Severing a Joint Tenancy

Severing a joint tenancy is the process by which you convert a Joint Tenancy into a Tenancy In Common.

‘Beneficial Interests’ in a property, when held by more than one person, must be held by them either as 'Joint Tenants', where each owns all the property, or as 'Tenants In Common', where each owns a specified part or ‘share’ of the property.

A person has a beneficial interest in property and its income when he or she has the right to use that property and that income as he or she wishes. In such circumstances he or she is said to be beneficially entitled to the property and the income.

Most houses are bought and held as Joint Tenants, but this can be or become inappropriate, (see below) and it therefore becomes necessary to sever, or to split, the Joint Tenancy, and to hold the house as Tenants In Common.

The interests in the house are then held in separate, distinct, shares which can, for example be left by will, and may not be equal.

**How do I know if I am a Joint Tenant?**

Your Title Documents, a copy of which can be obtained from HM Land Registry, include ‘Official Copies of Register Entries' ("Office Copies"). The Office Copies are split into 3 Registers; the Property Register, the Proprietorship Register, and, the Charges Register.

The Proprietorship Register shows the names of those people who own the property and where the property is held as Tenants in Common, a Restriction will be entered on the Register. The Restriction is usually entered on the Register in the following form:-

"No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court".

Where no such wording is present on the Title Document then you almost certainly hold the property as **Joint Tenants**.

The purpose of the restriction is to safeguard the rights of the people who may have an interest in the property but who are not themselves proprietors (such as those to whom property has been left by a proprietor who has died).
The Land Registry do not charge for entering the restriction on the title documents.

With the restriction on the register both you and the other proprietor(s) of the property, acting together, will still be able to deal with the property in any way you could before the entry was made. The restriction makes it clear there must generally be ‘at least two people’ to share the responsibility of making sure that the money received on a sale or other dealing with the property is correctly dealt with.

However, if one or more of the proprietor(s) dies, so that only one of them remains, the restriction will prevent the Land Registry from being able to register any transfer or other dealing with the property for money.

In practice this means that the remaining proprietor would not be able on his/her own to sell the property or otherwise deal with it for money, because any purchaser would not be able to apply for registration.

To overcome the difficulty, the remaining proprietor would need to arrange for at least one other person to act with him/her as trustee, and become joint proprietor(s) of the property with him/her if the property were to be sold.

A purchaser could then safely complete the purchase because a transfer to them would be by two or more proprietors, so that restriction would not prevent the registration of the purchaser as a proprietor.

**So what's the difference and why do I need to sever anything?**

If you own your property as Joint Tenants then each of you jointly own the entire property (technically it is held by you in trust for yourselves!). The consequence of this is that upon the death of one party their interest in the property automatically passes to the survivor (this is known as ‘the right of survivorship’) It is therefore usual for married couples to opt to hold the property as Joint Tenants.

However, if a couple split up it is unlikely that they would wish their ‘ex’ to automatically take their “share” in the property if they were to die and to ensure each of the couple have their own ‘distinct share’ in the property, they must sever the joint tenancy and become Tenants In Common, until such time as the property is sold or transferred fully from one party to the other.

Where there are two owners, the share-split is automatically calculated on a 50:50 basis, **unless** the parties decide that a different or ‘unequal’ split is appropriate in their circumstances (e.g. 60:40, 80:20)
The main thing to remember is that each of the Tenants In Common always owns their share of the property, and as such they are only entitled to that percentage of the sale proceeds, if the property is disposed of during their lifetime. In the event of death, the individuals share of the property, forms part of their estate. It does not automatically pass to the other owner.

**Severing a Joint Tenancy**

In order to sever a joint tenancy and create a tenancy in common, a Notice of Severance needs to be served by one owner on the other owner of the property.

A Notice of Severance of a Joint Tenancy is valid once it is communicated by one joint owner on the other. Putting the Notice in the post is sufficient, but it does have to be communicated.

Severance is effective even if the other party does nothing. It is deemed to be a unilateral option, which means it does not require agreement by the other tenant, but of course you cannot just choose what the proportions of ownership are.

Severance does not have to be agreed, accepted or registered with the Land Registry and once the Notice has been served the joint tenancy has been severed and there is nothing that the other owner can do to prevent it.

Notices often need to be served quickly, and may be followed by court proceedings. If a share is specified too early, this can cause further disagreement or difficulty. However, if you and the other party clearly agree as to what the shares should be, it makes sense to include this declaration now.

It helps to be able to prove ‘service’ (that the Notice has been served on the other tenant) and, therefore, the recipient is asked to sign to acknowledge receipt, and to return a copy of same. Because of the importance of the Notice, the other tenant will also be advised to obtain independent legal advice. There are a number of ways that Severance can be achieved:-

1. By *Written Notice* by one party to the other

2. By *Mutual Agreement* between the parties which may be express or implied, and need not be in writing. This is ultimately a question of fact depending on the circumstances of each case

3. By one joint owner *‘Operating Upon His Own Share’* (acting in such a way that his own share is intended to be held in common and not jointly), for example:-

   (a) Assignment by one of the tenants of his / her interest to another person.

   (b) If the first tenant forges the second tenants’ signature on a purported conveyance of the property, the conveyance will not transfer the legal estate, but does pass the first tenant’s beneficial interest to the purchaser, thereby severing the joint tenancy.
(c) A Declaration Of Trust (or Trust Deed) by one tenant of his/her interest in favour of a third party will sever the joint tenancy as regards that share.

(d) A contract by one tenant to sell his interest, provided that the contract is specifically enforceable.

(e) A Mutual Wills Agreement between the first and second tenant will sever the joint tenancy.

(f) Charging his / her share by way of a mortgage or charge over his interest will sever the joint tenancy.

(g) *Involuntary alienation* (the loss of property for non-payment of debts such as taxes or mortgage foreclosure or *Involuntary Conveyance* (the transfer of real property without consent of the owner e.g. condemnation and divorce sales) of the second tenant’s share;

   i. following T2’s bankruptcy;
   ii. By the making of a charging order against the second tenant’s beneficial interest
   iii. By the imposition of a statutory charge in favour of the Legal Services Commission (Legal Aid) upon any interest recovered or preserved in legally aided litigation.

4. By *Course of Dealing / Mutual Conduct*, best defined as conduct of the first tenant and the second tenant which falls short of an agreement to sever but indicates a clear common intention to that effect.

   Inconclusive negotiations for the first tenant to purchase the second tenant’s share, or the conversion of the jointly-owned house into two Maisonettes will not suffice. The execution of mutual wills (mentioned above) is a good example of the degree of consensus required.

5. By *Homicide*. If one tenant criminally kills the second tenant, he cannot take any equitable interest by survivorship. This applies whether the act is murder, manslaughter or aiding and abetting a suicide.

If there is some doubt as to whether the joint tenancy was severed in the past, a tenant might be advised to **serve a notice of severance, without prejudice** on the basis that the joint tenancy was severed antecedently by reason of such-and-such. Finally, two important restrictions to the availability of severance must be noted:-

1. Severance cannot be affected unilaterally by will, save through mutual wills, and;

2. Since 1926, severance cannot be effected in relation to a legal estate (only the beneficial estate)
Other Reasons for Severing a Joint Tenancy

If the event you want to take advantage of the savings in inheritance tax which can be made by using **Nil Rate Band Discretionary Trust Will**, you will need to make sure that you and your spouse/partner hold your property as Tenants-In-Common rather than as Joint Tenants.

As abovementioned, the majority of properties are bought and held under a Joint Tenancy whereby each Tenant, jointly owns the entire property and when one of them dies, the entire property automatically passes to the surviving tenant by an automatic right of survivorship.

However, in the event you wish to leave ‘your half’ or ‘your share’ of the property to a Nil Rate Band Discretionary Trust, and take advantage of / utilise the ‘loop hole in the inheritance tax rules, you and your spouse or partner will need to sever any existing joint tenancy and become tenants-in-common instead.

As Tenants-In-Common you and your partner will each own a distinct 50% share in the property, (unless you decide to hold the property in ‘unequal specified shares’) and you will be free to do whatever you want with your share in your Will - in this case specifying that some or your entire share passes to a Nil-Rate Band Discretionary Trust.

Please note that, this form of severance is not like a divorce where the house is split 50:50 and the wife gets the inside and the husband gets the outside. It is simply a legal exercise to ensure you are both equal owners with distinct shares.

Where severance is affected by ‘mutual agreement’, a Notice will be prepared and signed by both Tenants. It will then be forwarded to the Land Registry together HMLR Form SEV which enables the Land Registry to place the restriction described on Pages 1 and 2 above, on the title documents.

**It is very important that you are absolutely certain that you wish to sever the Joint Tenancy. This is because, whilst a Joint Tenancy can be converted by Severance, to a Tenancy In Common, it is not possible to convert a Tenancy In Common ‘back’ to a Joint Tenancy at a later date.**