Report on Joint Tenancy

A Report prepared for the British Columbia Law Institute by the Members of the Real Property Law Reform (Phase 2) Project Committee

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The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its strategic mission is to be a leader in law reform by carrying out:

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- the best in outreach relating to law reform.

This project was made possible with the financial support of The Law Foundation of British Columbia, the Notary Foundation, and the Real Estate Foundation of British Columbia. The Institute gratefully acknowledges the support of these foundations for its work. The Institute also gratefully acknowledges the sustaining support of The Law Foundation of British Columbia and the Ministry of Attorney General.

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INTRODUCTORY NOTE

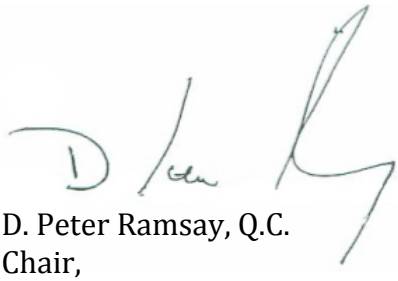
Report on Joint Tenancy

Joint tenancy is one of the two forms of co-ownership in existence today. It is very prevalent in British Columbia. The most distinctive characteristic of joint tenancy, namely the right of survivorship, is especially attractive to co-owning spouses and parties to long-term marriage-like relationships, because it allows the property to pass automatically to the surviving joint owner without having to pass first through the deceased's estate.

The common law rules governing joint tenancy originated at a time when spouses could not own land as joint tenants. Some of those rules are not in keeping with present-day circumstances. Severing a joint tenancy without the knowledge of the other joint tenant is open to abuse, especially in spousal or marriage-like relationships. It is also inconsistent with the proper operation of the land title system, because a joint tenancy may still appear in the register even though the owners now hold the title as tenants in common after a secret unregistered severance.

The "four unities" rule making unity of time, title, interest and possession essential to the existence of a joint tenancy is unnecessarily rigid. Its effect is to require that the respective interests of joint tenants must arise at the same time, through the same instrument, and be of equal size. This makes it impossible to recognize unequal financial contributions to the acquisition of the jointly owned property, or to add or substitute joint tenants.

This report makes numerous recommendations for the reform of the law of joint tenancy to remove some of its more anachronistic features and allow this very popular way of holding land to better serve contemporary society.



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The Institute also extends its gratitude to the Law Foundation of British Columbia, the Notary Foundation, and the Real Estate Foundation, for their financial support of Phase 2 of the Real Property Law Reform Project.

The Institute extends its thanks to all those individuals and organizations who responded to the consultation paper that preceded this report. The comments they provided were of great assistance to the Project Committee in reviewing and refining the recommendations reflected in the report.

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The Institute acknowledges the contribution of the legal staff of the Institute in supporting the work of the Project Committee and the Board of Directors leading to this report, in particular Mr. Greg Blue, Q.C., project manager, Mr. Kevin Zakreski, and Mr. Andrew McIntosh. Other present and former members of the Institute staff who contributed to the project at various times were Mr. Christopher Bettencourt, Ms. Emma Butt, Ms. Heather Campbell, Ms. Kristine Chew, Ms. Setareh Javadi, and Ms. Elizabeth Pinsent.

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EXECUTIVE SUMMARY

Two forms of co-ownership of land exist today: joint tenancy and tenancy in common. The principal difference between them is the right of survivorship that attaches to joint tenancy. On the death of a tenant in common, the deceased's interest in the land forms part of the deceased's estate. When a joint tenant dies, however, the interest the deceased held in the land does not form part of the deceased's estate and the surviving joint tenants continue as the sole owners.

For a joint tenancy to exist, the "four unities" must be present: unity of title, time, interest and possession. This means in effect that joint tenants must acquire their interests at the same time through the same document, hold equal interests, and have an equal right to possession of all the land. If one of the four unities is removed, the joint tenancy is said to be "severed" and is automatically converted to a tenancy in common. Tenants in common, while also having a right to simultaneous possession of all the co-owned land, may hold unequal interests and acquire them at different times.

A joint tenancy may be "severed" in several ways. One of the ways severance can occur is by a unilateral act inconsistent with the continuance of a joint tenancy, such as transferring an interest in a joint tenancy to a third party.

For the most part, joint tenancy continues to serve modern needs, but some of the common law principles that govern it are archaic, inflexible, and not fully consistent with present-day circumstances. In particular, land owned by spouses and family members is often held in joint tenancy today, because the right of survivorship is a convenient means of transferring real estate to a surviving spouse or between generations without probate. The common law rules arose at a time when spouses could not own land in joint tenancy, however. This has some untoward consequences.

In British Columbia, unlike some other Canadian jurisdictions, it is still possible for a joint tenancy to be severed secretly, depriving other joint tenants of the right of survivorship without their knowledge. As joint tenancy affords a kind of economic security for spouses and long-term cohabitants, secret severance can lead to considerable hardship for a surviving joint tenant. Settled, long-term expectations of financial and even physical security based on home ownership can easily be overturned by concealment of the fact that a joint tenancy has been severed. Registration of a severing transfer or other transaction is not necessary for severance to occur. This leads to inaccuracy in land title records.

The common law four unities rule makes it impossible to add or substitute joint tenants, or for joint tenants to hold in unequal shares that would allow recognition of different contributions to the purchase of the land. It is unnecessarily rigid and anachronistic.

This report proposes reforms to eliminate the possibility of severance in secret. It also proposes abrogation of the requirement for unity of title, time, and interest in order to allow joint tenancy to be a more flexible form of co-ownership, permitting joint tenants to hold in unequal interests. Only the unity of possession that allows each joint tenant a right to occupy the entire property would be essential to a joint tenancy in addition to the right of survivorship.

The report calls for the effect of a mortgage of an interest in joint tenancy to be clarified. While the mortgage would continue to operate as a severance, the severing effect would be limited to the interest of the mortgagor alone. If there were more than two joint tenants initially, the joint tenancy would persist among the joint tenants who were not parties to the mortgage. A long-term agreement for sale (of the kind covered by section 16(1) of the *Law and Equity Act*) calling for payment of the purchase price by instalments would be treated like a mortgage, severing the joint tenancy but only with respect to the interest of the joint tenant being sold.

Elimination of the four unities rule would mean that the right of survivorship would remain as the only feature distinguishing joint tenancy from tenancy in common. As the traditional terms "joint tenancy" and "tenancy in common" were never particularly descriptive of the legal differences between the two forms of co-ownership in any case, the consultation paper proposes replacement of the terms "joint tenancy" and "tenancy in common" by "co-ownership with survivorship" and "co-ownership without survivorship," respectively.

The reforms proposed in this report would remove some of the more anachronistic aspects of joint tenancy, clarify other aspects of the law surrounding it, and make this form of land ownership more adaptable to modern needs.

PART ONE

I. INTRODUCTION

A. General

This report proposes changes to the law concerning co-ownership of land in the form of joint tenancy. Joint tenancy is one of two forms of co-ownership that exist in British Columbia today. The other is tenancy in common. The word "tenancy" is employed in these terms in an older sense denoting ownership of an estate in land, rather than in its usual modern meaning of occupation under a lease. "Tenant" used in this older sense is only another term for "owner."

Land owned by spouses is very often held in joint tenancy. Land is also typically held in joint tenancy when the co-owners are members of more than one generation of a family. The reason for this in both cases is the right of survivorship. On the death of a joint tenant, the surviving joint tenants continue as the owners. The interest that the deceased joint tenant held while alive does not pass through that joint tenant's estate. The right of survivorship makes joint tenancy a very convenient means of transferring wealth to a surviving spouse or between generations.

While joint tenancy continues to serve modern needs quite well in many circumstances as a form of land ownership, the legal principles surrounding it date from feudal times. In some respects, they are not fully consistent with present-day circumstances and standards. They can lead to unfair and untoward results. In this report, we set out a case for modification of those principles. While most of the recommendations made in this report may be equally applicable to personal property, the report focuses on joint tenancies in land because the terms of reference under which the recommendations were generated extend only to real property.[1] Co-ownership of personal property, which includes intangibles, has distinct complexities worthy of separate examination.

B. The Real Property Reform Project

This report is one of a series issued in connection with Phase 2 of the Real Property Reform Project, a multi-year initiative funded by the Law Foundation of British Co-

1. The recommendations in this report that directly concern registration in a land title office of instruments affecting joint tenancies are obviously linked to the land title system, but the remainder dealing with the substantive principles of joint tenancy may be transferable to personal property.

lumbia, the Notary Foundation, and the Real Estate Foundation. The Real Property Reform Project examined several areas of land law in British Columbia that were not under review by other bodies and which were in need of reform. The objective is to develop concrete recommendations for legislative reform needed in these areas, based on extensive research and consultation. The published reports embodying the final recommendations will be provided to provincial Ministries, the Land Title and Survey Authority, and other bodies concerned with the matters in question.

Phase 1 of the Real Property Reform Project was a preliminary scoping study completed in 2007 with the aid of an Advisory Committee. Phase 2, which began in 2008, involved active research, consultation, and development of the law reform recommendations. The members of the Project Committee for Phase 2 are listed at the beginning of this document.

C. The Consultation Paper

This report was preceded by a consultation paper issued for the purpose of eliciting comment on the proposed reforms to the law of joint tenancy.[2] The Project Committee fully considered the comments received in response to the consultation paper in developing the recommendations for reform of the law of joint tenancy set out in this report.

D. Structure of the Report

Part One consists of four chapters. Chapter I is a general introduction. Chapter II reviews the present law of joint tenancy. Chapter III discusses the deficiencies of the present law and explains the basis for the recommendations for its reform. Chapter IV presents a conclusion and lists the recommendations for legislative modification of the law of joint tenancy.

Part Two contains draft legislation to implement the recommmendations of the report and commentary.

2. See British Columbia Law Institute, *Consultation Paper on Joint Tenancy* (Vancouver: The Institute, 2011), online at http://www.bcli.org/sites/default/files/Real_Property_-_Joint_Tenancy_CP.pdf.

II. THE EXISTING LAW OF JOINT TENANCY

A. The Nature of Joint Tenancy

1. THE "FOUR UNITIES"

Four requirements must be present for a joint tenancy to arise. These are called the "four unities" of title, time, interest, and possession.[3]

Unity of title: The interests of the co-owners must be created by the same act or instrument, such as a transfer of land or a will.

Unity of time: The interests of the co-owners must be created at the same time.[4]

Unity of interest: The interests of the co-owners must be of equal nature, size, and duration. For example, one cannot be a life interest and another an interest in fee simple. If there are three co-owners, one cannot have a half-interest and two others one-fourth each. Each must have a one-third interest.

Unity of possession: Each co-owner is entitled to possession of the whole of the land and none is entitled to any part of it to the exclusion of the other co-owners. (This is actually a characteristic of both joint tenants and tenants in common. For this reason, the respective interests of both kinds of co-owners are said to be "undivided.")

If one or more of the four unities is not present, the result is a tenancy in common.

3. Cheshire G.C. and E.H. Burn et al., *Cheshire and Burn's Modern Law of Real Property*, 17th ed. (Oxford: Oxford University Press, 2006) at 454.

4. There are two exceptions to this requirement for unity of time. A gift of land under a will may be made to beneficiaries as joint tenants even though their interests may not all vest at the same time: *Blamford v. Blamford* (1615), 3 Bulstr. 98 at 101, 81 E.R. 84 at 86-87. A transfer to a trustee for beneficiaries may create a valid joint tenancy with respect to the beneficial ownership of the trust property even if the interests of the beneficiaries may vest at different times: *Kenworthy v. Ward* (1853), 11 Hare 196, 68 E.R. 1245.

2. The Right of Survivorship

The other distinguishing feature of joint tenancy is the right of survivorship.[5] On the death of a joint tenant, the interest of that joint tenant comes to an end rather than belonging to his or her estate, and the surviving joint tenants simply continue in ownership of the entire property in the co-owned land.

Originally only natural persons could be joint tenants, because corporations cannot die like a natural person and the other joint tenants could therefore not enjoy the right of survivorship. The unity of interest would not be present because the incidents of the respective interests would not be identical. Legislation has altered this. Section 31(1) of the *Business Corporations Act*[6] expressly allows a corporation to own property in joint tenancy in British Columbia. Section 31(3) provides that on dissolution of a corporation holding as a joint tenant, the interest of the corporation devolves on the remaining joint tenant, thus treating dissolution of a corporation like the death of a natural person for the purposes of the right of survivorship.

3. How Joint Tenancy Differs From Tenancy In Common

While undivided possession of the whole of the co-owned land is a feature of both tenancy in common and joint tenancy, the root difference is that tenants in common hold separate titles to the whole. Joint tenants, however, are treated in law essentially like a unitary owner while the joint tenancy subsists.

Tenants in common can deal with their respective interests freely without changing the nature of the co-ownership. They can dispose of their interests by will, for example, because their interests belong to their estates and pass to their personal representatives instead of to the remaining co-owners.

Joint tenants are said to hold *per my et per tout*, loosely translated as meaning each joint tenant owns the whole and nothing separately.[7] They cannot deal with their interests in the co-owned land in a manner inconsistent with the concept of unitary ownership and still preserve the joint tenancy.

4. Consequences of the Four Unities Rule

The four unities rule is relatively restrictive. The unities of time and title make it impossible to add or substitute any joint owners in the original arrangement. A new

5. The right of survivorship is sometimes referred to by its Latin name *jus accrescendi*.

6. S.B.C. 2002, c. 57.

7. *Evans v. Evans (No. 2)*, [1951] 2 D.L.R. 251 (B.C.C.A.).

joint tenancy would have to be created by the existing owners transferring to themselves and the new owners jointly.

The unity of interest rule means that it is not possible for two or more persons to co-own land in unequal proportions and still enjoy the right of survivorship with respect to the whole.[8] More than twenty years ago the former Law Reform Commission of British Columbia (LRCBC) commented as follows:

> There are many reasons parties might want unequal interests clearly recorded so that if, at some future date, a severance of the joint tenancy should take place, there is little room for argument concerning their respective interests. For example a husband and wife may purchase a matrimonial home with the wife putting up 80% of the money. They find the notion of a joint tenancy attractive for its right of survivorship, but fear that if the husband's business activities should lead to his bankruptcy, the trustee would be entitled to half the property. A form of joint tenancy which recognized unequal interests would seem to satisfy their needs.[9]

One might wonder what purpose is served in the present day by barring co-owners with interests of different size from the benefit of the right of survivorship.

B. The Creation of Joint Tenancies

At common law, if land was transferred to two or more owners and the deed or other transferring instrument was silent as to the manner in which the transferees were to hold the land, they were presumed to own it as joint tenants. The common law presumption in favour of joint tenancy has been changed by legislation in British Columbia. The legislation is now found in section 11(2) of the *Property Law Act*.[10] It provides that when land is transferred, made the subject of a gift under a will, or sold under an agreement for sale to two or more persons, those persons are tenants in common unless a different intention appears in the instrument in question.

Today, if a transfer of land, an agreement for sale, or a clause in a will confers an interest in land on two or more persons, it must accordingly state or clearly imply that they are to take as joint tenants if a joint tenancy is intended.

8. *Speck v. Speck* (1983), 51 B.C.L.R. 143 (S.C.).

9. LRCBC, *Working Paper on Co-Ownership of Land* (WP 58) (Vancouver: The Commission, 1987) at 26-27.

10. R.S.B.C. 1996, c. 377.

C. Severance of Joint Tenancies

1. Severance at Common Law

(a) General

A joint tenancy may be "severed" and thereby converted into a tenancy in common. There are three ways of severing a joint tenancy at common law:

(a) an act or transaction by one joint tenant with respect to that joint tenant's individual interest;

(b) mutual agreement of the joint tenants;

(c) a course of dealing that indicates the joint tenants are treating their respective interests as if they were tenants in common.[11]

The first method of severance, namely an act or transaction with respect to an individual joint tenant's interest, may be unilateral vis-à-vis the other joint tenants. The second and third methods of severance, namely mutual agreement and a course of dealing, depend on a common intention on the part of the joint tenants to treat the joint tenancy as being at an end.[12]

(b) Act or transaction with respect to a joint tenant's individual interest

Most, but not all, acts or transactions by a joint tenant that result in severance involve alienation of the joint tenant's interest. The alienation may be voluntary or involuntary. Some examples of acts and transactions with respect to an individual interest in joint tenancy that will result in severance are:

11. *Williams v. Hensman* (1861), 1 John & H. 546 at 557-558, 70 E.R. 862 at 867; *Walker v. Dubord* (1992), 67 B.C.L.R. (2d) 302 at 308 (C.A.). The murder of one joint tenant by another will also sever the joint tenancy, on the ground that the murderer cannot benefit by survivorship because of the principle of property law that one cannot benefit by one's own wrong: *Re Pupkowski* (1956), 6 D.L.R. (2d) 427 (B.C.S.C.).

12. A.J. McClean, "Severance of Joint Tenancies" (1979), 52 Can. Bar Rev. 1 at 2. The common intention need not be on the part of all the joint tenants, as long as two or more of them decide to sever. If two of three joint tenants decide to sever, the two who agree to sever will be tenants in common between themselves and will remain joint tenants vis-à-vis the third co-owner: *ibid.*

(a) transfer of a joint tenant's interest to another person;[13]

(b) transfer of an interest in joint tenancy to oneself;[14]

(c) a mortgage of an individual joint tenant's interest;[15]

(d) a declaration of trust by a joint tenant in favour of a third party;[16]

(e) involuntary transmission or vesting of a joint tenant's interest in another by operation of law, such as would occur in the following circumstances:

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13. *Williams v. Hensman, supra*, note 11.

14. *Property Law Act*, R.S.B.C. 1996, c. 377, s. 18(3). See also *Walker v. Dubord*, *supra*, note 11. While s. 18(3) of the *Property Law Act* expressly provides that a transfer to oneself of an interest in joint tenancy is a severance, it would also be the result apart from s. 18(3), because the unity of title would be broken. The co-owners would no longer hold their respective interests by virtue of the same instrument.

15. *Bank of Montreal v. Koszil*, [1985] B.C.J. No. 2097 at para. 30 (C.A.); *Campbell v. Smith Estate*, [1991] B.C.J. No. 3611 (S.C.). This is based on the assumption that a mortgage of land in British Columbia continues to have the effect it was said to have in *District of North Vancouver v. Carlisle* (1922), 31 B.C.R. 372 (C.A.), namely the effect it had at common law of vesting the legal estate of the mortgagor in the mortgagee, subject to a right of redemption. Note that s. 231(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250 now states that a mortgage operates to charge the mortgagor's interest in the land it affects, whether or not the mortgage contains words of transfer subject to redemption. The meaning of s. 231(1) is open to debate, especially as s. 231(2) provides the mortgagor and mortgagee have all the rights they would have if the mortgage did transfer the legal estate, and s. 231(3) states ss. 231(1) and (2) do not "alter the general law of mortgages or the legal and equitable rules that apply between mortgagor and mortgagee…." The Court of Appeal was content to assume in *Dhillon v. Jhutee*, [1998] B.C.J. No. 639 that the law was still as it was stated in *District of North Vancouver v. Carlisle*. The Court of Appeal raised the possibility that the predecessor provision to s. 231(1) may have changed the law, but did not decide the point because it was not argued. A 2010 decision of the Court of Appeal contains *obiter dicta* stating that registration of a judgment or mortgage against the interest of a joint tenant does not sever the joint tenancy, but the only authorities referred to for this proposition were ones dealing with registration of a judgment: see *R. v. Ford*, 2010 BCCA 105 at para. 30. The earlier unanimous decision of a panel of the Court of Appeal in *Bank of Montreal and Koszil*, *supra,* appears not to have been cited to the court on this occasion. In any case, the Land Title Office insists on registration of a transfer by the mortgagor to him- or herself to sever a joint tenancy before registering a mortgage of an interest in joint tenancy. The registrar requires this on the footing that the non-mortgaging joint tenant could otherwise take the entire estate by right of survivorship, eliminating the mortgagee's interest: *Land Title Practice Manual*, vol. 1 at 11-8. There is some authority elsewhere that a mortgage of land under a Torrens system operates only as a charge and does not sever a joint tenancy: *Lyons v. Lyons*, [1967] V.R. 169 (S.C.). The New Brunswick *Land Titles Act*, S.N.B. 1981, c. L-1.1, s. 25(3) provides expressly that the registration of a mortgage does not sever a joint tenancy.

16. *Public Trustee v. Mee*, [1972] 2 W.W.R. 424 (B.C.C.A.).

(i) on a joint tenant becoming bankrupt;[17] or

(ii) on the completion of execution against an interest in joint tenancy under a judgment against the owner;[18]

(f) acquisition by one joint tenant of a greater interest in the land than the other joint tenants.[19] For example:

> A and B hold a life estate in land as joint tenants. B then acquires the remainder in fee simple. This destroys the unity of interest, severing the tenancy for the joint lives of A and B.

The common feature in these examples of unilateral dealings having the effect of severance is that the act or transaction in question is inconsistent with preservation of one or more of the four unities. Joint tenants are able to deal with their interests like other owners, but if the dealing is of a nature that one or more of the four unities is removed, the result is a tenancy in common.[20]

A mere declaration of intent to sever or to hold and deal with an undivided interest separately is insufficient to produce a severance because it does not itself destroy one of the four unities.[21]

It is not possible to sever a joint tenancy by means of a will, because the interest of a joint tenant does not form part of the deceased's estate on death and thus is not within the power of the deceased to give. Severance is only possible during the lifetime of a joint tenant.

17. *Re White*, [1928] 1 D.L.R. 846 (Ont. S.C.). But see *obiter dicta* of Newbury, J.A. in *DaimlerChrysler Financial Services (Debts) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242 at para. 29.

18. But not on the mere registration of a judgment against a joint tenant's interest in land, because nothing has happened at that stage to divest the joint tenant of title: *Re Young Estate* (1968), 66 W.W.R. 193 (B.C.C.A.); *CIBC v. Muntain*, [1985] 4 W.W.R. 90 (B.C.S.C.).

19. *Giles v. Wiscot* (1599) 2 Co. Rep 60b, 76 E.R. 555 (C.P.); McClean, *supra*, note 12 at 5. It would not have prevented a joint tenancy in the life estate from coming into being in the example if B had been granted the remainder at the same time as the life estate was created, *e.g.* by a conveyance "to A and B for life jointly, remainder to B" but if B acquired it later, this would amount to severance: *Giles v. Wiscot, ibid.*

20. McClean, *supra*, note 12 at 2.

21. *Walker v. Dubord*, *supra*, note 11.

(c) Severance by mutual agreement

An express agreement between the joint tenants to sever the joint tenancy will have that effect. This method of severance can also take the form of an agreement that does not address severance specifically, but is one from which an inference may be drawn that the parties intend to terminate the joint tenancy. An example is an agreement by one joint tenant to sell to the other.[22]

(d) Severance by course of dealing

Severance may be inferred from a course of dealing between joint tenants indicating that their joint tenancy has been mutually treated as a tenancy in common.[23] This is said to be a mode of severance entirely distinct from severance by agreement.[24] This distinction between implied agreement and a course of dealing has been criticized as lacking in logical cogency.[25] It remains recognized in case law nonetheless.

2. ORDER FOR PARTITION OR SALE

An order for partition of jointly owned property under the *Partition of Property Act*[26] results in severance, because the purpose of partition is to divide co-owned land between the respective co-owners. An order for sale under the Act in lieu of partition would have the same effect, as the purpose of sale would be to dissolve the co-ownership arrangement and distribute the proceeds between the co-owners.[27]

22. *Burgess v. Rawnsley*, [1975] Ch. 429; *Philippson v. van Gruting* (1993), 85 B.C.L.R. (2d) 46 (S.C.). The agreement to sell need not be specifically enforceable in order to produce a severance. In other words, it need not be sufficiently evidenced in writing to satisfy the Statute of Frauds as long as it indicates a settled intention that there should be no right of survivorship any longer: *Burgess v. Rawnsley*, *ibid.*

23. *Williams v. Hensman*, *supra*, note 11. See *Ginn v. Armstrong* (1969), 3 D.L.R. (3d) 285 (B.C.S.C.), where a separated husband and wife exchanged correspondence through their solicitors in which the wife sought the sale of the property they held in joint tenancy and division of the proceeds, and the husband requested the wife to transfer her half-interest to her son. The correspondence never culminated in a sale, but was held to be sufficient to show there had been a severance. In *Walker v. Dubord*, *supra*, note 11, the Court of Appeal explained *Ginn v. Armstrong* as involving a finding that the joint tenancy had been severed by a course of dealing.

24. *Burgess v. Rawnsley*, supra, note 22 at 447.

25. McClean, *supra*, note 12 at 16. See also *Philippson v. van Gruting*, *supra*, note 22 at 55.

26. R.S.B.C. 1996, c. 347.

27. *Munroe v. Carlson*, [1976] 1 W.W.R. 248 (B.C.S.C.). Severance does not occur merely because an application for partition or sale has been made, however: *Rodrigue v. Dufton* (1976), 72 D.L.R. (3d) 16 at 20 (Ont. H.C.).

3. Severance under Part 5 of the Family Relations Act

Part 5 of the *Family Relations Act*[28] provides for the division of matrimonial property on the breakdown of a marriage. Division occurs automatically when certain specified events (commonly referred to as "triggering events") occur. The triggering events are: a separation agreement, a declaratory judgment under section 57 of the Act that the parties have no reasonable prospect of reconciliation, divorce, judicial separation, or annulment. On the occurrence of the first triggering event, each spouse automatically acquires a half-interest as a tenant in common in each family asset, regardless of how the family asset was owned previously.[29] If the property was held by the spouses as joint tenants before the triggering event, the Act will operate to sever the joint tenancy and create a tenancy in common.

4. Effect of Severance on Non-Severing Joint Tenants

Severance of one joint tenant's interest does not affect the relationship among the remaining co-owners among themselves. A joint tenancy will persist among them. For example:

> A, B, and C are joint tenants and A transfers A's interest to a third party. The third party is a tenant in common vis-à-vis B and C, but B and C remain joint tenants as between themselves.

5. Registration Not Required for Valid Severance

It is unnecessary to register a severing instrument for it to be effective to end a joint tenancy. This is true notwithstanding that the *Land Title Act*[30] provides that interests in land do not pass as against third parties (which in this case would seem to include the non-severing joint tenant(s)) unless the instrument that transfers or assigns them is registered. This was firmly established in the well-known case *Stonehouse v. Attorney General of British Columbia*.[31]

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28. R.S.B.C. 1996, c. 128. The *Family Relations Act* is slated to be replaced by the *Family Law Act*, S.B.C. 2011, c. 25. The *Family Law Act* contains various reforms to the matrimonial property regime that are not in force as of the date of publication. After the relevant provisions of the *Family Law Act* come into force, a division of family property will likely still have the effect of severing a joint tenancy.

29. *Ibid.*, s. 56(1). A "family asset" is property owned by one or both spouses and ordinarily used by the spouses or a minor child of either spouse for a family purpose: s. 58(2).

30. *Supra*, note 15.

31. [1962] S.C.R. 103. See also *Feinstein v. Ashford* (2005), 50 B.C.L.R. (4th) 382 (S.C.).

In *Stonehouse* a husband and wife were registered owners in joint tenancy. The wife signed a transfer of her interest to her daughter. The transfer remained unregistered for three years and was submitted to the Land Title Office for registration the day after the wife died. The daughter was registered as the owner of a half-interest in the property. The husband brought a claim against the assurance fund on the ground that he had been deprived of full title because of a mistake of the registrar. He argued the joint tenancy could not be severed before registration of the transfer, and before that had occurred he had become the rightful owner by right of survivorship. He also argued the registrar should have inquired into the circumstances of a three-year-old transfer being submitted for registration. The Supreme Court of Canada held that the joint tenancy was severed on delivery of the signed transfer to the transferee, because the transfer took effect as between the immediate parties at that point. Registration was unnecessary to perfect the severance.

The fact that joint tenancies can be severed without registration does not fit well with the land title system. It means that land title office records may not reflect the true state of the title to co-owned land at a given point in time. This is inconsistent with the principles of the *Land Title Act*, under which the register is meant to be a definitive statement of the title to land. The legal rules concerning severance were developed before modern schemes for registration of land titles or documents of title came into being.

6. Secret Severance

Stonehouse v. Attorney General of British Columbia illustrates another aspect of the law relating to severance of joint tenancies in British Columbia: it is possible for a joint tenancy to be severed in secret. Several British Columbia decisions since *Stonehouse* have reinforced the proposition that a non-severing joint tenant need not know of the severing transaction or dealing in order for it to be fully effective to end the joint tenancy.[32]

The ability to sever joint tenancy in secret may overturn long-held expectations of future financial and perhaps physical security based on the right of survivorship. It may result in considerable injustice even if those expectations are not present or are in the background. The following example is based on the facts of a recent case:

32. See *Feinstein v. Ashford*, *ibid.*; *Glass v. Clarke*, 2001 BCSC 249; *McDonald v. Eckert*, 2004 BCSC 323. It is possible for a spouse to gain some protection against secret severance of a joint tenancy in the matrimonial home before it occurs by applying for an entry against the title to the jointly owned land under the *Land (Spouse Protection) Act,* R.S.B.C. 1996, c. 246. The effect of the entry is to prevent registration of a disposition of the land without the consent of the spouse.

> A and B are long-term cohabitants. A acquires retirement property entirely at A's expense. A registers the title in the names of A and B as joint tenants because A wants to provide for B's security if A predeceases B. Over a period of many years during which A and B live on the property, A expands and renovates the property at A's sole expense. Unexpectedly, B predeceases A. A then applies to be registered as the sole owner. A is shocked to discover that B had secretly severed the joint tenancy by transferring B's half-interest to B and B's children in joint tenancy, so that these stepchildren are now co-owners of the retirement residence that A acquired and maintained at A's sole expense.[33]

Someone in A's position could be forgiven for thinking that the law of severance is perverse.

The LRCBC pointed out that the possibility of severance in secret allows the severing joint tenant to pursue a strategy to ensure that only he or she will benefit by the right of survivorship, and gave this example:

> A and B hold Blackacre in joint tenancy. A, unknown to B, conveys his interest to his favourite nephew (the sole beneficiary under A's will) and instructs him to keep the conveyance hidden until A or B dies. If A survives B, the conveying documents are destroyed and A receives the entire estate which ultimately passes to the nephew. If B survives A, the documents are produced, thus establishing that the joint tenancy was severed before A's death, and the nephew receives A's share.[34]

In either eventuality, B is deprived of the right of survivorship while A ensures that either A or A's beneficiary benefits. This is inconsistent with the concept of joint tenancy as a form of land holding carrying a mutual right of survivorship.

33. See *McDonald v. Eckert*, *ibid*.

34. LRCBC, *Report on Co-Ownership of Land* (LRC 100) (Vancouver: The Commission, 1988) at 35. Online at http://www.bcli.org/bclrg/projects/co-ownership-land-1988.

III. REFORM

A. The Four Unities Rule

Is it necessary to preserve the four unities rule? Its survival to this point appears to have been a matter of mere legal traditionalism. There does not appear to be either a practical or a policy reason for insisting on continuance of three of the four rules, namely those requiring that co-owners' respective interests must derive from the same document or transaction (unity of title), be of equal size (unity of interest), and come into being simultaneously (unity of time).

Only the unity of possession seems to have a purpose, as the foundation of both joint tenancy and tenancy in common is the concurrent right in two or more persons to possession of the whole of a parcel of land, with a corresponding inability to exclude any co-owner from any part of the land.

Two decades ago the LRCBC recommended that the unity of interest be abrogated to allow interests in joint tenancy of unequal size.[35] The Ontario Law Reform Commission went further, concluding that only the unity of possession was essential. It recommended the abolition of the other three unities on the ground that they "do not carry out any useful policy in the modern law."[36] The Ontario Law Reform Commission noted that the unity of time was not strictly applied because joint tenancies can be created under a will or trust in which the interests of the beneficiaries taking as joint tenants do not arise at the same time. It concluded that there was no functional reason why interests in joint tenancy had to be equal in size and arise at the same time.

The Project Committee agrees with the Ontario Law Reform Commission, and endorses the conclusion expressed in this paragraph drawn from its 1996 report:

> Accordingly, we recommend that the unities of interest, time and title should be abrogated as requirements for a joint tenancy. Instead, the fundamental

35. *Ibid.*, at 31.

36. Ontario Law Reform Commission, *Report on Basic Principle of Land Law* (Toronto: Ministry of the Attorney General, 1996) at 105.

> determining factor should (subject to the relevant presumptions) be solely one of intention: whether the parties intended the right of survivorship.[37]

One example of when co-owners may wish to hold as joint tenants with unequally sized interests was given in Chapter II, namely that of spouses who acquire a residence with one spouse contributing 80 per cent of the purchase price and the other 20 per cent. The spouses may be fully content for either to take the entire interest by way of survivorship, but the spouse who made the greater contribution would want to have that greater share recognized if the other spouse became bankrupt or if their property was divided in the event of marital breakdown.

Another example where the ability to hold unequal interests in joint tenancy might be useful could involve a transfer of a fractional interest by a parent to a child:

> A owns a home. A has an adult son or daughter, C. A wishes to transfer to C in joint tenancy so that C will own the home by way of survivorship on A's death. C cannot afford to purchase a half-interest from A, however, and A wants to be recognized while alive as owning the full interest or very nearly the full interest in case, for any reason, the home is sold in A's lifetime. If joint tenants were able to hold in unequal interests, A could transfer a 1/100 interest in the home to C in joint tenancy.

A concern raised in a response to the consultation paper was that to allow joint tenants to hold in unequal interests that may arise at different times would be to encourage fragmentation of titles and greater complexity in the ways title is held. The possibility of joint tenancy and tenancy in common co-existing within the title to the same land was given as an example. It is possible now for joint tenancy and tenancy in common to exist simultaneously with respect to the same parcel of land, however. As explained earlier in Chapter II, severance of the interest of one or more, but not all, joint tenants can result in some of the original joint tenants continuing to hold as joint tenants amongst themselves, but as tenants in common with the remaining co-owners. The change being proposed here would not create a possibility for a mixed pattern of ownership that does not exist at the present time.

The Institute therefore recommends:

1. The Property Law Act should be amended to provide that interests in joint tenancy may

37. *Ibid.*, at 107. The form of co-ownership is sometimes determined not by the intention of the co-owners, but by that of their grantor. For example, a person may give land by will to two or more beneficiaries jointly.

(a) be of unequal size;

(b) arise from different instruments;

(c) arise at different times.

B. Terminology of Co-Ownership

Abolition of three of the four unities as prerequisites for the existence of a joint tenancy would leave the right of survivorship as the only distinction between joint tenancy and tenancy in common. There would be little reason then to retain the terms "joint tenancy" and "tenancy in common," as the adjective "joint" would no longer denote a single shared title, as opposed to the individual titles of tenants in common in the whole of the co-owned land. While their retention was urged in one of the responses to the consultation paper on the ground of long usage and a settled body of judicial interpretation surrounding them, these terms were never particularly apt to denote a distinction in meaning to anyone without legal training.

Rather than continuing to employ the conventional terms "joint tenancy" and "tenancy in common" after implementation of the foregoing recommendation, it would be simpler and clearer to refer to co-ownership with or without a right of survivorship. This would require legislation providing for the new terms to be the conceptual equivalent in law of the present ones. An expedient way to accomplish the change in terminology would be to amend the *Property Law Act*[38] to provide that land may be co-owned with or without a right of survivorship, and that references to "joint tenancy" or "tenancy in common" in a document or enactment are to be read after the effective date of the amendment as references to "co-ownership with survivorship" or "co-ownership without survivorship," respectively. The amendment should also provide that words in a transfer or other document that would have served to create a joint tenancy if the amendment had not been passed (e.g., "to A and B as joint tenants" or "to A and B jointly and not as tenants in common") would be deemed to create a co-ownership with survivorship.

In the remainder of this report, the present terms "joint tenancy" and "tenancy in common" are used when describing the present law or referring to commentary on the present law, such as that contained in judicial decisions and publications of other

38. R.S.B.C. 1996, c. 377. Consequential amendments to enactments referring to joint tenancy or tenancy in common, such as section 56(2) of the *Family Relations Act*, *supra*, note 28, would also be needed.

law reform agencies. "Co-ownership with survivorship" and "co-ownership without survivorship" are used with reference to the law as it would stand after implementation of the recommendations.

The Institute therefore recommends:

2. The Property Law Act should be amended to provide for the replacement of the terms "tenancy in common" and "joint tenancy" by the terms "co-ownership without survivorship" and "co-ownership with survivorship," respectively, and consequential amendments should be made to other enactments to reflect this change in terminology.

C. Severance of Joint Tenancies

1. Severance After Reform of the Four Unities Rule

(a) Severance by mutual agreement and course of dealing

As explained in Chapter II, two of the methods by which a joint tenancy may be severed under the current law are an express mutual agreement and a course of dealing (actually an implied agreement) that indicates a mutual intention of the co-owners to treat their property as a tenancy in common. These two methods of severance are not dependent for their theoretical justification on the four unities rule. When the co-owners themselves agree to deal with their respective interests without regard to the right of survivorship as if they were separate titles, it would not make sense for the law to stand in their way. There can be little objection to preserving these two methods of severance, although it would make the law more coherent to label them as "severance by express or implied mutual agreement" and dispense with the obscure distinction in the case law between a mutual agreement to sever and a "course of dealing" denoting a mutual understanding that severance has taken place.

(b) Dealings with the interest of an individual co-owner resulting in severance

Chapter II explains that certain acts and transactions, including transfers, that affect an individual interest in joint tenancy are considered to result in severance because they remove one of the four unities. Once Recommendation 1 is implemented, however, the absence or destruction of the unities of interest, title and time would no longer prevent the formation or continuance of co-ownership with survivorship. Should dealings with a joint tenant's interest that are unilateral vis-à-vis the other joint tenants, and that treat the joint tenant's interest as if it were a separate title, still bring about a severance?

In seeking an answer to that question, it must be borne in mind that joint tenancy is generally chosen as a form of co-ownership because of some relationship between the intended co-owners that justifies surviving co-owners taking the entire property on the death of a co-owner, rather than for the interest that was held by the deceased to form part of the deceased's estate. This is why, for example, spouses or members of the same family are more likely to hold land in joint tenancy than unrelated persons.

Transfer of an interest in joint tenancy to a third party alters the original relationship between the joint tenants. Even a transfer to another joint tenant alters that relationship by changing the size of the pre-existing group of co-owners and the size of the individual interests. A mortgage of an interest in joint tenancy creates the possibility that the mortgagee may be interposed as a co-owner through foreclosure, or may enter into possession at some point.[39]

Once a new member is injected into the pre-existing group of co-owners, there is no basis for assuming that the original co-owners would wish the benefit of survivorship to be extended to the new member. A transfer or mortgage of a co-ownership interest with survivorship should therefore continue to operate as a severance of the transferor's or mortgagor's interest. It is open to the remaining original co-owners, should they wish to extend the right of survivorship to the newcomer, to register a transfer into all their names as co-owners with survivorship.

The same reasoning would apply to involuntary transfers occurring by operation of law, such as the vesting of the property of a co-owner with survivorship in a trustee in bankruptcy. It would apply in fact to any other act or transaction affecting an individual co-ownership interest that alters the composition of the group of co-owners or involves treating the interest as if it were a separate title. Thus, acts or transactions having this effect should continue to be treated as resulting in a severance, in other words ending the right of survivorship with respect to the individual interest in question.

(c) Transfers of an interest in co-ownership with survivorship to oneself

What should be the effect of transferring an interest in co-ownership with survivorship to oneself? Arguably this would bring about no change in the pattern of co-

39. If a mortgage still has the effect of transferring the legal title of the joint tenant to the mortgagee, as some British Columbia cases suggest, then of course the mortgage transaction itself would interpose the mortgagee as a co-owner in place of the joint tenant, without the need for foreclosure. See *supra*, note 15.

ownership. A transfer of this kind is unnecessary unless the transferor wants to change something, however. It is an act in relation to the interest as if it were separate from those of the other co-owners. For this reason, transfers of this kind should also continue to be treated as a severance of the transferred interest.

(d) Preservation of existing methods of severance

On the basis of the above, the Institute concludes that no change will be needed in how severance can be accomplished after Recommendation 1 is implemented and the existing methods of severance should be preserved.

(e) Effect of unilateral severance on right of survivorship amongst remaining co-owners

If there are more than two co-owners and only one co-owner severs his or her right of survivorship, the effect under the current law is that that the right of survivorship continues as between the remaining co-owners. Thus if A, B, and C are joint tenants and A transfers to D, D is a tenant in common vis-à-vis B and C, but B and C remain joint tenants between themselves. This is a result that can be justified under the current law on the ground that none of the four unities have been disturbed as between B and C.

After the unities of time and title are abolished by implementation of Recommendation 1, the result under the present law will no longer be justifiable on the basis of the four unities. What effect should A's dealing have on the remaining original co-owners then? A could be seen as having altered the co-ownership arrangement fundamentally by breaking up the original relationship through transferring to D, an outsider. The original arrangement was among all three co-owners, not as between two only. This fundamental change might be thought of as a general severance, destroying the right of survivorship completely.

On the other hand, it is equally arguable that B and C have done nothing to alter the configuration of the original form of co-ownership. Only A has shown an intention to deal inconsistently with it. Thus, the right of survivorship should only be terminated in relation to A and should persist as between B and C. Under this reasoning, the result should be the same as under the present law. On balance, the Project Committee favours this view and is not convinced there is a need for the law to change in relation to the effect of unilateral severance of one co-owner's interest on the remaining co-owners' right of survivorship amongst themselves.

(f) Reconstituting the right of survivorship following unilateral severance

If B, C and D in the example above wish to bring a new co-ownership with survivorship into being amongst themselves, they may clearly do so by transferring the property to themselves on that basis and registering the transfer. A question arises whether that should be the only means by which the right of survivorship can be reconstituted with D taking the place of A. Should the mere intent of the three be enough to bring the new arrangement into being, or possibly an unregistered declaration of intent?

There is a need for certainty vis-à-vis the rest of the world as to how land is owned where several names are on the title. The policy of section 11(2) of the *Property Law Act* is to remove ambiguity by presuming no right of survivorship is intended when land is acquired by two or more owners unless the contrary intent is clearly spelled out. Giving effect to tacit understandings between co-owners, or unregistered declarations of intent, would not further that policy. Reconstituting the right of survivorship following a severance should require a transfer by the co-owners to themselves as co-owners with that right.

2. The Problem of Severance in Secret

In Chapter II it is noted that the possibility for secret severance can visit considerable hardship on a surviving joint tenant, because expectations of future economic and physical security are often based on the right of survivorship. This is particularly true in the case of spouses and long-term cohabitants. Severance without the knowledge of other co-owners may deprive them of the opportunity to re-order their own affairs appropriately in light of loss of the right of survivorship. Several law reform agencies in Canada and elsewhere have recommended abolition of the ability to sever a joint tenancy unilaterally without the knowledge of the non-severing joint tenants.[40] The LRCBC was among them.

40. Ontario Law Reform Commission, *supra*, note 36 at 118; Victorian Law Reform Commission, *Disputes between co-owners* (2001) at 46-51; Law Reform Commission of Western Australia, *Joint Tenancy and Tenancy in Common* (1994) at 37-38; New South Wales Law Reform Commission, *Unilateral Severance of Joint Tenancy* (1994) at 72; Queensland Law Reform Commission, *Consolidation of Real Property Act* (1991) at 21; Law Reform Commission of Ireland, *Report on Land Law and Conveyancing: (7) Positive Covenants over Freehold Land and Other Proposals* (2003) at 57-58. The Law Reform Commission of Ireland recommended abolition of unilateral severance entirely in favour of a requirement of consent by all joint tenants. Ireland enacted the recommendations of its Law Reform Commission in the *Land and Conveyancing Law Reform Act 2009*, Number 27/2009, ss. 30(1) and (2). Queensland enacted the recommendation of its Law Reform Commission: *Land Title Act 1994* (Qld), s. 59.

In making the case for abolition of severance in secret, the LRCBC noted that common law rules for severance arose at a time when joint tenancy was not a form of co-ownership that could be used by spouses. At common law spouses could only co-own property under a tenancy by the entireties. This was essentially a joint tenancy that was not severable.[41] Tenancy by the entireties has disappeared from modern law. Today joint tenancy is typically chosen as a form of co-ownership by spouses or close relatives because the right of survivorship provides a means of future security. The interdependence arising from a spousal or family relationship gives rise to a need for a high degree of candour and good faith between the parties. The ability to deprive another party to that relationship of the benefit of the right of survivorship without that party's knowledge is not consistent with this need. It is an undesirable feature of the law.

Some provinces have addressed this troublesome aspect of real property law through their land title systems. In Saskatchewan, a transfer of a joint tenant's interest cannot be registered unless all other joint tenants consent in writing or court authorization for the transfer is obtained.[42] Manitoba requires either the consent of all the non-severing joint tenants, execution of the instrument by all joint tenants, or proof of service of a notice of intent to sever on the non-severing joint tenants at least 30 days before registration.[43] Alberta has requirements closely resembling those of Manitoba.[44]

The LRCBC recommended in the 1980's that severance of a joint tenancy should be possible only by registration of an instrument (which could include a "declaration of severance") against the title to the land, and that the Land Title Office be required to advise the other co-owners by mail of the registration of the severing transaction.[45] This would make it impossible to sever a joint tenancy in secret. The LRCBC did not believe that in the absence of an agreement by the joint tenants to the contrary, it should be necessary to obtain the consent of all before severance of an individual co-

41. Tenancy by the entireties was based on the common law rule that a husband and wife were one person in law, with legal personality vested with the husband. The *Married Women's Property Act 1882* (re-enacted in British Columbia by S.B.C. 1887, c. 20) abrogated this principle by allowing married women to own property separately and prevented new tenancies by the entireties from being formed: Gray and Gray, *Elements of Land Law*, 5th ed. (Oxford: Oxford University Press, 2009) at 963. Section 12 of the *Property Law Act*, R.S.B.C. 1996, c. 377 now provides that a husband and wife must be treated as two persons for the purposes of acquisition of land.

42. *Land Titles Act, 2000*, S.S. 2000, c. L-5.1.

43. *Real Property Act*, C.C.S.M. c. R30, s. 79(1).

44. *Land Titles Act*, R.S.A. 2000, c. L-4.

45. *Supra*, note 34 at 43-45.

owner's interest could occur. The LRCBC reasoned that joint tenancy was often used as an estate planning tool, and the ability to sever resembled the ability to revoke a will.

The Project Committee agrees with the former Commission that unilateral severance should not be possible without notice to the other co-owners, although it recommends a different process that is explained below. Notice of severance should be required where severance takes place as the result of an act of one or more, but not all, co-owners. It should not be required when the severance occurs by operation of law, or by a property interest devolving on a co-owner that confers a greater estate than the one in which the co-ownership with survivorship subsists.[46]

While one correspondent commenting on the consultation paper urged that severance be possible only by mutual consent, the Project Committee also agrees with the former Commission that it would be excessively protective to require the consent of all co-owners in every case. An interest in co-ownership with survivorship is a right of property, and its owner should be able to deal with it to the owner's advantage, subject to basic requirements of fairness to the other co-owners whom the severance will affect. Situations in which the co-owners agree that the co-ownership with survivorship will not be severable without universal consent are discussed later in this report.

The Institute therefore recommends:

3. The Land Title Act should be amended to provide that in order to sever a co-ownership with survivorship in land unilaterally, the severing co-owner or other person receiving an interest under a severing transaction must give notice of the severing transaction, including a mortgage, to the other joint tenant(s).

3. Notice of Severance and Registration of Severing Instruments

(a) General

The Project Committee considered whether delivering a notice to other co-owners containing a declaration of intent to sever should itself sever co-ownership with survivorship. The Project Committee concluded, however, that this would add to the complexity of the law by adding another method of severance and creating uncertainty about the effect of a transaction such as a transfer or mortgage with which the notice was associated. It is simpler instead to confine the notice to the purpose of in-

46. See the example in paragraph (f) on page 8.

forming the other co-owners that the co-owner giving it has executed a severing instrument such as a transfer or mortgage, or has done something else to cause a severance.

Notification to non-severing co-owners before registration of a registrable severing instrument gives them greater opportunity to plan and act in their own interests than they would have if they only received a notice from the Land Title Office afterwards. It is a reasonable requirement to impose on a severing co-owner, whereas adding another step in the process of registration may be less reasonable. The requirement for notice could be enforced by prohibiting registration of an instrument that severs without proof that notice of it has been given to the co-owners who are not parties to the instrument, as under the Manitoba and Alberta provisions noted above.

In order that a co-owner may retain the ability to deal with his or her interest when the required notice cannot be given because a co-owner cannot be located, the registrar should have a discretion to register a severing instrument if satisfied that reasonable efforts have been made to find the missing co-owner, or for any other reason it is impracticable to insist on proof of notice.

The introduction of a requirement to give notice of severance as a prerequisite to the registration of a severing instrument would undoubtedly require some adjustments to land title office procedures. In a response to the consultation paper, an institutional correspondent raised the concern that an additional examination requirement would contribute to increased operating costs in the system and therefore lead to higher land title fees. Concern was also expressed about additional risk to the assurance fund. The Project Committee was not persuaded that the proposed notice of severance, coupled with a discretion for the registrar to waive notice in an appropriate case, would result either in significantly higher operating costs or greater exposure to the assurance fund. We note that if there is sufficient concern about increased exposure to the assurance fund from claims based on discretionary waivers by the registrar, it would be possible to for the legislature to make the fund immune against claims of this kind, as it has done in relation to certain other types of claims.[47] We do not take a stand on whether such legislative protection is warranted.

47. See ss. 294.6 and 303 of the *Land Title Act*, *supra*, note 15.

(b) Timing of notice of severance

The Manitoba provision requires the notice to be given to the non-severing co-owners a minimum of 30 days before registration of the severing instrument. This is to allow the recipient of the notice to apply for a court order preventing registration. The basis on which a court would interfere with a co-owner's right to sever is not clear. The Project Committee does not see a need to require that the notice have been given a minimum number of days before an application for registration of a severing instrument is made.

(c) Form of notice of severance

In Manitoba a prescribed form is used for a notice of intent to sever a joint tenancy. A prescribed form would help to maintain the fairness of the procedure by ensuring that the notice is properly informative. Failure to use the prescribed form should not be fatal to the application for registration if adequate notice was given otherwise.

The Institute therefore recommends:

4. The Land Title Act should be amended to provide that

(a) subject to paragraph (b), the registrar must not register a transaction severing a co-ownership with survivorship other than by agreement between all the co-owners without proof that notice of severance was given to the other co-owner(s);

(b) if the registrar of the Land Title Office is satisfied that

(i) a person to whom the notice of severance is to be given cannot be located after all reasonable efforts have been made, or

(ii) it is impracticable for any other reason to require proof that the notice of severance was given,

the registrar may

(iii) dispense with the requirement of notice, or

(iv) require that the notice be given in a substituted manner as the registrar may direct.

5. A form of notice of severance of co-ownership with survivorship should be prescribed under the Land Title Act.

6. Provided that the registrar is satisfied that a severing co-owner has given sufficient notice of severance to the other co-owner(s), the registrar should have discretion to register an instrument severing a co-ownership with survivorship where the severing co-owner has not used the prescribed form referred to in Recommendation 4.

4. Effective Time Of Severance

The LRCBC recommended that registration of a severing instrument be necessary for a severance based upon the unilateral act of a co-owner to have effect. The former Commission did distinguish between effectiveness of the severance as between the co-owners themselves and as against third parties in this respect. It should be remembered, however, that the solution proposed by the former Commission called for notice to the other co-owners to be sent by the Land Title Office following registration. Our recommendation, on the other hand, calls for notice to precede registration.

The Project Committee agrees that registration should be necessary to make a severance effective against third parties. For example, if there is no indication of a severance on the title, a purchaser of the entire property should be able legitimately to insist that all the co-owners sign the transfer. The Project Committee sees no reason why the severance should not be effective (with regard to the severing co-owner's interest) as against other co-owners from the time notice is given to them, however. At that point each co-owner should be empowered to re-order his or her affairs in light of the loss of survivorship.

This scheme is consistent with the *Land Title Act*, inasmuch as unregistered interests may have effect as against the immediate parties.

The Institute therefore recommends:

7. Severance should be effective

(a) as between the severing co-owner and each other co-owner when the notice of severance is given to that other co-owner, and

(b) as against third parties, only upon registration of the severing instrument against the title to the property held in co-ownership with survivorship.

5. Last Minute Severance: Death of Severing Co-owner Before Notice Given

The LRCBC recommended a means of protecting the right of a co-owner to sever to the very end of his or her lifetime. It recommended that an instrument severing a joint tenancy that was executed by a joint tenant who died before the instrument could be registered should be registrable if the application for registration was made within 14 days after the instrument was executed or acknowledged before a person qualified to take affidavits or notarize documents under the *Evidence Act*.[48] The severing instrument, once registered under this provision, would override the right of survivorship that would otherwise have operated at the moment of the severing co-owner's death.[49]

The LRCBC's recommendation was made in the context of the system it had proposed in which a severance would have no effect, even as between the co-owners, until registration. If registration is not to be essential for severance as between the co-owners, the need for a special mechanism to protect the right to sever until the very end of life is diminished. The Project Committee nevertheless considered whether it should be possible for a notice of severance to be effective if it is received within a specified short interval after the death of the severing co-owner.

It must be noted that accommodating "last minute severance" in this manner would not relieve the problem of prejudicial secrecy exemplified by *Stonehouse v. Attorney General of British Columbia*.[50] In addition, there would be a problem of priority if the surviving co-owner sold the entire property in the belief that he or she had acquired it by survivorship, and then received the notice of severance before the title was changed into his or her sole name as a necessary step prior to transfer to the purchaser.

On balance, the Project Committee concluded that a notice of severance should have to be given before the death of the severing co-owner.

The Institute therefore recommends:

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48. *Supra*, note 34 at 46-47.

49. The LRCBC recommendation was modeled on a California provision that is still in force: Cal. Civil Code, s. 683.2(c)(2).

50. *Supra*, note 31.

8. A notice of severance should be effective only if given before the death of the severing co-owner.

6. Notice of Severance and Joint Beneficial Interests in Trusts of Land

When a trustee holds the legal title to land under a trust for two or more beneficiaries, it is possible for the beneficiaries to own the beneficial title as co-owners. If one beneficiary wants to sever the (equitable) co-ownership with survivorship so as to be able to dispose of his or her interest by will, on whom must the notice of severance be served, the trustee, the other beneficiaries, or both?

The Project Committee has concluded that the same procedures should be followed with regard to equitable co-ownerships with survivorship as with legal ones. The notice of severance should go to the other beneficiaries and take effect with respect to the beneficial interests at that time. Delivery to the trustee should not be necessary for the severance to be effective as between the beneficiaries, because the jointure is with respect to the beneficial title. There should be no liability on the part of the trustee for continuing to treat the beneficiaries as co-owners with survivorship until receiving notice of a severance, however.

The Institute therefore recommends:

9. Recommendations 1 to 7 should apply to all co-ownerships with survivorship in land, including beneficial interests in co-ownership with survivorship when a trustee holds the legal title.

10. Where beneficial interests in a trust of land are held in co-ownership with survivorship, notice to the trustee should not be necessary to sever the survivorship as between the beneficiaries, but the trustee should be justified in treating the beneficiaries as co-owners with survivorship until receiving notice of a severance.

7. Non-Severable Co-Ownership with Survivorship?

The LRCBC recommended that it be possible for joint tenants to elect at any time that the consent of all of them should be required for a joint tenant to enter into a transaction that would affect that joint tenant's interest. A notice setting out this restriction could be registered so as to appear on the title.[51]

51. *Supra*, note 34 at 45.

It may be noted that the British Columbia Supreme Court decision in *Foort v. Chapman* suggests it is possible to create a non-severable joint tenancy by mutual agreement of the joint tenants.[52]

The Project Committee agrees with the LRCBC that it should be open to co-owners to make the co-ownership with survivorship non-severable by the act of one co-owner without the consent of all. There should be provision for registering a notice to that effect in order to give warning that all the co-owners must be involved in any dealing with the land that might have the effect of a severance.

The Project Committee considered whether it should be possible for a grantor to create a co-ownership with survivorship that would be non-severable without unanimous consent of the co-owners. For example, should a grantor transferring land to A, B, and C with survivorship be able to stipulate that no severances will be possible without the consent of all three? As the form of co-ownership is sometimes chosen by a grantor rather than by the co-owners themselves, allowing the feature of non-severability without unanimous consent to be imposed by the grantor as well as by agreement of the co-owners amongst themselves has a certain appeal in terms of maintaining symmetry in the law. On the other hand, it would also subject co-owners involuntarily to a restraint on the alienability of their interests. A majority of the Project Committee was not persuaded that it would be desirable to allow the imposition of unanimous consent as a prerequisite for severance, otherwise than by agreement of the co-owners themselves.

The Institute therefore recommends:

11. The Property Law Act should be amended to make it possible, by agreement of the co-owners, to create a co-ownership with survivorship that is not severable by an act or dealing by a co-owner with respect to that co-owner's interest unless all the co-owners first consent to the act or dealing.

12. The Land Title Act should provide for the registration of a notice of an agreement referred to in Recommendation 11 against the title to the land it affects.

52. [1973] 4 W.W.R. 461 (B.C.S.C.).

8. Severance and Third Party Rights

(a) Mortgagees

The LRCBC and the Project Committee share a common conclusion that mortgagees should not be prejudiced by the operation of the right of survivorship.[53]

A mortgage of the interest of one joint tenant is thought to sever joint tenancy under present law, but this is also the practical effect of the Land Title Office's insistence on severance before registering a mortgage granted by a single joint tenant with respect to that joint tenant's interest.[54] The Project Committee believes that a mortgage by one co-owner should operate to sever co-ownership with survivorship with respect only to that co-owner's interest (so that if there are more than two co-owners, the right of survivorship would persist between those not granting the mortgage). This is because the two alternatives to this result are equally unpalatable. If the mortgagee's interest were to persist after the death of the mortgagor without severance, the surviving co-owner would take the entire property subject to a mortgage to which the survivor was not a party and the mortgagee would get a windfall in terms of increased security. If the right of survivorship were to prevail instead over the mortgagee's interest, the security would be defeated.

The LRCBC proposed a means of protecting third party rights under which registered financial charges (mortgages and registered judgments) would prevail against the right of survivorship. It would have allowed the mortgage security to attach to the title of the surviving joint tenant after the death of the mortgagor. This would be subject to a right of the survivor to disclaim the interest of the deceased mortgagor that was subject to the charge.

The Project Committee sees it as simpler to treat a mortgage of a single co-owner's interest as a severing transaction. It avoids a windfall accretion to the mortgagee's security.

Once a mortgage has severed the co-ownership with survivorship, the discharge of the mortgage should not restore it. A contrary result might produce confusion about the state of the title. The co-owners would have the option of creating a new co-ownership with survivorship by transferring to themselves with right of survivorship if they so wished.

53. *Supra*, note 34 at 47.

54. See *supra*, note 15.

It flows from the conclusion that a mortgage of a single co-owner's interest should be treated as a severance that foreclosure of such a mortgage should operate as if the mortgage had been granted in respect of an undivided interest in co-ownership without survivorship. Foreclosure should give the mortgagee no right of survivorship.

The Institute therefore recommends:

13. The Property Law Act should be amended to provide that

(a) a mortgage of the interest of a co-owner with survivorship should operate as a severance, subject to Recommendations 3 to 7, but only with respect to the mortgagor's interest;

(b) discharge of a mortgage of the interest of a co-owner should not operate to restore a right of survivorship;

(c) foreclosure of a mortgage of the interest of a co-owner should operate as if the mortgage had been granted in respect of the undivided interest of a co-owner without survivorship.

(b) Agreements for Sale within Section 16 of the Law and Equity Act

An agreement for sale of the kind described in section 16(1) of the *Law and Equity Act*,[55] whereby the purchase price is paid in instalments over time and title is transferred only when it is paid in full, currently does not produce a severance even if the right to purchase is registered against the vendor's title.[56] In practice, the long-term agreement for sale functions like a mortgage in favour of the vendor. Like a mortgage by a single co-owner with survivorship, it represents a repudiation by the vendor of the co-ownership with survivorship and an intention to treat the vendor's interest separately from the rest of the co-owned property. The Project Committee believes that agreements for sale coming within section 16 of the *Law and Equity Act* should have the same effect as a mortgage, i.e. severance with respect to the vendor's interest. The purchaser should not benefit from the right of survivorship.

The Institute therefore recommends:

55. R.S.B.C. 1996, c. 253, s. 16(1) (definition of "agreement for sale").

56. *Re Foort and Chapman*, *supra*, note 52.

14. The Property Law Act should be amended to provide that execution of an agreement for sale (as defined in section 16(1) of the Law and Equity Act) of the interest of one or more, but not all, co-owners with survivorship should operate as a severance with respect only to the interests of the co-owners who are parties to the agreement.

(c) Judgment Creditors

It is understood that the provincial government is considering the introduction of a new system of civil judgment enforcement based on the Uniform Law Conference of Canada *Uniform Civil Enforcement of Money Judgments Act* (UCEMJA). The UCEMJA contains provisions addressing the effect of registration of a judgment against the interest of a joint tenant. In anticipation of the possible introduction of new judgment enforcement legislation that may address execution of judgments against co-ownership interests, the Project Committee has refrained from making recommendations at this time on the effect of registration of judgments against the interest in land of a co-owner with right of survivorship.

9. Statutes Producing Automatic Vesting of Title

The *Bankruptcy and Insolvency Act*[57] provides for the automatic passage of the property of a bankrupt to the trustee in bankruptcy. Certain other federal and provincial statutes, such as those providing for forfeiture of property as a penal measure, also provide for automatic transfer or vesting in the Crown or a public official to fulfil the policy of the enactment in question.

The Project Committee believes that the policy of statutes providing for automatic transfer or vesting of the title of a co-owner with survivorship to an undivided interest in land should prevail over general rules about severance. The requirements regarding notice of severance in Recommendations 3 and 4, for example, should not apply when the circumstances bring the statutes calling for automatic vesting into play. They could not apply in any event in the face of a valid federal enactment calling for automatic divestiture, because of the constitutional doctrine of paramountcy.

Involuntary statutory transfers and vestings of the interest of a co-owner with survivorship should nevertheless be considered to sever as if its owner had transferred the interest to a third party. The authority in whom the property vests should not enjoy the benefit of survivorship, having acquired the property only for an official purpose.

57. R.S.C. 1985, c. B-3, s. 71.

The Institute therefore recommends:

15. A statute that effects an automatic transfer, transmission or vesting of the interest of a co-owner with survivorship should prevail over legislation implementing Recommendations 1 through 14.

D. Transitional Considerations

1. General

A basic question is whether the changes to the law of joint tenancy recommended in this report should apply to joint tenancies in existence on the date on which legislation implementing the recommendations comes into force (the "effective date") as well as to co-ownerships with survivorship that are formed afterwards.

If the changes were applied only to co-ownerships with survivorship formed after the effective date, there would be a clean break between old and new. The present law would continue to govern joint tenancies in existence on the effective date. A minority of the Project Committee favours this approach on the ground that it would avoid any possible objection that pre-existing rights are being adversely affected.

Taking that approach would nevertheless mean that two different forms of co-ownership of land accompanied by a right of survivorship would continue indefinitely into the future. To third parties, a pre-existing joint tenancy and a co-ownership with survivorship formed after the effective date would appear indistinguishable. This would be somewhat akin to reviving the situation that prevailed in the mid-nineteenth century, when tenancy by the entireties and coparcenary tenancy coexisted with joint tenancy and tenancy in common as forms of co-ownership.[58] It would undoubtedly make the law more complex, and possibly lead to confusion.

58. See, *supra*, note 41, regarding tenancy by the entireties. Coparcenary tenancy arose at common law when land descended on intestacy to two or more persons who collectively constituted the heir. Typically, this would be a situation in which an intestate had only female successors. Coparcenary tenancy resembled joint tenancy in some respects and tenancy in common in others. There was no right of survivorship, but as with joint tenancy, the alienation of a coparcener's interest resulted in tenancy in common. Coparcenary tenancy can no longer be created because the common law rules concerning the descent and distribution of real property on intestacy have been altered by legislation. Real property no longer descends to the heir at law but instead on the personal representative in a manner similar to personal property: *Estate Administration Act*, R.S.B.C. 1996, c. 122, ss. 77-80. (See also ss. 162-163 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, not yet in force, which will supplant the *Estate Administration Act* provisions and are to the same effect.)

The recommendations in this report are intended as remedial, in the sense that they address deficiencies in the present law. With one exception, they would add to existing rights rather than removing or curtailing them. The exception is the proposed abolition of the ability to sever a joint tenancy without the knowledge of the other joint tenants. The possibility of severance in secrecy was, however, characterized earlier as being an undesirable feature of the present law. Extending the requirement for notice of severance to joint tenancies in existence on the effective date as well as to co-ownerships with survivorship formed later would be in keeping with the general rejection of secret severance on policy grounds, and would further the general remedial objectives of the recommendations.

For these reasons, a majority of the Project Committee favour the application of the recommendations to joint tenancies in existence on the effective date as well as to co-ownerships with survivorship formed after it. The legal effect of transactions completed before the effective date would not be disturbed under this approach. The recommendations would apply to existing joint tenancies only from the effective date forward. For example, a unilateral severance that took place after the effective date could not be registered unless notice of the severance was given to the other co-owners, whether the co-ownership was a joint tenancy in existence on the effective date or a co-ownership with survivorship formed afterwards. A severance that took place under the present law before the effective date would remain valid, however, even if accomplished in secret as in the *Stonehouse* case.[59]

2. Special Cases

(a) Severance prior to effective date, with application for registration after effective date

If an interest in joint tenancy is unilaterally severed before the effective date and an application to register the severing transaction is made after the effective date, a question would arise whether the registrar should proceed to register the transaction without requiring proof that notice of the severance has been given to the non-severing co-owners as required by Recommendation 3. In the view of the Project Committee, the policy of leaving transactions completed before implementation of the recommendations undisturbed should prevail in these circumstances, with the result that the transaction should be registrable without proof of notice of the severance.

59. *Supra*, note 31.

(b) Long-term agreements for sale executed but not fully performed on the effective date

An agreement for sale within the meaning of section 16(1) of the *Law and Equity Act*[60] might be in existence with respect to an interest in joint tenancy on the effective date, but not yet fully performed by payment of the final instalment of the purchase price and transfer of title to the purchaser. Under the present law, the execution of the agreement for sale would not have severed the joint tenancy.[61] Under Recommendation 14, the execution of an agreement for sale would operate as a severance, subject to the notice requirement of Recommendation 3. What effect should the agreement for sale have after Recommendation 14 has been implemented?

Consistency with the policy of not disturbing the legal effect of transactions occurring before the effective date would appear to require that there be no change in the effect of the agreement for sale. It is a fully formed contract in the sense of being legally binding on the vendor and purchaser. It makes sense to treat a long-term agreement for sale executed prior to the effective date as a completed transaction, even if the obligations under it have not been not fully performed. It should continue to have the effect it has under the present law. In other words, it should not be treated as severing the joint tenancy in itself. Instead, the severance should be considered to occur when the title to the vendor's interest is ultimately transferred to the purchaser. At that time, the transfer should be treated as a severance occurring after the effective date, and notice to the non-severing co-owners would be required for it to be registrable.

3. Recommendation on Transition

The Institute recommends:

16. (1) Subject to paragraphs (2) and (3), Recommendations 1 to 15 should apply to all co-ownerships with survivorship, whether formed before or after the date ("effective date") on which legislation implementing the recommendations comes into force.

(2) Recommendations 1 to 16(1) should not prevent the registration of a transaction severing a co-ownership with survivorship that was completed before the effective date.

60. *Supra*, note 55.

61. *Foort v. Chapman*, *supra*, note 52.

(3) Recommendation 14 should apply only to agreements for sale entered into after the effective date.

IV. Conclusion and List of Recommendations

A. Conclusion

The changes to the law recommended in this report would remove some of the more anachronistic aspects of joint tenancy, clarify other aspects of the law surrounding it, and make this form of land ownership more adaptable to modern needs. They would also reduce and de-mystify the differences between the two modern forms of co-ownership, which the common law terms "joint tenancy" and "tenancy in common" always made obscure to non-lawyers. The Institute endorses the reforms summarized below and urges their implementation.

B. List of Recommendations

1. The Property Law Act should be amended to provide that interests in joint tenancy may

(a) be of unequal size;

(b) arise from different instruments;

(c) arise at different times.

[pp. 14-15]

2. The Property Law Act should be amended to provide for the replacement of the terms "tenancy in common" and "joint tenancy" by the terms "co-ownership without survivorship" and "co-ownership with survivorship," respectively, and consequential amendments should be made to other enactments to reflect this change in terminology.

[p. 16]

3. The Land Title Act should be amended to provide that in order to sever a co-ownership with survivorship in land unilaterally, the severing co-owner or other person

receiving an interest under a severing transaction must give notice of the severing transaction, including a mortgage, to the other joint tenant(s).

[p. 21]

4. The Land Title Act should be amended to provide that

(a) subject to paragraph (b), the registrar must not register a transaction severing a co-ownership with survivorship other than by agreement between all the co-owners without proof that notice of severance was given to the other co-owner(s);

(b) if the registrar of the Land Title Office is satisfied that

(i) a person to whom the notice of severance is to be given cannot be located after all reasonable efforts have been made, or

(ii) it is impracticable for any other reason to require proof that the notice of severance was given,

the registrar may

(iii) dispense with the requirement of notice, or

(iv) require that the notice be given in a substituted manner as the registrar may direct.

[p. 23]

5. A form of notice of severance of co-ownership with survivorship should be prescribed under the Land Title Act.

[p. 24]

6. Provided that the registrar is satisfied that a severing co-owner has given sufficient notice of severance to the other co-owner(s), the registrar should have discretion to register an instrument severing a co-ownership with survivorship where the severing co-owner has not used the prescribed form referred to in Recommendation 4.

[p. 24]

7. Severance should be effective

(a) as between the severing co-owner and each other co-owner when the notice of severance is given to that other co-owner, and

(b) as against third parties, only upon registration of the severing instrument against the title to the property held in co-ownership with survivorship.

[pp. 24-25]

8. A notice of severance should be effective only if given before the death of the severing co-owner.

[p. 26]

9. Recommendations 1 to 7 should apply to all co-ownerships with survivorship in land, including beneficial interests in co-ownership with survivorship when a trustee holds the legal title.

[p. 26]

10. Where beneficial interests in a trust of land are held in co-ownership with survivorship, notice to the trustee should not be necessary to sever the survivorship as between the beneficiaries, but the trustee should be justified in treating the beneficiaries as co-owners with survivorship until receiving notice of a severance.

[p. 26]

11. The Property Law Act should be amended to make it possible, by agreement of the co-owners, to create a co-ownership with survivorship that is not severable by an act or dealing by a co-owner with respect to that co-owner's interest unless all the co-owners first consent to the act or dealing.

[p. 27]

12. The Land Title Act should provide for the registration of a notice of an agreement referred to in Recommendation 11 against the title to the land it affects.

[p. 27]

13. The Property Law Act should be amended to provide that

(a) a mortgage of the interest of a co-owner with survivorship should operate as a severance, subject to Recommendations 3 to 7, but only with respect to the mortgagor's interest;

(b) discharge of a mortgage of the interest of a co-owner should not operate to restore a right of survivorship;

(c) foreclosure of a mortgage of the interest of a co-owner should operate as if the mortgage had been granted in respect of the undivided interest of a co-owner without survivorship.

[p. 29]

14. The Property Law Act should be amended to provide that execution of an agreement for sale (as defined in section 16(1) of the Law and Equity Act) of the interest of one or more, but not all, co-owners with survivorship should operate as a severance with respect only to the interests of the co-owners who are parties to the agreement.

[p. 30]

15. A statute that effects an automatic transfer, transmission or vesting of the interest of a co-owner with survivorship should prevail over legislation implementing Recommendations 1 through 14.

[p. 31]

16. (1) Subject to paragraphs (2) and (3), Recommendations 1 to 15 should apply to all co-ownerships with survivorship, whether formed before or after the date ("effective date") on which legislation implementing the recommendations comes into force.

(2) Recommendations 1 to 16(1) should not prevent the registration of a transaction severing a co-ownership with survivorship that was completed before the effective date.

(3) Recommendation 14 should apply only to agreements for sale entered into after the effective date.

[pp. 33-34]

Part Two – Draft Legislation

The draft legislation set out below is intended only as an illustration of one manner in which the recommendations in this report could be implemented and does not form part of the recommendations themselves.

Real Property (Joint Tenancy) Reform Act, 20__

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Property Law Act*, R.S.B.C. 1996, c. 377 is amended by adding the following sections after section 11:

Substitution of equivalent terms

11.1 After this section comes into force, in an enactment, instrument, agreement, or other document or record pertaining to land, the words appearing in column 1 of the following table are to be interpreted as having the same meaning as the words appearing opposite them in column 2 of the table.

Column 1	Column 2
co-ownership with survivorship	joint tenancy
co-owner with survivorship	joint tenant
co-ownership without survivorship	tenancy in common
co-owner without survivorship	tenant in common

Comment: This section is intended to implement, in part, Recommendation 2 of this report. Recommendation 2 calls for the replacement of the historic term "joint tenancy" with "co-ownership with survivorship," and "tenancy in common" with "co-ownership without survivorship," respectively. The change in terminology incidentally clarifies the cardinal distinction between joint tenancy and tenancy in common.

This distinction was never obvious from the historic terms. The new terms also reflect the changes to the law of joint tenancy that would be made by s. 11.2 below, which would result in the right of survivorship being the sole remaining distinction between joint tenancy and tenancy in common.

In order to fully implement Recommendation 2 of the report, consequential amendments would be required to other provincial legislation and regulations to substitute the new terms in column 1 for the ones in column 2.

Interests in co-ownership with survivorship

11.2 If land is transferred, devised by will, charged or contracted to be sold to, or is owned by, two or more persons as co-owners with survivorship, the interests of those persons in the land may be

(a) equal or unequal in size,

(b) created by or under the same or different instruments, and

(c) created at the same time or at different times.

Comment: Section 11.2 implements Recommendation 1 of this report by changing the common law rule that the "four unities" of interest, title, time, and possession must be present for a joint tenancy to exist. Joint tenancy is a form of co-ownership carrying a right of survivorship. In other words, the survivor or survivors of the co-owners continue as the sole owners when one or more of the joint tenants die. The "four unities" rule requires that the interests of all co-owners be of identical size (unity of interest), created at the same time (unity of interest), by or under the same instrument (unity of title), and that all the joint tenants be equally entitled to possession of the whole property (unity of possession).

Section 11.2 removes three of the four unities as requirements for existence of a co-ownership with survivorship, namely those of interest, title, and time. Only the unity of possession would remain essential. This would allow for new co-owners to be added to the original group, and for co-owners to hold in unequal shares, while preserving the right of survivorship.

Mortgage or agreement for sale by co-owner of individual interest

11.3 (1) Subject to subsection (2) and to sections 177.1 to 177.4 of the *Land Title Act*, execution of

(a) a mortgage, or

(b) an agreement for sale within the meaning of section 16(1) of the *Law and Equity Act*

of the interest in land of a co-owner with survivorship operates to sever the co-ownership with survivorship with respect only to the interest of the mortgagor or vendor.

(2) Subsection (1) applies only to a mortgage or agreement for sale executed by one or more, but not all, co-owners with survivorship.

(3) If a co-ownership with survivorship is severed under subsection (1) with respect to the interest of a co-owner by a mortgage or agreement for sale of that interest, discharge of the mortgage or cancellation or determination of the agreement for sale does not restore the right of survivorship with respect to that interest.

Comment: Sections 11.3(1) and (2) clarify the severing effect of a mortgage that does not extend to the interests of all the co-owners with survivorship. Such a mortgage would operate as a severance, but only with respect to the individual interest or interests that are mortgaged. Section 11.3(1) essentially restates what is generally thought to be the law at the present time with respect to a mortgage of an individual interest of a joint tenant.

Section 11.3(1) changes the present law with respect to the effect of execution of an agreement within the meaning of s. 16(1) of the *Law and Equity Act* that relates to the individual interest of a co-owner with survivorship. Such an agreement provides for the purchase price of land to be paid in instalments. The title is transferred to the purchaser only when the final instalment of the price has been paid. Usually the purchaser is in possession of the land while the instalments are being paid to the vendor. As held in *Foort v. Chapman*, [1973] 4 W.W.R. 461 (B.C.S.C.), an agreement for sale of this kind to does not currently operate as a severance. As a long-term agreement for sale functions much like a mortgage, however, its effect on a co-ownership with survivorship should be similar. Sections 11.3(1) and (2) implement Recommendation 14 of this report by providing that an agreement for sale that does not affect the interests of all the co-owners with survivorship operates as a severance with respect to the interests of the vendor or vendors.

Section 11.3(3) confirms that discharge of a mortgage that has operated to sever a co-ownership with survivorship does not restore the right of survivorship to the mortgagor**,** nor does it restore a right of survivorship to the other co-owners with respect to the mortgagor's interest. Insofar as mortgages are concerned, s. 11.3(3) probably restates the existing law. Likewise, s. 11.3(3) also provides that if an agreement for

sale covered by s. 16(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 has operated to sever the co-ownership with survivorship, its cancellation or determination (bringing to an end) in another manner does not reverse the severance and restore the vendor's right of survivorship.

Agreement by co-owners to require mutual consent to severance

11.4 (1) At the time a co-ownership with survivorship is created or at any later time while a co-ownership with survivorship subsists, the co-owners with survivorship may agree that severance of the interest of a co-owner from the co-ownership with survivorship may not occur without the prior consent in writing of all the co-owners with survivorship.

(2) An agreement between co-owners with survivorship under subsection (1) is subject to

(a) the *Land Title Act*,

(b) section 59 of the *Law and Equity Act*, and

(c) any enactment or law that operates to extinguish, transfer, transmit or otherwise divest the interest of a co-owner with survivorship without the consent of the co-owner with survivorship.

Comment: Section 11.4(1) would implement Recommendation 11 when added to the *Property Law Act*, R.S.B.C. 1996, c. 377. Recommendation 11 of this report calls for a change in the law to permit co-owners with survivorship to agree amongst themselves that the co-ownership will not be severable by an individual co-owner dealing with his or her individual partial interest in the co-owned property except by mutual consent.

Section 11.4(2) provides that an agreement between co-owners with survivorship requiring mutual consent for severance is subject, first, to the *Land Title Act*, which means it must be registered in order to be effective against third parties. (See the proposed addition of s. 177.3 to the *Land Title Act* below and the commentary following it.) Second, s. 11.4(2) provides that an agreement of this kind is subject to section 59 of the *Law and Equity Act*. Section 59 of the *Law and Equity Act* addresses requirements that a contract respecting land must meet in order to be enforceable. Most important is the requirement of s. 59(3) that contracts affecting interests in land be in writing. Last, s. 11.4(2) provides that an agreement requiring mutual consent of the co-owners with survivorship to severance does not override enactments or other laws that operates to extinguish or transfer the interest of a co-owner to someone else involuntarily. Section 11.4(2) refers both to an "enactment"

and a "law" because section 1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines "enactment" when it appears in British Columbia legislation to mean a provincial Act or regulation. Involuntary transfers, divestitures, and forfeitures could occur under federal legislation as well. For example, a bankruptcy order made against a co-owner with survivorship under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 would vest the co-owner's interest in the land in his or her trustee in bankruptcy without consent.

Application of sections 11.1 to 11.4

11.5 (1) Subject to subsection (2), sections 11.1 to 11.4 apply to co-ownerships with survivorship created before, on or after the date on which they come into force.

(2) Section 11.3(1) does not apply to an agreement for sale executed before the date on which section 11.3 comes into force.

Comment: Apart from the exception covered by section 11.5(2), ss. 11.1 to 11.4 are intended to apply to co-ownerships with survivorship that are in existence when those sections come into force as well as ones formed afterwards. This is because these sections either clarify the law or change it in ways that expand rather than curtail the rights that co-owners with survivorship have to deal with their property.

Section 11.5(2) restricts the application of s. 11.3(1) to agreements for sale within the meaning of s. 16(1) of the *Law and Equity Act* that are executed after s. 11.3 comes into force. This is to avoid attaching consequences to agreements for sale still being performed which were not contemplated by the parties when the agreements were made.

2. The *Land Title Act* is amended by repealing section 177 and substituting the following:

Registration of co-owners with survivorship

177 If, on the registration of title to land under an instrument or document, 2 or more persons are co-owners with survivorship, the registrar must enter in the register, following the names, addresses, and occupations of those persons, the words "as co-owners with survivorship."

Comment: This section is a re-enactment of the present s. 177 of the *Land Title Act*, R.S.B.C. 1996, c. 250 with the term "co-owners with survivorship" substituted for "joint tenants," as contemplated by Recommendation 2 of this report.

3. The *Land Title Act* is further amended by adding the following after section 177:

Notice of severance

177.1 (1) If, after this section comes into force, a co-owner with survivorship executes a transfer, mortgage or other instrument that would have the effect upon execution of severing the co-ownership with survivorship if this section had not been enacted, the transfer, mortgage, or other instrument severs the co-ownership with survivorship

(a) as between the co-owners with survivorship, upon service of a written notice of severance on all other co-owners who have not executed the transfer, mortgage or other instrument,

(b) as against a trustee in whose name the title to land held beneficially in co-ownership with survivorship is registered, upon service of the notice of severance on the trustee, and

(c) as against all other persons, upon registration of the transfer, mortgage or other instrument.

(2) A notice of severance may be served by or on behalf of

(a) a co-owner with survivorship who has executed the instrument to which the notice of severance relates, or

(b) a person receiving or intended to receive an interest under the instrument.

(3) Subject to section 177.2(3), a notice of severance must be in the form approved by the director.

(4) Except for sections 317(2), 319 and 321, Part 22 applies to the service of a notice of severance.

(5) A notice of severance is effective only if it is served before the death of the co-owner with survivorship who executed the transfer, mortgage or other instrument to which it relates.

Comment: Section 177.1(1) implements Recommendations 3 and 7 of this report, which require notice of a severance to be given to the co-owners with survivorship who are not parties to the severing transaction in order to bring about a valid severance. This recommendation would change the law relating to severance by means of an act or dealing by an individual co-owner. The present law, as expressed in *Stonehouse v. Attorney General of British Columbia,* [1962] S.C.R. 103, allows for severance to occur by the act of an individual joint tenant in dealing with his or her own interest in jointly owned property without the knowledge of the other joint tenant(s) or registration of the severing instrument.

Section 177.7(1) provides that severance occurs as between the co-owners with survivorship themselves only when a notice of severance is served on the co-owners with survivorship who have not executed the instrument that transfers or charges the severing co-owner's interest.

If the co-owners with survivorship are beneficial owners and a trustee holds the legal title to the property, the severance is not effective as against the trustee until the trustee is also served with a notice of severance. This means a trustee is able to continue to treat the beneficial owners as co-owners with survivorship until receiving a notice of severance.

As against other persons, severance will occur only on registration of the severing instrument, which will require proof that notice of severance was served. (See s. 177.2 below.) This corresponds to the general scheme of the *Land Title Act*, under which registration is required to make an instrument transferring, charging, or otherwise dealing with or affecting an interest in land operative against persons other than the immediate parties.

Note that s. 177.1(1) only applies to severing instruments executed after that provision comes into force. Thus, a severing instrument executed before the effective date of s. 177.1(1) could be registered afterwards without proof of notice of severance. This is to avoid undoing the effect of transactions entered into and instruments executed on the basis of present law and thereby giving the change in the law represented by s. 177.1(1) an unintended retrospective effect.

Subsection (2) provides that a notice of severance may be served by or on behalf of the severing co-owner with survivorship or a party receiving an interest under the severing instrument.

Subsection (3) calls for use of a form of notice of severance approved by the Director of Land Titles. It implements Recommendation 5. See s. 177.2(3) below regard-

ing the registrar's discretion to register a severing instrument despite failure to use the approved form of notice of severance.

Subsection 177.1(4) deals with the application of Part 22 of the *Land Title Act* to notices of severance. Part 22 contains a code of procedure for giving notices required by the Act. The requirement to "serve" a notice of severance under s. 177.1(1) attracts Part 22 and allows for a notice of severance to be given in any of the methods of service permitted by s. 315(1), namely personal service, electronic means, registered mail, or in any manner ordered as substitutional service by the registrar.

Section 177.1(4) excludes the application of ss. 317(2), 319 and 321 because those provisions of Part 22 are inappropriate to the context of notices of severance. Section 317(2) deals with undeliverable notices served by the registrar by means of registered mail, while s. 177.1(2) contemplates that the severing co-owner or the other party to the severing instrument will serve the notice of severance or cause it to be served. Section 319 deals with service on the personal representative of a deceased person who would be a proper recipient of a notice if alive. Only a living co-owner with survivorship would ever have to be served with a notice of severance, however, as the estate of a deceased former co-owner with survivorship does not acquire the deceased's rights in the land. Section 321 provides that a purchaser, mortgagee or chargeholder for valuable consideration is unaffected by an omission to send a notice under the Act or the failure to receive one. This would not be the case if a notice of severance is not served, however. A purchaser or mortgagee of the individual interest of a co-owner with survivorship then could not register the transfer or mortgage because proof of service of the notice is a prerequisite for registration under s. 177.2 below. If the transferor or mortgagor died before the severance was perfected against the other co-owners with survivorship through service of the notice, the interest of the transferee or mortgagee would be defeated by the right of survivorship. This is a risk that anyone purchasing or taking a mortgage of the fractional interest of an individual co-owner with survivorship would have to accept.

Subsection (5) of s. 177.1 requires a notice of severance to be served before the death of the severing co-owner in order to be effective, as otherwise the operation of the right of survivorship will have brought that co-owner's interest to an end. It implements Recommendation 8.

Registration of instrument severing co-ownership with survivorship

177.2 (1) Subject to subsections (2) and (3) and section 177.3, the registrar must not register an instrument executed after section 177.1(1) comes into force that would sever a co-ownership with survivorship upon execution if section 177.1 had not been enacted unless the instrument is accompanied by proof that a notice of severance in the

form approved by the director has been served on each co-owner with survivorship who is not a party to the instrument.

(2) Despite subsection (1), if the registrar is satisfied that

(a) an applicant for registration of an instrument severing a co-ownership with survivorship has made all reasonable efforts to locate a co-owner entitled to receive notice of severance of such a co-owner and the co-owner cannot be located, or

(b) it is impracticable for any other reason to require proof of service of a notice of severance,

the registrar may

(c) dispense with the requirement of notice of severance with respect to the co-owner, or

(d) order substituted service of the notice in one or more of the methods permitted by section 318(2).

(3) Despite subsection (1), if the registrar is satisfied that each co-owner with survivorship who is not a party to an instrument severing the co-ownership with survivorship have been given sufficient notice of severance otherwise than in the form approved by the director, the registrar may register the instrument.

Comment: Section 177.2 implements Recommendation 4 by making proof that notice of severance has been given a prerequisite to the registration of an instrument intended to result in severance and providing for exceptional cases where the requirement should be modified or waived.

Section 318(2) of the *Land Title Act* referenced in s. 177.2(2)(d) empowers the registrar to order substituted service in one or more of several means, including personal service or service by mail on a solicitor or agent, publication of advertisements, and leaving the notice at a usual or last known residence.

Agreement allowing severance only by mutual consent

177.3 (1) An agreement between co-owners with survivorship under section 11.4(1) of the *Property Law Act* may be endorsed on the title to the land

to which it relates with the notation "severance only with consent of all co-owners with survivorship."

(2) If an agreement under section 11.4(1) of the *Property Law Act* is endorsed on the title to land owned in co-ownership with survivorship, the registrar must not register an instrument executed by a co-owner that severs the co-ownership with survivorship with respect to the interest of that co-owner unless the instrument is accompanied by the written consent of each other co-owner with survivorship.

Comment: Section 177.3 would implement Recommendation 12 by providing for the endorsement on the title of an agreement between co-owners with survivorship that severance will be possible only by mutual consent. Subsection (2) makes an agreement of this kind effective against third parties by preventing registration of a severing instrument without the written consent of the co-owners who are not parties to the instrument.

Application of sections 177.1 to 177.3

177.4 Sections 177.1 to 177.3 apply to a co-ownership with survivorship created before, on or after the date on which those sections come into force.

Comment: Section 177.4 declares in effect that ss. 177.1 to 177.3 apply to co-ownerships with survivorship (joint tenancies) in existence before those provisions come into force as well as to co-ownerships with survivorship formed afterwards. This is to avoid creating different categories of co-ownership with survivorship with different incidents.

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