



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 78

Joint Tenancy and Tenancy in Common

REPORT

NOVEMBER 1994

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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To: **HON C L EDUARDES MLA**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on various aspects of the law relating to joint tenancies and tenancies in common of real and personal property in law and equity.

PG CREIGHTON,
Chairman

22 NOVEMBER 1994

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ABBREVIATIONS

Baalman	R A Woodman and P J Grimes <i>Baalman The Torrens System in New South Wales</i> (2nd ed 1974).
Bradbrook	A J Bradbrook, S V MacCallum and A P Moore <i>Australian Real Property Law</i> (1991).
Butt	P Butt <i>Land Law</i> (2nd ed 1988).
Dickey	A Dickey <i>Family Provision after Death</i> (1992).
Duncan and Vann	W D Duncan and R J Vann <i>Property Law and Practice in Queensland</i> (1986).
Helmore	J W Carter, P Lane, G J Tolhurst and E M Peden <i>Helmore: Commercial Law and Personal Property in New South Wales</i> (10th ed 1992).
Megarry and Thompson	Sir Robert Megarry and M P Thompson <i>Megarry's Manual of the Law of Real Property</i> (7th ed 1993).
Megarry and Wade	Sir Robert Megarry and H W R Wade <i>The Law of Real Property</i> (5th ed 1984).
Mendes Da Costa	D Mendes Da Costa <i>Co-Ownership Under Victorian Land Law</i> (1961) 3 MULR 137.
NSWLRC DP	New South Wales Law Reform Commission <i>Unilateral Severance of a Joint Tenancy</i> (DP 23 1991).
NSWLRC Report	New South Wales Law Reform Commission Report on <i>The Testator's Family Maintenance and Guardianship of Infants Act, 1916</i> (LRC 28 1977).
NSWLRC WP	New South Wales Law Reform Commission Working Paper on <i>Testator's Family Maintenance and Guardianship of Infants Act, 1916</i> (1974).
Oughton and Tyler	R D Oughton and E L G Tyler <i>Tyler's Family Provision</i> (2nd ed 1984).
Practice Manual	Western Australian Office of Titles <i>A Manual of the Practice and Procedures of the Office of Titles</i> (2nd 1986).
Whalan	D J Whalan <i>The Torrens System in Australia</i> (1982).

The pronouns and adjectives "he", "him" and "his", as used in this report, are not intended to convey the masculine gender alone, but include also the feminine equivalents "she", "her" and "hers".

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked:

"to review the law relating to joint tenancies and tenancies in common of real and personal property in law and equity in respect to -

- (a) the rules of construction governing the creation of joint tenancies and tenancies in common;
- (b) the severance of joint tenancy by notice; and
- (c) whether the *Inheritance (Family and Dependents Provision) Act 1972* should be amended to empower the Court to include a deceased person's interest in a joint tenancy in the property from which provision for an application may be made."

2. JOINT TENANCY AND TENANCY IN COMMON

1.2 Joint tenancy and tenancy in common are for all intents and purposes the only means of co-ownership of real or personal property in Western Australia. Joint tenants hold the whole property jointly and nothing separately. Tenants in common, on the other hand, have a distinct share in the property. There are two essential features that distinguish a joint tenancy from a tenancy in common. The first feature is the right of survivorship: upon the death of one joint tenant his interest in the property is extinguished and the interest of the surviving joint tenants is correspondingly enlarged. Upon the death of a tenant in common his interest in the property passes under his will or intestacy. The second feature is the presence of four unities: in order for there to be a joint tenancy there must be unity of title, interest, time and possession. Although the four unities may be present in a tenancy in common, the only unity which is essential is unity of possession.

3. ISSUES CONSIDERED BY THE COMMISSION

1.3 Chapter 2 of the Report is concerned with the rules of construction governing the creation of joint tenancies and tenancies in common. Two issues are considered. First, should

the law require the type of ownership, joint tenancy or tenancy in common, to be specified in all or at least some cases? Secondly, if not required in all cases, should the presumption be reversed and generally favour tenancy in common? In most cases where property is jointly owned, the type of ownership is made clear by the relevant parties. In the case of property the subject of a gift, the donor can indicate how the donees are to receive it. Where two or more persons purchase property jointly, it is their intention as to the type of ownership which is relevant. However, where the type of ownership is not made clear by the parties, the law makes certain presumptions. Usually it presumes joint tenancy, but in a limited class of cases it presumes tenancy in common.

1.4 Chapter 3 is concerned with the severance of a joint tenancy. A joint tenancy can be converted into a tenancy in common by action of the co-owners. Uncertainty exists as to precisely what must be done to achieve this conversion or "severance". Some commentators on the law also consider the existing procedures too onerous. The question is: what procedures should be required to sever a joint tenancy?

1.5 Chapter 4 is concerned with whether the *Inheritance (Family and Dependents Provision) Act 1972* should be amended to empower the Supreme Court to include a deceased person's interest in a joint tenancy in the property from which provision for an application may be made.

Chapter 2

CO-OWNERSHIP OF PROPERTY IN WESTERN AUSTRALIA

1. FORMS OF CO-OWNERSHIP

2.1 Co-ownership is the ownership of real or personal property concurrently, by two or more persons. The common law rules which apply are analogous whether the subject matter of co-ownership is real or personal property.¹ At common law there are four main forms of co-ownership: joint tenancy; tenancy in common; tenancy by entireties; and coparcenary. To all intents and purposes only joint tenancy and tenancy in common exist in Australia. The other forms are obsolete and discussion of them is pointless.²

(a) Joint tenancy

2.2 There is a joint tenancy where two or more persons together as a group own the entire interest in the property. In the eyes of the law each joint tenant holds the whole jointly and nothing separately.³ Joint tenancy has two essential features which distinguish it from tenancy in common: the right of survivorship and the presence of the four unities. These features are discussed below.

(i) Survivorship (*jus accrescendi*)

2.3 Upon the death of one joint tenant his interest in the property is extinguished and does not form part of his estate. It follows that the interest of the surviving joint tenants is correspondingly enlarged. Eventually, the property vests in the last survivor in sole ownership.⁴ For example, where husband and wife hold property in joint tenancy, upon the death of either of them the survivor automatically becomes the sole owner of the property. If there were three joint tenants, A, B and C, and A dies, his interest in the property is extinguished and that of B and C correspondingly enlarged. Upon the death of B his interest

¹ Helmore 58.

² Tenancy by entireties was effectively abolished by s 1(1) of the *Married Women's Property Act 1892*, which recognised the right of married women to own property separately and independently from their husbands. Since its enactment the rules of law and of equity applicable to co-ownership between total strangers became equally applicable as between husband and wife: A Dickey *Family Law* (2nd ed 1990) 505; Megarry and Wade 428. Coparcenary is virtually non-existent because of the abolition of estates tail: *Property Law Act 1969* s 23. For a discussion of these forms of tenancy see Bradbrook 300-301.

³ 39 Halsbury's *Laws of England* (4th ed 1982) para 529 fn 5.

⁴ *Wright v Gibbons* (1949) 78 CLR 313, 323.

will also be extinguished leaving C, the last survivor, as sole owner of the property. This is known as the right or doctrine of survivorship. Because of this doctrine property which is held under joint tenancy cannot devolve by will or intestate succession unless the joint tenancy has been previously severed in the life-time of the deceased joint tenant.⁵

2.4 At common law a body corporate was incapable of holding in joint tenancy either with another body corporate or with a human being.⁶ The common law reasoned that since bodies corporate are capable of perpetual succession the right of survivorship might never apply. The position has now been changed by section 29 of the *Property Law Act 1969* which enables corporations to hold property in joint tenancy with natural persons or with each other. For purposes of application of the doctrine of survivorship, dissolution of the company constitutes its "death".⁷

(ii) *The four unities*

2.5 The second essential feature of joint tenancy is the four unities. These are: unity of title, interest, time and possession. Without these four unities there cannot be joint tenancy.

2.6 Unity of title means that the title of the joint tenants must have the same origin. Thus, if they acquired the interest by inheritance it was under the same will. If the property was conveyed to them the conveyance must have been made under the same instrument.⁸

2.7 Unity of time means that the interest of each joint owner must have vested at the same time. However, the common law excepted from this requirement disposition in a will and conveyances to trustees. In those situations joint tenancy could arise in spite of the absence of unity of time.⁹

2.8 Unity of interest means that the interest of each joint tenant must be identical in nature, extent and duration. For example, there cannot be joint tenancy where one co-owner

⁵ *Swift v Roberts* (1764) 3 Burr 1488, 97 ER 941. Severance of joint tenancy is discussed in Ch 3 below.

⁶ *Law Guarantee and Trust Society v Bank of England* (1890) 24 QBD 406.

⁷ *Property Law Act 1969* s 29(3).

⁸ *Ward v Ward* (1871) 6 Ch App 789. See also *A G Securities v Vaughan* [1988] 2 All ER 173.

⁹ Bradbrook 297.

holds a freehold interest in the subject land and the other a leasehold¹⁰ or where the co-owners are entitled to receive income in unequal proportions.

2.9 Unity of possession means that each co-owner is entitled to the undivided possession of the whole of the property and none holds any part separately to the exclusion of the other co-owners.¹¹ The existence of unity of possession is not only essential for joint tenancy but is necessary for all forms of co-ownership. Because of unity of possession one co-owner cannot exclude his companions from enjoyment of any part of the land. For the same reason a co-owner who uses the whole property exclusively cannot be subjected to an action of trespass by the other co-owners.¹²

(b) Tenancy in common

2.10 Tenancy in common differs from joint tenancy, in that tenants in common hold in individual shares: each tenant in common has a distinct share in the property which has not yet been divided among the co-tenants.¹³ Because each tenant in common has a fixed share in the property, the doctrine of survivorship does not apply. Thus, if one of the tenants in common dies, his interest in the property passes under his will or intestacy.¹⁴ Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is unity of possession. For example, A and B can be tenants in common even though their shares in the property are unequal. However, because of unity of possession each one of them is entitled to enjoy any part of the common property without restriction irrespective of the size of his share.¹⁵

2. CREATION OF JOINT TENANCY AND TENANCY IN COMMON

(a) General law

2.11 Under the general law, the common law and equity differed in their approach to

¹⁰ 39 Halsbury's *Laws of England* (4th ed 1982) para 529 fn 3.

¹¹ Mendes Da Costa 138 and 150

¹² *The Proprietors of the Centre Building Units Plan No 343 v Bourne* [1984] 1 Qd R 6, 13. An action in trespass may lie if a co-owner wrongfully excludes the others from the land: see *Jones v Jones* [1977] 1 WLR 438.

¹³ Bradbrook 300.

¹⁴ Ibid.

¹⁵ *Bull v Bull* [1955] 1 QB 234.

the creation of joint tenancy and tenancy in common.

(i) *Common law*

2.12 The common law leaned in favour of joint tenancy because it inevitably led to the vesting of the property in one person through the operation of the doctrine of survivorship.¹⁶ The enforcement of feudal obligations against one person was easier than against a multiplicity of tenants. Thus, at common law where a grant was made to two or more persons it was presumed that the grantor intended to create a joint tenancy of the legal interest. The presumption was discharged either where one of the four unities was missing or where the grant contained words of severance.¹⁷ Words of severance are expressions which indicate the grantor's intention that each grantee should take a separate and distinct share in the property.¹⁸ Expressions which have been held to constitute words of severance include "amongst", "alike" and "equally".¹⁹

(ii) *Equity*

2.13 In equity, as at common law, a grant of property to two or more persons without words of severance created a joint tenancy and a grant with words of severance created a tenancy in common.²⁰ However, equity leaned in favour of tenancy in common because equity, concerned with justice, "preferred the certainty and equality of a tenancy in common to the chance of 'all or nothing' which arose from the right of survivorship."²¹ Hence, in certain situations even in the absence of words of severance equity presumed that the co-owners intended to create a tenancy in common and not a joint tenancy unless there was clear evidence to the contrary. Traditionally, there were three such situations in which persons who were joint tenants at law were presumed (in absence of contrary evidence) by equity to hold the legal estate upon trust for themselves as equitable tenants in common. These were unequal contribution; partnership property; and loan on mortgage. Each of these situations will be considered.

¹⁶ *Morley v Bird* (1798) 3 Ves 628; 30 ER 1192. See Megarry and Wade 424-425.

¹⁷ Megarry and Wade 424-425.

¹⁸ *Robertson v Fraser* (1871) 6 Ch App 696.

¹⁹ Ibid. Modern law tends to lean in favour of tenancy in common, so that the slightest indication of an intention to divide the property creates such a tenancy: id 699 per Lord Hatherley.

²⁰ *Morley v Bird* (1798) 3 Ves 628; 30 ER 1192.

²¹ Megarry and Wade 427.

* **Unequal contribution**

2.14 Where two or more persons together purchased property, the purchase price having been contributed in unequal amounts, equity presumed that the purchasers intended to hold beneficially as tenants in common in shares proportionate to their contribution. For example, if A and B took a conveyance of land as joint tenants, A having contributed two thirds of the purchase price and B one third, the equitable presumption was that they held the legal estate in trust for themselves as tenants in common in shares proportionate to their contribution.²² Where only one made a contribution but the conveyance was made to two or more as joint tenants, equity presumed that the sole contributor of the funds did not intend the other person(s) to take beneficially. In the absence of any evidence to rebut the presumption, there arose a resulting trust in favour of the contributor.²³ It is important to note that if the purchase money was provided in equal amounts, and the property was conveyed to the contributors in joint tenancy, equity in that case did not presume tenancy in common.²⁴ The parties took as joint tenants both at law and in equity unless there was contrary evidence which showed that they intended to take as tenants in common.²⁵

2.15 The equitable presumption of a resulting trust may be displaced in appropriate cases by a counter presumption of "advancement" or intention to give a beneficial interest.²⁶ The presumption of advancement is made where property is conveyed to husband and wife together as joint tenants, the husband having contributed more than half of the purchase price. The effect of the presumption is that the wife takes her legal interest as a gift, not in trust for her husband, and that the beneficial ownership goes with the legal title.²⁷ The position would be the same where the joint tenants are father and child or someone to whom the man stands in loco parentis.²⁸ But there is no presumption of advancement in favour of a de facto wife.²⁹

²² *Robinson v Preston* (1858) 4 K & J 505; 70 ER 211.

²³ *Calverley v Green* (1984) 155 CLR 242.

²⁴ *Robinson v Preston* (1858) 4 K & J 505; 70 ER 211. Equity's non-intervention was justified on the ground that each purchaser had "wagered" the same amount on gaining the benefit of survivorship: see *Lake v Gibson* (1729) 1 Eq Cas Abr 290. The distinction between equal and unequal contribution is criticised by several writers but is based on long established authority: see Megarry and Wade 427.

²⁵ *Robinson v Preston* (1858) 4 K & J 505; 70 ER 211.

²⁶ It is called a presumption of advancement "but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title": *Martin v Martin* (1959) 110 CLR 297, 303 per Dixon CJ, McTiernan, Fullagar and Windeyer JJ.

²⁷ *Calverley v Green* (1984) 155 CLR 242, 247, 259 and 265.

²⁸ Id 247. The position is the same with a mother and her child: *Brown v Brown* (1993) 31 NSWLR 582.

²⁹ *Napier v Public Trustee (WA)* (1980) 55 ALJR 1, cited with approval in *Calverley v Green* (1984) 155 CLR 242, 256 per Mason and Brennan JJ; 269 per Deane J; Gibbs CJ at 250 and Murphy J at 264 dissented.

Nor will the presumption of advancement arise where the wife contributes more than half of the purchase price of the property conveyed to her and her husband in joint tenancy.³⁰

2.16 The presumptions of resulting trust and advancement are rebuttable by evidence of the actual intention of the parties at the time of the purchase.³¹

* **Partnership property**

2.17 Where property was acquired by partners as part of the partnership assets, equity presumed that they intended to hold beneficially as tenants in common even though the legal interest was conveyed to them in joint tenancy.³² The presumption was made because equity considered it inappropriate to apply the right of survivorship to a business undertaking. The fact that contribution to the purchase price was equal did not affect the equitable presumption.³³ The presumption of tenancy in common of the beneficial ownership of partnership assets is now incorporated in section 30(2) of *The Partnership Act 1895*.

* **Loan on mortgage**

2.18 Where two or more persons advance money, whether equally or unequally, to a third person and a mortgage is made to them jointly, at law they are joint tenants but in equity they are presumed to hold the mortgage in tenancy in common. This is because equity presumed that "each means to lend his own and take back his own."³⁴

* **Other situations**

2.19 In the case of *Malayan Credit Ltd v Jack Chia-MPH Ltd*³⁵ the Privy Council rejected the argument that the situations in which joint tenants at law were presumed to hold the beneficial interest in tenancy in common in equity were rigidly limited to the three situations described above. Lord Brightman, delivering judgment on behalf of the Privy Council, observed:

³⁰ *Mercier v Mercier* [1903] 2 Ch 98.

³¹ *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353.

³² *Lake v Craddock* (1732) 3 P Wms 158; 24 ER 1011.

³³ *Ibid.*

³⁴ *Morley v Bird* (1798) 3 Ves 628, 631; 30 ER 1192, 1193.

³⁵ [1986] AC 549, cited with approval in *Delehunt v Carmody* (1986) 161 CLR 464, 471.

"Their Lordships do not accept that the cases in which joint tenants at law will be presumed to hold as tenants in common in equity are as rigidly circumscribed as the plaintiff asserts. Such cases are not necessarily limited to purchasers who contribute unequally, to co-mortgagees and to partners. There are other circumstances in which equity may infer that the beneficial interest is intended to be held by the grantees as tenants in common."³⁶

In this case a lease of office premises was executed in favour of the plaintiff and the defendant to serve their individual commercial interests. The Privy Council held that, even though the co-tenants were not partners, there was a presumption that they held their beneficial interests in the lease as tenants in common. Professor Butt generalises that:

"Whenever the parties organised their affairs in a manner which demonstrated an intention to hold beneficially as tenants in common, equity would so regard them, notwithstanding that they hold the legal estate as joint tenants."³⁷

Butt argues that because of equity's dislike of joint tenancy, slight circumstances are required to demonstrate the requisite intent.³⁸

(b) Creation of co-ownership under the *Transfer of Land Act 1893*

(i) Nature of co-ownership specified in the instrument of transfer

2.20 Under the *Transfer of Land Act 1893*, joint tenancy and tenancy in common are created by registration of the instrument of transfer.³⁹ Instruments presented for registration that would transfer an estate or interest to two or more persons usually set out the manner in which the co-owners hold the estate or interest. Where it is intended that the transferees hold as joint tenants the transferee panel containing their names, addresses and occupation should contain in addition the words "as joint tenants".⁴⁰ If it is intended that they hold as tenants in common the transferee panel of the transfer form following a description of the transferee should state likewise and the proportions in which the land is held. For example, where the shares are equal: "A of etc and B of etc as tenants in common" or "as tenants in common in equal shares."⁴¹

³⁶ [1986] AC 549, 560.

³⁷ Butt 191. He cites as his authority *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 549.

³⁸ Butt 191.

³⁹ *Transfer of Land Act 1893* ss 58 and 82.

⁴⁰ Practice Manual para 26.

⁴¹ Id para 27.

2.21 Registration of the co-owners as joint tenants or tenants in common is conclusive as far as concerns third parties who act in reliance upon the Register. However, as between the parties, registration is not conclusive as the court may find an intention not disclosed in the Register that the beneficial interest be held differently.⁴² The equitable presumptions discussed above⁴³ operate in appropriate cases to determine the intention of the parties. For example, in *Calverley v Green*⁴⁴ the appellant and respondent, while living together in a de facto relationship, contributed in unequal proportions to the purchase price of a house. The house was conveyed to them in their joint names and they were registered as joint tenants. It was held by the High Court that in equity it was presumed that they held the house in trust for themselves as tenants in common in shares proportionate to their contribution.⁴⁵

(ii) *Nature of co-ownership not specified in the instrument of transfer*

2.22 Where the instrument of transfer to two or more persons is registered without specification in the instrument of transfer of the nature of the co-ownership, section 60 of the *Transfer of Land Act 1893* applies. It relevantly provides:

"Two or more persons who may be registered as joint proprietors of land shall be deemed to be entitled to the same as joint tenants....".⁴⁶

According to the Office of Titles Practice Manual, the effect of the section is that, where the instrument of transfer to two or more persons is registered without specifying the nature of their tenancy, it is presumed that they hold in joint tenancy.⁴⁷

2.23 Although the section does not appear so far to have caused any practical difficulties in Western Australia several writers have indicated potential difficulties with the interpretation of corresponding provisions in other states. In particular, the expression "persons who may be registered as joint proprietors" is controversial.⁴⁸ Some writers suggest that the effect of the section is that, if co-owners have become registered and in the instrument of transfer are

⁴² *Calverley v Green* (1984) 155 CLR 242.

⁴³ Paras 2.13-2.19.

⁴⁴ (1984) 155 CLR 242.

⁴⁵ See also *Muschinski v Dodds* (1985) 160 CLR 583.

⁴⁶ A similar provision is found in the equivalent statutes of New South Wales, Victoria and South Australia: *Real Property Act 1900* (NSW) s 100(1); *Transfer of Land Act 1958* (Vic) s 30(2); *Real Property Act 1886* (SA) s 74.

⁴⁷ Practice Manual para 26. Whalan 102 suggests that this interpretation is based on the perception that the draftsman intended to favour joint tenancy because he equated a registered title with a legal title under the old system.

⁴⁸ See Baalman 349.

explicitly described as "joint proprietors", then they are deemed to hold as joint tenants.⁴⁹ Another interpretation is that, if co-owners who have the qualifications necessary for a joint tenancy are registered, but the nature of their co-ownership cannot be ascertained by inspection of the dealings whereby they acquired registered status, they are deemed to be joint tenants.⁵⁰ However, whatever the interpretation, it is generally agreed that the presumption of joint tenancy only applies to dealings between the registered proprietors and third parties acting on the basis of the Register, but not between the registered proprietors (or their personal representatives) inter se.⁵¹ The authority oft cited for this view is a New Zealand case: *In Re Foley (Deceased), Public Trustee v Foley*.⁵² In that case Henry J held with reference to section 61 of the New Zealand *Land Transfer Act 1952*, which materially corresponds with section 60 of the *Transfer of Land Act 1893*, that:

"...the intention of the Legislature is to make registration conclusive so far as concerns parties who act in reliance on the registered instrument. In the case of two or more registered mortgagees appearing in a memorandum of mortgage, they may be treated by the Registrar, and by all persons dealing with them, as joint tenants with right of survivorship, and the registered estates and interests will pass accordingly.. ..s 61 does not preclude the Court from entering upon an inquiry as to whether or not a tenancy in common exists between registered mortgagees where the registered instrument is silent on that point."⁵³

2.24 In practice, the situation envisaged in section 60 will seldom arise because instruments of transfer submitted for registration of two or more co-transferees normally specify the exact nature of the co-ownership.⁵⁴

(iii) Recommendation

2.25 The Commission **recommends** that section 60 of the *Transfer of Land Act 1893* should be repealed. The section should be replaced by a new provision which requires

⁴⁹ Ibid. See also Bradbrook 308.

⁵⁰ See Baalman 349.

⁵¹ See Whalan 103; Bradbrook 308.

⁵² [1955] NZLR 702.

⁵³ Id 705. According to Bradbrook 308, the "deeming" of joint tenancy is not necessarily conclusive even from the viewpoint of third parties.

⁵⁴ According to Whalan 102, the Registrar would not register an instrument of transfer to two or more persons if it does not specify the exact tenancy in which the land is held. Hence, s 60 of the *Transfer of Land Act 1893* would only apply where "Registrarial vigilance breaks down, and an instrument to which the section applies is registered". See also Bradbrook 308. However, it would seem that the Western Australia Titles Office practice is to register all instruments presented for registration whether or not the transfer specifies the nature of the co-ownership. Instruments of transfer would only be queried where they are submitted with another document which reveals ambiguity as to whether the parties intend to hold in joint tenancy or tenancy in common.

instruments of transfer to two or more persons submitted for registration to specify whether the co-owners are joint tenants or tenants in common. Any instrument which does not state the nature of the co-ownership must not be registered.⁵⁵

2.26 The proposal has several advantages. Where the nature of the co-ownership is not specified it is most likely due to an oversight or because the transferees are not clear in their minds as to the exact nature of their co-ownership. Rejection of instruments which do not specify the nature of the co-ownership will force the transferees (or, in the case of a gift, the transferors) to think about the type of co-ownership they desire. The Commission **recommends** that a simple explanation of the significance of the distinction should be contained in the instrument of transfer. Instruments of transfer are normally completed by a settlement agent or solicitor who should explain to the relevant parties the legal distinction between the two types of co-ownership so that they could make an informed choice of whichever type they desire. Another advantage of requiring the parties to state in advance the exact nature of their co-ownership is that it substantially reduces the scope for future disputes among the transferees or persons claiming under them.

(c) Statutory presumption of tenancy in common in other jurisdictions

(i) Property other than registered land

2.27 In New South Wales and Queensland the common law presumption in favour of joint tenancy has been reversed by legislation.⁵⁶ The relevant statutory provisions are reproduced below.

⁵⁵ The Queensland Law Reform Commission has made a similar recommendation: *Consolidation of Real Property Acts* (Report No 40 1991) 20 draft bill s 37(1). This recommendation has not been adopted. S 56(2) of the *Land Title Act 1994* (Qld) provides that if the instrument of transfer does not show whether the co-owners are to hold as tenants in common or joint tenants, they must be registered as tenants in common.

⁵⁶ The New South Wales provision, on which the Queensland provision was modelled, was introduced in 1919 as a result of a Royal Commission inquiry into conveyancing and the law of property in that State. According to the Commissioner, the provision was entirely novel: Bradbrook 305 fn 36. However, the suggestion to enact such a provision was made as far back as 1861 by Sir W Page-Wood V-C in *Williams v Hensman* (1861) 1 J & H 546, 557; 70 ER 862, 866.

2.28 Section 35 of the Queensland *Property Law Act 1974* provides:

"(1) A disposition of the beneficial interest in any property, whether with or without the legal interest, to or for 2 or more persons together beneficially shall be construed as made to or for them as tenants in common, and not as joint tenants.

(2) This section does not apply -

(a) to persons who by the terms or by the tenor of the disposition are executors, administrators, trustees, or mortgagees, nor in any case where the disposition provides that persons are to take as joint tenants or tenants by entireties; and

(b) to a disposition for partnership purposes in favour of persons carrying on business in partnership.

(3) Subject to the provisions of the *Partnership Acts 1891*, a disposition for partnership purposes of an interest in any property in favour of persons carrying on business in partnership shall, unless a contrary intention appears, be construed as -

(a) a disposition (if any) of the legal interest to those persons as joint tenants; and

(b) a disposition (if any) of the beneficial interest to those persons as tenants in common.

(4) This section applies to any disposition made after the commencement of this Act.

(5) In this section -
'disposition' includes a disposition which is wholly or partly oral."

2.29 Section 26 of the New South Wales *Conveyancing Act 1919* provides:

"(1) In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants.

(2) This section does not apply to persons who by the terms or by the tenor of the instrument are executors, administrators, trustees, or mortgagees, nor in any case where the instrument expressly provides that persons are to take as joint tenants or tenants by entireties."

2.30 The general effect of the legislation is that if property⁵⁷ is disposed to two or more persons together, even without words of severance and irrespective of whether or not their contribution to the purchase price was equal or unequal, they are presumed to hold as tenants in common.⁵⁸ It has been held that the presumption is directed purely to the construction of transactions and does not alter substantive property law.⁵⁹ For example, the presumption does not alter the general law that choses in action, apart from patents, cannot be held in tenancy in common at law.⁶⁰ This has led to a controversy as to whether the statutory presumption of tenancy in common applies to choses in action. In 1939, Hutley suggested that the presumption should be construed as not applying to choses in action.⁶¹ Duncan and Vann, on the other hand, propose a "middle course" between a construction which avoids exclusion of all choses in action and one which requires changes to the substantive law, by permitting the holding of choses in action in tenancy in common at law. They argue that:

"...the statutory presumption only operates where prior to the Act it was possible for particular interests in property to be held jointly and in common. As most choses in action could only be held in these two ways in equity, the section generally only operates in equity for choses in action."⁶²

Duncan and Vann also submit that because the provision is a rule of construction it has no qualifying effects on the doctrines equity has developed dealing with beneficial interests, especially the presumption of advancement and the situations where unequal contributions are made to the purchase price. So, for example, if A and B purchase property in joint names, A having provided two thirds of the purchase price, A and B will be tenants in common at law; in equity they will take as tenants in common in the proportion 2:1. However, it seems that the equitable doctrine has been modified to some extent. It was formerly the case that where A and B contributed equally to the purchase price of property, equity, following the law, held that they took beneficially in joint tenancy. The High Court in *Delehunt v Carmody* has ruled that this conclusion had to be modified because of the statutory presumption. Gibbs CJ, with whom the other judges agreed, observed that:

⁵⁷ The legislation applies to real and personal property: see Duncan and Vann 646.

⁵⁸ Bradbrook 306.

⁵⁹ *Registrar-General of New South Wales v Wood* (1926) 39 CLR 46, 55.

⁶⁰ Duncan and Vann 651; F C Hutley *Conveyancing Act 1919-1938* (NSW) s 26 *Application to Chases in Action* 13 ALJ 230, 231-232.

⁶¹ F C Hutley *Conveyancing Act 1919-1938* (NSW) s 26 - *Application to Chases in Action* 13 ALJ 230, 231-232; contra *In re Wool Trading Company Ltd (In Liquidation)* (1927) 28 SR (NSW) 106. But see *Buchan v Nash* [1983] 2 NSWLR 575.

⁶² Duncan and Vann 651.

"Where, as a result of following the law, a beneficial joint tenancy would formerly have been created, now a beneficial tenancy in common will (in New South Wales) come into existence."⁶³

This is clearly the case where the property is conveyed to A and B. Under the statute, they take as tenants in common, and equity simply follows the law.⁶⁴ But where the property is conveyed to A alone, so that the New South Wales statutory presumption does not apply, the High Court considered that it would be anomalous to retain the old rule that A and B would be joint tenants in equity. Gibbs CJ proceeded by analogy to the cases covered by the statute, and ruled that A held the property on trust for A and B as tenants in common in equal shares. It would seem that the same result would be reached in Queensland by direct application of the statutory presumption.

2.31 The statutory presumption of tenancy in common does not apply to persons who are by the terms of the disposition executors, administrators, trustees, mortgagees or partners, or in the light of contrary evidence that the purchasers intended to hold the beneficial interest in joint tenancy.⁶⁵ The reasons for the exclusion are briefly considered.

1. Executors, administrators and trustees: The convenient administration of estates and trust property demands that the trustees and administrators, if there are more than one, hold the legal title in joint tenancy rather than tenancy in common. On death of one joint tenant, the survivors by operation of *jus accrescendi*, have the legal power to administer the estate. In any event, as the trustee has no beneficial interest in the property, there is no reason to facilitate disposal of a separate interest. In Queensland the provision is complemented by sections 15 and 16 of the *Trusts Act 1973* and section 45 of the *Succession Act 1981*, which enact that every estate vested in trustees and personal representatives as such, respectively, is vested in joint tenancy.⁶⁶

⁶³ (1986) 161 CLR 464, 473. See also a leading Canadian textbook, A H Oosterhoff and W B Rayner *Anger & Honsberger: Law of Real Property* Vol (2nd ed 1985) 791: "Although joint ownership can arise by...application of the doctrines of resulting or constructive trusts, in the face of section 13 [*Conveyancing and Law of Property Act 1980* (Ont)], one would presume that the form of joint ownership so arising would be tenancy in common as opposed to joint tenancy." S 13 materially corresponds with the New South Wales provision.

⁶⁴ Similarly, it would seem that if a husband and wife purchase property in joint names, the husband having provided two thirds of the purchase price, they will now take beneficially as tenants in common in equal shares since, by the presumption of advancement, equity follows the law: *Martin v Martin* (1959) 110 CLR 297. See para 2.15 above.

⁶⁵ *Conveyancing Act 1919* (NSW) s 26(2); *Property Law Act 1974* (Qld) s 35(2)(a).

⁶⁶ *Trustee Act 1925* (NSW) s 57(1) provides that trustees are presumed to hold in joint tenancy unless otherwise expressed in the instrument. S 10 of the *Trustees Act 1962* corresponds with s 15 of the *Trusts Act 1973* (Qld), while s 45 corresponds with s 57 of the *Trustees Act* (NSW). The *Administration Act*

2. Co-mortgagees are dealt with under a separate provision which enacts the "joint account" clause in mortgage agreements.⁶⁷
3. Partnership. Only the Queensland provision excludes partnership property from the operation of the statutory presumption.⁶⁸ The Queensland Law Reform Commission recommended the express exclusion of partnership property because it was concerned that the application of the statutory presumption might cause practical difficulties in winding up partnerships following the death of one of the partners.⁶⁹ The Law Reform Commission was in particular mindful of the case of *Re George Livanos, Deceased*.⁷⁰ This was a case in which A and B entered into a partnership and registered title to their land, a partnership asset, as tenants in common at law. Since section 23(3) of the Queensland *Partnership Act* provides that the legal estate and interest in any partnership land is to devolve according to the nature and tenure thereof and the general rules of law applicable thereto, when A died (intestate) his interest as legal tenant in common descended as by law prescribed and did not accrue to the surviving partner as in joint tenancy. Also, since section 23(1) provides that partnership assets are held on trust for the partnership, it followed that the legal estate of A as tenant in common was held by him on trust and, accordingly, upon his death the legal estate vested in the Public Curator pursuant to section 12 of the *Trustees and Executors Acts*. This meant that the survivor could not dispose of the partnership property without assistance of the deceased's personal representative.⁷¹ Duncan and Vann also justify exempting partnership property from the statutory presumption because of the recognition of the highly developed and specialised nature of the law with respect to partnership property and because that law operates satisfactorily.⁷² Partnership property is dealt with in section 35(3) of the Queensland *Property Law Act 1974*. The effect of the subsection is that unless a contrary intention appears, the legal interest

1903 s 8 does not require administrators of estates, where more than one, to hold in joint tenancy (cf *Succession Act 1981* (Qld) s 45).

⁶⁷ *Property Law Act 1974* (Qld) s 93; *Conveyancing Act 1919* (NSW) s 99. The provision corresponds with s 67 of the *Property Law Act 1969*.

⁶⁸ S 35(2)(b).

⁶⁹ Report on *A Bill to Consolidate, Amend, and Reform the law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* (QLRC 16 1973) 26.

⁷⁰ [1955] St R Qd 362.

⁷¹ On death of a partner the firm normally dissolves and the survivor has a legal obligation to wind up the business which usually involves sale of the partnership property: K L Fletcher *Higgins and Fletcher The Law of Partnerships in Australia and New Zealand* (5th ed 1987) 138.

⁷² Duncan and Vann 648-649.

will vest in the partners as joint tenants and the beneficial interest will vest in the partners as tenants in common. This is subject to the operation of sections 23, 24 and 25 of the Queensland *Partnership Act 1891* which deal with the acquisition, holding and conversion of partnership property.⁷³

4. Contrary intention. The statutory presumption does not apply in the light of contrary evidence that the purchasers intended to hold the beneficial interest as joint tenants.⁷⁴ Section 26 of the New South Wales *Conveyancing Act 1919* appears to exclude the statutory presumption only where there is an express statement in the instrument of transfer that the co-owners hold as joint tenants or tenants by entireties. However, even in the absence of an express declaration, it has been held that an intention to exclude the statutory presumption of tenancy in common can be inferred from surrounding circumstances.⁷⁵

2.32 Section 26 of the New South Wales *Conveyancing Act 1919*, strictly interpreted, appears to apply only where a disposition is by *instrument* and not where it is oral. However, in the case of *Carmody v Delehunt*,⁷⁶ the New South Wales Court of Appeal refused to give the section a restricted meaning. The Court adopted the view that the section is indicative of a general legislative intention to favour tenancy in common over joint tenancy. Consequently, it held that the presumption applied to all situations, including those not explicitly covered in the section, where previously a joint tenancy was presumed whether at law or in equity. Professor Butt summarises the law in New South Wales thus:

"The position now seems to be that where all that is known is that A and B are co-owners of the beneficial interest and *there is no evidence that they intended a right of survivorship to apply between them* [his emphasis], they are tenants in common of that beneficial interest, even in those situations where s 26(1) does not strictly apply and even in those situations where prior to 1920 a joint tenancy would have resulted in equity (as in the case of parties advancing equal amounts by way of purchase price).⁷⁷

⁷³ These provisions correspond with ss 30, 31 and 32 of The *Partnership Act 1895*.

⁷⁴ *Conveyancing Act 1919* (NSW) s 26(2); *Property Law Act 1974* (Qld) s 35(2)(a).

⁷⁵ *Hircock v Windsor Homes (Development No 3) Pty Ltd* [1979] 1 NSWLR 501. See also Duncan and Vann 647.

⁷⁶ [1984] 1 NSWLR 667, affirmed (1986) 161 CLR 464.

⁷⁷ Butt 192.

2.33 Under the Queensland *Property Law Act 1974*, the above interpretation difficulties do not arise because section 35(5) expressly states that dispositions which are wholly or partly oral are included in the section.

(ii) *Application of the statutory presumption to registered land*

* **New South Wales**

2.34 Prior to the New South Wales Supreme Court decision in *Hircock v Windsor Homes (Development No 3) Pty Ltd*⁷⁸ there was doubt whether section 26 of the *Conveyancing Act 1919* applied to Torrens system land. The reason was that in some academic circles it was thought that the presumption of tenancy in common under section 26 of the *Conveyancing Act 1919* was inconsistent with section 100(1) of the New South Wales *Real Property Act 1900*, which appears to presume joint tenancy.⁷⁹ However, in *Hircock v Windsor Homes (Development No 3) Pty Ltd*, Hutley J A denied that the two sections were inconsistent. His Honour opined that section 100(1) of the *Real Property Act* merely applied the incidents of the joint tenancy to the term "joint proprietorship" but that the section did not deem all co-owners to be joint tenants.⁸⁰ Therefore, if two or more are registered as joint proprietors the presumption of tenancy in common under section 26(1) of the *Conveyancing Act 1919* would apply unless excluded or rebutted under section 26(2).⁸¹

* **Queensland**

2.35 In Queensland the above problem does not arise because section 56(2) of the *Land Title Act 1994* provides that if the instrument of transfer does not show whether the co-owners are to hold as tenants in common or joint tenants, the Registrar must register them as tenants in common. Accordingly, under the provision, *at law* they hold as tenants in common and section 35 of the *Property Law Act 1974* determines that in equity they also hold as tenants in common.

⁷⁸ [1979] 1 NSWLR 501.

⁷⁹ The section reads:

"Two or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act, shall be deemed to be entitled to the same as joint tenants."

⁸⁰ The section is similar to s 60 of the *Transfer of Land Act 1893*, discussed at para 2.23 above.
[1979] 1 NSWLR 501, 506.

⁸¹ See also Bradbrook 309 and Butt 193.

(iii) Recommendations

2.36 The Commission **recommends** that the presumption of joint tenancy should be replaced by a statutory presumption of tenancy in common as in Queensland and New South Wales. Except where excluded, the presumption should apply to dispositions of personal and real property including land registered under the *Transfer of Land Act 1893*. The proposal is supported on a number of grounds. First, the presumption of tenancy in common is consistent with the modern law's preference for tenancy in common over joint tenancy. Secondly, most people not conversant with the technical distinction between joint tenancy and tenancy in common are likely to find the consequences of tenancy in common more in keeping with their expectation than those of a joint tenancy. For example, if A and B are joint tenants and A dies, many people would be surprised if they were told that B would have the entire property to himself and that A's will in which he purported to donate his interest to a third person would not have any legal effect. Thirdly, the presumption of tenancy in common is more likely to be fairer in situations where the parties have not expressed a desire for joint tenancy with the consequence of the right of survivorship. For example, if a testator donates a boat to his adult children, A and B, at common law in the absence of words of severance the children would take as joint tenants, with the consequence that upon the death of one of the children the survivor would remain as sole owner to the exclusion of the deceased co-owner's estate. Many would view this as unfair and it is unlikely that if the testator at the time of making the will was aware of the legal distinction between joint tenancy and tenancy in common he would have made the grant in joint tenancy.

2.37 It is recommended that the proposed provision should be modelled on section 35 of the Queensland *Property Law Act 1974*, subject to the following amendments -

1. Choses in action: It is proposed that the controversy regarding whether or not the statutory presumption applies to choses in action should be resolved by express statutory provision. A blanket application of the presumption to any chose in action is not recommended because it may, in some cases, result in unforeseeable legal problems. It is thought that Duncan and Vann's construction of the Queensland provision offers a suitable compromise between total exclusion of choses in action from the operation of the statutory presumption and a substantive change in property law. As may be recalled, they effectively interpret the statutory presumption as

generally only operative *in equity* for choses in action.⁸² For the avoidance of doubt the Commission **recommends** that a provision along these lines should be expressly enacted in the proposed section.

2. Co-ownership between married people: The Commission **recommends** that the Queensland provision creating exceptions to the operation of the statutory presumption should be retained and extended to include property disposed of to married people. Joint ownership is the most popular form of co-ownership between married people because upon the death of either spouse the survivor automatically becomes the sole owner without need of probate. Also because it is the wish of both spouses that whoever is the survivor should enjoy the property. Therefore, the common law presumption of joint tenancy (and equity where equity follows the law) operates satisfactorily as regards married people. The application of the statutory presumption of tenancy in common may lead to results which are inconsistent with the wish and expectation of most spouses. Spouses who wish to hold their property in tenancy in common could do so by clear indication of their intention.⁸³
3. Contrary intention: The Commission **recommends** that the presumption should be rebuttable by evidence of contrary intention. This should be made clear by express provision.

⁸² See para 2.30 above.

⁸³ *Married Persons' Property Act 1986* (ACT) s 9(2) enacts that unless a contrary intention appears, where married persons contribute funds to purchase property and the property is transferred to only one spouse, it is presumed that they intend to hold the property in joint tenancy.

Chapter 3

SEVERANCE OF JOINT TENANCY

1. INTRODUCTION

3.1 Severance is the process whereby joint tenancy is converted into a tenancy in common. Though strictly speaking a joint tenant owns no distinct share in the property, the Court of Equity which leaned in favour of tenancy in common recognised that each joint tenant had a potential share in the property equal in size to that of the other co-tenants which each tenant was entitled to sever during his lifetime.¹ The significance of severance is that it destroys the right of survivorship. For example, if A and B own land as joint tenants and A, prior to his death,² severs the joint tenancy the right of survivorship would not apply in favour of B.

3.2 Severance of a joint tenancy may be effected by destroying either the unity of title or unity of interest.³ The *locus classicus* of the rules of severance is the following passage in the judgment of Sir William Page-Wood V-C in *Williams v Hensman*:

"...in the first place, an act of anyone of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant 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 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."⁴

To the three rules of severance identified in the passage, we should add the following: severance by homicide and severance by judicial order. Each of these methods of severance will be considered.

¹ Megarry and Thompson 299.

² Severance by will is ineffective: see *Re Caines* [1978] 1 WLR 540.

³ Unity of time cannot be severed and severance of unity of possession means partition: see Megarry and Wade 430.

⁴ (1861) 1 J & H 546; 70 ER 862, 867.

2. UNILATERAL SEVERANCE OR SEVERANCE BY ACT OF ONE JOINT TENANT

(a) The present law

3.3 A joint tenant may sever the tenancy by engaging in an act which operates upon his share. It is not necessary to seek prior consent of the other joint tenants or even to inform them of the severance. So unilateral severance can occur in total secrecy.⁵

3.4 For convenience unilateral acts which may operate to sever a joint tenancy are considered under the following subheadings -

- (i) transfer of interest to a third party;
- (ii) transfer of interest to a third party as trustee for self;
- (iii) transfer of interest to self;
- (iv) declaration of trust;
- (v) unilateral declaration;
- (vi) partial transfer of interest to a stranger.

(i) *Transfer of interest to a third party*

3.5 If A and B hold an interest in land as joint tenants and A alienates his undivided interest to T, the joint tenancy is severed because there is no unity of title between B and T.⁶ If initially there were more than two joint tenants, say A, B and C, and A alienates his interest to T, the latter would hold the detached proportionate share as tenant in common with B and C, while B and C would continue to hold a two-thirds interest as between themselves in joint tenancy.⁷ Thus, if B pre-deceases C the doctrine of survivorship will apply in C's favour in respect of the two-thirds share of the land, but it will not affect T's one third share. Conversely, of course, if T dies, his one-third share of the land will not be affected by the doctrine of survivorship.

3.6 At law a transfer to a third party becomes effective to sever a joint tenancy when the interest of the transferee is conveyed to that party. Hence, where the joint tenancy is registered

⁵ See *In the Marriage of Rickie* (1979) 24 ALR 507.

⁶ Bradbrook 321.

⁷ *Wright v Gibbons* (1949) 78 CLR 313.

under the *Transfer of Land Act 1893*, severance becomes effective on registration of the transfer.⁸ In equity, severance is recognised as operative even before registration of the transfer to the third party provided that there is an agreement which would in equity be specifically enforceable. For example, if a joint tenant enters into a written agreement for valuable consideration⁹ to transfer his interest to a third party the agreement would, pending actual transfer, operate in equity to sever the joint tenancy and create an equitable interest in tenancy in common.¹⁰

3.7 An intended transfer by a joint tenant of his interest to a stranger made without valuable consideration or made under an unenforceable agreement, is ineffective to sever the joint tenancy in equity unless the circumstances of the case are such that the stage is reached where equity regards the transfer as *complete*.¹¹ For the purposes of equity a transfer is complete where the donor has done all that is necessary to be done to put the donee in a position to acquire a legal title without further reference to the donor.¹² Whether this is indeed the case will depend on the manner required for the legal transfer of the subject property. For example, a gift inter vivos of a chose in possession is effected at law either by deed or by delivery of the chattel to the donee with intention to donate. An intended donation not made by deed or accompanied by delivery of the chattel is not complete, and in the absence of a declaration of a trust equity will not assist the donee to perfect the gift.¹³ In that case the intended gift is not effective to sever a joint tenancy of a chattel.

3.8 If the joint tenancy is held in land registered under the *Transfer of Land Act 1893*, a gift by one joint tenant of his aliquot share to a third party effects severance of the joint tenancy once the transfer is registered. Whether a jointure may be severed in equity by an unregistered gift, is not very clear. One view is that no interest arises until the transfer is registered.¹⁴ On this view an unregistered voluntary transfer to a third party does not operate

⁸ *Transfer of Land Act 1893* s 58. See also *Wright v Gibbons* (1949) 78 CLR 313. If it is old system land the transfer must be by deed: *Property Law Act 1969* s 33(1).

⁹ In determining whether there is consideration equity looks to the substance, not the mere form: *Corin v Patton* (1990) 169 CLR 540, 577 per Deane J.

¹⁰ *Wright v Gibbons* (1949) 78 CLR 313.

¹¹ *Corin v Patton* (1990) 169 CLR 540, 580 per Deane J. This is based on the notion that a court of equity will not assist a volunteer to perfect an imperfect gift.

¹² *Milroy v Lord* (1862) 4 De GF & J 264; 45 ER 1185.

¹³ E L J Tyler and N E Palmer *Crossley Vaines' Personal Property* (5th ed 1973) 305. An ineffective assignment will not be construed as itself constituting a declaration of trust in order to make it effective in equity: see *Williams v Lloyd* (1934) 50 CLR 341, 368-369.

¹⁴ *Travica v Travica* [1955] VLR 261; *Galding v Hands* [1969] WAR 121, 126; *Corin v Patton* (1990) 169 CLR 540, 570 per Brennan J. This view has been criticised as not well founded because it is "incompatible with the well-established principle that an unregistered interest may exist in the form of

to sever a joint tenancy. The other view is that if the donor delivers to the donee an instrument of transfer in a registrable form and the certificate of title (or authority to procure the production of the certificate of title from whoever is holding it) to enable the donee to obtain registration, the transfer is complete. This is illustrated by the case of *Re Ward; Gillett v Ward*.¹⁵ In this case the deceased instructed his lawyer to transfer to the deceased's son by way of gift certain land registered under the *Transfer of Land Act 1893*. He executed the relevant instruments of transfer and gave authority for the certificate of title to be delivered by the bank to his solicitor so that the transfer could be registered. He also instructed the solicitor to have the document stamped and delivered to the donee. The deceased told the solicitor that the stamp and other duties were to be paid by the son. Though the son agreed to make the payments he did not pay them as he was unable to. The donee died before the transfer was registered. It was held by the Supreme Court that the gift was valid because the deceased had done all that was necessary to enable the son to acquire the legal estate without further reference to him. On this view, although not a case of severance of joint tenancy, a voluntary unregistered transfer to a third party may operate to sever a joint tenancy.¹⁶

(ii) *Transfer to a trustee for self*

3.9 A joint tenancy may be severed by a joint tenant transferring his aliquot interest to a stranger to hold for the benefit of the transferor.¹⁷ To be effective the transfer must vest in the trustee the legal or equitable interest of the transferor.¹⁸ An agreement to transfer to the trustee if not supported by genuine consideration¹⁹ is ineffective to sever the joint tenancy at law or in equity unless the transferor has done all that is necessary to enable the transferee to obtain the legal title. For example, in *Golding v Hands*,²⁰ A and B were registered proprietors in joint tenancy under the *Transfer of Land Act 1893*. With a view to severing the joint tenancy, A executed a memorandum of transfer to a trustee and the trustee executed a re-transfer. A instructed the trustee not to register the instruments of transfer until after A's death and that in the meantime the trustee should keep the instruments in safe custody, which he did. A died a

beneficial interests under express or constructive trusts...": see G L Teh and B M Dwyer *Introduction to Property Law* (2nd ed 1992) 107.

¹⁵ [1968] WAR 33. See also *Corin v Patton* (1990) 169 CLR 540, 559 per Mason CJ and McHugh J.

¹⁶ See also para 3.11 below. For a case in which a joint tenancy was severed see *Costin v Costin* (unreported) Supreme Court of New South Wales 13 September 1994, No 3319 of 1991.

¹⁷ *Wright v Gibbons* (1949) 78 CLR 313, 332 per Dixon J.

¹⁸ Butt 205.

¹⁹ In determining whether a party has given consideration equity looks at the substance not form: *Corin v Patton* (1990) 169 CLR 540, 577 per Deane J.

²⁰ [1969] WAR 121.

year later. The issue was whether the joint tenancy had been severed. Jackson J held that "the only unilateral act which will suffice to produce severance is effective alienation to a stranger".²¹ The transfer, not being a transaction for value, was ineffectual to vest in the trustee any legal or equitable interest in the land, and hence did not sever the joint tenancy.

3.10 Significantly, in *Golding v Hands*, Jackson J made a passing remark that an "interesting question" would have arisen if the instrument of transfer had been delivered to the trustee with the certificate of title and with instructions that it be registered.²² A similar question did indeed arise in the Family Court in the case of *In the Marriage of Badcock*.²³ The facts of the case were as follows. A and B were registered proprietors in joint tenancy of certain land. With a view to sever the joint tenancy A purported to transfer her interest to a trustee for her benefit. She issued instructions to M (mortgagee) who had custody of the certificate of title to hand it over to the trustee to enable registration of the transfer. However, M refused to hand over the certificate to the trustee. Murray J held that there had been alienation in equity. Her Honour distinguished *Golding v Hands* because there the transferor had issued specific instructions to the trustee not to proceed with the registration until after her death which meant that it was still within the transferor's powers to recall the transfer. She reasoned that in the instant case the transferor's right to dispose of her interest had been diminished by the terms of the trust deed.

3.11 The issue of severance by unregistered voluntary transfer has recently been considered by the High Court in the case of *Corin v Patton*. The facts of the case were as follows. Mr and Mrs Patton were registered proprietors in joint tenancy of certain land. Mrs Patton, who was terminally ill, wished to sever the joint tenancy so that she could devise her interest in her will. She signed an instrument of transfer of aliquot interest to C to hold "[i]n consideration of and pursuant to the terms of a deed of Trust between the Transferor and Transferee." The deed of trust constituted C as trustee for Mrs Patton's interest for the benefit of Mrs Patton. The deed of trust and the instrument of transfer which was in a registrable form were taken away by S, Mrs Patton's solicitor. However, the certificate of title was in the possession of a mortgagee and Mrs Patton did not take any steps to procure it to enable registration of the transfer. Mrs Patton died before the transfer was lodged for registration. The issue was whether she had done enough to effect severance of the joint tenancy. The High Court

²¹ Id 126.

²² Ibid.

²³ (1979) 5 Fam LR 672.

unanimously held that she had not. However, there was no unanimity as to whether a voluntary transfer could sever a joint tenancy of registered land without registration. Mason CJ and McHugh J held that an equitable estate passed to the donee when the donor had done all that was necessary to put the donee in a position to acquire a legal title:

"Where a donor, with the intention of making a gift, delivers to the donee an instrument of transfer in registrable form with the certificate of title so as to enable him to obtain registration, an equity arises, not from the transfer itself, but from the execution and delivery of the transfer and the delivery of the certificate of title in such circumstances as will enable the donee to procure the vesting of the legal title in himself."²⁴

The statement is *obiter*, because their Honours found that Mrs Patton took no steps to arrange the production of the certificate of title. Deane J in a separate judgment agreed with the legal principle stated by Mason CJ and McHugh J, but he also added a further reason for dismissing the appeal. He held that since C was a bare trustee of Mrs Patton's interest, she being the beneficiary, it was always within her power to recall the transfer as long as it remained unregistered.²⁵

3.12 In view of the foregoing authorities, it may be concluded that an unregistered voluntary transfer may operate to sever a joint tenancy of land registered under the *Transfer of Land Act 1893*, provided that the transferor delivers to the transferee without any reservations an instrument of transfer in a registrable form together with the certificate of title (or authority to procure the certificate from whoever has possession of it) and any other relevant documents to enable registration. However, until the High Court directly resolves the matter a degree of uncertainty inevitably remains.

(iii) *Transfer to self*

3.13 Under the general law a person could not alienate real or personal property to himself or even himself and others. Therefore, a joint tenancy could not be severed by transfer to

²⁴ *Corin v Patton* (1990) 169 CLR 540, 560; compare Brennan J at 571.

²⁵ *Corin v Patton* (1990) 169 CLR 540, 583. See also Toohey J at 592. However, Toohey J appears to be of the view that a voluntary transfer of registered land is incomplete at law and in equity until the transfer is registered (see 592-593). Brennan J at 571 also appears to subscribe to a similar view. See also, to the same effect, S MacCallum *Severance of a Matrimonial Joint Tenancy by a Separated Spouse* (1980) 7 Mon ULR 17, 25-29.

oneself.²⁶ The general law has been replaced by section 44 of the *Property Law Act 1969*. The section empowers a person to convey property to himself or himself and another person or persons. In the case of *Freed v Taffel*, the New South Wales Supreme Court held, *obiter*, that where there was a statutory provision similar to section 44, a conveyance by one joint tenant of his interest to himself as tenant in common with the other joint tenant is capable of severing the jointure.²⁷ But the Court added a proviso that there must be either at law or in equity an effective alienation of the transferor's interest before the unity of title is effected and the jointure severed. In this case the deceased, with a view to severing the joint tenancy of registered land, executed a memorandum of transfer purporting to transfer from himself as transferor an estate as joint tenant in the property to himself as transferee as tenant in common. The consideration was shown as \$1. The person holding the certificate of title on behalf of the other joint tenant refused to hand over the certificate of title so as to enable registration. The issue was whether the joint tenancy had been severed. Hekham CJ held that since the purported transfer to self was voluntary, without registration it did not operate at law or in equity to affect the jointure.²⁸ His Honour did not seem to consider as relevant to his decision the fact that registration did not proceed because the other joint tenant would not hand over the certificate of title. With reference to personal property, it has been suggested that a transfer by one joint tenant of his interest to himself as tenant in common with the other co-owner(s) may suffice to sever the joint tenancy.²⁹

3.14 Severance by transfer to self is simple and inexpensive. The requirement that the transfer to self is not effective to sever a joint tenancy unless registered may be seen as a little too hard on joint tenants who seek to sever their joint tenancy. It is particularly unfair in situations similar to that in the case of *Freed v Taffel* where the registration was deliberately impeded by the other joint tenant (or mortgagee in possession of the certificate) refusing to hand over the certificate of title to enable registration, thereby denying the deceased his right to sever the tenancy. Arguably, there may be good policy reasons for holding that a voluntary unregistered transfer should not be operative to sever the jointure. One of the reasons is that it

²⁶ *Samuel v District Land Registrar* [1984] 2 NZLR 697.

²⁷ [1984] 2 NSWLR 322. The transfer to self destroys the original unity of title since the transferor holds under the instrument of transfer to himself: Butt 206.

²⁸ See also *McNab v Earle* [1981] 2 NSWLR 673; also Butt 206. Compare *Samuel v District Land Registrar* [1984] 2 NZLR 697, the facts of which were materially identical with *Freed v Taffel*. There Moller J held that the transfer to self though unregistered operated to sever the joint tenancy. Alternatively, his Honour held (at 702) that s 49 of the New Zealand *Property Law Act 1952* (which corresponds with s 44 of the *Property Law Act 1969*) provided a statutory exception to the rule that one of the four unities must be destroyed if a joint tenancy is to be severed.

²⁹ Helmore 60 fn 16. They rely on the authority of an *obiter dictum* in *McNab v Earle* [1981] 2 NSWLR 673. *Quaere*: Is the transfer to self effected by deed or delivery?

is relatively easy to execute an instrument of transfer to self; if that is all it takes to effect a severance, a joint tenant may in the heat of the moment sever the jointure without considering all the consequences.³⁰ The registration requirements allow for tempers to cool and time to consider whether to proceed with unilateral severance. There could also be other difficulties. Suppose A and B are joint tenants of registered land. A, then in possession of the certificate of title, signs an instrument of transfer of his interest to himself. If the joint tenancy is thereby severed there is a danger that A may secretly sign a memorandum of transfer to himself which he may be tempted to destroy should B predecease him.

3.15 In the absence of direct Australian authority, it is not settled that a joint tenancy of registered land can be severed by transfer to self, at any rate, without registration of the transfer.

(iv) *Declaration of trust*

3.16 The learned authors of *Australian Real Property Law*³¹ propose that a joint tenancy may be severed in equity where a joint tenant declares himself a trustee of the interest for another. The only requirement is that the declaration must comply with the writing requirement in section 34 of the *Property Law Act 1969*.³² This proposition is based on Canadian authorities, including *Re Sorensen and Sorensen*.³³ In this case husband and wife were registered under the Torrens system as joint tenants. The wife without the consent or knowledge of her husband executed a trust deed covering her interest in the land in favour of her son. The trust deed contained a declaration of trust³⁴ and an intention to sever the joint tenancy. She also executed an instrument of transfer which was not registered. In the Alberta Supreme Court, Appellate Division, McDermid JA held that the declaration of trust *alone* severed the joint tenancy and that the son had become the owner of the beneficial interest of the donor who settled the trust upon him.³⁵

³⁰ Once severance is effected it cannot be undone: see *Burgess v Rawnsley* [1975] 1 Ch 429. However, the Commission recommends the enactment of a power to sever the joint tenancy by written notice to the other joint tenants: para 3.34 below.

³¹ Bradbrook 322.

³² Ibid.

³³ (1979) 90 DLR (3d) 26.

³⁴ The trust deed read in part "I ... do hereby declare that I hold the said lands upon trust for my son Arthur....his heirs and assigns forever".

³⁵ (1979) 90 DLR (3d) 26, 37. See other Canadian cases cited by Butt 206. See also *Ogilvie v Littleboy* (1897) 13 TLR 399, cited Bradbrook 322 fn 117.

3.17 Once again in the absence of any direct Australian authorities it is a matter for conjecture whether a declaration of a trust per se, especially in relation to joint tenancy of land registered under the *Transfer of Land Act 1893*, can effect severance of a joint tenancy. For example, since the declaration of trust is essentially a voluntary transfer, can the transaction be complete without registration of the transfer?³⁶

(v) *Severance by unilateral declaration*

3.18 It has been established in several Australian cases that a mere declaration by one joint tenant of his intention to sever the joint tenancy, whether or not communicated to the other, written or unwritten, is insufficient to sever a jointure of real property.³⁷ As regards personal property, authorities are conflicting. Some authorities hold that a written notice of a desire to sever by one joint tenant to the other is sufficient to sever a joint tenancy in equity, whilst others hold that it is not.³⁸

(vi) *Severance by a partial alienation*

3.19 So far the Commission has considered situations where a joint tenant alienates his whole interest in the property. Under this heading the Commission considers a situation where a joint tenant leases or mortgages his aliquot interest in the property.

*** Mortgages**

3.20 Under the general law a mortgage was created by conveyance of title to the mortgagee with a covenant to reconvey the property when the mortgaged debt was discharged.³⁹ Accordingly, a mortgage by a joint tenant operated to sever the joint tenancy because it destroyed the unity of title with reference to the interest mortgaged.⁴⁰ In contrast, under the Torrens system a mortgage has effect only as security and does not operate as a transfer of the

³⁶ Para 3.11 above.

³⁷ *Davies v Davies* [1983] WAR 305; *Patzak v Lytton and The Registrar of Titles* [1984] WAR 353. The Australian courts have rejected Lord Denning MR's proposition in *Burgess v Rawnsley* [1975] 1 Ch 429, 439 that in equity a joint tenancy is severed by a mere communication to other co-tenants of intent to sever.

³⁸ See eg. *Burgess v Rawnsley* [1975] 1 Ch 429, 439-440 per Lord Denning MR. See also *Partriche v Poulet* (1740) 2 Atk 54, 55 per Hardwicke LC, cited B A Helmore *Personal Property and Mercantile Law in New South Wales* (7th ed 1965) 159, fn 20; contra Helmore 60 fn 16.

³⁹ Bradbrook 712.

⁴⁰ *York v Stone* (1709) 1 Salk 158.

interest or estate charged.⁴¹ Consequently, if one joint tenant of land registered under the *Transfer of Land Act 1893* mortgages his interest the unity of title with the other joint tenant(s) is not destroyed and there is no severance of the jointure. The leading Australian authority is the case of *Lyons v Lyons*.⁴² In this case husband and wife were registered as proprietors in fee simple as joint tenants of certain land. During his lifetime the husband mortgaged his interest in the land to a third party and the mortgage was registered. After his death, his widow, the applicant, claimed to be entitled to the whole estate by right of survivorship free from the third party's mortgage. It was contended that the joint tenancy was severed by the mortgage. McInerney AJ held that there was no severance of the joint tenancy. His Honour went on to hold that upon the death of the joint tenant mortgagor the mortgage was extinguished and the survivor took the land free of the third party's claim.⁴³

*** Lease by a joint tenant**

3.21 One joint tenant may grant a lease over his aliquot interest in the property.⁴⁴ There is controversy as to whether in that case the lease severs the joint tenancy. According to English authorities, a grant of a lease to a stranger or even to a fellow joint tenant confers possession by separate title and hence it severs the joint tenancy.⁴⁵ On the other hand, the prevalent view in Australia seems to be that a lease by one joint tenant merely "suspends" the right of possession of the joint tenant lessor but does not sever the jointure.⁴⁶ For example, where A and B are joint tenants, and A leases his interest in the land to T for five years, if during the currency of the lease A predeceases B the right of survivorship will apply in B's favour as regards the freehold expectant. However, T's lease will not be affected by A's death.

3.22 The "doctrine" of suspension of the joint tenancy has been criticised as conceptually wrong. It has been argued that the grant of a lease by one joint tenant to a stranger destroys the unity of interest and the immediate right to possession. Consequently, the effect of the lease ought to sever the joint tenancy and not merely suspend the jointure.⁴⁷ Moreover, it raises the difficulty of determining as to whom the rent ought to be paid during the period of

⁴¹ *Transfer of Land Act 1893* s 106.

⁴² [1967] VR 169.

⁴³ If the joint tenant mortgagor survives the other joint tenant the mortgage would attach to the whole estate: Butt 202-203.

⁴⁴ *Frieze v Unger* [1960] VR 230, 244-245.

⁴⁵ See Megarry and Wade 431. The learned authors admit that the matter is not free from doubt.

⁴⁶ *Frieze v Unger* [1960] VR 230. See also Mendes Da Costa 454-455; Butt 203-204.

⁴⁷ A J McClean *Severance of Joint Tenancies* (1979) 57 Canadian BR 1, 9-10.

"suspension" of the joint tenancy. Should it be paid to the survivor or to the estate of the deceased joint tenant who leased his interest?⁴⁸ Legislative action may be necessary to clarify the legal position.

(b) Reforms in other jurisdictions

3.23 As we have seen, a joint tenancy can be severed by unilateral action without the consent or knowledge of the other joint tenants. However, there is varying uncertainty regarding what is required to achieve severance especially where a transaction is made without consideration. Because of this uncertainty, legal advisers are likely to face difficulties as to how best to effect a client's instructions unilaterally to sever a joint tenancy. The problem is likely to be aggravated by the fact that in many cases there is usually a sense of urgency because the client seeking severance is elderly or terminally ill.

In such cases a mistake is likely to be irremediable. In some jurisdictions the law has been changed or there are proposals to change the law to facilitate unilateral severance. Some of these reforms are considered below.

(i) Tasmania

3.24 Section 63 of the Tasmanian *Land Titles Act 1980* provides as follows:

"(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."

Prior to the enactment of section 63 joint tenants who wished to convert their joint tenancy into tenancy in common did so by executing a transfer to themselves as tenants in common. This could only be done by mutual agreement of all joint tenants, but not where one or some of them agreed. Section 63 was added to provide a single and certain means of unilateral

⁴⁸ Butt 204 suggests that the rent payable by the tenant would presumably be payable to the deceased joint tenant's estate to be distributed according to his will or on intestacy.

severance where a joint tenant so wished.⁴⁹ According to the Tasmania Land Titles Office, the statutory method of severance has proved to be satisfactory in avoiding the original problem.⁵⁰

3.25 Section 63 only applies to land registered under the *Land Titles Act 1980*. It is noteworthy that the manner of severance stipulated in the section is in addition to and not in substitution for other ways of severance under the general law. It is also worth noting that since it is a requirement of the section that the Recorder upon registration of a declaration of severance notify every other joint tenant, the statutory method of severance cannot be used if a joint tenant wishes to break the joint tenancy without knowledge of the other joint tenant until after his death.⁵¹ In that case he has to use the other (less certain) ways of severance under the general law which are not affected by the legislation.

(ii) *Queensland*

3.26 The Queensland Law Reform Commission in its report on *Consolidation of Real Property Acts*,⁵² proposes a new provision to be incorporated in the *Real Property Act 1861*, which would enable a joint tenant unilaterally to sever the joint tenancy of Torrens system land. The proposal has been substantially adopted in section 59 of the Queensland *Land Title Act 1994* which 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.

⁴⁹ Letter on file Acting Deputy Recorder of Titles to the Commission, 16 November 1983. To date the declaration of severance is liable to only nominal stamp duty if there is no change in the interest of the parties.

⁵⁰ NSWLRC DP para 3.4.

⁵¹ See eg *Golding v Hands* [1969] WAR 121, discussed at para 3.9 above.

⁵² Report No 40 1991 21 draft s 38.

- (4) If there are more than 2 joint tenants of the lot, the joint tenancy of the other registered owners is not affected."

3.27 This provision is similar to section 63 of the Tasmanian *Land Titles Act 1980*. In both provisions severance takes effect upon registration and in both provisions the other joint tenant must be notified. The difference is that under the Queensland provision the onus is on the joint tenant requesting severance to notify the other joint tenants.

3.28 There are two other noticeable differences between the Tasmanian and the Queensland provisions. First, the Queensland provision expressly stipulates that where there is more than one joint tenant and only one of them requests to sever, only his interest would be severed when the request is registered.⁵³ Secondly, the Queensland provision does not expressly state that the statutory manner of severance is in addition to other methods of severance.

(iii) *New South Wales*

3.29 The New South Wales Law Reform Commission in its Discussion Paper⁵⁴ proposes reforms along the lines of section 63 of the Tasmania *Land Titles Act 1980*. However, the New South Wales Law Reform Commission, mindful of terminally ill property owners and of the fact that in some cases it may take several weeks before a declaration is registered, proposes that there should be a mechanism to expedite registration. One of the mechanisms the New South Wales Law Reform Commission has in mind is to dispense with the requirement to present the certificate of title with a declaration of severance.⁵⁵ The New South Wales Law Reform Commission also recommends that an identical provision be inserted in the New South Wales *Conveyancing Act 1919* to cater for old system land.

(iv) *England*

3.30 Section 36(2) of the English *Law of Property Act 1925* added to the ways in which a joint tenancy could be severed by providing that severance occurs where one joint tenant in writing notifies the other joint tenant(s) of his intention to sever. The section reads as follows:

⁵³ Probably this interpretation can be implied in the wording of s 63 of the *Land Titles Act 1980* (Tas).

⁵⁴ NSWLRC DP para 4.9-4.11.

⁵⁵ Id para 4.5. The Commission noted that in practice the Recorder of Titles in Tasmania dispenses with this requirement.

"....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."

The scope of the section is limited to severance in equity since in England a legal tenancy in common can not exist after 1925.⁵⁶ The notice need not be in any particular form provided it evinces an intention that the severance should occur immediately.⁵⁷ For example, a writ commencing legal proceedings, or an affidavit in the proceedings, may suffice as notice to sever the jointure if a claim to an immediate interest in the property is made, even if the proceedings are not pursued.⁵⁸ Where there are several joint tenants, a notice given to one but not to all the others appears not to be effective.⁵⁹ In the event of a denial by one joint tenant that the notice was received, the Act provides that the notice is deemed to be served if it is left at the last-known place of abode or business of the person to be served or sent by registered mail and the letter is not returned through the post office undelivered.⁶⁰

3.31 The main advantage of the English provision is that it makes severance of joint tenancy simple and inexpensive. The provision reinforces the fact that severance at common law is a right which all joint tenants are entitled to exercise at any time prior to their death. The provision merely facilitates its exercise. On the other hand, some may criticise the provision on the ground that severance is made so simple that joint tenancy could be severed impulsively after differences arise between the joint tenants which in due course could blow over. However, the same could be said for severance by mutual agreement, which requires no special formality.⁶¹ The New South Wales Law Reform Commission also points out another possible criticism of the English provision if applied to joint tenancy registered under the Torrens system. The Commission argues that:

⁵⁶ *Law of Property Act 1925* (UK) ss 1(6) and 34(1).

⁵⁷ *Harris v Goddard* [1983] 3 All ER 242.

⁵⁸ *Burgess v Rawnsley* [1975] 1 Ch 429, 440; *Megarry and Thompson* 302. But in *Harris v Goddard* [1983] 3 All ER 242 it was held that a divorce petition for a property adjustment order without more is not a sufficient notice of severance.

⁵⁹ *Megarry and Thompson* 302.

⁶⁰ *Law of Property Act 1925* (UK) s 196.

⁶¹ Paras 3.36-3.38 below.

"Where one joint tenant serves a notice of severance on another joint tenant but does not register the notice promptly, severance would be effected in equity but not at law. The conclusiveness of the Register may therefore be seen as threatened."⁶²

In response to the latter criticism it may be questioned whether unregistered severance would threaten the conclusiveness of the Register any more than other unregistered dealings. It is trite law that equitable interests created by unregistered dealings are enforceable under the Torrens system subject to the principle of indefeasibility of title.⁶³

(c) Discussion and recommendations

(i) *Secret severance*

3.32 The Commission has considered whether the common law right to sever a joint tenancy without knowledge of the other joint tenant should be retained.⁶⁴ There are reasons for and against retention. In favour of retention it is arguable that the interest of a joint tenant is his and therefore he should be free to deal with it as he wishes, including secretly disposing of it to another person. A joint tenant may have genuine reasons for wishing to sever without knowledge of the other joint tenant. For example, a wife may wish to sever so that she can provide in her will for her children by a previous marriage, but fears that if her husband knows about it their marital relationship might be strained. Against this, it can be said that property held in joint tenancy is "unified"; whatever one joint tenant does with his interest will affect the other. Therefore, in fairness the other joint tenant should be notified of the severance before it takes effect.⁶⁵ In the example given above, the husband may have planned his life on the assumption that if he survived his wife he would become the sole owner of the property; conversely, if he predeceased her she would become the sole owner. Another reason against secret severance is that it may tempt commission of fraud, for example, if the joint tenant who purported to sever secretly happens to survive the other joint tenant, he may be tempted to hide the fact that he had severed so that he could take advantage of the right of survivorship. Finally, under the law as it stands the manner of unilateral severance is so uncertain that most attempts to sever secretly would probably be unsuccessful.⁶⁶ The

⁶² NSWLRC DP para 4.8.

⁶³ *Barry v Heider* (1914) 19 CLR 197.

⁶⁴ Para 3.3 above.

⁶⁵ See A J McClean *Severance of Joint Tenancies* (1979) 57 Canadian BR 1, 39.

⁶⁶ *Corin v Patton*, cited at para 3.11 above, is the classic example of such attempts.

Commission considers that the arguments for requiring notice to other joint tenants are stronger, so that notice should become a precondition for severance.

(ii) *Severance by will*

3.33 The Commission also considered whether the common law rule that joint tenancy cannot be severed by will should be reversed. It **does not recommend** changing the common law in this regard. In many cases, severance by will would not give adequate notice to other joint tenants. But more significantly, a power to sever by will would substantially undermine the right of survivorship which forms the essence of joint tenancy.

(iii) *Severance by notice*

3.34 The Commission *recommends* that unilateral severance of joint tenancy should not be effective without written notice to the other joint tenants. The provision should apply to severance of any form of property, personal or real, including joint tenancy of land registered under the *Transfer of Land Act 1893*. Existing methods of severance could continue to be used, but would not be effective until notice is given to the other joint tenants. Alternatively, a joint tenant could opt simply to give written notice. In the absence of an express provision, the notice would be served in accordance with the *Interpretation Act 1984*.⁶⁷ As regards registered land, notice of severance will only take effect in equity until a declaration of severance is registered as proposed below.

(iv) *Registration of declaration of severance*

3.35 The Commission also *recommends* that the law of unilateral severance be reformed by inserting in the *Transfer of Land Act 1893* a provision along the lines of section 59 of the *Queensland Land Title Act 1994*.⁶⁸ One adjustment to the provision is necessary. The section should expressly empower the Registrar at his discretion to dispense with the requirement to produce the certificate of title to enable a transfer to be registered.⁶⁹ This power may be used,

⁶⁷ S 76.

⁶⁸ Para 3.26 above.

⁶⁹ Though s 74 of the *Transfer of Land Act 1893* gives the Registrar power in certain cases to dispense with the production of the duplicate certificate of title, the exercise of this power is subject to certain formalities, for example, the Registrar must have at least 14 days' notice in a newspaper of his intention to dispense with the certificate of title. A delay of 14 days may be too long in urgent applications for

for example, in urgent cases where the applicant is terminally ill and the certificate of title cannot readily be obtained because, for example, the person holding it has refused to hand it over to enable registration⁷⁰ or because his whereabouts are unknown.⁷¹

3. SEVERANCE BY MUTUAL AGREEMENT

3.36 Rule 2 propounded by Sir William Page-Wood V-C in *Williams v Hensman* covers severance by mutual agreement. If all the joint tenants mutually agree to hold as tenants in common the joint tenancy is severed.⁷² There is valuable consideration for the agreement in that each joint tenant agrees to relinquish the beneficial interest in the common property, including the right of survivorship, in return for a share of a tenancy in common.⁷³ The fact that the agreement is oral or otherwise incapable of specific performance does not appear to be important:

"The significance of an agreement is not that it binds the parties; but that it serves as an indication of a common intention to sever, something which was indisputably within their power to do."⁷⁴

3.37 In equity severance is effective immediately upon agreement to sever though at law the co-tenants hold as joint tenants. Thus, if the parties are registered under the *Transfer of Land Act 1893* as proprietors in joint tenancy, from the moment of agreement to sever, the legal joint tenants will hold as trustees for themselves as tenants in common in equal shares.⁷⁵ Once the joint tenants have agreed to sever the joint tenancy, the subsequent repudiation of the agreement by one of them does not affect the severance.⁷⁶

3.38 The rule of severance by mutual agreement seems to be fair, clear and non-controversial. Therefore, it is thought that the common law need not be disturbed and it is best to let the courts develop it in difficult cases.

registration of a severance. Compare s 160(5) of the *Land Titles Act 1980* (Tas), which gives the Recorder a general discretion to dispense with the production of the certificate of title without any formal restrictions.

⁷⁰ See eg *Freed v Taffel* [1984] 2 NSWLR 322, discussed at para 3.13 above.

⁷¹ See for example *Patzak v Lytton and The Registrar of Titles* [1984] WAR 353, 355.

⁷² *Wright v Gibbons* (1949) 78 CLR 313, 322 per Latham CJ.

⁷³ *Corin v Patton* (1990) 169 CLR 540, 574 per Deane J.

⁷⁴ *Burgess v Rawnsley* [1975] 1 Ch 429, 446 per Sir John Pennycuik; contra *Lyons v Lyons* [1967] VR 169, 171 per McInerney AJ. Academic writers generally support the reasoning in *Burgess v Rawnsley*, see eg Bradbrook 327-328. See also *Public Trustee v Pfeiffle* [1991] 1 VR 19, 29-30 per McGarvie J.

⁷⁵ *Corin v Patton* (1990) 169 CLR 540, 574 per Deane J.

⁷⁶ *Abela v Public Trustee* [1983] 1 NSWLR 308, 314.

4. SEVERANCE BY COURSE OF DEALING

3.39 Rule 3 in *Williams v Hensman* covers severance by a "course of dealing sufficient to intimate that interests of all were mutually treated as constituting a tenancy in common". The question is not so much whether there was an actual destruction of any of the four unities, but rather whether there has been a course of dealing that reveals a mutual understanding that the joint tenancy should be severed. Whether this is so essentially is a question of fact depending on the circumstances of each case.⁷⁷

3.40 Severance by mutual agreement and by course of dealing may in some cases overlap. However, they are separate and are distinct methods of severance. The difference is that, whereas severance by mutual agreement encompasses express agreement to sever, course of dealing covers circumstances not involving any express agreement but where it could be inferred from the circumstances that the parties formed a "common intention" to hold their property as tenants in common.⁷⁸ Thus, it was held in *Burgess v Rawnsley* that a court may be entitled to infer a common intention to sever by course of conduct on the basis of negotiations carried on by the joint tenants even though those negotiations did not result in an agreement.⁷⁹ This view was given tacit approval by the New South Wales Supreme Court in *Abela v Public Trustee*.⁸⁰ Also in the Canadian case of *Robichaud v Watson*⁸¹ the High Court of Ontario held that severance by course of dealing may be inferred from an inconclusive agreement where the evidence indicates that the parties regarded themselves as tenants in common and that the only issue in the negotiations was the value of their respective interests.

3.41 It is settled law that the commencement of legal proceedings by a joint tenant seeking partition, sale or settlement of the joint property is not a course of dealing from which a court may infer a common intention to sever the joint tenancy.⁸² Such proceedings are regarded as mere unilateral declaration to sever which do not operate to sever the jointure. Nor is a common intention to sever necessarily to be inferred even where both joint tenants separately

⁷⁷ *Burgess v Rawnsley* [1975] 1 Ch 429, 440.

⁷⁸ *Burgess v Rawnsley* [1975] 1 Ch 429, 447 per Sir John Pennycuik. For criticism of the distinction see A J McClean *Severance of Joint Tenancies* (1979) 57 Canadian BR 1, 16. McClean argues that both rules 2 and 3 cover severance by agreement and that the only difference between them is the basis upon which the agreement is proven.

⁷⁹ [1975] 1 Ch 429, 447 per Sir John Pennycuik.

⁸⁰ [1983] 1 NSWLR 308, 316. However, the inconclusive agreement was considered, among other factors, to establish a sufficient course of conduct from which to infer severance.

⁸¹ (1983) 147 DLR (3d) 626.

⁸² *Davies v Davies* [1983] WAR 305.

commenced proceedings for sale or partition of the property unless the parties by their conduct evince a common intention to sever. This point is illustrated by the case of *Patzak v Lytton and The Registrar of Titles*.⁸³ In this case the husband (deceased) and wife (plaintiff) were registered as proprietors in joint tenancy of the subject land. Following their marriage breakdown, the deceased applied to the Family Court for an order for the land to be sold and the proceeds divided equally between him and his estranged wife. The plaintiff in response made her own application to the Family Court for the deceased's application to be dismissed and requested that the property be sold and the proceeds divided on a different basis. The husband died before the Family Court had determined the dispute, and the plaintiff withdrew her application. It was argued that the deceased's application and the plaintiff's counter application constituted a course of conduct indicating a mutual intention to sever. The mutuality, it was submitted, was spelt out by the fact that both the deceased and the plaintiff wanted the property to be sold but differed only on the manner in which the proceeds were to be divided. Pidgeon J dismissed the argument on the ground that mutuality could not be inferred from the plaintiff's application which was in the nature of a counter application. His Honour reasoned that the applications were no more than statements of intention of each party which they could change at any time.⁸⁴

3.42 Severance by course of conduct has been argued in several cases, but apart from *Abela v Public Trustee*⁸⁵ there are no Australian cases of which the Commission is aware where the argument has succeeded.⁸⁶ One writer has observed that the Australian courts, unlike their Canadian counterparts, are much more reluctant to make a finding on the basis of severance by course of conduct.⁸⁷

3.43 Where it is alleged that a joint tenancy was severed by course of conduct during the lifetime of the joint tenants, it will often be difficult to determine whether there was, on the facts, a course of conduct sufficient to sever the jointure. The problem is more likely to be faced by administrators or executors (or their legal advisers) of deceased estates who initially will have to decide from a multitude of alleged acts whether there was severance. Nevertheless, it is not thought that anything needs to be done about this method of severance. It is thought that the law is best left to the courts to develop as they see fit. In any event, if the

⁸³ [1984] WAR 353.

⁸⁴ Id 358. See also *Berdal v Burns* [1990] WAR 140.

⁸⁵ [1983] 1 NSWLR 308.

⁸⁶ See eg *Slater v Slater* (1987) 12 Fam LR 1.

⁸⁷ P Butt *Severance of Joint Tenancies in Matrimonial Property* (1982) 9 Syd LR 568, 580.

proposals to facilitate unilateral severance outlined above are adopted, there will be less need to rely on severance by course of conduct.

5. OTHER WAYS OF SEVERANCE

3.44 In addition to the three rules of severing of joint tenancy referred to by Sir William Page-Wood V-C in *Williams v Hensman*, there are other ways of severance of a joint tenancy. These are mentioned in outline here for the sake of completeness.

(a) Severance by court order

3.45 It has been demonstrated that the mere commencement of litigation by a joint tenant against another seeking an order for partition, sale or settlement of their joint property does not of itself constitute severance of the joint tenancy.⁸⁸ However, once the proceedings result in an order which is inconsistent with the continuation of the joint tenancy, the joint tenancy is thereby severed in equity from the date of the judgment though the parties will continue to hold as joint tenants at law until the order is executed and the necessary legal transfers made.⁸⁹ This is illustrated by the case of *Berdal v Burns*.⁹⁰ In this case Mr and Mrs Burns were registered as proprietors of their matrimonial home in joint tenancy. In 1975 they were divorced by a decree made under the *Commonwealth Matrimonial Causes Act 1959*.⁹¹ The decree conferred a right of exclusive occupation and use of the subject property on Mrs Burns until her remarriage, death or further court order. Mr Burns predeceased Mrs Burns. It was held that though the 1975 order did not expressly order that the parties should thenceforth hold the property as tenants in common, it was clearly intended to sever the joint tenancy. Commissioner Williams QC held that:

"In principle, the 1975 order purports to give Robert [Burns] a vested equitable interest in half of the proceeds of sale of the house, enjoyment of which has been postponed while Joyce [Burns] has exclusive occupation of the house. On the face of it, the effect of the order is that while Robert and Joyce continued to be registered as joint tenants, they were, as registered proprietors, trustees for themselves for their respective interests under the order."⁹²

⁸⁸ Para 3.41 above.

⁸⁹ Butt 210-211.

⁹⁰ [1990] WAR 140.

⁹¹ The Act was repealed and replaced by the *Family Law Act 1975* (Cth).

⁹² [1990] WAR 140, 143.

3.46 By contrast, an order under section 79 of the Commonwealth *Family Law Act 1975* which merely excludes one spouse from the enjoyment of the property, even for a long time, does not affect the parties' proprietary interests. Therefore, it does not affect the joint tenancy of the parties.⁹³

(b) Severance following homicide

3.47 It is a rule of public policy of the general law that a person who unlawfully kills another shall not be permitted to profit by his crime.⁹⁴ In the context of joint tenancy this means that if one joint tenant unlawfully kills another joint tenant the right of survivorship cannot operate in favour of the killer.⁹⁵ Though at law the survivor takes as the sole owner of the property, equity will prevail on him to hold the legal interest on a constructive trust for himself and the estate of the deceased in tenancy in common in equal shares.⁹⁶ Where the original joint tenancy comprises more than two joint tenants, for example A, B and C, and A kills B (C being entirely blameless), it has been held in *Rasmanis v Jurewitsch*⁹⁷ that at law A and C hold as joint tenants. Their interest is thereby enlarged because of B's death. However, to prevent any benefit accruing to A in consequence of his crime, a one third interest in the property is held on trust for C. In other words, the one third interest behind the constructive trust belongs to C in tenancy in common, but A and C continue to hold as joint tenants between themselves a two thirds interest in the property.⁹⁸

⁹³ *Mullane v Mullane* (1983) 158 CLR 436.

⁹⁴ Megarry and Wade 433.

⁹⁵ *Rasmanis v Jurewitsch* (1970) 70 SR (NSW) 407.

⁹⁶ Ibid. The courts have decided that public policy considerations do not require that compensation be paid to the victim or that the killer be punished by depriving him of his interest: Bradbrook 331.

⁹⁷ (1970) 70 SR (NSW) 407, 412.

⁹⁸ Ibid. The justification is that C (who had nothing to do with the crime) is not denied the benefit of survivorship: Bradbrook 331. The issue which is yet to be resolved in this area is whether in applying the above rule public policy requires the courts to take into account the nature of the homicide. Contrast *Public Trustee v Evans* [1985] 2 NSWLR 188 with *Re Stone* [1989] 1 Qd R 351. See also the *Forfeiture Act 1982* (UK) s 2(2) and *Re K* [1986] 1 Ch 180.

Chapter 4

PROVISION FOR FAMILY AND DEPENDANTS

1. THE PRESENT LAW

4.1 The terms of reference require the Commission to consider whether the *Inheritance (Family and Dependants Provision) Act 1972* should be amended to empower the Supreme Court to include a deceased person's interest in a joint tenancy in the property from which provision for an application may be made. Section 6(1) of the Act gives the Supreme Court a discretionary power to modify a particular will or alter the effect of the intestacy rules in a particular case, to make provision out of the deceased's estate for maintenance and support of certain relatives of the deceased mentioned in section 7 of the Act. Section 6(1) provides that:

"....if the Court is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of the persons mentioned in section 7 of this Act as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose."

4.2 For present purposes it is important to note that the Court's power to make orders for family provision is limited to making provision out of the *estate* of the deceased. In *Easterbrook v Young* the High Court held that the expression "out of the estate of the testator" referred to:

".... assets of which the testator might at his death dispose and which have come or could come to the hands of the personal representative by reason of the grant of probate or letters of administration."¹

In other words, the statute only permits the courts to modify the deceased's testamentary dispositions or the law's usual provisions in the case of intestacy. The law does not permit the Court to undo transactions entered into by the deceased during his lifetime which reduced the value of his estate. Where the deceased held property in joint tenancy, because of the doctrine of survivorship, his interest in that property would be extinguished by virtue of his death.

¹ (1977) 136 CLR 308, 318.

Therefore, the property would not form part of the estate out of which an order for provision could be made under the Act.²

4.3 For example, if the deceased owned a house in joint tenancy with his brother, no part of the value of the house would be available for an order in favour of the deceased's widow or children. If the deceased had no other substantial assets at death, the Act could not assist in making provision for the widow and children. Applicants other than the surviving spouse may face a similar problem where the deceased's main asset (in many cases the matrimonial home) was held in joint tenancy with the surviving spouse.³

4.4 In many cases, the deceased will have entered the joint tenancy without regard for its effect on claims to his estate. However, beyond this, there may be cases where a person deliberately seeks to avoid his moral obligation to provide for maintenance and support of family members by disposing of his property *inter vivos* to another person to hold with him in joint tenancy. For instance, a father may seek to defeat the claims of the children of his first marriage by entering into joint tenancy with his second wife. On his death the property would be beyond the reach of the courts under the *Inheritance (Family and Dependents Provision) Act 1972*.⁴

4.5 It is thus clear that the fact that the deceased held property as a joint tenant may create an obstacle to making provision for his family and dependants under the Act. However, it has to be recognised that joint tenancy is one of a number of arrangements that could have been made by the deceased in his lifetime that will have reduced his estate. It must also be recognised that in many cases the other joint tenants will have acted in good faith in reliance upon the expectation that they could acquire the property by survivorship and that it may cause hardship to them if their vested rights are upset in order to make provision for the family of the deceased.

² E H Burn *Cheshire and Bum's Modern Law of Real Property* (15th ed 1994) 834.

³ This illustration is taken from the English Law Commission *Second Report on Family Property: Family Provision on Death* (Law Com No 61 1974) paras 138-140.

⁴ Dickey 47. It is arguable that a fraudulent transaction could be set aside: see *Cadogan v Cadogan* [1977] 1 WLR 1041; G L Certoma *The Law of Succession in New South Wales* (2nd ed 1992) 228.

2. REFORMS AND PROPOSALS FOR REFORM ELSEWHERE

(a) Introduction

4.6 Reforms in England and New South Wales have been enacted to make it possible for a court to order those who benefited from some lifetime dispositions of property to provide money or property for those entitled to family provision. Similar reforms have been made or proposed in Canada. These are examined with particular emphasis on their application to joint tenancies.

(b) England

4.7 In England, following the recommendation of the Law Commission, the *Inheritance (Provision for Family and Dependents) Act 1975* extended the property available for distribution so as to include some property disposed of by the deceased in transactions taking effect during his lifetime. Certain items, such as property nominated by the deceased under statutory powers and property the subject of a *donatio mortis causa*, are automatically included in the estate. Property the subject of joint tenancy may be included at the discretion of the court. Section 9 permits the court to treat, to the extent it considers to be fair, the deceased's share in property held in joint tenancy as part of his estate at its value immediately before his death. Section 9 relevantly provides as follows:

“(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased.”

Property for the purposes of the Act includes a chose in action. Therefore a joint bank account may be the subject of an order under the Act.⁵

⁵ s 9(4).

4.8 Several points arising under section 9 and other provisions of the Act need to be stressed. First, an order under section 9 may only be made where an application for family provision is made within six months from the date on which the representation is first taken out. If the court in the exercise of its discretion grants leave to make an application outside the six month period,⁶ it will nonetheless be unable in the proceedings on that application to make an order under section 9.⁷ The object of the six month limitation period is to protect survivors from tardy applications.⁸ Secondly, the maximum value of the property out of which the court can make an order is limited to the severable share of the deceased immediately before his death after deduction of appropriate capital transfer tax.⁹ Thus, the fact that between the deceased's death and the application the value of the property has appreciated or depreciated does not affect the original value of the deceased's severable share at the time of death.¹⁰ Thirdly, a severable share is only available if and to the extent the court thinks just. This broad discretionary power is given to the court to facilitate the making of orders for financial provision. Obviously, several factors would have to be taken into account before the court makes the order, including the impact such an order will have on the survivor, who may well have expended money on the property or given up other opportunities in the expectation that he will enjoy the property throughout his lifetime.¹¹ In the case of *Jessop v Jessop*, Nourse LJ adopted the following questions which the judge should ask himself in exercising his discretionary powers under the section:

"Firstly, am I satisfied that the disposition of the deceased's estate.... is not such as to make reasonable financial provision for the applicant having regard to the matters referred to in s 3 and bearing in mind my power to order, for the purpose of facilitating the making of such a provision, that the deceased's severable share.... should be treated as part of the net estate? Secondly, if so, having regard to and bearing in mind those same matters, ought I to order that further provision be made and, if so, what provision? Thirdly, to what extent is it just in all the circumstances of the case to order that the deceased's severable share.... be treated as part of the net estate?"¹²

⁶ See s 4.

⁷ 17 *Halsbury's Statutes* (4th ed 1993) 400 fn.

⁸ Oughton and Tyler 214. However, the authors note that the provision is not as effective as it appears because there is no legal obligation to take out a grant of representation in "good time": *ibid*.

⁹ S 9(1)-(2).

¹⁰ It has been suggested that where the property has depreciated in value the court is unlikely to make an order based on the higher value: Oughton and Tyler 214.

¹¹ Oughton and Tyler 215, for instance, suggest that the court may draw a distinction between property which is a dwelling house or car actually occupied or used by the survivor and property which is an investment. If it is the former the court is less likely to disturb the occupation without good reason. Compare *Kourkgy v Lusher* (1983) 4 FLR 65, with *Jessop v Jessop* [1992] 1 FLR 591.

¹² [1992] 1 FLR 591, 596-597.

It has been suggested that orders under section 9 are likely to be rare¹³ and the Commission is aware of only one reported case where the discretion has been exercised.¹⁴

4.9 Section 10 of the English Act also provides that the court may set aside any disposition made by the deceased less than six years before death with the intent of defeating an application for family provision.¹⁵ In order to exercise this power, the court will need to be satisfied on balance that the deceased entered the transaction with the intention (not necessarily his sole intention) of defeating a claim made after his death against his estate.¹⁶ Further it must be shown that the person who benefited from the disposition did not provide full valuable consideration for the benefit he received. In principle, this provision could be applied to prevent the survivor taking property under a joint tenancy. However, the difficulty of finding evidence of the relevant intention is likely to make successful applications under this provision rare.

(c) New South Wales

4.10 New South Wales is the only jurisdiction in Australia which has enacted a provision to extend the definition of the estate of the deceased beyond its usual meaning. The New South Wales *Family Provision Act 1982* empowers the court to make an order for provision not only out of the deceased's estate but also out of his "notional estate". Dickey¹⁷ describes a notional estate as "property which would have become part of the deceased's estate had it not been dealt with, or had it been dealt with, by the deceased in a particular way, and in particular circumstances, prior to his or her death".

4.11 The Act focuses on those lifetime transactions by which the value of the deceased's estate has been diminished, namely those for which the deceased did not receive full consideration. These are described in the Act as prescribed transactions. The Commission briefly considers the definition of such transactions, particularly as it applies to joint tenancy.

¹³ Oughton and Tyler 215-216.

¹⁴ *Jessop v Jessop* [1992] 1 FLR 591.

¹⁵ Oughton and Tyler 217.

¹⁶ The deceased need not have been aware of the Act: *Re Kennedy* [1980] CLY 2820.

¹⁷ 45-46.

(i) *Prescribed transaction*

4.12 Section 22(1) of the New South Wales *Family Provision Act 1982* defines "prescribed transaction". The section relevantly provides that if a person directly or indirectly does or omits to do any act as the result of which property becomes held by another person and full valuable consideration in money or money's worth for the doing or omitting of that act is not given, then the person shall be deemed to have entered into a prescribed transaction. Thus, a person who transfers his own property into the names of himself and another as joint tenants for no consideration enters into a prescribed transaction. The Act goes on to provide in section 22(4)(b) that in particular, and without limiting the generality of subsection (1), a person is deemed to have done or to have omitted to do an act if:

"holding an interest in property which would, on his death, become, by survivorship, held by another person (whether or not as trustee) or subject to a trust, he is entitled, on or after the appointed day, to exercise a power to prevent his interest in the property becoming, on his death, so held or subject to that trust but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled".

4.13 Hence, if the deceased omits to sever the joint tenancy and the survivor by operation of jus accrescendi becomes sole owner of the property, the property may be designated "notional estate" unless the omission by which the survivor became sole owner was supported by full valuable consideration. It is noteworthy that consideration in this context does not refer to the consideration whereby the donee acquired title to the property in joint tenancy with the donor. Rather it refers to the consideration moving to the donor for forbearance to sever the joint tenancy immediately before his death.¹⁸ The consideration must be full valuable consideration in money or money's worth.¹⁹

4.14 According to Certoma, money's worth does not include marriage as a consideration but includes, for example:

"...if immediately before the deceased's death (the date of the transaction according to the Act) there was an even chance as to which joint tenant would die first, the value of the chances of having jus accrescendi operating in the deceased's favour was even and

¹⁸ *Family Provision Act 1982* (NSW) s 22(4)(b). See also *Wade v Harding* (1987) 11 NSWLR 551, 554.

¹⁹ *Family Provision Act 1982*(NSW) s 22(1)(b).

accordingly there was a fair equivalence or, in other words, full consideration in money's worth."²⁰

4.15 As already indicated, the framers of the legislation aimed to exclude from the Act transactions entered into for full valuable consideration. Although the Law Reform Commission contemplated that the *creation* of a joint tenancy without valuable consideration would be a prescribed transaction, the Act also treated the *failure to sever* the tenancy as a relevant transaction. Applying the requirement that the transaction be without full consideration has proved difficult in the case of a failure to sever, as it requires an assessment of the consideration given (if any) for a transaction which never took place and which was probably never contemplated.²¹ It is debatable whether it was envisaged that the "equivalence" of chances of survival immediately before death of the disponent would constitute valuable consideration for forbearance to sever the joint tenancy. But given that interpretation of valuable consideration, it seems that section 22 is unlikely to apply to the failure to sever a joint tenancy except, perhaps, where there is a "generation gap" between the deceased and his joint tenant, or where immediately before death the deceased was known to be in significantly poorer health than the other joint tenant.

(ii) *Circumstances in which property the subject of prescribed transactions may become part of the notional estate*

4.16 Proof that the disposal of property was by way of a gift is not enough to bring the transaction within the scope of the Act. Section 23 further requires that the prescribed transaction must have taken place in certain situations. These were explained by the New South Wales Law Reform Commission as follows:

1. dispositions made within three years prior to the deceased's death with an intention of evading the Act;²²

²⁰ G L Certoma *The Law of Succession in New South Wales* (2nd ed 1992) 230. It was on this ground that the court in *Wade v Harding* (1987) 11 NSWLR 551 ruled that *Family Provision Act 1982* (NSW) s 22 was not applicable to bring land held on joint tenancy within the Act.

²¹ *Wade v Harding* (1987) 11 NSWLR 551, 555.

²² The New South Wales Law Reform Commission considered that notwithstanding that the disposition was made with the subjective intention of defeating the Act it was not in the public interest for a donee to remain uncertain for an indefinite period whether a gift to him is legally effective. The three year period was chosen as a compromise.

2. "unjust gifts", that is gifts to persons with substantially smaller claims to the testator's bounty than those of the applicant under the Act, when made within the deceased's last year of life; and
3. property disposed of at any time by certain types of "will substitute". A will substitute is an arrangement made by the deceased during his lifetime which typically gives him rights to enjoy and dispose of property during his lifetime but disposes of the property on or after his death by way of contract or settlement rather than by will.

Creating a joint tenancy is one example of a will substitute;²³ it could also fall into the other two categories in appropriate circumstances. Further, since the failure to sever a joint tenancy is treated as a transaction occurring immediately prior to the deceased's death, failing to sever might also fall within the first two categories. But it is important to note that many other lifetime dispositions, such as outright gifts on the creation of interests under trusts, may fall within the ambit of the Act in appropriate circumstances. Further, other omissions to deal with property, such as the failure to exercise a power of appointment or a power to extinguish a trust and the failure to deal with entitlements under a policy of life insurance or under a superannuation fund, may also be caught. The provisions relating to "notional estate" recognise that the effectiveness of the Act can be undermined by a whole range of lifetime transactions, and not simply by joint tenancy.

(iii) Other requirements

4.17 In addition to the foregoing requirements, an applicant for an order designating property as notional estate must satisfy the court that the order ought to be made;²⁴ that the designation of particular property as notional estate is necessary to make the order for family provision; and that it is reasonable in the circumstances to designate the property as notional estate.²⁵

²³ NSWLRC Report para 2.22.16.

²⁴ *Family Provision Act 1982* (NSW) ss 23(a) and 24(a).

²⁵ See Dickey 61-63.

(d) Canada

(i) Ontario

4.18 In Ontario, the *Succession Law Reform Act 1977* provides that the capital value of a number of transactions are included as testamentary dispositions as of the date of the death of a person and "shall be deemed to be part of his net estate for purposes of ascertaining the value of his estate, and being available to be charged for payment by an order" for the securing of payment under an order by a charge on property.²⁶ The transactions include any disposition of property made by the deceased whereby property is held at the date of his death by the deceased and another as joint tenants.²⁷ The capital value of the transaction is deemed to be included in the net estate of the deceased to the extent that the consideration for the property held as joint tenants was furnished by the deceased.²⁸

(ii) Alberta

4.19 In Alberta, the Institute of Law Research and Reform has recommended that where there are insufficient assets in the net estate out of which to provide proper maintenance, a judge should be empowered to require a person who benefited from various transactions²⁹ in which the deceased did not receive full valuable consideration ("will substitutes") to contribute to the support of the deceased's dependants. Those transactions include one in which the deceased made a transfer so that property is held by the deceased and another with right of survivorship, that is, a joint tenancy.³⁰ The support would be in the form of an order that the person benefited pay to the estate of the deceased or directly to the dependants such sum as the judge considers adequate for the proper maintenance and support of a dependant. The value of the order for support would not exceed the value of the benefit received by the person affected by the order, less the value of the consideration in money or money's worth given by that person. The Institute recommended that where real property is held in joint tenancy, the value of the benefit received by the survivor should on the deceased's death be

²⁶ S 79. The section is based on s 20 of the *Uniform Dependants' Relief Act* drafted by the Uniform Law Conference of Canada.

²⁷ *Succession Law Reform Act 1977* (Ont) s 79(1)(d).

²⁸ Id s 79(2).

²⁹ Or any person who holds property on his behalf.

³⁰ *Family Relief* (Report No 29, 1978) 118.

taken to be equal to the ratio of the contribution of the deceased to the contribution of all the parties multiplied by the fair market value of the property at the time of the deceased's death.

4.20 Except in relation to one form of transaction,³¹ the Institute recommended that there should not be any time limit in relation to when the transaction occurred because a time limit would depend solely upon the fortuitous timing of the deceased's death measured from the date of the transaction. In the case of a transaction creating a joint tenancy, the deceased retained a right to sever the joint tenancy and there would be little or no reliance interest in the person benefited which would warrant protection by providing a cut-off date. The judge could, however, take into account the injurious effect of an order to make contribution in the light of circumstances occurring between the date of the transfer and the date of application for dependant's relief.

3. DISCUSSION

(a) Introduction

4.21 As the discussion in the previous section shows, the increase in the use of will substitutes³² and other dispositions of property as a means of avoiding the law of wills, testators family maintenance, and the rules of descent on intestacy has resulted in a number of jurisdictions introducing anti-avoidance provisions. The creation of joint accounts or interests in property is only one of a number of avoidance mechanisms addressed by these provisions. There are four other main will substitutes -

- * life assurance;
- * pension, retirement or superannuation schemes;
- * revocable trusts; and
- * settlements or contracts whereby a person retains the enjoyment and disposal of property until his death by the settlement or contract, not by will.

³¹ An unreasonably large transfer of property where the parties are not dealing at arm's length.

³² A will substitute is a device short of an outright disposition wherein a substantial degree of control over, or interest in, the property is retained by a person during his life but the assets do not form part of the person's estate at death: Manitoba Law Reform Commission *The Testators Family Maintenance Act* (Report 1985) 108 fn 128.

See J H Langbein *The Nonprobate Revolution and the Future of the Law of Succession* (1984) 97 Harvard LR 1108.

The use of gifts during the deceased's lifetime, including gifts *donatio mortis causa*, as an avoidance mechanism has also been addressed in other jurisdictions.

4.22 The question whether the *Inheritance (Family and Dependents Provision) Act 1972* should be amended to include anti-avoidance provisions involves a consideration of a number of conflicting rights or interests. On the one hand there is the right of a person to arrange his affairs in his own way and the right of a transferee of property to a secure title. On the other hand, there is the interest of the deceased's family and dependants not to be disinherited. As the New South Wales Law Reform Commission stated:

"...any reformer faces a dilemma: if all dispositions of property made by a person in his lifetime are valid against the surviving members of his family, the Act gives incomplete protection to the family: if the surviving members can claim against property disposed of by, say, their deceased father, the Act will be recognising a potential interest in property which must clog its alienability and thereby adversely affect its utility and value."³³

(b) Joint tenancy

4.23 The Commission has given consideration to how the position regarding joint tenancies might be reformed. The Commission considers that it is right in principle that the Court should have a discretion³⁴ to make property held on joint tenancy subject to an order under the Act if the transaction in which the joint tenancy was created did not involve full consideration and was entered into by the deceased with the intention of evading the Act. In these cases, the need to protect the family and other dependants outweighs the other interests referred to above.

4.24 However, if operation of an anti-avoidance provision depends solely upon proof of the deceased's intention to avoid the policy of the Act, it will be difficult to establish in many cases the intention of the deceased. Because of this difficulty it may also be desirable to provide an objective test. This could be done by providing that all joint tenancies created by transactions for less than full consideration are deemed to be part of the deceased's estate. However, such a provision would not give sufficient consideration to the interest in allowing a

³³ NSWLRC WP para 11.3.

³⁴ Factors which could be taken into account by the Court in the exercise of its discretion include the time that has elapsed between the date of the transaction and the date of the deceased's death and any contribution the surviving joint tenant has made to the value since his interest was acquired.

person during his lifetime to do as he wishes with his property and the community interest in maintaining security of transactions and security of title. To balance these interests and the interest in protecting the family and dependants, at the discretion of the Court, it would be preferable if only transactions in which a joint tenancy is created within a period of, say, one year of the deceased's death for less than full consideration were capable of being treated as part of the net estate of the deceased for the purposes of the Act. In these cases the transactions would in effect be deemed to have been made with an intention of avoiding the policy of the Act.

4.25 The New South Wales Act provides that in some cases a joint tenancy may be included in the notional estate where the deceased fails to sever the joint tenancy. The omission by which the survivor became sole owner must be supported by full consideration if the property is not to be included in the notional estate. Generally this consideration will exist because there is a fair equivalence immediately before death between what was foregone in not severing the joint tenancy and what was received by continuing to be a joint tenant. But where the deceased had a significantly greater risk of dying before his co-tenant, consideration for failing to sever will be lacking. It is questionable whether it is fair to the fellow joint tenant for the Act to apply to failure to sever, particularly where the fellow joint tenant provided valuable consideration for the creation of the joint tenancy. Normally, each joint tenant bears the risk that he will have nothing if he dies before the other joint tenants, but in return has the prospect of benefiting if he survives. The policy of the Act seems to be that once it becomes clear that one joint tenant runs a significantly greater risk of dying first, he is morally obliged to sever the tenancy so that he can leave his share in the property by will. If not, the property becomes part of the notional estate. This is unfair. The fellow joint tenant, who has borne the risk of losing all property in the event of dying first, is to be deprived of the benefit of survivorship in the interests of providing for the first joint tenant's family. In these cases, the right of a transferee of property to security of title should prevail over the interest of the deceased's family or dependants not to be disinherited.

4.26 Transactions involving full valuable consideration need not be included within the discretion since they do not diminish the value of the deceased's estate. Where an order is made to treat property the subject of joint tenancy as part of the net estate of the deceased regard could be had to any consideration provided by the survivor affected by the order or any contribution made by the survivor to the maintenance or improvement of the property since

the interest was acquired. The amount included in the estate would not exceed the ratio of the consideration or contribution of the deceased to the consideration or contribution of all the parties multiplied by the fair market value of the property at the time of the deceased's death.

4.27 The limitation of an anti-avoidance provision to a transaction occurring within one year before the date of the deceased's death is necessarily arbitrary. It is dependent upon the fortuitous timing of the deceased's death measured from the date of the transaction concerned. On the other hand, a person who has received a gift of property or a transfer for less than full consideration should know with certainty that he can enjoy the full benefit conferred upon him after the lapse of a certain period of time. Uncertainty is undesirable because it is a disincentive to the expenditure of money to maintain, develop or improve the property, notwithstanding that it would be taken into account in determining the amount to be included in the estate. On balance, the Commission considers that any period in excess of one year would cause too much uncertainty and disruption to the security of title of those taking by survivorship.

4.28 A person who holds property with the deceased as a joint tenant should know how his interest in the property is to be affected without undue delay after the deceased's death. At present an application under the *Inheritance (Family and Dependants Provision) Act 1972* must be made within six months from the date on which the administrator becomes entitled to administer the estate of the deceased in Western Australia.³⁵ For the sake of consistency, the same period could apply in relation to applications involving a joint tenancy. However, this approach could lead to undue delay because there is no obligation to take out a grant in "good time".³⁶ Further, particularly where the only asset of any value is jointly held property, it is not always necessary to take out a grant of representation. While some other jurisdictions have time limits similar to those in Western Australia, in New South Wales an application for family provision must be made within 18 months from the date of the deceased's death.³⁷ In Queensland, the period is nine months from the date of the deceased's death.³⁸ The Commission considers that the period of nine months from the date of the deceased's death is a reasonable one in which to commence proceedings.³⁹

³⁵ S 7(2)(a).

³⁶ See fn 8 above.

³⁷ *Family Provision Act 1982* (NSW) s 16(1)(b), (2).

³⁸ *Succession Act 1981* (Qld) s 41(8).

³⁹ Provision would need to be made for the application of this provision where the date of the deceased's death is uncertain. See s 16(5) of the *Family Provision Act 1982* (NSW) which provides that, where the

4.29 In England, following a recommendation of the Law Commission, the *Inheritance (Provision for Family and Dependants) Act 1975*⁴⁰ provides that where an order is made that property held in joint tenancy be treated as part of the net estate of the deceased, a person is not rendered liable for anything done by him before the order was made. The purpose of this provision is to ensure that a surviving joint tenant and any other person acting in relation to the relevant property, such as a joint bank account, may ignore the possibility that an order might later be made. A bank paying money to a surviving joint tenant of a bank account would therefore not be liable to be made accountable for such money in family provision proceedings.⁴¹ The Act also provides that an order may, for the purpose of giving effect to the order, require any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order.⁴² The Commission considers that a similar provision would be appropriate.

4. CONCLUSION

4.30 There are sound arguments for extending the scope of property available for distribution under the *Inheritance (Family and Dependants Provision) Act 1972* to include property disposed of by the deceased during his lifetime in certain circumstances, particularly when done with intent to evade the Act or where the transaction operates as a will substitute. The policy of the Act is otherwise too easily frustrated. However, there is legitimate scope for argument as to where to draw the line so as to exclude transactions made for valuable consideration and to avoid undue disruption to the security of title of those taking under lifetime transactions of the deceased. In any event, it is clear that the issues extend far beyond joint tenancy. The Commission considers that it would be undesirable to amend the law of family provision in relation to jointly owned property without giving full consideration to the general issue of the extent to which courts should have power to undo lifetime transactions of the deceased in order to increase the estate available for family provision; joint tenancies are

date of death is uncertain, the court may allow the application to be made within such period as it thinks reasonable.

⁴⁰ S 9(3).

⁴¹ Law Commission *Second Report on Family Property: Family Provision on Death* (Law Com No 61, 1974) para 142.

⁴² *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s 2(4)(a). This follows a Law Commission recommendation that in family provision proceedings the court should have power to make such order as may be just against the surviving customer or creditor to whom such money has been paid or is owing; Law Commission *Second Report on Family Property: Family Provision on Death* (Law Com No 61, 1974) para 142.

merely one aspect of a much wider issue, and it is desirable that there be a coherent and consistent response to all such transactions.

4.31 The Commission therefore considers that the *Inheritance (Family and Dependents Provision) Act 1972* should not be amended to deal solely with property the subject of a joint tenancy. It does, however, consider that it is desirable for there to be a review of the general issue of the extent to which courts should have power to undo lifetime transactions of the deceased in order to increase the estate available for family provision. It therefore recommends that further consideration be given to the general issue of the extent to which the Act should be amended to bring within its ambit property disposed of by the deceased by lifetime transactions.

Chapter 5

SUMMARY OF RECOMMENDATIONS

5.1 The Commission recommends that -

Creation of co-ownership under the *Transfer of Land Act 1893*

1. Section 60 of the *Transfer of Land Act 1893* should be repealed. The section should be replaced by a new provision which requires instruments of transfer to two or more persons submitted for registration to specify whether the co-owners are joint tenants or tenants in common. Any instrument which does not state the nature of the co-ownership must not be registered.

Paragraph 2.25

2. A simple explanation of the significance of the distinction between a joint tenancy and a tenancy in common should be contained in the instrument of transfer.

Paragraph 2.26

Presumption of tenancy in common

3. The presumption of joint tenancy should be replaced by a statutory presumption of tenancy in common as in Queensland and New South Wales. Except where excluded, the presumption should apply to dispositions of personal and real property including land registered under the *Transfer of Land Act 1893*.

Paragraph 2.36

4. The provision should be modelled on section 35 of the Queensland *Property Law Act 1974*, subject to the following amendments -

1. The statutory presumption should only be operative *in equity* for choses in action.

2. The Queensland provision creating exceptions to the operation of the statutory presumption should be retained and extended to include property disposed of to married people.
3. The presumption should be rebuttable by evidence of contrary intention. This should be made clear by express provision.

Paragraph 2.37

Severance by notice

5. Unilateral severance of joint tenancy should not be effective without written notice to the other joint tenants.

Paragraphs 3.32 and 3.34

Registration of declaration of severance

6. The law of unilateral severance should be reformed by inserting in the *Transfer of Land Act 1893* a provision along the lines of section 59 of the Queensland *Land Title Act 1994*. However, the section should expressly empower the Registrar at his discretion to dispense with the requirement to produce the certificate of title to enable a transfer to be registered.

Paragraph 3.35

Severance by will

7. The common law rule that joint tenancy cannot be severed by will should not be reversed.

Paragraph 3.33

Severance by mutual agreement

8. The rule that a joint tenancy may be severed if all the joint tenants mutually agree to hold as tenants in common should not be altered statutorily.

Paragraph 3.38

Severance by course of dealing

9. The rule that a joint tenancy may be severed by a course of dealing sufficient to intimate that interests of all were mutually treated as constituting a tenancy in common should not be altered statutorily.

Paragraph 3.43

Provision for family and dependants and joint tenancy

10. The *Inheritance (Family and Dependants Provision) Act 1972* should not be amended to deal solely with property the subject of a joint tenancy. However, further consideration should be given to the general issue of the extent to which the Act should be amended to bring within its ambit property disposed of by the deceased by lifetime transactions.

Paragraph 4.31

P G CREIGHTON,
Chairman

P R HANDFORD

C J McLURE

22 NOVEMBER 1994