

JOINT TENANCY, THE RIGHT OF SURVIVORSHIP AND YOUR FAMILY LAW CLIENT

A family home is quite often the most valuable asset held by family law clients. Most parties hold title to their family home jointly.

In joint tenancy, both parties hold an undivided interest, with the right of survivorship; upon the death of the first joint owner, the entire property passes to the survivor.

Many separating parties (or their otherwise-heirs) are unaware of these provisions and do not contemplate that upon death, the deceased owner's interest in the jointly held home will pass to the other joint owner and will not form part of the estate that can be bequeathed as they wish.

Further, as the deceased party's share of the jointly held property does not form part of their estate, that value will not be included when calculating the portion of the estate to which the survivor is entitled in the event of a *Family Property Act* ("FPA") Part IV application by the survivor (see [FPA s. 37](#)). The survivor will be entitled to retain the entire property in addition to their Part IV entitlement.

If parties are aware of the right of survivorship inherent in joint tenancy, they may not know that this status can be changed (see [Simcoff v. Simcoff](#), 2009 MBCA 80). Alternatively, they may be wary of the time and cost involved to alter the joint tenancy, and instead may simply hope that they will not die before matters are resolved.

There are a number of ways that a joint tenancy can be severed, and become a tenancy in common. Tenancy in common maintains ownership but does not carry the right of survivorship. The deceased party's share will then fall into their estate, to be distributed in accordance with their will (subject to the potential rights of the survivor under various statutes such as *The Homesteads Act*, the *FPA*, and *The Dependants Relief Act*) or upon an intestacy.

It is part of your professional responsibility, and should be part of your ordinary practice, to discuss these issues with your family law client. They can then elect whether or not it is in their interests to attempt to sever joint tenancies, or have them remain.

[The Real Property Act \("RPA"\) section 79](#) sets out the legal requirements for registration of a severance of a joint tenancy with the Land Titles Office. It permits severance by consent, by notice or by court order.

Severance by Consent

If the parties are in agreement, all joint tenants may execute the severing instrument or provide their consent in writing. The severing instrument is a Transfer of Land (Form 5.1) by the severing joint tenants to themselves. A land transfer tax exemption is available (change of tenure – s. 114(1)(a)(ii) of *The Tax Administration and Miscellaneous Taxes Act*).

Severance by Notice

One party may complete the Notice of Intention to Sever Joint Tenancy (Form 20) and have it personally served upon the other party. In the event the served party wishes to contest the severance, they must file an action in court within 30 days, and provide a court certified copy and any relevant motions to the district registrar along with Request/Transmission Form 15.1. No severance can then be registered until the court determination. These provisions are set out in section 79. (See for example, *Forbes v. Forbes*, 1993 CanLII 14730 (MB KB), where the wife objected and the court did not permit severance.)

If 30 days has elapsed and the served party has not initiated a court action, the severing instrument along with the affidavit of service can be submitted for registration. It is important to do so promptly so that the severance can take place.

If a party dies before severance is effected, survivorship will normally apply unless a valid severance has occurred prior to death.

For more information including the Land Titles forms, see Teranet Manitoba [Severance by a Joint Tenant with Notice](#).

Severance by Course of Dealing

Severance can occur through a course of dealing. Where the co-owners knew of each other's position and all treated their respective interests in the property as no longer being held jointly, the intention of the parties and their conduct may suffice to sever the joint tenancy. (See *Hansen Estate v. Hansen*, 2012 ONCA 112 for an example of severance by conduct.)

Even failed or uncompleted negotiations between separated spouses can lead to a severance because negotiating separate interests can indicate that the parties no longer treated the property as jointly held, but rather as individual interests. (See *Siwak v. Siwak*, 2019 MBCA 60 where a mutual course of conduct severed the joint tenancy. See also *Davison v. Davison Estate*, 2009 MBCA 100 and *Gorski v. Gorski*, 2011 MBQB 125, both cases where there was no such mutual conduct, pleadings for partition and sale alone being insufficient.)

A court determination will be necessary for severance by a course of dealing.

Severance can also be effected by one party unilaterally dealing with their own interest. However, no disposition of homestead property can be valid without the consent of the other spouse, making this inapplicable in most cases of separating couples.

Death

In the event one joint tenant dies while the joint tenancy continues to exist, a survivorship request can be registered pursuant to section 50. This is the case whenever a section 79 severance has not been registered, even if a Notice of Intention has been served, and even if court proceedings to object to a severance have been filed but not determined.

In the event of death, there are certain actions that might be taken to provide some measure of protection to the interest of the deceased joint tenant. These include the registration of a Caveat (perhaps claiming equitable ownership by virtue of a severance of the joint tenancy by course of dealing prior to death) and/or the registration of a Pending Litigation Order. Even where the title has been registered in the name of the survivor, section 176(1) allows a judge to make an order directing the district registrar to cancel, correct or substitute a certificate of title.

Be Proactive

Discuss these issues with your family law clients. This will help avoid the possibility of death leading to an unintended property result for your client and a claim against you.

Steps for Severance by Notice

- Perform a Land Titles search to confirm title and ownership.
- Prepare Notice of Intention to Sever Joint Tenancy (Form 20).
- Personally serve Form 20 on other joint tenants and swear affidavit of service.
- Wait 30 days from service.
- Provided no court proceedings are filed, execute self-to-self Transfer of Land to convert interest to tenancy in common.
- Register Transfer and verify title update.
- Provide client with updated title and retain filing documents.