DOC-05 Tenancy

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1 Overview

Tenancy only needs to be considered where there is co-proprietorship in an interest in land. In a co-tenancy between proprietors of land, each proprietor has an interest in the whole of the parcel of land.

The tenancy between co-proprietors of an interest in land is a matter that must be decided at the time of entering into a legally binding contract. Tenancy between co-proprietors is created in the document that is lodged for registration at Landgate, usually in accordance with an Offer and Acceptance of a Contract of Sale.

When a joint tenancy is discussed, an interest as a joint tenant is referred to as having an interest in land.

When a tenancy in common is discussed, a tenant in common is referred to as having an equal or undivided share in land.

2 Sole Owner

A deceased sole proprietor of land can be bequeathed under the Will of the deceased or under the Administration Act 1903.

A Transmission Application is lodged to register the Executor or Administrator on the title in place of the deceased registered proprietor.

3 Joint tenants

Each proprietor has an equal interest in the whole of the parcel of land. Joint tenancy commonly occurs in the husband and wife situation, but it is possible (but not common) for corporations to hold
land as joint tenants, or for a person and a corporation to hold land as joint tenants.

The main feature of a joint tenancy is a right of survivorship. When one of the joint tenants dies their interest is extinguished, and the surviving joint tenants interest is correspondingly enlarged.

The four essential elements of a joint tenancy:

Unity of time

The interest of each joint tenant must commence at the same time and by virtue of the same event.

Unity of title

All joint tenants must derive their interest from the same document or via the same act.

Unity of possession

Each joint tenant has legal possession over the whole of the land. One of the co-owners is not entitled to exclusive possession of any part of the land.

Unity of interest

Each co-owner has the same interest in the land (an undivided equal interest).

All the above four elements must exist for a joint tenancy to be created.

For example:

A - B - C as joint tenants

A sells to D B and C as joint tenants of two third shares and

D of one third share, as tenants in common.

A joint tenancy can be severed by:

Death

Transfer of interest as a joint tenant

Simultaneous death of joint tenants – Section 120 of the Property Law Act prescribes that the proprietors are then tenants in common.

Murder – at law a person cannot profit from an illegal act. Therefore, if a joint tenant is convicted of murdering a co-joint tenant, the survivorship can be refused.

Where a person unilaterally transfers their interest as a joint tenant in land (to effect the severance of the joint tenancy – no valuable consideration expressed) then the Transfer of Land must be registered prior to the death of the Transferor. Otherwise the Courts may set the transfer aside because the Transferor had not completed the gift of the interest in the land.

The main feature of a joint tenancy is that, upon the death of one joint tenant, the surviving joint tenant(s) become the registered proprietor of the land by Survivorship Application.

Where no tenancy is expressed in a Transfer of Land, then Section 60 of the Transfer of Land Act deems the co-proprietors to be joint tenants. In digital titles, a tenancy will always be stated in the proprietorship section of the title.
4 Tenants in common

This a co-tenancy between proprietors of land, with each proprietor having an undivided share in the whole of the land. Each proprietor is legally entitled to possession of the whole parcel unless exclusive use agreements are made between the proprietors. The unity of possession is the only essential element that applies to a tenancy in common.

Common instances of a tenancy in common include husband and wife situations, or farming properties, time share developments, retirement villages, corporations, etc.

It is possible for a separate Certificate of Title to be issued for each undivided share in the land parcel, but this no longer a common practice.

The undivided share of a deceased proprietor of land can be bequeathed under the Will of the deceased or under the Administration Act 1903.

A Transmission Application is lodged to register the Executor or Administrator on the title in place of the deceased registered proprietor.

5 Multiple co-tenancy arrangements

Where persons desire to hold land as tenants in common but some of them, between themselves, desire to create a joint tenancy as to their share, the transferee panel should show:

James Smith, and Mary Smith, both of 10 Kew Street PERTH WA 6001, as joint tenants of one undivided half share and Thomas Jones of 5 Timm Street BALGA WA 6061, of one undivided half share, as tenants in common.

or

James Smith, and Mary Smith, both of 10 Kew Street PERTH WA 6001, as joint tenants, of one undivided half share and Thomas Jones, and Jane Jones, both of 5 Timm Street BALGA WA 6061, as joint tenants, of one undivided half share, as tenants in common.

or

James Smith and Mary Smith, both of 10 Kew Street PERTH WA 6001, as joint tenants of two undivided fourth shares, Thomas Jones of one undivided fourth share and Jane Jones of one undivided fourth share, both of 5 Timm Street BALGA WA 6061, as tenants in common.

In the case of a digital title, tenants in common will only receive one duplicate certificate of title showing all their shares noted on that one duplicate certificate of title. If a separate duplicate certificate of title is required for each tenant in common's share, separate paper titles can be created and registered for the respective shares of the transferees.

The request should be typed or written on the transfer form and signed by each new transferee or by the transferee’s solicitor or agent. A further fee is payable for each additional certificate created. (Click on the following link for a list of the current Lodgement and Search fees payable.)