

NSW Law Reform Commission

REPORT 73 (1994) - UNILATERAL SEVERANCE OF A JOINT TENANCY

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Terms of Reference and Participants

To the Honourable John P Hannaford, MLC
Attorney General for New South Wales

Unilateral Severance of a Joint Tenancy

Dear Attorney General

We make this final Report to the reference to this Commission dated 14 November 1990.

Hon Gordon J Samuels AC QC

(Chairman)

Hon J S Cripps QC

(Commissioner)

Mr H D Sperling QC

(Commissioner)

Professor David Weisbrot

(Commissioner)

Terms of Reference

On 14 November 1990, the Attorney General, the Hon J R A Dowd QC, required the Commission to inquire into and report upon:

- (i) whether and in what respect the law relating to the unilateral severance of a joint tenancy should be altered; and
- (ii) any related matter.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon R M Hope AC CMG QC (until 2 April 1993)

The Hon G J Samuels AC QC (from 3 April 1993)

The Hon J S Cripps QC

Mr H D Sperling QC

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Executive Summary

In this report the Commission recommends that the law be changed to permit unilateral severance of a joint tenancy in Torrens Title land by the simple device of registering a declaration of severance. The Commission further recommends that unilateral severance by declaration be available to joint tenants of personal property. Joint tenancies are an extremely common form of property co-ownership in New South Wales. The most distinguishing feature of this form of co-ownership is the right of survivorship. The practical significance of the right of survivorship is that upon the death of one joint tenant the property does not devolve according to that person's will, but "survives" to the other joint tenant. The right of survivorship overcomes any testamentary provision to the contrary.

This consequence of a joint tenancy is entirely suitable in the context of harmonious co-ownership. However, when the relationship between co-owners deteriorates the right of survivorship may become inappropriate.

The only way to destroy the right of survivorship is by severing the joint tenancy. There are a number of existing methods for severing a joint tenancy. However, in practice these methods do not always operate satisfactorily: they can be lengthy, complex, costly and sometimes uncertain.

It is often only in a life threatening situation that people are forced to organise their affairs and confront the issue of what is to happen to their property after death, and to consider the details of property devolution.

With the delays involved in the current methods of severance, this consideration might occur too late; and intentions of arranging for the property, the subject of the joint tenancy, to be left to other parties may be defeated.

A need exists for a simple, cheap and quick method of unilaterally severing joint tenancies.

There is some opposition to this move. Though never explicitly stated, at the base of the opposition appears to be the view that since a joint tenancy is deliberately created, generally following consultation and by mutual decision of all parties, it is therefore wrong to facilitate the severance of that joint tenancy by one party alone. People holding this view are under the misconception that there is some security or permanence in a joint tenancy. This is wrong. Not only is severance possible at present but furthermore the process of severance itself is not inherently difficult or problematic. It is the procedures which have been established that make the process complex.

An assignment of Old System land, and thus a severance, can be effected relatively quickly and simply. For this reason the Commission does not recommend the extension of severance by declaration to Old System land.

Under the Commission's proposal a severance of a joint tenancy in Torrens Title land into a tenancy in common in equal shares is effected upon registration of a real property form, to be developed. This procedure meets the essential criteria. It is:

Simple: The declaration of severance is a standard form which is easy to understand and leaves no party in doubt about the current ownership status of the property. The primacy of the Register is maintained in accordance with the Torrens Title system of land registration.

Quick: The process involves completing a form for registration at the Land Titles Office. The involvement of third parties, be it in the form of a purchaser, a trustee or a court is unnecessary. Problems involved in accessing the certificate of title are avoided; the declaration would be registered without the certificate of title being produced.

Affordable: The method involves no court costs, minimal legal fees and nominal stamp duty (at most).

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In addition, this method of severance represents an improvement on the existing methods. The Registrar-General is to give notice to the other joint tenants advising that severance has occurred, which ensures that there will be no "secret" severances.

Severance by registered declaration is intended to be available generally to joint tenants. Trustees, executors and other persons who hold property as joint tenants by virtue of their office are specifically excepted, severance not being appropriate action for persons holding in a representative capacity.

The Report also recommends that a variation of this procedure should be implemented to enable joint tenants of personal property to sever unilaterally by written declaration. The variations are designed to take account of an absence of a register, or limited registration facilities.

The Commission's recommendations do not affect the existing law relating to severance of joint tenancies. Introduction of unilateral severance by registered declaration merely increases the options available to a joint tenant seeking to sever the joint tenancy.

Summary of Recommendations

1. Registration of a declaration of severance should be introduced as a means of severing a joint tenancy unilaterally. [para 7.36]
2. Notice of the severance should not be a prerequisite to severance. [para 8.10]
3. The Registrar General should notify the other joint tenant(s) of the severance following registration of a declaration of severance, and of the need to consider arrangements for the disposition of the resulting interest. [para 8.13]
4. The declaration of severance should be registerable without production of the certificate of title. [para 8.14]
5. The effect of a declaration of severance should be to convert the joint tenancy into a tenancy in common in equal shares. [para 8.17]
6. Where there are more than two joint tenants, severance by declaration by one joint tenant should not affect the joint tenancy as between the remaining joint tenants. [para 8]
7. Unilateral severance of a joint tenancy by registered declaration should be in addition to, and not in substitution of, other available methods of severing a joint tenancy. [para 8.18]
8. The existing law need not be amended to make notification a requirement for all methods of severance. [para 8.23]
9. A separate RP form entitled "Declaration of Severance" should be created. It should identify the property and the joint tenants. It should contain an acknowledgment clause confirming that the joint tenant has given consideration to making provision for the disposition of the property following severance. It should contain an execution clause and an attestation clause, and should conform with such other requirements as may be prescribed by regulation. [para 8.30]
10. The consent of any mortgagee, chargee or judgment creditor is not required as part of the scheme for severance by declaration. [8.43]
11. As a general rule and subject to the exceptions following, unilateral severance by declaration should be available to all joint tenants. [para 8.44]
12. Unilateral severance by declaration should not be available to effect severance of a joint tenancy of Old System land. [para 8.47]
13. Persons or corporate bodies who hold property as joint tenants by virtue of their office should not be permitted to sever unilaterally by declaration without the leave of the court. [para 8.53]
14. Severance by declaration should be available to joint tenants of personal property. As a general rule, and subject to any prohibition to the contrary by statute or in an instrument relating to the item of personal property, a written declaration of severance communicated to the other joint tenant(s) should take effect at law and in equity.

In cases where there is a system of registration of title, severance at law should be postponed until the Register is appropriately altered. However, a severance of the joint tenancy in equity should occur on communication of the written declaration of severance to the other joint tenant(s).

Similarly, in so far as a severance of the joint tenancy cannot be achieved at law, for whatever reason, then the written declaration should have effect in equity upon communication of the declaration to the other joint tenant(s). [para 8.63]

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15. A declaration of severance should be added to the list of dealings in s 74H(5) of the *Real Property Act* 1900 permitting the recording in the Register of a declaration of severance notwithstanding the presence of a caveat, unless declarations of severance are specifically forbidden by the caveat. [para 8.77]
16. Section 66G of the *Conveyancing Act* 1919 should be amended to explicitly provide that an application brought under the section survives the death of one or more of the parties. [para 8.79]
17. Solicitors and licensed conveyancers should be educated to impress upon co-purchasers of property the significance of the different forms of co-ownership, the entitlement to sever, the methods of achieving severance and of the opportunity to caveat (where relevant). [para 8.87]
18. After two years of operation the Law Society should conduct a survey of its members to assess unilateral severance by declaration to determine whether the method has successfully served its purpose, whether it could be improved and whether it has had any untoward effect. [para 8.88]

1. Introduction

BACKGROUND TO THE REFERENCE

1.1 On 14 November 1990, the then Attorney General, the Honourable JRA Dowd QC, MP, asked the Commission to inquire into and report upon:

- (i) whether and in what respect the law relating to the unilateral severance of a joint tenancy should be altered; and
- (ii) any related matter.

1.2 The reference arose under the Commission's Community Law Reform Program. The Program allows the Commission to give preliminary consideration to proposals for law reform made by members of the legal profession and the community at large and, where it is thought appropriate, to seek a suitable reference from the Attorney General.¹

1.3 The matter under consideration was first raised in correspondence from Professor John Wade (then of the University of Sydney, now of Bond University), and author of a number of texts on the subject of family law and property division upon marriage breakdown. Professor Wade identified a number of difficulties involved in the unilateral severance of joint tenancies especially in the context of estranged couples holding property as joint tenants.

1.4 In marriage and de facto relationships, couples frequently own property, both real and personal, as joint tenants. According to material supplied by the Land Titles Office, joint tenancy is the most common form of real estate co-ownership in NSW. If one tenant dies the property automatically passes to the surviving tenant. On the breakdown of the relationship, one party may try to end the joint tenancy to prevent his or her estranged or former spouse taking the property by survivorship. However, due to the cumbersome and complex means available to end a joint tenancy unilaterally and effect property settlements, this process may take several years to complete. If the joint tenant seeking to sever the joint tenancy dies in the meantime a severance may not be effected at all.

1.5 An examination of this topic is timely considering the rise in the incidence of marital breakdown.² The problem has been highlighted in three reported cases in New South Wales³ in which unilateral severance was attempted as a means of preventing property passing by survivorship to an estranged spouse. In each case a joint tenant had executed a transfer to sever the joint tenancy but for various reasons registration of the transfer under the *Real Property Act 1900* (NSW) had not taken place at the time of the severing joint tenant's death. The Court held in each case that unilateral severance of the joint tenancy had not occurred because there was no registration of the transfer. The deceased joint tenant's share consequently survived to the remaining joint tenant.

CONSULTATION

1.6 In September 1991 the Commission distributed a Discussion Paper entitled "Unilateral Severance of a Joint Tenancy" in which the Commission invited comment on whether the law relating to unilateral severance of a joint tenancy should be changed to provide a speedy and effective way to sever unilaterally a joint tenancy, and if so, the manner in which such reform may best be achieved.

1.7 Submissions in response to the Discussion Paper were received from the New South Wales Land Titles Office, Mr Brendan Edgeworth (Senior Lecturer in Law, University of NSW), the Victorian Bar Council, Mr Michael Reymond (from the law firm Sly & Weigall), the Property Law Committee of the Law Society of New South Wales and the Senior Assistant Land Registrar at HM Land Registry, England. All but one of the submissions which addressed the issue supported the introduction of a simpler method of effecting a unilateral severance of a joint tenancy.

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1.8 The single dissenting submission, from the Property Law Committee of the NSW Law Society rejected the proposal completely, arguing that the concerns raised by the Commission in the Discussion Paper would be more appropriately addressed by other means, such as enlarging the Supreme Court's jurisdiction for sale or partition and amplifying the powers of the Family Court.

1.9 In August 1992 the Commission invited a number of persons with interest and expertise in the area to participate in a discussion on the issues raised both in the Discussion Paper and in the submissions received in response to the Discussion Paper. The Commission gratefully acknowledges the assistance and contribution provided on this occasion by Mr Bernard Coles QC, Ms Margaret Stone (consultant, Freehill Hollingdale and Page), Mr Brendan Edgeworth and representatives from the New South Wales Land Titles Office and the Law Society's Property Law Committee.

1.10 A more extensive analysis of the operation and implementation of the three possible models, developed in outline at that meeting, and a detailed consideration of associated matters were undertaken by the Commission and the further observations of Ms Margaret Stone and Mr Brendan Edgeworth were received. The views of Ms Diane Skapinker from the Law Faculty of the University of Sydney were also received with appreciation.

ORGANISATION OF THIS REPORT

1.11 This Report consists of eight chapters.

Chapter 2 - Background. This chapter provides a brief summary of the present state of the law in relation to joint tenancies. The discussion in this chapter elaborates on the material contained in DP 23. It examines the defining features of a joint tenancy and provides a historical overview to illustrate the context in which joint tenancies developed.

Chapter 3 - Existing methods of unilateral severance. This chapter reviews the presently available methods of unilaterally severing a joint tenancy.

Chapter 4 - Shortcomings of the existing modes of effecting unilateral severance. The various obstacles to severance presented by the existing methods and which may be encountered by a joint tenant seeking to sever the joint tenancy in a timely fashion are examined in this chapter.

Chapter 5 - Why should unilateral severance be simplified? This Chapter draws together the reasons for supporting the introduction of a simpler method of unilaterally severing a joint tenancy.

Chapter 6 - Reform in other jurisdictions. This chapter outlines the legislative provisions existing in other jurisdictions enabling unilateral severance of a joint tenancy by notice.

Chapter 7 - Recommendation: Unilateral severance by registration of a declaration of severance. This chapter contains the Commission's central recommendation for the introduction of unilateral severance by registered declaration. The reasons for preferring this method over other possible options for reform are set out.

Chapter 8 - Features of the system of severance by registration of declaration. The Commission's recommendations for reform with supporting commentary are presented in this chapter.

FOOTNOTES

1. The nature and progress of the Community Law Reform Program is discussed in detail in the Commission's Annual Reports.
2. For recent statistics refer to Australian Bureau of Statistics *Divorces Australia* 1992 Catalogue no 3307.0.
3. *McNab v Earle* [1981] 2 NSWLR 673; *Freed v Taffel* [1984] 2 NSWLR 322; *Corin v Patton* (1990) 169 CLR 540; (1990) 64 ALJR 256; (1990) 92 ALR 1; (1988) 13 NSWLR 10; (1988) 13 NSWLR 15.

2. Background

JOINT TENANCY

What is a joint tenancy?

2.1 Where two or more persons¹ simultaneously hold an interest in the same parcel of land or item of personality, they do so either as joint tenants or tenants in common. Joint tenancy as a form of co-ownership has two distinguishing features: the right of survivorship and the four unities.

The right of survivorship

2.2 The right of survivorship (or *jus accrescendi*) is the most significant incident of a joint tenancy. When one joint tenant dies the whole of the estate remains with the surviving joint tenant(s). The survivor is not regarded as succeeding to the deceased joint tenant's interest, as the survivor acquired that interest at the time of transfer. The effect of the death is simply to free the property from the control of one of its owners. The interest of a joint tenant in the subject property cannot be bequeathed or disposed of by will. As long as co-owners remain joint tenants this right to survivorship cannot be defeated. A joint tenant is free, however, to sever the joint tenancy during his or her lifetime. If severance does take place during the lifetime of the joint tenant, thereby creating a tenancy in common, the interest in the property will devolve in accordance with the provisions of that person's will or be otherwise distributed in accordance with the rules of intestacy. (See tenants in common, paragraph 2.4 below.)

The four unities

2.3 The following four unities must be present for a joint tenancy to exist.

Unity of Possession: Each co-owner is entitled to possession of the whole of the property, not exclusively for himself or herself but to be enjoyed together with the other joint tenants.

Unity of Interest: The interest of each joint tenant must be the same in nature, extent and duration.

Unity of Title: All the joint tenants must derive their interests from the same document or the same act.

Unity of Time: The interests of all joint tenants must vest at the same point in time. There are two exceptions to this: any conveyance executed to a trustee for beneficiaries or any disposition in a will may give rise to a joint tenancy in the grantees, even where unity of time does not exist.²

Joint tenancy distinguished from a tenancy in common

2.4 Tenants in common each have a distinct yet undivided share in the property, which can generally be dealt with by each tenant in common at their liberty. There is no right of survivorship. Upon his or her death, the share of a tenant in common passes to the beneficiary or beneficiaries nominated in his or her will, or descends to the persons entitled to his or her property under the rules governing intestate succession. The only unity which is essential for there to be a tenancy in common is unity of possession.

Development of joint tenancy

2.5 Co-ownership is common to many developed systems of law. However, joint tenancy as a means of co-owning property does not appear to have any exact counterpart in systems which are not modelled on English law.

Position at common law

2.6 At common law there is a presumption that an interest given to two or more persons either by way of legacy or otherwise is joint unless there are words of severance.³

2.7 Viewed in its historical context it is clear how this presumption arose. From the perspective of feudal lords, a joint tenancy was preferable because the right of survivorship made it more likely that the land would vest in one tenant from whom feudal dues could be more conveniently exacted. From the point of view of feudal tenants, a joint tenancy was preferable because certain feudal services which would otherwise be due separately from each tenant in common could be avoided. For example, feudal incidents of tenure connected with inheritance could be avoided through the operation of the right of survivorship. Finally, from the perspective of purchasers of real property a joint tenancy was preferable because it made the investigation of title much easier. Joint tenants hold a single title whereas each tenant in common has a separate title. If a joint tenant died there remained only one title whereas if a tenant in common died, his or her share might be left to a number of persons thereby proliferating the number of titles to be searched before the land could be sold as a whole.⁴

2.8 By the eighteenth century the courts had developed a distinct preference for tenancies in common but were constrained to follow the "ancient law" whereby joint tenancies were favoured.⁵ To overcome this constraint the courts tended to interpret the words used in a disposition in a liberal fashion. The slightest indication that a tenancy in common was intended was seized upon. If this was not possible the courts would be "... driven to rely on minute grounds for holding a severance to have taken place."⁶

2.9 Equity's preference was always for the certainty and equality of a tenancy in common. Thus, even though the legal estate might have passed by survivorship, if there were circumstances indicating a distinct severalty of interests, the survivor was regarded in equity as holding the legal estate in trust for himself or herself and the legal personal representative of the deceased co-owner.

Statutory position

2.10 The common law presumption in favour of joint tenancies appears to have been reversed under s 26(1) of the *Conveyancing Act 1919* (NSW). The Royal Commissioner⁷ appointed to consider the *Conveyancing Bill* was cognisant of the courts' reluctant obligation to uphold the common law presumption. In the explanatory memorandum accompanying the draft cl 26 of the *Conveyancing Bill* the Commissioner stated:

... At present the presumption of law is that if property is conveyed or devised to persons, they take as joint tenants ... The clause as drawn raises a presumption the other way and presumes a tenancy in common unless otherwise indicated.

When the Bill was reintroduced into Parliament in 1919 it was accepted by Parliament at the time that cl 26 "radically alters the law".⁸ In committee, the Minister for Housing explained the reason for overriding the common law thus: "Because the Commissioner thinks - and I must say it seems to me that it is so - the present rule generally defeats the intention of the donor."⁹

2.11 Section 26(1) has the effect of vesting the beneficial interest in the property conveyed (whether with or without the legal estate) to persons as tenants in common, unless they are shown, either by the terms or by the tenor of the instrument, to be executors, administrators, trustees or mortgagees, or to take as joint tenants. Accordingly, persons will still take as joint tenants where the instrument expressly so provides.¹⁰

Torrens Title land

2.12 At first glance the position under the *Real Property Act* 1900 (NSW) appears to be inconsistent with the presumption created under the *Conveyancing Act*. Section 100(1) of the *Real Property Act* provides that: “two or more persons who may be registered as joint proprietors ... shall be deemed to be entitled ... as joint tenants”. In practice the difficulties presented by this apparent contradiction are circumscribed. The Registrar General requires instruments presented for registration to state expressly whether co-owners are to take as joint tenants or tenants in common.¹¹ When the relationship between these two statutory provisions arose for consideration before the Court of Appeal in *Hircock v Windsor Homes (Development No 3) Pty Ltd*¹² it was held that no inconsistency existed between the two provisions. Section 100(1) did not deem all co-owners to be joint tenants. The subsection has effect only on the registration of the instrument and means:

If two or more persons are registered as joint proprietors of an estate or interest in land under the provisions of the Act, they shall have the same rights as if they were joint tenants of a similar estate or interest at common law.¹³

2.13 In light of this preference for tenancies in common it is curious that the 1992 Edition of the standard contract for the sale of land provides that if the parties fail to nominate a particular form of co-ownership, then by default (being the option printed in block capitals on the contract) the co-owners are to be joint tenants.

HOW POPULAR ARE JOINT TENANCIES?

2.14 The benefits accruing from this form of co-ownership, in terms of smooth transition of ownership, make joint tenancies an attractive arrangement for couples purchasing property together. This convenience is reflected in the high proportion of co-owners preferring to adopt this arrangement. The Land Titles Office estimates that in NSW joint tenancies outnumber tenancies in common by a factor of 11 to 1.¹⁴

SEVERANCE OF A JOINT TENANCY

2.15 A joint tenancy may be severed during the lifetime of the joint tenants. Severance operates to convert the interest held as joint tenant into one held as tenant in common. If there were originally three joint tenants then following severance by one of the joint tenants the other two joint tenants continue to hold the remaining two-thirds as joint tenants, so that the one who survives takes the whole of the two-thirds.

2.16 At common law there are three ways in which a joint tenancy can be severed. These are outlined in the classic statement on severance by the Vice-Chancellor, Sir W Page Wood, in *Williams v Hensman*¹⁵ and cited with approval in *Corin v Patton*:

... **in the first place**, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant (sic) is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivorship. **Secondly**, a joint-tenancy (sic) may be severed by mutual agreement. And, **in the third place**, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.¹⁶ (Emphasis added)

WHY SEVER A JOINT TENANCY?

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2.17 There are several reasons why co-owners may wish to sever the joint tenancy. Undoubtedly the most common event precipitating severance is the breakdown in the relationship between co-owners. In these circumstances the likelihood is that each of the co-owners would no longer wish the other co-owner to take the property in its entirety but would prefer to leave his or her share to someone else.

2.18 If only one party desires to sever the joint tenancy then only the first method mentioned in *Williams v Hensman* (ie, an act of any party operating on his or her own share) allows unilateral severance of a joint tenancy. The second and third methods involve at least an implicit agreement between the parties to sever a joint tenancy.

FOOTNOTES

1. Pursuant to s 25 of the *Conveyancing Act* 1919 (NSW) corporations are capable of holding property in joint tenancy, notwithstanding the common law rule that a corporation cannot die.
2. See for example, *M'Gregor v M'Gregor* (1859) 1 De G F & J 63 at 73; 45 ER 282 at 286.
3. *Morley v Bird* (1798) 3 Ves Jun 629; 30 ER 1192.
4. For historical background on the development of the joint tenancy see generally A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (Law Book Co, Sydney, 1991) at 301-302.
5. *Morley v Bird* (1798) 3 Ves Jun 629; 30 ER 1192.
6. *Williams v Hensman* (1861) 1 J&H 546; 70 ER 862 at 866.
7. Royal Commission appointed to inquire into the terms and provisions of a Bill to amend and consolidate the law of property and to simplify and improve the practice of conveyancing (1918).
8. as per Mr Johnston, member for Bathurst, New South Wales *Parliamentary Debates* Session 1919 Vol 76 at 1793.
9. New South Wales. *Parliamentary Debates* Session 1919 Vol 76 at 1793.
10. *Conveyancing Act* 1919 (NSW) s 26(2).
11. In accordance with clause 7 of the *Real Property Regulation* 1993 all relevant dealings must state whether the co-proprietors are to be joint tenants or tenants in common. According to the Land Titles Office if there is no such statement then a requisition is raised requiring the matter to be clarified. The dealing will not be registered until the requisition is satisfied. (Letter from Land Titles Office to NSW Law Reform Commission dated 26 March 1993).
12. [1979] INSWLR 501
13. *Hircock v Windsor Homes (Development No 3) Pty Ltd* [1979] 1 NSWLR 501 at 506.
14. Letter from the Land Titles Office to the NSW Law Reform Commission dated 26 March 1993.
15. (1861) 1 J & H 546, 557-8; 70 ER 862, 867.
16. (1990) 169 CLR 540; (1990) 64 ALJR 256, 258; (1990) 92 ALR 1.

3. Existing Methods of Unilateral Severance

INTRODUCTION

3.1 In the previous chapter the Commission noted that more than one person simultaneously owning property may do so either as joint tenant or tenant in common. Property may be either real or personal.¹ Personal property includes tangible movable objects (corporeal personal property or choses in possession) as well as intangible rights such as debts and shares in a company (incorporeal personal property or choses in action). In this chapter the Commission examines the existing methods of unilaterally severing a joint tenancy.

SEVERANCE BY ALIENATION

3.2 A joint tenant is free at any time to sell or transfer (alienate) his or her interest in the property, the subject of the joint tenancy, to a third person. Alienation operates to sever the joint tenancy because it destroys the unity of title. As a general rule, severance by selling or transferring a joint tenant's interest to a third person does not require the consent or notification of the remaining joint tenant(s). Upon transfer, the transferee and the other joint tenant will hold equal shares as tenants in common.

3.3 It is instructive to examine the manner in which various forms of property may be alienated in order to gain an appreciation of the problems which can arise when unilateral severance is attempted by this method.

Alienation of real property

Old System land

3.4 This is the name given to land not yet brought under the Torrens Title land registration system. To transfer an interest under Old System Title at law the transferor must execute and deliver a deed of conveyance. Delivery by a party is constituted by any words or conduct expressly or impliedly acknowledging that he or she intends to be bound immediately and unconditionally by the provisions of the deed. Equity will recognise a transfer for consideration provided that it is in writing or evidenced by writing.

Torrens Title land

3.5 Under the Torrens system, no interest in land can pass at law until a transfer is registered.² However even if there has been no alienation (and so no severance) at law, an effective alienation of the equitable interest by one of the joint tenants will result in severance of the joint tenancy in equity. Consequently, provided that there is consideration for a transfer, severance of a joint tenancy in equity will be immediately effective on exchange of contracts for sale of the interest notwithstanding that severance at law will occur only when the transfer is registered.

3.6 The position is more complicated where the transfer of land is by way of gift and the transfer has not been registered. This is discussed in more detail in Chapter 4. Essentially, alienation, and so severance, will occur in equity only where the donor has done everything which is necessary on his or her part to transfer the property. Generally this will require the donor joint tenant to have signed and handed to the donee a registrable form of transfer and to have done whatever is necessary to enable the donee to have access to the certificate of title so that the transfer may be lodged for registration.

Alienation of personal property

3.7 As a general rule personal property can be alienated by much less formal methods than those applicable to real estate. Under a contract for the sale of goods, legal title passes according to rules laid down in the *Sale of Goods Act* 1923. Chattels may be alienated by deed, with or without consideration, and with no requirements for delivery. However, a gift of corporeal personal property may also be made without deed or writing provided that the gift is accompanied by delivery of possession. Delivery consists of the handing over of the chattels themselves or of the means of access to them.

3.8 The requirements for the effective assignment of personalty not capable of physical possession are more onerous. At common law, choses in action were not assignable. Section 12 of the *Conveyancing Act* 1919 now authorises the absolute assignment of a debt or legal chose in action. In addition, various statutes permit the assignment of particular classes of choses in action provided that the statutory requirements are satisfied. Examples of choses in action which, by virtue of statute, may now be assigned include: bills of exchange; shares and debentures; copyright; patents and designs; trademarks; rights of entry; insurance policies and bills of lading. The efficacy of a deed of gift in relation to these particular items of personalty depends on whether the donor has done everything necessary to put the donee in his position having regard to their ordinary mode of assignment.

3.9 If the imperfect assignment is for value then pursuant to the maxim that “equity regards as done that which ought to be done” an equitable assignment may be effected without a deed or writing,³ no particular form of words being necessary so long as the intention is shown that the chose in action is to be transferred to the assignee.⁴ But an equitable assignment must be distinguished from a mere revocable mandate or direction by a creditor to a debtor to pay a third party.⁵

3.10 Though the position is far from settled, it appears that dispositions of equitable interests in personalty are caught by the provision in s 23C(1)(c) of the *Conveyancing Act*, and must therefore be in writing.⁶

SEVERANCE BY CONVERSION

3.11 Where a joint tenant wishes to sever a joint tenancy but retain an interest in the property and otherwise avoid the difficulties involved with alienation to third parties, conveyancers have sought to adopt the device of converting the interest by alienation back to the joint tenant who will then hold his or her interest as a tenant in common. Severance will occur provided that the conveyance is effective to pass an interest in the subject property either at law or in equity. This can be effected in either of the following ways:

by conveyance to a third party to hold on trust for the transferring joint tenant;

by direct conveyance from the joint tenant to himself or herself.⁷

Conveyance to a trustee

Real property

3.12 Where a joint tenant intends to create a trust of Old System land, the interest is passed when the deed of conveyance is delivered to the trustee. Nothing short of execution and delivery of a deed of conveyance will be effective to pass any interest in the property.

3.13 If the land is under Torrens Title there will be no vesting at law in the trustee, and so no severance at law, until registration of the transfer; but there will be severance in equity even before registration if the intending donor has done everything which it is necessary for him or her to have done to effect a transfer of the legal title.

Personal property

3.14 Trusts of legal interests in personalty may be created orally or in writing. However, where the subject matter of the proposed trust is an existing equitable interest in personalty, and the settlor proposes to transfer that interest to trustees, or to make such a declaration of trust as will divest the settlor of all further interest in the property, such transfer or declaration must, under s 23C(1)(c) of the *Conveyancing Act* 1919, be in writing.⁸

3.15 Where the severing joint tenant seeks to create a voluntary trust by assurance of property which is capable of being assigned at common law, then, as with real property, a form of assurance is necessary which will be effective to vest the legal title to the property in the proposed trustee. If the form of assurance is ineffective to pass any interest either at law or in equity then severance will not take place.

3.16 Equity will recognise an assurance to a trustee provided that the donor has done everything which, according to the nature of the property, was necessary to be done by him or her in order to transfer the property and which it was in his or her power to do.

Direct conveyance to self

3.17 This mechanism is only available where there is express statutory authority. At general law, except through the medium of a use, a person could not convey property to himself or herself.

3.18 Now, s 24 of the *Conveyancing Act* 1919 (NSW) provides that "A person may assure property to himself, or to himself and others". Section 24 of the *Conveyancing Act* 1919 applies to property generally and this includes an assignment of personal chattels to oneself. By virtue of s 24 an assurance may now be effected directly in the manner prescribed for the property in question. It would appear that s 24 is used by joint tenants for the purpose of effecting a severance of the joint tenancy, but "extremely rarely"⁹.

3.19 There are no cases on s 24 of the *Conveyancing Act* in New South Wales. In *Corin v Patton* Mason CJ and McHugh J referred by way of *obiter dicta* to the use of s 24 as a means of severing a joint tenancy but declined to make a finding either way concerning the efficacy of this method.¹⁰

3.20 In Canada and New Zealand, where similar statutory provisions exist, a deed expressed to convey an interest in land from a joint tenant back to himself or herself has been held to be effective: *Re Murdoch v Barry* (1975) 64 DLR (3d) 222; *Samuel v District Land Registrar* [1984] 2 NZLR 697. However, the basis on which the court arrived at its decision in each instance differed slightly.

3.21 In the latter case the court held that severance was effected because the transfer destroys at least the unity of interest, or alternatively, s 49 (the New Zealand equivalent of s 24) provides a statutory exception to the rule that one of the four unities must be destroyed if a joint tenancy is to be severed.¹¹

3.22 By contrast, in *Re Murdoch v Barry* the court held:

... the clear wording of the section [s 42 of the *Conveyancing and Law of Property Act* (Ont.)] is sufficient ground upon which to hold that a conveyance by a joint tenant from himself to himself of his interest in the property destroys the unity of title in that from the time such conveyance is deemed to have been delivered, he claims his interest in and title to the property under that deed and not under the deed or document which created the joint tenancy, in the same manner as a third person would have claimed his interest in such property if he had been named as grantee in such deed.¹²

SEVERANCE BY DECLARATION OF TRUST

3.23 A joint tenancy may be severed in equity by one joint tenant declaring himself or herself trustee of the interest for another, provided that there has been compliance with the statutory requirements in relation to declarations of trust.¹³

SEVERANCE BY COURT ORDER

Application for sale or partition

3.24 A joint tenant may apply to the Supreme Court for an order to sell or partition the property pursuant to s 66F-I of the *Conveyancing Act*, especially s 66G. Where the Court grants an application trustees are appointed and the property is vested in them upon either the “statutory trust for sale” or the “statutory trust for partition”.

3.25 Generally the Court will only refuse an application under s 66G in special circumstances, such as where the applicant is bound by agreement with the other co-owners not to do anything to sever the joint tenancy or not to act in relation to the property except with the consent of all the co-owners, or there are otherwise contractual or fiduciary obligations which the Court feels ought to be honoured.

3.26 Sections 66G does not apply to chattels. The relevant provision pertaining to chattels is found in s 36A of the *Conveyancing Act*. This section authorises the sale of a chattel in appropriate cases. Unlike s 66G, there is no provision for interposing trustees for sale.

Alteration of property interests under the Family Law Act

3.27 Acting pursuant to s 79 of the *Family Law Act 1975* (Cth) the Family Court may order the severance of a joint tenancy. Section 79 empowers the Court to make an order altering the interests of the parties in the property (including personal property) in respect of which the proceedings are brought. An order under s 79 will not have the effect of severing a joint tenancy unless and until it is a final order.¹⁴

3.28 Property proceedings can only be instituted under the *Family Law Act 1975* if they constitute a “matrimonial cause”. Since 1983 the definition of matrimonial cause has been expanded to include property proceedings arising out of the marital relationship.¹⁵ Accordingly an application under s 79 may be made at any time after the breakdown of the marriage (and even before the marriage has finally broken down) and the commencement of proceedings is not dependent on proceedings for the dissolution of marriage having been instituted.

3.29 Corresponding provisions with respect to property owned by partners in a de facto relationship are contained in the *De Facto Relationships Act 1984* (NSW).¹⁶ An order adjusting property interests can generally only be made if the parties have lived together for at least two years.¹⁷

SEVERANCE BY UNILATERAL DECLARATION

Real property

3.30 It is clearly established that a unilateral declaration of intention to sever by one joint tenant is insufficient to sever the joint tenancy.¹⁸ In England, the general law position has been altered by s 36(2) of the *Law of Property Act 1925* (UK) which allows severance of a joint tenancy in equity by written notice. In New South Wales, however, severance of a joint tenancy is governed by the general law. The courts have consistently rejected the proposition that a unilateral declaration is sufficient to effect a severance.¹⁹

Personal property

3.31 There is some authority to suggest that severance by notice of a joint tenancy in personal property is available at general law. In *Burgess v Rawnsley*²⁰ Browne LJ stated that “the proviso to s 36(2) of the *Law of*

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Property Act 1925 seems to imply that notice in writing would, before 1925, have been effective to sever a joint tenancy in personal property.”²¹ Sir John Pennycuick said:

Perhaps in parenthesis, because the point does not arise, the language of s 36(2) appears to contemplate that even under the existing law notice in writing would be effective to sever a joint tenancy in personalty: see the words ‘such other acts or things’. The authorities to the contrary are rather meagre and I am not sure how far this point was ever really considered in relation to personalty before 1925.²²

3.32 However, another line of authority clearly holds that severance of a joint tenancy in personal property by notice is not possible under the general law. For example, Walton J in *Nielson-Jones v Fedden and others* held that:

... since it is, I think, not in dispute that the methods of severance of a joint tenancy in personal estate before 1926 were precisely the same as the methods of severance of a joint tenancy in real estate the final effect of this subsection [s 36(2) of the *Law of Property Act*] is merely to add another method to the ways in which the severance of a joint tenancy in real estate may be effected. Why this highly convenient method of severance was not also extended to personal estate, I am at a loss to understand.²³

3.33 In New South Wales, it would appear that the position adopted by Walton J prevails. In *Abela v Public Trustee*²⁴, for example, part of the property in dispute was certain items of personalty, principally furniture. The personalty was purchased from a joint bank account. Upon separation the wife made claims in respect of the matrimonial home and also in respect of only part of the furniture.

3.34 Rath J made a preliminary finding that the evidence as to the purchase of the personal estate from the joint account and as to the contributions to the joint account pointed strongly to a joint tenancy in respect of the items claimed.

3.35 Rath J concluded that the wife’s claim (which was made in a letter from her solicitor to her husband’s solicitor) to part only of the furniture was not evidence of any agreement for severance or of a course of conduct showing an intention to sever. The principles of severance being the same in the case of personalty as they are in the case of realty the judge was satisfied that the joint tenancy in respect of the items of personalty had not been severed.

FOOTNOTES

1. For the purpose of this reference chattels real are dealt with as real property and not personal property.
2. *Real Property Act 1900* (NSW) s 41.
3. No writing is necessary pursuant to the *Conveyancing Act 1919* (NSW) s 23C(1)(c) because this section does not apply to equitable dispositions of legal interests in property.
4. See for example *Row v Dawson* (1749) 1 Ves. Sen. 331; 27 ER 1064.
5. *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614.
6. The authors of *Equity-Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992) at paras [709]-[714] “hesitantly” state that the better view is that s23C(1)(c) applies to equitable interests in personalty as well as realty, but that it does not apply to equitable dispositions of legal interests in personalty.

The uncertainty arises because paras (a) and (b) of s 23C(1) are limited to dealings with interests in land but para (c) is not. Also, the section is located in a Division of the Act headed “Assurances of land”. However, the term “disposition” is defined to include dealings with personalty. Furthermore the House of Lords has held that the corresponding provision in the English legislation extends to dispositions of personalty (although in England, the provision is not placed in a context dealing exclusively with

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assurances of land). Interestingly, in the English cases which consider this point (*Grey v IRC* [1960] AC 1; *Oughtred v IRC* [1960] AC 206; and *Vandervell v IRC* [1967] AC 291) no argument was mounted that s 53(1)(c) (the equivalent provision) did not apply to personalty based on the definition of "equitable interest" contained in s 205 of the Act. This section provides that: "unless the context otherwise requires ... 'equitable interests' mean all the other interests and charges in or over land or in the proceeds of sale thereof ..." (s 205(1)(x)). The answer to this seems to be that s 53 is seen as a consolidation of certain sections (especially s 9) of the Statute of Frauds (which applied to all assignments), with the consequence that "the context otherwise requires". However, in determining that the use of the word "disposition" in s 53(1)(c) was not the equivalent of the former words of s 9, but of broader application, Lord Radcliffe states that it is apparent that the sections [of the Statute of Frauds] are not just being re-enacted, but that alterations of more or less moment are in fact being made. "For these reasons I think that there is no direct link between s 53(1)(c) of the Act of 1925 and s 9 of the Statute of Frauds." (*Grey v IRC* at 17). At no time did Lord Radcliffe question the applicability of s 53 (1)(c) to equitable dispositions of personalty though.

7. The common law considered a conveyance back to oneself a nullity, but s 24 of the *Conveyancing Act* 1919 recognises it.
8. R P Meagher QC and W M C Gummow *Jacobs' Law of Trusts in Australia* (5th Ed, Butterworths, 1986) at para [704].
9. Letter from Land Titles Office to NSW Law Reform Commission dated 26 March 1993.
10. *Corin v Patton* (1990) 169 CLR 540 at 562.
11. [1984] 2 NZLR at 702.
12. (1975) 64 DLR (3d) at 226.
13. *Conveyancing Act* 1919 (NSW) s 23C. A declaration of trust by the holder of a legal interest in land must be in writing, but the holder of a legal interest in personalty may declare a trust orally.
14. *Corry v Corry* (1983) FLC 91-343.
15. *Family Law Act* 1975 (Cth) s 4(1), para (ca)(i).
16. s 20-25.
17. s 17.
18. *Partriche v Powlet* (1740) 2 Atk. 54.
19. *Corin v Patton* (1990) 169 CLR 540; (1990) 92 ALR 1; (1990) 64 ALJR 256.
20. [1975] 3 All ER 142.
21. at 151.
22. at 154.
23. [1974] 3 All ER 38.
24. [1983] 1 NSWLR 308.

4. Shortcomings of the Existing Modes of Effecting Unilateral Severance

4.1 The limitations posed by the existing methods of unilaterally severing a joint tenancy may be illustrated by reference to the following hypothetical problem. Consider the situation of H and W, recently estranged. The matrimonial home in which they were living until separation is Torrens Title land registered in the name of H and W, as joint tenants. The certificate of title to the matrimonial home is in H's custody for safekeeping. The household furniture was purchased with money from the couple's joint bank account. In addition, H and W had purchased shares as joint tenants. W has discovered that she has a limited life expectancy. W does not want H to become sole owner of the house or items of personalty upon her death. H does not consent to a severance of the joint tenancy and refuses to produce the certificate of title to assist W in achieving this result.

4.2 At present W's options for unilaterally severing the joint tenancy are (as discussed in the previous chapter):

Transferring her interest to a trustee to hold on trust for herself.

Declaring herself trustee of her interest for another.

Transferring her interest to herself as tenant in common.

Alienating her interest.

Making an application to the court for sale or partition pursuant to s 66G of the *Conveyancing Act 1919* (NSW).

Making an application for an order altering interests in property under s 79 of the *Family Law Act 1975* (Cth).

4.3 The difficulties presented by each of these options are examined below.

ISSUES PERTAINING TO SEVERANCE OF JOINT TENANCY IN ITEMS OF REAL PROPERTY

Transferring interest to trustee to hold on trust

4.4 The creation and use of a trust is a convoluted method of achieving the desired result. First and foremost this device requires the involvement and participation of a third party. The actual process may also prove time consuming and stamp duty costs will be incurred. If, as in the example given above, the property is Torrens Title land, delay may be experienced in obtaining registration where there is a caveat on the title or the relevant certificate of title is in the possession of another joint tenant or a mortgagee. The problem of the other joint tenant refusing to produce the certificate of title is one which may be more frequently encountered by women. Commonly it is the husband who retains custody of the title deeds.¹

4.5 The Registrar General may dispense with the production of the certificate of title provided certain procedures have been followed. The applicant must sign a statutory declaration testifying to the fact that production of the certificate of title has been sought but refused, and provide the reasons for the holder's refusal. If the Registrar considers it to be an appropriate case in which to exercise this discretion he or she will write to the holder of the certificate of title requesting its production. If the certificate of title is still not forthcoming the Registrar will send a formal requisition. Only if no response is received to the requisition may the original applicant lodge a request to dispense with production. This process takes at least several weeks.

4.6 As suggested in Chapter 3, a transfer which has not been registered before the death of the severing joint tenant may nonetheless be sufficient to effect a severance of the joint tenancy in equity.

4.7 The effect in equity of an unregistered voluntary transfer was in issue before the High Court in the leading case of *Corin v Patton*.² In this case the wife had attempted to create a trust in favour of herself by executing a transfer of her interest in the joint tenancy to a trustee. The wife died prior to registration without taking any action to obtain the certificate of title which would have enabled the transfer to be registered. The trial judge, McLelland J, held that the joint tenancy had not been severed.³ The Court of Appeal upheld the trial judge's decision,⁴ applying the principles set down in *Milroy v Lord*⁵ and followed in later decisions,⁶ stating that the trustee had obtained no legal or equitable interest in the land. At best he was put in a position to procure the registration of the transfer, a right or power which he might exercise only for the benefit of the transferring joint tenant and which could be withdrawn by her at any time. In dismissing the appeal in the High Court,⁷ Mason CJ and McHugh J, in a joint judgment,⁸ and Deane J,⁹ held that no interest arose in equity because the donor had not done everything that was necessary for her to have done to effect a transfer of legal title. The High Court did not consider the power of the donor to recall the gift to be strictly relevant to the issue of whether she had done everything necessary to effect a transfer of legal title.

4.8 On the authority of *Corin v Patton*, an equitable interest will arise where the transaction is complete so far as the severing joint tenant is concerned. This will occur, for example, where the transferring joint tenant delivers to the trustee an instrument of transfer in registrable form together with the certificate of title or an authority enabling the trustee to obtain the certificate from a mortgagee.

4.9 *Old System land*. Where the property is Old System land and there is no consideration for the conveyance, nothing short of execution and delivery of a deed of conveyance will be effective to sever the joint tenancy. This is because no interest in the property can pass in the absence of a properly executed and duly delivered deed, and equity generally will not assist a volunteer or intervene to perfect an imperfect gift.

Declaration of trust

4.10 A declaration of trust is fairly simple to achieve: except to the extent to which writing is required by statute, no particular formality is necessary. However, this is an unsatisfactory mechanism for severing a joint tenancy because it does not permit the donor to divest himself or herself of the legal interest in the property. Severance of the joint tenancy is only effected in equity. Accordingly, this procedure is unsuitable for anyone who either wishes to cease all association with the property or for anyone wishing to continue to enjoy the real benefit of the property.

Transferring interest to oneself

4.11 There is no judicial authority confirming that the transfer of a joint interest to oneself is effective to sever a joint tenancy.

4.12 Even if this method is available, the device of conveyance to oneself is unsatisfactory where registration of the transfer cannot be speedily effected. As with a transfer to a trustee, delays may occur where there is a caveat on the title or where the mortgagee or other joint tenant refuses to produce the certificate of title.

4.13 In *Freed v Taffe*¹⁰ a joint tenant executed memoranda purporting to transfer interest in property to himself as tenant in common. The transfers (there were two items of property) were not registered. The Court held that severance of a joint tenancy of land under the *Real Property Act 1900* could not be effected by anything less than an act sufficient to assign the interest at law or in equity. An attempt by a person to alienate his or her interest as joint tenant will not suffice.

4.14 In light of *Freed v Taffe*, it is unlikely that an equitable interest will arise where a joint tenant transfers his or her interest in Torrens Title land to himself or herself without obtaining registration.

Old System land

4.15 In the case of a transfer to oneself of Old System land, a conveyance by deed is necessary. There will be no severance if, for any reason, the deed of conveyance is inoperative.

4.16 In the Canadian case of *Re Sammon*,¹¹ a husband (who was joint tenant with his wife) executed in the presence of his solicitor a deed of conveyance in favour of himself. The deed was not registered. The Ontario Court of Appeal held the deed was ineffective to sever the joint tenancy on the basis that there had been no delivery of the deed. Although signing the deed, in the presence of the solicitor, permits an inference of delivery, in this case the Court was not persuaded that the husband had made clear by words or conduct that he considered himself to be immediately and unconditionally bound by the deed, which is a fundamental requirement for delivery. There had to be an acknowledgment by the husband of an intention to immediately and unconditionally convert the joint tenancy into a tenancy in common, regardless of the order of their deaths. Registration of the deed would have been virtually conclusive evidence of delivery, and whereas non-registration was treated as a "neutral fact", in the circumstances the Court considered the husband had compelling reasons not to take a step which would irretrievably destroy his right of survivorship.

4.17 The policy underlying the decision appears to be a desire to discourage joint tenants from executing deeds of conveyance to themselves without communicating this fact to the other party, and only having them produced in the event of their dying before the other joint tenant(s). The Court acknowledged that it is settled law that a severance of a joint tenancy can be effected without notification to the other joint tenant, but was critical of this practice.

Alienation

4.18 This method of severance has some significant shortcomings. It offers no comfort to a joint tenant who does not want to dispose of his or her interest, but merely wishes to convert it to that of a tenant in common to avoid the operation of the principle of survivorship. Even if a joint tenant is willing to dispose of his or her interest, there almost invariably will be a delay while a purchaser is found and contracts prepared and exchanged. Where the joint tenant wishing to sell is elderly or suffering from a terminal illness this delay could operate to frustrate his or her intention. Moreover, it will normally prove very difficult to find a purchaser who is willing to buy an interest in property as co-owner with a stranger, particularly in the case of residential property. If a buyer is found, the consideration obtained can be expected to be significantly less than would have been obtained had the entire property been sold and the proceeds divided.

Application for sale or partition

4.19 Severance by application for sale or partition is time consuming: the matter may take up to two and a half years to be determined, although in urgent cases an application for expedition can be made. This method is also expensive: the filing fee on the summons alone is \$450 and to this must be added legal fees.

4.20 The mere commencement of proceedings for sale or partition will not effect severance. Furthermore, delays may be experienced if the Court stays proceedings to await the outcome of proceedings in another jurisdiction, such as the Family Court.

4.21 This method is not ideal for a joint tenant who wishes to retain his or her interest in the property as tenant in common. Although sale and partition are alternatives, in the sense that either may be sought, the current emphasis is on sale as the primary right with partition in special circumstances.¹²

Application under section 79 of the Family Law Act 1975

4.22 This option is available only to joint tenants in a marital relationship. Joint tenancies between siblings or other family members cannot be severed using this procedure.

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4.23 Section 79 of the *Family Law Act* does not create any legal or equitable rights in property until an order is made. Accordingly, the mere commencement of proceedings under s 79 will not effect a severance of the joint tenancy. Only when a final order is actually made in such proceedings is severance effected finally.

4.24 Amendments made to the *Family Law Act* in 1983 have made it possible for property settlement proceedings to be continued notwithstanding the death of one of the parties. Section 79(8) authorises proceedings which have been commenced but not completed to be continued by or against the legal personal representative of the deceased party. Even so, if an application under s 79 has been filed and death occurs prior to the hearing of the application, there is no guarantee that the legal personal representative of the deceased joint tenant will continue the pending proceedings under s 79.

4.25 Examples of the form of order that will effect a severance include an order for sale and division of the proceeds and an order that one spouse transfer his or her interest to the other. Where the order is subject to a condition, such as the decree for dissolution of marriage becoming absolute, there will be no severance until that condition has been fulfilled.¹³

4.26 There are no filing fees for an application under s 79, but parties are generally liable for legal fees. A contested s 79 application can take up to four years to be determined.

ISSUES PERTAINING TO SEVERANCE OF JOINT TENANCY IN ITEMS OF PERSONAL PROPERTY

4.27 Not surprisingly, the existing case law highlighting difficulties involved in effecting severance of joint tenancies deals predominantly with real property. Real property will generally be the single most valuable asset that any person will ever own, whether alone or in combination with others. Consequently the survivorship principle is not as significant or as valuable to a co-owner of personal property. Furthermore, most items of personal property may be alienated or divided with a degree of facility unknown to real property. Thus, co-owners wishing to bring an end to the right of survivorship will be more inclined to divide the property in question, rather than effecting a technical severance.

4.28 However, where a joint tenant does wish to effect a severance, he or she can do so using the same methods as are available to a joint tenant of real estate. Generally speaking, similar difficulties to those outlined above in relation to real property will be experienced by joint tenants of personal property seeking to sever the joint tenancy unilaterally, apart, of course, from those impediments to severance of a joint tenancy in real estate which arise by virtue of requirements peculiar to the Torrens system or requirements pertaining exclusively to land transactions. For example, the problems posed by caveats simply do not apply to personal property and likewise the delay caused by the inability to obtain the certificate of title is not an issue for many forms of personal property.

4.29 In other instances the problems identified will not be so acute when it comes to personal property. In so far as the requirements for assignment are more relaxed for many forms of personal property the difficulties involved in effecting a severance by voluntary transfer to a trustee are not as significant.¹⁴

4.30 Where severance is sought to be effected by means of a court order, a joint tenant of personal property may encounter the same shortcomings as a joint tenant of real property. Special problems relating to severance by alienation exist in respect of joint tenancies in choses in action. These are discussed in paragraph 4.33 *et seq.*

4.31 The foregoing discussion has been necessarily general. Within the context of this Report it is not practical to examine the specific problems in relation to the severance of a joint tenancy of individual forms of personal property by each of the existing methods because the range of items comprehended by the expression "personal property" is very diverse. For convenience, categories such as "choses in possession" and "choses in action" have been created, but the nature of the items conforming to these labels is not always clear cut. In particular, the term "choses in action" has come to be used as a catch-all, primarily to distinguish those chattel interests which (unlike choses in possession) are incapable of transfer by delivery. While the term has now been extended

with the development of new forms of property, in the strict sense, choses in action are things recoverable by suit or action in a court of common law.

4.32 There are dangers in treating identically all forms of personal property which are incorporeal in nature. For example, shares, patents, copyrights and designs are peculiar types of property governed by statute, and the rights of ownership and transfer require individual attention.¹⁵

Problems of severance unique to personal property

Severance of joint tenancies in choses in action

4.33 Severance of joint tenancies in choses in action raises several conceptual problems. There is authority that choses in action cannot be owned in common at law.¹⁶ As the common law looked upon a chose in action merely as a right of action, it was concerned only with the proper persons to bring the action, and, regarding them as one person in law, recognised only joint tenants and not tenants in common.

4.34 At common law there could be no assignment of a chose in action. Absolute assignments of any debt or other legal chose in action were made possible by s 12 of the *Conveyancing Act* 1919. However, this provision does not authorise the assignment of part only of a debt or other legal chose in action. Other particular kinds of choses in action are assignable under the special legislation which governs them, and in these cases the general provisions of s 12 do not apply.¹⁷

4.35 There is no case law establishing whether an assignment by a single joint tenant of his or her interest in the chose in action is an absolute assignment or an assignment of part of a chose in action. If such an interest were to be regarded as part only of a chose in action then severance at law (by alienation) would not be possible, although it is possible to deprive the other joint tenant of a chose in action of the benefit of survivorship in equity.¹⁸

4.36 Unfortunately it is not clear which forms of property cannot be owned in common at law. In the case of *In re Wool Trading Company Ltd (In Liquidation)*¹⁹, Long Innes J took the view that the share register of a company is an instrument within the meaning of s 26(1) of the *Conveyancing Act* [which creates the presumption in favour of tenancy in common] and that the entry on a share register constitutes a disposition of the beneficial interest in the shares in question.

4.37 In a commentary on this case, F C Hutley (as he then was) argued that the view taken by Long Innes J that s 26 might apply to shares ought to be reconsidered. His own view was that choses in action should be excluded from the purview of s 26 because at law no chose in action could be held in common. By the term "choses in action" Hutley took the broad definition. "This rule [that no chose in action could be held in common at law] applies to all choses in action other than patents." He submitted that

Since s 26 is a construction section it should not be construed so as to produce changes in the substantive law of property, unless no intelligible construction can be given to the section in any other way.²⁰

4.38 Under the present *Patents Act* 1990 (Cth) and *Designs Act* 1906 (Cth) ownership in common is recognised and the presumption appears to be that in the absence of an agreement to the contrary, two or more patentees or owners of a registered design are tenants in common.²¹ Similarly, for the purposes of copyright law, joint authors are in the position of tenants in common and not joint tenants.²²

4.39 That the issues raised in the foregoing paragraphs remain inconclusively resolved is referable in no small part to the fact that in practice simple procedures exist whereby the property may be divided, with the result that each party acquires a defined portion of the property rather than a distinct but undivided share, which is the hallmark of a tenancy in common. One such illustration is in respect of joint bank accounts. It is generally accepted that co-owners of a joint bank account are joint tenants.²³ Where either party wishes to terminate the joint account the usual course is to close the account and share the proceeds equally. This requires one or both

of the parties (depending upon whether one or both must sign on the account) to withdraw the balance from the account. This procedure does not raise any problems, unless both parties' signature is required for any transaction and one of the parties refuses to lend his or her signature to the withdrawal.

4.40 In other cases the issue is avoided altogether because ownership in common is clearly proscribed at the outset. In relation to shares, for example, the company's articles of association may not recognise ownership in common at law.²⁴

Identifying the nature of the co-ownership of certain choses in possession

4.41 The position with respect to choses in possession is much simpler, although in such cases questions may sometimes arise as to the proper identity of the owner. The couple in the hypothetical situation discussed above were in possession of furniture purchased from their joint account. The traditional view is that each party to a joint account is authorised to draw upon it and consequently any purchases made belong to the person who made the withdrawal.²⁵ However, where the account is opened for the purpose of financing joint investments, then the inference is that property bought using funds from the joint account is a joint purchase. This is a likely finding when both parties contribute to the fund. Where the property that is bought represents a major investment then it is thought that the most likely inference is that it is a joint investment.²⁶

4.42 In *Abela v Public Trustee*²⁷ Rath J made a finding that evidence about purchase from a joint account and about contributions to the joint account pointed strongly to a joint tenancy in the items of furniture claimed.

FOOTNOTES

1. Mr Brendan Edgeworth (Senior Lecturer in law, UNSW) *Submission* (29 February 1992) at 4.
2. (1990) 169 CLR 540; (1990) 64 ALJR 256; (1990) 92 ALR 1.
3. (1987) 13 NSWLR 10.
4. (1988) 13 NSWLR 15.
5. (1862) 45 ER 1185.
6. For example *Anning v Anning* (1907) 4 CLR 1049; *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555; (1937) 11 ALJR 108; [1937] ALR 349.
7. (1990) 92 ALR 1.
8. (1990) 92 ALR 1 at 13-4 at 13-14.
9. (1990) 92 ALR 1 at 13-4 at 26.
10. [1984] 2 NSWLR 322.
11. (1979) 94 DLR (3d) 594.
12. P Butt *Land Law* (2nd ed, Law Book Co, Sydney 1988) at 214.
13. *Penny Nominees Pty Ltd v Fountain (No 3)* (1990) 5 BPR 11,284 (NSW Sup Ct, Young J).
14. As regards gifts of personal property, it is worth noting that where an attempted assignment of personal property by a person on their deathbed might otherwise fail if viewed simply as a gift *inter vivos*, by reason for example, that the deed has not been sealed, then providing all the requirements are met, the beneficiary of the deathbed gift may seek to rely on the doctrine of *donationes mortis causa*. Traditionally,

a *donatio mortis causa* is “a gift of personal property by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die but not otherwise.” This definition provided by Story in his *Equity Jurisprudence* as reproduced in R P Meagher, W M C Gummow and J R F Leane *Equity - Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992) at 741. The three requisites for a valid *donatio mortis causa* are: (i) the gift must be made in contemplation of the donor’s death; (ii) the gift must be conditioned to become indefeasible only on the donor’s death; and (iii) there must be delivery of the subject of the donation or “something amounting to that”. Examples of documents which have been held to satisfy the test, and their delivery to operate as a good gift *mortis causa* include: bills of exchange payable to donor or order though not due until after his or her death and not endorsed; cheques payable to donor or order though not endorsed (there can, however, be no *donatio mortis causa* of a promissory note or cheque drawn by the donor himself or herself); bonds; and certificates for building society shares. There has been doubt about whether delivery of a share certificate is sufficient to constitute a valid *donatio mortis causa*, but a recent decision of Cohen J in the Equity Division of the Supreme Court has held that it is: *Public Trustee v Bussell* (1993) 30 NSWLR 111. See also R P Meagher, W M C Gummow and J R F Leane *Equity - Doctrines and Remedies* at 747.

It has been a widely held view that realty could not be the subject of a *donatio*. However, in a 1991 decision the English Court of Appeal extended this doctrine to deathbed gifts of land: *Sen v Headley* [1991] Ch 425. No reported Australian decisions have considered this case. Any consideration of this decision in the New South Wales context should be undertaken with extreme caution bearing in mind the different property regime existing in England.

15. R H Kersley *Goodeve’s Modern Law of Personal Property* (9th ed, Sweet & Maxwell, London 1949) at 196.
16. Halsbury’s Laws of England cite *In re McKerrell, McKerrell v Gowans* [1912] 2 Ch 648 as authority for this proposition.
17. J D Heydon, W M C Gummow and R P Austin *Cases and Materials on Equity and Trusts* (2nd ed, Butterworths, Sydney 1982) at para [510].
18. However, the requirements necessary for equity to recognise the assignment will vary depending upon whether or not the property is regarded as being assignable at law. If it is assignable at law then before equity will recognise a voluntary assignment the requirements set down in *Milroy v Lord* must be complied with. If the property is not capable of being assigned at law then all that equity requires is “a manifestation by the assignor of an intention to transfer the chose in action to the assignee in a manner binding upon himself, as distinguished from an intention merely to give a revocable mandate while retaining ownership of the chose in action” (per Kitto J in *Shepherd v FCT* (1965) 113 CLR 385 at 397). Further complications arise where the property is an equitable chose in action. It would appear that s 12 of the *Conveyancing Act* applies to equitable choses in action. (Heydon, Gummow and Austin *Cases and Materials on Equity and Trusts* at para [726]).
19. (1927) 28 SR (NSW) 106. In the result s 26 did not apply on the facts because the parties had contracted that the applicants should be admitted to membership as joint tenants of the shares in question.
20. F C Hutley “Conveyancing Act 1919-1938 (NSW), s 26 - Application to Choses in Action” (1939) 13 *Australian Law Journal* 230.
21. Each owner is entitled to “an equal undivided share” in the patent (s 16), or monopoly in the design (s 25A).
22. *Powell v Head* (1879) 12 Ch D 686; *Lauri v Renad* [1892] 3 Ch 402.
23. See for example M P Thompson *Co-ownership* (Sweet & Maxwell, London, 1988) at 29. On the death of a joint holder the survivor or survivors is or are in ordinary cases entitled to the whole amount, either under the law of devolution between joint owners (which may be rebutted by evidence of a contrary intention: *Thorpe v Jackson* (1837) 2 Y & C 553), or by custom of bankers and express or implied agreement. For example reg 14 of the *Commonwealth Banks Regulations* governs joint accounts in the

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Savings Bank and permits the bank to pay the money standing to the credit of the account to the survivor or survivors on the death of any of the persons in whose name the account is kept.

24. For example article 23 of Table A provides that: "In the case of death of a member, the survivor where the deceased was a joint holder, ... shall be the only person[s] recognised by the company as having any title to his interest in the shares ...".
25. *Re Young* (1885) 28 Ch D 705.
26. See for example M P Thompson *Co-ownership* (Sweet & Maxwell, London, 1988) at 30.
27. [1983] 1 NSWLR 308.

5. Why Should Unilateral Severance be Simplified?

INTRODUCTION

5.1 A joint tenancy must be deliberately created.¹ *Although not well founded in law*, it may often be the expectation of the parties that the consent of both is needed to change the nature of their interests, and without that mutual consent, on the death of one, the property will pass to the survivor.

5.2 It might be suggested that any move to simplify the requirements for unilaterally severing a joint tenancy should be resisted because joint tenancies deliberately created should not be too lightly destroyed. This chapter seeks to demonstrate that such objections are not well founded. The chapter then examines the reasons why reform is not only desirable, but necessary.

SEVERANCE AS A PRESENT RIGHT OF CO-OWNERS

5.3 Severance of a joint tenancy, even without the consent of the other joint tenant, is already possible. The form of co-ownership chosen is not immutable. Perceptions of joint tenancy as a permanent arrangement, if indeed such perceptions actually exist, are misconceived. As Peter Butt expressed it: "The layman's commonly held belief that there is some 'security' in joint tenancy is a myth".² The Master of the Rolls in the case of *Cray v Willis*³ succinctly stated the position thus:

... the duration of all lives being uncertain, if either party has an ill opinion of his own life, he may sever the joint tenancy (sic) by a deed granting over a moiety in trust for himself; **so that survivorship can be no hardship, where either side may at pleasure prevent it.** (emphasis added)

5.4 The development of new methods of achieving severance of the joint tenancy in response to a changing social climate is not a remarkable event, evidenced by the introduction of provisions in the *Family Law Act* enabling the Court to alter the property interests of the parties.

JOINT TENANCY AS A MECHANISM OF PROPERTY DISTRIBUTION ON DEATH

5.5 It was noted in Chapter 2 that the single most important incident of a joint tenancy is the right of survivorship, a concept inextricably linked with will-making power. The right of survivorship operates as a rule of law and cannot be overridden by the will of one of the joint tenants. This has potentially extremely harsh consequences for a joint tenant if the operation of the rule of survivorship no longer accurately reflects his or her wishes in relation to the property the subject of the joint tenancy. This is of particular significance if the joint tenants are husband and wife. The right of survivorship is appropriate for so long as the parties are happily living together. In these circumstances the notion that the surviving party will receive the common property in its entirety may be perfectly natural and will generally accord with the parties' testamentary intentions.

5.6 However, the right of survivorship is generally inappropriate in the context of property owned jointly by estranged spouses. For example, in *Abela v Public Trustee*, Rath J said:

In the case of husband and wife, joint tenancy, in favouring longevity, is usually achieving the object for which it was created; but once the matrimonial relationship has broken down the original purpose of the joint tenancy is at an end.⁴

5.7 In 1988, amendments were made to the *Wills Probate and Administration Act 1898* which had the effect of revoking any provision in a will in favour of a former spouse upon termination of the marriage.⁵ This amendment was made pursuant to recommendations made by this Commission.⁶ In LRC 47, the Commission recognised that a breakdown in the marital relationship had profound consequences in terms of property distribution. The Commission said:

Termination of marriage represents a fundamental change in a person's life which, more often than not, renders inappropriate provisions in favour of the former spouse in wills made during the marriage⁷

5.8 These sentiments apply with equal vigour to married couples holding property as joint tenants. The Commission is not advocating automatic severance of a joint tenancy upon breakdown of marriage. It must be borne in mind, however, that a joint tenancy arrangement is a mechanism for distributing property upon death. Viewed from this perspective there is no reason why joint tenants should not be able to sever a joint tenancy with the same expedition and facility as is currently possible in relation to the making or redrafting of a will.

5.9 The central focus of this debate is, appropriately, joint tenancies existing between husbands and wives. It was in this particular context that the existing problems were brought to the Commission's attention. However, joint tenancies do exist outside marriage and apart from certain exceptions (which will be discussed in Chapter 8) similar considerations apply in relation to these other classes of joint tenants.

WHY IS THE PRESENT LAW UNSATISFACTORY?

5.10 The only way to destroy the right of survivorship is to sever the joint tenancy. If only one of the parties wishes to sever then that joint tenant does have several options available to him or her to accomplish this. Unfortunately though, there are a number of obstacles to unilateral severance operating at present. The current methods of severance are either unnecessarily lengthy, complex, expensive or uncertain.

5.11 A severing joint tenant must either seek a court order with all the attendant costs and delays, or else effect a transfer to himself or herself, to a third party outright or to a third party as trustee. This process can be impeded by the inability to obtain the certificate of title and consequential delay while application is made for the production of the certificate of title to be dispensed with.

5.12 A detailed examination of the various problems which may be encountered by a joint tenant seeking to sever the joint tenancy unilaterally was made in Chapter 4.

WHY NOT SIMPLY ABOLISH JOINT TENANCIES?

5.13 Does a proposal to introduce a simplified means of unilaterally severing a joint tenancy, which does not require the destruction of one of the four unities, so fundamentally alter the nature of a joint tenancy that it becomes no longer logical to maintain joint tenancy as a separate form of co-ownership? The short answer to this is no. Joint tenancies have in the past, and continue in the present, to serve a useful function. Not the least, a joint tenancy is a convenient way to avoid the consequences of an intestacy in respect of a person's most substantial asset. In view of the number of persons dying intestate, this expedient cannot be overstated. Furthermore a joint tenancy as a mechanism for distributing property on death has an added advantage over devolution of property by will in that the transmission of property in the former case can be achieved without having to obtain the grant of probate first. The costs and delays involved in settling a deceased's estate are avoided in respect of real estate owned jointly. Arguably a further advantage of a joint tenancy is that since property held in joint tenancy does not form part of the deceased's estate, then as a general rule such property cannot be applied in payment of the deceased's debts or testamentary expenses.

CALLS FOR REFORM

5.14 The need for reform in the area of unilateral severance of joint tenancies, especially with regard to real property, has been highlighted by a number of commentators, each calling for the introduction of a simpler method.⁸

5.15 In DP 23, the Commission reached the tentative conclusion that the law should be altered and a speedy and inexpensive means of unilaterally severing joint tenancies introduced. Apart from one, all of the submissions received by the Commission which addressed the issue were in favour of such a course of action.

RESPONDING TO THE CRITICS

5.16 In its dissenting submission the Property Law Committee of the Law Society of New South Wales queried whether the provision of a speedy and inexpensive means of unilaterally severing joint tenancies “would open Pandora’s box”. The Committee expressed the view that the solution provisionally endorsed by the Commission in its Discussion Paper could “create other problems resulting in litigation in the Family Court or Supreme Court or both, and effectively circumvent[ing] the jurisdiction of the Family Court to make orders with respect to matrimonial property”⁹

5.17 These arguments fail to appreciate that the Commission is not proposing the creation of any new rights, merely the simplification of an existing right. The introduction of an additional method of severance, whereby severance can be effected cheaply and expeditiously does no more than facilitate a present right. Severance without the consent of the other joint tenant(s) is already possible. There is no *inherent* unfairness in the act of severance.

5.18 Problems anticipated by the Committee consequent to relaxing the requirements for severance could just as readily occur under the present law. In fact, the effect of a declaration of severance is in many instances less drastic than current methods which result in the passing of the legal estate to a third party and which could in certain defined circumstances result in the invocation by the other party of the Family Court’s jurisdiction under s 85 of the *Family Law Act 1975* (Cth). A declaration of severance is a far simpler procedure than those which joint tenants are presently compelled to adopt. It also has an additional advantage over some of the existing methods in that, under the Commission’s proposal, notice of the severance must be given to the other joint tenant. Consequently there can be no severances behind the back of the other joint tenant.

5.19 The Law Society’s Property Law Committee submitted that any amendments to the existing law should be effected solely by enlarging the Supreme Court’s jurisdiction in partition, or the Family Court’s powers. The Commission is not persuaded by this suggestion. Such amendments would not eliminate the costs and delay associated with accessing the court system. Such action has the potential to exacerbate present difficulties by causing further congestion to already long court waiting lists.

5.20 The Property Law Committee had a number of other more particular concerns. These are addressed in Chapter 8.

CONCLUSION

5.21 The Commission’s conclusion is that there is a clear need for unilateral severance of a joint tenancy to be simplified.

FOOTNOTES

1. As noted in Chapter 2 there is a statutory presumption in favour of tenancy in common.
2. P Butt “Unilateral unregistered transfer by joint tenant to herself-Whether operated to sever joint tenancy” (1982) 56 *Australian Law Journal* 490.
3. (1729) 2 P. Wms 529; 24 ER 847.
4. [1983] 1 NSWLR 308.
5. Section 15A inserted by the *Wills, Probate and Administration (Amendment) Act 1989*.

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6. New South Wales. Law Reform Commission *Wills-Execution and Revocation* (LRC 47, 1986).
7. at 129.
8. See for example (1988) 15 *Brief* at 31 where the writer calls for the enactment of a parallel provision to s 36(2) of the English *Property Law Act*. Also, S MacCallum in (1980) 7 *Mon Law Review* at 34 suggests that legislation should be introduced to provide that severance by declaration is an acceptable means of severing a joint tenancy.
9. Property Law Committee of the Law Society *Submission* (21 August 1992) at 4.

6. Reform in Other Jurisdictions

INTRODUCTION

6.1 In the previous chapter the conclusion was reached that a simpler method of effecting a unilateral severance should be introduced. The matter has been considered in a number of other jurisdictions. In most cases, the legislatures in those jurisdictions which have considered this particular issue have introduced an additional method of severance, namely: severance by notice (England), declaration of severance (Tasmania) and registration of a transfer (Queensland).

OTHER AUSTRALIAN STATES

6.2 Enquiries conducted in other States of Australia into the law relating to unilateral severance of a joint tenancy are at various stages of completion. In 1980 the Tasmanian government legislated to provide an additional way to effect a unilateral severance of a joint tenancy in real estate, and the Queensland Parliament recently enacted similar alterations to the law in that State. The Western Australian Law Reform Commission is enquiring into severance of joint tenancies by notice as part of a more general review of the law relating to joint tenancies and tenancies in common. A draft report is currently being prepared on this topic.

Tasmania

6.3 Section 63 of the *Land Titles Act 1980 (Tas)* provides that:

- (1) A joint tenant of registered land may sever his joint tenancy by a declaration of severance in the prescribed form and registered under this Act.
- (2) On registering a declaration of severance in accordance with subsection (1), the Recorder shall notify every other joint tenant of the land by notice in writing.
- (3) The mode of severance prescribed by this section is in addition to, and not in substitution for, any other mode available before the proclaimed date to a joint tenant of registered land.

6.4 Upon registration of the declaration the person who executes the declaration henceforth holds the estate as tenant in common. As a matter of practice the Land Titles Office does not require the production of the certificate of title for registration purposes. The Recorder of Titles will only register a declaration of severance which results in the joint tenants holding their estates as tenants in common in equal shares. An unequal apportionment can only be achieved by all parties signing a transfer.

6.5 According to the Tasmanian Land Titles Office this method of severance has proved to be satisfactory in overcoming the original problem.¹ No exact statistics are available on the use of s 63. In 1991 the Examination Section of the Tasmanian Land Titles Office and Registry of Deeds estimated that approximately four declarations were lodged per month, the majority relating to matrimonial cases.²

Queensland

6.6 In March 1991 the Queensland Law Reform Commission published a report entitled *Consolidation of Real Property Acts*³ containing, as the name suggests, a draft consolidation of Queensland real property legislation. The 1994 *Land Title Act (Qld)* is based largely on the Law Reform Commission's draft Bill. Section 59 of the new Act, which commenced operation on 24 April 1994, allows for the unilateral severing of a joint tenancy by a joint tenant through the registration of a transfer. Section 59 provides as follows:

- (1) A registered owner of a lot subject to a joint tenancy may unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner.
- (2) However, the Registrar may register the instrument of transfer only if a registered owner satisfies the Registrar that a copy of the instrument has been given to all other joint tenants.
- (3) On registration of the instrument of transfer, the registered owner becomes entitled as a tenant in common with the other registered owners.
- (4) If there are more than 2 joint tenants of the lot, the joint tenancy of the other registered owners is not affected.

OVERSEAS JURISDICTIONS

England

6.7 A system of registration of title now governs a large proportion of conveyancing done in England and Wales. However, the system existing in the United Kingdom differs materially from the Torrens system in New South Wales.⁴

6.8 In England, unilateral severance of a joint tenancy by notice is possible in equity pursuant to the *Law of Property Act 1925* (UK).

6.9 In England there are no tenancies in common at law. This form of co-ownership at law was abolished in 1925, in order to simplify the conveyancing process. The object of the reform was to eliminate the need for purchasers of land to investigate the separate title of each tenant.

6.10 A corollary to the rule that a legal tenancy in common cannot be created is that a joint tenancy cannot be severed at law.

6.11 However, provided that the estate concerned is not settled land, it is possible to sever a joint tenancy in equity. Section 36(2) of the *Law of Property Act 1925* (UK) facilitates this process. This section provides that:

... where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.

6.12 The issue of a summons under the *Married Women's Property Act*, seeking an order that the matrimonial home be sold and that the proceeds be distributed according to the respective interests of the parties, together with the supporting affidavit have been held to constitute notice within the meaning of s 36(2).⁵

6.13 A notice under s 36(2) must show an intention to bring about severance immediately. Thus a notice in writing which expresses a desire to bring about the wanted result at some time in the future (and not immediately) is not a notice in writing within s 36(2). Accordingly, the general prayer in a divorce petition, asking the Court to exercise its jurisdiction under the *Matrimonial Causes Act 1973* does not operate as a notice to sever the joint tenancy in equity because such a prayer contemplates a future exercise of jurisdiction, and furthermore, the Court may make alternative orders.⁶

6.14 Section 36 deals with all joint tenancies. Previous doubts about the applicability of s 36 to joint tenancies held by husbands and wives have been dispelled.⁷

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6.15 An uncommunicated declaration by one joint tenant cannot operate as a severance.⁸ However, a prepaid notice of severance properly addressed sent by recorded delivery, though never received, is sufficient to effect severance of the joint tenancy for the purposes of s 36(2).⁹

6.16 It is far from settled in England whether severance by notice is available in respect of personal property. The first and traditional view is that a declaration of intent does not sever. This was the conclusion reached by Walton J in *Nielson-Jones v Fedden and others*¹⁰ following a complete review of authorities. However, a contrary approach was taken by members of the Court of Appeal in the case of *Burgess v Rawnsley*.¹¹ Lord Denning expressed his view that s 36(2) of the *Law of Property Act* is declaratory of the law as to severance by notice and not as a new provision confined to real estate. Without actually pronouncing on the issue, Browne LJ and Sir John Pennycuik both expressed the view that s 36(2) of the *Law of Property Act* 1925 contemplates that severance by notice is already available (at general law) in respect of personal property.

Ireland

6.17 The Irish Law Reform Commission gave consideration to whether a joint tenant should be able to sever unilaterally a joint tenancy by giving notice in its recent report on Land Law and Conveyancing Law. The Commission declined to make such a recommendation. For reasons not dissimilar to those submitted by the Property Law Committee of the Law Society of New South Wales, the Irish Law Reform Commission concluded that the problems which prompted this suggestion were best addressed by estranged spouses taking advantage of the provisions of the *Judicial Separation and Family Law Reform Act* 1989 and seeking an order from the court in respect of the property which, if successful, would avoid the risk of the property all passing to the husband on the wife's death.¹² The Irish Commission expressed the view that severance by notice would only be of benefit in a minority of cases and that this solution might create more problems than it solved.

FOOTNOTES

1. Letter of 27 February 1991 from the Land Titles Office and Registry of Deeds, Department of Environment and Planning.
2. Letter of 27 February 1991 from the Land Titles Office and Registry of Deeds, Department of Environment and Planning.
3. Queensland. Law Reform Commission *Consolidation of Real Property Acts* (Report 40, 1991).
4. R E Megarry and H W R Wade *The Law of Real Property* (Stevens & Sons, London, 1984) at 195.
5. *Re Draper's Conveyance* [1967] 3 All ER 853.
6. *Harris v Goddard* [1983] 1 WLR 1203.
7. *Harris v Goddard* [1983] 1 WLR 1203.
8. *Burgess v Rawnsley* [1975] 3 All ER 142.
9. *Re 88 Berkeley Road* [1971] 1 All ER 254.
10. [1974] 3 All ER 38.
11. [1975] 3 All ER 142.
12. Ireland. Law Reform Commission. Report on Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44, 1992).

7. Recommendation: Unilateral Severance by Registration of a Declaration of Severance

7.1 It is apparent that a joint tenancy arrangement is a mechanism for distributing property after death. The procedure for severance should be neither more complex, nor more time consuming than drafting or altering a will.

7.2 Contrary to popular belief, joint tenancies do not carry any “security” for the co-owners. As a general rule, every joint tenant is at liberty to defeat the right of survivorship at any time. Unfortunately though, the difficulties involved in severing unilaterally a joint tenancy serve to reinforce and perpetuate the notions of permanence and security that the term joint tenancy apparently connotes.

7.3 There is no good policy reason for endowing joint tenancies with the qualities of permanence and security when severance generally, and unilateral severance in particular, is a right which currently exists. The entitlement to sever should be facilitated, not impeded.

OPTIONS FOR REFORM

7.4 Any new procedure for severing unilaterally must possess certain key attributes: it must be simple, affordable and quick.

7.5 In DP 23, two possible options for achieving reform were suggested: severance by registration of a declaration of severance (modelled on the Tasmanian provision) and severance by notice (based on the English model but adapted to our system of title by registration).

7.6 The submissions received overwhelmingly supported the first option, although there was at least one very strong submission favouring the second option, which convinced the Commission to reassess its provisional recommendation in favour of severance by registration proposed in the Discussion Paper.

7.7 Following a thorough re-assessment, the Commission’s initial preference in favour of severance by registered declaration has prevailed. Set out below, in abridged form, is an assessment of the options for reform considered by the Commission in formulating its ultimate recommendation; including the reasons for preferring severance by registered declaration.

SEVERANCE BY NOTICE

7.8 In summary, this model would permit a joint tenant to effect a severance in equity on communication of a written notice, provided that the notice evinces a clear intention of effecting an immediate severance of the joint tenancy. Severance at law would be postponed until registration of the notice.

7.9 It is objected that as a result of this procedure the Register could cease to provide an accurate reflection of the relationship between co-owners in all cases. However, there are a number of reasons why this is not a compelling argument. As one submission noted:

it has always been the case that a joint tenancy is severed in equity when one joint tenant has entered into a binding contract to sell his or her share to a third party;

since *Corin v Patton* it is possible to sever a joint tenancy of Torrens Title land in equity where the joint tenant has done all that he or she can do to put the donee in a position to become the registered proprietor; and

finally, and more generally, the courts have consistently recognised unregistered interests.¹

7.10 For example, at general law severance of a joint tenancy by agreement or by course of conduct is recognised. In such circumstances the Register will not necessarily reflect the proper status between co-owners and yet the agreement or course of conduct is sufficient to sever the joint tenancy.

7.11 One of the most important factors in favour of this model is that disadvantage is unlikely to be suffered by third parties. A *bona fide* purchaser for value, or non-fraudulent volunteer *may* rely on the Register. The equitable severance on communication of notice would occur between the parties to the transaction only. The title of a *bona fide* purchaser for value or non-fraudulent volunteer is indefeasible, in accordance with the ordinary principles of priority.²

7.12 Therein lies the incentive for the severing joint tenant to secure registration of the notice in due course. Only registration will make the notice effective at law against the whole world, and prevent the rights of third parties intervening, and taking priority.

7.13 By contrast, any title to the entire property obtained by a fraudulent joint tenant must be defeasible. For this proposed model for effecting a unilateral severance to operate effectively in practice, provision would need to be made affirming that registration of a notice of death by the surviving joint tenant, in clear disregard of the notice of severance amounts to fraudulent conduct, and that the resulting title would be defeasible at the suit of certain nominated parties. In this way a mechanism is provided for ensuring that the surviving joint tenant cannot assume ownership of the entire property in the event that the other joint tenant dies before the notice of severance is registered.

7.14 This proposal is very attractive for its simplicity. Depending on the requirements for effective notice, it also has the potential to operate in such manner as to ensure that severance is not defeated by reason only that the severing joint tenant has no knowledge of

the form of co-ownership;

the significance of the rule of survivorship; or

the legal requirements for effecting severance;

provided that he or she has nevertheless clearly indicated that he or she regards his or her interest as one held in common rather than jointly. For example, it is currently the case that severance by course of conduct will have taken place even where the joint tenants are ignorant of the fact that they hold as joint tenants: *Williams v Hensman*.

7.15 The advantages of this model are its inexpensiveness, speed (the notice is effective on communication) and informality (the notice need not be in any particular form). The tenancy is severed without the need for court proceedings, access to title documents, or administrative delay.³

7.16 These features notwithstanding, there are several factors which have ultimately persuaded the Commission against adopting this model. The principal arguments against severance by notice are summarised below.

Reasons for rejecting severance by notice

Severance by notice produces greater uncertainty

7.17 The benefits to be derived from informality are outweighed by the uncertainty it produces. This scheme offers no absolute assurances that a given document constitutes notice. To prescribe formal requirements for notice would destroy the objective of giving effect to the intent of the joint tenant however informally expressed. However, in the absence of specific requirements it would then fall to the courts to decide whether the requisite

elements were to be found in a given document. The terms of an informal communication intended to sever a joint tenancy might well be unclear. A question may also arise as to whether a particular document had the implied or incidental effect of severing the joint tenancy. There may be uncertainty not only as to whether a document constituted notice of severance, but also as to whether there had been communication of the notice.

7.18 In any case the advantages of informality may be illusory. It may be doubted that anyone would attempt to effect severance without consulting a lawyer.

Severance by notice introduces a greater chance of fraud and/or duress

7.19 If this method is to be available to give effect to the intent of persons who are ignorant of the law it will be less practical to insist on the same safeguards against fraud existing in respect of wills. A compromise position in which there are set requirements for notice with judicial discretion to waive the requirements (modelled on s 18A of the *Wills, Probate and Administration Act 1898 (NSW)*) is not particularly satisfactory. The principal objective of introducing the section would only be accomplished by reference to the exception rather than the rule. Too much reliance would be placed on the exercise of judicial discretion, a fruitful source of litigation.

7.20 Moreover, the position of the surviving joint tenant cannot be disregarded. Introducing severance by notice admits the possibility of unscrupulous beneficiaries falsely alleging that severance has taken place.

REGISTERED DECLARATION OF SEVERANCE

7.21 Severance by registered declaration addresses the problem identified in the Discussion Paper without attracting the concomitant problems found with severance by notice.

7.22 Severance by registration of declaration of severance represents a simplified procedure for severing unilaterally in terms of cost, complexity and time while in no way derogating from the primacy of the Register.

7.23 Unilateral severance by registration of a declaration of severance meets the essential criteria identified in paragraph 7.4 above. Under this proposal severance can be achieved in a straightforward manner. Severance by registered declaration obviates the need for the severing joint tenant to alienate his or her interest or appoint a trustee. Intervention by the court is avoided. Cost is minimised since court fees and legal fees connected with court proceedings are eliminated.

7.24 Certainty is the clear advantage of having severance effective at law and in equity on registration. No equitable interests are created outside the Register. Under this scheme the integrity and accuracy of the public record is maintained. A standard document ensures consistency and permits the surviving joint tenant and the beneficiaries of the deceased joint tenant to be confident of their respective positions.

7.25 Registration of a declaration of severance in a prescribed form is unambiguous and unequivocal. Either the declaration has been registered or it has not. Litigation is avoided. The opportunities for fraud are negligible. The drawbacks outlined in the paragraphs above in relation to severance by notice do not arise.

7.26 The severance procedure envisaged can be quickly carried out. As evidenced by the Tasmanian system, dispensing with the need to produce the certificate of title facilitates rapid registration and overcomes one of the major obstacles to successful severance operating at present. A similar provision in New South Wales would reduce the opportunities for the non-severing joint tenant to be obstructive.

7.27 The obvious disadvantage is that nothing short of registration will suffice. This proposal will not prevent the rule of survivorship operating if death of the severing joint tenant occurs before the registration process is complete. It is the Commission's considered view, however, that the introduction of a provision designed to meet this rare occurrence is unwarranted.

CONDITIONAL SEVERANCE ON LODGMENT OF DECLARATION

7.28 A third possible model was considered as a means of overcoming perceived shortcomings in the option of severance by registered declaration.⁴

7.29 Under this model notice to the other joint tenant(s) would be required. Notice would be given to the other joint tenant(s) by the Registrar, upon lodgment of the declaration. Registration would be postponed for a specified period of time, during which the other joint tenant(s) would be able to take action to prevent registration of the declaration.

7.30 Severance would be effective when a declaration of severance was lodged, unless court action to prevent registration was taken by the other joint tenant(s) within this specified time period. If court action failed, severance would be effective retrospectively from the date of lodgment. In this way, a severance would not be defeated should the severing joint tenant die before the court action was resolved in his or her favour.

7.31 This model was suggested as a means of ensuring that a severing joint tenant would not be prejudiced by delays on the part of the Land Titles Office in registering a declaration or delay caused by the presence of a caveat.

7.32 The Commission does not believe that these are significant problems. Although the Land Titles Office does currently experience administrative delays during periods of peak lodgment or by reason of computer malfunction, it anticipates that within a few years lodgment and registration will be effected simultaneously.

7.33 The circumstances in which the non-severing joint tenant's interest in maintaining the joint tenancy would support a caveat are rare. Provided that provision is made for the declaration of severance to be added to those dealings listed in s 74H(5) of the *Real Property Act*, the circumstances in which delay may be caused by the presence of a caveat are minimal.

7.34 In these circumstances the safeguards contemplated by the third model are largely unnecessary and represent a significant departure from the general thrust of the *Real Property Act*. The possible delays which might occur do not justify the introduction of this gloss, which would complicate an otherwise simple method.

RECOMMENDATION

7.35 For the reasons outlined above the Commission has adopted the provisional proposal contained in the Discussion Paper and recommends the introduction of unilateral severance by registration of a declaration of severance.

7.36 The features of this new scheme for unilaterally severing a joint tenancy are described in the following chapter.

RECOMMENDATION 1

Registration of a declaration of severance should be introduced as a means of severing a joint tenancy unilaterally.

FOOTNOTES

1. B Edgeworth *Submission* (29 February 1992) at 6-7.
2. In the case of a *bona fide* purchaser such indefeasibility would be conferred following settlement pursuant to s 43A of the *Real Property Act* 1900 (NSW).
3. B Edgeworth, *Submission* (29 February 1992) at 6.
4. Such as delays in the time from lodgment to registration, institution of court proceedings and presence of a caveat on the title. B Edgeworth *Submission* (29 February 1992) at 5.

8. Features of the System of Severance by Registration of Declaration

8.1 Chapter 7 recommended that severance by registration of a declaration of severance should be introduced. In this chapter the details of the procedure for effective severance are outlined.

8.2 First, a number of threshold issues need to be addressed.

SHOULD NOTICE TO THE OTHER JOINT TENANTS BE REQUIRED BEFORE SEVERANCE CAN TAKE PLACE?

8.3 Under both the Tasmanian and the Queensland schemes notice to the other joint tenants is contemplated. However, the Queensland provision requires the Registrar to be satisfied that a copy of the instrument has been given to all other joint tenants *before* he or she may register the instrument of transfer. In Tasmania notice is sent to the other joint tenants *after* registration.

8.4 A requirement of notification before the severing transaction is effective does impose a restraint on the severing joint tenant's freedom of action. Arguably though, this burden is outweighed by consideration of the position of the other joint tenant.

8.5 The non-severing joint tenant may have (or may believe that he or she has) good grounds for seeking to prevent a severance taking place. For example, registration might be objected to on the grounds that it infringes a legal or equitable obligation including obligations under an agreement; or it might be alleged that the severance should not take place because the equal ownership which results ignores the fact that the parties contributed unequally to the purchase price.

8.6 Situations falling within the first category will be rare, although they are not unknown.¹ The second category of aggrieved joint tenant is the most significant one. A non-severing joint tenant who contributed the largest proportion to the purchase price may complain about a severance which ignores this consideration. However, in such a situation, the non-severing joint tenant may be entitled to seek a declaration as to the extent of each of the co-owners' interests. This remedy is not destroyed by the registration of the declaration of severance.

8.7 Insisting on service of notice on the other joint tenant(s) as a prerequisite for registration has the potential to jeopardise the severance and disadvantage the severing joint tenant severely. Delays might occur in complying with such a requirement, particularly since in many instances the joint tenants will be estranged. In the event that the other joint tenant were overseas, necessitating service by post, service would not be taken to have been effected until the letter had been *delivered* in the ordinary course of post.² In the case of a seriously ill severing joint tenant any delay could defeat the severance.

8.8 Uncertainty about the sufficiency of notice could be resolved to a large extent by including formal requirements for notice in the code, including provision for substituted service, but that would not avoid all the practical problems about compliance, particularly where for example, the parties may be estranged, residence uncertain or avoidance of service possible.

8.9 Further, where time constraints exist and these are known to the non-severing joint tenant, a requirement of notice would present the non-severing joint tenant with an opportunity to employ delaying tactics.

8.10 Notice to the other joint tenant is not a prerequisite for existing methods of unilateral severance, and should not be a prerequisite for severance by declaration. Measures already exist which may be enlisted by the non-severing joint tenant to protect his or her interest, if in fact the interest is of a nature which deserves protection.

RECOMMENDATION 2

Notice of the severance should not be a prerequisite to severance.

SHOULD NOTICE TO THE OTHER JOINT TENANTS BE REQUIRED AT ALL?

8.11 It is settled law that severance may be effected unilaterally without the consent, or even the knowledge, of the other joint tenant.

8.12 Secrecy, however, is at the very least unfair and may lead to a suspicion of fraudulent dealing. It is desirable that notice in fact be given to the other joint tenant. The other joint tenant ought to be apprised of the change in the nature of his or her existing interest. In this way he or she will be provided with the opportunity of making appropriate provision for the disposition of that interest by will. Notice of the severance to the other joint tenant(s) should be a part of the new procedure. The Commission proposes that the obligation to inform the other joint tenants of the severance reside in the Registrar General. However, this duty will be fulfilled upon issue of the notice to the last known address of the other joint tenant(s). The Registrar General should not be obliged to conduct enquiries for the purposes of determining the whereabouts of the other joint tenant(s).

8.13 The notification to the other joint tenants which is issued by the Registrar General upon registration of the declaration should advise that severance has taken place and that the joint tenant(s) should now make arrangements for the disposition of their interest.

RECOMMENDATION 3

The Registrar General should notify the other joint tenant(s) of the severance following registration of a declaration of severance, and of the need to consider arrangements for the disposition of the resulting interest.

CERTIFICATE OF TITLE

8.14 A significant impediment to expeditious unilateral severance at present is the inability of the severing joint tenant to obtain the certificate of title, either because it is in the hands of the other joint tenant who refuses to produce it or with a mortgagee who may likewise refuse to produce it without the consent of all mortgagors. There is a mechanism for dispensing with the need for production of the certificate of title but this procedure can take time.³ Once a severing joint tenant has attempted to negotiate with the other joint tenant or mortgagee and sought the assistance of the Registrar a considerable period of time may have elapsed. In the case of an ill or elderly joint tenant this delay may defeat the attempted severance. As noted previously in paragraph 6.4, it is the practice of the Land Titles Office in Tasmania *not* to require the production of the certificate of title for registration purposes. Under proposed NSW legislation the Registrar should be under an obligation to register the declaration of severance without insisting on the production of the certificate of title.

RECOMMENDATION 4

The declaration of severance should be registrable without production of the certificate of title.

EFFECT OF THE SEVERANCE

8.15 By the nature of a joint tenancy each of the joint tenants have, at law, an equal interest in the property. Severance of a joint tenancy by presently available methods results in the joint tenants henceforth holding their

interest as tenants in common in equal shares. The effect of a unilateral severance by declaration should be identical. The Registrar is not in a position to know or judge the merits of any special claim to the property made by any of the parties. Therefore the Registrar cannot register any declaration of severance which purports to create a tenancy in common in unequal shares.

8.16 It was a matter of some concern to the Law Society's Property Law Committee that severance of a joint tenancy results in equal ownership notwithstanding that the parties' contribution to the purchase price may have been unequal.⁴ However, this is neither a novel problem, nor is it one which arises exclusively in the context of unilateral severance. The law of resulting trusts has developed in response to this circumstance.⁵ Should the situation foreshadowed by the Property Law Committee arise in practice, it should be resolved according to ordinary principles of equity. This is a separate issue from severance *per se* and should be left to be addressed by the parties in the same way as any assertion that the legal position does not reflect the equitable position.⁶

8.17 Where there are more than two joint tenants and one joint tenant registers a declaration of severance the joint tenancy as between the remaining joint tenants should be unaffected by the severance such that, as between themselves, the other co-owners continue to hold as joint tenants. This is in accordance with the position at common law.

RECOMMENDATION 5

The effect of a declaration of severance should be to convert the joint tenancy into a tenancy in common in equal shares.

RECOMMENDATION 6

Where there are more than two joint tenants, severance by declaration by one joint tenant should not affect the joint tenancy as between the remaining joint tenants.

SHOULD THIS METHOD BE THE EXCLUSIVE MEANS OF EFFECTING UNILATERAL SEVERANCE?

8.18 In *Williams v Hensman* the Court declared three methods of severing a joint tenancy: an act of any one of the persons interested operating upon his own share; mutual agreement; and course of dealing. The current enquiry by the Commission is confined to an examination of the first of these methods. Specifically, the Commission's recommendations are directed at overcoming those particular problems which have been identified as obstacles to expeditious unilateral severance, especially where the severing joint tenant is operating under time constraints by reason of age or ill-health. Outside of the discrete context in which the Commission's recommendations have been formulated there is scope for the operation of the other methods of effecting severance, including those for unilateral severance identified elsewhere in this Report. Joint tenants wishing to sever the joint tenancy should be able to avail themselves of the most appropriate method, which may depend on individual circumstances.

RECOMMENDATION 7

Unilateral severance of a joint tenancy by registered declaration should be in addition to, and not in substitution of, other available methods of severing a joint tenancy.

SHOULD NOTICE FOLLOWING SEVERANCE BE A REQUIREMENT FOR ALL MODES OF UNILATERAL SEVERANCE?

8.19 The Commission has concluded that in the interests of fairness notice of the severance should be given to the other joint tenants after severance by declaration has taken place, where possible. These considerations of fairness are equally applicable to all forms of unilateral severance. The question therefore arises whether the requirement of notice should be made a general requirement for *all* modes of unilateral severance.

8.20 In the course of his judgment in the Canadian case of *Re Sammon*, Morden JA of the Ontario Court of Appeal said:

Before concluding, it is not out of the way to comment that while the law is well settled on this point, it seems wrong that one joint tenant should be able to sever a joint tenancy without any requirement that the other be notified.⁷

8.21 His Honour's disquiet was particularly justified in that case, where severance of the joint tenancy was attempted by delivery of a deed to uses by one joint tenant in favour of himself as grantee. In this situation notice to the other joint tenant is a safeguard against fraud. Absent a requirement of notice, it is possible that a deed of assignment may be kept hidden and ultimately destroyed in the event that the other joint tenant dies first.

8.22 It would appear that land registry practice in certain provinces in Canada requires that notice be given to the other joint tenants as a *prerequisite* to severance.⁸

8.23 Whilst notice of severance to the other joint tenants is highly desirable in all cases on the grounds of fairness, the Commission does not wish to distract from the main thrust of its recommendations by proposing a requirement of notice under the existing methods of unilateral severance.

RECOMMENDATION 8

The existing law need not be amended to make notification a requirement for all methods of severance.

FORM AND CONTENT OF THE DECLARATION

8.24 Dealings with Torrens Title land are generally achieved by registering the approved RP form. As the declaration of severance is a registrable instrument a separate RP form for this purpose should be developed. The Land Titles Office suggested that RP 13 ("Transfer") could be used for this purpose. However in order to distinguish this method of severance from a transfer to self as tenant in common pursuant to s 24 of the *Conveyancing Act 1919* (NSW) and also to avoid characterising the transaction as a transfer it is preferable that a separate form be developed.

Content of prescribed RP form "Declaration of severance"

8.25 The minimum details which should be contained in this form are the particulars of title and description of the land. It should identify the joint tenants and there must be an execution clause and an attestation clause.

8.26 One submission received by the Commission⁹ made the following point:

[I]n the often difficult circumstances surrounding the dissolution of joint tenancies, the nature of the new interest created, being a tenancy in common which **can** be disposed of by will, is overlooked.

8.27 Two reasons are given to explain why it is necessary to ensure proprietors have considered the issue of disposition of their new interest (particularly as the proprietors severing tenancies are sometimes old or terminally ill), namely:

It is always desirable that persons have given due consideration to the disposition of their belongings.

More particularly, it may be that the reason for dissolution of the joint tenancy was to prevent a particular family member from taking by survivorship. If no provision is made regarding the property in a will the rules of intestacy might operate in favour of that particular person, and so thwart the proprietor's intentions.¹⁰

8.28 It is suggested that a clause be included in the form acknowledging that due consideration has been given to making provision for the disposition of the property. The clause would serve as a reminder.

8.29 The Commission favours the insertion of an appropriately worded clause in the separate RP form to be developed.

Additional formalities

8.30 In Chapter 5 the Commission commented that a joint tenant should be able to sever the joint tenancy with the same degree of facility as in making or redrafting a will. Correspondingly, in order to safeguard against forgery and duress some at least of the formalities required for a valid will should be adopted. Old or dying joint tenants may otherwise be pressured into severing by persons taking under their will. At a minimum, the declaration of severance should be signed by the severing joint tenant in the presence of one or more attesting witnesses. The regulation prescribing the requirements of a valid declaration of severance should also address such issues as whether or not a person likely to benefit under the will of the joint tenant, as a result of the severance, should be disqualified from being a witness.

RECOMMENDATION 9

A separate RP form entitled “Declaration of Severance” should be created. It should identify the property and the joint tenants. It should contain an acknowledgment clause confirming that the joint tenant has given consideration to making provision for the disposition of the property following severance. It should contain an execution clause and an attestation clause, and should conform with such other requirements as may be prescribed by regulation.

POSITION OF JUDGMENT CREDITORS, MORTGAGES AND CHARGEES

8.31 One of the submissions received by the Commission raised the issue as to whether severance of a joint tenancy should be permitted without first obtaining the consent of any mortgagee, caveatee, chargee or judgment creditor registered on the title, or alternatively whether notice of the severance should be served upon such parties.¹¹

8.32 The view of the Commission is that the consent of these persons or bodies to the unilateral severance of the joint tenancy should only be required if their position with respect to their security or judgment, as the case may be, is prejudiced by the severance.

8.33 Generally speaking not only is no disadvantage suffered by these people but their position may in fact be enhanced by a severance (in circumstances described below). Accordingly the Commission recommends that their consent to the severance not be required as part of the scheme.¹² However, as a matter of courtesy such persons should be notified of the severance following registration of the declaration.

Mortgage

Old System land

8.34 This issue does not arise where the mortgage is by one joint tenant of his or her interest in Old System land. A mortgage of Old System land is in the form of a conveyance (subject to contractual proviso for

reconveyance). Consequently the effect of one joint tenant creating a mortgage over his or her interest in Old System land is to sever the joint tenancy.¹³

Torrens Title land

8.35 A mortgage of Torrens Title land takes effect as a charge on the land, and not as a conveyance.¹⁴

8.36 It is most unusual for a mortgagee to accept as security a mortgage from one joint tenant alone, the reason being that if the joint tenant mortgagor dies before the other joint tenant(s) the land will vest in the surviving joint tenant(s) free of the mortgage.¹⁵

8.37 In the unlikely event that a mortgagee has accepted a mortgage from one joint tenant alone and the occasion arises for the mortgagee to exercise his or her power of sale then from the point of view of the mortgagee it makes no difference whether the mortgagor holds his or her interest as joint tenant or tenant in common: the mortgagee can only sell the extent of the mortgagor's interest in the property. Naturally the person taking title under the transfer from the mortgagee takes as tenant in common.

8.38 In the usual situation, where all joint tenants are party to the mortgage, the rights and obligations of the parties are determined by the terms of the mortgage or the general law governing mortgages. The relationship between the parties has no bearing on their obligations to the mortgagee. Ownership is separate from liability under the mortgage contract.

8.39 At present, if all joint tenants are party to the mortgage and one of the joint tenants sought to sever the joint tenancy, the bank, as holder of the certificate of title would be made aware of the intended severance. Under the proposed system the certificate would no longer be required in order to sever the joint tenancy. The Commission recommends that as a courtesy the mortgagee should be advised of severance by declaration.

Judgment creditor

8.40 A judgment creditor has a number of avenues available for enforcing a judgment. Probably the most common form of enforcement chosen by creditors is a writ of execution against the goods of the debtor. It is not unusual for goods, for example, household furniture and motor vehicles, to be held jointly by the debtor and another. The practice adopted by the Sheriff in relation to such goods is that, as a general rule, they may be seized and sold. The other party may seek the assistance of the Sheriff who may bring an application for relief by way of interpleader. The form of co-ownership is of no practical significance to the judgment creditor when it comes to enforcing his or her judgment.

8.41 A debtor's personal property may be insufficient to satisfy the judgment debt whereupon the judgment creditor may seek execution upon land. If the real property is co-owned then only the right and title of the debtor may be sold. This is the position irrespective of the form of co-ownership. Accordingly, a change in the nature of the co-ownership is of no consequence to the judgment creditor. However, where a writ has been placed in the Sheriff's hands against a joint tenant, under which an interest in land may be taken by the Sheriff, and the joint tenant dies before execution, the surviving joint tenant will hold the land discharged of the execution.¹⁶ In this situation the position of the judgment creditor would in fact be enhanced by an earlier severance of the joint tenancy.

8.42 A further method of enforcing a judgment is by obtaining a garnishee order, whereby a creditor can "garnishee" money from certain people who owe money to the debtor. However, a joint bank account cannot be attached to answer a judgment debt of only one of the account holders.¹⁷ In this situation the judgment creditor would once again obtain a clear benefit from a severance of the joint account.

8.43 It should be noted that bankruptcy of one of the joint tenants effects a severance of the joint tenancy.¹⁸

RECOMMENDATION 10

The consent of any mortgagee, chargee or judgment creditor is not required as part of the scheme for severance by declaration.

WHO MAY SEVER UNILATERALLY BY DECLARATION?

8.44 The Commission anticipates that severance by declaration will have greatest application in matrimonial cases. However severance by declaration has a much broader application and the scheme should not be limited to joint tenants who are married couples. Apart from the exceptions noted below, any joint tenant, including corporations should be able to sever by declaration.

RECOMMENDATION 11

As a general rule and subject to the exceptions following, unilateral severance by declaration should be available to all joint tenants.

EXCEPTIONS TO THE GENERAL RULE

Old System land

8.45 The submissions received by the Commission on the question of whether severance by notice should be available in respect of Old System land were divided. In favour of extending the new procedure to Old System land was the Victorian Bar Council who submitted that if rights to unilateral severance are to be extended then they ought to be extended to owners of both Old System and Torrens Title land.

8.46 On the other hand, the Commission agrees with the submission of Mr Brendan Edgeworth, that there seems to be less need to introduce reform in the area of Old System land. The presently existing requirements for severance: execution and delivery of a deed, are not particularly onerous and may be satisfied relatively quickly. Furthermore, a notice of severance could easily be removed, either by accident or by design, from the chain of title, with resulting prejudice to *bona fide* purchasers for value.

8.47 There are approximately only 60,000 to 80,000 parcels of Old System land still in existence in NSW, representing about 3% of all existing land parcels. It is likely that in another five to ten years all outstanding land parcels will have been converted to *Real Property Act* land.¹⁹ Extension of unilateral severance by declaration to Old System land is not warranted.

RECOMMENDATION 12

Unilateral severance by declaration should not be available to effect severance of a joint tenancy of Old System land.

Persons holding property as joint tenant by virtue of their office

8.48 There are some capacities in which persons hold property together which are most suited to joint tenancy. This fact is recognised by statute because the statutory presumption in favour of tenancy in common does not apply to persons who by the terms or the tenor of the instrument are executors, administrators, trustees, or mortgagees.²⁰

8.49 The position of executor is in fact quite exceptional and co-executors are not joint tenants in the technical sense. Generally speaking the authority of co-executors is joint and several so that any one of them may bind all of the others.²¹ Unlike ordinary joint tenants, executors cannot partition a chattel²² and they have no power to sever their joint interest and create a tenancy in common.²³

8.50 A further and common example of persons holding property as joint tenants by virtue of their office are trustees. Trustees invariably hold trust property as joint tenants because of the convenience of the trust property passing automatically by the right of survivorship to the other trustees when one trustee dies. If co-trustees were not joint tenants then on the death of one of the trustees a conveyance of the trust property to the surviving trustee would be necessary, because the office of trustee does not devolve on the trustee's legal personal representative upon his or her death.

8.51 In contrast to executors, where there is more than one trustee of a *private* trust, the concurrence of all is in general necessary in a transaction affecting the trust property. Subject, therefore, to any contrary provision in the trust instrument constituting the trust, unilateral severance by one trustee is not possible. If severance is for any reason deemed necessary then the trustee may seek the authorisation of the Court. In the exercise of their general supervisory power over trusts, courts may authorise any action which is beneficial to the trust.

8.52 The Law Society's Property Law Committee was concerned that any relaxation in the requirements to sever joint tenancies will make it easier for a fraudulent trustee to dispose of an interest in trust property to a third party without the knowledge of his co-trustee especially if the fraudulent trustee holds the title deed.²⁴

8.53 A simplified method of severing unilaterally will not facilitate a fraudulent disposal of an interest in the property. Unilateral severance by declaration will enable a joint tenant to sever the joint tenancy without the need to produce the certificate of title. However, any disposal to a third party will continue to require the certificate of title. If a trustee has the certificate of title and is determined to be fraudulent there is no reason why he or she would wish to effect severance at all.

RECOMMENDATION 13

Persons or corporate bodies who hold property as joint tenants by virtue of their office should not be permitted to sever unilaterally by declaration without the leave of the court.

PERSONAL PROPERTY

8.54 Generally speaking personal property is capable of being owned in common or jointly in the same way as real property.²⁵

8.55 The incidents of joint tenancy in personal property are identical to those of a joint tenancy in real property. Thus the "four unities" are necessary for the creation of a joint tenancy in personalty, and so also the rule of survivorship holds.

8.56 Joint ownership of personal property is likewise severed in the same manner and by the same methods available in respect of real property. In fact the property the subject of dispute in *Williams v Hensman*, from which the classical statement on severance derives, was personal property, in that instance a money fund.

8.57 In England, there is some dispute as to whether severance of a joint tenancy in personalty by notice is available under the general law. It has been said that it would be a curious position if the method of severance prescribed by s 36(2) of the *Law of Property Act* (UK) was only available in respect of real property.²⁶ In New South Wales there is little doubt that severance of a joint tenancy in personalty by notice is not possible.

8.58 To avoid any uncertainty, and to prevent the anomalous situation whereby the same procedures are not available for all forms of joint tenancy, the Commission recommends that it be made explicit that severance by declaration extends to joint tenancies in personal property.

8.59 In view of the broad range of items coming within the category of personal property it is not convenient to make individual recommendations in respect of each kind of personal property. In so far as they are applicable, the preceding recommendations have effect in respect of personal property.

8.60 In general (and subject to the important qualification mentioned in the paragraph below), a written declaration communicated to the other joint tenant(s) showing an intention to bring about the severance immediately should sever the joint tenancy both in equity and at law.

8.61 This is quite straightforward in relation to those items of personal property with which third parties have neither interest nor function, such as most common chattels. Where complications arise, however, are in those cases where third parties are unavoidably involved, or have a compulsory interest in the items of personal property. Choses in action where ownership or membership is a reflection of, and dependent upon notation being made in, a Register are the obvious example. In such cases the written declaration should take effect in equity once communicated to the other joint tenant, but severance should not be taken to have been effected at law unless and until the Register is altered. As noted in Chapter 4, ownership in common in certain choses in action may not be possible either as a matter of law or as a result of the instrument creating or governing the particular item of personal property. In these cases also, the written declaration should nevertheless take effect in equity once communicated to the other joint tenant.

8.62 Permitting severance to take effect in equity on communication of the written declaration to the other joint tenant, before the Registrar notes the consequence of the declaration, introduces a material difference between severance by declaration of joint tenancies in personal property and real property. The main reason for this difference is that, unless alterations to the governing legislation were to be made, a declaration of severance is not the type of document which would generally be accepted for recording purposes into a personal property register. Few personal property registers have the facility to record a transaction of this nature. They are not designed to accommodate the type or extent of information that can be entered into the Torrens Register. Personal property registers do not have the paramount status of the Torrens Register. Under the Torrens system the Register is conclusive. By contrast, a share register (for example), is merely *prima facie* evidence of all matters inserted therein.²⁷

8.63 To give effect to this recommendation ancillary changes to some of the governing statutes may be required, stipulating that a declaration of severance is an exception to the general provisions which make unregistered particulars inadmissible for the purpose of proving title.

RECOMMENDATION 14

Severance by declaration should be available to joint tenants of personal property. As a general rule, and subject to any prohibition to the contrary by statute or in an instrument relating to the item of personal property, a written declaration of severance communicated to the other joint tenant(s) should take effect at law and in equity.

In cases where there is a system of registration of title, severance at law should be postponed until the Register is appropriately altered. However, a severance of the joint tenancy in equity should occur on communication of the written declaration of severance to the other joint tenant(s).

Similarly, in so far as a severance of the joint tenancy cannot be achieved at law, for whatever reason, then the written declaration should have effect in equity upon communication of the declaration to the other joint tenant(s).

CAVEATS

8.64 The caveat provisions in the *Real Property Act* are intended to offer persons with an unregistered interest in Torrens Title land protection for that interest. The provisions operate in the following manner. If a dealing is lodged for registration which would defeat the caveator's interest, the Registrar General must withhold registration until the caveator has been given the opportunity of pursuing such remedies as he or she may have against the person lodging the dealing for registration.

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8.65 Clearly, a caveat will delay the registration of the dealing in question. It is conceivable then, that the registration of a declaration of severance might be delayed by the presence of a caveat, thereby jeopardising severance.

8.66 For the purposes of this discussion it is convenient to consider separately caveats lodged by third parties and caveats lodged by the co-tenant. As regards caveats in the former category it was apparent from the consideration at paragraph 8.33 *et seq* above, that a change in status between co-owners from joint tenants to tenants in common was essentially a matter of indifference to mortgagees and chargees. It is hard to conceive of any interest of a third party that would be defeated by a severance of the joint tenancy.

8.67 To minimise the risk of delay by reason of the presence of a caveat generally, a declaration of severance should be added to the list of dealings contained in s 74H(5) of the *Real Property Act* 1900 so that the Registrar will not be prohibited from recording the declaration of severance, unless the caveat otherwise specifies.

8.68 As regards caveats lodged by the other or another joint tenant, it was noted in Chapter 7 that in practice it would be rare for the non-severing joint tenant's interest in maintaining the joint tenancy to be sufficient *in itself* to support a caveat.

8.69 A person who lodges a caveat "wrongfully and without reasonable cause" is liable to pay compensation to any person suffering pecuniary loss as a result.²⁸ This provision should be sufficient to ensure that a frivolous caveat is not lodged for the purpose of obstructing a severance.

8.70 There is a further category which requires special consideration. In its submission the Law Society's Property Law Committee states that:

No consideration appears to have been given to the situation that sometimes arises where there is a devise to several persons, often siblings, to be held by them as joint tenants on condition (express or implied) that they retain it in that form. Resort to caveat or injunction proceedings in such circumstances will be encouraged [by implementation of either of the proposals].²⁹

8.71 The Commission does recognise that joint tenancies may arise under a will in circumstances contemplated by the Property Law Committee, or otherwise be created on condition that the joint tenancy be maintained.

8.72 Unilateral severance by registered declaration is not intended to defeat joint tenancies which have been created by will pursuant to this understanding, neither is it intended to defeat agreements entered into between joint tenants whereby each joint tenant agrees not to do anything to sever the joint tenancy or at least agree that specified procedures must be followed before a severance can take place.

8.73 However, the submission of the Law Society's Property Law Committee fails to recognise that the same considerations apply equally to severances effected under the current law. At the basis of this submission appears to lie the premise that the incidence of severance will increase with the introduction of severance by declaration. This is at least debatable.

8.74 It is also necessary to bear in mind that there are limits to the type of restriction on alienation that can be imposed by an agreement. Such bargains risk being declared void on the grounds that they constitute an invalid restraint on alienation.³⁰

8.75 To the extent that agreements between joint tenants limiting the circumstances or the manner in which severance can take place are not an invalid restraint on alienation, they ought to be protected.

8.76 Whereas it would be rare for the non-severing joint tenant's interest in maintaining the joint tenancy to be sufficient *in itself* to support a caveat, the existence of an agreement of this nature might well alter the position. Section 74F(2) of the *Real Property Act* 1900 empowers a registered proprietor of an estate or interest, who fears an improper dealing with the estate or interest by another person, to lodge a caveat prohibiting the recording of any dealing affecting the estate or interest. Arguably, registration of a declaration of severance by one joint tenant in breach of an agreement to maintain the joint tenancy amounts to an "improper dealing" for the purposes of the

section. The Commission was unable to find any authority on this point to determine conclusively whether a joint tenant who was party to, or subject to an agreement of this nature would be competent to lodge a caveat under this section.

8.77 In the event that a severance takes place in breach of a valid agreement a joint tenant will have recourse to the usual remedies.³¹

RECOMMENDATION 15

A declaration of severance should be added to the list of dealings in s 74H(5) of the *Real Property Act 1900* permitting the recording in the Register of a declaration of severance notwithstanding the presence of a caveat, unless declarations of severance are specifically forbidden by the caveat.

ENLARGEMENT OF JURISDICTION IN PARTITION AND SALE

8.78 The Law Society's Property Law Committee in its submission asserted that reform, if any, in this area should be achieved by enlarging the Supreme Court's jurisdiction in partition and sale to enable the Court to make an order for severance, even after the death or loss of mental capacity of a joint tenant, retrospectively to the date of the lodgment of an application for an order under s 66G.³² For reasons given elsewhere in this Report the Commission is not persuaded that this measure is in itself a sufficient reform. However, the Commission does agree that it is desirable that proceedings pursuant to s 66G be capable of being continued notwithstanding the death of one of the parties. In the Commission's view it is not clear whether or not such an application abates on death or whether it is of a class of cause of action which falls within s 2 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW).³³

8.79 Accordingly, s 66G should expressly provide for proceedings brought under the section to survive after death.

RECOMMENDATION 16

Section 66G of the *Conveyancing Act 1919* should be amended to explicitly provide that an application brought under the section survives the death of one or more of the parties.

STAMP DUTY

8.80 In Tasmania, a declaration of severance is liable for nominal stamp duty pursuant to the *Stamp Duties Act 1931* (Tas).

8.81 The Commission would prefer that the declaration of severance be exempted from stamp duty but declines to make any recommendation to this effect since matters arising under the *Stamp Duties Act 1920* (NSW) do not come within the purview of this reference.

8.82 The amount of stamp duty, if any, payable on a declaration of severance is likely to have ramifications in terms of the mode of severance adopted by practitioners.

8.83 Currently, instruments executed pursuant to the making of a s 79 (of the *Family Law Act 1975* (Cth)) order are exempt from duties or charges.³⁴ A transfer from X and Y as joint tenants to X and Y as tenants in common is chargeable with duty of \$10.³⁵ A court order under s 66G of the *Conveyancing Act 1919* (NSW) is liable to duty of \$10.³⁶

8.84 The duty payable on a transfer to a trustee accompanied by a declaration of trust is dependent upon the order of execution of the documents. If the transfer is signed prior to the declaration of trust, duty would be

payable at conveyance rates on the value of one half of the property on such a transfer. The subsequent declaration of trust would be liable to duty of \$10.³⁷ If the order of execution is reversed the declaration of trust would be liable to conveyance rates of duty on value and the transfer liable to duty of \$2.

8.85 According to the Office of State Revenue, stamp duty on a transfer from one joint tenant to himself or herself would be payable at conveyance rates on the value of one half of the property.³⁸

8.86 The foremost consideration is that severance not be delayed for any reason connected with stamping. The most common requisition raised in Tasmania is in respect of non-payment of stamp duty. However, the Commission understands that in New South Wales it is the practice of the lodgment officers not to accept for lodgment in the first place, any dealing not appropriately marked. In view of this practice it is unlikely that a declaration would ever be required to be uplifted for stamp duty purposes.

ISSUES OF LEGAL PRACTICE

8.87 Whilst no empirical data has been collected, anecdotal evidence suggests that there is substantial ignorance amongst co-owners in the general community concerning the existence of, and differences between, the two different forms of co-ownership. This is a matter of concern. Such ignorance should be addressed when the joint tenancy is formed, rather than making provision to overcome it at the dissolution stage. Solicitors and licensed conveyancers should therefore be educated to impress upon co-purchasers of property the significance of the different forms of co-ownership, the entitlement to sever, the methods of achieving severance and of the opportunity to caveat (where relevant). Joint tenancy is, after all, a mode of distributing property after death. Most people are aware that drafting a will is attended by certain legal formalities, and that a will is a "solemn" document. People should likewise be conscious of the significance of joint tenancy.

RECOMMENDATION 17

Solicitors and licensed conveyancers should be educated to impress upon co-purchasers of property the significance of the different forms of co-ownership, the entitlement to sever, the methods of achieving severance and of the opportunity to caveat (where relevant).

8.88 The implementation of the proposed method of unilateral severance should be monitored and an assessment made at the conclusion of its second year of operation for the purpose of determining whether the method is achieving its principal objective, to determine if cases exist where speedier severance *inter partes* would have been desirable and whether the method has had any untoward effect. The assessment should be coordinated by the Law Society by means of a survey of its members.

RECOMMENDATION 18

After two years of operation the Law Society should conduct a survey of its members to assess unilateral severance by declaration to determine whether the method has successfully served its purpose, whether it could be improved and whether it has had any untoward effect.

FOOTNOTES

1. See for example *Stephens and Anor v Debney* (1959) 60 SR (NSW) 468. A blanket prohibition on severance effectively denies a joint tenant the right to sell his or her interest. An agreement containing this type of prohibition might well be found to be an invalid restraint on alienation, and therefore contrary to public policy. No relief by way of injunction will be given to enforce a restraint clause which is contrary to public policy and void or unenforceable on that ground: J W Carter, D J Harland *Contract Law in Australia* (2nd ed, Butterworths, Sydney 1991) at para [1708]. More common are agreements which limit or qualify the co-owners' right to seek an order for partition or sale, for example, until some preconditions are

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satisfied or some procedure carried out. (Once again, an agreement which seeks to exclude *totally* the parties' entitlement to apply for an order under s 66G is not likely to be effective or enforced.) However, a joint tenant who severs unilaterally by registered declaration will not be in breach of a valid agreement qualifying the circumstances in which an order under s 66G may be sought.

2. *Interpretation Act 1987* (NSW) s 76.
3. See para 4.5.
4. Law Society of New South Wales, Property Law Committee *Submission* (21 August 1992) at 2.
5. When two or more purchasers contribute to the purchase of property then, in the absence of a relationship that gives rise to a presumption of advancement, the equitable presumption is that they hold the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions. *Calverley v Green* (1985) 59 ALJR 111.
6. Ms Margaret Stone, Freehill Hollindale & Page in comments to the Law Reform Commission on the draft report contained in a letter dated 25 October 1993.
7. (1979) 94 DLR (3d) at 609.
8. A J McClean "Severance of Joint Tenancies" (1979) 1 *The Canadian Bar Review* 1 reports that the Land Registry practice in Alberta and Manitoba is not to accept for registration a transfer by a joint tenant of his interest unless the other tenants consent or at least are notified.
9. Mr Michael Reymond, Sly & Weigall *Submission* (29 January 1992).
10. *Submission* of 29 January 1992 at 2.
11. New South Wales Land Titles Office *Submission* (29 November 1991) at 2.
12. This is consistent with the position in England. According to the internal Practice Book of HM Land Registry, the entry of a restriction following the severance of a joint tenancy in equity is not a disposition or dealing by the proprietor of the land which is caught by the terms of any existing restriction and no consent by an existing restrictioner to the entry of the obligatory restriction is ever required. Likewise, the entry of an obligatory restriction is not a dealing by the proprietor for the purposes of s 55 of the *Land Registration Act 1925*, so that no consent by any existing cautioner (or deposittee of the Land Certificate) is required. No "objection" notice should be sent on registration of the obligatory restriction following the severance of a joint tenancy in equity, and no notice to a chargee under s 30 of the *Land Registration Act 1925* is required.
13. A mortgage by all joint tenants of old system land will not result in a severance. See generally A J Bradbrook, S V MacCallum and A P Moore *Australian Real Property Law* (Law Book Co., Sydney 1991) at 321.
14. *Real Property Act 1900* s 57(1) provides: "A mortgage, charge or covenant charge under this Act has effect as a security but does not operate as a transfer of the land mortgaged or charged."
15. *Penny Nominees Pty Ltd v Fountain (No 3)* (1990) 5 BPR 11,284 (NSW Supreme Court, Young J). However, if one joint tenant transfers ("releases") his or her interest to the other joint tenant then the mortgage does subsist over the whole fee simple in the transferee joint tenant's hand.
16. *Lord Abergavenny's Case* 6 Co. Rep. 78b, (1607) 77 ER 373; *Power v Grace* [1932] 2 DLR 793.
17. *Hirschhorn v Evans* (1938) 54 TLR 1069.

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18. Section 58 of the *Bankruptcy Act* 1966 (Cth) provides that upon sequestration the property of the bankrupt vests in the trustee in bankruptcy. Thus, the trustee in bankruptcy and the other co-owner will hold as tenants in common in equal shares.
19. Letter from Land Titles Office to NSW Law Reform Commission dated 26 March 1993.
20. *Conveyancing Act* 1919 (NSW) s26(2).
21. *Union Bank of Australia v Harrison* (1910) 11 CLR 492. However, the *Conveyancing Act* 1919 s 153(4) now requires all legal representatives to join in the sale, lease or mortgage of real estate, unless the leave of the Court is obtained.
22. *Union Bank of Australia v Harrison* (1910) 11 CLR at 527.
23. *Union Bank of Australia v Harrison* (1910) 11 CLR at 521.
24. Law Society of New South Wales. Property Law Committee *Submission* (21 August 1992) at 3.
25. Subject to the possible qualifications referred to in para 4.31 *et seq.*
26. See paras 3.31 and 6.17.
27. *Corporations Law* s 209(9). Similarly, the Register of patents is *prima facie* evidence of particulars registered in it: *Patents Act* 1990 (Cth) s 195.
28. *Real Property Act* 1900 (NSW) s 74P.
29. Law Society of New South Wales. Property Law Committee *Submission* (21 August 1992) at 2-3.
30. See for example *Nullagine Investments v WA Club Inc* (1993) 67 ALJR 739; (1993) 116 ALR 26.
31. The non-severing joint tenant will have an action for breach of contract. Clearly though, the assessment of damages will be complicated, because as at the date of breach no actual financial loss has occurred, the only loss is of the chance of receiving the entire estate. Consequently, the non-severing joint tenant might be able to seek an order for specific performance on the basis that damages are an inadequate remedy. In the event that the joint tenant who severs in breach of an agreement dies first, it is possible that the agreement might be enforced by a court in its equitable jurisdiction at the suit of the surviving tenant, by treating the persons claiming under the deceased joint tenant as constructive trustees of that half interest in the property.
32. Law Society of New South Wales. Property Law Committee *Submission* (21 August 1992) at 4.
33. This section provides for the survival of causes of action after death.
34. *Stamp Duties Act* 1920 (NSW) s 74CB.
35. s 66B.
36. *Stamp Duties Act* 1920 Second Schedule "Appointment of Trustees". All information on stamp duty liability on instruments which may sever joint tenancies kindly provided by the Office of State Revenue to the Commission in a letter dated 11 May 1993.
37. Second schedule, para 2(b).
38. Cf J H Wade *Property Division Upon Marriage Breakdown* (CCH Australia Limited, 1984) at para 13-012.

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