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MAGCO LEGAL LESSONS

LEGAL TOPIC: CO-OWNERSHIP OF LAND

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A) INTRODUCTION

The authors Kevin Gray and Susan Francis Gray, in *Elements of Land Law 4th Edition*, explained; that Co-ownership is the term used to describe the form of ownership in which two or more persons are simultaneously entitled in possession to an interest or interests in the same asset. In other words “co-ownership” is a concept whereby more than one person share the rights to a property.

Most legal systems recognise two main concepts of concurrent ownership; namely **Joint Tenancy**; and **Tenancy in Common**.

We have observed throughout the years however that due to the nature of concurrent ownership; namely, that a number of co-owners are entitled to interests in a co-owned property, it appears to be inevitable for the parties to encounter disputes as it relates to the management and use of the particular property. Therefore it is important for us to understand the fundamental differences between the two types of ownership, which will be explored in this Article; as the type of ownership ultimately determines the rights of the parties to sell their interest in the property to others, to dispose of the property to their respective beneficiaries and/or to separate their ownership of the property.

Please bear in mind that throughout this Article, the term “Tenant” will be used frequently. However, in this instance, the term “Tenant” simply means “Owner;” and it is unrelated to the concept of Landlords and Tenants.

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B) JOINT TENANCY

Where there is a joint tenancy, all of the co-owners or “joint tenants” are said to own the entire property as one, with no distinct shares. In other words, the co-owners are as a group, regarded as a single entity, with each person holding a one hundred percent stake in the property’s value.

The author, Gilbert Kodilyne in Commonwealth Caribbean Property Law 3rd Edition expressed that;

“The essence of a joint tenancy is that there is one title and the joint tenants are collectively regarded as a single owner, although as between themselves, they have separate rights, such as the right to sever the joint tenancy...”

C) UNITY BETWEEN JOINT TENANTS

In order to establish the existence of a valid Joint Tenancy, the “Four Unities” must be present.

The four unities are:

- i) The Unity of Possession;
- ii) The Unity of Interest;
- iii) The Unity of Title; and
- iv) The Unity of Time

If any of these four unities is broken or missing, a tenancy in common will arise.

Unity of Possession

This means that each joint tenant must have the right to possess the whole property. Therefore, no tenant can identify any part of the property as his own, to the exclusion of the others. One should bear in mind however that the Unity of Possession does not require the physical possession of a co-owned property at all times. Therefore, if a co-owned property is leased by one of the joint tenants to one of the co-owners or to a third party, even though the said joint tenant would not be physically occupying the property, it does not affect the existence of the unity of possession as the lessee would be occupying the property under the co-owners’ will and possession.

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Unity of Interest

Each Joint Tenant must have the same type of interest in the property and the interest must run for the same duration, extent and nature. For example, if one co-owner has a life interest while another co-owner has an interest in fee simple, they cannot be considered to be joint tenants.

Unity of Title

This means that the interests held by the co-owners must have derived out of the same instrument or means; for example, by virtue of the same Will or Conveyance.

Unity of Time

As implied by the name, this element means that the interest of each joint tenant must be acquired by the co-owners at the exact same time.

D) JUS ACCRESCENDI (The Right of Survivorship)

One important characteristic of a joint tenancy is the principle of the “Right of Survivorship”. The effect of this principle is that on the death of one joint tenant, the interest which belonged to the Deceased co-owner automatically devolves to the surviving Joint Tenants. In other words, the surviving owner(s) automatically absorbs the dying owner’s share of the property.

Thus, if land is held by A, B and C as joint tenants and C dies first, C’s interest in the land would be automatically passed to A and B as joint tenants; and on B’s death, the land will pass to A alone. The longest living co-owner will then hold the land completely and on the death of that sole surviving joint tenant, the land will pass to his/her personal heirs.

In this example, even if B and C each prepared a Will expressly referring to the property, that particular provision in the Will would be of no effect since B and C would, in essence, have nothing to pass to their beneficiaries.

E) SEVERING THE JOINT TENANCY

It is always open to a joint tenant to sever a joint tenancy in order to avoid the consequences of the Right of Survivorship, thereby converting the said joint tenancy into a tenancy in common.

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In the case of **Williams v Hensman (1861) 70 ER 862**, Page Wood VC highlighted three circumstances in which a joint tenancy can be severed. Page Wood VC explained;

“In the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share.

Secondly, a joint tenancy may be severed by mutual agreement.

And in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.”

Act of any person interested in operating upon his own share

This means that one of the Joint Tenants can alienate or transfer his share to another; it could be to another Joint Tenant or to someone outside of the original co-ownership agreement.

Mutual Agreement

A specifically enforceable agreement for the alienation of a joint tenant’s interest will also have the effect of severing the joint tenancy. In the case of **Burgess v Rawnsley [1975] 3 All ER** an elderly couple, Mr. Honick and Mrs. Rawnsley joined in the purchase of a house. When the relationship broke down between the parties, Mr. Honick negotiated with his wife to buy out her interest in the property and there was evidence that Mrs. Rawnsley had orally agreed to sell her interest to her husband for a specified price. Mrs. Rawnsley later repudiated the agreement and demanded a higher price but her husband died before the negotiations could continue. It was held in the instant case that Mr. Honick had effectively severed the joint tenancy before his death, thereby creating a tenancy in common and his Estate was accordingly entitled to a half-share of the proceeds of sale of the property.

Course of Dealing

This involves an agreement or an intention by the co-owners to sever the Joint Tenancy. Although they may appear to be similar, the concept of “course of dealing” differs from “mutual agreement” as it does not require any express act of severance by the co-owners. All that is required is a consensus between the joint tenants arising in the course of dealing with the co-owned property, which would effectively exclude the future operation of a right of survivorship. **Gray, Elements of Land Law, 1987, London: Butterworths, p 329**

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For example, where spouses who are joint tenants engage in negotiations with one another for some arrangement in relation to their interests in a property upon divorce, it may be possible to infer from the circumstances a common intention to treat each other as tenants in common. However, a unilateral declaration by one party of an intention to sever the joint tenancy, will not suffice.

F) TENANCY IN COMMON

Unlike joint tenancies, in tenancies in common, each co-owner holds a distinct, fixed and finite share or proportion of entitlement to the property; for example, one-half share or one-third share of the property

It must also be noted that there are two defining characteristics of the tenancy in common which sets it apart from joint tenancies. They are:

- i) That the concept of “Right of Survivorship” does Not apply. Therefore upon the death of a tenant in common, his interest in the property does not automatically pass to the surviving co-owners. A tenant in common may therefore dispose of his share in the property by virtue of a Will or it may pass on his intestacy; and
- ii) Unlike with joint tenancies, in tenancies in common, only one unity must be fulfilled, that is, the Unity of Possession. Therefore, each tenant in common must show that they have a Right to Possession of the land in order for a valid tenancy in common to exist.

G) EQUITABLE PRESUMPTION OF TENANCY IN COMMON

In Megarry’s Manual of the Law of Real Property, 6th Edition, David Hayton expressed;

“Whereas the common law favoured joint tenancies, equity has always leaned in favour of tenancies in common, as equity ‘preferred the certainty and equality of a tenancy in common to the element of chance which the jus Accrescendi of a joint tenancy introduced.”

Therefore, equity presumes that a tenancy in common has been created in the following instances:

i) Purchase Money provided in Unequal Shares

- Where two or more persons purchase land together, providing purchase money in unequal shares, a tenancy in common of the property is presumed and the purchasers therefore take shares proportionate to the amounts advanced by each.

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ii) Loan on Mortgage

- Where two or more persons advance money (whether in equal or unequal shares) and take a mortgage of the land from the borrower to themselves jointly, they are treated in equity as tenants in common and the surviving co-owner is a trustee of the Deceased mortgagee's share for the latter's personal representatives.

iii) Partnership Assets

- Where business partners purchase land as part of their partnership assets, they are presumed to do so as tenants in common.

iv) Individual Business Purposes

- Where Business tenants hold a particular premises for their individual purposes, they will be treated as tenants in common. **Malayan Credit Limited v Jack Chia-MPH Limited [1986] 1 All ER 711.**

H) PARTITION

The author, Gilbert Kodilinye in Commonwealth Caribbean Property Law, expressed that co-owners, whether joint tenants or tenants in common, may agree voluntarily to bring an end to the co-ownership by dividing the property into separate parcels, each former co-owner henceforth becoming a single owner of his parcel. This process is referred to as "Partition."

In most Commonwealth Caribbean jurisdictions, co-owners can apply to the High Court of Justice for an Order for Partition or, alternatively, for an Order of Sale, the effect of which will be that each co-owner will obtain a precise share out of the proceeds of sale.

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