

# Explaining legal tenure



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When two or more people purchase a property together, they must decide on the form or capacity of ownership interest that they would like to have. This is known as the legal tenure. The two types of legal tenure relating to multiple owners are joint tenancy and tenants in common.

In the case of joint tenancy, each owner has an undivided interest in the whole of the property. A joint tenancy must have what is referred to as the four unities: possession (the undivided nature of the property shared by the owners), interest (being of the same size and duration among the owners), title (one document provides the title to all owners) and time (all owners get title at the same time). This means that each owner is an owner of the entire property and that one owner cannot sell his or her share without the consent of the others.

With tenants in common, each owner/tenant has a defined share or percentage of interest in the property that is individual and undivided. These shares can be disposed of without the consent of the other tenant (or tenants) in common. Where the legal tenure is not specified in the case of multiple owners, the presumption in the case of real property is that ownership is to be taken as tenants in common, unless a clear intention can be found to rebut the presumption.

Perhaps the most significant practical difference between ownership as joint tenants as compared to ownership as tenants in common is that between joint tenants, there exists a right of survivorship. The effect of the right of survivorship is that when one of the joint tenants dies, their entire interest in the jointly held property automatically passes to the surviving joint tenant or tenants.

Between spouses, title is almost always held as joint tenants. This is primarily done so that upon the death of the first spouse, the surviving spouse will automatically own the joint property, without the delay and expense that would be associated with the probate process if there was no right of survivorship. However, in some situations, such as a second marriage where both partners have children from a previous relationship, tenancy in common may be the preferred ownership capacity between spouses. This would allow for each spouse to dispose of their share of the property to their children through their will should they wish to do so. Another way the ownership capacity of property can affect estate planning considerations occurs in situations where a parent who is the sole owner of a property decides to become joint tenants with an adult child or other heir to take advantage of the right of survivorship.

Changes in tenure can be made with the consent of all owners. However, an owner may also unilaterally end a joint tenancy through a severance. By severing the interests in the property, an owner can create a tenancy in common, instead of a joint tenancy.

The ownership capacity of property can have many implications. As well as various financing, tax and estate planning considerations, things like the amount of control an owner wishes to have over the property need to be considered. The potential consequences of owning property as the sole owner, as joint tenants, or as tenants in common should be discussed fully with both legal and financial experts.

*co-authored with Mark Armitage, associate lawyer*

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