sale of the land or any part thereof, whether the estate is legal or equitable or equitable only. The court may direct sale if half or more of the persons interested require a sale and distribution of the proceeds instead of division of the property.

The court may direct sale and distribution of the proceeds if it thinks this more beneficial to the parties interested by reason of the nature of the property, the number of parties interested, the disability of some, or other circumstance. The court may direct sale and distribution of the proceeds if one party requires this and the others do not undertake to purchase that party's share and, in the case of the undertaking, the court may order valuation.[2a] Provision is also made for a request for sale or undertaking to purchase on behalf of persons under disability.

In Nova Scotia, the *Partition Act*[3] provides that all persons holding land as joint tenants, coparcenors or tenants in common may be compelled to have the land partitioned or to have it sold and the proceeds distributed among the persons entitled. Any one or more of such persons may bring such an action but the action must be by a person having an estate in possession, not by a person entitled only to a remainder or reversion.

The action is maintainable by a tenant or tenants for years against co-tenants as if all were tenants of a freehold, but no tenant for a term of years, unless at least 20 years remain unexpired, may maintain the action against a tenant of the freehold.

Unless it appears to the court that a sale is necessary, the court may appoint three commissioners to partition. Where the land cannot be divided without prejudice to the owners, or where a particular part is of greater value than the share of any party and cannot be divided without prejudice to the owners, the whole or part so incapable of division may be set off to any of the parties who will accept it upon payment by them to one or more of the others of such compensation as the commissioners determine.

The commissioners, instead of setting off the land or part may assign exclusive occupancy of the whole or part, as the case may be, to each of the parties alternately for specified times in proportion to their interests. Each such person is liable to the others for injury to the premises caused by their misconduct to the same extent as a tenant for years is liable to their landlord. Each such person may maintain an action for trespass as if this person held under a lease for the term of their exclusive occupancy. Where the land or part cannot be divided or any party, by reason of infancy, insanity or absence from the province, cannot accept such land incapable of division, the court may order sale.

In Prince Edward Island, the *Real Property Act*[4] provides that all persons holding land as joint tenants, tenants in common or coparcenors may be compelled to divide the land. Any one or more may apply by petition to the court for partition, the petition being maintainable only by one having an estate in possession and not by one only entitled in remainder or reversion. No tenant for a term of years, unless at least 20 years remain unexpired, may petition but, when two or more hold jointly or in common for a term of years, either may have their share divided from the others as if they all had been tenants of the freehold. Where premises cannot be divided without damage to the owners, or a part is of greater value than another party's share and cannot be divided without damage to the owners, the whole or part incapable of division may be set off to a party who will accept it, paying such sums as the court awards to make the partition just and equal. The court, instead of setting off the premises or part, may assign exclusive occupancy of the whole or part to each of the parties alternately for specified times in proportion to their interests. Each of such parties is liable to the others for injury to the property caused by misconduct as a tenant for years is liable to their landlord. Each such person may bring an action for trespass as if they held under a lease for the term of exclusive occupancy.

In New Brunswick partition may be ordered under the Rules of the Supreme Court.[5] The court may order sale in lieu of partition where the court considers a beneficial partition to be difficult.

In Manitoba it has been held that partition is a matter of right under the *Law of Property Act*[6] and that the court has no discretion to refuse a partition action brought by one co-tenant against another.[7] However, in subsequent cases[8] the courts have concluded that they have discretion to refuse partition, and partition will be refused if the granting of the order would be vexatious or oppressive or if the applicant has not met the requirements of equity.[9]

In Ontario the court has a discretion to grant or refuse partition or sale of lands jointly owned.[10] The discretion will be exercised on the following principles:

> (1) A person who holds lands as a joint tenant, tenant in common or coparcenor has a *prima facie* right to partition or sale of them at any time.
>
> (2) There is a corresponding obligation on joint tenants (and others) to permit partition or sale.
>
> (3) The court should compel such partition or sale if no sufficient reason appears why such an order should not be made.[11]

It has been held that if the application is vexatious or oppressive, sufficient reason is shown to refuse the order to partition or sell.[12] It has been held that the court can only refuse the order when the application is vexatious or oppressive.[13] However, there is no doubt that subsequent cases referred to hereafter have greatly expanded the court's discretion. These decisions, arising in the context of matrimonial difficulties, are not uniform[14] and must be read in light of subsequent statutory changes.[15]

In British Columbia the court has discretion to refuse partition but must have a good reason to do so.[16] Although there is a *prima facie* right to partition, partition may be refused if the application is vexatious, malicious or oppressive.[17] The word "oppressive" has been interpreted as meaning "economic oppression" as opposed to inconvenience or even hardship in some cases.[18] However, other decisions have adopted a more liberal interpretation so as to include within it a serious hardship.[19] In other instances the court has balanced equities to see if a sale would be oppressive in an objective sense,[20] and has gone so far as to conclude that the earlier limited discretion has been significantly expanded so as to include the test of relative hardship.[21]

In Newfoundland and Labrador, the courts have interpreted the legislation to leave the courts with the ability to refuse an application for partition should the interests of justice so require.[21a]

As mentioned earlier, the courts in Ontario have accepted a broader discretion when deciding whether to order partition. Although courts in other Canadian jurisdictions have also been willing to exercise more discretion in this area,[22] the issue appears to have come before the courts more often in Ontario and hence, reference to the Ontario cases may perhaps be more illustrative of any developing trend.[23]

In *Silva v. Silva*,[24] the Ontario Court of Appeal held that the *Family Law Act* did not oust the jurisdiction of the *Partition Act* when dealing with jointly owned spousal property. However where substantial rights in relation to jointly owned property are likely to be jeopardized by an order for partition and sale, an application under the *Partition Act* should be deferred until the matter is decided under the *Family Law Act*.

In the past, courts would make a distinction between those cases where one of the joint tenants was a deserted spouse and where there was no desertion. In *Re Maskewycz and Maskewycz*,[25] the Ontario Court of Appeal concluded that a deserted husband had a right to remain in possession of the matrimonial home, a right corresponding to the right of a deserted wife.[26] In Ontario, the issue of the deserted spouse to remain in the matrimonial home has now been rendered academic by the *Family Law Act*.[27] Both spouses are given an equal right to possession that does not depend upon desertion and is not affected by ownership by one or other, or indeed both of the spouses. Section 19 of the Act states that both spouses have an equal right to possession of a matrimonial home. When only one of the spouses has an interest in the matrimonial home, the other spouse's right of possession is personal as against the first spouse and ends when the two cease to be spouses unless a separation agreement or court order provides otherwise.

It had been held as late as 1973 that on an application for partition or sale the court was bound to grant the order if the application was neither vexatious nor oppressive and if the applicant came to the court with clean hands.[28] However, several subsequent cases and even prior decisions indicate that the court's discretion is somewhat wider. Serious hardship on the spouse and particularly on the children of the marriage which would result from partition has been accepted as a legitimate ground for refusal of the order.[29] It is incumbent upon the party resisting partition to establish serious hardship,[30] and the court will consider not only hardship to the one side if partition is granted but also hardship to the other if it is refused.[31] The test of relative hardship has been applied not only as between spouses but also as between one spouse and creditors of the other.[32] Estoppel has also been used as an effective defence to an application for partition.[33]

It is not possible to deal with the many cases that have arisen from time to time in regard to various fine points under the provisions of provincial rules of practice and statutes relating to partition. The task of determining which of them have continued application must be left to the readers in each province in the light of present rules. Several references, however, appear to be appropriate.

If only one of several co-tenants desires partition, a part may be allocated to such co-tenant and the residue held as before by the others jointly or in common.[34]

Four distinct parcels of land in different townships belonging to 18 persons are not indivisible by nature like a home, mill or other property that cannot in its nature be divided.[35]

Some courts have held that a life tenant is entitled to a partition and that, where there is a right to partition, there may be a right to a sale as the court may determine.[36] Another decision held that a sole life tenant had no status under the *Partition Act* of 1887 to apply for a sale of the estate and that, in the nature of things, no partition was possible as regards the life tenancy.[37]

The court will not decree the partition of lands, the title to which is vested in the Crown, nor will it decree the sale of the lands at the instance of the representatives of the deceased locatee[38] but, where a locatee of Crown lands was an absentee for over seven years so as to be presumed to be dead and, of his four children, one son and a daughter had occupied the property exclusively for 14 years so as to obtain possessory title against the other two children, and where the son in possession had made improvements, it was held that the *Statute of Limitations* applied because the rights involved were merely private rights not affecting the pleasure or sovereignty of the Crown so that declaratory

relief might be given which would work practically the same as a partition, subject to the Crown being willing to act upon the judgment of the court, and that the Crown in making partition should recognize the son's rights to improvements.[39]

An applicant for partition must be a person having a partitioning interest in land in the sense of being entitled to possession of their share, so that a person entitled to a legacy charged on land has no status to demand partition.[40] Partition will not be ordered until any honest dispute as to ownership is resolved.[41]

Although partition of an estate which is subject to a mortgage may be directed, if one of several co-tenants has mortgaged their undivided share, the mortgagee is a necessary party to partition proceedings in order to find the legal estate.[42]

A purchaser from a joint tenant is entitled *prima facie* to partition of the resulting tenancy in common. It has been held that if the purchaser has acted in good faith, without malice, inconvenience to the other co-tenant is not a sufficient ground to refuse partition.[43]

Sale as an alternative to partition will only be ordered where it is apparent that partition would not be advantageous to both parties.[44] The courts in Ontario have refused to order sale in circumstances where that would result in an unequal or unfair distribution or where income disparity between the parties is such that it is clear who will end up with the property.[44a] The remedy is generally invoked when a co-tenant has no other means of realizing their interest.[44b]

The general rule in accounting is that a joint tenant, unless ousted by a co-tenant, cannot sue the co-tenant for use and occupation but, if the joint tenancy is terminated by court order for partition or sale, the court may make all allowances and should give such directions as will give complete equity to the parties.[45] What is equitable depends on the circumstances of each case. If the occupying tenant claims for upkeep and repairs, the court, as a term of allowing the claim, usually requires the occupying tenant to submit to an allowance for use and occupation. If one tenant has made improvements that increases the selling value, the other tenant cannot take advantage of the increase without submitting to an allowance for the improvements and, if one tenant paid more than their share of encumbrances, this tenant is entitled to an allowance of the excess.[46] Thus, in an accounting on a partition application, the husband's share was turned over to his wife to satisfy maintenance arrears.[47] There is no jurisdiction on an accounting after the order of partition to deny the interest of one of the joint tenants. The matter becomes *res judicata* after the partition order.[48]

When an account is taken, it is necessary to bear in mind the possibility of gift. Thus, where the husband and wife purchased a house as joint tenants and the husband freely made subsequent mortgage payments, the subsequent payments were treated as gifts from him to her and were not to be accounted for.[49] Similarly, where a wife discharged a mortgage on property held jointly with her husband, with the intention that the money advanced was to benefit both, the mortgage payment was not included in the accounting.[50]

It is not possible in a book of this nature to discuss in detail the debit and credit items to be brought into account.[51] However, it should be mentioned that it has been decided that where one joint tenant borrows money to purchase the property, they are entitled to repayment out of the proceeds of the sale of the property in priority to the other joint

tenant.[52]

Although the general rule is that one joint tenant will not be restrained from committing waste at the instance of a co-tenant, the rule is different if a bill for partition of the estate has been filed.[53]

FOOTNOTES

[1] R.S.O. 1990, c. P.4.

[2] R.S.B.C. 1996, c. 347, ss. 2(1), 6. See *Bradwell v. Scott* (2000), 235 W.A.C. 235 (B.C.C.A.); *Pelikan v. Quarry* (2006), 39 R.P.R. (4th) 237 (B.C.S.C.).

[2a] *Ibid.*, s. 8. See *Rendle v. Stanhope Dairy Farm Ltd.* (2003), 22 B.C.L.R. (4th) 77 (S.C.); *Vantreight v. Vantreight* (2005), 13 B.L.R. (4th) 52 (B.C.S.C.); *Machin v. Rathbone* (2006), 42 R.P.R. (4th) 135 (B.C.S.C.). In Newfoundland and Labrador, see *Conveyancing Act*, R.S.N.L. 1990, c. C-34, ss. 53-55; and see *Hart v. Ripley* (2012), 331 Nfld. & P.E.I.R. 27 (N.L. T.D.); *Winter v. Royle* (2014), 354 Nfld. & P.E.I.R. 261 (N.L. T.D.).

[3] R.S.N.S. 1989, c. 333, s. 4.

[4] R.S.P.E.I. 1988, c. R-3, ss. 18-53.

[5] *Rules of Court of New Brunswick*, N.B. Reg. 82-73, rule 67.02 under the *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 73.

[6] R.S.M. 1987, c. L90 (C.C.S.M., c. L90), ss. 19-25.

[7] *Szmando v. Szmando*, [1940] 1 D.L.R. 222 (Man. K.B.).

[8] *Steele v. Steele* (1960), 67 Man. R. 270 (Q.B.); *Shwabiuk v. Shwabiuk* (1965), 51 D.L.R. (2d) 361 (Man. Q.B.); *Fetterly v. Fetterly* (1965), 54 D.L.R. (2d) 435 (Man. Q.B.); *Krohn v. Krohn* (1987), 47 Man. R. (2d) 58 (Q.B).

[9] *Steele v. Steele*, *supra*, footnote 8; *Shwabiuk v. Shwabiuk*, *supra*, footnote 8; *Fetterley v. Fetterley*,

supra, footnote 8; *Simcoff v. Simcoff*, [2009] 9 W.W.R. 248 (Man. C.A.), revg in part [2008] M.J. No. 299 (QL) (Q.B.).

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[10] *Re Hutcheson and Hutcheson*, [1950] 2 D.L.R. 751 (Ont. C.A.); *Davis v. Davis*, [1954] 1 D.L.R. 827 (Ont. C.A.); *Silva v. Silva* (1990), 75 D.L.R. (4th) 415 (Ont. C.A.); *Dibattista v. Menecola* (1990), 74 D.L.R. (4th) 569 (Ont. C.A.); *Shemish v. Benarzi* (2006), 27 E.T.R. (3d) 56 (Ont. S.C.J.). See also P.M. Perell, "A Partition Act Primer", 30 Adv. Q. 251 (2005); *Maynes v. Maynes*, 2010 ONSC 2314.

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[11] *Davis v. Davis*, *supra*, footnote 10.

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[12] *Klakow v. Klakow* (1972), 7 R.F.L. 349 (Ont. H.C.J.); *Czarnick v. Zagora* (1972), 8 R.F.L. 259 (Ont. H.C.J.); *Mitchell v. Leach* (2015), 68 R.F.L. (7th) 398 (Ont. S.C.J.).

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[13] *Re Roblin & Roblin*, [1960] O.R. 157 (H.C.J.). Hardship to a co-tenant does not permit the court to defer indefinitely a sale requested by the other co-tenant: *Aviado v. Goralczyk* (2004), 33 R.P.R. (4th) 227 (Ont. S.C.J.). See also *McCord v. Robinson* (2005), 33 R.P.R. (4th) 148 (Ont. S.C.J.); *Greenbanktree Power Corp. v. Coinamatic Canada Inc.* (2004), 193 O.A.C. 204, affg 69 O.R. (3d) 784 (S.C.J. (Div. Ct.)), affg 59 O.R. (3d) 449 (S.C.J.) (leave to appeal to S.C.C. granted January 29, 2004); *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre* (2009), 82 R.P.R. (4th) 43 (Ont. S.C.J.); *Garfella Apartments Inc. v. Chouduri* (2010), 321 D.L.R. (4th) 461 (Ont. S.C.J. (Div. Ct.)) (in the commercial conduct, oppressive conduct is the appropriate standard; oppression is to be assessed by examining the reasonable expectations of the parties); *First Capital (Canholdings) Corp. v. North American Property Group* (2010), 94 R.P.R. (4th) 131 (Ont. S.C.J.); *Paglia v. Favot*, 2014 CarswellOnt 945 (S.C.J.), leave to appeal refused 2014 CarswellOnt 4863 (Div. Ct.); *Re Economopoulos* (2014), 378 D.L.R. (4th) 682 (Ont. C.A.).

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[14] *Carton v. Carton* (1975), 21 R.F.L. 366 (Ont. S.C.).

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[15] For example, the *Family Law Act*, R.S.O. 1990, c. F.3.

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[16] *Partition of Property Act*, R.S.B.C. 1996, c. 347, s. 6; *Evans v. Evans*, [1951] 2 D.L.R. 221 (B.C.C.A.); *Harmeling v. Harmeling* (1978), 90 D.L.R. (3d) 208 (B.C.C.A.); *Pelikan v. Quarry* (2006), 39 R.P.R. (4th) 237 (B.C.S.C.); *Trimble v. Crow* (2006), 46 R.P.R. (4th) 90 (B.C.S.C.); *Lothrop v. Kline* (1957), 21 W.W.R. 333 (B.C.S.C.); *Hayes v. Schimpf* (2004), 24 R.P.R. (4th) 235 (B.C.S.C.), application by appellant for stay pending appeal and by respondents for security for costs in the appeal dismissed 2005 BCCA 413, affd 361 W.A.C. 48 (C.A.); *Bradwell v. Scott* (2000), 235 W.A.C. 235 (B.C.C.A.); *Martin v. Chidley*, 2008 BCSC 329; *Sahlin v. Nature Trust of British Columbia Inc.*, 2011 BCCA 157, affg 317 D.L.R. (4th) 26 (S.C.) (court held that there was a "good" reason not to order sale given longstanding connection of petitioner to the land); *Mowat v. Dudas* (2012), 33 B.C.L.R.

(5th) 164 (S.C.); *Bindley Estate v. Quartermaine Holdings Ltd.*, 2017 CarswellBC 1083 (S.C.); *Summer v. Mackenzie* (2016), 71 R.P.R. (5th) 335 (B.C.S.C.).

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17 *Korolew v. Korolew* (1972), 7 R.F.L. 162 (B.C.S.C.); *Reitsma v. Reitsma*, [1975] 3 W.W.R. 281 (B.C.S.C.).

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18 *Reitsma v. Reitsma*, *supra*, footnote 17; *Kaplan v. Kaplan* (1974), 15 R.F.L. 239 (B.C.S.C.); *Van Engel v. Van Engel* (1973), 11 R.F.L. 303 (B.C.S.C.).

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19 *Bergen v. Bergen* (1969), 68 W.W.R. 196 (B.C.S.C.). See also *Phillips v. Phillips* (1980), 24 B.C.L.R. 194 (C.A.); *Bradwell v. Scott* (2000), 235 W.A.C. 235 (B.C. C.A.); *Mowat v. Dudas* (2012), 33 B.C.L.R. (5th) 164 (S.C.).

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20 *Meadows v. Meadows* (1974) 17 R.F.L. 36 (B.C.S.C.).

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21 *Fernandes v. Fernandes* (1975), 65 D.L.R. (3d) 684 (B.C.S.C.).

21a *Hart v. Ripley* (2012), 331 Nfld. & P.E.I.R. 27 (N.L. T.D.) (in the commercial context, this discretion is limited to circumstances of malice, oppression and vexatious intent; in family circumstances, the discretion may be broader).

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22 See, for example, *Kornacki v. Kornacki* (1975), 58 D.L.R. (3d) 159 (Alta. C.A.); *Kronenberger v. Kronenberger* (1977), 77 D.L.R. (3d) 571 (Alta. S.C.), amended 6 A.R. 491 (S.C.); *Melvin v. Melvin* (1975), 58 D.L.R. (3d) 98 (N.B.C.A.); *Fernandes v. Fernandes*, *supra*, footnote 21.

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23 See particularly the review of Ontario decisions in *Melvin v. Melvin*, *supra,* footnote 22. It must be remembered that there is still a *prima facie* right to partition: see *Bisson v. Luciani* (1982), 136 D.L.R. (3d) 287 (Ont. H.C.J.).

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24 (1990), 75 D.L.R. (4th) 415 (Ont. C.A.). Applied in *Cudmore v. Cudmore*, [1997] O.J. No. 847 (QL) (Gen. Div.).

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25 (1973), 44 D.L.R. (3d) 180 (Ont. C.A.). This decision reviews the law relating to matrimonial property prior to the passing of the *Family Law Reform Act, 1978*, S.O. 1978, c. 2 (now the *Family Law Act*, R.S.O. 1990, c. F.3).

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[26] *Re Jollow and Jollow*, [1955] 1 D.L.R. 601 (Ont. C.A.). See also *Hearty v. Hearty* (1970), 10 D.L.R. (3d) 732 (Ont. H.C.J.).

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[27] R.S.O. 1990, c. F.3, s. 19. The effect of this statute on the respective rights of both spouses to real property *inter se* and vis-à-vis third parties is dealt with in detail in ch. 15.

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[28] *Perkins v. Perkins* (1972), 31 D.L.R. (3d) 694 (Ont. H.C.J.).

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[29] *McFadden v. McFadden* (1972), 5 R.F.L. 299 (Ont. Co. Ct.); *Verzin v. Verzin* (1974), 16 R.F.L. 94 (Ont. H.C.J.); *Lindenblatt v. Lindenblatt* (1974), 48 D.L.R. (3d) 494 (Ont. H.C.J.); *MacDonald v. MacDonald* (1973), 13 R.F.L. 248 (Ont. C.A.).

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[30] *Cmajdalka v. Cmajdalka* (1973), 11 R.F.L. 302 (Ont. C.A.).

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[31] *MacDonald v. MacDonald* (1976), 73 D.L.R. (3d) 341 (Ont. Div. Ct.); *McKenzie (Trustee of) v. McKenzie*, [2003] 7 W.W.R. 470 (Man. Q.B.), affd 252 D.L.R. (4th) 717 (C.A.); *Bailey v. Rhoden* (2008), 170 A.C.W.S. (3d) 653 (Ont. S.C.J.), supp. reasons re costs 169 A.C.W.S. (3d) 489 (S.C.J.), appeal allowed in part on other grounds 173 A.C.W.S. (3d) 943 (S.C.J. (Div. Ct.)).

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[32] *Yale v. MacMaster* (1974), 46 D.L.R. (3d) 167 (Ont. H.C.J.). See also *Montgomery v. Mercer* (2017), 94 R.F.L. (7th) 261 (P.E.I.C.A.).

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[33] *Yale v. MacMaster*, *supra*, footnote 32.

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[34] *Devereux v. Kearns* (1886), 11 P.R. (Ont.) 452.

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[35] *Re Dennie Applying for Partition* (1852), 10 U.C.Q.B. 104.

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[36] *Lalor v. Lalor* (1883), 9 P.R. (Ont.) 455 (Ch. Div.); *Aho v. Kelly* (1998), 57 B.C.L.R. (3d) 369 (S.C.).

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[37] *Fisken v. Ife* (1897), 28 O.R. 595 (Div. Ct.); *Rolston v. Rolston* (2016), 67 R.P.R. (5th) 66 (Ont. S.C.J.).

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[38] *Abell v. Weir* (1877), 24 Gr. 464.

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[39] *Pride v. Rodger* (1896), 27 O.R. 320 (H.C.J.).

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[40] *Re Fidler and Seaman*, [1948] 2 D.L.R. 771 (Ont. H.C.J.); *Morrison v. Morrison* (1917), 34 D.L.R. 677 (Ont. S.C. App. Div.); *909403 Ontario Ltd. v. DiMichele* (2014), 95 E.T.R. (3d) 169 (Ont. C.A.).

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[41] *Blackhall v. Jardine*, [1958] O.W.N. 457 (C.A.); *Noel v. Noel* (1903), 2 O.W.R. 628; *Emberley v. Hans* (1991), 48 C.P.C. (2d) 212 (Ont. Ct. (Gen. Div.)); *Aperdev Investments Inc. v. Remer Holdings Inc.* (2006), 149 A.C.W.S. (3d) 710 (Ont. S.C.J.); *Nobis Investments Ltd. v. Atlantic Metal Spinning Co.*, [1988] O.J. No. 335 (QL) (C.A.); *Ames v. Bond* (1992), 39 R.F.L. (3d) 375 (Ont. C.A.); *Kulczycki v. Kulczycki*, [1949] O.W.N. 177 (C.A.); *Punit v. Punit* (2014), 43 R.F.L. (7th) 84 (Ont. Div. Ct.).

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[42] *McDougall v. McDougall* (1868), 14 Gr. 267.

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[43] *McGeer v. Green and Westminster Mortgage Corp. Ltd.* (1960), 22 D.L.R. (2d) 775 (B.C.S.C.).

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[44] *Cook v. Johnston*, [1970] 2 O.R. 1 (H.C.J.); followed in *Dibattista v. Menecola* (1990), 74 D.L.R. (4th) 569 (Ont. C.A.); *Finanders v. Finanders* (2005), 34 R.P.R. (4th) 295 (N.S.S.C.); *Zackariuk Estate v. Chepsiuk* (2005), 17 E.T.R. (3d) 100 (B.C.S.C.); *C.T.V. Diagnostics Inc. v. 2013871 Ontario Ltd.* (2006), 39 R.P.R. (4th) 60 (Ont. S.C.J.), affd 152 A.C.W.S. (3d) 341 (S.C.J. (Div. Ct.)); *Ponvert v. Wood* (2006), 146 A.C.W.S. (3d) 177 (Ont. S.C.J.); *Beckett v. Beckett* (2008), 169 A.C.W.S. (3d) 726 (Ont. S.C.J.); *McQuaid v. Underhill*, 2014 CarswellNB 248 (Q.B.); *Comeau v. Comeau* (2015), 431 N.B.R. (2d) 385 (Q.B.).

[44a] *Suddick v. Schwenger Estate* (2007), 52 R.P.R. (4th) 306 (Ont. S.C.J.), revd in accordance with minutes of settlement 69 R.P.R. (4th) 318 (S.C.J. (Div. Ct.)); *Garfella Apartments Inc. v. Chouduri* (2008), 76 R.P.R. (4th) 290 (Ont. S.C.J.), affd 2010 ONSC 3413 (Div. Ct.).

[44b] *Shabinsky v. Cohen*, [1983] O.J. No. 1096 (QL) (Div. Ct.); *997897 Ontario Inc. v. 926260 Ontario Ltd.*, [2001] O.J. No. 3960 (QL) (S.C.J.).

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[45] *Mastron v. Cotton*, [1926] 1 D.L.R. 767 (Ont. S.C. App. Div.); *Shore v. Shore* (1975), 63 D.L.R. (3d) 354 (B.C.S.C.); *Atkinson v. Caton*, [2000] B.C.J. No. 1604 (QL) (S.C.); *Re Kostiuk* (2002), 215 D.L.R. (4th) 78 (B.C.C.A.); *Dunn v. Vicars* (2008), 71 R.P.R. (4th) 305 (B.C.S.C.). See also *Osachuk v. Osachuk* (1971), 18 D.L.R. (3d) 413 (Man. C.A.); *Shumilak v. Shumilak*, 2013 CarswellMan 86 (Q.B.). It is not necessary that there be an ouster when both joint tenants are spouses. The court has jurisdiction to charge occupation rent under the provisions of the *Family Law Act*, R.S.O. 1990, c. F.3. See *Diotallevi v. Diotallevi* (1982), 134 D.L.R. (3d) 477 (Ont. H.C.J.). See also *Hedrick v. Graham*, 2012 CarswellBC 3674 (S.C.).

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[46] *Mastron v. Cotton*, *supra*, footnote 45.

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[47] *Crystal v. Crystal* (1972), 32 D.L.R. (3d) 116 (Man. Q.B.), affd 38 D.L.R. (3d) 300 (C.A.).

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[48] *Davis v. Davis*, [1959] O.W.N. 41 (H.C.J.).

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[49] *Andrews v. Andrews* (1969), 7 D.L.R. (3d) 744 (B.C.S.C.).

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[50] *Morrison v. Guaranty Trust Co. of Canada* (1972), 28 D.L.R. (3d) 458 (Ont. H.C.J.).

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[51] For such a discussion, see *Spatafora v. Spatafora*, [1956] O.W.N. 628 (H.C.J.).

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[52] *Brewin v. Ferguson* (1982), 134 D.L.R. (3d) 538 (Alta. Q.B.); *Aleksich v. Konradson*, [1995] 6 W.W.R. 268 (B.C.C.A.).

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[53] *Lassert v. Salyerds* (1870), 17 Gr. 109.

§14:30.70 Mutual Rights of Tenants in Common

In matters relating to the unity of possession, the incidents of a tenancy in common are similar to those of a joint tenancy. Like joint tenants, tenants in common hold *per mie et per tout*,[1] that is, they hold the whole and nothing separately, their occupation being undivided.

FOOTNOTES

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[1] *Gunn v. Burgess* (1884), 5 O.R. 685 (H.C.J.), at p. 688; *Lasby v. Crewson* (1891), 21 O.R. 255 (H.C.J.), at p. 260.

§14:30.90 Accounting between Tenants in Common

At common law there could be no action of account by one tenant in common against another who had occupied the whole property unless the absent tenant had appointed the latter as their bailiff so as to make the occupying tenant liable to account in that capacity. In equity, however, a tenant in common is liable to account in an action by the others and, by statute, a tenant in common who receives more than their share is made liable to account to co-tenants.[1]

Mere occupation of the property by one of several tenants in common, if unaccompanied by exclusion of the other co-tenants, does not make them liable to the other tenants in common for rent.[2]

As each tenant in common is entitled to enter upon the whole property, one tenant in common is not liable to another for occupation rent but, if their acts amount to an exclusion of the other, the court may appoint a receiver and, if they receive rents, an account will be ordered. The occupying tenant is not entitled to repayment in regard to repairs and improvements in the property, however, unless they submit to an occupation rent and account for the profits they have received.[3]

One tenant in common who expends moneys in ordinary repairs has no right of action against a co-tenant for contribution.[4] One tenant in common who has leased their interest to a co-tenant may recover from the latter use and occupation rent if the latter remains in occupation as tenant by sufferance after the expiration of the lease.[5]

A tenant in common in sole occupation is not entitled to be repaid for repairs and improvements unless they are charged an occupation rent,[6] and a similar situation results where the tenant in sole occupation has been in occupation of part of the property.[7] However, whether or not they are charged with an occupation rent, the tenant in sole occupation is entitled to an inquiry as to expenditures properly made in permanent improvements to the property during co-ownership and the inquiry should be reciprocal.[8] If they are charged with occupation rent, the tenant in sole occupation is entitled to contribution from their co-tenant for taxes and water rates paid by the tenant in sole occupation.[9]

A tenant in common who holds possession of, manages, and receives the rent of common property which is subject to an encumbrance is entitled, when called to account by a co-tenant or co-tenants, to an allowance for advances properly and reasonably made by them for repairs, improvements and payments of principal and interest on the encumbrances, with interest from the time the advances are made. "There is a broad distinction between the cases of a co-tenant in actual sole occupation of the premises and

one in receipt of the whole rents and profits."[10]

No tenant in common is entitled to execute repairs or improvements upon the property held in common, so long as the property is enjoyed in common, and then to charge a co-tenant or co-tenants with the cost but, in a suit for partition, it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common. When it is decided to put an end to that state of things, it is then necessary to consider what was expended on improvements or repairs. The property has been increased in value by the improvements and repairs and, whether the property is divided or is sold by the decree of the court, one party cannot take the increase in value without making allowance for what has been expended in order to obtain that increased value. In fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value.[11]

In a partition action, however, the right of a tenant in common to be paid for improvements made by them is restricted to improvements made after the tenancy in common commenced. Thus, where a tenant in common in remainder, by an agreement with the life tenant, went into possession and expended large sums on improvements during the life tenancy at the life tenant's request, it was held that he was not entitled in a partition action to the value of those improvements.[12]

In a partition action in a court of equity, an allowance for the value of improvements was always made.[13]

A tenant in common who takes proceedings for partition and an account from their co-tenant is entitled to such account if the applicant shows that the co-tenant received a greater share from the estate than that to which they were entitled. Thus, where one of several tenants in common had been in sole possession of a plaster bed and sold portions of the plaster, an account was ordered as to the receipts therefrom.[14]

A special note should be made of possession between parent and child. Where parent and child are tenants in common, usually possession of the parent is that of the child, but the presumption that the parent's possession was as bailiff or agent of the child's share is rebuttable. The relation of principal and agent may be dissolved by various circumstances but the attainment of majority by the child is not, in itself, sufficient to rebut the presumption referred to if there is no break in possession.[15]

FOOTNOTES

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[1] See §14:20.50, *supra.*

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[2] *M'Mahon v. Burchell* (1846), 2 Ph. 127, 41 E.R. 889; *Griffies v. Griffies* (1863), 8 L.T. 758. See also *Bates v. Martin* (1866), 12 Gr. 490.

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[3] *Rice v. George* (1873), 20 Gr. 221; *Osachuk v. Osachuk* (1971), 18 D.L.R. (3d) 413 (Man. C.A.);

Bernard v. Bernard (1987), 12 B.C.L.R. (3d) 75 (S.C.), supp. reasons 7 A.C.W.S. (3d) 296 (S.C.).

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[4] *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.).

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[5] *Leigh v. Dickeson*, *supra*, footnote 4; *Campbell v. Ives*, [1988] B.C.J. No. 71 (QL) (S.C.), affd 13 A.C.W.S. (3d) 227 (C.A.).

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[6] *Rice v. George*, *supra*, footnote 3.

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[7] *Teasdale v. Sanderson* (1864), 33 Beav. 534, 55 E.R. 476.

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[8] *Kenrick v. Mountsteven* (1899), 48 W.R. 141, 44 Sol. Jo. 44.

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[9] *Wuychik v. Majewski* (1920), 19 O.W.N. 207 (H.C.).

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[10] *Re Curry; Curry v. Curry* (1898), 25 O.A.R. 267 at p. 286, *per* Moss J.A.

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[11] *Lasby v. Crewson* (1891), 21 O.R. 255 (H.C.J.), quoting Cotton L.J. in *Leigh v. Dickeson*, *supra*, footnote 4; *Vandongen v. Royal* (1990), 72 O.R. (2d) 533 (Dist. Ct.); *Warner v. Warner* (1998), 94 O.T.C. 146 (Gen. Div.).

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[12] ***Supra*.**

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[13] ***Handley v. Archibald*** **(1899), 30 S.C.R. 130 at p. 141; *Griffies v. Griffies* (1863), 8 L.T. 758.**

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[14] ***Curtis v. Coleman*** **(1875), 22 Gr. 561. See also §14:20.140, *supra*.**

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[15] ***Fry and Moore v. Speare*** **(1916), 30 D.L.R. 723 (Ont. S.C. App. Div.).**

§14:30.100 Trespass and Waste by Tenants in Common

Since each tenant in common has an equal right of entry on every part of the property, one cannot bring an action against the other for trespass but, if one is ousted or denied the right of entry, they may take ejectment proceedings.[1] A demand of possession by one tenant in common and a refusal by the other, stating that they claimed the whole, is evidence of an ouster.[2]

The court will not restrict a tenant in common in the legitimate enjoyment of the estate because an undivided occupation is of the very essence of a tenancy in common and to interfere with that right would be to deny an essential quality of title. Therefore, a tenant in common is not entitled to an injunction where their co-tenant is exercising their rights in a legitimate manner. If a tenant in common desires relief, they must proceed by partition. Equitable waste will not be restrained but, if a tenant in common proceeds to destroy the common property, they will be restrained by injunction.[3] It has been said that: "It is clear that a tenant in common has not an unlimited power to do as he will with the estate; for though the court is slow to interfere between tenants in common, yet where one commits any act amounting to destruction, he will be restrained". Hence, the digging of earth for bricks was restrained.[4]

FOOTNOTES

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[1] ***Murray v. Hall*** **(1849), 7 C.B. 441, 137 E.R. 175;** ***Elliott v. Smith*** **(1858), 3 N.S.R. 338 (S.C.);** ***Petrie v. Taylor*** **(1847), 3 U.C.Q.B. 457;** ***Wiggins v. White*** **(1836), 2 N.B.R. 179 (S.C.).**

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[2] ***Doe d. Hellings v. Bird*** **(1809), 11 East 49, 103 E.R. 922;** ***Monro v. Toronto Ry. Co.*** **(1904), 9 O.L.R. 299 (C.A.).**

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[3] ***Dougall v. Foster*** **(1853), 4 Gr. 319.**

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[4] ***Dougall v. Foster***, ***supra***, **footnote 3, at p. 327,** ***per*** **Spragge V.C.;** ***Hole v. Thomas*** **(1802), 7 Ves. Jun. 589, 32 E.R. 237. For cases where a co-tenant has been restrained from committing**

waste with respect to timber, see *Arthur v. Lamb* (1865), 2 Dr. & Sm. 428, 62 E.R. 683; *Pyat v. Winfield* (1730), Mosely 305, 25 E.R. 408; *Proudfoot v. Bush; Bush v. Proudfoot* (1859), 7 Gr. 518; *Christie v. Saunders* (1851), 2 Gr. 670. With respect to soil or quarries, see *Wilkinson v. Haygarth* (1847), 12 Q.B. 837, 116 E.R. 1085; *Goodenow v. Farquhar* (1873), 19 Gr. 614. With respect to crops, see *Brady v. Arnold* (1868), 19 U.C.C.P. 42; *Jacobs v. Seward* (1872), L.R. 5 H.L. 464. For a review of the statutory provisions with respect to waste, see §14:20.60, *supra*.

R.S.C. 1985, c. B-3, s. 67

s 67.

Currency

67.
67(1)Property of bankrupt
The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Note:

S.C. 1997, c. 12, s. 59(2), provides as follows:

> *(2) Application*
> *Subsection (1) [S.C. 1997, c. 12, s. 59(1), which re-enacted s. 67(1)(b) and enacted s. 67(1)(b.1)] applies to bankruptcies in respect of which proceedings are commenced after that subsection came into force [on April 30, 1998].*

67(2)Deemed trusts
Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

67(3)Exceptions
Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

> (a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Amendment History
1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32

Currency
Federal English Statutes reflect amendments current to March 7, 2018
Federal English Regulations are current to Gazette Vol. 152:5 (March 7, 2018)

End of Document

Ontario Statutes
Conveyancing and Law of Property Act

Most Recently Cited in: Oram v. Horlick, 2014 NLTD(G) 14, 2014 CarswellNfld 244, 48 R.F.L. (7th) 318, 1085 A.P.R. 324, 349 Nfld. & P.E.I.R. 324, [2014] W.D.F.L. 4017, 244 A.C.W.S. (3d) 724 | (N.L. T.D., Jan 29, 2014)

R.S.O. 1990, c. C.34, s. 13

s 13.

Currency

13.

13(1)Effect of grants, devises, etc., to two or more

Where by any letters patent, assurance or will, made and executed after the 1st day of July, 1834, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee simple or for any less estate, it shall be considered that such persons took or take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants.

13(2)Spouses

This section applies notwithstanding that one of such persons is the spouse of another of them.

13(3)Definitions

In subsection (2),

"same-sex partner" [Repealed 2005, c. 5, s. 13(2).]

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage.

("conjoint")

Amendment History

1999, c. 6, s. 13(1), (2); 2005, c. 5, s. 13

Currency

Ontario Current to Gazette Vol. 151:09 (March 3, 2018)

End of Document

Ontario Statutes
Conveyancing and Law of Property Act

Most Recently Cited in: Windsor Family Credit Union Ltd. v. Windsor (City), 2008 CarswellOnt 5941, 53 M.P.L.R. (4th) 202, 75 R.P.R. (4th) 259, 170 A.C.W.S. (3d) 419 | (Ont. S.C.J., Oct 6, 2008)

R.S.O. 1990, c. C.34, s. 9

s 9. Requirement of deed for certain interests

Currency

9.Requirement of deed for certain interests
A partition of land, an exchange of land, an assignment of a chattel interest in land, and a surrender in writing of land not being an interest that might by law have been created without writing, are void at law, unless made by deed.

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Ontario Statutes
Conveyancing and Law of Property Act

R.S.O. 1990, c. C.34, s. 14

s 14. Land acquired by possession by two or more

Currency

14.Land acquired by possession by two or more
Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants.

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R.S.O. 1990, c. C.34, s. 31

s 31. Waste between joint tenants and tenants in common

Currency

31.Waste between joint tenants and tenants in common
Tenants in common and joint tenants are liable to their co-tenants for waste, or, in the event of a partition, the part wasted may be assigned to the tenant committing the waste at the value thereof to be estimated as if no waste had been committed.

Currency
Ontario Current to Gazette Vol. 151:09 (March 3, 2018)

Most Recently Cited in: Newstead v. Hachey, 2018 ONSC 1317, 2018 CarswellOnt 3167 | (Ont. S.C.J., Feb 26, 2018)

R.S.O. 1990, c. C.43, s. 122

S 122.

Currency

122.

122(1)Actions for accounting

Where an action for an accounting could have been brought against a person, the action may be brought against the person's personal representative.

122(2)Idem

An action for an accounting may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share.

Currency

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End of Document

Most Recently Cited in: Johnston v. Song, 2018 ONSC 1005, 2018 CarswellOnt 2145 | (Ont. S.C.J., Feb 12, 2018)

R.S.O. 1990, c. F.3, s. 14

s 14. Presumptions

Currency

14.Presumptions
The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Amendment History
2005, c. 5, s. 27(3)

Currency
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Concordance References
Family Law Concordance 128, Property rights consequent on marriage

R.S.O. 1990, c. L.5, s. 62

s 62.

Currency

62.

62(1)Trusts not to be entered

A notice of an express, implied or constructive trust shall not be entered on the register or received for registration.

62(2)Description of owner as a trustee

Describing the owner of freehold or leasehold land or of a charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall be deemed not to be a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise, but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted.

62(3)Owners described as trustees to be joint tenants

Where two or more owners are described as trustees, the property shall be held to be vested in them as joint tenants unless the contrary is expressly stated.

62(4)Saving

Nothing in this section prevents the registration of a charge given for the purpose of securing bonds or debentures of a corporation, but the registration of such a charge is not a guarantee that the steps necessary to render the charge valid have been duly taken.

Currency

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R.S.O. 1990, c. L.5, s. 71

s 71.

Currency

71.

71(1)Protection of unregistered estates

Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director of Titles.

Proposed Amendment — 71(1)

71(1) ***Protection of unregistered estates***

Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions as are authorized by this Act or by the Director.

2012, c. 8, Sched. 28, s. 45 [Not in force at date of publication.]

71(1.1)Agreement of purchase and sale

An agreement of purchase and sale or an assignment of that agreement shall not be registered, but a person claiming an interest in registered land under that agreement may register a caution under this section on the terms specified by the Director of Titles.

Proposed Amendment — 71(1.1)

71(1.1) ***Agreement of purchase and sale***

An agreement of purchase and sale or an assignment of that agreement shall not be registered, but a person claiming an interest in registered land under that agreement may register a caution under this section on the terms specified by the Director.

2012, c. 8, Sched. 28, s. 45 [Not in force at date of publication.]

71(2)Effect of registration

Where a notice, caution, inhibition or restriction is registered, every registered owner of the land and every person deriving title through the registered owner, excepting owners of encumbrances registered prior to the registration of such notice, caution, inhibition or restriction, shall be deemed to be affected with notice of any unregistered estate, right, interest or equity referred to therein.

Amendment History
1998, c. 18, Sched. E, s. 129

Currency
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R.S.O. 1990, c. P.5, s. 2

s 2. Partnership

Currency

2.Partnership
Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

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R.S.O. 1990, c. S.7, s. 18

s 18.

Currency

18.

18(1)Who may apply for exercise of powers

Any of the persons authorized by section 32 to make a demise of a settled estate, and any person entitled to the possession or to the receipt of the rents and profits of a settled estate for any greater estate than the estate mentioned in that section and the assigns of any such person may apply to the court to exercise the powers conferred by this Act.

18(2)Where jointly entitled

Where two or more persons are entitled as tenants in common, joint tenants or coparceners, any or either of them may make the application.

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End of Document

"More Owners, More (Potential) Problems: How to Avoid Disputes Between Co-owners and What to do when They Arise"

Mark Dunn
Goodmans LLP

1. **Miller Thomson on Estate Planning,** by Miller Thomson LLP, Marty Rochwerg, Editor-in-Chief, (978-0-7798-4927-7), Chapter 10 Taxation of Real Estate and Investments, s. 10.20.10.30, (2 pages) Document provided in material.

2. **Anger & Honsberger Law of Real Property, Third Edition**, by Anne Warner La Forest, (0-88804-416-X), Part V, Chapter 14, s. 14.10, (one page), Document provided in material.

3. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.20.10, (8 pages), Document provided in material.

4. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.20.20, (3 pages), Document provided in material.

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6. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.20.40, (one page), Document provided in material.

7. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.20.50, (4 pages), Document provided in material.

8. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.20.70, (3 pages), Document provided in material.

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12. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.30.70, (one page), Document provided in material.

13. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.30.90, (3 pages), Document provided in material.

14. **Anger & Honsberger Law of Real Property, Third Edition**, Part V, Chapter 14, s. 14.30.100, (2 pages), Document provided in material.

15. **WestlawNext - 909403 Ontario Ltd. v. DiMichele**
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(Ont. C.A.), (13 pages),
https://nextcanada.westlaw.com/Document/If679a1ff60093afae0440021280d79ee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=2014+onca+261

16. **Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67**, (2 pages), Document provided in material.

17. **WestlawNext - Black v. Owen**
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18. **WestlawNext** - **Canadian Imperial Bank of Commerce v. Mulholland Construction Inc.** (1998), 1998 CarswellOnt 340, 37 O.R. (3d) 759, 16 R.P.R. (3d) 85, 54 O.T.C. 68, [1998] O.J. No. 304 (Ont. Gen. Div.), (3 pages), https://nextcanada.westlaw.com/Document/I10b717d1fd1e63f0e0440003ba0d6c6d/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=1998+carswellont+340

    CanLII – **Canadian Imperial Bank of Commerce v. Mulholland Construction Inc., 1998 CanLII 14653 (ON SC)** https://www.canlii.org/en/on/onsc/doc/1998/1998canlii14653/1998canlii14653.html?autocompleteStr=Canadian%20Imperial%20Bank%20of%20Commerce%20v.%20Mulholland%20Construction%20Inc.%20&autocompletePos=1

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