

HOW SHOULD WE TAKE TITLE TO OUR PROPERTY?

**PREPARED FOR RELANS CONFERENCE
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One of the most basic and most important decisions to be made by our purchaser clients in a real estate transaction concerns the manner in which to hold title to the property being purchased. It is a topic that needs to be flagged and discussed with the client at the earliest opportunity in the transaction. It is information that will need to be communicated to the Vendor's lawyer as soon as possible to enable the Deed to be prepared for signature especially if the Vendor resides outside of the Province. There is nothing more frustrating for a Vendor's lawyer than to have the Purchaser's lawyer fail to respond to a request for the information as to how the Purchaser wishes to take title. With many transactions involving non-resident Vendors and short time frames for closings, there is a duty of courtesy on the part of all lawyers in the transaction to provide timely responses to requests for such information. Failing to provide the required information as soon as possible may result in a need to extend the Closing Date if the Deed does not make the required trip to the Vendors and back.

When there is more than one party involved in the purchase, then there is a decision to be made. The ownership may be registered as tenants in common; as joint tenants; or a combination thereof. Sometimes a life interest may be utilized.

The statutory framework for holding title to land in Nova Scotia is found in the **Real Property Act**, R.S., c.385. A copy of Sections 1 to 5 of the Act is attached hereto to show, firstly, that Nova Scotia permits aliens to own land here (Section 2) and, secondly, that by virtue of Section 5, the common law has been modified in Nova Scotia. At common law, if 2 or more persons were named as owners of land without any mention of the type of tenancy, then they were deemed to be joint tenants with right of survivorship. Pursuant to Section 5 of the **Real Property Act**, with the exception of trustees or executors, two or more persons to whom land is transferred are tenants in common unless there are words expressly creating a joint tenancy.

There are numerous factors that will influence the decision as to how to take title. If the purchasers are married to each other, then joint tenancy is the most common form of ownership as it avoids probate issues in the event of the death of one of the spouses. In situations where the parties have children from previous marriages, then estate planning considerations may influence the manner of ownership. In situations where the parties are not married, factors such as the financial contributions being made to the transaction will influence the decision as to ownership.

In some transactions, there will be a desire to have varying percentages of ownership or mixtures of joint tenants and tenants in common. I have attached an example of a Deed that I prepared in 2010 with two parties being joint tenants as to a 2/3 ownership interest and two parties being joint tenants as to the remaining 1/3 interest, but the couples being tenants in common as to their respective ownership interests.

There are also situations that arise where we must be careful to identify the person or persons who is/are our client(s). We need to be aware that one of the parties may need to receive independent legal advice concerning the manner in which title is to be

registered. If a client wishes to change the ownership of a property to create a joint tenancy with one or more of his/her children or to transfer title but retain a life interest, we need to be certain to clearly explain the consequences of each scenario and to be vigilant for situations of undue influence or diminished capacity.

In situations where parents are providing financial assistance to children for the purchase of real estate, the lawyer must give consideration as to whether the parents should be put on title or should be given mortgage security. If the child is our client, then the parents should have independent legal advice.

The new Code of Professional Conduct will be implemented in January, 2012. We need to consult this document whenever we have a concern about legal ethics and conflicts of interest.

There are many factors that will influence the final decision as to how title to real estate should be held. It is the duty of the lawyer to raise the issue with the clients as soon as possible in the process and to be careful to explain the options and consequences to the clients.

An Act Respecting the Law and Transfer of Real Property

Short title

1 This Act may be cited as the *Real Property Act*. R.S., c. 385, s. 1.

ALIENS

Power of alien to hold or transmit real property

2 Aliens, corporations and companies incorporated out of the Province may take, hold, convey and transmit real property situated in the Province. R.S., c. 385, s. 2.

Title not invalid by alienage of former owner

3 No title to real property shall be invalid on account of the alienage of any former owner or holder thereof or because the same was formerly owned or held by a corporation or company incorporated out of the Province. R.S., c. 385, s. 3.

Title invalid on March 31, 1854

4 Nothing in this Act shall have the effect of confirming or rendering valid the title or claim of any alien invalid or incapable of being enforced on account of alienage on the thirty-first day of March, 1854. R.S., c. 385, s. 4.

JOINT TENANCY AND TENANCY IN COMMON

Tenancy in common and joint tenancy

5 (1) Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy but every estate vested in trustees or executors as such shall be held by them in joint tenancy.

Application of Section

(2) This Section shall apply as well to estates already created or vested as to estates hereafter to be granted or devised. R.S., c. 385, s. 5.

THIS WARRANTY DEED made the 1st day of October, 2010.

BETWEEN:

Gretchen Pamela Hache, of 165 Liverpool Street, Fredericton, New Brunswick, E3B 4V6, being the Owner of the lands described in Schedule "A" herein

(hereinafter called the "Grantor")

- and -

Timothy Warren Stewart and Elspeth Ann Chant, both of 4030 Marble Mountain Road, Lime Hill, Inverness County, Nova Scotia, B0E 3K0 as Joint Tenants as to a 2/3 ownership interest and **Rudolf Henninger and Ulrike Henninger**, both of 4091 Marble Mountain Road, Lime Hill, Inverness County, Nova Scotia, B0E 3K0 as Joint Tenants as to a 1/3 ownership interest

(hereinafter called the "Grantees")

WITNESSETH THAT in consideration of One Dollar and other good and valuable consideration;

THE GRANTOR hereby conveys to the Grantees, Timothy Warren Stewart and Elspeth Ann Chant a 2/3 ownership interest as joint tenants and to Rudolf Henninger and Ulrike Henninger a 1/3 ownership interest as joint tenants with Timothy Warren Stewart and Elspeth Ann Chant being tenants in common with Rudolf Henninger and Ulrike Henninger as to their respective ownership interests, the lands described in Schedule "A" to this Warranty Deed (the "lands") and hereby consents to this disposition, pursuant to the *Matrimonial Property Act* of Nova Scotia.

THE GRANTOR covenants with the Grantees that the Grantees shall have quiet enjoyment of the lands, that the Grantor has good title in fee simple to the lands and the right to convey them as hereby conveyed, that the lands are free from encumbrances, and that the Grantor will procure such further assurances as may be reasonably required.

IN THIS Warranty Deed the singular includes the plural and the masculine includes the feminine, with the intent that this Warranty Deed shall be read with all appropriate changes of number and gender.

JOINT TENANCY

A tenancy created where the same interest in real or personal property is passed by the same conveyance to two or more persons in the same right or by construction or operation of law jointly, with a right of ownership, i.e., the right of the survivor or survivors to the whole property.

R..v. Uniacke [1944] 3.W.W.R. 323
(Sask. C.A.)

TENANCY IN COMMON

A form of tenancy that arises when owners have community of possession but distinct and several titles to their shares which need not necessarily be equal and there is no right of survivorship between owners in common

R. V. Uniacke [1944] 3 W.W.R. 323
(Sask. C.A.)