

Recent Developments  
in  
Joint Tenancy

Diane B. Davies  
Faegre & Benson LLP

Real Estate Section  
Colorado Bar Association

April 2, 2009  
Maggiano's Denver Tech Center

## I. Issues Related to Joint Tenancy.

“Joint tenancy” is a form of ownership in which each joint tenant possesses the entire estate, rather than a fractional share. Taylor v. Canterbury, 92 P.2d 961 (Colo. 2004). The unique characteristic of a joint tenancy distinguishing it from a tenancy in common, is the right of survivorship in each of the co-tenants. The right of survivorship is the result of the unity of interest by each of the joint tenants. Historically, the creation, termination and operation of a joint tenancy has been governed by the four unities of interest, title, time, and possession. The concept of joint tenancy relies on the rather metaphysical concept of a unity of persons as co-owners. Although under the unity of interest each joint tenant is viewed as owning the whole, for some purposes they are recognized as having individual rights in respect of the property. Moynihan, Introduction to the Law of Real Property, West Publishing, 1962.

The rights of joint tenants in real property are fixed and vested at the time of the creation of the joint tenancy. In re Estate of Lee v. Graber, 462 P.2d 492 ( Colo. 1969); Smith v. Greenburg, 218 P.2d 514 (Colo. 1950). For the duration of the joint tenancy, each tenant owns the undivided whole of the property; he does not own a fractional part. Each tenant also retains the right of survivorship until the joint tenancy is effectively severed. Severance is only effective if it occurs prior to the death of one of the joint tenants, because the right of survivorship instantly vests title to the whole property in the surviving tenant at the moment of death of the other joint tenant.

In a joint tenancy, the right of survivorship is an expectancy that is not irrevocably fixed upon the creation of the estate. As noted by the Colorado Supreme Court: “It arises only upon success in the ultimate gamble, survival, and then only if the unity of the estate has not theretofore been destroyed by voluntary conveyance, by partition proceedings, by involuntary alienation under an execution, or by any other action which operates to sever the joint tenancy.” Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004). A joint tenant may unilaterally eliminate the survivorship element of the ownership rights, and by doing so, eliminate his own survivorship rights as well.

Any joint tenant can encumber or convey the interest that he owns, unless the property is held by a husband and wife, AND one of the spouses has recorded a written declaration of homestead rights. C.R.S. 38-35-118(1), 38-41-202(1, 3, 4). Commercial Factors of Denver v. Clarke & Waggener, 684 P.2d 261 (Colo. App. 1984).

### A. Creation

#### 1. At Common Law

At early common law, a conveyance to two or more persons (other than a husband and wife) was presumed to create a joint tenancy. Later, the law evolved to presume a tenancy in common, unless a joint tenancy was clearly intended.

The common law of England applies in Colorado, unless the legislature has repealed or modified it. C.R.S. §2-4-211. Statutes are not presumed to alter the common law unless they expressly, or by necessary implication, provide for such alteration. A statute may be merely cumulative of the common law if the legislature intended not to interfere with preexisting rights, but to give additional relief. Vigil v. Franklin, 103 P.2d 322 (2004); City of Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998).

2. Under Colorado Statute – C.R.S. §38-31-101.

- (a) A joint tenancy may only be created by compliance with the statute.
- (b) A joint tenancy may only be created between natural persons, except in the case of fiduciaries.
- (c) A conveyance or devise to two fiduciaries is presumed to create a joint tenancy.
- (d) A conveyance or devise to two or more persons which does not create a joint tenancy creates a tenancy in common.

B. Survivorship. The surviving joint tenant of real property does not take any new or additional interest on the death of his joint tenant under the laws of descent and distribution, but rather under the original conveyance by which the joint tenancy was created, his interest in the property is merely freed from the participation of the other. The death of a joint tenant does not result in a transfer of that tenant's interest to the survivor, but merely terminates any interest the decedent may have had, any liens existing against the deceased joint tenant's interest are likewise extinguished, and the survivor becomes the sole owner of the entire property free from any liens which may have previously existed on the now extinguished interest of the joint tenant debtor. Park State Bank v. McLean, 660 P.2d 13 (1982).

C. Severance. In order to be effective, severance of a joint tenancy must be accomplished prior to death of one of the joint tenants. Severance results in the former joint tenants owning the property as tenants in common.

1. A non-exclusive list of common law methods of severance:

- (a) Destruction of one of the four unities (which may be accomplished by one of the other listed methods).
- (b) Conveyance of the interest of one joint tenant.
- (c) Mortgage of one joint tenant's interest in a title theory state – not Colorado.
- (d) Foreclosure of a mortgage on one joint tenant's interest.
- (e) Execution sale on one joint tenant's interest – but not attachment of judgment lien.
- (f) Contract or agreement.
- (g) The modern view is that a joint tenancy is terminated when one or more joint tenants manifests an intent to terminate the right of survivorship. Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004), Mangus v. Miller, 35 Colo. App. 115, 532 P.2d 368 (1975). Such intent may be inferred from actions which are inconsistent with continuation of the relationship. Bradley v. Mann, 525 P.2d 492 (Colo. App. 1974), *aff'd*, 188 Colo. 392, 535 P.2d 213 (1975).

2. Colorado Statutes Provide Additional Means of Severing a Joint Tenancy:

- (a) Felonious killing of a joint tenant. C.R.S. §15-11-803.
- (b) Dissolution of marriage, except as provided in an agreement or court order. C.R.S. §15-11-804(2)(b).
- (c) A will does not affect a joint tenancy. C.R.S. §15-15-102..

II. Recent Developments

A. Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004)

1. Sanctioned the severance of a joint tenancy by a deed from one of the joint tenants to himself, without requiring a straw man.

2. Held the four unities, required at common law to create and maintain a joint tenancy, have been abolished by statute.

3. Stated that in determining whether a joint tenancy has been created or severed, we look not to the four unities, but to the intent of the parties

B. 2006 Legislation: Amended C.R.S. §§ 38-31-101, 103 and added C.R.S. §38-31-201

- 1. HB06-1254

2. States the exclusive methods of creating a joint tenancy
3. Confirms that a joint tenancy may only be created between natural persons, except in the case of fiduciaries.
4. Creates a presumption that a conveyance to two fiduciaries creates a joint tenancy.
5. Clarifies that any conveyance to two or more persons which does not create a joint tenancy creates a tenancy in common.
6. No Tenancy by the Entirety in Colorado.
7. Conveyances purporting to create a tenancy by the entirety prior to July 1, 2006 are presumed to create a joint tenancy.
8. Conveyances purporting to create a tenancy by the entirety on or after July 1, 2006 shall create a joint tenancy.

C. 2008 Amendments to C.R.S. § 38-31-101

1. Pre-Amendment law questions
  - (a) Can there be unequal joint tenancies?
  - (b) Can one sever a joint tenancy by deed to himself?
  - (c) Did the Legislature abolish the four unities?
2. 2008 Amendments to C.R.S. § 38-31-101
  - (a) Provides that the doctrine of the four unities of time, title, interest, and possession is continued as part of the law of this State subject to other provisions of the Statute which clarify, supplement or modify the doctrine.
  - (b) Confirms the right of survivorship as an incident to a joint tenancy.
  - (c) Allows for severance of a joint tenancy by a deed from one joint tenant to himself or herself as a tenant in common with other joint tenant(s).
  - (d) Provides that filing bankruptcy does not sever a joint tenancy.
  - (e) Permits interests of joint tenants to be equal or unequal. Interests are presumed to be equal; and will be conclusively presumed to be equal, absent compliance with the recording statute. Interests will be equal for the purpose of the Colorado Medical Assistance Act.

D. Proof of Death

1. 2006 Amendments Regarding Provides for proof of death for a joint tenant, life tenant or other person whose record interest in real property terminates upon death
  - (a) Amended C.R.S. § 38-31-102 to provide, that when a certificate of death is available, proof of death may be made by recording a certificate of death or a certified copy in the county in which the real property affected by the joint tenancy is located, together with a supplementary affidavit sworn to or affirmed by an individual with no interest in the property.
  - (b) Amended C.R.S. § 38-31-103 to provide that if a certificate of death or a certified copy thereof cannot be procured, proof of death may be made by recording an affidavit sworn to or affirmed by two or more persons having no record interest in the in the county in which the real property affected by the joint tenancy is located.
  
2. Title Standard 7.1.1
  - (a) Approved May, 2006.
  - (b) Amends and Restates Title Standard 7.1.1 to conform to changes made by HB 1254 in 2006
  - (c) Notes application of procedure for proof of death of an “Owner” under a “Beneficiary Deed” as defined in C.R.S. § 15-15-401.

fb.us.3804381.02

## APPENDIX

West's Colorado Revised Statutes Annotated Currentness

Title 38. Property--Real and Personal (Refs & Annos)

Real Property

Interests in Land

Article 31. Co-Ownership of Real Property (Refs & Annos)

Part 1. Joint Tenancy in Real Property--Proof of Death (Refs & Annos)

→ **§ 38-31-101. Joint tenancy expressed in instrument--when**

(1) Except as otherwise provided in subsection (3) of this section and in section 38-31-201, no conveyance or devise of real property to two or more natural persons shall create an estate in joint tenancy in real property unless, in the instrument conveying the real property or in the will devising the real property, it is declared that the real property is conveyed or devised in joint tenancy or to such natural persons as joint tenants. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning as the phrases "in joint tenancy" and "as joint tenants". Any grantor in any such instrument of conveyance may also be one of the grantees therein.

(1.5)(a) The doctrine of the four unities of time, title, interest, and possession is continued as part of the law of this state subject to subsections (1), (3), (4), (5), (6), and (7) of this section and paragraph (b) of this subsection (1.5).

(b) Subsections (1), (3), (4), (5), (6), and (7) of this section are intended and shall be construed to clarify, supplement, and, limited to their express terms, modify the doctrine of the four unities.

(c) For purposes of this subsection (1.5), the "doctrine of the four unities of time, title, interest, and possession" means the common law doctrine that a joint tenancy is created by conveyance or devise of real property to two or more persons at the same time of the same title to the same interest with the same right of possession and includes the right of survivorship.

(2) Deleted by Laws 2006, Ch. 75, § 1, eff. July 1, 2006.

(3) A conveyance or devise to two or more personal representatives, trustees, or other fiduciaries shall be presumed to create an estate in joint tenancy in real property and not a tenancy in common.

(4) An estate in joint tenancy in real property shall only be created in natural persons; except that this limitation shall not apply to a conveyance or devise of real property to two or more personal representatives, trustees, or other fiduciaries. Any conveyance or devise of real property to two or more persons that does not create or is not presumed to create an estate in joint tenancy in the manner described in this section shall be a conveyance or devise in tenancy in common or to tenants in common.

(5)(a) Except as provided in sections 38-35-118 and 38-41-202(4), a joint tenant may sever the joint tenancy between himself or herself and all remaining joint tenants by unilaterally executing and recording an instrument conveying his or her interest in real property to himself or herself as a tenant in common. The joint tenancy shall be severed upon recording such instrument. If there are two or more remaining joint tenants, they shall continue to be joint tenants as among themselves.

(b) Filing a petition in bankruptcy by a joint tenant shall not sever a joint tenancy.

(6)(a) The interests in a joint tenancy may be equal or unequal. The interests in a joint tenancy are presumed to be equal and such presumption is:

(I) Conclusive as to all persons who obtain an interest in property held in joint tenancy when such persons are without notice of unequal interests and have relied on an instrument recorded pursuant to section 38-35-109; and

(II) Rebuttable for all other persons.

(b) This subsection (6) does not bar claims for equitable relief as among joint tenants, including but not limited to partition and accounting.

(c) Upon the death of a joint tenant, the deceased joint tenant's interest is terminated. In the case of one surviving joint tenant, his or her interest in the property shall continue free of the deceased joint tenant's interest. In the case of two or more surviving joint tenants, their interests shall continue in proportion to their respective interests at the time the joint tenancy was created.

(d) For purposes of the "Colorado Medical Assistance Act", articles 4, 5, and 6 of title 25.5, C.R.S., a joint tenancy shall be deemed to be a joint tenancy with equal interests among the joint tenants regardless of the language in the deed or other instrument creating the joint tenancy.

(7) Nothing in this section shall be deemed to abrogate any existing case law to the extent that such case law establishes other means of severing a joint tenancy.

#### CREDIT(S)

Amended by Laws 1996, H.B.96-1342, § 15, eff. July 1, 1996; Laws 2002, Ch. 317, § 14, eff. July 1, 2002; Laws 2003, Ch. 315, § 67, eff. May 22, 2003; Laws 2006, Ch. 75, § 1, eff. July 1, 2006; Laws 2008, Ch. 193, § 1, eff. April 25, 2008.

Current through Chapters 2, 3, 4, 7, and 8 of the First Regular Session of the Sixty-Seventh General Assembly (2009).

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.