

CO-OWNERSHIP OF REAL ESTATE
(as of 2/28/2017)

Owning real estate with others as joint tenants or tenants in common is the default form of co-ownership, and although easy and inexpensive it is fraught with problems if disagreements among co-owners arise. Although it is fairly typical and usually appropriate for spouses to own property as joint tenants, co-ownership among non-spouses (even family members) is often not a good idea. It is important to understand the difference between the two common forms of ownership. Fundamentally the difference relates to what happens upon the death of a co-owner. When a joint tenancy owner dies, his or her interest passes to the surviving owners irrespective of the terms of the decedent's will or estate plan. In contrast, when a tenants-in-common owner dies, his or her interest passes pursuant to the terms of his or her will or estate plan.

The limited rules that do exist governing joint tenancy and tenants-in-common ownership of real estate are summarized below. Most of these rules arise from common law—which is another way to say court cases. It's not always clear as to what the actual rules are since court decisions are often strictly aligned with the facts of the underlying case. The striking thing about co-ownership of real estate is that there are very few rules governing the co-owners. Indeed, the only real remedy for disagreement among co-owners is to go to court. The law provides a remedy of partition to any cotenant who wishes to force the sale or division of the property, and the remedy is available to any cotenant at any time. Partition actions are expensive, drawn out and emotionally draining for all parties involved. This office touts the use of real estate management vehicles (such as LLCs or real estate trusts) to eliminate the threat of partition and other disadvantages inherent in co-ownership of real estate. In effect, transferring your property into an entity allows you to create a set of rules and governing structure for the ownership of property. LLCs are the favored vehicle for holding family and commercial real estate and providing a structure for succession and management. If you are interested in exploring this further, we are happy to discuss and provide more materials if requested.

Here is a bullet-point summary of the basic rules of co-ownership under Maine law.

- **Possession.** Each cotenant may possess and use all portions of the property but has no right to exclusive possession of any portion of the property. This is not a very palatable way to own property. Essentially, you all either agree unanimously as to how to allocate use of the property or you go to court. There is no majority rule in co-ownership. In other words, if you own a 75% interest in the property as tenants in common, you cannot outvote the 25% co-owner. Moreover, you have no right to use the property 75% of the time absent an agreement or court order to that effect.
- **Necessary expenses v. Improvements.** Typically, a cotenant who pays more than his or her pro rata share of necessary expenses (e.g. taxes, mortgage payments, necessary repairs) is entitled to pro rata contributions from other cotenants. In contrast, a cotenant is not entitled to pro rata contributions from other cotenants for the cost of improvements to the property unless there is an action for partition. In a partition action, courts generally award the cotenant who made the improvements the resulting increase in the value of the estate, and not the actual cost of the

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improvements. See *Palanza v. Lufkin*, 2002 ME 143. Unfortunately, if a cotenant is not paying their fair share, the remedy is again to go to court. An LLC can include internal enforcement mechanisms for compelling payments of assessments. For example, use of the property can be suspended or an owner's interest forfeited in the event that assessments are not paid in a timely manner.

- ***Recovery of rent or income.*** Cotenants are entitled to their pro rata share of rents or income. See 33 MRSA §953.
- ***No waste by cotenant without notice.*** A cotenant is prohibited from cutting or carrying away trees, timber, ore, stone or committing strip or waste without first giving 30 days' notice to other cotenants. See 14 MRSA §7505. This rule evidently does not apply to damage to buildings or other improvements on the land. See *Foisy v. Bishop* 232 A.2d 797 (Me. 1967) (“This statute is of ancient origin . . . It has been invoked many times but only with respect to the cutting of timber and the removal of stone – never in a case involving the destruction of buildings or structures.”)
- ***Unequal initial contributions.*** In general, joint tenants own equal undivided shares even though their initial contributions may have been unequal. That result is a consequence of the right of ownership that attaches to a joint tenancy. Tenants in common, on the other hand, are presumed to own equal shares, but this presumption may be overcome by evidence, such as evidence of unequal initial contributions, establishing an intention to have unequal shares. *Bradford v. Dumond*, 675 A.2d 957 (1996). In addition, the source deed can provide for unequal ownership. In other words, a deed may state the percentage ownership interest being granted to the tenants in common.
- ***Termination of co-ownership; partition actions.*** Any cotenant has the right to petition for judicial partition of the property at any time. Statutory partition is an action for partition of the property which may only be carried out by physical division. Equitable partition is an action for partition of the property which may be carried out by sale and division of the proceeds. Equitable partition is appropriate where physical division is impractical or would materially injure the rights of the parties. *Libby v. Lorrain*, 430 A.2d 37 (1981).