5 Co-Ownership of Real Property

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Key Terms

- Concurrently
- Severalty
- Community property
- Separate property
- Commingling
- Joinder
- Tenancy in common
- Contribution
- Waste
- Partition
- Joint tenancy
- Right of survivorship
- Unity of possession
- Unity of interest
- Unity of time
- Unity of title
- Marketable title
- Severance
- Corporation (domestic or foreign)
- Shareholders
- Nonprofit corporation
- Articles of incorporation
- Partnership (general or limited)
- Partnership property
- Limited liability company
- Joint venture
- Syndicate

Chapter Overview

Ownership of real property is frequently shared by more than one person. Two, ten, or two hundred people can own the same piece of property at the same time (**concurrently**). This chapter explains the forms that concurrent ownership can take.

The first section of the chapter focuses on the various ways in which co-owners can hold title, such as community property or tenancy in common. The second part of the chapter describes ownership by associations of two or more persons, such as partnerships.

Forms of Co-ownership

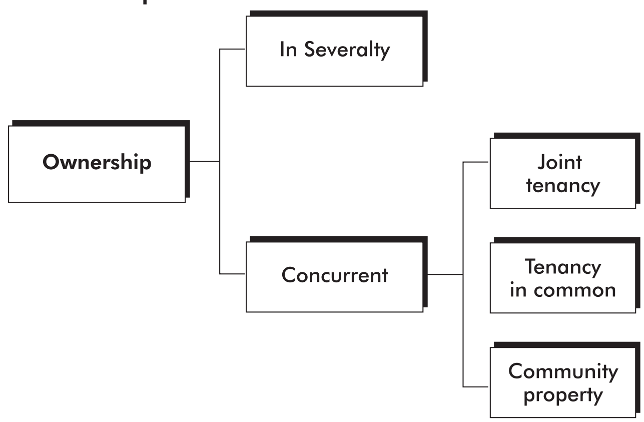
When one individual or entity owns property, title is held **in severalty**. In Washington, when property is owned by more than one individual, they can hold title in one of three ways:

- community property,
- tenancy in common, or
- joint tenancy.

Many prospective co-owners are unaware of these various forms of co-ownership, and wind up with one or another by default. However, the way in which title is held is very important, as it determines who controls the property. It can also have dramatic repercussions when co-ownership ends, whether voluntarily or through dissolution or death. Co-owners need to understand these potential consequences and deliberately choose the type of ownership they want.

Real estate agents should make sure that buyers realize the importance of the form of co-ownership. However, when an agent raises the subject, buyers often ask for help in choosing how to take title. This is beyond the licensee's area of expertise; at that point, she must advise the buyers to consult a lawyer. Even a well-intentioned licensee who gives buyers friendly advice may end up charged with the unauthorized practice of law,

Fig. 5.1 Forms of ownership



in addition to facing disciplinary action by the Department of Licensing. And if the buyers make the wrong choice based on the agent's advice, the agent could be liable for damages.

Even though a real estate licensee should avoid advising buyers about forms of co-ownership, the licensee nevertheless needs at least a general understanding of the subject. Whenever a legal document is executed, the agent needs to know whether only one co-owner's signature is sufficient, or whether all the co-owners need to sign. For the parties, this can mean the difference between an effective sale and a voidable transaction. For the agent, it can mean the difference between a commission and a lawsuit.

Community Property

Community property is one of the most common forms of co-ownership in this state. Outside of Washington, only Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Wisconsin have community property systems. In most other states, married couples co-own property as **tenants by the entirety**. Tenancy by the entirety is similar to joint tenancy (discussed below).

The concept of community property is based on Spanish law. Early Washington settlers had little contact with Spain or Spanish culture. However, many of Washington's early laws were patterned after California's laws, and California has a history that is rich with Spanish influence.

When Community Property Rules Apply

Under community property rules, all property owned by a married couple is classified either as the **separate property** of one spouse, or as the **community property** of both spouses. These classifications determine a couple's rights and duties in regard to the property.

Community property rules apply only to property acquired during a marriage. In some states, a couple that has lived together for a certain number of years in a marriage-like relationship is considered legally married, even though there has been no marriage ceremony, and no marriage license has been obtained or signed. This kind of marriage is called a **common law marriage**. Washington law does not provide for common law marriages. However, if a couple has met the common law marriage requirements of another state before moving to Washington, they will be considered legally married when they move to Washington, and the property they acquire while living in Washington will be considered community property.

Unmarried Couples. Although community property laws don't apply to unmarried couples, if a couple has lived together for a significant period of time, Washington courts will examine the nature and extent of the relationship and the property accumulations, and try to make a just and equitable disposition of the property when the couple splits up or one party dies. The court considers a number of factors:

- continuous cohabitation,
- duration of the relationship,
- purpose of the relationship,
- pooling of resources,
- pooling of services for joint projects,
- which party acquired the property,
- monetary and labor contributions,
- whether or not there are children,
- who is to care for the children, and
- the general condition in which each of the parties will be left.

Based on these factors, a court may divide property evenly between the parties, award it to the person whose name is on the title, or award it in some other fair and equitable manner.

Classifying the Property

While problems can arise when dividing property between an unmarried couple, the question of an equitable division of property occurs most frequently when a married couple separates. Who receives what portion of the property depends on whether the property is classified as community property or separate property.

The idea behind the community property system is that a marriage is a partnership. Each spouse works for the good of the partnership. Any money or property acquired through the skill or labor of either spouse during the marriage belongs to the marital community, not just to the individual who earned it. This means that the salaries of both spouses are community property. And even if only one spouse works outside the home for wages (for example, while the other spouse works inside the home raising children), those wages are community property, and belong to both spouses.

In addition, anything purchased with community funds or community credit (for example, an item purchased with a credit card issued to both spouses) is community property.

The principle behind community property is favored so strongly that it is presumed that any property purchased during marriage belongs to the community, even if title is held in the name of only one spouse, unless it can be proven otherwise.

> **Example:** Suppose Tim and Sarah were married for nine years. During their marriage, they bought a house. Title to the house is in Tim's name alone. When they divorce, the house is presumed to be community property even though title is in Tim's name.

On the other hand, everything acquired before marriage remains separate property after marriage. This includes money accumulated before marriage, and items purchased with money accumulated before marriage.

> **Example:** Sarah earns her living as a bus driver. While she was single, she accumulated \$15,000 in savings. Even after her marriage to Tim, that \$15,000 remained Sarah's separate property. Anything purchased with separate property funds is also separate property. So if Sarah uses her \$15,000 to buy a car during her marriage, the car is also her separate property.

Gifts. Property or money acquired by gift, will, or inheritance is also separate property, even if it is received during the marriage. For example, if Veronica's father leaves her \$25,000 in his will, that \$25,000 is Veronica's separate property, even if she acquired it during her marriage to Phil.

The rationale behind this rule is that a gift, a legacy, or an inheritance is not earned by the skill or labor of a spouse. But if a gift is actually given in exchange for services rendered, either in the past or in the future, it is considered community property rather than separate property.

> **Example:** Phil's elderly mother gives him her sailboat. It is understood between them that the sailboat is Phil's compensation for helping his mother with housekeeping and other chores. The sailboat is not a true gift. Because Phil "earned" it, the sailboat is community property rather than separate property.

Note that a gift purchased with community funds by one spouse for the other spouse is the recipient spouse's separate property.

> **Example:** Veronica buys Phil a Rolex watch with money she has saved from her salary. Even though the watch was purchased with community funds, the watch becomes Phil's separate property.

Fig. 5.2 Community property vs. separate property

Community Property	• Assets acquired through skill or labor of either spouse • Assets purchased with community funds or credit • Items covered by community property agreement • Separate funds commingled or given as gifts to community
Separate Property	• Assets acquired before marriage or while separated • Gifts & inheritances • Rents & profits generated by separate property

Rents and Profits. Ordinarily, any appreciation in separate property and any rents or profits generated by separate property are also separate property. However, if the appreciation or profits are the result of a spouse's effort, skill, or labor, they are community property instead.

> **Example:** Phil owns an apartment building as his separate property. If he hires a property management company and is not actively involved in managing the building himself, the rents it generates will be his separate property. But if he spends time and energy on maintaining the building and leasing the apartments, the rents will be at least partly community property.

Community Property Agreements. Some couples choose to sign **community property agreements**, which makes all property owned by either of them community property, no matter when or how it was acquired. Most community property agreements provide that:

1. all property owned by either spouse is converted to community property;
2. all property later acquired will be community property; and
3. upon the death of one spouse, all community property will immediately vest in the survivor.

Note that a community property agreement avoids the necessity for probate when one spouse dies. All of the deceased spouse's property has been converted to community property by the agreement, and all community property automatically vests in the surviving spouse. An attorney should be consulted prior to preparing a community property agreement, because the agreement could disrupt more sophisticated estate planning.

Commingling. Even without a community property agreement, separate property will sometimes become community property. This occurs when separate funds are mixed, or **commingled**, with community funds so that they are impossible to distinguish.

> **Example:** Returning to an earlier example, suppose that when Sarah got married she put her $15,000 into a joint checking account. Both she and Tim contributed to the account and used funds from the account. It is no longer clear whether the money remaining in the account is Sarah's $15,000 or community funds.
>
> Under these circumstances, the $15,000 might well be considered a gift to the community and will no longer be considered Sarah's separate property.

Separation. The rules change when a married couple is living separately or if a decree of separation has been issued. Then the income earned and property acquired by each spouse is considered his or her separate property. This rule applies only to a "defunct marriage," and does not apply when the spouses are separated for other reasons.

Case Example:

A husband and wife experienced a long separation due to the wife's confinement in a mental institution outside of Washington. Acquisitions by the husband during the separation were considered community property, not his separate property. *Rustad v. Rustad*, 61 Wn.2d 1176, 377 P.2d 414 (1963).

When a married person wins a personal injury suit, the damages award is community property if it is received while the couple is living together. If the couple is living apart, the damages award is usually the separate property of the injured spouse. Even then, if the injury occurred while the couple was still living together, a portion of the award may be community property.

Case Example:

Ronna and William Brown were married in 1967. In 1979, Ronna was injured in a car accident. Approximately six months later, Ronna instituted a dissolution action. At trial, Ronna had not yet recovered any damages for the accident. The trial court said any recovery should be divided as follows:

- lost earnings and diminished earning capacity from the date of the accident until the date of the separation is community property and should be awarded one-half each to Ronna and William;
- lost earnings and diminished earning capacity after the date of separation is Ronna's separate property;

- out-of-pocket expenses prior to trial had already been reimbursed in full (otherwise, expenses paid by community funds would probably have been reimbursed);
- expenses occurring after trial should be awarded to the party incurring the expense; and
- recovery for all other damages (probably referring to "pain and suffering") is Ronna's separate property.

In re Marriage of Brown, 100 Wn.2d 729, 675 P.2d 1207 (1984).

A different rule applies if the personal injury was inflicted by the other spouse, rather than a third party. Then the damages award is the injured spouse's separate property, regardless of whether the couple is living together.

Separate and Community Property Interests. Sometimes there are both separate and community interests in a single property. This commonly occurs in two situations: when the property is paid for over time, and when the property is improved during the marriage.

When property is paid for over time (as with a deed of trust or an installment contract), some payments may be made with separate funds and some with community funds. This is especially likely to occur with a major purchase, such as a home.

> **Example:** Doreen and Dimitri purchased a residence for $400,000. They used Doreen's separate funds to make the $80,000 downpayment. However, their $320,000 loan was a community obligation (both Doreen and Dimitri signed the loan documents). They proceed to use community funds to make the monthly payments on the loan.
>
> The house is community property, but Doreen has a separate property interest in the house in the same proportion that the downpayment had to the purchase price (20%). If ten years later the property is worth $700,000, Doreen's separate interest has increased to $140,000 (20% of $700,000).

Another common example would be one spouse purchasing a home before the marriage, and then making the mortgage payments on the home after the marriage with community funds. The home would be the purchasing spouse's separate property, but the community would have an interest in it in proportion to the amount of principal payments made with community funds.

Community property—either community funds, or the time, skill, and labor of one of the spouses—is often used to improve separate property. That gives the marital community an interest in the property.

> **Example:** Terri and Sharon are married. Terri inherits a house from her mother. This is Terri's separate property. Since Terri and Sharon already have a home, Terri decides to lease the inherited house to tenants. In preparing the house for rental, Terri spends $10,000 in community funds on repairs and improvements. The house is still Terri's separate property, but Terri and Sharon's marital community now has an interest in it.
>
> This interest is proportionate to the community's contribution (the $10,000 plus Terri's time and efforts). Although most of the rent generated by the property will be Terri's separate property, a portion will be Terri and Sharon's community property.

The same process works in reverse. Let's say Terri's mother left her $10,000, which Terri used to improve the home she and Sharon own as community property. Then Terri would have a separate interest in the home along with the community's interest.

Legal Consequences

The way in which property is classified has a significant bearing on each spouse's rights and interests in that property: each spouse owns his or her separate property in severalty; each has an undivided ½ interest in all community property.

Management and Control. Equal control of community property is the general rule. Equal control means that either spouse can act unilaterally, without the other's consent.

Example: Lowell and Gina own a car as community property. One day a passerby offers Lowell $5,000 for the car. That strikes Lowell as a very good price, so he accepts the offer without consulting Gina.

When Lowell tells Gina he sold the car, she's very annoyed. But it's too late to do anything about it; Lowell's unilateral action was legally binding.

One exception to this rule is that when one spouse operates a business, the other spouse has no right to interfere in its management, even though the business is community property.

Joinder Requirements. There are several important limitations on a spouse's right to unilateral management and control of community property. In certain transactions, both spouses are required to act jointly; this is called a **joinder requirement**.

One spouse can't give away community property without the other's consent. In the example above, if Lowell had given away the car rather than selling it, Gina could have demanded it back. Also, one spouse can't sell, lease, or encumber the couple's household furnishings without the other's consent. And one spouse can't purchase, transfer, or encumber community real property without the other spouse's consent.

It is crucial for real estate agents to remember this joinder requirement and obtain the signature of both spouses on any contract involving community real property. Otherwise, the contract is voidable.

Example: Instead of selling their car, Lowell decides to sell their home without asking Gina. He finds a buyer and signs a purchase and sale agreement. Since Lowell cannot transfer community real property without Gina's consent (and signature), the purchase and sale agreement is not a valid contract.

There are very few exceptions to this joinder requirement. One of the exceptions is that joinder is not required in an estoppel situation. A spouse who accepts benefits from a transaction, or fails to object to it in a timely way, may be estopped from objecting. Also, if another party has acted in reliance on consent given by one spouse, the other spouse may not be allowed to object. For example, suppose a neighbor builds a garage over the property line because Lowell said it was okay. Even though Gina didn't give her approval, a court might not allow her to object to the encroachment, because the neighbor expended significant resources in reliance on her husband's permission.

Remedies for Unauthorized Acts. When only one spouse enters into a transaction regarding community real property, the transaction is not binding on the other spouse. If the nonacting spouse wants to, he or she may void the transaction, even when the other party acted in good faith. Any payment received from the other party (for example, an earnest money deposit) must be refunded.

For real estate agents, buyers, and lienholders, the rule is simple: always determine whether a property owner is married. If so, then the safest course is to have the owner's spouse:

- sign a quitclaim deed transferring any interest he or she might have in the property to the other spouse (the one who's participating in the transaction),
- execute a power of attorney authorizing the other spouse to transfer the property, or
- co-sign all the documents involved in the transaction (the listing agreement, purchase and sale agreement, and deed).

These steps are not necessary if in fact the property being transferred or encumbered is entirely the separate property of the spouse who's participating in the transaction. However, if it turns out that the community has an interest in the property, the buyer could lose the property, and the brokerage could lose the commission.

Case Example:

Roy and Billee Haueter owned an apartment building they wanted to sell. On October 3, 1982, Roy signed an exclusive listing contract with Larry Klaas. Billee testified that she did not know about this listing agreement.

On November 29, 1982, the Haueters sold the apartment house through Dennis Weybright. Weybright received a 6% commission on the sale.

Klaas brought a lawsuit for breach of his exclusive listing agreement. The court entered a judgment against Roy Haueter individually. No judgment was entered against the community because the court found that Billee Haueter had not authorized the listing with Mr. Klaas and did not ratify the contract. *Klaas v. Haueter*, 49 Wn. App. 697, 745 P.2d 870 (1987).

In this case example, the sale itself was valid. The problem arose because an unwary agent did not have both spouses sign an exclusive listing agreement. The fact that Klaas won a judgment against Roy Haueter individually means that he was entitled to the full commission amount from Roy. However, the fact that no judgment was entered against Billee may have made it harder for Klaas to actually collect the money.

Liability for Debts. A creditor's rights against a married person's property are determined by its classification as separate or community property. One spouse's separate property is shielded from liability for the other spouse's premarital debts.

Fig. 5.3 Creditors' claims and community or separate property

	Other Spouse's Premarital Debt	Other Spouse's Debt Incurred During Marriage
Separate Property	SAFE	SAFE*
Community Property	SAFE**	NOT SAFE

* unless debt is for necessities
** except for child support/maintenance, or judgments incurred in three years prior to marriage

> **Example:** When Lois and Joe got married, Lois already owned a home, and Joe owed a large judgment in connection with an automobile accident. Since the home is Lois's separate property, the judgment against Joe cannot become a lien against the home.

Separate property is also protected from debts the other spouse incurs during the marriage, unless the debts were incurred for necessities such as food and clothing. Thus, if Joe's automobile accident occurred during the marriage, Lois's separate property still could not be reached by the judgment creditor.

A spouse's premarital creditors generally cannot reach the couple's community property. There are two exceptions. The community may still be liable for a child support or maintenance obligation from a spouse's previous marriage. The community may also be liable for a judgment debt against one spouse that arose within three years prior to the marriage.

Finally, all community property is subject to liability for the debts either spouse incurs during the marriage. Referring back to the example above, if the home were community property and Joe's accident occurred during the marriage, the judgment lien against Joe would attach to the home, even though Lois had nothing to do with the automobile accident.

Division of the Property on Dissolution. When a marriage is dissolved, the court presiding over the dissolution can divide and award the couple's community property.

Community property is divided between the spouses in a "just and equitable manner." The court may divide the property equally, or it may choose an unequal allocation, based on the economic circumstances of each spouse. Separate property is excluded from this process; the court cannot award one spouse's separate property to the other spouse.

In determining whether property is separate or community property, the court relies on two legal presumptions that strongly favor community property:

1. all property acquired during the marriage is presumed to be community property, unless it was a gift or inheritance, and
2. after several years of marriage, everything the couple owns is presumed to have been acquired during the marriage.

These presumptions apply even if the title to the property states that it is separate property. Either spouse may rebut these presumptions with evidence that the property is actually separate property.

> **Example:** When Todd married Nancy, he owned a car and had $85,000 in savings. The car and the money were his separate property. During the marriage, Todd used his $85,000 to buy some land. The deed to the property says, "Todd Smith, a married man, as his sole and separate property."
>
> In the couple's dissolution proceedings, the court presumes that both the car and the land are community property. It is up to Todd to rebut this presumption by showing that they are his separate property. He must present evidence that he owned the car before the marriage, and that he purchased the land with funds he possessed before the marriage.

It can be especially difficult to prove that property is separate when it has changed form during the marriage (from a grand piano to cash to a motorcycle), or when separate funds have been commingled with community funds. It may be necessary to go through a complicated process of tracing the couple's expenditures. Community expenses are presumed to have been paid out of community funds, and separate expenses are presumed to have been paid out of separate funds.

When there are both separate and community interests in the same piece of property, the court will likely order some form of reimbursement. Typically, a spouse must reimburse the community for contributions to his or her separate property, and the community must reimburse a spouse for separate contributions to community property.

Disposition of Property at Death. When a married person dies, the probate court determines what part of the estate is separate property and what part is community property. The property is then distributed according to the will, or if there is no will, according to the rules of intestate succession. (See Chapter 9 for more information about wills and intestate succession.)

A married person is free to will his or her separate property to anyone. In addition, both spouses have the right to will their undivided ½ interest in all community property to someone other than the surviving spouse.

> **Example:** Jules and Maria own a home as community property. Maria wills her ½ interest in the property to her friend, Josephine. When Maria dies, Jules and Josephine each own an undivided ½ interest in the property as tenants in common.

If a married person dies without having made a valid will, all the community property vests in the surviving spouse.

> **Example:** Bud and Rena had four children. Bud never got around to writing a will. When he dies, Rena receives full title to their home, car, furniture, and other community property. She now owns all of this in severalty, and the children have no rights in it.

The separate property of the intestate spouse (the spouse who died without leaving a will) is divided between the surviving spouse and the deceased's children. The spouse receives an undivided ½ interest in the separate property and the children share the remaining ½ interest. All of these interests are held as tenants in common.

> **Example:** Bud also owned some land as his separate property. When Bud dies, Rena receives an undivided 1/2 interest in the land. Each of their four children receives an undivided 1/8 interest in the land (a 1/2 interest divided among four children).

If both spouses die at the same time (in an accident, for example), each spouse's ½ interest in the community property is distributed as if that spouse survived the other spouse.

Tenancy in Common

Tenancy in common is the most basic form of concurrent ownership. It is the residual category: co-ownership that doesn't fit into any of the other categories is a tenancy in common by default. If a deed transferring land to two unmarried individuals doesn't specify how they are taking title, they take title as **tenants in common**.

Co-owners who choose tenancy in common should make that clear in the deed, by adding "as tenants in common" after their names. If they own unequal shares in the property, that should be stated in the deed as well.

> **Example:** When Zowalski and Martinez bought Baker's tract of land, they decided to take title as tenants in common. Zowalski came up with ⅔ of the purchase price, and Martinez contributed ⅓. Their deed reads, "Zowalski, a single woman, with an undivided ⅔ interest, and Martinez, a single woman, with an undivided ⅓ interest, as tenants in common."

When a deed does not state each co-tenant's fractional interest, the law presumes that the interests are equal. In a lawsuit, a tenant in common can overcome that legal presumption by submitting evidence that the contributions to the purchase price were unequal.

> **Example:** Zowalski paid ⅔ of the purchase price, and Martinez paid ⅓. However, their deed simply states, "Zowalski, a single woman, and Martinez, a single woman, as tenants in common."
>
> Zowalski and Martinez subsequently have a serious disagreement, and they take each other to court over the property. Because the deed doesn't state what fractional interest each of them owns, the judge presumes that each has a ½ interest.
>
> But Zowalski presents evidence (a canceled check) showing that she paid ⅔ of the purchase price. This rebuts the presumption that she and Martinez have equal shares. Now the judge is likely to rule that Zowalski has a ⅔ interest in the property and Martinez has only a ⅓ interest, unless Martinez presents persuasive evidence to the contrary.

Rights and Duties of Tenants in Common

In principle, there's no limit to how many tenants in common can share a property. There are also no restrictions on how they divide up the ownership. One tenant in common might own a ½ interest, and 50 others might each own a 1/100 interest.

The interests owned by tenants in common are always **undivided**: each tenant has a right to possess and occupy the whole property, no matter how small his or her share of ownership is. Similarly, no co-tenant can exclude another co-tenant from any portion of the property. This rule is referred to as **unity of possession**. This concept is best illustrated by contrasting tenancy in common with ownership in severalty.

> **Example:** Abernathy owns a large tract of land. She deeds the east ⅔ of it to Bernstein, and the west ⅓ to Corman.
>
> Bernstein and Corman each own their portion of the tract in severalty. They are not co-owners; they are sole owners of two separate properties. Each holds the entire bundle of rights to his portion, and has the right to exclude all others from his portion. Bernstein can exclude Corman from the east ⅔ and Corman can exclude Bernstein from the west ⅓.
>
> On the other hand, suppose Abernathy deeds her entire tract to Bernstein and Corman as tenants in common, with Bernstein taking an undivided ⅔ interest and Corman taking an undivided ⅓ interest. Now they are co-owners of a single property, sharing a single bundle of rights. Both have the right to possess and occupy the whole tract; neither can exclude the other from any part of it. Even though Bernstein's interest in the property is twice as great as Corman's, Bernstein can't fence off ⅔ of the property and tell Corman to keep out.

One tenant in common does not have a right to charge another co-tenant rent. If Bernstein chooses to live on the property while Corman chooses not to, Corman is not entitled to collect rent from Bernstein. But Corman may be allowed to offset the rental value of the property against his share of the property's expenses.

As an extension of the unity of possession rule, each co-tenant has a right to an equal share of any products or income generated by the property. Diamonds from a mine or apples from an orchard belong to all the tenants in common. If they lease out the property to someone else, the co-tenants share the collected rent equally.

Contribution. All tenants in common are required to share the property's expenses, such as maintenance, insurance, taxes, and mortgage payments. Unless otherwise agreed, each tenant's share of expenses is proportionate to his or her ownership interest. Thus, Bernstein is liable for ⅔ of the expenses, and Corman is liable for ⅓ of the expenses.

A co-tenant who pays more than his share of the expenses can demand reimbursement from the other tenants in common. This is called the **right to contribution**.

The right to contribution also applies to property improvements, but only when the other tenants in common have agreed to the improvement.

> **Example:** Armstrong, Bennett, and Crane own a house as tenants in common. Armstrong and Bennett want to add a deck, but Crane is opposed to the project. Armstrong pays a carpenter to build the deck. Armstrong is entitled to reimbursement from Bennett, but not from Crane.

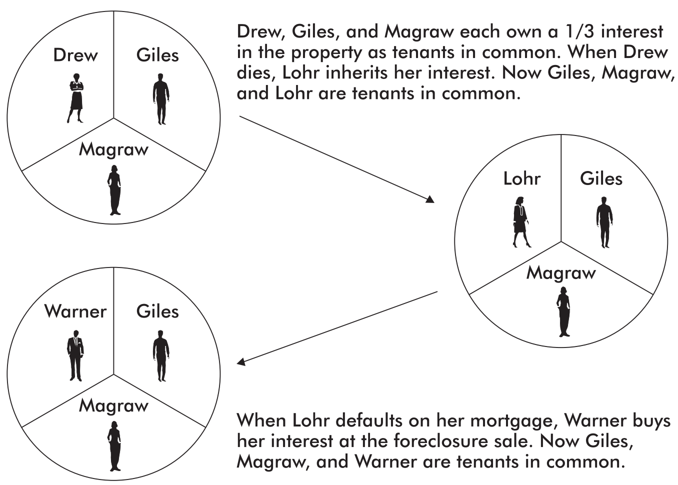
As you might guess, this rule often leads to disputes over whether a particular project (a new cedar roof, for example) was an improvement or necessary maintenance.

Waste. A tenant in common is liable to the other tenants for any waste she commits on the property (just as a life tenant is liable to a remainderman for waste). For instance, if Armstrong drives a car through the garage wall, she will have to compensate Bennett and Crane for the damage.

Transfer and Encumbrance

A tenant in common is free to sell, will, or encumber his undivided interest without the consent of the other tenant(s). A tenant in common's interest can also be transferred involuntarily, by foreclosure or bankruptcy.

> **Example:** Drew, Giles, and Magraw are tenants in common. Drew mortgages her undivided ⅓ interest, but that mortgage doesn't encumber Giles's or Magraw's interest.
>
> Drew dies, leaving all her property to her friend, Lohr. Now Giles, Magraw, and Lohr are tenants in common, and Lohr's undivided ⅓ interest is encumbered by the mortgage.
>
> Lohr can't make the mortgage payments, so eventually the bank forecloses. Warner purchases Lohr's ⅓ interest at the foreclosure sale. Now Giles, Magraw, and Warner are tenants in common.



To transfer or encumber the whole property, all the tenants in common must sign the deed, deed of trust, or other instrument.

> **Example:** Williams, McNeil, Pohto, and Starbuck are tenants in common. Investments, Inc. offers them a great deal of money for their land. Williams, McNeil, and Pohto leap at the offer. But Starbuck (who holds an undivided $^{1}/_{16}$ interest) turns it down, because of his sentimental attachment to the property.
>
> Williams, McNeil, and Pohto can sell their combined undivided $^{15}/_{16}$ interest in the property without Starbuck's consent, but they can't sell the whole property. Investments, Inc. insists on all or nothing. The others plead with Starbuck, but he won't budge. Investments, Inc. withdraws its offer.

What if Williams, McNeil, and Pohto all signed a deed that purported to convey the whole property to Investments, Inc.? The deed would effectively convey their undivided $^{15}/_{16}$ interest, but not the whole property. Investments, Inc. could withdraw from the transaction or sue for damages.

The real estate agent who represented Investments, Inc. in the sale might be in trouble. She probably relied on the title insurance company to figure out who owned the property and who needed to sign the deed. The title officer slipped up—it happens, though not often. By failing to double check, the real estate agent exposed herself to liability for negligence. She might even be accused of participating in a fraud, if she knew about Starbuck's interest.

Terminating a Tenancy in Common

A tenancy in common can be terminated by agreement or by judicial partition.

Agreement. All the tenants in common can agree to terminate the tenancy. The co-tenants can agree to change their tenancy in common to one of the other forms of concurrent ownership (joint tenancy or community property, if they are married). Or they can agree to divide their property, so that each owns a portion of the property in severalty. This division by agreement is called voluntary partition.

> **Example:** Ames wills 20 acres of vacant land to Bakke and Church as tenants in common. Bakke and Church agree that they'd each rather have half the property instead of sharing the whole property.
>
> They have the land surveyed and divided into two ten-acre parcels. Bakke deeds her undivided ½ interest in the east ten acres to Church, and Church deeds his undivided ½ interest in the west ten acres to Bakke. Now each owns a ten-acre tract in severalty.

Judicial Partition. A tenancy in common can also be terminated by the unilateral action of one of the co-tenants, without the consent of the other(s). If Bakke wants to end the tenancy in common, but Church does not, Bakke can file a **partition action** in superior court.

Everyone with a recorded interest in the property (co-tenants and lienholders) is brought into the partition suit as a defendant. The judge determines the status and priority of all the liens against the property, and what interest each party holds. Then the judge terminates the tenancy in common by partitioning the property. Each former co-tenant is granted a share proportionate to her ownership interest.

Whenever possible, the judge will order the property to be physically divided. But physical division often won't work. For example, if the property Bakke and Church owned as tenants in common included a house, it would not be practical to divide it in half.

When physical partition is impractical or inequitable, the judge can order the property sold. The sale proceeds are then divided among the former co-tenants according to their ownership interests. Or, in some cases, a judge may order part of the property sold and part of it physically divided.

A tenant in common may oppose a physical division of the property. She can present evidence to show that the divided property would be worth substantially less than the proceeds from a sale of the whole property. In this case, the judge should order the property sold instead of physically divided.

Joint Tenancy

Joint tenants have a relationship similar to that of tenants in common: each joint tenant has an undivided interest in, and shares possession of, the whole property.

But the distinguishing feature of joint tenancy—the **right of survivorship**—comes into play if one of the joint tenants dies. When a joint tenant dies, his interest in the property passes automatically to the surviving joint tenant(s).

> **Example:** Craft, Kaskell, and Rusnak buy a vacation home together. Sometime later, Craft dies. If Craft, Kaskell, and Rusnak were tenants in common, Craft's undivided interest would pass to his heirs. Kaskell, Rusnak, and Craft's heirs would then own the property as tenants in common.
>
> But if Craft, Kaskell, and Rusnak were joint tenants, from the moment of Craft's death, Kaskell and Rusnak own the whole property. Because of the right of survivorship, Craft cannot will his interest to his heirs.

Creating a Joint Tenancy

Since joint tenancy has such a radical effect on the disposition of property, it isn't something co-owners can slip into by default. Specific rules exist for creating and maintaining a joint tenancy. If these rules are not followed when the property is acquired, or if they are broken during the period of ownership, the joint tenancy fails and the right of survivorship is lost. Instead of a joint tenancy, the co-owners will either have a tenancy in common or, if they're a married couple, community property.

The Four Unities. To create a joint tenancy, the **four unities of title** must exist:

1. unity of possession,
2. unity of interest,
3. unity of time, and
4. unity of title.

Unity of possession means that all co-owners have the right to occupy the whole property. A tenancy in common also requires the unity of possession.

Unity of interest means that all the joint tenants must have an equal interest in the property. If there are two joint tenants, each must have a ½ interest; if there are three joint tenants, each must have a ⅓ interest; and so on. If Scovel has a ¼ interest and Dimarco has a ¾ interest, they aren't joint tenants.

Unity of time means that all of the joint tenants must acquire their interests in the property at the same moment.

Unity of title means that the joint tenants all must take title through the same deed or will.

> **Example:** Connelly deeds an undivided ½ interest in his property to Dreyer. Two months later, Connelly deeds an undivided ½ interest in the same property to Cree. Dreyer and Cree cannot be joint tenants, because they acquired title at two different times, through two different deeds. Although there is unity of interest and unity of possession, there is no unity of time and no unity of title. As a result, there is no joint tenancy.

However, it is possible for a property owner to create a joint tenancy by deeding the property to herself and others.

> **Example:** Karen has owned some land for many years. When her children, Bill and Clarisse, reach adulthood, Karen deeds the property "to Karen, Bill, and Clarisse, as joint tenants."
>
> This new deed satisfies the unity of time and the unity of title requirements, even though Karen originally acquired the property long before and through a different deed than Bill and Clarisse.

Note that joint tenants may agree among themselves to give one joint tenant exclusive possession of the property. Such an agreement does not destroy the joint tenancy. The agreement can even be entered into at the same time that the co-owners acquire the property, without preventing the creation of a joint tenancy.

Other Requirements. A joint tenancy can only be created in writing. The deed or will must expressly state the intention to create a joint tenancy. It's best to have the deed or will state that title is held either "as joint tenants" or "in joint tenancy."

Courts have disagreed over whether any other language is sufficient evidence of an intent to create a joint tenancy. However, it is clear that the phrase "with the right of survivorship" will not create a joint tenancy by itself. And even the words "as joint tenants" or "in joint tenancy" only establishes a presumption that there was an intent to create a joint tenancy. A court will consider evidence presented to rebut the presumption: for example, evidence showing that the grantor, the testator, or the new co-owners had confused joint tenancy with tenancy in common.

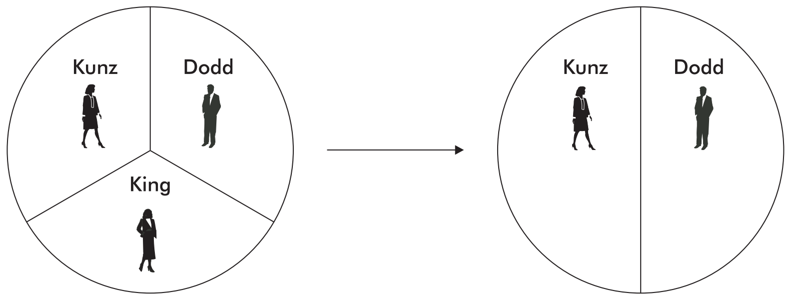
Rights and Duties of Joint Tenants

Once co-owners manage to establish a joint tenancy, they have similar rights and duties as tenants in common: the right to contribution, the right to the products and rents from the property, and the duty to avoid waste. A joint tenant can also encumber his own interest without the others' consent. But in addition, joint tenants have a right that tenants in common don't have: the right of survivorship.

Right of Survivorship. As explained earlier, when a joint tenant dies, her interest in the joint tenancy property passes directly to the surviving joint tenants.

Example: Kunz, Dodd, and King are joint tenants. Because of the unity of interest rule, each has an undivided ⅓ interest in the joint tenancy property.

When King dies, Dodd and Kunz still own the property as joint tenants, but now each has an undivided ½ interest, since they automatically acquired King's interest.



A joint tenancy interest cannot be willed or inherited, because it no longer belongs to the joint tenant at the moment of her death. As a result, joint tenancy property does not need to go through the probate process. This can spare the surviving joint tenants considerable expense and delay. However, joint tenancy property doesn't escape federal estate taxes. The deceased joint tenant's interest is treated as part of her estate for federal estate tax purposes.

Making the Title Marketable. Although surviving joint tenants acquire the deceased joint tenant's interest automatically at the moment of death, they must take steps to clear their title.

This can be accomplished by recording proof of the death, such as a court decree or a certified copy of the death certificate. The survivors should also record a sworn statement (an affidavit) that identifies the deceased as one of the property's joint tenants and identifies themselves as the surviving joint tenants. It may also be necessary to record certificates of state or federal estate tax lien releases.

Until these steps have been taken, the surviving joint tenants' title is not **marketable**. That means the public record presents some question about the validity of their title.

A title company will refuse to insure a title unless it is marketable. Here again, however, a real estate agent can't rely absolutely on the title company. The agent needs to know the rules and double check to make sure they've been followed. When surviving joint tenants sell property, the buyer should not go through with the transaction until the proof of death, affidavit, and tax releases have all been recorded.

Simultaneous Death. If all the joint tenants die at once, each tenant's interest in the joint tenancy property passes according to his or her will. Each joint tenant's interest is probated separately and the heirs of each joint tenant receive their interests as tenants in common.

Example: Debra and Tim own property as joint tenants. They are killed at virtually the same moment when an earthquake hits their house.

Debra's undivided ½ interest in the property passes to her heirs, Samuel and Zeke, by intestate succession. Tim had written a will leaving all his property to his friend Cliff, so Cliff takes Tim's undivided ½ interest in the joint tenancy property.

After the probate process is completed, Samuel, Zeke, and Cliff are tenants in common. Samuel and Zeke each have an undivided ¼ interest, and Cliff has an undivided ½ interest.

Terminating a Joint Tenancy

Partition. Just like tenants in common, joint tenants can agree to partition their property, or one joint tenant can bring suit for judicial partition. Either way, by breaking the unity of possession, partition eliminates the right of survivorship and ends the co-ownership.

Merely filing a partition action does not terminate the joint tenancy; it ends only when the court's partition judgment is entered. Thus, if one of the joint tenants dies during the trial, the right of survivorship is still effective.

Severance. A joint tenancy is also terminated when it is **severed**. Severance may occur as a result of transfer, declaration, or agreement. Severance ends the joint tenancy and eliminates the right of survivorship, but unlike partition, it does not terminate the co-ownership. Instead, severance changes a joint tenancy into a tenancy in common or community property.

Each joint tenant has the power to sever the joint tenancy by transferring his or her interest. A transfer severs a joint tenancy by breaking the unities of time and title.

Example: Adams and Buzzell own some land as joint tenants. Buzzell sells her undivided ½ interest in the property to Wall. Now Adams and Wall each own an undivided ½ interest, but they are tenants in common, not joint tenants.

An involuntary transfer of a joint tenant's interest also severs the joint tenancy. This includes transfers due to bankruptcy or foreclosure.

A transfer (either voluntary or involuntary) severs the joint tenancy only in regard to the transferred interest. When there are just two joint tenants, that ends the joint tenancy altogether. When there are more than two joint tenants, however, the co-owners who did not transfer their interests remain joint tenants in relation to one another.

Example: Kennedy, Jordan, and Chin are joint tenants. Kennedy deeds her interest to her friend, Peabody. That severs the joint tenancy as far as Kennedy's undivided ⅓ interest is concerned, so Peabody is not a joint tenant. Peabody is a tenant in common in relation to Jordan and Chin. But Jordan and Chin are still joint tenants in relation to one another.

If Peabody were to die, her interest would pass to her heirs, since the right of survivorship does not apply to her.

But if Jordan dies, Chin (rather than Jordan's heirs) acquires Jordan's interest, because the right of survivorship was still effective between Jordan and Chin. On Jordan's death,

> Chin has an undivided ⅔ interest, and Peabody still has an undivided ⅓ interest. Chin and Peabody are tenants in common.

In Washington (and most other states), a joint tenant may sever the joint tenancy simply by deeding her interest in the property to herself.

Transferring the property is not the only way to sever a joint tenancy. One of the co-owners can simply declare in writing that the joint tenancy is severed. And executing any written instrument that shows an intention to sever the joint tenancy also may be held to sever it.

> **Example:** Kunz and Lambert own a house as joint tenants. They enter a written agreement stating that Lambert is to have the right to will his interest in the property to his heirs.
>
> This agreement suggests an intention to sever the joint tenancy, since the right of survivorship is a basic characteristic of a joint tenancy. For that reason, a court would probably hold that the agreement caused a severance.

In this example, it is the written document that caused the severance, because it was evidence of an intention to sever. Note that a joint tenant's unilateral attempt to will the joint tenancy property will not automatically cause a severance (although it may be used as evidence of an intent to sever).

Recording requirement. Unless all the joint tenants have agreed to the severance, a deed, declaration, or other document severing the joint tenancy must be recorded to be effective. If the severance document has not yet been recorded and the severing joint tenant dies, the property will still pass to the surviving joint tenants as required by the right of survivorship.

Agreement requiring consent to sever. Joint tenants may agree among themselves that their joint tenancy can only be severed by mutual consent, and not by the unilateral action of one tenant. If one joint tenant later deeds his or her interest to someone else, the transfer will not be effective, and the joint tenancy won't be severed.

> **Example:** Ramsey and Pomerenke agree that their joint tenancy can be severed only by mutual consent. Later Ramsey deeds his undivided ½ interest to Thorne. Because of the mutual consent agreement, the deed to Thorne is invalid, and the joint tenancy is not severed.

There's an important exception to this rule. If Thorne was a good faith purchaser, received the interest in exchange for value, and was not aware of the mutual consent agreement, the deed is valid and the joint tenancy is broken.

Advantages and Disadvantages of Joint Tenancy

Co-owners who take title as joint tenants usually choose to do so to avoid probate, and to enable the surviving tenant to take the property free of the other's liens and debts. These are substantial advantages, if in fact one of the parties dies during the period of co-ownership.

But the right of survivorship is very easily lost through severance. Although a severance document must be recorded to be effective, a co-owner who has no reason to suspect that the joint tenancy has been severed is not likely to check the public record. He may be in for a shock if the other co-owner dies and the deceased's interest in the property becomes part of the deceased's estate.

As mentioned above, co-owners can prevent this kind of surprise by agreeing that their joint tenancy cannot be severed except by mutual consent. But that arrangement can create the opposite problem, making it difficult to get out of the joint tenancy. If one of the joint tenants is unwilling to consent to a severance, the others must file a partition action. Like any lawsuit, a partition action can be expensive, time-consuming, and stressful.

Co-ownership and Married Couples

Spouses may share title to property as joint tenants or as tenants in common, rather than holding it as community property. For example, a married couple may choose to own their home in joint tenancy: that way, if one spouse dies, his or her interest is automatically transferred to the other spouse, without having to wait for probate to be completed.

However, in Washington, there is a very strong presumption in favor of community property. There must be conclusive evidence showing that a couple understood the various forms of ownership and specifically wanted a form other than community property. Otherwise, the court will presume that the property is community property.

Fig. 5.4 Characteristics of different forms of co-ownership

	Joint Tenancy	Tenancy in Common	Community Property
Creation presumed	No	Yes	Yes
Equal right to possession	Yes	Yes	Yes
Equal interests required	Yes	No	Yes
Right of survivorship	Yes	No	No
Each co-owner can unilaterally convey undivided interest	Yes	Yes	No
Each co-owner can will undivided interest	No	Yes	Yes

Statutory law provides that property co-owned by spouses is presumed to be community property, even if the deed states that it is owned in joint tenancy. If a married couple wants to own property as joint tenants, they must take other steps (such as stating in the deed that the property is not intended to be community property) to be sure that the presumption of community property can be refuted.

In dissolution proceedings, real estate held in joint tenancy is presumed to be community property, regardless of what the deed says. The spouse who objects to this classification must present evidence to rebut the presumption, showing that the couple truly intended a joint tenancy and not community property.

A joint tenancy between spouses is not severed by dissolution of the marriage, and the court does not have the power to award joint tenancy property in the property settlement.

When a spouse dies, the deceased spouse's interest in property held in joint tenancy with the other spouse vests automatically in the survivor. But the heirs and devisees of the deceased spouse may try to establish that it really was community property, rather than a joint tenancy.

> **Example:** The deed to Rick and Samantha's home says, "Richard Fitch and Samantha Walters, a married couple, in joint tenancy." Rick dies, and his will provides that his undivided ½ interest in the home goes to Denise, his daughter by a previous marriage.
>
> If the home was truly owned in joint tenancy, Rick's interest in it could not be willed. Upon Rick's death, the right of survivorship would automatically vest Rick's interest in Samantha. (Rick's attempt to will his interest would not have severed the joint tenancy.)
>
> But Denise wants to establish that the home was really held as community property, not in joint tenancy. In the probate court, she may argue that Rick and Samantha didn't really understand what a joint tenancy was and didn't intend to create one. Denise can use her father's attempt to will his interest to her as evidence that there wasn't a joint tenancy, along with the absence of language in the deed stating that the property should not be considered community property.
>
> If Denise succeeds in proving that the home was community property, the court will award her Rick's undivided ½ interest, in accordance with his will. Denise and Samantha would then own the home as tenants in common. (And then, because of hard feelings generated by the lawsuit, either Denise or Samantha would probably bring a partition action to end the co-ownership.)

Ownership by Associations

The second aspect of real property co-ownership is ownership by associations—businesses, nonprofit groups, and other organizations—rather than individuals. Depending on its form, an association may be a legal entity separate from its individual members or owners.

Title to property can be held in an association's name. Ownership by associations overlaps with the different forms of co-ownership discussed in the first part of the chapter. For example, a business organization may hold property in severalty, or it may be a tenant in common with other organizations or individuals.

A business organization generally can't be a joint tenant, however, since the right of survivorship is the key trait of a joint tenancy. Artificial entities such as corporations potentially have perpetual existence, which would prevent a joint tenant from acquiring any genuine survivorship right.

A real estate agent should understand when and how an association can hold title to real property. Most importantly, she needs to know who can sign (and who must sign) on behalf of an association to enter into contracts and transfer property.

Corporations

The most sophisticated form of association is the **corporation**. The ownership interests in a corporation are divided into **shares**. The corporation is owned by **stockholders** or **shareholders**, individuals who purchase shares in the company as an investment. The money invested provides the corporation with operating capital.

A corporation may have only a few shareholders, or it may have hundreds. The shareholders may simply be several members of a family—as with many closely held corporations—or they may have purchased publicly traded shares on a stock exchange. But the corporation is legally a separate entity from its shareholders. The law treats it as an artificial individual: it can enter into contracts, own property, incur debts, sue and be sued. Because of this special legal status, corporations are tightly regulated by state and federal laws.

Creation. To start a corporation in Washington, its organizers (the **incorporators**) file **articles of incorporation** with the secretary of state's office. The articles establish the corporation's name, list the name and address of each incorporator, explain the share structure, and include a general statement of purpose.

A **domestic corporation** is one organized in compliance with Washington law. A **foreign corporation** is one organized under the laws of another state, or in another country. A foreign corporation involved in Washington real estate transactions must be registered by the secretary of state to do business in Washington.

Management. A corporation's shareholders may have very little direct involvement in its management. They receive an annual report and may inspect the corporate records. They may also attend an annual meeting and vote on some major issues.

The real power behind a corporation is its **board of directors**. The directors govern the corporation's affairs in accordance with its bylaws. They appoint corporate **officers**—for example, the president or chief executive officer (CEO), one or more vice presidents, a treasurer or chief financial officer (CFO), and a corporate secretary—who run the business on a day-to-day basis.

The officers are not automatically authorized to convey or encumber the corporation's real property. These actions must be expressly authorized by a resolution of the board. A title company will usually require proof of the authorization before insuring a transaction.

Liability. The primary advantage of the corporate form of organization is that shareholders are protected from liability for the corporation's debts.

Example: A few years ago, Mendez spent $3,000 on stock in the ABC Corporation. His shares are now worth $3,600.

The ABC Corporation is found liable for an injury caused by a defective product it manufactured, and a $250,000 judgment is entered against the corporation. The judgment creditor can file a lien against the corporation's assets if the judgment is not paid.

However, the creditor cannot proceed against Mendez to collect the judgment. His home, bank accounts, and other property are protected from liability, because the corporation is a separate legal entity. Mendez may lose his original $3,000 investment if the corporation goes out of business because of the judgment, but that is the extent of his liability.

In theory, all stockholders have this protection from liability. But in fact, creditors often require the personal guaranties of the major stockholders before they will make large loans to or enter into a lease with a corporation.

Taxation. One potential drawback to the corporate form of organization is the problem of "double taxation," where income is taxed twice, first at the corporate level and then at the individual level for shareholders. However, not all corporations face this problem; most small businesses organized as corporations are set up as **S corporations**, where the income flows through to the shareholders without first being taxed at the corporate level. An S corporation can have no more than 100 individual shareholders and only one class of stock. Larger corporations, known as **C corporations**, are subject to corporate tax.

Nonprofit Corporations. Until now, our discussion of corporations has been limited to for-profit corporations—businesses organized for the purpose of generating a profit that is distributed to its shareholders. Now let's take a moment to discuss **nonprofit corporations**, which are subject to some different rules.

Nonprofit corporations may be organized for charitable, political, social, religious, or professional purposes. Examples of nonprofit corporations include homeowners associations, social clubs, charities, and service organizations. Note that labor unions and cooperative organizations are excluded from nonprofit corporation status, as are organizations subject to state banking or insurance laws.

In contrast to a for-profit corporation, a nonprofit corporation must be structured so that it shares neither ownership nor revenues with individuals or other corporations. So a nonprofit corporation cannot issue stock or distribute income to its members, directors, or officers. It is also prohibited from lending money or extending credit to directors or officers.

However, nonprofit corporations are permitted to earn revenues, and may pay reasonable compensation to or confer benefits on members, directors, or officers for services rendered.

General Partnerships

A **general partnership** is simply an association of two or more individuals as co-owners of a business run for profit. It doesn't have the formal structure of a corporation or other business organization. Although a partnership can own property, for most other purposes the law does not recognize a general partnership as an entity independent from its members.

Creation. General partnerships are usually created by express agreement (either oral or written). In Washington, they can also be created by implied agreement, based on the actions of the parties. However, having a common interest in a business transaction doesn't automatically create a partnership. The parties must intend to carry on a definite, ongoing business as co-owners, sharing the management and profits. When that is their intention, they have a partnership, whether they call it that or not.

In Washington, general partners are not required to file any paperwork to form a partnership. However, an affidavit of partnership may be filed in the county recorder's office. Although this is not a legal requirement, some lenders or title insurance companies may require such a filing before participating in any transactions with the partnership.

Management and Profits. A general partnership agreement can provide for almost any allocation of rights and duties between the partners. If the agreement doesn't address an issue (or if it is an implied agreement), then the allocation will be according to statute. The rules outlined here are the statutory rules; most of them can be altered in a partnership agreement.

All general partners have an equal voice in the management and control of the business. The partnership is legally bound by the actions of one partner, as long as the partner is acting within the scope of his authority. (Each partner is an agent and a fiduciary of the partnership, so the agency rules explained in Chapters 6 and 7 apply.)

Unless otherwise agreed, the partners all share in the profits equally, even if their contributions to the business are unequal. In fact, some partners may contribute only skill or labor, without making any capital contributions at all. Partners usually divide losses in the same way they share profits.

Liability. General partners have unlimited liability for the acts of the partnership. Each partner can be made to pay the full amount of any partnership debts out of her own pocket.

> **Example:** Power, Quen, and Roberts own the PQR Company, a general partnership. Both the PQR Company and the individual partners are sued for breach of a construction contract, and a judgment is entered against them for $95,000. Neither the individual partners nor the PQR Company pay the judgment, so the judgment creditor claims a lien against Power's home. Power ends up paying the entire $95,000 to protect his home from foreclosure.

Power can then demand reimbursement from Quen and Roberts for their share of the judgment, and can sue them if they don't pay. This personal liability is the main disadvantage of a general partnership. It contrasts sharply with the protection enjoyed by a corporate shareholder, for example.

Partnership Property. All property that general partners bring into the business at the outset, and all that they later acquire for the business, is **partnership property**. Anything purchased with partnership funds is presumed to be partnership property.

Real estate may be acquired in the partnership name. If title is acquired in the partnership name, it can be conveyed only in the partnership name. Note that partnership property can be encumbered or conveyed in the name of the partnership with the signature of any authorized partner. When there are several partners and they live in different cities, this can save a lot of time and expense.

Every partner is an agent of the partnership, and thus the acts of any partner will bind the partnership. However, a partner cannot bind the partnership by acts that exceed his authority if the third party knows that the partner is acting beyond his authority.

> **Example:** Tom, Dick, and Harry own TDH Enterprises, a general partnership. The partnership owns some land, but the title to the land is in Tom's name. Tom sells the land to his brother. Tom and his brother are trying to cheat the partnership out of the property. They both know that the land is actually partnership property and that Dick and Harry would not approve of the sale.
>
> The sale does not bind the partnership. When Dick and Harry find out about the sale, they can recover the land from Tom's brother.

On the other hand, if a partner conveys partnership property to a good faith purchaser who doesn't realize that the partner is not authorized to sell it, the partnership can't recover the property.

> **Example:** Returning to the example above, suppose that Tom sells the land to Arthur, who is an innocent, good faith purchaser. Because Arthur believes that Tom has authority to sell the land, the partnership will be bound by the sale. Dick and Harry can sue Tom for violating his duties to the partnership, but they can't get the land back from Arthur.

Unless otherwise agreed, each partner has a right to possess all partnership property for partnership purposes. A partner has no right to possess partnership property for any other purpose, except with the consent of the other partners.

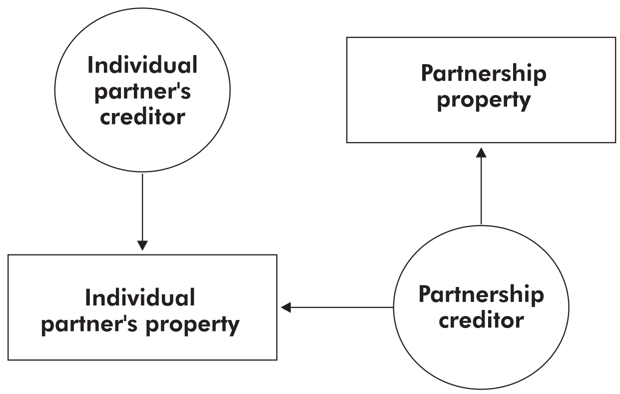
A partner can't transfer her interest in partnership property to someone outside the partnership, except when all of the partners assign the whole property. But (unless otherwise agreed) one partner may assign her interest in the partnership itself to an outsider. That gives the assignee a right to share in the partnership's profits. It does not make the assignee a partner, however, or give her the right to interfere in the management of the business.

Also, if a judgment is entered against a partner personally, the judgment creditor can't claim a lien against the partnership property in order to enforce the judgment.

> **Example:** Abernathy and Bowen own A&B Company, a general partnership. They also own a building as partnership property.
>
> Bowen is involved in an automobile accident, and a judgment is entered against her. The judgment creditor is entitled to liens against Bowen's house and other real property that she personally owns, and the creditor can foreclose if the judgment isn't paid. But the creditor cannot claim a lien against A&B Company's building, since that's partnership property. (The creditor could claim a lien against the building if the judgment were against the partnership rather than Bowen.) However, the creditor could collect the judgment by garnishing Bowen's share of the profits from the partnership.

When a partner dies, his interest in partnership property vests in the surviving partners. The deceased partner's estate has a right to an accounting and a share of the partnership profits, but it does not have an interest in the partnership property.

Fig. 5.5 Partnership liability



Limited Partnerships

A **limited partnership**, like a general partnership, is an association of two or more persons as co-owners of a business. A limited partnership has one or more general partners, plus one or more limited partners. The rights and duties of general partners in a limited partnership are the same as in a general partnership, but the limited partners have only limited liability.

Think of a limited partnership as a compromise between a general partnership and a corporation. Limited partners generally don't participate in the management of the business to the extent that general partners do, although they may have a greater role than corporate shareholders. Like corporate shareholders, limited partners are protected from the business's debts. As a result, limited partnerships are more strictly regulated than general partnerships.

Unlike a general partnership—which can be formed without filing any particular document, or even without any written agreement at all—a limited partnership can be formed only by filing a certificate of limited partnership at the office of the secretary of state. This form includes the name and address of all general partners. It must also include an address where the names and addresses of all limited partners may be found. The names and addresses of the limited partners do not have to be filed with the secretary of state, but they must be available for inspection at the address listed in the form. If the certificate of limited partnership is not filed, or the names and addresses are not available as required, all of the partners may be considered general partners.

A limited partner has no control over partnership property, which is controlled solely by the general partners.

Limited Liability Companies

Owners and investors, especially real estate owners and investors, often choose the **limited liability company** (**LLC**) form of business for its many advantages. First, there is great flexibility in structuring the management of a limited liability company. Second, members of an LLC are subject only to limited liability for the company's obligations. And last, an LLC can be set up so that it is taxed as a partnership. Limited liability companies in Washington are governed by the state Limited Liability Company Act.

Creation. An LLC is created when an LLC agreement is drawn up and a certificate of formation is filed with the state. In the LLC agreement, members can choose virtually any manner of allocating income, losses, or appreciation among themselves. Once the LLC is created, initial and annual reports must be filed with the state and an annual fee must be paid.

Management. LLCs have the flexibility of a general partnership when it comes to managing the business. Management of the LLC is placed in the hands of its members, unless the certificate of formation assigns management to one or more managers.

In a **member-managed** limited liability company, every member has agency authority; that is, all managing members can bind the LLC with their actions. Unless the LLC agreement provides otherwise, all decisions are made by the majority of LLC members. However, the LLC agreement may create a structure in which certain persons or classes of members have different management powers, duties, and voting rights.

In a **manager-managed** limited liability company, ordinary members do not act as agents of the LLC. Unless the LLC agreement provides otherwise, designated managers may be appointed or removed by a majority of the members and do not need to be members of the LLC.

Liability. An attractive aspect of the LLC form is that its members enjoy limited liability like that of corporation shareholders or limited partners. However, members and managers will be liable for any acts or omissions on behalf of the LLC that constitute gross negligence, intentional misconduct, or a knowing violation of the law.

Taxation. As we previously discussed, a major disadvantage to the corporate form of ownership is the double taxation imposed on large, publicly traded corporations and their shareholders. Income is first taxable at the corporate level, and is then taxable at the shareholder level when it is distributed as dividends. Income earned by an LLC, on the other hand, is taxed at only one level—the member level. LLC income is taxed as the personal income of each member, in the same manner as partnership income.

As you can see, LLCs offer a unique combination of advantages. By using this form of business entity, an owner can take advantage of the best attributes of both a corporation and a partnership.

Joint Ventures

A **joint venture** is similar to a partnership, but is formed for a single transaction or a related series of transactions, not as an ongoing business. There are no formal requirements for the creation of a joint venture. The parties simply agree to work together on a project and to share the profits or losses.

A joint venture is not an entity separate from its individual members; however, title to property can be held in the joint venture's name.

Syndicates

A **syndicate** is not a recognized legal entity. Like "company," the term "syndicate" can be used to refer to virtually any business organization. The XYZ Syndicate might be a corporation, general partnership, limited partnership, or trust, and it would hold title accordingly.

Conclusion

In Washington, ownership of real property by married persons is subject to community property laws. There is a very strong presumption in favor of community property. Property is presumed to belong to the marital community unless specific evidence shows otherwise. Certain transactions concerning community property require the consent and signature of both spouses. This requirement is especially significant to a real estate agent, since neither spouse can transfer or encumber community real property unless the other spouse also consents to the transaction.

Co-ownership of property also includes tenancy in common and joint tenancy. The biggest difference between tenancy in common and joint tenancy is the right of survivorship enjoyed by joint tenants.

Many legal presumptions exist in the area of co-ownership. If they want a form of co-ownership that differs from the applicable presumptions, co-owners must clearly and specifically set out their intentions in writing.

Real estate agents also need to be familiar with property ownership by associations such as corporations, partnerships, and limited liability companies. Each type of entity has different characteristics in terms of organizational structure, personal liability, and taxation.

Case Problem

The following is a hypothetical case problem. Most of the facts are taken from a real case. Make a decision on the issues presented and then check to see if your answer matches the decision reached by the court.

The Facts

Jeanette Borghi purchased a property in 1966, using a real estate contract. She married Robert Borghi in March 1975. In July 1975, the Borghis paid off the real estate contract; they received a special warranty deed to the property executed to "Robert G. and Jeanette L. Borghi, husband and wife." However, they did not record the 1975 deed until 1979, when they also used the property as security for a loan to purchase a mobile home to place on the property.

Jeanette Borghi died intestate (without a will) in 2005. Robert was still alive, and he was appointed personal representative of Jeanette's estate. Arthur Gilroy, Jeanette's son from a previous marriage, claimed that he was entitled to a one-half interest in the property because it was Jeanette's separate property at the time of her death.

The superior court held that the property was the Borghis' community property and would pass to Robert under the rules of intestate succession. Gilroy appealed, and the state Court of Appeals reversed the lower court's decision, holding that the property was Jeanette's separate property. The estate then appealed the Court of Appeals decision to the Washington Supreme Court.

The Questions

Was the property separate or community property at the time of Jeanette's death? Is it more important that she owned the property prior to her marriage, or that the Borghis received a deed with both their names on it?

The Answer

The Washington Supreme Court held that the property was Jeanette's separate property, so her son was entitled to a partial interest under the rules of intestate succession. The deed issued in the name of both spouses, received years after the property was first acquired by Jeanette, did not create a presumption that it was community property.

The supreme court stated that property's character as either community property or separate property is determined on the date of acquisition. Under the theory of "inception of title," when property is purchased through a real estate contract, the property is acquired when the contract obligations are first undertaken.

To establish that the property had stopped being Jeanette's separate property, the estate would have had to present evidence of the Borghis' intent to transmute the separate property into community property. The estate had argued that a deed that included Robert's name on it acted as a transfer of the property, as a gift, to the marital community. However, the supreme court suggested that a more affirmative act, in writing, would be necessary to accomplish that—for example, Jeanette executing a quitclaim deed transferring the property to the marital community, or the Borghis entering into a community property agreement. Robert's name on the deed only expressed the Borghis' intent to jointly take title, not necessarily to turn the property into community property. *In the matter of the Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009).

Chapter Summary

- All property owned by a married couple in Washington is either the separate property of one spouse or the community property of both. Both spouses have equal control over the community property. The joinder requirement prevents the transfer or encumbrance of community real property without the signature of both spouses. An unauthorized transfer is voidable by the nonconsenting spouse. Community property is not subject to partition.
- A tenancy in common is the most basic form of co-ownership. Tenants in common may have unequal interests, their interests are undivided, and they share possession of the whole property. A tenant in common's interest can be freely transferred or willed. A tenancy in common may be terminated by partition, either voluntarily or by court order.
- A joint tenancy requires the four unities (time, title, interest, and possession). The key characteristic of joint tenancy is the right of survivorship. It prevents a joint tenant from willing her interest, but makes probate of the property unnecessary. The transfer of a joint tenant's interest severs the joint tenancy by breaking the unities of time and title. Severance does not terminate the co-ownership, but changes it to tenancy in common or community property.
- Title to real property can be held by associations of individuals: corporations, general partnerships, limited partnerships, or limited liability companies. Each form of organization has advantages and disadvantages in terms of management, taxation, regulation, and liability.
- General partners have equal rights of possession and control of partnership property. One partner cannot transfer or encumber his undivided interest in the property separately from the other partners' interests.
- A limited liability company has the flexibility and tax advantages of a partnership, but LLC members have limited liability, like corporate shareholders.

Checklist of Problem Areas

Real Estate Licensee's Checklist

- ❑ Have both spouses signed the listing agreement and the purchase and sale agreement?
- ❑ What kind of interest does the seller have in the property? Is it owned in severalty, or is the seller a tenant in common or joint tenant?
- ❑ If the seller is a tenant in common or a joint tenant, are the other owners aware of the sale? Will the buyer be an owner in severalty or will she be a co-owner?

Seller's Checklist

- ❑ Are you selling separate or community property? If it is community property, has your spouse agreed to the sale and signed the listing agreement and the purchase and sale agreement?
- ❑ If you are a tenant in common or a joint tenant, you may sell your interest in the property without your co-tenants' consent. However, you may sell only your portion, not the entire property.
- ❑ If you hold property as a joint tenant, selling your interest separately will sever the joint tenancy. Severance changes a joint tenancy into a tenancy in common. Does the buyer realize that she is purchasing only an undivided interest in the property?
- ❑ If you hold property as a joint tenant, have you signed any kind of agreement specifying that the property may only be severed by mutual consent?

Buyer's Checklist

- ❑ Are you purchasing property as your separate property or as community property? If it will be community property, has your spouse signed the purchase and sale agreement? If you intend for it to be separate property, is this clearly specified in the agreement and the deed, and are you paying for the property with your separate funds?
- ❑ Will you hold title in severalty or as a tenant in common or joint tenant? If you're attempting to create a joint tenancy, has the four unities requirement been met?

Chapter Quiz

1. Anderson and Baker own a house in Seattle. Anderson has an undivided ¾ interest in the property and Baker has an undivided ¼ interest. They hold the property as:
   a. tenants in common
   b. joint tenants
   c. tenants by the entirety
   d. community property

2. In Washington, a married person cannot hold title to real property:
   a. as separate property
   b. in a partnership
   c. as a tenant by the entirety
   d. as a joint tenant

3. When title to property is held in severalty:
   a. the property cannot be transferred or encumbered without the consent of a majority of the co-owners
   b. the property is owned by one individual
   c. none of the owners can be a corporation
   d. the property cannot be willed

4. The only one of the four unities required for a tenancy in common is the unity of:
   a. time
   b. title
   c. interest
   d. possession

5. When Schultz and White took title to the house as joint tenants, they agreed that only White would live there. What effect did this agreement have on the joint tenancy?
   a. It severed the joint tenancy; unity of possession is essential
   b. It did not sever the joint tenancy if Schultz and White stated that they did not intend to sever it
   c. It did not sever the joint tenancy as long as Schultz is charging White rent
   d. It severed the joint tenancy by partitioning the property

6. Adams, Kester, and Calhoun own some land as tenants in common. Adams and Kester each have an undivided ¼ interest, and Calhoun has an undivided ½ interest. Calhoun wills all his property to Davis. When Calhoun dies, who owns the land?
   a. Adams and Kester each have an undivided ½ interest
   b. Adams and Kester each have an undivided ¾ interest
   c. Adams and Kester each have an undivided ¼ interest, and Davis has an undivided ½ interest
   d. Adams, Kester, and Davis each have an undivided ⅓ interest

7. Ayers, Burns, and Cervas own some land as joint tenants. When Cervas dies, Ayers and Burns each have a ½ undivided interest, because of:
   a. the right of survivorship
   b. unity of possession
   c. the rules of intestate succession
   d. the doctrine of severalty

8. Alton, Barrett, and Carter own a house as tenants in common. Alton and Barrett want to sell the property to a developer; Carter refuses. Alton and Barrett would like a court to order the sale of the property and distribution of the proceeds among the three co-owners. To request such a court order, they will file a:
   a. foreclosure action
   b. interpleader action
   c. quiet title action
   d. partition action

9. Ames, Barry, and Carlson own some land as joint tenants. Carlson sells his interest in the property to Delaney. Which of the following is true?
   a. Ames and Barry each hold an undivided ⅓ interest as joint tenants, and Delaney holds an undivided ⅓ interest as a tenant in common
   b. Ames and Barry each hold an undivided ¼ interest as joint tenants, and Delaney holds an undivided ½ interest as a tenant in common
   c. Ames, Barry, and Delaney each hold an undivided ⅓ interest as joint tenants
   d. Ames, Barry, and Delaney each hold a ⅓ interest in severalty

10. A married couple might choose to hold real property in joint tenancy rather than as community property in order to:
   a. avoid paying property taxes
   b. avoid the probate process
   c. prevent one spouse from conveying his or her interest in the property without the other's consent
   d. prevent a mortgage foreclosure

11. Harry and Wilma are a married couple; they own some land as community property. Harry wills all his property to Annette. When Harry dies, who owns the land?
   a. Wilma owns the land in severalty
   b. Wilma has an undivided ⅔ interest and Annette has an undivided ⅓ interest
   c. Wilma and Annette each have an undivided ½ interest
   d. Wilma, Annette, and Harry's minor child each have an undivided ⅓ interest

12. Which of these is a spouse's separate property?
   a. A house she bought before the marriage
   b. A house purchased during the marriage using her own earnings as a downpayment
   c. A house he received during the marriage in exchange for services rendered to a family member
   d. None of the above; all real property owned by a married person is community property

13. Fong did not consent to any of these transactions involving community property. He can void the transfer or encumbrance in each case except one. Which one?
   a. His wife sold the couple's boat to a neighbor
   b. His wife gave the couple's boat to a neighbor
   c. His wife sold the couple's vacant lot to her cousin
   d. His wife mortgaged the couple's residence

14. The ZAP Corporation owns some land in severalty. In order to sell the land, who must sign the sale documents?
    a. The CEO and at least one member of the board of directors
    b. A majority of the directors
    c. A majority of the stockholders
    d. Corporate officers authorized to sell it by a resolution of the board of directors

15. The LMNOP company is a general partnership. Partnership funds were used to purchase a building for the company's offices. The building is partnership property:
    a. only if the deed lists all the partners and expressly states that they are tenants in partnership
    b. even though the title is in one partner's name alone
    c. only if the title was acknowledged by all the general partners
    d. as long as none of the partners is a married person