

HAWAII CONVEYANCE - TENANCIES

The State of Hawaii has four different methods of holding title to real estate property. The below definitions are not intended as more than a superficial explanation of the distinguishing features for each tenancy. There are numerous legal and tax implications arising from the use of each tenancy. The selection of any tenancy will depend upon a number of factors which can only be evaluated upon a consideration of the total legal and estate planning "picture" of the persons involved. It is unwise to assume blindly that any particular tenancy is "right" for any person without an examination of that "picture". The conveyancer, escrow officer or real estate broker, in the event of questions regarding tenancies from parties to a document should limit discussion to a general explanation of the tenancies available in the situation. Should questions remain as to what may be the best tenancy to use, the parties should be urged to seek competent tax or legal advice before proceeding further. **A Loan Officer is not qualified to give you advice on this matter.** As used below, the term "person", without other qualifications, includes corporations, partnerships, etc., as well as natural persons.

Tenant In Severalty:

A tenancy held by one person alone, "severed" from others. There is no need to state that an individual holds title as tenant in severalty, as indicated in the forms which follow. It is, of course, permissible to include such a statement.

Tenants In Common:

A tenancy held by two or more persons, each having an undivided interest in the entire property to the extent of this ownership share. Unless otherwise stated, each tenant in common holds an ownership share equal to that of the other tenants in common (for example, each of four persons holding title as tenants in common would own one-fourth (25%) undivided share in the entire property.) However, the ownership shares of tenants in common may be unequal (for example, of three tenants in common, one might hold 2/3 interest and each of the others a 1/6 interest.) There is no right of survivorship between tenants in common, and the interest of a deceased tenant in common passes as part of his estate. Each tenant in common may sell or encumber his interest at any time, with the transferee of the interest becoming a tenant in common with the remaining tenants. A tenant in common is also entitled to institute an action for partition of the property and, if the court cannot determine a equitable division of the property among the tenants, the court will order the property sold and the sale proceeds divided among the tenants according to their respective interest.

Joint Tenants:

A tenancy held by two or more natural persons, each of whom hold an equal undivided interest in the entire property. The right of survivorship exists in a joint tenancy, and upon the death of a joint tenant, the interest of the deceased tenant passes to the surviving joint tenants in equal shares. In Hawaii, the intent to create a joint tenancy must be clear from the document vesting title in the tenants, otherwise a tenancy in common will be created. The presence of four "unities" is essential to the creation of a joint tenancy: the four "unities" are: time, title, interest and possession. That is, the interest of the tenants must arise at the same time, be conferred by the same document of title (conveyance), with each tenant having an interest equal to that of the other tenants, and an equal right to possession of the entire property. A transfer of the interest of one joint tenant will sever the joint tenancy as to such interest. (For example, if one of three joint tenants conveys his interest, the transferee of the interest will hold a 1/3 interest as tenant in common with the remaining two joint tenants who, as between themselves, will hold the remaining 2/3 interest as joint tenants).

Tenants By The Entirety:

A special form of joint tenancy available only to a lawfully married couple. The four "unities" of a joint tenancy are required to be present, with the addition of a fifth requirement – a valid marriage. As with a joint tenancy, upon the death of one spouse, the survivor succeeds to the entire ownership interest in the property. An intent to create a tenancy by the entirety must be manifest, as with a joint tenancy. Divorce will sever a tenancy by the entirety, the parties becoming tenants in common upon divorce. One spouse may not convey or partition his or her interest in property held as tenants by the entirety without the consent of the other spouse. Nor may the creditors or one spouse attach the interest of such spouse in property held as tenants by the entirety. The definitive case law in Hawaii on tenancies by the entirety is found in *Sawada v. Endo*, 57 Haw.609 (1977).

GENERAL COMMENTS:

The proper wording for tenancies often causes difficulty to the inexperienced conveyancer. The placement within the document of the tenancy designation may vary as the conveyancer desires. Wherever placed, the underlined wording in the forms below is sufficient in all cases to accomplish the desired result. Certain basic rules are good to keep in mind with respect to tenancies:

- Only natural persons can hold title as joint tenants. A corporation, partnership or other similar entity can hold title with a natural person or another entity only as a tenant in common.
- With multiple parties (natural or unnatural) if no tenancy is stated, a tenancy in common (each tenant holding an equal undivided interest) is created. Section 509-1, Haw.Rev.Stat.
- Where two or more people hold title to property and desire to change the tenancy in which they hold title, it is not necessary to convey title to a third party and have that party convey title to the people in the desired tenancy. The people can simply execute a conveyance to themselves in the desired tenancy. Section 509-2, Haw.Rev.Stat.
- For parties to hold title as joint tenants (or tenants by the entirety) they must take title at the same time by the same instrument.
- DO NOT specify that joint tenants, as between themselves, are to hold title in any particular shares or percentage, as each joint tenant, by law, holds a share equal to that of the other joint tenants.
- DO NOT attempt to have multiple parties hold title to specified (e.g. one-half) interests in property and, as between the specified interests, hold overall title as joint tenants. This most often arises when parents are assisting a child in the acquisition of property and desire to be record title holders. For example, the parents will express the desire to hold title to half of the property as tenants by the entirety, the child to hold title to half and, as between the parents and the child, to hold overall title as joint tenants. The division of the title into separate halves, even though equal, negates the possibility of a joint tenancy.