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## **APPLICATION OF JOINT TENANCY ON REAL PROPERTY AND ITS IMPACT UNDER THE LAW OF SUCCESSION IN MALAYSIA**

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### **Abstract**

Joint ownership refers to property owned by two or more persons. Two significant forms of joint ownership in real estate exist joint tenancy and tenancy-in-common. Under common law, joint tenancy is applied as a mechanism for administering an estate, which takes effect after the joint owner's or joint tenant's death. The National Land Code (Act 828) recognises only tenancy-in-common tenancy rather than joint tenancy. Hence, this study proposes a regulatory framework and a suitable mechanism for the land conveyance process in the application of joint tenancy. This study is based on qualitative research and analysis of primary and secondary materials. For a comparative analysis, the study explores the law and practice of joint tenancy in Singapore and Australia for the dual legal and Torren systems. It is predicted that the joint tenancy application would give the proprietor more options in planning the management of his property and rightly give the surviving joint tenant full enjoyment of the property.

**Keywords:** Joint-Ownership, Joint Tenancy, Tenancy-in-Common, Law of Survivorship, Law of Succession

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## **INTRODUCTION**

Joint ownership refers to the property owned by two or more persons. There are two significant forms of real estate joint ownership: joint tenancy and tenancy-in-common.

Under the common law, joint ownership in the form of joint tenancy is the most popular form of co-ownership between married people because upon the death of either spouse, the survivor automatically becomes the sole owner without the need for a grant of representation. Eventually, joint ownership can also be one of the mechanisms to deal with joint assets acquired during a subsisting marriage and for administering an estate, which takes effect after the co-owner's or co-tenant's death.

In Malaysia, the National Land Code (Act 828) (NLC) recognises the concept of joint ownership in the form of tenancy-in-common in Sections 343 to 345. The concept of joint tenancy with the right of survivorship is acknowledged in the National Land Code (Penang and Malacca Titles) Act 1963 (Act 1963) under Section 47(1).

Hence, there is inconsistency, particularly when the joint tenancy can overcome the succession disputes after the death of the joint tenant. The joint tenancy would also give more options to the proprietor in planning the management of his property and rightly provide the advantage to the joint tenant towards the full enjoyment of the property. Further, the increased standard of living and value of real property require contemporary and new contracts, which serve as an option for purchasing and owning a property.

In pursuance of the above matter, this study explores and analyses the concept of joint tenancy and its impact under the law of succession or estate management via the principle of gift *inter vivos* or conditional gift (as the case may be) in Malaysia. The objectives are to (i) explore the application of joint tenancy and its impact on the Malaysian law of succession, (ii) compare the law and practice of joint tenancy in other jurisdictions, and (iii) propose a legal framework or mechanism for regulating joint tenancy in real property in Malaysia.

The outcome of this study includes a legal framework or mechanism for regulating the application of joint tenancy in dealing with joint ownership of land in Malaysia.

## **LITERATURE REVIEW**

Joint tenancy is equivalent to tenancy-in-common with two vital differences: the shares of ownership and the right of survivorship. Joint tenancy is a common-law principle introduced by the British to Penang at the end of 1807, vide the First Royal Charter of Justice 1807. The salient feature of the English deed system introduced in Penang is that one's land ownership is not ascertained by title

registration but is based only on deeds or documents executed between the parties.

On the law of succession, Sulong (2019) defines joint tenancy as a kind of possession in common law where all asset sharers have equivalent rights and each tenant acquires the same portion. Consent from all co-owners is required in any transaction towards the property. Thus, joint tenancy is not separable ownership but rather a joint possession between co-owners who act on a mutual decision (Rahman, 2012). If any of the joint tenants die, the left portion of the deceased will be obligatorily conceded to the survivor (Rasban, 2010). Based on this principle, joint tenancy is uncommon in the land ownership concept, and cannot be divided through the inheritance process (Noordin et al., 2016).

In Nur Aamal Arif's (2013) analysis, she found that the ownership by joint tenancy among the Muslims in Singapore under civil law contradicts the MUIS Fatwa (2008). Meanwhile, Section 343 (1)(a) of the National Land Code (Act 828) (NLC) recognises joint ownership in the form of undivided shares, as the provision underlines that in the incident of co-ownership where any property is vested in two or more individuals as co-owners, their allocations therein shall be equivalent except that different amounts are underlined in the registration records (Mustar & Muhamad, 2013).

Under the same Code, the law acknowledges joint tenancy in Sections 343 to 345, but only for the property beheld by the trustee. Thus, when one trustee dies, or when the trustee is a body, the body is dissolved. The right of survivorship arises, the interests of the deceased trustee/dissolved body are extinguished, and the interests of the remaining trustees *qua* trustees are enhanced (Sihombing, 2017).

Under the National Land Code (Penang and Malacca Titles) Act 1963, Penang and Malacca have recognised joint tenancy as a mechanism in which the whole estate is succeeded by the left joint tenant who survived. The law also acknowledges the intent under the joint tenancy contract, giving the surviving joint tenant an undivided portion. The law recognises the right to survivorship, as highlighted in Section 47(1)(c); such a right is embedded between two or more persons whose names were recorded in the provisional record (Sulong, 2019).

The equivalent concept of joint ownership in Muslim law is called *hibah ruqba*, or conditional gift. The Department of Mufti of Wilayah Persekutuan and the Shari'ah committee of some institutions, such as the Securities Commission, Bank Negara, and State Shari'ah Judiciary Department, acknowledge the concept of conditional gift. This recognition is paralleled with the underlining stipulation of joint tenancy in the law pertaining to the land of the National Land Code (Penang and Malacca Titles) Act 1963 and the National Land Code.

In the above respect, it was shown that the NLC does not recognise joint tenancy. Thus, this study explores the concept of joint tenancy under the common

law and examines its validity under the law of succession in Malaysia. The proposal for its application needs to be coupled with a proposed legal framework, new guidelines, and an appropriate mechanism to regulate joint tenancy in the existing land conveyance and applicable law in Malaysia, should the concept be legally recognised.

## **RESEARCH METHODOLOGY**

This study aims to achieve a depth of understanding rather than a breadth of experience. Qualitative research addresses research objectives by selecting specific data sources from which the data are collected. Hence, this study adopts a qualitative method that is divided into primary and secondary research. This study explores the concept of joint tenancy in joint land ownership in Malaysia from a common law perspective.

The study also adopts a comparative approach, focusing on Singapore and Australia. These countries were chosen because both apply the Torrens system. Singapore, like Malaysia, inherited principles of English common law from the same legal system. Both nations apply a dual legal system and have adopted and regulated joint tenancy in land conveyances as an estate planning mechanism.

To gather fresh perspectives on joint tenancy application and verify the proposed legal framework, focus group discussions (FGDs) were conducted. The FGDs included representatives from the Land Office, the Shari'ah High Court, and subject matter experts (SME) in the law of succession and land law.

The qualitative data review involved manually examining the current primary and secondary sources, including interviews, the data collected from the FGDs, legislative provisions, case laws, and other legal and non-legal literature relating to the law and procedure for the administration of joint tenancy in joint ownership land in Malaysia.

An analysis of the statutes, including but not limited to the Rules of Court 2012, National Land Code, National Land Code (Penang and Malacca Titles) Act 1963, Civil Law Act 1956, and state enactments, was conducted to explore and propose the most appropriate method in regulating the application of joint tenancy in Malaysia.

Finally, the collected data were analysed using a data triangulation approach. Triangulation in qualitative research involves the use of multiple methods or data sources to understand a phenomenon comprehensively (Patton, 2014). Triangulation has also been viewed as a qualitative research strategy to test validity by converging information from different sources. This approach was applied to validate the data and produce the best results.

## **ANALYSIS AND FINDINGS**

This study explores the application of joint tenancy of the common law in land conveyance and its impact on the Malaysian law of succession. The issues directed by the research questions, which focus on exploring the application of joint tenancy in Malaysia and the law and practice in other jurisdictions, are as follows:

### **Benefits of Joint Tenancy**

This study identified the benefits of joint tenancy other than providing an option aside from the normal way of obtaining ownership over a property. Owning a property as a joint tenant is similar to providing a gift. An owner is giving up some value and control of the property to other joint owners.

At present, purchasing public housing (HDB) in Singapore (managed by the government's Housing and Development Board (HDB) through a joint tenancy contract) is a popular choice where a property is purchased together with a relative or someone who is in a relationship. This mechanism can be an advantage because it simplifies beneficial ownership.

Joint tenants who desire to hold a property for the purposes of estate planning may choose joint tenancy due to the ease of the automatic transfer of ownership to surviving co-owners. Joint tenancy also eliminates the need to apply for probate on the joint property and avoids complicated property transfers by the deceased owner's estate.

### **The Legal Concept of Joint Tenancy in Malaysia**

Currently, the legal framework does not provide a legal framework for holding land as joint tenants. The provision of Section 343 of the NLC recognises joint ownership in the form of an undivided share; it underlines that in the incident of co-ownership where any property is vested in two or more individuals as co-owners, their allocations therein shall be equivalent, except that different amounts are underlined in the registration records.

In a nutshell, joint tenancy is not recognised by the NLC but applies only in Sections 343 to 345 for property beheld by the trustee or personal representative. In contrast, Section 47(1)(c) of the National Land Code (Penang and Malacca Titles) Act 1963 allows for the registration of land with a right of survivorship in the Interim Register. The Interim Register is a registration book that keeps all landholdings before implementing the NLC and the Torrens system. The data is migrated from the former land title (deed system) to the land title under the NLC.

The 1963 National Land Code (Penang and Malacca Titles) Act was introduced during the transition from the deed system to the Torrens system. On the grant, it is not known as joint tenancy, but rather as co-proprietors with the

right of survivorship. For Malacca, the term used to describe joint tenancy is *joint proprietorship with a right of survivorship*.

### **Registration of Joint Tenancy**

A joint tenancy contract, as acknowledged by the National Land Code (Penang and Malacca Titles) Act 1963 (Act 1963), denotes that the survivor will succeed the whole estate under the rule of survivorship. The rights of survivorship are recognised by the statute as underlined in Section 47(1)(c) of Act 1963. These rights are embedded between two or more individuals, whose names are registered in the provisional record.

Under the Act of 1963, there is a form of temporary registration to register land ownership based on the current conveyance. This form, called the Interim Register (IR), entails land ownership under the NLC. All important and relevant information on the conveyance, including land ownership through joint tenancy, will be included in the IR. Hence, co-proprietorship owners who used joint tenancy based on previous joint tenancy registration are transferred to the IR.

### **Validity of Joint Tenancy**

In the case of joint tenancy, the analysis of its validity under the existing law has been categorised into two:

#### **(i) Involving a Muslim's Estate**

Most of the reported cases on the issue of joint tenancy involved the Muslim estate (see: *Shafeeg bin Salim Talib and Anor v Fatimah bte Abud bin Talib and Ors* [2010] SLR 1123, *Salmah bt Omar & Ors v Ahmad Rosli bin Aziz (administrator of the estate of Osman bin Mohamed, deceased) & Anor* [2012] 3 MLJ 567, *Saliza Othman (waris yang sah ke atas harta pusaka Haznah Binti Aziz @ Abdul Aziz, si mati) v Che Rokian Desa & Ors* [2013] 1 LNS 185, *Mohamad Taupik Bin Mohamad Nor & Ors v Siti Rahmah Mohd Noor & Ors* [2016] 1 LNS 1462 & *Peter Chong & Anor v Khatijah bt Md Ibrahim & Anor (personal representative of Aishah bt Ibrahim, the deceased) and another suit* [2018] 10 MLJ 735). However, the validity of joint tenancy under land conveyance and Islamic law has been the crux of the argument in these cases. As a result, the court determined that Islamic law does not prevent or negate conveyance or the resulting joint tenancy. Even if this is true, the fact that the conveyance is a hibah ruqba does not violate Islamic law.

Based on the above arguments, the civil court does not have jurisdiction to declare the validity of any transactions involving Muslims. Therefore, to challenge the validity and applicability of the principle “right of survivorship” under joint tenancy, the matter should be referred to the Shari’ah Court.

(i) Involving a Non-Muslim's Estate

No Malaysian has reported cases involving a non-Muslim immovable property, except for moveable asset. Presently, the application of joint tenancy over immovable property has not been an issue for non-Muslims, except in dealing with monies held in a joint account. The principle is that when money is placed in a joint account in the name of two or more persons, they hold it as joint tenants in the absence of a contrary intention. (see: *Public Bank Berhad v New Ace Digital Print Sdn Bhd & Anor* [2019] 3 MLJ 421 & *Phuah Beng Chooi @Koh Kim Kee v Koh Heng Jin* [2015] MLJU 2168)

**Joint Tenancy for Muslims in Singapore**

This study showed that the issue of ownership in the form of joint tenancy in Singapore has evolved over the past 20 years since 1997. There are three fatwas issued pertaining to joint tenants.

A joint tenancy contract is religiously valid without the need to draw additional documents. It is thus a new form of contract with 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 a contemporary and new contract that cannot be found in traditional Islamic law, it is permitted because it does not conflict with Islamic principles and is based on the legal maxim "the original rule in the transaction is permissibility." Furthermore, the objective of the contract is straightforward, does not contain any ambiguity, and contains no elements of injustice, oppression, or deceit. The latter has given Muslims a clear option to purchase and own property in Singapore.

Thus, joint owners have the option to select joint tenancy contracts or tenancy-in-common contracts during their lifetime. The manner of holding a property will significantly impact the legal heirs. Undeniably, both forms of joint ownership have their advantages. By selecting one of the above, the owners agreed to meet the conditions set out and the objectives of each of the agreements they had made during their lifetime.

**New Form of Contract on Purchasing and Owning Property**

Based on the above premise, the study found that a joint tenancy contract is applied to purchase leased public housing (HDB) flats in Singapore, which are managed by the government's Housing and Development Board (HDB). It was reported that over 80% of Singapore's population lives in an HDB flat. These homes are affordable and can be easily purchased by an average Singaporean, as the facilities are subsidised by the government and are offered with housing grants (Rahim & Qureshi, 2018).

The salient part of the contract is that it allows two or more flat owners to change the proportion of shares held by each owner from joint tenancy to

tenancy-in-common and vice versa. The two available types of contracts for owning an asset provide the public with the option to acquire an asset.

### **Conditional Hibah under the Islamic Law Principles**

In Islamic law, a gift is a conveyance to someone else without expecting repayment or compensation. This is performed willingly throughout the donor's lifetime. Al-Hibah is recommended in Islam.

According to the majority of Islamic scholars, al-hibah has four pillars: the donor (al-wahib), the recipient (al-mawhub lah), the gift itself (al-mawhub), and the utterance of contract (sighah). The utterance of al-grant occurs immediately if the utterance of al-hibah is general. This is because the utterances indicate the granting of ownership to others that arise immediately. However, if the utterance of al-hibah has any restriction, it will be treated as a condition of the utterance. For example, the conditions of the utterance regarding time limit are Al-Hibah Al-Umra and Al-Hibah Al-Ruqba.

The difference between al-hibah and the two varieties of al-hibah, Al-Hibah Al-Ruqba and Al-Hibah Al-Umra, is that al-hibah ownership is eternal. However, Al-Hibah Al-Ruqba ownership is subject to time, i.e. the parties' death and the recipient's death in Al-Hibah Al-Umra.

It is evident from the traditions of the Prophet (PBUH) that the utterance of the al-hibah is valid despite the void between the two conditions of al-umra and al-ruqba. In addition, Imam Abu Hanifah and Imam Muhammad ibn Al-Hassan said that if the owner gives a house with the term *Al-Ruqba*, the term changes as the house was given on the term of the loan, and the owner can take it from the recipient whenever he wishes.

### **Application of Hibah in Malaysia**

The National Land Code (Act 828) permits the transfer of land through a 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 with the benefit of any registered interests enjoyed with the land.

One case illustrating the acceptance of hibah ruqba by our Shari'ah Court in the case of *Rafizah bt Abd Karim v Kamar bin Abd Karim & 4 Ors*. The judge, in this case, referred to the decision of the Shari'ah Advisory Council (SAC) of the Security Commission, which confirmed the principles of hibah ruqba in the execution of the hibah declaration form for transactions involving joint accounts of Unit Trust Funds held by Muslims. Thus, the judge decided that the hibah was a hibah ruqba, which took place between the grantor and recipient of the hibah through the declaration document of the hibah. Therefore, the hibah was valid (Azalan & Said).

During the study, we also discovered the existence of a new form of a deed of gift executed between married couples. This form is considered an



instrument of estate management provided and promoted by a trust estate company for Muslims. A conditional contract known as “*Perjanjian Aset Perolehan Bersama*” involves the gift of an asset, whether registered in both or sole name, during the subsisting marriage. The declaration section of the contract states that the transfer of the matrimonial property will be enforceable in the mentioned circumstances, namely, if the husband contracted a polygamous marriage, dissolution of the marriage, or death of either party.

Nonetheless, the validity of such an instrument can only be verified in court, i.e. Shari’ah Court, upon the occurrence of the circumstances or condition. The parties’ names would not be endorsed on the land title during his lifetime.

### **Prohibition on Reception of English Common Law**

The crucial part of the proposed joint tenancy is the prohibition of the importation of common law into our existing law. Joint tenancy is a common law practice in English law in England. The law was formally introduced in Penang by the first charter of justice in 1807 with the proviso that “as far as local circumstances will admit.”

However, after the cut-off date of 7 April 1956, Section 6 of the Civil Law Act 1956 (CLA) excluded the application of English law to land matters. It provides inter alia ‘nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure, conveyance, or assurance of succession to any immovable property or any estate, right or interest therein.’

Hence, Section 6 ousts the application of common law and rules of equity relating to land tenure, transfer or transmission of immovable property, or any estate, right or interest therein. The co-proprietorship of tenancy-in-common or joint tenancy deals with shareholding of the undivided share, which falls within the rules of law that govern the incidents of land tenure.

Therefore, by restricting the reception of English common law, the principle of joint tenancy with the right of survivorship has no statutory force under the National Land Code and cannot be made part of the local law. Thus, its introduction will go beyond the proviso of Section 3 and contravene Section 6 of the CLA.

### **CONCLUSION AND RECOMMENDATIONS**

This study explored the roles of the application of joint tenancy in Malaysia. The discussion includes a legal framework or mechanism to regulate the application of joint tenancy in dealing with joint ownership of land in Malaysia. The proposed legal framework aligns with current needs, existing law, and Islamic succession law where applicable.

### **Insertion of the Concept of Joint Tenancy**

At the outset, Section 6 of the Civil Law Act 1956 prohibits the incorporation, importation, or reception of the common law concept of joint tenancy in our land law of tenure and conveyance. The principle of joint tenancy with the right of survivorship has no statutory force under the National Land Code and cannot be made part of the local law. Thus, its introduction will go beyond the ambit of the proviso of Section 3 and contravene Section 6 of the Civil Law Act 1956.

Should the interpretation of Section 6 of the Civil Law Act allow such tenure to be applied in our Torrens system or an amendment be made to such provision, it is proposed that the amendment be made to the existing Section 342 of the National Land Code (Act 828) by inserting a manner of holding an undivided share of immovable property by the joint tenant. The provision of coproprietorship and the manner of holding under the Land Titles Act 1993 would be the model of the law and procedure.

### **Legalising a Joint Tenancy Contract**

A joint tenancy contract is valid under the contract law and Islamic transactions. A contract for a sale or acquisition of land or any interest in land will be legally binding when the contracting parties mutually agree upon all the terms and conditions.

It is proposed that the two types of contract, namely the joint tenancy contract and the tenancy-in-common contract, be introduced for the purchasing and owning of a property that involves two or more individuals, whether spouses, couples, relatives, or family members (Arshad et al, 2023). Ultimately, it would be robust to purchase a property due to the increased standard of living and value of the real property.

### **Execution of Deed of Gift Inter Vivos or Hibah**

A gift inter vivos transfers any property from one person to another gratuitously. It is an act whereby anything is voluntarily transferred from the actual possessor to another person, with the full intention that the thing shall not return to the donor and with the full intent on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. Two things are necessary for a gift inter vivos: the intention to give and the acts giving effect to the intention. So long as the intention is not entirely carried out, the gift is imperfect, and the donee has no legal rights against the donor. It is a gift between living persons and, in Roman law, intended to be effective irrespective of the donor's death.

In Malaysia, the hibah instrument is usually used by Muslims in planning asset distribution to the intended beneficiaries in relation to specific assets, whereby the ownership of the asset is transferred to the beneficiary during the donor's lifetime (inter vivos) or in certain limited circumstances, conditionally passed over after the donor's death.

The concept of joint tenancy in land ownership can be implemented by executing a deed of gift or hibah in Islam, which can be made in writing, by conduct, or orally. Advisable is a letter of hibah or deed of hibah of a donor who voluntarily gave the asset to the donee unconditionally or with conditions attached to it (valid and considered as hibah ruqba).

Instrument of gift inter vivos or hibah with the right of survivorship may be endorsed or implemented over the real estate in the following manner:

- I. There are two contracts—a gift contract and a second contract—through mutual agreements. A deed of gift with a right of survivorship, known as hibah ruqba or conditional gifts, is executed with the condition that upon the co-owners death, the survivor shall be entitled to the whole share. After completing the first contract (ijab and qabul), the condition must be inserted. The transfer is based on the deed of gift using Form 14A. In contrast, the second contract (conditional gift with the stipulation of joint tenancy in the law) is enforced by a vesting order obtained against the estate after the passing of the co-owners pursuant to Section 417 or 420 of the National Land Code.
- II. Execution of a deed of gift or hibah with conditions attached to it as a valid and considered hibah ruqba. The registered proprietor or any third party will hold the land or Form 14A in escrow of the donee until a particular condition has been met, i.e. death of the proprietor. After that, his/her title or interest will be registered or vested thereon.
- III. Execution of the hibah ruqba and the implementation after the proprietor's death by a declaration of the court or vesting order under Section 417 or 420 of the National Land Code.

### **Holding Property as Trustee**

The next option is to register the co-owner as a trustee, using the requisite form (executed and attested before the Land Administrator or lawyer [designated persons in the Fifth Schedule]), enclosed deed of trust, issued title document, and registration fee. Where there is more than one trustee, they hold “as trustee” and consequently as joint tenants. This is pursuant to Section 344 of the National Land Code.

The co-owner should execute a trust deed holding the property on behalf of the co-owner. Although generally, a trust deed should be executed for the disabled (namely an infant/minor or person who is unsound mind), most states do not require the registration of trust to be made for the disabled. This allows the trust to be registered over the land accordingly.

Another option is to transfer the property by hibah and subsequently register the donor as a trustee, known as hibah amanah. Interestingly, the instrument of hibah can be combined with the concept of trust. Based on the

concept of trust, the property involved in the hibah amanah will be held by the trustee for the agreed period before it is handed over to the recipient of the hibah in absolute.

Thus far, the study concludes that it is high time that a contract or conveyance of land by way of joint tenancy is regulated. While acknowledging that the process of amending and introducing new laws is not straightforward, the above recommendation should prove to be the solution at hand to be used as a basis for regulating the contract or concept of joint tenancy in the existing legal framework governing land tenure and the law of inheritance, consistent with the intentions of the holders or co-owners.

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