



# NATIVE HAWAIIAN LEGAL CORPORATION

*Serving Hawai'i since 1974*

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## COTENANCY

**There is no such thing as a perfect body of law, and the law covering the rights respecting cotenancy and joint ownership of land is by no means an exception to this rule. The Native Hawaiian Legal Corporation's lawyers have among them, several decades of practice dealing with matters involving cotenancy. What we have tried to do in this brochure is to give you a general idea of your rights as a cotenant, concerning the most frequently encountered situations facing cotenants in Hawai'i. In asking and attempting to answer the questions posed below, we are not providing legal assistance in response to specific questions, and we urge you to seek legal advice from a lawyer before making any decisions regarding your cotenancy rights.**

**I OWN LAND WITH SEVERAL OTHER PERSONS. WHAT KIND OF AN OWNERSHIP INTEREST DO I HAVE?**

**There are two common types of multi-person, or cotenancy, ownerships: tenancies in common and joint tenancies. Other types of cotenancies exist, for example, partnerships however, in the latter case, the rights of the cotenants are typically spelled out in a written agreement, and therefore many of the matters discussed below are taken care of by the agreement itself.**

**HOW DO I KNOW WHETHER I AM A TENANT IN COMMON OR A JOINT TENANT?**

**As to the two most common types of cotenancies, joint tenancies are less frequently encountered than tenancies in common. Joint tenancies can only be created by deed or will, and the document that creates the interest will vest it in more than one person, either as joint tenants or (for married couples) tenants by the entirety. If the deed or will does not state that the undivided interest conveyed was a joint tenancy or tenancy by the entirety, the law presumes that the grantee or devisee received a tenancy in common interest. Moreover, an undivided interest inherited from someone who did not devise it by will vests as a tenancy in common, by operation of law.**

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## WHAT CAN I DO WITH MY JOINT TENANCY INTEREST?

**You can rent the property and mortgage your interest; however, your undivided interest is not transferable to the same extent that it would be if you were a tenant in common. The general rule is that joint tenancies automatically pass the ownership interest of a deceased joint tenant to the surviving co-owners, with the ultimate result being that the last survivor acquires all of the property. Joint tenants in theory can not transfer their interest during their lifetimes, and creditors of a deceased joint tenant have no recourse against the co-owners, as the deceased owner's interest terminates upon his or her death. However, if a joint tenant during his lifetime conveys his interest, the grantee becomes a tenant in common in relation to the remaining joint tenants, and the grantee's interest will pass upon his death to his heirs, and not to the other joint tenants.**

## I OWN AN INTEREST IN PROPERTY AS A JOINT TENANT: CAN I MORTGAGE THE PROPERTY?

**You can not mortgage all of the property; only your undivided interest. However, if your interest is foreclosed, the mortgagee automatically becomes a tenant in common with the other joint tenants, and only the unencumbered portion of the property remains with the other surviving joint tenants.**

## WHAT HAPPENS TO MY JOINT TENANCY INTEREST WHEN I DIE?

**Again, it passes automatically to the surviving joint tenants.**

## IF I AM A TENANT IN COMMON, WHAT CAN I DO WITH MY UNDIVIDED INTEREST?

**There are a number of matters involved here. Let us take them one at a time.**

## CAN I MOVE ONTO OR USE THE PROPERTY?

**You can occupy the property at least in proportion to your interest, and if the other cotenants are not using the property, you can occupy the whole premises. However, if other cotenants also want to use the property and you are unwilling to accommodate them, you may thereafter be liable for the fair rental value of the property, in proportion to their interest. If you want to just use the property, short of living on it, these same rules apply.**

## WHAT ABOUT INCOME EARNED FROM MY USE OF THE PROPERTY?

**In general, you do not have to account to your cotenants for profits realized from your own labor, for example, from the sale of vegetables that you planted; however, courts have the discretion to order an accounting, where circumstances warrant the sharing of such profits. In addition, you can not pass expenses relating to your use of the property on to your cotenants, unless the payments you made were incurred to preserve or maintain the property, and you may be required to offset those payments by the fair rental value of the property.**

## HOW ABOUT HARVESTING TIMBER?

**If you want to harvest trees or other crops growing on the land, say, koa logs for canoe hulls, you may do so only in proportion to your interest in the property. Any excess harvesting will subject you to a claim for waste, which may require you to account to your cotenants for profits.**

## WHAT IF ONE OF MY OTHER COTENANTS IS ALREADY USING OR LIVING ON THE PROPERTY?

**If the other cotenants will not let you occupy or use the property in proportion to your interest, you have the right to go to court to ask a judge to either let you physically partition the property, or if it is too small to be partitioned among all the cotenants who want lots, to have a commissioner appointed to sell the property at a public auction. For more information on judicial partition, please refer to the discussion on division of property, at the end of this brochure.**

## CAN I RENT OUT THE PROPERTY?

**Any cotenant can rent the property, however the rental proceeds must be distributed less payment of taxes and other charges, to the other cotenants in proportion to their interests. Unless there is a written agreement allowing you to deduct the fair market value of your services for managing the property, you can not claim compensation for management services. In the absence of a written agreement, it is also doubtful that you could seek reimbursement from your cotenants for property management services that you paid for.**

ONE OF MY COTENANTS LEASED THE PROPERTY, AND I CAN NOT USE IT: CAN I EVICT THE LESSEE?

**Generally speaking, you may not evict a lawful lessee. If your cotenant had the right to possess the entire premises at the time it was leased, the lessee acquired through the lease his lessor's right to possession. Your legal remedy is for an accounting, and the cotenant who leased out the premises may be required to pay to you, your proportionate share of the rental proceeds.**

I AM RESPONSIBLE FOR MANAGING THE PROPERTY: CAN I MAKE IMPROVEMENTS AND GET REIMBURSED?

**Any cotenant can make improvements; however, in the absence of a written agreement, you can not seek contribution from your cotenants for the improvements that you paid for. You can, however, seek contribution for repairs. Unfortunately, there is no bright line test to differentiate between repairs and improvements.**

NO ONE IS USING THE PROPERTY, BUT I PAY THE PROPERTY TAXES AND MAINTENANCE: CAN I SEEK REIMBURSEMENT?

**Generally speaking, you can be reimbursed for upkeep of the property, unless you have prevented the other cotenants from using or occupying the property. Although the Hawaii courts have not ruled on this issue, a cotenant out of possession may be entitled to claim a credit based upon his share of the fair market rental value of the property. And remember, the cotenants out of possession may assert that maintenance expenses were not repairs, but improvements, which are ordinarily not reimbursable. The bottom line is that the courts have the discretion to determine whether it is fair, under all of the circumstances, to charge the other tenants in common for the upkeep of the property.**

WHAT HAPPENS IF MY COTENANT MORTGAGES HIS INTEREST, AND IT IS FORECLOSED?

**The mortgage will encumber only the mortgagor's undivided interest, and only his interest can be foreclosed. However, as a practical matter, the mortgagee, who becomes a cotenant, can ask the court to partition the property, which means the entire parcel will be sold if it can not be physically subdivided (see division of property, below).**

CAN I SELL MY INTEREST IN THE PROPERTY?

**Unequivocally, the answer to this question is yes. However, the grantee receives only your undivided interest; and acquires it subject to the rights of the other cotenants.**

WHO GETS MY UNDIVIDED INTEREST WHEN I DIE?

**If you leave a will or your interest is held in trust, your devisees or beneficiaries will inherit your undivided interest in the property. These persons will also be cotenants; however, as among them, you may create a joint tenancy in your cotenancy interest only. If you die without a will or trust, your spouse and children, or other surviving heirs, as provided by law, will inherit your interest, as tenants in common with all of the other owners.**

CAN WE JUST DIVIDE UP THE PROPERTY AMONG OURSELVES?

**It was at one time possible to create separate parcels by means of partition deeds, exchanged among cotenants. However, modern subdivision laws do not allow this type of subdivision, except where there are equal numbers of owners and separate tax key numbers, the cotenants reciprocally quitclaim their interests, and the county approves the exchange of interests. Otherwise, the property will have to be subdivided in accordance with the procedures established by the county planning department.**

WHAT IF WE CANNOT MEET THE COUNTY'S SUBDIVISION REQUIREMENTS, FOR EXAMPLE, BECAUSE THE PROPERTY'S TOO SMALL TO SUBDIVIDE, OR WE CANNOT AGREE ON HOW TO SUBDIVIDE OUR INTERESTS?

**This is a fairly common situation in land-scarce Hawai'i, where many parcels owned by tenants in common are too small to practically or economically subdivide. In such cases, the law provides for judicial partition. A commissioner in partition is appointed by the court to investigate the feasibility of physical partition at least among groups of cotenants, if the property is too small to be partitioned at least among groups of cotenants, if the property is too small to be partitioned individually. If partition in kind is not possible, even under these circumstances, then the court will order the commissioner to sell the property, and the net proceeds will be divided among the individual cotenants, after payment of commissioner's costs, the petitioning cotenant's attorney fees, real property taxes, and other partition-related expenses. Mortgages and liens will also be paid off, but only out of the mortgagor's or debtor's share.**