

# PROPERTY

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CLASS 16(B): CONFLICTS BETWEEN CO-OWNERS

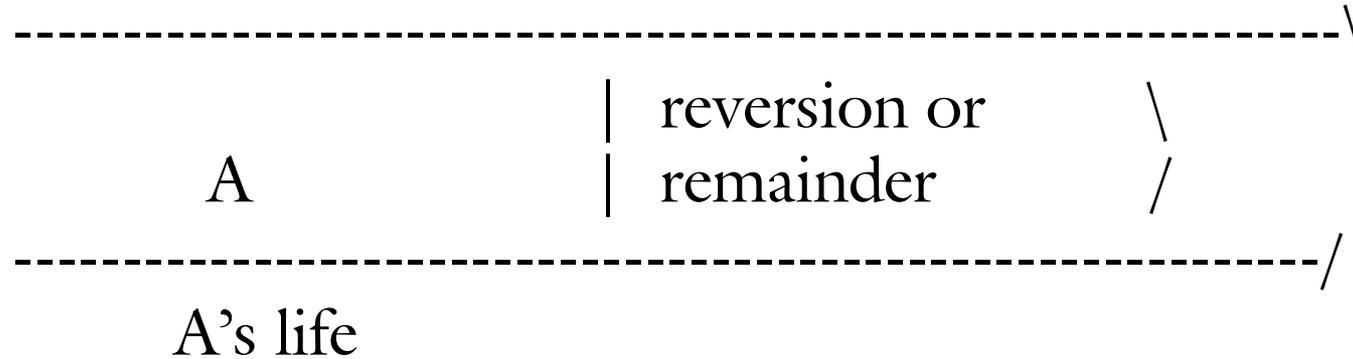
# Class Outline

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- Concurrent and Marital Estates
  - Tenancy in Common
  - Joint Tenancy
  - Tenancy by the Entirety
  - Community Property
- Partition
- Attribution and Accounting
- Severance

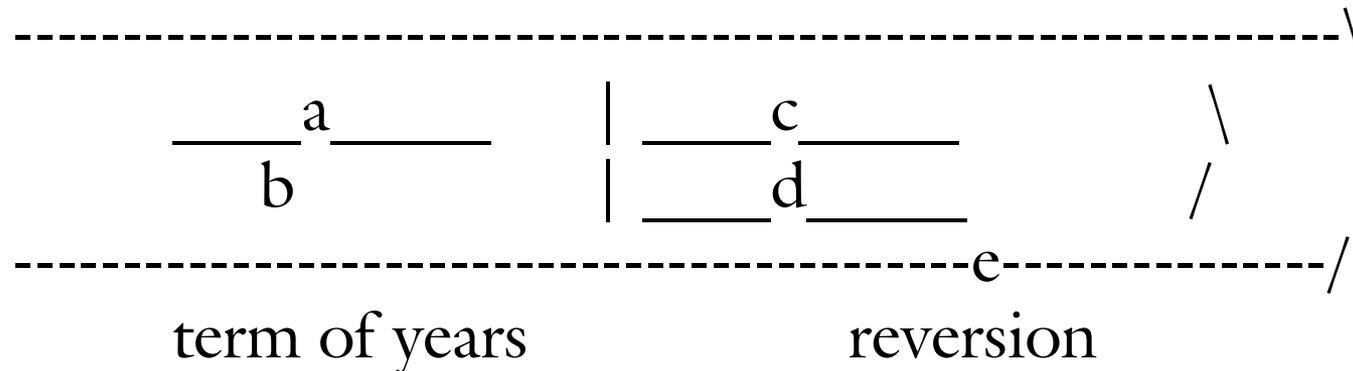
## Future interests:

e.g., horizontal division (over time)



## Concurrent interests:

vertical division (at any point in time)



# Unity of Possession

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- All forms of co-ownership involve “unity of possession”:
- Each co-owner has an equal right to possess the whole
  - This doesn’t mean that they actually possess the whole (only that they have the right to)

# Concurrent Estates

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- Tenancy in common
- Joint tenancy

# Tenancy in Common (“TIC”)

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- Each tenant in common has a separate but undivided interest. Each interest is descendible, conveyable, and devisable (but no right of survivorship). (Survivorship = when one T dies, the property automatically passes in full to the surviving T).
- Only “unity” required is that of possession.
- Creating TIC is easy: just say “to A and B.” Can be from common grantor, e.g., O. Or can be from one co-T, e.g., A owns in fee simple and then creates concurrent interest in B.
- Also flexible. Interests need not be equal, e.g., A conveys 1/8 interest as TIC to B.

# Joint Tenancy (“JT”)

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- Like a tenancy in common + the added right of survivorship.
- Joint tenants treated for some purposes as a single owner. Survivorship = the interest passes automatically at death. (Technically nothing passes; the deceased joint tenant’s interest is extinguished and full ownership goes to the surviving owner.)
- The joint tenancy can be severed (creating a tenancy in common) by unilateral act such as a transfer; and so a joint tenant has an exit right.
- JT is primarily appropriate for intimate relationships (married couples, family business).

# The joint tenancy requires 4 unities:

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1. time (each interest must be acquired or vest at the same time),
2. title (all must acquire title by the same instrument or by joint adverse possession; never by intestate succession or other act of law),
3. interest (all must have equal undivided shares and “durationally” identical interests; these days not necessarily identical value-portions), and
4. possession (each must have the *right* to possess the whole)

# Concurrent Estates

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- To the outside world, each of the JTs and TICs have most of the rights and incidents of full property ownership.
- Each can exclude strangers, or admit strangers to the property.
- Each can use property for enjoyment or profit.
- Each can sell his or her interest to a third party.
- Major exception: JTs lack inheritability, since each JT in effect succeeds to the interest of the other upon death. (This does potentially impact third parties.)

# Marital Estates

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- Tenancy by the entirety
- Community property

# Tenancy by the Entirety

- Like a joint tenancy, only for married couples.
- Similar right of survivorship, but no *unilateral* exit option as long as the couple stays married.
- To destroy a tenancy by the entirety, co-owners must get divorced, or convey the property to themselves (usually via a “straw” transactor)
- (Tenancy by the entirety no longer exists in many states.)

# Brief History of Marital Property

- The common law employed a fiction that husband and wife were one (woman could have title but husband had sole right to manage etc.).
- This was changed in all the states in the mid-nineteenth century with the Married Women's Property Acts (which also abolished dower and curtesy and provided for the spousal forced share).
- The original common-law system had been partially modified by equity courts. Especially by means of trusts, a married woman could enforce a right to determine use as against husband. This was in effect available only to the wealthy.

# Marital Property in Divorce

- Prior to about 1970, common law states followed the title rule for property division. (Man's name was on the title, so it was his.) This was “offset,” so to speak, by award of periodic payments called alimony designed to provide income support if one spouse was economically dependent. Amount also influenced by comparative fault and other equitable considerations.
- After about 1970, most states adopted a system of equitable division of property. Now, courts exercise broad discretionary power to divide property in accordance with principles of equity. State of title disregarded. In contrast to community property, no strong presumption in favor of 50-50 as starting point (but that is changing). Movement away from alimony toward lump sum payment, although support payments (now called maintenance) may still be awarded in some cases.

## One Method of Property Division in Divorce

*Source:* Agence France Presse, <http://www.sott.net/article/167304-Cambodian-couple-split-house-in-half-to-avoid-divorce-court>



# Community Property

- In community property states (several western and southwestern states and Louisiana) only.
- Most other states either go with tenancy by the entirety (rare), or allow married couples to own in fee simple (i.e. separately) or as a joint tenancy (most common).
- Basically, earnings of spouses during marriage are owned equally in undivided shares by the spouses.
- All property that is not community property is separate (property acquired before marriage or during marriage by gift, bequest, devise, or descent, and in some states the earnings on these; in other states the earnings are community property)
- Presumptions for community property and actual commingling separate property can make the showing not possible.

# Partition

- Partition is available to tenants in common and joint tenants, not to tenants by the entirety.
- Any co-tenant can sue for partition for any reason (or no reason at all); court does not make a reasonableness inquiry.
- In effect, this gives each co-tenant the right to automatically terminate co-tenancy at any time.
- Tenants by the entirety must first convert into either TIC or JT (or divorce) in order to obtain partition.
- 2 types: (1) partition by sale; and (2) partition in kind.

# *Delfino v. Vealencis*



*Gillmor v. Gillmor*  
(Sheep Grazing on BLM Land in Snake  
Valley, Utah)



# Ouster

- Basic rule: Co-tenants do not have to account for their use to each other, absent ouster. (They do have to account for rents received from third parties, with offsets for costs.)
- So for own-use, the property is a mini-commons, with attendant problems. Mostly to be solved by the co-tenants themselves.
- What is an ouster? Physically pushing someone out is enough – or an act of exclusion. Mere exclusive use is not an ouster.
- An act that “necessarily excludes” other tenant is an ouster.