

Vesting order granted for retroactive joint tenancy after death of spouse

Land Title Act | Litigation | Litigation & Dispute Resolution | Real Estate

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Spouses often take title to a property as joint tenants rather than tenants in common due to the "right of survivorship," by which the surviving spouse assumes sole title to the jointly held property upon the death of the other. While an application must ordinarily be filed by the surviving spouse pursuant to [section 123 of the Land Titles Act](#), to remove the deceased's name from the register, this is not a conveyance *per se* as the interest of the deceased spouse does not "transfer" to the surviving spouse. Essentially, the interest of the deceased spouse disappears, leaving the surviving spouse as the sole title holder. The property does not form part of the estate of the deceased spouse, does not require probate, and is not included in the calculation of estate administration tax.

Issues may arise, however, when title was either not properly registered as a joint tenancy or when one of the spouses attempted to sever the joint tenancy before their death. The latter situation resulted in the practice of "zombie deeds" whereby transfers were registered in the names of deceased owners, a practice strongly opposed in Ontario by the Director of Titles ([A Lot From the Dot: Zombie Deeds are Dead! 28 May 2020](#)).

In other situations, however, an error in the registration of title may not have reflected the true intentions of the owners. In *Hardy v. Estate of Louise Winters Hardy*, [2022 ONSC 1966 \(CanLII\)](#), the Ontario Superior Court of Justice provided some guidance on how to resolve the situation by seeking a vesting order.

In 1986, a husband and wife bought a property in what is now part of London, Ontario and attended at a lawyer's office with instructions to be registered as joint tenants of the property. For reasons unknown, but which the lawyer later attributed to probable inadvertence, the Transfer/Deed stated only that the property was being transferred to the spouses, leaving the capacity in which they were taking title as a complete blank.

As a result, the parcel register for the property simply indicated that the property was the subject of a transfer to the spouses, without indicating whether they took title to the subject property as joint tenants or tenants in common.

The wife died intestate in March 2021. At the time, she was still married to her husband and living in the subject property. She had one adult son.

Upon discovery of the state of the current registry, the husband sought a vesting order from the court to have title registered in his sole name. The application was supported by the real estate lawyer who had prepared the 1986 transfer and the deceased's son.

The lawyer candidly acknowledged that he had no personal recollection of his meeting with the spouses in 1986, so many years after the fact, and that he no longer had any file material showing what his instructions were. He stated that leaving the title portion of a transfer blank, in relation to the capacity in which the property was being taken, was contrary to the standing practice of his firm and was likely inadvertent. There was no contrary evidence filed.

The general authority for a court to issue a vesting order is [section 100 of the Courts of Justice Act](#), which provides: "A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed."

The application judge also referred to [section 25 of the Land Titles Act](#) which generally requires the land registrar to make any consequential entries in the register that may be necessary to give effect to a vesting order issued by the court.

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However, since neither of these statutory provisions addressed how or why a court should make a vesting order in this particular case, the application judge took the opportunity to outline some general principles.

The application judge reviewed the historical common law presumption that when real property or personal property was granted to two or more persons with no words of severance, the persons were considered joint tenants, with a right of survivorship in relation to the property. Over time, the Courts of Equity developed a rule of construction that effectively reversed the common law.

In Ontario, the presumption of tenancy in common was formally recognized in [subsection 13\(1\)](#) of the *Conveyancing and Law of Property Act* which provides that in any "letters patent, assurance or will" made after July 1, 1834, are presumed to have persons taking title as tenants in common and not as joint tenants, *unless an intention sufficiently appears on the face of the letters patent, assurance or will, that they are to take as joint tenants*

In the court's view, the 1986 transfer was an "assurance" without any intention appearing on its face that the spouses intended to take the property as joint tenants.

While the equitable remedy of rectification is available in some cases to correct a document that fails to accurately record the true agreement of the parties, the application judge did not view this doctrine to be applicable to fill a "gap" in the parties' true agreement: [2484234 Ontario Inc. v. Hanley Park Developments Inc., 2020 ONCA 273](#), at para. 2.

In the court's view, the intention of the spouses alone was not sufficient to provide a sufficient basis for the equitable doctrine of rectification. At best, their unfulfilled intention reflected a gap in the transfer agreement that the surviving spouse wanted to fill retroactively.

The application judge therefore turned to [section 160](#) of the *Land Titles Act*, which provides broader statutory power of rectification:

Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, ... the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

Based on the evidence, the court was satisfied that the applicant husband was an "aggrieved" person and "the justice of the case" warranted an order that the relevant register entry be amended to indicate that the spouses took title to the property as joint tenants in 1986. The court therefore granted the surviving husband a vesting order confirming that he was the sole title holder to the property.

Significantly, there was no evidence before the court that a retroactive amendment to the register would prejudice or potentially prejudice anyone, since the potential beneficiaries of the wife's estate had consented to the relief sought and there were no encumbrances or other registered interests that would be detrimentally affected. Accordingly, the rectification sought under [section 160](#) of the *Land Titles Act* did not adversely affect any "estates or rights acquired by registration." Had the application been opposed by parties seeking a claim to the wife's potential interest as a tenant in common, there may well have been a further consideration of the "justice of the case" in the circumstances. A PDF version is available to download [here](#).

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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