PRACTICE MADE PERFECT CLE BC

ESTATES: OUT OF THE ORDINARY PROBLEMS
PAPER 7.1

Joint Tenancy

These materials were prepared by James D. Baird of Boughton Law Corporation, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, June 2008.

JOINT TENANCY

One might question the relevance of discussing joint tenancies in a course on probate and administration of estates. Isn't it a simple matter that jointly held properties pass directly to the surviving joint owner(s) and therefore outside of the deceased's estate? Not always.

Note: The term "joint tenancy(ies)" is used in this article to describe any situation where property, real or personal, is held in a manner which, at law, the death of one joint owner results in the property passing to the surviving joint owner(s) as opposed to passing to the estate of the deceased owner.

The purpose of including this section on "joint tenancies" in a probate course is not to deal with the standard situation where the interests pass automatically to the surviving joint owner, but to discuss those less clear cut situations where assets are owned in joint tenancy (legally) but the parties intend in fact that the assets are the property (beneficially) of only one of them.

Until the 2007 decision of the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17 (CanLII), [2007] 1 S.C.R. 795, (2007), 279 D.L.R. (4th) 513, (2007), 37 R.F.L. (6th) 237, (2007), 224 O.A.C. 330 (see discussion below) the law, although not entirely straightforward, gave relatively unambiguous answers as to who was the real owner, as long as one could sort out the factual matrix involved in originally establishing the joint title.

What follows is largely a discussion of how matters would have stood prior to the *Pecore* decision, and probably still apply to the majority of situations. *Pecore* is discussed at the end and as well as its potential effect.

This paper also discusses other situations where the face of the title may not accurately reflect the state of ownership, perhaps because the joint tenancy has been severed, or title has been inaccurately recorded.

I. Joint Tenancy (Generally)

Legally speaking, property held in "joint tenancy" must be owned by two or more persons in **equal** proportion(s) (i.e., ½ - ½ or ⅓ - ⅓ - ⅓) with identical interests and an equal right to use the whole of the property. Upon the death of a joint owner, the deceased person's interest passes automatically to the surviving joint owners. In law, property held in "joint tenancy" is deemed to pass immediately prior to death. Thus upon death the jointly held property does not form a part of the deceased person's estate. It has already passed to the surviving owner(s) and the property does not pass to the deceased person's heirs or to the beneficiaries under the deceased person's Will.

Joint tenancy is a form of co ownership of property (real or personal). The critical effect for purposes of this discussion is that on the death of a one joint owner the deceased's interest passes automatically to the surviving joint owner(s). Creation of a joint tenancy requires the existence at the time the property is conveyed to the co owners and throughout their co ownership the presence of what are described as the four unities.

(a) Unity of title, that is, all joint tenants must take under the same instrument;

(b) Unity of interest, that is, the interest of each must be identical in nature, extent, and duration;

(c) Unity of possession, that is, each joint tenant has undivided possession of the whole property;

(d) Unity of time, that is, the interest of each must vest at the same time.

II. "Tenancy in Common" versus "Joint Tenancy"?

Property held with other owners in "tenancy in common" does form part of the owner's estate on that person's death. It does not pass on death to the surviving co-owners. While interests in "joint tenancy" must always be held in equal shares, co-owners may hold different proportions of a particular property as "tenants in common" (i.e., ¼ - ¾).

III. "Legal" and "Beneficial" Ownership in Respect of Property

The law recognizes that there is a legal title to property (which has no real value), and in addition there is the beneficial interest in the property (which is the "real" ownership and which has the real value). This important distinction, between "legal" and "beneficial" ownership (which, strictly speaking, is not confined to the discussion of "joint tenancy" property), is at the root of the estate lawyer's enquiry when dealing with situations of jointly held property.

While usually the person who owns property owns both the "legal" title and the "beneficial" interest, that is not always going to be the case. The "beneficial" owner is the true owner. The law recognizes that sometimes the "legal" owner is not the true owner of the property but merely holds the title to the property for the true owner (the "beneficial" owner). In the context of administering an estate one needs to inquire whether there is any reason the deceased held the entire beneficial interest. So, for example, where a parent had transferred title to the family home to one of several children in "joint tenancy," the question remains did they transfer just the "legal" title or did they intend to transfer the "beneficial" ownership as well.

While these situations often arise deliberately as part of a professionally advised estate plan, most problems for the estate lawyer occur where the parties create joint tenancies as part of a self advised, self help effort in estate planning. In the professionally advised plan one would hope to find clear documentation of the parties intentions. (Sample forms of a "deed of gift" and a "bare trust declaration" which could be used to clarify the parties intentions are found at the end of this paper.) It

seems financial advisors, bank clerks, friends and Uncle Harry all have an idea how joint tenancy works and have no difficulty recommending that everyone put all their assets in joint tenancy. In their view this avoids all kinds of complications on death, such as probate, probate fees, the need for lawyers, and even the necessity of paying income tax. These planning exercises are rarely accompanied by any documentation other than the transfer of the asset into joint tenancy.

The lawyer advising on probate and administration needs to be constantly alive to this issue and should never assume that assets apparently held in joint ownership were automatically intended to pass beneficially at death to the surviving joint owner.

When analyzing the deceased's intention at the time of creation of the joint tenancy, the personal representative (and their lawyer) should consider whether the deceased intended to transfer simply the "legal" title or also transfer the "beneficial" ownership of property. Clients are not always going to know or understand the significance of the question, so some explanation is required. Two examples serve to illustrate the point.

(a) Consider parents who transfer their principal residence into "joint tenancy" with their children who do not reside in the home with them. A principal residence is subject to the principal residence exemption from tax on any capital gains. If the child received the "beneficial" interest in the property (and not simply the "legal" title), future gains on the child's portion of the title will be subject to tax. If the principal residence had been left in the parent's name, the children's portion of the capital gain would not attract tax. Similarly, if the child has creditors, or a judgment is brought against the child, the child's interest in the property will be subject to the claims of the creditor. To avoid this result, the parents could (and should) transfer the "legal" interest only.

(b) Consider a parent who transfers a revenue property or stock portfolio. If the parent intended to transfer both the "legal" and the "beneficial" ownership, then the transfer would have triggered a "deemed disposition" for income tax purposes and the payment of tax on the deemed capital gain at the time of the transfer. This may or may not be desirable. If the parent did not want this result then the parent should have transferred the "legal" interest only.

Although it depends on the circumstances (a husband and wife holding the family home in joint tenancy, having purchased it together years before, mostly likely hold the legal and beneficial interest jointly) the lawyer advising the personal representative should in many cases make inquiries as to the true state of affairs. The personal representative should be advised of the consequences where the jointly held legal title was only created as a matter of convenience. Likely the surviving owner then holds the asset in trust for the estate of the deceased.

If the intention is to avoid probate fees (which is a common reason given for entering into these kinds of transfers), care must be taken. Probate fees will only be avoided if it is unnecessary to obtain probate of a Will or to administer a deceased person's estate. If for any reason a Will needs to be probated, the executor must list all assets belonging to the deceased on death. Therefore assets, in which the survivor of the joint tenancy had only held the "legal" interest and not the beneficial, remains and must be included in the deceased person's estate. The "beneficial" interest is still owned by the deceased. It does not pass on death as a matter of "joint tenancy" only the "legal" interest does. The "beneficial" interest remains part of the estate and is subject to probate fees.

Most difficulties have their origin in non arms length, no consideration transfers of assets from one person (say a parent) into joint names with another (say a child). When part of a professionally prepared estate plan one would hope to find documentation setting out the parties intentions. If the transfer of property into joint tenancy was intended to include the beneficial interest then there should be a deed of gift prepared evidencing the donor's intention. If on the other hand the creation of the joint tenancy was for convenience only (perhaps to avoid probate fees) then there should be a declaration of bare trust signed by the donee's and evidencing the intention that no transfer of

beneficial interest was intended and the donee holds legal title only, the beneficial interest remains that of the owner. This is of critical importance on death as traditionally (see the below discussion concerning the situation after *Pecore*) one would conclude the asset remains owned beneficially by the estate of the deceased. Legal title would pass on death to the surviving joint owner, but they would receive the beneficial interest subject to the trust in favour of the deceased and the deceased's estate.

Unfortunately in the self help plan any documentation is absent, and memories and intentions conflict as to what was intended. Surprisingly the child who was helping out the aged mother and had all of the bank accounts placed in joint tenancy (to make it easier to assist mom while alive) following mom's death recalls that mom intended to gift all of those assets to be a gift to the child. (Parenthetically it should be noted there doesn't seem to be any good reason to set up bank accounts in joint tenancy just to assist with day to day management when a power of attorney is perfectly adequate for the job.)

IV. Practice when Applying for Probate or Administration

The lawyer acting for the personal representative must ensure that the personal representative reports all assets of the deceased when applying for probate. The affidavit of personal representative (or administrator) contains the following statements:

(a) The statement marked exhibit * to this affidavit discloses the assets and liabilities of the deceased, irrespective of their nature, location, or value, which pass to the deceased's personal representative, together with the names and addresses of the beneficiaries, their relationship to the deceased, and the property passing to them.

(b) I will disclose forthwith to the court the existence of any asset or liability that has not been disclosed in exhibit * when I learn of the same.

If it is determined that jointly held assets actually belong to the estate they must be included. This is a difficult point to make to your personal representative client especially if they and the deceased have specifically organized the deceased's affairs so that assets pass outside of the Will through survivorship of a joint tenancy.

Some clients will object and will even tell you that others (including some lawyers and court registry staff) have told them it is not necessary to list joint tenancies in the disclosure statement. This is possibly true, although this writer is advised by the Vancouver Supreme Court Probate Registry that they would not give such advice, if they were aware that the beneficial interest belonged to the deceased. With those facts they would advise that the interest would have to be disclosed.

The critical point for the lawyer is the need to ensure that the affidavit contains the truth. The client personal representative also needs to be aware of his duties to the heirs and beneficiaries. All assets properly passing through the estate of the deceased must be accounted for. While it may seem convenient to allow one child who takes a property by survivorship to proceed on trust to transfer the asset to the estate beneficiaries, if the personal representative fails to disclose this as an estate asset, they set themselves up for difficulties when the surviving joint owner fails to carry through, dies, becomes incapacitated etc. The personal representative should be consistent from the outset on their position concerning the true ownership of assets.

V. Severance of the Joint Tenancy Before Death (Unregistered Instruments)

Another situation to be alert to when administering an estate is the possible severance of the joint tenancy by some act taken by either the deceased or another joint owner prior to death. Severance of the joint tenancy occurs at any time there is a break in one of the four unities. See the decision of *Feinstein v. Ashford*, 2005 BCSC 1379 (CanLII), (2005), 50 B.C.L.R. (4th) 382.

Also consider whether one of the joint tenants has dealt with their interest separately from the other joint owner(s). If one, and not necessarily the deceased, had transferred, or mortgaged their interest that would sever the joint tenancy.

Also note the effect of s. 56(2) of the *Family Relations Act* which declares the interests of separating spouses to be "tenants in common";

> **Equality of entitlement to family assets on marriage breakup**
>
> 56(1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
>
> (a) a separation agreement,
>
> (b) a declaratory judgment under section 57,
>
> (c) an order for dissolution of marriage or judicial separation, or
>
> (d) an order declaring the marriage null and void
>
> respecting the marriage is first made.
>
> (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

VI. Rectification

On occasion clients will face the need to probate an estate and include an asset which on the record is not held in joint tenancy but there is evidence that it was intended to be held jointly. This is worth further enquiry. The original (conveying) documents establishing title to the assets should be reviewed. In the case of land the transfer form can be obtained from the registry. It has happened that the Land Registry has inadvertently entered a property conveyed in joint tenancy as a tenancy in common. The registry or court should be able to correct this if it was just a mistake of the registry

Where the mistake was in the drafting of the original conveyance document correction may be more difficult. It may be possible on certain facts (such as a lawyer drafting error when preparing the transfer) to obtain an order of the court for rectification. There have apparently been some successful rectification applications. In the reported decision *Peters v. British Columbia (Registrar of Land Titles)*, 1999 CanLII 5620 (B.C.S.C.) Mr. Justice McEwan commented (at para. 13) that although the facts warranted relief, there are "serious doubts that I can after the fact breathe life into a form of legal status that is now a practical impossibility there being no unity of possession." Subsequently however, and upon further evidence, an order for rectification was granted. Where the mistake is as a result of lawyer error the Lawyers Insurance Fund will assist and can provide a precedent for such the rectification application.

VII. Post Pecore

The 2007 decision of the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17 (CanLII) ,[2007] 1 S.C.R. 795, (2007), 279 D.L.R. (4th) 513, (2007), 37 R.F.L. (6th) 237, (2007), 224 O.A.C. 330 has introduced an entirely new twist to the foregoing discussion.

Until *Pecore* it was believed by most that the right of survivorship to jointly held property was merely an incidence of the joint ownership. The right to take by survivorship was not separate from joint ownership. It was not an independent property right.

The facts in *Pecore* fit the pattern of many family situations. A father in a no consideration transfer in which he contributed all of the assets placed his mutual funds, bank accounts, and income trusts in joint name with his adult daughter. After his death a competing claim, by the daughter's husband, who inherited through the deceased's Will argued that the jointly held accounts were of the legal interest only. The classic argument of legal vs. beneficial entitlement ensued.

Much of the decision in *Pecore* dealt with the related but separate issue of whether the father's gratuitous transfer created a resulting trust or whether the presumption of advancement to a child operated to make it a gift. *Pecore* changed the law and abolished the presumption of advancement to adult children.

For our purposes however the importance of the decision is as it relates to joint ownership and the right of survivorship. The peculiar fact pattern in this case on the establishment of the joint tenancy however is set out in para. 10 of the decision of Rothstein J:

> In 1993, Paula's father was told by a financial advisor that by placing his assets in joint ownership, he could avoid 'the payment of probate fees and taxes and generally make after-death disposition less expensive and less cumbersome' ((2004), 7 E.T.R. (3d) 113, at para. 7). In February of 1994, he began transferring some of his assets which were mainly either in bank accounts or in mutual funds to himself and to Paula jointly, with a right of survivorship (*ibid*., at para. 6). In 1996, Paula's father was advised by his accountant that for tax purposes, transfers to his daughter (as opposed to a spouse) could trigger a capital gain, with the result that tax on the gain would be due as of the year of disposition. As a result, Paula's father wrote letters to the financial institutions purporting to deal with the tax implications. In these letters he stated that he was 'the 100% owner of the assets and the funds are not being gifted to Paula.'

Unlike so many cases where intention of the donor is ambiguous, or impossible to discern, in *Pecore* the father stated that he would hold on to the beneficial interest as his own property. As to the beneficial interest it would appear the four unities are not established. And in fact the father continued to treat the accounts as his sole property, including payment of all income taxes on the income generated.

Starting at para. 45 the Court addressed the issue of survivorship in a joint account. Notwithstanding that the lifetime beneficial interest in the account was not joint, indeed that was rebutted by the father's letters which he said he retained 100% ownership, the Court found that he could gift the "right of survivorship" and do so independently of at least joint beneficial ownership.

Although it is not entirely clear what effect the *Pecore* decision will have some observations should be made.

A number of respected commentators are of the view *Pecore* has changed the law and created the right of survivorship as a separate and independent property right. That is, it is possible to gift the right of survivorship of the beneficial interest in property, on death, by merely transferring the legal title into joint ownership and retaining the beneficial interest exclusively to the donor, during the lifetime of the donor. One may make this gift inter-vivos and apparently it is not testamentary so need not comply with the formal rules of testamentary instruments.

How does the "right of survivorship" to the beneficial interest arise when the beneficial interest itself was not a joint tenancy? Does it somehow append to the legal interest which is in joint tenancy?

When does the "right of survivorship interest" vest? At the time of transfer, or at death?

Can the "gift" of the right of survivorship be unilaterally revoked by the donor prior to death?

The tax implications of a gift of the right of survivorship are unknown. Is it a deemed disposition for income tax purposes at the time of the gift and creation of the (legally) jointly held account?

Will the usual indicia that show a property was placed in joint tenancy for convenience, be strong enough to prove there was no intention to at the same time to gift the beneficial interest of the right of survivorship, or will additional proof be needed?

VIII. In Summary

Lawyers acting for personal representatives (or others) when dealing with estates need to be alive to the fact that assets held in joint tenancy on their face may not in fact be joint tenancies beneficially.

Lawyers must consider who the real owner of the property is and whether it is the same persons shown as registered legal owners of the asset?

If probate is required all assets, including the deceased's beneficial ownership of assets that do not pass to the surviving legal owner must be disclosed and included as assets of the estate.

Consider actions taken by one or more joint owners during the deceased's lifetime that may have had the effect of severing the joint tenancy. Unregistered conveyance, mortgage or other dealings with one joint owner's interest separate from the others. Has there been a triggering event under the *Family Relations Act*.

If a title incorrectly shows a property as owned as tenants in common, when the parties intended joint tenancy, consider if the title can be corrected. (or conversely if a title is shown as joint but the intention was to hold as tenants in common.)

IX. Appendix—Sample Documents

THIS **DEED OF GIFT** made the * day of *, *.

BETWEEN:

*****

(the "Donor")

AND:

*****

(the "Donee")

WHEREAS:

A. The Donor has transferred all of his interest in the bank account located at:

Account # *

HSBC
*

(the "Property")

to the Donee jointly with the Donor together with the right of survivorship;

B. For greater certainty the Donor wishes to confirm the transfer of the said Property to the Donee including the right of survivorship is by way of a complete and absolute gift to the Donee.

NOW THEREFORE THIS DEED OF GIFT WITNESSETH as follows:

2. The Donor hereby gives, conveys and assigns the Property to the Donee jointly with the Donor together with the right of survivorship to have and to hold the same absolutely.

3. The Donee hereby accepts the gift and all of its benefits and obligations made by the Donor.

IN WITNESS WHEREOF the parties to the Deed of Gift have set their hands and seals as of the date first above written.

SIGNED, SEALED and DELIVERED by ***** in the presence of:

_____
Signature

_____
Print Name

_____
Address

_____

_____
Occupation

_____
*

SIGNED, SEALED and DELIVERED by * in the presence of:

_____
Signature

_____
Print Name

_____
Address

_____

_____
Occupation

_____
*

THIS DECLARATION OF BARE TRUST AND AGENCY AGREEMENT dated as of the * day of *, 2008.

BETWEEN:

***,**
of *****

(the "Bare Trustee")

AND:

***,**
of *****

(the "Owner")

WHEREAS:

A. The Owner is beneficially entitled to the lands and premises hereinafter described:

Parcel Identifier: *
Parcel "*" (*) Lot "*" Suburban Block *

(the "Property");

B. Legal title to the Property was registered in the name of the Bare Trustee in the * land title office on *, 2006, but since that date the Bare Trustee have held the Property in trust for *.

C. The Bare Trustee will hold the Property, as nominee, agent and bare trustee for the sole benefit and account of the Owner as principal and beneficial owner thereof, in accordance with this Declaration. THEREFORE in consideration of the premises and $1.00 now paid by the Owner to the Bare Trustee, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. Appointment

The Owner appoints the Bare Trustee as her nominee, agent and bare trustee to hold the Property for and on behalf of the Owner in accordance with this Declaration, with full power to manage and deal with the Property and execute any instrument, document or encumbrance in respect of the Property for the sole benefit and account of the Owner, all at the direction of the Owner as principal and beneficial owner and strictly in accordance with this Declaration and the Bare Trustee confirms her acceptance of such appointment.

2. Bare Trustee's Agreements

The Bare Trustee acknowledges and agrees that:

(a) the Bare Trustee will hold the legal title to the Property as nominee, agent and bare trustee for the sole benefit and account of the Owner as principal and beneficial owner and the Bare Trustee will have no equitable or beneficial interest in the Property, and the equitable and beneficial interest in the Property will be vested solely and exclusively in the Owner;

(b) the Bare Trustee will hold the Property as nominee, agent and bare trustee for the sole benefit and account of the Owner as principal and beneficial owner subject to and in accordance with this Declaration and subject to the terms and conditions of any transfer, deed, mortgage, debenture, security agreement, or other instrument, document or encumbrance pertaining to the Property;

(c) any benefit, interest, profit or advantage arising out of or accruing from the Property is and will continue to be a benefit, interest, profit or advantage of the Owner and if received by the Bare Trustee will be received and held by the Bare Trustee for the sole use, benefit, and advantage of the Owner and the Bare Trustee will account to the Owner for any money or other consideration paid to or to the order of the Bare Trustee in connection with the Property as directed in writing by the Owner;

(d) the Bare Trustee will, upon the direction of the Owner, deal with the Property and do all acts and things in respect of the Property at the expense of and as directed by the Owner from time to time and will assign, transfer, convey, lease, mortgage, pledge, charge, or otherwise deal with the Property or any portion of the Property at any time and from time to time in such manner as the Owner may determine, at the extent permitted under all relevant laws; without limiting the generality of the foregoing, the Bare Trustee will transfer legal title to the Property to or as directed by the Owner forthwith upon the written demand of the Owner;

(e) the Bare Trustee will, upon and in accordance with the direction of the Owner, act as the agent of the Owner, as undisclosed principal, in respect of any matter relating to the Property or the performance or observance of any contract or agreement relating to the Property;

(f) acting under this Declaration at the direction of the Owner, the Bare Trustee will have the full right and power to execute and deliver, under seal and otherwise, any transfer, deed, statement of adjustments, plan, lease, sublease, easement, right of way, license, restrictive covenant, building scheme, release or other instrument or document pertaining to the Property without delivery of proof to any person (including, without limitation, any other party to any such instrument or document or the Registrar of any land title office) of her authority to do so and any person may act in reliance on any such instrument or document and for all purposes any such instrument or document will be binding on the Owner;

(g) acting under this Declaration at the direction of the Owner, the Bare Trustee will have the full right and power to borrow money from time to time and to covenant to repay money borrowed by the Owner either alone or with others from time to time and to secure the repayment of any and all indebtedness and liabilities with respect to any amounts so borrowed by the grant of any charge or encumbrance (both fixed and floating) on, or security interest in, the Property or any part thereof, by way of debenture, mortgage, assignment of rents, assignment of sale proceeds, security agreement or other instrument or document without delivering proof to any person (including, without limitation, any other party to any such instrument or document or the Registrar of any land title office) of her authority to do so and any person may act in reliance on any such instrument or document and for all purposes any such instrument or document will be binding on the Owner;

(h) the Bare Trustee will not deal with the Property in any way or execute any instrument, document or encumbrance in respect of the Property without the prior consent or direction of the Owner;

(i) the Bare Trustee have no discretion to deal with the Property in her capacity as bare trustee; and

(j) the Bare Trustee will notify the Owner forthwith upon receipt by the Bare Trustee of notice of any matter or thing in respect of the Property or any portion of the Property, including, without limitation, in respect of any tax, lien, charge or encumbrance in respect of the Property.

3. Reimbursement of Expenses

Any payments or disbursements made by the Bare Trustee in respect of the Property in accordance with this Declaration will be made as the agent of and for the account of the Owner, as principal, and the Owner will reimburse the Bare Trustee for any amount reasonably and properly expended by the Bare Trustee in connection with the Property with the consent or direction of the Owner, but the Bare Trustee will not receive any fee or remuneration from the Owner for acting under this Declaration.

4. Time Limitation

The powers conferred on the Bare Trustee under this Declaration will not extend beyond the expiration of 80 years from the date of execution and delivery of this Declaration, unless renewed.

5. Indemnity by Owner

The Owner agrees to indemnify and save harmless the Bare Trustee against any and all liability, loss, cost, action, claim or expense resulting from the Bare Trustee holding of title to or dealing with the Property as directed by the Owner from time to time, except to the extent that the same results from a dishonest, fraudulent or negligent act or omission of the Bare Trustee.

6. Notices

Any notice given pursuant to or in connection with this Declaration will be in writing and delivered personally to the party for whom it is intended at the last known address of such party.

7. Assurances

The Bare Trustee will perform all such other acts and things and execute all such other documents as are necessary or desirable in the reasonable opinion of the Owner to evidence or carry out the terms or intent of this Declaration.

8. Governing Law

This Declaration and all matters arising under it will be governed by and construed in accordance with the laws of British Columbia, which will be deemed to be the proper law of this Declaration, and the Courts of British Columbia will have non-exclusive jurisdiction to entertain and determine all claims and disputes arising out of or in any way connected with this Declaration and the validity, existence and enforceability of this Declaration.

9. No Waiver

No failure or delay on the part of either party in exercising any right, power or privilege under this Declaration will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power of privilege. Except as may be limited in this Declaration, either party may, in its sole discretion, exercise any and all rights, powers, remedies and resources available to it under this Declaration or any other remedy available to it and such rights, powers, remedies and recourse may be exercised concurrently or individually without the necessity of making any election.

10. Amendment

This Declaration may be altered or amended only by an agreement in writing signed by the parties.

11. Enurement

This Declaration enures to the benefit of and is binding upon the respective successors, legal representatives and assigns of the parties.

IN WITNESS WHEREOF the parties have executed this Declaration as of the date first above written.

SIGNED, SEALED and DELIVERED by ***** in her capacity as registered owner and Bare Trustee of the Property in the presence of:

_____
Name

_____
Address

_____

_____
Occupation

_____
*****

SIGNED, SEALED AND DELIVERED by ***** in her capacity as Owner in the presence of:

_____
Name

_____
Address

_____

_____
Occupation

_____
*****