

# HAWAII TITLE AND TENANCY



**Local Hawaii Real Estate**  
**Honesty · Integrity · Commitment**  
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NOTICE:

This document is just a guideline and not intended to be legal advice. You are advised to seek the services of a lawyer for legal advice concerning Hawaii State Title and Tenancy.

# TENANCY

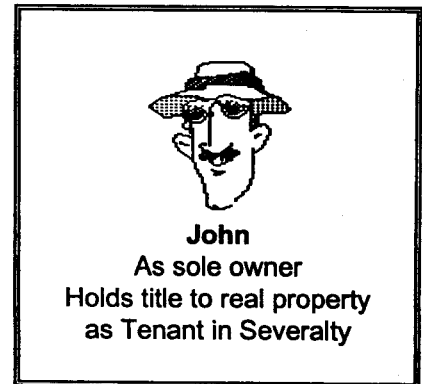
Tenancy reflects a method of ownership.

## Four Types of Tenancy or Ownership Interests:

- ★ Tenancy in Severalty
- ★ Joint Tenancy
- ★ Tenancy by the Entirety
- ★ Tenancy in Common

### ★ Tenancy in Severalty

- ownership by one as his sole property
- upon death, interest passes to heirs or devisees
- must go through probate proceedings
- liens against owner are liens against property



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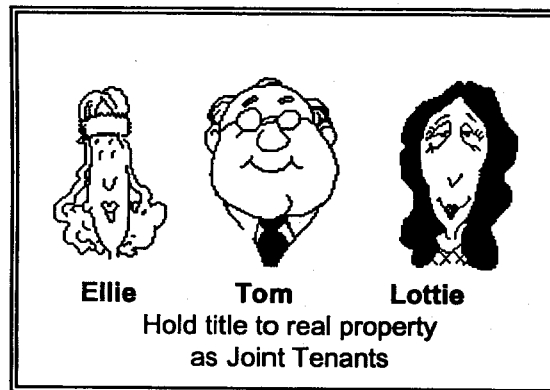
### TEST YOUR KNOWLEDGE:

1. *The State of Hawaii has a tax lien against John for non-payment of his income taxes. Is this also a lien against John's real property? \_\_\_\_\_*
2. *When John dies, what happens to his real property? \_\_\_\_\_*

**ANSWERS:** 1. Yes  
2. Goes to his heirs or devisees through Probate proceedings

## \* Joint Tenancy

- intentionally created for 2 or more persons
- right of survivorship - upon death, interest passes to surviving tenant(s) without probate
- interests must be equal
- consent not needed by tenants to mortgage, sell, etc.



- lien against one tenant attaches to his interest only, not the entire property
- liens, mortgages, leases relating to one tenant are ineffective as to the property upon that tenant's death

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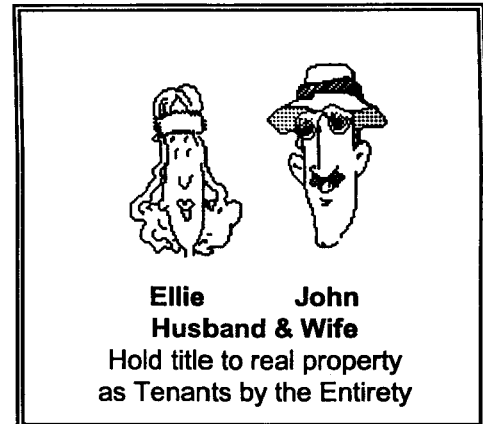
### TEST YOUR KNOWLEDGE:

1. *Is it possible for Ellie to have 1/2 interest with Tom and Lottie having a 1/4 interest each in the real property and still be Joint Tenants?* \_\_\_\_\_
2. *XYZ Corporation has a recorded Circuit Court Judgment against Tom. Is this a lien against the real property?* \_\_\_\_\_
3. *If Tom dies, his interest goes to* \_\_\_\_\_
4. *Is probate needed for Tom?* \_\_\_\_\_

- ANSWERS:**
1. *No – the interests are unequal*
  2. *Yes, but only against Tom's interest*
  3. *To Ellie and Lottie as the surviving Joint Tenants*
  4. *No because of the rights of survivorship*

## ★ Tenancy by the Entirety

- ownership for legally-married husband and wife or parties with a reciprocal beneficiary relationship only
- right of survivorship - upon death, interest passes to surviving tenant without probate
- divorce or termination of benefits severs the tenancy
- personal debts of either tenant may not be attached to the property
- neither tenant may sell, mortgage, etc. without the other tenant
- creditor of one tenant may not force a sale of the property



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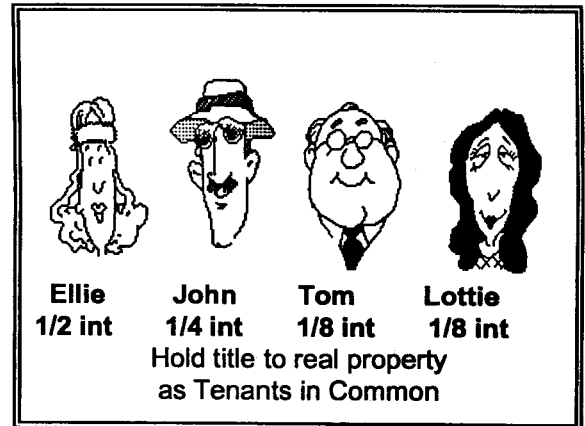
### TEST YOUR KNOWLEDGE

1. *Would a Lender accept a mortgage on the real property by John securing only his interest in the real property?* \_\_\_\_\_
2. *There is a recorded Judgment against John. Is this Judgment a lien against the real property he owns with Ellie as Tenants by the Entirety?* \_\_\_\_\_
3. *If Ellie dies, what happens to her interest in the property?* \_\_\_\_\_
4. *Is a probate needed for Ellie?* \_\_\_\_\_
5. *Ellie and John divorced. What is their tenancy?* \_\_\_\_\_

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| <p><b>ANSWERS:</b></p> <ol style="list-style-type: none"><li>1. No because both tenants are required to act</li><li>2. No</li><li>3. Goes to John as the surviving Tenant</li><li>4. No because of the rights of survivorship</li><li>5. Tenants in Common</li></ol> |
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## ★ Tenancy in Common

- ownership by two or more
- no right of survivorship between the co-tenants
- upon death of one tenant, share goes to the tenant's heirs or devisees through probate proceedings
- undivided interests may be unequal
- a lien against a tenant is a lien against that tenant's interest in the property
- a tenant may sell, mortgage, etc. interest without other tenant's knowledge or permission
- mortgage by one tenant does not bind the other tenants



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### TEST YOUR KNOWLEDGE

1. *Lottie dies. What happens to her interest in the property?* \_\_\_\_\_
2. *Is a probate needed?* \_\_\_\_\_
3. *AA Partnership has a recorded judgment against Tom. Can AA force a sale of the property?* \_\_\_\_\_

**ANSWERS:**

1. *To her heirs and devisees through Probate proceedings*
2. *Yes*
3. *Yes, however, only as to Tom's 1/8 interest*

# TENANCY

	Tenancy in Severalty	Tenancy in Common	Joint Tenancy	Tenancy by the Entirety
<b>DEFINITION</b>	Property held by one person, severed from all others	Property held by 2 or more person, with <b>no</b> right of survivorship	Property held by 2 or more individuals (not corporation), with right of survivorship	Property held by husband and wife or reciprocal beneficiaries with right of survivorship
<b>CREATION</b>	Any transfer to one person	By express act; also by failure to express the tenancy	Express intention plus 4 unities of time, title, interest and possession (with statutory exception)	Express intention. Divorce or termination of benefits automatically results in tenancy in common
<b>POSSESSION</b>	Total	Equal right of possession	Equal right of possession	Equal right of possession
<b>TITLE</b>	One title in one person	Each co-owner has a separate legal title to his undivided interest; will be equal interests unless expressly made unequal	One title to the whole property since each tenant is theoretically deemed owner of whole; must be equal undivided interests.	One title in the tenant unit
<b>CONVEYANCE</b>	No restrictions (check release of marital rights, if any)	Each co-owner's interest may be conveyed separately by its owner; purchaser becomes tenant in common	Conveyance of 1 co-owner's interest breaks his tenancy; purchaser becomes tenant in common	Cannot convey without consent of the other tenant
<b>EFFECT OF DEATH</b>	Entire property subject to probate	Decedent's fractional interest subject to probate. The property passes, by will to devisees or to the heirs, who take as tenants in common. No survivorship rights	No probate and cannot be disposed of by will; property automatically belongs to surviving co-tenants (last one holds in severalty).	Right of survivorship, so no probate
<b>CREDITOR'S RIGHTS</b>	Subject to creditor claims	Co-owner's fractional interest may be sold to satisfy his creditor who then becomes tenant in common	Joint tenancy is broken and purchaser becomes tenant in common. Creditor gets nothing (as to the property) if debtor tenant dies before sale	Only a creditor of both tenants can execute on property.

## TRUSTS

A trust is an arrangement whereby legal title to property is transferred by the grantor (settlor) to a third person called a trustee, to be held and managed by that person for the benefit of another, called a beneficiary. The beneficiary holds equitable title. Title to real property is held in the name of the trustee, rather than the trust.

### Reviewing the Trust Document

We will need copies of the trust and all amendments (note: we don't need full copies - only the portion of the trust document(s) with the data that needs to be reviewed - short form and memorandum OK)

Review documents for the following:

- trustee name
- date
- name of trust
- powers of trustee - sell, convey, acquire, purchase, mortgage, encumber
- successor trustee
- signature
- termination
- appointment of attorney-in-fact (only if P/A used to sign documents)

### Death of trustee - regular system property

- verify death of trustee
- check trust document for status of trust upon death of trustee
- check trust document for successor trustee
- need acceptance of successor (signed letter or document signed as "successor trustee")

### Death of trustee - Land Court property

New TCT will be issued - file Petition with the following:

- certified copy of death certificate
- original copy of trust and all amendments
- formal acceptance by successor trustee

### General Rules

- Trustee is mortgagee - must check trust documents for powers if obtaining title insurance
- Trustee of another's trust - we will not insure if the trustee conveyed the trust property to him/herself
- Liens against trustee - if self trust or family trust - will encumber the real property
- Trustee of another's trust conveys real property to him/herself - we won't insure

## TRUSTS & POWER OF ATTORNEY - QUICK GUIDE

	TRUSTS	POWER OF ATTORNEY
<b>This to check for:</b>	<ul style="list-style-type: none"> <li>• name</li> <li>• date</li> <li>• name of trust</li> <li>• powers of trustee     sell, convey, purchase,     lease, mortgage, encumber</li> <li>• successor trustee</li> <li>• signature</li> <li>• amendments</li> </ul>	<ul style="list-style-type: none"> <li>• principal's name</li> <li>• agent's name</li> <li>• powers of attorney     sell, lease mortgage</li> <li>• real property specified</li> <li>• date of P/A (less than 3 years OK -     need affidavit for 3-5 years, won't     accept P/A older than 5 years)</li> <li>• expiration date</li> </ul>
<b>Things to watch out for:</b>	<ul style="list-style-type: none"> <li>• powers not stated or unclear -     cannot insure</li> <li>• client provided only amendment     of trust, still need original and     any other amendments</li> <li>• title must be in name of trustee,     not trust</li> <li>• trustee cannot appoint P/A     unless trust documents     specifically says OK</li> </ul>	<ul style="list-style-type: none"> <li>• must be recorded for insurability</li> <li>• principal and agent must be of age     and competent</li> <li>• corps, partnerships, and trustees     may appoint P/A ONLY if specified in     the corp resolution, partnership     agreement or trust document</li> <li>• attorney-in-fact may not sign     document conveying property to     him/herself</li> <li>• husband cannot use P/A to convey     wife's dower</li> </ul>
<b>Death of trustee / principal</b>	<p><b>REGULAR SYSTEM</b></p> <ul style="list-style-type: none"> <li>• review trust &amp; amendments for     successor trustee</li> <li>• verify death of trustee</li> <li>• need acceptance by successor     (signing documents as     "successor" may be sufficient)</li> </ul> <p><b>LAND COURT</b></p> <p>- file Petition to include:</p> <ul style="list-style-type: none"> <li>• original trust and amendments</li> <li>• death certificate of trustee</li> <li>• letter of acceptance by     successor</li> <li>• new TCT will be issued</li> </ul>	<ul style="list-style-type: none"> <li>• power of attorney not effective upon     death of principal</li> <li>• effectiveness of P/A in case of     disability of principal:     P/A document must state it     survives disability</li> </ul>
<b>Land Court issues:</b>	<ul style="list-style-type: none"> <li>• trustee can take title with middle     initials rather than full name</li> <li>• do not need to record trust     document if document states     powers</li> <li>• if recording trust, settlor's name     must conform with TCT</li> </ul>	<ul style="list-style-type: none"> <li>• agent can take title with middle     initials rather than full name</li> <li>• special P/A must refer to current TCT</li> </ul>
<b>Liens</b>	liens against trustee - if trustee of own trust - will encumber the property	liens against agent have no effect on property