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A COMPARATIVE ANALYSIS OF THE APPLICATION OF JOINT TENANCY IN THE ADMINISTRATION OF REAL PROPERTY IN MALAYSIA, SINGAPORE, AND AUSTRALIA

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Abstract

Joint tenancy has been applied when one of the joint tenants dies; the deceased's left portion must be given to the surviving joint tenant. The National Land Code (Act 828) acknowledges the concept of joint ownership in form of tenancy in common while the right of survivorship was only acknowledged in the National Land Code (Penang and Malacca Titles) Act 1963. Therefore, the research aims to explore the concept of joint tenancy and the existing laws governing the joint ownership in Malaysia. This research is based on the qualitative research and analysis of the primary and secondary materials through the governing statutes and reported cases. The research also explores the practice of joint tenancy in Singapore and Australia for comparative analysis. It is predicated that the application of joint tenancy would give the advantage to the surviving joint tenant towards the full enjoyment of the property.

Keywords: Joint Tenancy, Right of Survivorship, Administration of Real Property

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INTRODUCTION

Joint ownership refers to the property owned by two or more persons. There are two main types of joint ownership of real estate namely tenancy in common and joint tenancy. Concurrent ownership of an undivided or individual interest in real estate is referred to as tenancy in common. Any tenant has the right to transfer ownership by will, deed, or other legal instrument. If one of the tenants in common passes away, his or her interest in the property will be dispersed in accordance with the terms of his or her will, if any, or the laws of intestacy, as applicable.

In contrast, the idea of joint tenancy has been applied in common law to administer an estate that comes into existence once a joint owner or tenant passes away. According to the underlying principle, joint tenancy is an uncommon type of ownership that cannot be transferred via inheritance.¹ For joint tenancy, the title must be obtained simultaneously through the same conveyance, and it must be stated on the instrument that the intention is to create a joint-tenancy estate.² Due to the right of survivorship provided by joint tenancy, the interest in the property will transfer to the remaining tenants following the death of any joint owner or tenant, regardless of the terms of the decedent's will, if any.³ This means that in the event that a co-owner or co-tenant passes away, the remaining joint owner will continue to be the sole legal owner of the property.

Despite the aforementioned, the National Land Code (Act 828) only recognises tenancy in common, not joint tenancy. As a result, the ownership will be shared both during and after the joint tenant's lifetime and will be regarded as a part of the deceased joint tenant's estate. This had proved difficult for the surviving joint owner, mainly when the property was acquired and developed jointly by the joint owners.

Singapore and Australia are examples of Commonwealth countries that use joint tenancy in land law. Therefore, the research analyses the law and practice of joint tenancy in Malaysia, as well as Singapore and Australia for the comparative analysis. All of these countries adopt the Torrens system, which bases the law of conveyance on the idea of indefeasibility of title. Since Singapore's land laws is applicable for general application, both Muslims and non-Muslims are subject to them, creating a dual legal system like to that of Malaysia. This study is based on a qualitative research and analysis of primary and secondary sources, including the governing statutes, reported cases, and data obtained from the relevant administrative agencies. It is assumed that the application of joint tenancy would allow the proprietor additional alternatives for planning the management of his property and give the surviving joint tenant the advantage of being able to fully enjoy the property.

THE APPLICATION OF CONCEPT OF JOINT TENANCY IN MALAYSIA

In Malaysia, law of succession is governed in two ways: Muslims and non-Muslims. Without a heritable estate, inheritance cannot take place. The succession for non-Muslims could be determined by a will, statutory rules of intestacy, or combination of both. A will has been executed determines how a deceased non-estate Muslim's will proceed and who will inherit it. Conversely, in the event of intestacy, the Distribution Act 1958 (Amended 1997)'s statutory rules of succession will be in effect.

It is a religious obligation for Muslims to distribute their estates in accordance with the prescribed law, i.e the faraid, upon death. According to the law of succession, a joint tenancy is a type of possession where each tenant will inherit the same piece of the asset and all owners of the asset have equal rights.⁴ Every co-owner must agree to any transaction involving the property. As a result, it is not separate ownership but rather carries joint possession around co-owners who act on a mutual decision.⁵ As a result, if one of the joint tenants passes away, the surviving tenant will obligatorily be conceded the deceased's remaining half.⁶ According to the underlying principle, joint tenancy is uncommon in the context of land ownership and cannot be divided via the succession process.⁷

Sections 343 to 345 of the National Land Code (Act 828) recognise the concept of joint ownership in the form of tenancy in common. In the meantime, Section 47(1) of the National Land Code (Penang and Malacca Titles) Act 1963 (Act 1963) recognised the concept of joint tenancy with the right of survivorship.

The court, in the case of *Salmah bt Omar & Ors v Ahmad Rosli bin Aziz (administrator of the estate of Osman bin Mohamed, deceased) & Anor*,⁸ provided that a joint tenancy is a way to transfer ownership of property held by two or more people in equal interest, with the right of survivorship going to the surviving joint tenant(s). The documents must have been acquired concurrently by the same conveyance and explicitly describe the purpose to create a joint tenancy estate. The court held that an application of the joint tenancy was not strictly applied to Muslims but subject to the acceptance of Islamic law.

However, the court distinguished the above decision in the case of *Peter Chong & Anor v Khatijah bt Md Ibrahim & Anor (personal representative of Aishah bt Ibrahim, the deceased) and another suit*,⁹ wherein Lim Chong Fong, J, expressed the opinion that the Mohammedan Ordinance that had codified customary law applicable to the Muslims did not apply to the conveyance and only applied to property relating to Islamic marriage and intestacy. The court ruled that Islamic law does not prevent or invalidate the conveyance or the resulting joint tenancy. Nonetheless, if that applies, the conveyance being a hibah ruqba does not contravene Islamic law.

The equivalent concept of joint ownership in Muslim law is called hibah ruqba or conditional gift. The impact of a hibah in Muslim law is described by Faiz Badruddin Tyabji,¹⁰ in Muslim Law, the Personal Laws of Muslims in India and Pakistan at p 300 as:

“The legal effect of hiba is that the immediate and absolute ownership of the subject of the hiba is transferred to the donee; and where the property is purported to be transferred by way of hiba with conditions, or restrictions, as to its use, or disposal, or alienation, the conditions or restrictions may be void.”

The National Land Code (Act 828) permitted the transfer of land through gift by virtue of Section 215 whereby the title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.¹¹

However, pursuant to Item 1, List II (State List), Ninth Schedule of Malaysia Federal Constitution, the Islamic law applies to Muslim personal laws which includes succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees, etc.¹² This concluded that hibah matters are governed by the Enactment of each state in Malaysia and under the jurisdiction of Syariah Court.

Since the surviving spouse immediately becomes the sole owner following the death of either partner without the requirement for a grant of representation, joint tenancy is the most prevalent type of co-ownership amongst married couple under common law. Eventually, it may also be a method for handling joint assets acquired during an ongoing marriage. As a result, the common law presumption of tenancy in common, which is applicable in Malaysian land law, may produce outcomes that are contrary to the expectations and aspirations of the majority of spouses.

THE APPLICATION OF CONCEPT OF JOINT TENANCY IN SINGAPORE

Singapore's Land Titles Act of 1993 (Cap 157) was passed to regulate land matters. Joint tenancy and tenancy-in-common are the two forms of ownership recognised by Section 53 of the said Act. Each partner tenant in a tenancy-in-common owns a unique and separate piece of the property. When the owner of the tenancy-in-common passes away, his portion of the agreement becomes a part of his estate.

On the other hand, joint tenancy in the form of an undivided share, as the provision has underlined that in the incident of co-ownership where any property is vested in two or more people as co-owners, their allocations therein shall be equal except where different amounts are underlined in the registration records. The joint tenant's interest in the property ceases upon his death. A tenancy in common can be created by legally severing a joint tenancy. In England, this situation existed prior to the Law of Property Act of 1925.

The court in the case of *Williams v Hensman*,¹³ stated that a joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.¹⁴

Any joint tenant has the right to sever a joint tenancy of any estate or interest in registered land by filing a declaration in the authorised form and serving copies of the document to the other joint tenants either personally or by registered post. Upon the registration of the instrument of declaration, the respective registered estates and interests in the registered land shall be held by the declarant as tenant-in-common with the remaining joint tenants in equal shares.

The Singapore Titles Automated Registration System (STARS) shall be used for the registration process and the submission of any pertinent documents relating thereto. The Land Titles Registration and Public Search Service of the STARS is computerised. A web-based system called STARS eLodgment allows users to create, edit, copy, delete, and submit documents related to land transactions using simple electronic forms.

An application for joint tenancy will only be rejected on procedural grounds by the Land Authority/Registry, not substantive grounds for instance, the applicants apply for joint tenancy but also include the percentage of shares; the name or identity card number is incorrectly stated, and so on. If the former occurs, the Registry will object and give the applicants instructions to modify the instrument. The certificate of correctness that is in the instrument of transfer must be submitted by the co-proprietors. The certificate of correctness is significant

because it attests to the document's good faith creation, the substantial accuracy of the information stated in the instrument, and the co-owners' legal capacity (under Section 59 of Land Titles Act 1993). However, if there is the existence of any specific agreement or arrangement, it will only be known or handled by the lawyers. A court must decide any disputes or challenges that have arisen. The received order is then given to the land registry so that further action can be done.

Both Muslims and non-Muslims must register joint tenancies using a similar approach. Muslims are not subject to any additional requirements because land law is governed by general application and does not have an impact on the manner of holding of the land.

The remaining tenant must submit a valid notice of death form together with a death certificate. Although lawyers often produce the notification of death, there is a system in place where the land authority permits self-service when dealing with a straightforward paperwork. After processing the application for around three weeks, the registrar will contact with the remaining tenant to arrange for collection of the newly issued title. On the other hand, the co-tenants' deaths will not immediately result in the issuance of the new title.

The concept of joint tenancy has been utilised by Muslims as a way to handle the estate following after the death of the co-owner or co-tenant.

Application of joint tenancy in Singapore has evolved over 20 years ago as in 1997, based on the 1st fatwa, the Fatwa Committee viewed the joint tenancy contract as a form of shared ownership. Each joint tenant owns half of the entire property. When a joint tenant passes away, the surviving owner is entitled to only 50% of the property, and the remaining 50% is subject to distribution by faraid.¹⁵

In 2008, the Islamic Religious Council of Singapore have reviewed and issued fatwa pertaining to joint tenants, in two directions, namely, the co-owner only received half of the share, or only inward his actual share in the property, after the demised of other co-owner, if there was no earlier agreement have been made among them. The left assets will be inherited by heirs' of the deceased. Secondly, if there was an agreement between the co-sharers, either under a mode of ruqba (conditional gift) or in a form of nazhar (vow) which clearly indicates that the assets are to be given totally to the existing co-sharer, after the demised of one of them, subsequently the survivor will own the property. In the absence thereof, their share can be divided according to faraid after his death.¹⁶

In the case of *Shafeeg bin Salim Talib and another v Fatimah bte Abud bin Talib and others*,¹⁷ the court held that an inter vivos joint tenancy gift of real property by Muslims is valid. Since there was no specific legislation which prevented the operation of the right of survivorship in a joint tenancy of land held by Muslims, the half share passed to the Respondent as the surviving joint tenant under the right of survivorship at common law and, therefore, it did not form part of the estate.¹⁸

In 2019, MUIS issued a new fatwa. Buyers who purchase a property as joint tenants can be assured that the joint tenancy contract is also religiously valid without having to draw up additional documents. It is thus a new form of contract with its benefits that serve the community's needs. Islamic scholars are of the opinion that the general ruling of a new contract is permissible. Although it is considered as a contemporary and new contract that cannot be found in traditional Islamic law, it is permissible because the contract does not conflict with Islamic principles and based on the legal maxim "the original rule in the transaction is permissibility." Furthermore, the objective of the contract is clear, does not contain any ambiguity, no elements of injustice or oppression and there are no elements of deceit.¹⁹

Therefore, joint tenants have the choice of signing joint tenancy contracts or tenancy-in-common contracts throughout their lives. Both arrangements for joint ownership offer benefits. By choosing one of the aforementioned options, the owners agree to meet the conditions set out and the objectives of each of these agreements that they had made during their lifetime.

THE APPLICATION OF CONCEPT OF JOINT TENANCY IN AUSTRALIA

Australia was settled by the English, albeit as a penal colony. Because English law was deemed to be applicable to Australia as a matter of common law principle, Australian land law was thus imported from English law. Australian land law was derived from English law, most of which was based on English feudal history and had no real bearing on Australian society.

The advent of the Torrens system of title registration was the most notable advance. The system of registering and recording land ownership was revolutionised by the South Australian invention known as Torrens Title. In this system, the moment a document transferring ownership of the property is submitted with the local Land Titles Office, the land ownership is occurred.

The common law recognised four types of co-ownership: joint tenancy, tenancy in common, coparcenary, and tenancy by the entirety. A tenancy by the entirety is a common-law form of ownership that exists between husband and wife only. It arose from any conveyance to a married couple unless limiting language was included. This form of ownership is similar to the common law joint tenancy except that neither tenant could voluntarily terminate the tenancy or convey his or her interest without the consent of the other.²⁰

The joint tenancy and the tenancy in common retain relevance in Australian law. There are two forms of co-ownership, namely joint tenancies and tenancies in common. The distinguishing feature of a joint tenancy is that on the death of one joint tenant his interest in the land passes to the other or others by right of survivorship. For there to be a joint tenancy, the four unities must be

present. There must be the unity of possession (each co-owner is as much entitled to possession of any part of the land as the others); unity of interest (each joint tenant has the same interest in extent, nature, and duration); unity of title (each joint tenant must claim his title under the same act or document); and unity of time (the interest of each tenant must vest at the same time). With tenancy in common, the tenants hold undivided shares, there is no right of survivorship, and only the unity of possession is essential.²¹

If a joint tenant severs the joint tenancy by transferring their interest to another, the four unities are broken and the joint tenancy is converted to a tenancy in common in equal or 'aliquot' shares. This is different from a typical tenancy in common, where co-tenants hold separate interests to the same land, often in unequal shares.

The continued existence of a joint tenancy and therefore the operation of the right of survivorship depend on the preservation of the unities of time, title, interest and possession. However, during his or her lifetime, a joint tenant 'is at liberty to dispose of his [or her] own interest in such a manner as to sever it from the joint fund and convert the joint tenancy into a tenancy in common (*Williams v Hensman*).²² Severance of a joint tenancy, without physical partition, operates by converting the undivided rights subsisting in the whole of the property into distinct but undivided shares. Since the interests of each joint tenant are always the same in respect of possession, interest, title and time, no distinction can be drawn between the interest of any one tenant and that of any other tenant.²³

There are three ways that a joint tenant may sever the joint tenancy, so that there is separate property to convey or give. First, in some circumstances there may be severance by unilateral action. Second, severance can occur by mutual agreement. Last, there may be severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. *McNamee* decided that a joint tenant could unilaterally sever the joint tenancy by assignment of the jointly owned property, being a chose in action, a debt, to herself by deed poll. However, it is by the second and third means of severing a joint tenancy that joint tenants achieve that outcome by making mutual wills. Historically, this occurs where mutual wills deal with an interest in real estate in a manner inconsistent with ownership of the real estate interest passing by survivorship.²⁴

Parties who own property as joint tenants mean that all joint tenants have equal ownership and interest in the property, and a right of survivorship exists. Eventually, if one of the joint tenants dies, the property will automatically pass to the surviving joint tenant. This happens regardless of any contrary intentions in the will of the deceased owner.²⁵

Joint tenants are frequently married couples or long-term partners. In other property ownership arrangements when all parties are happy with the right of survivorship, joint tenancy is a type of ownership that can be utilised.

The concept of joint tenancy depending on the 'gamble of the tontine' (as Deane J called the right of survivorship in *Corin v Patton*,²⁶ there may be nothing for the joint tenant to give on death. When the joint tenant comes to make their will, he or she may want to change that outcome by ending the joint tenancy.²⁷

The right of survivorship is not a 'right' in any legal sense. It is merely a hopeful gamble and a consequence following the death of a joint tenant. Nor does it involve a vesting by survivorship because there is no shift in ownership. When one joint tenant dies, his or her interest ceases to exist. Deane J said:

*“When one joint tenant dies during the subsistence of the joint tenancy, his interest ceases: the interests of the remaining joint tenants expand by accretion. When there is but one survivor, the joint tenancy has run its course and the survivor becomes the full owner of the whole property.”*²⁸

By completing the necessary form and submitting it to the responsible government agency, a joint tenancy may be terminated. When one or more of the joint tenants (but not all of the joint tenants), transfers all their interest in the property, this transfer does not affect the shares of a registered joint tenant who is not part of the transfer.

In New South Wales, the concept of joint tenancy was acknowledged in the Real Property Act 1900 (NSW). Under Section 97(1), for the severance of joint tenancy by unilateral action (without notifying others who may be affected by the action and seeking their agreement), the registration of a transfer by a joint tenant of their interest in land as a joint tenant, severs a joint tenancy. The law provides that the Registrar may require that person to provide the Registrar-General with further information before recording. Section 97 provides that such information to be sought by the Registrar-General includes the names and addresses of the other joint tenants, a statement that they are not aware of any limitations or restrictions on their entitlement to sever the tenancy and anyone else who may be affected. Once it has been lodged, the Registrar-General must then give notice of the severance to all other joint tenants except in certain circumstances.²⁹

DISCUSSION AND THE RECOMMENDATIONS

From the above discussion, this demonstrates that the National Land Code (Act 828) does not recognise joint tenancy. The study assumes that a legal framework

or mechanism should exist to regulate the application of joint tenancy when dealing with joint ownership of land in Malaysia.

Joint tenancy is proposed as a solution to issues that frequently arise following a spouse's passing regarding the security of the widow and children. Such concerns are common in today's world, thus solving them will demand serious measures. For instance, the Malaysia Gazette News Portal reported on February 20, 2020, that disputes between Nor Hidayah, the deceased's widow, and the deceased's family members started to surface soon after the death of a popular comedian Abam, also known as Syed Umar Mokhtar Syed Mohd Ridzuan. The younger brother in this case, Ali Puteh, made the decision to assume control over the deceased person's property and eventually set up the requisite procedures to apply for the faraid system of property distribution through a Syariah court. The difficulties encountered by Nor Hidayah and her 9-month-old child after Abam's death captured the attention of people all over the country, particularly after social media disclosed the disputes regarding his late husband's belongings. Nor Hidayah stated that after her husband passed away, she was left with nothing and that it was difficult for her to travel around after the family took away the car and other belongings.³⁰

Another case involving celebrity in Malaysia involves the son of comedian AR Badul, who passed away on September 4, 2019, in Kem Kok Lawi, Sabah. After Mohd Zahir passed away, AR Badul got in touch with the wife to assert his claim to the estate of his son. Shafinar, the deceased wife, opted to stop all calls from her father-in-law and the siblings out of frustration and pressure.³¹

The welfare of the decedent's family can be secured by offering joint tenancy as a method of estate administration. Additionally, there is a need to raise public awareness to concern on moral and financial support as well as maintenance of the deceased's family. Thus, family disputes on the deceased's property can be prevented.³²

Therefore, it is anticipated that the application for joint tenancy would provide the owner more flexibility in deciding how to handle his property and would properly grant the surviving joint tenant the right to full enjoyment of the property. However, it must be noted that the application of the concept of joint tenancy must be compatible with Muslim law and the law of succession in order to meet present needs.

CONCLUSION

To conclude, the research explores the application of joint tenancy in Malaysia by discussing the concept of joint tenancy under the National Land Code (Act 828) and its application in Malaysia under the civil law of general application and the Islamic law of inheritance. Additionally, the study investigates joint tenancy legislation and practise in Singapore and Australia under the dual legal system

and the Torrens system, respectively. It is assumed that applying joint tenancy would allow the owner more flexibility in deciding how to manage his property and would fairly give the surviving joint tenant the advantage of being able to use the property to its fullest extent. The study concluded that it is high time for Malaysia to regulate a contract or conveyance of land by way of joint tenancy in dealing with joint ownership of land in Malaysia. However, it must be noted that the proposed legal framework must be in tandem with the current needs, and existing law and consistent with the Islamic law of succession, as the case may be.

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¹¹ Section 215, National Land Code 1965.

¹² Item 1, List II (State List), Ninth Schedule, Federal Constitution.

¹³ [1861] 1 John & H 546

¹⁴ *Williams v Hensman* [1861] 1 John & H 546.

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²⁰ G. Thompson, *Commentaries On the Modern Law of Real Property*, (n.p: 1963).

²¹ R E Megarry & H W R Wade, *Law of Real Property*, (London: Sweet & Maxwell, London, 1984), pp 417–422; G W Hinde, D W McMorland and P B A Sim, *Land Law*, (New Zealand: Butterworths, 1978-1979), pp 907–16.

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²³ *Wright v Gibbons* (1 949) 78 CLR 3 13, 323.

²⁴ *McNamee v Martin as Financial Manager for John Boden McNamee* [2021] NSWSC 568.

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²⁷ *Corin v Patton* (1990) 169 CLR 540, 572

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