



## Legal Notes

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### **WHO PAYS THE MORTGAGE AFTER DEATH?**

In a recent BC case the court was asked to decide if a widow could require the executor of her husband's estate to pay half a joint mortgage debt from non-joint (estate) assets.

The widow and the deceased husband purchased real property as joint tenants, which passed wholly to the wife by right of survivorship. But the couple had borrowed money secured by a mortgage registered against the property. The amount outstanding at death was about \$400,000.00. The widow sought an order requiring the estate to pay half, on the basis that the mortgage was expressed to be "joint and several." Since this is common wording when two or more people purchase property together, the widow's argument had potentially significant implications.

The executor of the estate refused to pay anything and argued that the widow was solely responsible to pay the mortgage debt.

#### *General Review of the Law*

There are different ways a person can receive property after death. Jointly-held property passes by right of survivorship to the survivors on title after one co-owner dies (as in the case above where it passed to the widow after the husband died). Single-owner property can be bequeathed under a Will: for example, a testator can specifically bequeath a cottage to a certain beneficiary. Or, such property might form part of the general residue of an estate. (There are other circumstances, such as property held in trust, or subject to a life estate, however we will limit discussion here.)

A review of law reveals the following general principles:

1. Joint tenants who take the entire interest in real property by right of survivorship will normally take sole responsibility for debts or charges registered against title when those debts or charges were incurred to acquire or maintain the property.
2. If, however, a debt or charge registered against joint tenancy property was not related to the acquisition of the land or is not otherwise connected with it, the estate of the deceased may be liable to contribute to repayment of the debt. (An example of an "unconnected" charge might be a mortgage to secure a loan when the monies were used for an unrelated business venture.)

*SEE REVERSE...*

3. Section 30 (2) of the *Wills Act*, RSBC 1996, applies to property passing under a Will and says effectively that if a person dies owning land subject to a mortgage, the people who receive the land are liable to pay the mortgage debt. An exception is if the deceased signified a contrary intention by Will, Deed or other document. Therefore, if a deceased made a Will leaving a cottage to one of his children and there is a mortgage registered against the cottage, the child takes the cottage subject to the mortgage and will be responsible to pay it unless the Will specifies the mortgage debt should be paid in some other way. (This is an issue to discuss with your lawyer when making a Will).

Interestingly, section 30(1) of the *Wills Act* defines "mortgage" to include "any charge, whether equitable, statutory or of other nature, including a lien..." It may be that this section charges the beneficiary of the property with responsibility to pay creditor judgments or other debts even when incurred for purposes not related to the property. (If so, the anomalous result is to place people taking by right of survivorship in a more favourable position than those taking under a Will.)

4. If the outstanding amount of a registered debt exceeds the value of the property (whether passing by right of survivorship or by specific bequest under a Will), the residuary beneficiaries of a deceased's estate may be called upon to cover the shortfall.
5. When more than one beneficiary receives property as a result of a death, they share responsibility for registered charges in accordance with their proportionate interests.

#### *Court Decision*

In the above-referenced case of the widow claiming against her husband's estate, the presiding Judge wrote, "I have decided that the [widow's] claim for contribution by the estate to one-half of the mortgage payments must fail...Here the [widow] has, by operation of survivorship, received the entire interest that secured the joint and several obligations. Similarly, it strikes me that in these particular circumstances, in the absence of an agreement to the contrary by the parties or some suggestion that the land was less than the debt, or some other relevant circumstance, the [widow] could not equitably be entitled to call on the executor of the estate to pay half of the debt."

#### *Conclusion*

Most often, the recipient of real property is responsible to pay any charges registered against it. However this issue warrants consideration by those responsible for the administration of an estate, with special attention to charges unrelated to the acquisition or maintenance of the property.

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