Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are talking about concurrent ownership of property, as part of our "Listen and Learn" series. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to our "Listen and Learn" series. Today, we're going to be discussing concurrent estates, which is when two or more people own property at the same time. Concurrent estates differ from present and future estates in that co-tenants have a current right to possess the property simultaneously. With present and future estates, in contrast, one person has the right to possess the property currently, while the other has an ownership interest but their right to possession won't commence until sometime in the future. We're only going to be discussing concurrent estates today; however, if you're interested in learning more about present and future estates, we have a two-part series on these topics which we'll link to for you in the transcript and show notes for this podcast.

Lee Burgess: With that said, let's get started! As we mentioned, a concurrent estate is when two or more people have the simultaneous right to possess property. It is important to note up front that, while their ownership percentages may differ, all co-tenants have an absolute right to access, possess, and use the entire property. So, even if Co-tenant A only has a 30% ownership interest in Whiteacre, they still have the right to access and use 100% of the property. As we'll discuss a little later, ownership percentages come into play when dividing up a co-tenant's right to certain property-related income or their obligation in regards to certain expenses. It will have no bearing on their right to possession.

Lee Burgess: There are three major forms of concurrent ownership that we will discuss today: (1) Tenancy in Common; (2) Joint Tenancy; and (3) Tenancy by the Entirety. Each of these three tenancies differs in four major ways: (1) how they are created; (2) whether there is a right of survivorship; (3) whether a co-tenant can unilaterally sell, transfer, or encumber the property; and (4) how they can be terminated or severed.

Lee Burgess: We'll start off by examining tenancies in common, which are the default form of concurrent ownership. The tenancy is considered the default, because there is a

rebuttable presumption that any conveyance to two or more people as joint owners is a tenancy in common. So, if no other form of ownership is explicitly referenced, we assume that the co-tenants hold the property as tenants in common.

Lee Burgess: With a tenancy in common, each tenant has the right to possess the entire property, even if they have different fractional shares of ownership. Tenants in common will not always hold equal ownership interests. For example, A and B may co-own Whiteacre as tenants in common, but their ownership interest might not be split 50/50. They may own the property 80/20 or 70/30. The important thing to remember is that, regardless of their ownership interest, they still have the right to possess the entire property as a whole. This is what we call the "unity of possession".

Lee Burgess: Tenancies in common do not grant co-tenants a right of survivorship. What this means is that ownership interests with tenancies in common are inheritable. If A and B own Whiteacre as tenants in common and A dies, A's heirs will inherit A's ownership interest in the property. B won't become the sole owner of the entire property when A dies, which is what happens when there is a right of survivorship. Rather, B will now be a tenant in common with whoever A named as their heirs.

Lee Burgess: Now, what happens if a tenant in common wants to sell their interest in the property? Or maybe they want to lease that interest to a third party – is that allowed? The answer is "yes" to both! Tenants in common have the unilateral right to transfer, devise, mortgage, or lease their ownership interest in the property. They don't need permission from the other co-tenants, and their decision will have no impact on the interests held by those other co-tenants. Let's consider this example: A and B are tenants in common of Whiteacre, with A owning a 75% ownership interest and B owning the remaining 25%. A decides to sell his interest in the property to C. This is completely permissible; however, it is important to note that you can never sell more than you have. So, in this example, A has a 75% ownership interest in the property, so that is all he can sell to C. B will continue to retain the remaining 25% interest and own the property as a tenant in common with C. C is essentially just stepping in to fill A's place.

Lee Burgess: The last thing we need to look at with tenancies in common is how they can be severed. There are three ways to sever a tenancy in common and we'll discuss each of them in turn. The first is for one tenant in common to sell their ownership interest to the other. So, let's change our previous example up a bit. A and B still own the property 75/25, but instead of selling his 75% interest to C, A decides to sell his share to his co-tenant, B. B will now have a 100% ownership

interest in the property on their own, so there would no longer be a tenancy in common. The second way we can sever a tenancy in common is if all the tenants in common agree to sell the property to a third party. So, in our example with A and B, both agree that they are going to sell the entire property to C. C will now own a 100% interest in the property, severing the tenancy in common. The third and final way to terminate a tenancy in common is a court ordered partition, which essentially means the court orders the property be severed into two parcels, with A owning one in its entirety, and B owning the other.

Lee Burgess: Our next form of concurrent ownership is called a joint tenancy. A joint tenancy is when two or more individuals jointly own property with a right of survivorship. The key thing to look for in identifying a joint tenancy is that survivorship language, because, as we discussed, tenancies in common have no right of survivorship.

Lee Burgess: To create a joint tenancy, four requirements must be met in addition to that survivorship language. We call these the "four unities". The first unity is a familiar one – the unity of possession. If you remember from our discussion on tenancies in common, this requires that each co-tenant have the right to access, possess, and use the entire property regardless of their ownership interest.

Lee Burgess: The second unity is the unity of interest. This requires that each co-tenant be granted equal ownership interests in the property. So, if A and B own Whiteacre as joint tenants, they must each own a 50% ownership share. If A, B, and C own Whiteacre as joint tenants, then they must each own a third. That is one of the major differences between the creation of a joint tenancy and a tenancy in common: the ownership interests must be identical.

Lee Burgess: The third requirement that must be satisfied is the unity of time, which requires that the property be conveyed to all the co-tenants at the same time. Consider this example: A owns Whiteacre in its entirety. Ten years down the road, A marries B and wants to add B as a joint tenant. A would not be able to do so, because they were not conveyed the property at the same time. There is an entire decade between the conveyances. So, A and B would have to be tenants in common, because they do not satisfy the unity of time.

Lee Burgess: The final requirement to create a joint tenancy is the unity of title. This means that the property must be conveyed to all the joint tenants, not just at the same time, but also through the same legal instrument.

Lee Burgess: If all four of these unities are met, then a joint tenancy can be formed. With a joint tenancy, there is a right of survivorship. This means that when one joint tenant dies, their ownership interest is automatically going to pass to the

surviving joint tenants. Consider this example: A and B are joint tenants. A dies with a will leaving his share of the property to C. The will is going to be irrelevant here, because there is that right of survivorship. B will own the entire property upon A's death. C will own nothing.

Lee Burgess: Let's also look at how this would play out in a scenario where we have more than two joint tenants. What happens when one joint tenant dies, leaving two surviving tenants? A, B, and C own Whiteacre as joint tenants, then A dies. B and C both have a right of survivorship, so they will each get an equal portion of A's third of the property. They will now own the property 50/50 as joint tenants. If B then dies later down the road, their 50% share will pass to C through the right of survivorship and C will own the entire property alone.

Lee Burgess: Okay, so we've discussed how joint tenancies are created and that they have a right of survivorship. Now, we're going to look at what other rights joint tenants have and how those rights can impact the tenancy. Similar to tenants in common, joint tenants have the unilateral right to sell the property. However, there is a major difference here! If a joint tenant unilaterally sells their ownership interest to a third party, it will sever the joint tenancy. This is because the sale will void the unities of title and time. Let's explore this with an example: A and B are joint tenants. A decides to sell to C. A can sell his 50% share to C, but the joint tenancy will be severed. This is because the property will have been conveyed to B and C at different times and in two different legal instruments, breaking two of the four unities. With the joint tenancy severed, B and C will instead own the property as tenants in common, each with a 50% ownership interest.

Lee Burgess: Now, what happens if we add a third joint tenant into this example? So, A, B, and C own Whiteacre as joint tenants. A then sells his interest to D. This is where joint tenancies can become a little complicated. If A sells his interest to D, it will only sever the joint tenancy in regards to A's interest. It does not impact the joint tenancy between B and C. What this means is, after the sale, D will hold a one third interest in Whiteacre as a tenant in common with B and C. However, B and C will still each hold a one third interest as joint tenants between themselves. So, if B later dies, their third will pass to C. D and C will then own Whiteacre as tenants in common, with D owning a third and C owning two thirds. At this point, no right of survivorship remains because we now have a tenancy in common. So, both C and D's interests are inheritable and will pass to their respective heirs when one or both of them die.

Lee Burgess: The last thing we need to discuss in regards to joint tenancies is whether joint tenants can mortgage or lease their interest in the property without severing the joint tenancy. In both circumstances, jurisdictions are split. The vast majority

of states consider a mortgage a lien on the property, and it will not sever the joint tenancy unless the property is later sold in foreclosure following a default. However, in a minority of states, the granting of a mortgage is seen as a transfer of title, which will sever the joint tenancy and convert it into a tenancy in common in regards to that interest. Like we discussed with sales, if there is more than one remaining joint tenant, they will continue to hold their property interests with each other as joint tenants. Jurisdictions likewise split in how to handle the leasing of a joint tenant's interest. Some will hold the lease destroys the unity of interest, thus severing the joint tenancy, while other jurisdictions consider the lease as merely temporarily suspending the joint tenancy until the lease's expiration.

Lee Burgess: The final form of concurrent ownership that we will discuss today is a tenancy by the entirety, which is a concurrent ownership between spouses. The property is considered to be owned by the marital entity rather than the individual here. So, the couple is essentially being seen as one.

Lee Burgess: To create a tenancy by the entirety, the four unities of a joint tenancy must be satisfied, along with a fifth unity called the "unity of person". The unity of person requires that the joint tenants be married at the time of conveyance. Like with a joint tenancy, a tenancy by the entirety does have a right of survivorship. However, unlike with a joint tenancy, a unilateral sale will not break the survivorship. That is because there is no unilateral right to sell, mortgage, or lease a property held as a tenancy by the entirety. Remember, the married couple is seen as one entity, so they must both agree as to whether to sell the property or not. Any unilateral sale made by one co-tenant would be invalid.

Lee Burgess: There are three ways to terminate a tenancy by the entirety. The first is both parties agree to sell the property. The second is if the parties agree to restructure to a different form of concurrent ownership, so either a joint tenancy or a tenancy in common. The final way to severe a tenancy by the entirety is if the parties get a divorce. This is because a divorce will break that fifth unity requiring a marriage between the co-tenants.

Lee Burgess: I know that was a lot of information at once, so let's do a quick recap. There are three types of concurrent ownership, which is when two or more people own a piece of property at the same time. The default form of concurrent ownership is a tenancy in common, which is inheritable with no right of survivorship. Each tenant may own a different fractional share, and they can unilaterally sell, mortgage, lease, or otherwise transfer that interest without disrupting the shares of other co-tenants. A joint tenancy can only be created if four requirements, known as the four unities, are met: the conveyance must have

occurred at the same time, in the same legal instrument, granting equal ownership interests, with a right to possess the entire property. If all four of these unities are satisfied, then a joint tenancy is formed and the co-tenants have a right of survivorship that can be severed if one tenant unilaterally sells their share of the property. Lastly, a tenancy by the entirety operates very similar to a joint tenancy; however, the tenants must satisfy a fifth unity, which requires that they be married to one another. The co-tenants are seen as one entity and cannot make any unilateral decisions to sell, mortgage, lease, or otherwise transfer the property.

Lee Burgess: Hopefully, you're all still with me! There are a lot of rules to take in, so let's walk through some hypotheticals to provide some context to our discussion on concurrent ownership. Our first hypo is adapted from Question 3 on the October 2020 California bar exam, but we've edited it a bit to focus solely on the concurrent estate issue:

Lee Burgess: "Andrew, a widower with three adult children (Bobby, Carol, and Dylan), owned a 40-acre parcel of wooded land called Havenwood. In 1989, Andrew died leaving a valid will that gave 'all my real estate to Bobby, Carol, and Dylan as joint tenants with a right of survivorship'. Did Andrew convey a valid joint tenancy to Bobby, Carol, and Dylan?"

Lee Burgess: So, what do we think? Let's consider what we're being asked. The hypo wants to know if there is a valid joint tenancy, so we need to evaluate whether a joint tenancy was created here. To create a joint tenancy, we need to satisfy those four unities of possession, interest, time, and title. The instrument of conveyance must also state that there will be a right of survivorship. That requirement is clearly met, as the deed expressly references that Bobby, Carol, and Dylan will have a right of survivorship. So, what we need to focus on here is the four unities.

Lee Burgess: Unity of possession exists when all joint tenants have an equal right to possess the land. Andrew's will gives Bobby, Carol, and Dylan an interest in the land, and nothing indicates they have anything less than equal possessory rights, so this unity is satisfied. The will conveyed Havenwood to the three of them equally, so they all have the same interest in the land. This satisfies the unity of interest. Unity of time and title are satisfied here as well, since the conveyance to Bobby, Carol, and Dylan occurred all at the same time via the same conveyance in Andrew's will.

Lee Burgess: Since all four unities are met and the will expressly states there is a right of survivorship, Andrew's will created a valid joint tenancy.

Lee Burgess: Hopefully, this hypothetical helped provide some context as to how these issues might play out on an exam. Let's walk through another example to be certain. This hypo is adapted from Question 5 on the July 2011 California bar exam. Again, we've edited this hypothetical a little to focus solely on the concurrent estate issue:

Lee Burgess: "Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris 'jointly with the right of survivorship'. In 1976, without the knowledge of Chris, Beth conveyed her interest in Blackacre to Frank. In 1977, Beth and Frank died in a car accident. Frank did not leave a will and his only living relative at the time of his death was his cousin Mona. In 1978, Chris and Andy learned that Beth had conveyed her interest in Blackacre to Frank. When Mona approached Chris a day later to discuss her interest in Blackacre, Chris told her that he was the sole owner of Blackacre. What right, title, or interest in Blackacre, if any, did Andy initially convey to Beth and Chris? What right, title, or interest in Blackacre, if any, are now held by Chris and Mona?"

Lee Burgess: What do we think about this one? We have a lot more moving pieces here, so let's take it in stages. First things first, we need to determine what interest Andy initially conveyed to Beth and Chris. The hypo tells us that the deed conveyed Beth and Chris the property jointly with a right of survivorship. Immediately, we can see there is survivorship language, which should be a red flag to look at whether this is a valid joint tenancy. Like our first hypo, Andy must have satisfied the four unities to create a joint tenancy, and he appears to have done so here. There is no indication that either Beth or Chris were conveyed anything less than an equal right to possess Blackacre. They were granted equal interest in the property 50/50, and this occurred at the same time in Andy's written deed. So, we have a valid joint tenancy, where Andy conveyed the property to Beth and Chris.

Lee Burgess: Now, how does Beth's unilateral decision to transfer her interest in Blackacre to Frank impact this joint tenancy? If you recall from our earlier discussion, a joint tenant may sell their ownership interest; however, that sale will sever the joint tenancy because it destroys the unities of title and time. When a joint tenancy is severed, the new tenants hold the property as tenants in common. So, here, Beth's sale to Frank severed her joint tenancy with Chris. Frank and Chris do not have their interests conveyed by the same instrument and the conveyances occurred at different times. Therefore, Frank and Chris both had a 50% interest in Blackacre as tenants in common.

Lee Burgess: We're also told Frank later died in a car accident, leaving Mona as his heir. Since Frank and Chris were tenants in common at the time of Frank's death, there was

no right of survivorship. Frank's interest in Blackacre is, therefore, inheritable. As Frank's only living relative, Mona will get Frank's 50% interest in Blackacre and be considered a tenant in common with Chris, who will continue to hold the remaining 50% interest.

Lee Burgess: And with that, we're out of time! If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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