Testate or Intestate: Is There Anything for the Estate? Unilateral Severance of a Joint Tenancy

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A joint tenant who wishes to have testamentary power over jointly owned property must avoid the right of survivorship. This requires conversion of the joint tenancy into a tenancy in common by severance of the joint tenancy. Under current Victorian law, difficult issues arise when the severance relates to Torrens title land. This paper examines the current common law and concludes that a simpler, quicker and more efficient form of unilateral severance of a joint tenancy is required.

INTRODUCTION

Changing social norms have encouraged a contemporary trend towards more co-operative land ownership between men and women.[1] Thus concurrent ownership of land that enables women to share ownership of family property has replaced models of successive ownership characterised in property settlements as recently as the early twentieth century.[2] Married couples or parties involved in a personal relationship today are more likely to hold co-owned property as joint tenants rather than as tenants in common.[3] One reason for this is that in Victoria, a joint tenancy of land need not be deliberately created and will be presumed to exist where there is a unity of possession, time, title and interest unless the transferees express a contrary intention.[4] Joint

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1 See K Gray, *Elements of Land Law* (2nd ed, 1993) 460–1 and fn 3. For a comparative evaluation of sexual equality in different legal systems, see M A Glendon, 'Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies' (1975) 23 *American Journal of Comparative Law* 1.

2 See Gray, op cit (fn 1) 609–10.

3 The Victorian Land Titles Office does not keep statistics, although experienced examiners believe that, of transfers of two or more individuals, approximately 80% result in joint tenancy either by choice or by operation of the presumption described in fn 4 infra: Letter of response from Ms Rosalyn Hunt, Registrar of Land Titles, 12 August 1997.

4 There is a common law presumption in favour of joint tenancies, such that if property is conveyed or devised to two or more persons they take as joint tenants. In Victoria, this position is the same for both general law and Torrens title land. Under s 33(4) of the *Transfer of Land Act* 1958 (Vic), any two or more persons named in any instrument as transferees 'shall unless the contrary is expressed, be deemed to be entitled jointly and not in shares.' Section 74 of the *Real Property Act* 1886 (SA) has a similar effect. The common law position has been changed by statute in Queensland by s 35 of the *Property Law Act* 1974 (Qld). Section 26(1) of the *Conveyancing Act* 1919 (NSW) also reverses the common law presumption. There is an apparent contradiction with s 100(1) of the *Real Property Act* 1900 (NSW) which seems to maintain the common law position. However, any potential conflict is obviated in practice by clause 7 of the *Real Property Regulation* 1993 (NSW) which requires transferees to nominate expressly in the transfer whether they take as joint tenants or tenants in common. For further discussion, see New South

tenancies are still a very common way to co-own estates and interests in land despite the abolition of death duties in Victoria and other Australian jurisdictions[5] which has made irrelevant the obvious advantages of joint tenancies as estate planning tools.

The consequences of holding co-owned property as a joint tenant can be far reaching for the succession of property because of the right of survivorship. The right of survivorship means that when a joint tenant dies, his or her interest ceases to exist such that a surviving joint tenant becomes the sole owner of the whole of the land. The right of survivorship cannot be destroyed by making a will. It can only be destroyed if the joint tenancy itself is destroyed and converted into a tenancy in common. This process is called severance. The imminent death of a joint tenant and the desire to make testamentary provision for a third party may impel urgent unilateral severance, particularly where there is disharmony or a breakdown in the relationship between the joint tenants. The most effective method of severance in these circumstances demands a simple, certain and low cost process.

In recent times, there has been judicial and parliamentary re-examination of unilateral conduct which may operate to sever a joint tenancy.[6] In 1990, the High Court of Australia in *Corin* v *Patton*[7] considered whether a unilateral declaration of intention or other act inconsistent with the continuation of a joint tenancy may suffice. Legislative initiatives in Tasmania and Queensland provide statutory methods of severance.[8] In addition, the New South Wales Law Reform Commission issued a Report[9] in July 1994 in which it proposed changes in the law to allow a registered unilateral declaration by a joint tenant to sever the interest of that joint tenant.[10] Further, the Law Reform Commission of Western Australia issued its report in November 1994.[11] There is no current inquiry in Victoria.

Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy*, (Report No 73, July 1994) para 2.12. The Law Reform Commission of Western Australia (Law Reform Commission of Western Australia, *Report on Joint Tenancy and Tenancy in Common* (Project No 78, November 1994), paras 2.36 and 5.1.3) has recommended that the presumption of joint tenancy be replaced by a statutory presumption of a tenancy in common as in Queensland and New South Wales.

[5] Section 2A(b) of the *Probate Duty Act* 1962 (Vic) abolished the payment of death duties as from 1 January 1984. For the position in other Australian States, see generally W H Pedrick, 'Oh, To Die Down Under! Abolition of Death and Gift Duties in Australia' (1982) 14 UWALR 438.

[6] Writing in 1980, Sue MacCallum acknowledged that the common law was 'in a confused state': see 'Severance of a Matrimonial Joint Tenancy by a Separated Spouse' (1980) 7 *Mon L R* 17, 31.

[7] (1990) 169 CLR 540.

[8] See s 63 of the *Land Titles Act* 1980 (Tas) which provides an additional mode of severance for joint tenants by registration of a declaration of severance, and s 59 of the *Land Title Act* 1994 (Qld) which allows for the severance of a joint tenancy through registration of a transfer.

[9] New South Wales Law Reform Commission Report, loc cit (fn 4). See also C Sherry, 'Unilateral Severance of Joint Tenancies' (1995) 3 *Australian Property Law Journal* 1.

[10] In England, s 36(2) of the *Law of Property Act* 1925 allows for severance of joint tenancy by notice in writing by one joint tenant to the other joint tenants.

[11] Law Reform Commission of Western Australia Report, loc cit (fn 4): See also T Wilson, 'The Western Australian Law Reform Commission Reviews Co-ownership' (1995) 9 *Australian Property Law Bulletin* 182.

This article explores and evaluates the current position in Victoria and concludes that statutory change to provide simpler, quicker, efficient and cheaper unilateral severance of a joint tenancy of Torrens title land is not only justifiable but necessary.[12] Reform and recommendations for reform in other Australian jurisdictions have been examined elsewhere.[13]

THE NATURE OF A JOINT TENANCY

The nature of a joint tenancy is to regard co-owners of property as a single entity. As an institution, the joint tenancy provided English feudal overlords of the early middle ages with an efficient tax collection system. Feudal dues were more easily recoverable where ownership of vast tracts of land remained unfragmented. Feudalism lost popularity and by 1660 most of the oppressive feudal incidents had been abolished.[14] However, some of its institutions, such as the joint tenancy, with conceptual features designed to support feudal policies, have survived intact. A joint tenancy is characterised by two features: the existence of the four unities and the right of survivorship.

The four unities

> The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.[15]

The four unities of possession, title, time and interest are said to embody the unified nature of a joint tenancy.[16] Unity of possession, which entitles each co-owner concurrently with the other co-owners to present possession and entitlement to the whole property, is common to both forms of co-ownership. The absence of unity of title, time or interest implies that the co-ownership is a tenancy in common rather than a joint tenancy. Unity of title means that all the titles are derived from the same instrument or grant, or from the same acts of adverse possession. Unity of time requires that all the jointly owned interests be vested at the same time and by virtue of the same event. Finally, unity of interest means that all the interests are identical in size: their nature,

[12] It is not the purpose of this paper to consider whether there is any justification to retain the institution of joint tenancy. However, in the light of the arguments raised in this article it's retention is anachronistic having derived from a feudal preoccupation for maintaining efficient tax collection. Furthermore, the certainty and equality of a tenancy in common is consistent with the freedom of tenants in common to devise jointly owned property to each other.

[13] See: J G Tooher 'Windfall by Wager or Will? -Unilateral Severance of a Joint Tenancy' (1998) 24 Mon L R 399.

[14] *Tenures Abolition Act* 1660 (UK).

[15] W Blackstone, *Commentaries on the Law of England* (1766) Vol 2 180.

[16] See generally, D Mendes Da Costa 'Co-ownership under Victorian Land Law' (1961) 3 MULR 137, 149–53.

extent and duration must be the same. The position is summed up by Deane J as follows:

> The substance of joint tenancy, while it subsists, lies in the equality and personal character of the interests of the joint tenants in the undivided rights which constitute ownership of the whole of the relevant property.[17]

When two or more people become co-owners of property, they will not be joint tenants unless all four unities are present. Similarly, if one of the unities is destroyed after the joint tenancy has been created, the joint tenancy will become a tenancy in common. The essential presence of the four unities thus means that

> one joint tenant cannot effectively assign at law his place in a continuing joint tenancy. . . . The only way in which an assignee can be substituted as a legal joint tenant is by the establishment of a new and different joint tenancy.[18]

The right of survivorship

The right of survivorship is not a 'right' in any legal sense. It is merely a hopeful gamble and a consequence following the death of a joint tenant. Nor does it involve a vesting by survivorship because there is no shift in ownership. When one joint tenant dies, his or her interest ceases to exist. For example, during her lifetime A, a joint tenant does not have a 'share' in the property and thus, upon her death, A has no 'share' in the property which is capable of being devised or devolving with A's estate. Deane J said:

> When one joint tenant dies during the subsistence of the joint tenancy, his interest ceases: the interests of the remaining joint tenants expand by accretion. When there is but one survivor, the joint tenancy has run its course and the survivor becomes the full owner of the whole property.[19]

In this sense the right of survivorship is both inherent and indestructible. Unlike the devolution of property by will, which can be challenged under the various state testator's family maintenance legislation, accretion by survivorship is inviolate upon the death of a joint tenant. Moreover, the extinguishment of the interest of the deceased joint tenant takes place regardless of whether the joint tenancy was created deliberately or by operation of presumption. Thus, if J and K are joint tenants of a fee simple estate in Blackacre, J's estate will not receive any interest in Blackacre upon J's death, regardless of whether J dies testate or intestate. This is because of the right of survivorship, an inherent feature of a joint tenancy. K, the survivor, becomes the sole owner of Blackacre, regardless of whether J may have purported to make a contrary testamentary disposition. By contrast, there is no inherent right of survivorship with a tenancy in common. During C's lifetime as a tenant in common, C holds an undivided but distinct share in the property which is

[17] *Corin* v *Patton* (1990) 169 CLR 540, 575.
[18] Ibid.
[19] Ibid.

capable of being devised or devolving with C's estate. Where C and D are tenants in common of a fee simple estate in Greenacre, upon C's death, C's share passes to C's estate, either under C's will or (where C dies intestate) under the relevant intestacy laws. The size of D's holding in Greenacre will only be enlarged if D takes as C's beneficiary. There is no right of survivorship in this form of co-ownership.

A disposition in a will does not eliminate the right of survivorship, because by the time the will becomes effective, the interest of the deceased joint tenant no longer exists and there is nothing that can pass by devise. In effect, the right of survivorship operates as an irrevocable devise to surviving joint tenants. It has been referred to as a 'poor man's will', saving married couples or family members the trouble and expense of a formal will and ensuring that property remained within the immediate family. It is perhaps more justifiable that family members rather than people unrelated by blood or marriage, such as business partners, should risk their inheritance on the chances of survivorship.[20] However it is not necessarily a judicious or expedient form of estate planning because it does not take into consideration various contingencies that may occur once the joint tenancy of the beneficial interest has been created.[21] Suppose for example that A and B, a newly married couple, purchased their matrimonial home as joint tenants. A and B are fully aware that the survivor will inherit the property. At the time of purchase they did not contemplate the changes in their family situation that later demand a revised testamentary plan. For example, if A and B remain childless and B has a falling out with A's family, B would have strong reservations about the likelihood of his interest ultimately devolving to A's family; or A might develop a gambling addiction or may lack any responsible capacity for property management such that the entire proceeds of the property would be placed at risk if A survives B. Thus there may be strong reasons why the right of survivorship is not a suitable mechanism for estate planning.

The continued existence of a joint tenancy and therefore the operation of the right of survivorship depend on the preservation of the unities of time, title, interest and possession. However, during his or her lifetime, a joint tenant 'is at liberty to dispose of his [or her] own interest in such a manner as to sever it from the joint fund'[22] and convert the joint tenancy into a tenancy in common. Severance of a joint tenancy, without physical partition, operates

[20] In 1709, Cowper LC said that 'a joint-tenancy is an odious thing in equity' because if a joint tenant mortgagor were to die first, 'all his estate and interest goes from his representatives to the survivor': see *York* v *Stone* 1 Salkeld 158; 91 ER 146.

[21] The right of survivorship plays a useful role in reducing the administrative burden where joint tenants hold the legal estate in property as trustees for a third party.

[22] *Williams* v *Hensman* (1861) 1 J & H 546, 557; 70 ER 862, 867. The passage referred to is generally regarded as the classic statement of the common law rules of severance and was cited with approval by Mason CJ and McHugh J in the High Court in *Corin* v *Patton* (1990) 169 CLR 540, 546. However, Toohey J (at 587) preferred as more succinct the following statement of Stirling J in *In re Wilks; Child* v *Bulmer* [1891] 3 Ch 59, 61–2: 'A joint tenancy may unquestionably be severed either (1) by a disposition made by one of the joint owners amounting at law or in equity to an assignment of the share of that owner; or (2) by mutual agreement between the joint owners.' This assumes the agreement between the joint tenants may be express or implied from a course of conduct.

by converting the undivided rights subsisting in the whole of the property into distinct but undivided shares. Since the interests of each joint tenant are always the same in respect of possession, interest, title and time, no distinction can be drawn between the interest of any one tenant and that of any other tenant.[23] Thus, for the purposes of severance each joint tenant is regarded as having a potential proportionate share corresponding to the number of joint tenants. Deane J provides the following explanation:

> One joint tenant can, by an appropriate instrument or act of legal transfer and in the absence of applicable statutory restraint, alienate his legal interest in the relevant property. Involved in such an alienation are two steps which occur simultaneously: the creation of a distinct proportionate share of the whole and a detachment of that share from the property which is subject to the joint tenancy with the consequence that the transferee received the share of a tenant in common. If there were initially two joint tenants, the transferee and the non-transferring joint tenant will thereafter hold as tenants in common in equal shares.[24]

The unity of time requirement applies at the date of creation of the joint tenancy. Strictly speaking, however, severance will only be effected by the destruction of either unity of title or interest. Unity of possession must continue to exist in a co-ownership of property because severance does not terminate the co-ownership, but simply destroys the right of survivorship. Thus, where J, K and L are joint tenants and J transfers his interest to a third party, C, unity of title and time will be destroyed and severance will convert J's interest into a tenancy in common. As between themselves, K and L will continue to be joint tenants and enjoy rights of survivorship.[25] In order to destroy the right of survivorship operating on a joint tenant's share and allow an effective devise of the share or its distribution on intestacy, severance of a joint tenancy must be effected during the lifetime of a joint tenant.

Severance of a joint tenancy

In 1861 Sir William Page Wood V-C[26] listed three ways in which a joint tenancy may be severed at common law:

> In the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. . . . Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.[27]

The first method Page Wood V-C listed is unilateral severance. Unilateral severance primarily requires an alienation whereby a joint tenant operates on

[23] *Wright* v *Gibbons* (1949) 78 CLR 313, 323.
[24] *Corin* v *Patton* (1990) 169 CLR 540, 575.
[25] *Wright* v *Gibbons* (1949) 78 CLR 313, 323.
[26] Sir William Page Wood V-C (who later became Lord Hatherley).
[27] *Williams* v *Hensman* (1861) 1 J & H 546, 557; 70 ER 862, 867. The relevant passage was approved by Mason CJ and McHugh J in *Corin* v *Patton* (1990) 169 CLR 540, 546–7.

his or her own share, such as by sale or gift to a third party. An effective alienation must destroy one of the unities of time, title or interest which characterise a joint tenancy to convert it into a tenancy in common or, depending on the number of co-owners, several tenancies.[28] Thus, where J, K and L hold as joint tenants, and J severs the joint tenancy by operating on her own share, J holds as tenant in common with K and L, who remain joint tenants as to the remaining two-thirds share. Severance effected by this means is unilateral in that the consent or co-operation of the other joint tenant or tenants is not required.[29] There is no legal obligation on the severing joint tenant to give them notice of the alienation.[30] Therefore it is quite likely that the other title holder or title holders might wrongly assume that the right of survivorship attaches to their co-ownership. A joint tenant's ability to destroy the right of survivorship unilaterally and to wrest testamentary power recognises that a joint tenancy is not an immutable co-ownership arrangement.[31] Unilateral severance is a means of avoiding the hardship that may otherwise follow to dependants of a deceased joint tenant when the surviving joint tenant and the dependants are different people. For example, the surviving joint tenant may be an estranged spouse and the dependents may be a partner or children from a subsequent relationship.

The main purpose of this article is to focus on unilateral severance, and consideration of the second and third methods of severance is therefore limited. Moreover, unilateral severance may be effected in a number of ways and it is beyond the scope of this article to deal in detail with all possible methods of unilateral severance.

Apart from converting a joint tenancy into a tenancy in common, a joint tenant of property is able to dismantle the common ownership altogether. There are a number of methods available. For example, it is possible to apply to the Supreme Court of Victoria for a physical partition or sale of the co-owned property.[32] Successful partition proceedings entail considerable delay and expense. Another option, available where the joint tenants are married or in a defacto relationship, is for one joint tenant to apply to the Family Court or to the Supreme Court for an order altering interests in property under s 79 of the *Family Law Act* 1975 (Cth) or Part 9 of the *Property Law Act* 1958

[28] Thus not all dealings by a joint tenant will unilaterally sever the joint tenancy. For example, severance by grant of a mortgage will depend on whether the land is general law or Torrens title land.

[29] Santow J in *Costin* v *Costin* (1994) NSW ConvR 55-715, 60,101, acknowledged that the authorities are inconsistent regarding the power of veto of the other joint tenants. However, his Honour said that in the case of unilateral severance by gift of Torrens land, the other joint tenants do not have the power to frustrate a unilateral severance because, armed with that authority and direction, the donee could expect that a court would compel the solicitors concerned to produce the certificate of title, notwithstanding the objection of the other joint tenant. See also the judgment of the New South Wales Court of Appeal at (1997) NSW ConvR 55-811.

[30] *Perks* v *Perks* [1950] 2 WWR 189, 192. However, joint tenants may contractually agree not to perform any act which will result in severance: see Gray, op cit (fn 1) 486; fn 10.

[31] See New South Wales Law Reform Report, op cit (fn 4) para 5.3.

[32] See ss 221–224 of the *Property Law Act* 1958 (Vic).

(Vic).[33] Under each of the options suggested, it is possible that the court will decide that only one of the co-owners should continue to hold the property as a sole owner.

UNILATERAL SEVERANCE OF JOINTLY OWNED TORRENS LAND IN VICTORIA

In Victoria, a joint tenant of Torrens title land may voluntarily sever the joint tenancy without the consent of the other joint tenants.[34] A legal or equitable alienation of all or part of a joint tenant's interest which destroys unity of title or interest will sever the joint tenancy.[35] The Torrens registration scheme altered general law conveyancing principles by creating a system of title by registration.[36] The execution of an instrument of transfer is a necessary prerequisite to registration. Furthermore, the transfer document must be registered before it is effectual to 'create vary extinguish or pass any estate or interest' at law.[37] In the case of general law land, effective alienation requires the execution of a deed.[38] In the case of Torrens system land, a formal transfer must be registered in order to constitute a legal severance of the joint tenancy simply because legal title is not transferred until registration.[39] Equitable severance occurs when a joint tenant alienates only an equitable interest. For example, the existence of a specifically enforceable contract for the sale of land which usually takes place before execution and completion of the legal formalities passes an equitable interest to the purchaser, thereby severing the joint tenancy in equity.[40] Similarly, an assignment for value by a joint tenant of an equitable leasehold will bring about an equitable severance. Although

[33] Severance by court order normally presupposes successful litigation and severance of the joint tenancy is not accomplished until the court makes an appropriate order for partition or settlement by sale or other dealing. *McKee* v *McKee* (1986) 10 Fam LR 754. See generally, P Butt, 'Severance of Joint Tenancies in Matrimonial Property' (1982) 9 *Sydney Law Review* 568.

[34] There may also be involuntary severance. This may occur by law, for example, as a result of the bankruptcy of one of the joint tenants (see *Sistrom* v *Urh* (1992) 40 FCR 550, and s 58(1) of the *Bankruptcy Act* 1966 (Cth)), or where one joint tenant unlawfully kills another (see *Rasmanis* v *Jurewitsch* [1968] 2 NSWR 166. See also the discussion in A Bradbrook et al, *Australian Real Property Law* (2nd ed,1997)10–42.)

[35] See text to fn 25, supra.

[36] 'The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor': per Barwick CJ in *Breskvar* v *Wall* (1971) 126 CLR 376, 385–6.

[37] *Transfer of Land Act* 1958 (Vic), s 40(1).

[38] See *Property Law Act* 1958 (Vic), s 52(1).

[39] See *Transfer of Land Act* 1958 (Vic), s 40.

[40] This method of creating equitable interests is based on the doctrine of *Walsh* v *Lonsdale* (1882) 21 Ch D 9 discussed by the High Court of Australia in *Chan* v *Cresdon Pty Ltd* (1989) 168 CLR 242, 261. A related doctrine is the equitable doctrine of conversion applied in *Lysaght* v *Edwards* (1876) 2 Ch D 499. On the basis of both *Walsh* v *Lonsdale* and *Lysaght* v *Edwards*, lack of compliance with legal formalities may produce severance in equity but not in law.

some doubt has been expressed, the execution of a written declaration of trust by a legal title holder, as trustee for a third party beneficiary, will also sever the joint tenancy.[41] Severance may occur in law or equity depending on which of these various methods is used.

The different methods of unilateral severance permit a joint tenant to choose whether to dispose of or retain a beneficial interest in the property. The relative merits of the various forms of unilateral severance available depend on whether the joint tenant wishes to retain a beneficial interest in the property. As long as the joint tenant has no desire to retain a beneficial interest in the jointly owned property, these methods work simply and efficiently.

Retaining the beneficial interest

A joint tenant who wishes to sever the joint tenancy unilaterally but who wants to retain a beneficial interest in the co-owned property has a number of options. Under the common law, an alienation or assignment by a joint tenant operating upon his or her own share generally involves a third party assignee or one of the other joint tenants as assignee. For example, a joint tenant might put land in trust for his own benefit by transferring his legal interest to a third party trustee.[42] Further, two of three joint tenants, who wish to ensure that the third joint tenant does not benefit from the right of survivorship, might sever the joint tenancy with the third co-owner by executing a transfer releasing their interests to each other.[43]

Severance by 'self dealing transfer'[44]

At common law, a person was unable to convey property to himself or herself unless the conveyance was to that person in another capacity. For example, an executor might transfer land to himself or herself as devisee or a beneficial owner might convey land to himself or herself as trustee for charitable purposes.[45] Statutory provisions such as s 72(3) of the *Property Law Act* 1958 (Vic), providing that 'a person may convey land to or vest land in himself' have been enacted in all Australian jurisdictions.[46] This provision is identical to s 72(3) of the *Law of Property Act* 1925 (UK). One very significant question that arises is whether an assurance of property by a person to himself or herself, now made possible by the statutory provision, is capable of severing a

[41] This would be an effective alienation of an equitable interest under the *Property Law Act* 1958 (Vic), s 53(1)(b). This is the position accepted by the authors of Bradbrook, op cit (fn 34) 10–31. However, the Law Reform Commission of Western Australia Report, op cit (fn 4) para 3.17 expressed some doubt in view of the voluntary nature of a declaration of trust. With respect, it is suggested that the doubt is not supportable on legal principles, although policy considerations may warrant some statutory intervention.

[42] Prior to the abolition of the Statute of Uses by the *Imperial Acts Application Act* 1980 (Vic) s 5, a joint tenant could also settle land on a feofee to the use of the settlor.

[43] See *Wright* v *Gibbons* (1949) 78 CLR 313.

[44] The term 'self dealing transfer' as used throughout this article refers to a transfer executed by the transferor to herself or himself.

[45] See *Samuel* v *District Land Registrar* [1984] 2 NZLR 697, 699.

[46] Some Canadian provinces have also enacted similar legislation: see E Gillese, *Property Law: Cases, Text and Materials* (2nd ed, 1990) 18:45.

joint tenancy. It is arguable that severance occurs because one of the essential unities is destroyed: the joint tenant who executes a self dealing transfer would thereafter hold title under a different instrument, thus destroying unity of title.[47] In *Rye* v *Rye* the House of Lords considered s 72(3) of the *Law of Property Act* 1925 to be declaratory of the common law position described above, and that its origins lay in 'technical considerations relative to the forms of conveyancing.'[48] Although the case dealt with the grant of a lease and the Court's comments regarding s 72(3) were obiter, it has been suggested that English courts would not, on the basis of s 72(3), regard a self dealing conveyance or transfer as sufficient to sever a joint tenancy.[49] This view was considered, but not followed, in the New Zealand case of *Samuel* v *District Land Registrar*.[50] In this case, Moller J adopted a wide interpretation of the New Zealand provision and held that a transfer by a joint tenant to herself unilaterally severed the joint tenancy and established a tenancy in common.[51]

In *Re Murdoch and Barry*,[52] a husband and wife were joint tenants of the matrimonial home. The Ontario High Court accepted that a self dealing transfer, executed by the wife with the intention of severing the joint tenancy, destroyed unity of title because the wife's interest was no longer held under the original deed which created the joint tenancy, but under the transfer she had executed to herself. The court said that joint tenants must take under the same instrument, and since this was no longer the case, the joint tenancy was severed. In *Re Sammon*,[53] the Ontario Court of Appeal agreed with its High Court that severance may be effected by a self dealing transfer. This approach was followed in New South Wales in *Freed* v *Taffel*.[54] Helsham CJ reasoned that:

> A conveyance by one joint tenant of his interest to himself as tenant-in-common is capable of severing the jointure. A conveyance to a third party does so; a person may assure property to himself (*Conveyancing Act* 1919, s 24); there is no reason why a conveyance by a joint tenant to himself should not have the same effect in law. The Ontario Court of Appeal

47 Cf: *Samuel* v *District Land Registrar* [1984] 2 NZLR 697, 702, where a registered joint proprietor executed a transfer of all her estate and interest in the property to herself and Moller J was of the opinion that the transfer destroyed, 'at least, the unity of interest.' Moller J also suggested that another approach is that the legislation might provide a statutory exception to the rule that one of the four unities must be destroyed.

48 [1962] 1 All ER 146, 153, 155. The House of Lords decided that two joint tenants could not grant a partnership of themselves an oral yearly tenancy because 'a person cannot agree with himself and cannot covenant with himself.' (Discussed in *Samuel* v *District Land Registrar* [1984] 2 NZLR 697, 699–700).

49 Gray, op cit (fn 1) 492.

50 [1984] 2 NZLR 697.

51 Section 49 of the *Property Law Act* 1952 (NZ) provides that 'A person may convey or mortgage property for any estate or interest to himself or to himself jointly with another or others.'

52 (1975) 64 DLR (3d) 222.

53 (1979) 94 DLR (3d) 594, 597.

54 However, there was no severance on the facts because the transfer had not been registered. Severance in equity was not an acceptable option in the case of a self dealing transfer.

assumed it to be so . . . Needham J in *McNab* v *Earle* did not question it.[55]

In Victoria, s 72(3) of the *Property Law Act* 1958 (Vic) provides appropriate machinery for Torrens land as well as general law land.[56] The Victorian Land Titles Office permits a joint tenant to a transfer of land and to register his or her aliquot share to himself or herself.[57] It is sufficient if the consideration is expressed to be 'my desire to sever joint proprietorship.'

However, there is some doubt as to the validity of this practice after *Corin* v *Patton*.[58] A majority view expressed some reservations about the correctness of the Canadian approach. After stating that it was accepted in *Re Murdoch and Barry* that a transfer to oneself could sever a joint tenancy, Mason CJ and McHugh J, stated: 'Whether or not that is so, there was in this case no transfer from Mrs Patton to herself, and no transfer to Mr Corin on trust for herself.'[59] Similarly, Deane J, is also equivocal in the following passage:

> It is true that there is little to be said from the point of view of logic or common sense for requiring that a joint tenant who desires to convert the joint tenancy into a tenancy in common should go through the charade of assigning his interest to a bare trustee for himself (or, **arguably**, conveying his interest to himself: cf *Re Murdoch and Barry*; *Re Sammon*; *Freed* v *Taffel*, and *Conveyancing Act*, s 24).[60] [My emphasis.]

It may at first appear that, after *Corin* v *Patton*, there is doubt whether severance of a joint tenancy by a registered self dealing transfer, although made possible by statute, is acceptable. Unfortunately no discussion accompanied either judicial comment. One can speculate that the reservations expressed in the judgments were based on an inclination to limit unilateral severance rather than expand its scope. The dearth of authority leaves open the ambit and effect of s 72(3) of the *Property Law Act* 1958 (Vic) although, given its plain meaning, an assurance executed pursuant to this provision would destroy unity of title. Furthermore, in the context of Torrens title land, a self dealing transfer, being an instrument capable of registration, is registered by making or altering recordings in the Register as necessary to give effect to the instrument.[61] Thus, in accordance with s 41 of the *Transfer of Land Act* 1958 (Vic), the Register provides conclusive evidence that the person named as the proprietor of, or having any estate or interest in, the land is seised or possessed of that estate or interest. Furthermore, subject to various exceptions, registration would confer indefeasibility of title such that the newly registered proprietor of land, holding as a tenant in common, shall, 'except in case of fraud, hold such the land subject to such encumbrances as

[55] Id 324. In *McNab* v *Earle* [1981] 2 NSWLR 673, 676, Needham J merely referred to *Re Murdoch and Barry* and *Re Sammon* as two Canadian cases of interest.

[56] Presumably, the provision contained in the *Property Law Act* 1958 (Vic) also applies to Torrens title land.

[57] See direction issued to Land Titles Office Examiners quoted in (1995) 40 *Property Law Bulletin* 16.

[58] (1990) 169 CLR 540.

[59] Id 562.

[60] Id 584.

[61] *Transfer of Land Act* 1958 (Vic) s 27A.

are recorded on the relevant folio of the Register but absolutely free from all other encumbrances.'[62] These provisions would collectively destroy the right of survivorship. For example, suppose that A and B are registered as joint tenants of an estate in fee simple of Torrens title land. If the Registrar of Land Titles accepts for registration a transfer executed by A to himself of a half share in consideration of his 'desire to sever joint proprietorship', the Register would be amended to show A and B holding as tenants in common.

The above analysis would suggest that the reservations of the Mason CJ, McHugh and Deane JJ in *Corin* v *Patton* will not prevent severance if the Registrar of Titles continues to register self dealing transfers. The judicial message conveyed in the comments may, however, increase the likelihood of injunctive or declaratory relief to prevent registration of a lodged dealing. It is obvious that severance by registered self dealing transfer involves an element of artificiality. However, as a matter of practice and policy, it is nevertheless a relatively simple, efficient and straightforward process of effecting a legal severance and should be allowed to continue.

Effect of an unregistered self dealing transfer

A self dealing transfer cannot effect a legal severance unless it is registered. Is an unregistered self dealing transfer capable of effecting an equitable severance? The reservations expressed by the members of the High Court in *Corin* v *Patton* presumably refer to a self dealing transfer which is registered. In any event, in *Freed* v *Taffel*, Helsham CJ held that severance of a joint tenancy of Torrens title land would be effected by nothing less than an act sufficient to alienate the interest at law or in equity.[63] This was because a joint tenancy is severed when one of the unities ceases to exist. Unity of title ceases to exist upon alienation of the joint tenant's interest. Thus, on the facts of *Freed* v *Taffel*, an instrument of transfer executed by a joint tenant which purported to transfer from himself an estate as joint tenant in the property to himself as tenant in common, did not sever the joint tenancy because the transfer was inoperative until registration. The actions of the now deceased transferor were ineffectual to pass any estate or interest at law. Although the consideration shown in the transfer was one dollar, the absence of a valid and binding contract was crucial to the decision.[64] The court alluded to the fact that a binding and enforceable contract entered into by one joint tenant will have the same effect as an alienation at law.[65] But, if the transfer remains unregistered at the joint tenant's death, the lack of a contractual element[66] in the self dealing transfer rules out equitable severance which results from a

[62] *Transfer of Land Act* 1958 (Vic) s 42(1).

[63] [1984] 2 NSWLR 322, 325.

[64] Presumably a 'bargain' with oneself is not an enforceable contract. The courts do not judge the legal enforceability of a contract by reference to the sufficiency of consideration: see *Woolworths Ltd* v *Kelly* (1991) 22 NSWLR 189, 193–4.

[65] That is, an equitable alienation according to the principle that where there is a specifically enforceable contract, equity will treat as done what ought to be done: *Walsh* v *Lonsdale* (1882) 21 Ch D 9.

[66] It makes no sense to speak of having a binding and enforceable contract with oneself.

specifically enforceable contract. It would seem that the voluntary nature of a self dealing transfer is a significant factor in denying its effect after execution but prior to registration.

Allowing severance prior to registration

There are situations where a method of equitable severance by a self dealing transfer prior to registration would avoid hardship. A joint tenant wishing to sever may be too ill to arrange registration, especially where the duplicate certificate of title is held by the other joint tenant or by a solicitor acting for both joint tenants. If the personal relationship between joint tenants has broken down to the extent that the parties no longer communicate, or communicate only through legal representatives, it may be difficult to obtain the duplicate certificate which will normally be required for registration. Although the Registrar of the Land Titles Office might exercise his or her discretion and dispense with production of the duplicate certificate of title in such circumstances,[67] the severing joint tenant's death might prevent the opportunity for such an exercise. Thus the personal representatives of a joint tenant who, for reasons beyond his or her control was unable to register a self dealing transfer, are penalised. Furthermore, the surviving co-owner may have successfully frustrated the attempts of the deceased joint tenant to avoid the consequences of survivorship. In cases where the personal relationship between joint tenants has broken down, other methods of severance, such as agreement or a mutual course of dealing, are not an option. Testamentary power may thus be denied to such a joint tenant because of the joint tenant's ill health and impending death.

There may be other reasons why a self dealing transfer executed by a joint tenant intending to sever the joint tenancy might remain unregistered at the death of the severing joint tenant. For example, there may be a caveat on the title forbidding registration, or the party holding the duplicate certificate of title (such as a mortgagee or the other joint tenant) may refuse to produce it to enable registration.[68] In both cases, death of the severing joint tenant may intervene before appropriate action can be taken to remove these obstacles.

A joint tenant wishing to sever may deliberately avoid or postpone registration to keep her or his intentions a secret.[69] An obvious reason for keeping severance from the other joint tenants and their personal representatives is

[67] See s 104(5) *Transfer of Land Act* 1958 (Vic).

[68] In *Freed* v *Taffel* [1984] 2 NSWLR 322, one of two joint registered proprietors of Torrens land had executed a transfer to himself but was prevented from registering the transfer because his son, who held the duplicate certificate of title to the property on behalf of the other joint tenant, refused to produce it. See also *In the Marriage of Badcock* (1979) 5 Fam L R 672, where registration of the transfer was prevented by the mortgagee's refusal to produce the certificate of title.

[69] In *McNab* v *Earle* [1981] 2 NSWLR 673, a joint tenant executed a transfer of her interest in the land to herself to sever the joint tenancy and devise her share to her son by a previous marriage without her husband's knowledge. She delivered the executed transfer to her solicitor with instructions that he retain it for registration until after her death. See also *Re Sammon* (1979) 94 DLR (3d) 594 (Ont).

that it allows a severing joint tenant fraudulently to claim the property as surviving joint tenant if he or she survives the co-owners. However, concealment of severance may not necessarily involve corrupt or unscrupulous purposes. For example, if A and B are married joint tenants, A may wish to organise his testamentary affairs to provide for a child from a former relationship. A's desire to keep the severance a secret from B may be driven by the fact that B does not know of the existence of the child and A believes ignorance of this fact is in the best interests of B, and of A and B's relationship.

Withholding knowledge of a severance from other co-owners is already possible under existing methods of unilateral severance, such as severance by sale or transfer to a third party. The severing joint tenant does not require the consent or knowledge of the other co-owners for a sale or transfer to a third party, and it may therefore happen that the other co-owners will not be aware of the destruction of the right of survivorship until after the surviving tenant's death. However, there is much less potential for fraud where co-owners have knowledge of alienation to a third party. Furthermore, a secret severance resulting from a self dealing transfer may affect the rights of third parties. For example, a mortgagee who accepts a mortgage from only one of two joint tenants will lose the security interest if the mortgagor predeceases the other joint tenant. However, if the joint tenancy is secretly severed before the death of the joint tenant mortgagor, the mortgagee will not even know that he or she has retained a security interest after the death of the mortgagor and is able to exercise the power of sale to the extent of the mortgagor's interest in the property. Further, third parties who are beneficiaries of joint tenants may suffer from a secret severance by the mere fact that without knowledge of the severance, the surviving co-owner will become sole owner and so deprive the beneficiaries. On balance, it is preferable that some form of publicity should be required for any equitable severance which results from a self dealing transfer.

In the absence of a more direct statutory means of equitable severance, a self dealing transfer provides a relatively straightforward basis for permitting equitable unilateral severance. At the very least, it clearly states the joint tenant's intentions and avoids more convoluted artificial alternatives which may not necessarily achieve the wishes of the severing joint tenant. However, as noted earlier, this may not be an acceptable solution for Deane J in *Corin* v *Patton*.[70]

Voluntary nature of a self dealing transfer

In *Corin* v *Patton*, the High Court confirmed that a unilateral severance of a joint tenancy in equity requires an effective alienation of the property in equity and the mere execution of an unregistered voluntary transfer by a joint tenant to a third party is insufficient to sever the joint tenancy.[71] Deane J said

[70] (1990) 169 CLR 540, 584; see pages 432–433 supra.

[71] (1990) 169 CLR 540, 547, per Mason CJ and McHugh J; 564 per Brennan J; 580 per Deane J. This has been applied by the New South Wales Court of Appeal in *Magill* v *Magill* [1997] NSW ConvR 55–975.

that 'where property is capable of being assigned at common law, a purported legal assignment of the property which is ineffective at law is of itself inoperative in equity in the absence of valuable consideration.'[72] However, Deane J's decision in *Corin* v *Patton* admits that in some situations a voluntary transfer may be effective in equity before it is effective in law once the donor has done all that he or she can do to alienate the property. In fact, a High Court majority in *Corin* v *Patton*[73] confirmed that the principles relating to incomplete gifts of Torrens land permit the possibility of equitable severance prior to registration of a voluntary transfer. Thus Deane J's statement must be understood to mean that the execution of a voluntary instrument of transfer to a third party is not an effective alienation in equity unless it falls within the principles relating to valid gifts of Torrens land.[74]

There are a number of reasons why the above interpretation of Deane J's statement would not cover a valid self dealing transfer executed by a joint tenant. One reason, for example, is that the principles relating to incomplete gifts of Torrens land require delivery of an executed transfer to the donee or the donee's agent. It makes no sense to require delivery of a self dealing transfer because the transferor and transferee are the same person. A second reason is that an effective alienation in equity implies that the donee or transferee acquires an equitable estate in the property. The intention and conduct of the donor or transferor combine to effect a disposition of the equitable interest to the donee or transferee. In the case of a self dealing transfer, the transferor and transferee are the same person and 'if one person has both the legal estate and the entire beneficial interest in the land he holds an entire and unqualified legal interest and not two separate interests, one legal and the other equitable.'[75] Even if it is accepted that a transfer executed under s 72(3) of the *Property Law Act* 1958 (Vic) will sever a joint tenancy and thereby create a separate equitable interest, this will not happen until registration of the transfer.

On the above analysis, a valid self dealing transfer executed by a joint tenant is nothing more than a unilateral statement of intention to sever and is inoperative to pass either a legal or equitable estate until registration. Thus the joint tenant's purported severance will be unsuccessful while the transfer remains unregistered. The traditional approach under existing common law principles is that an unregistered unilateral declaration of intention will not sever the joint tenancy because it does not destroy the unity of title. The definitive explanation is summed up in the following statement by Mason CJ and McHugh J in *Corin* v *Patton*:[76]

[72] (1990) 169 CLR 540, 580. Cf: Brennan J who followed Isaacs J's view in *Brunker* v *Perpetual Trustee Company* (1937) 57 CLR 555.

[73] (1990) 169 CLR 540.

[74] A gift of Torrens land can be complete in equity before the gift is complete in law and so effect a severance. This happens when the donor does all that is necessary on the donor's part: See *Corin* v *Patton* [1989–1990] 169 CLR 540.

[75] *D K L R. Holding Co (No.2) Pty Ltd* v *Commissioner of Stamp Duties* (NSW) (1982) 149 CLR 431, 463, per Aickin J, referred to in the judgment of Toohey J in *Corin* v *Patton* 593.

[76] (1990) 169 CLR 540, 548.

> Unilateral action cannot destroy the unity of time, of possession or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the party acting unilaterally is transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estates in the relevant property. A statement of intention, without more, does not affect the unity of title.

The principles relating to gifts of Torrens land may nevertheless provide a useful framework for canvassing the possibility of allowing equitable severance prior to registration in the case of a self dealing transfer. For example, take the typical gift scenario in which A, the registered proprietor of Torrens land, executes a voluntary transfer in favour of B. A hands the executed transfer document to B, together with the duplicate certificate of title. Once B has the means of effecting registration, B has an equitable interest in the land. How is this different in substance or policy from the situation where A, a registered joint tenant, in possession of the duplicate certificate of title, executes a transfer to herself? A has the means of effecting registration. What difference does it make if A does not have possession of the duplicate certificate of title? These matters will be considered below.

Incomplete gifts of Torrens land

The principles relating to incomplete gifts of Torrens title land were dealt with by the High Court in *Corin* v *Patton*.[77] Mr and Mrs Patton were registered proprietors as joint tenants of an estate in fee simple in Torrens land. Mrs Patton was terminally ill. Wishing to avoid the consequences of survivorship and to gain testamentary power to benefit her children, she took steps to sever the joint tenancy in the property by executing three documents on 12 July 1984. Mrs Patton executed a deed of trust appointing her brother, Mr Corin, as trustee for herself as beneficiary and tenant in common of the property she co-owned with Mr Patton. In order to implement the trust deed, she also executed a transfer of her estate and interest as joint tenant in the property to her brother, the purported trustee. Finally, Mrs Patton executed a will appointing her brother and another party as executors and leaving her estate to her children in equal shares. Mrs Patton died on 17 July 1984. The transfer had not yet been registered. An unregistered mortgagee held the duplicate certificate of title and Mrs Patton had taken no steps to obtain the duplicate certificate of title to enable registration. Mr Patton's entitlement to the entire property by survivorship depended on whether the joint tenancy had been severed before Mrs Patton's death.

Four of the five judges treated the fact situation as an unregistered voluntary transfer by a joint tenant to a third party and resolved the severance issue by reference to whether there had been an effective gift of property. Toohey J framed the issue differently. His Honour asked whether the unregistered transfer had any consequences for the surviving joint tenant's right to be registered by survivorship as the proprietor of an estate in fee simple in the

[77] (1990) 169 CLR 540.

land.[78] Toohey J did not regard this as a gift case because Mrs Patton never intended to confer a beneficial interest on the purported donee, and Mr Corin never had any expectation of receiving a beneficial interest. The instrument of transfer was executed to give Mr Corin the legal title as trustee of the property.

On the facts, it was held that the execution of the transfer did not sever the joint tenancy. The voluntary transaction was ineffective to pass in equity any title to the transferee. Mason CJ and McHugh J concluded that:

> It is desirable to state that the principle is that, if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. 'Necessary' used in this sense means necessary to effect a transfer. From the viewpoint of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part.[79]

Under this test, it is arguable that if a joint tenant who executes a self dealing transfer, is 'equipped' for registration, then equity will recognise that the joint tenancy is severed in equity upon execution of the transfer by the joint tenant to himself or herself. In practical terms this requires the severing joint tenant to be in physical possession of the duplicate certificate of title. This may not always be possible. Since a joint tenancy comprises undifferentiated interests in the whole subject matter, separate titles do not issue to joint tenants. In *Corin* v *Patton*, Toohey J, speaking of an alienation by a joint tenant to a third party, observed that the very nature of a joint tenancy precludes the joint tenant from having separate certificates of title reflecting his or her interest and ordinarily there will be no certificate in the possession of one joint tenant which he or she is in a position to deliver to a proposed transferee, whether for value or otherwise.[80] The severing joint tenant must be in physical possession of the duplicate certificate or be given access to it by the other joint tenants before he or she is equipped for registration.[81] Furthermore, if the property is mortgaged, the mortgagee would be holding the duplicate certificate of title and may not be prepared to release it.[82] Toohey J considered it was an 'unreal demand' to include delivery of the certificate of title in the steps required of a joint tenant seeking to sever the joint tenancy. It would seem that, even if the Mason CJ and McHugh J view relating to gifts of land could be applied to self dealing transfers, it would have a limited

[78] Id 588.
[79] Id 559.
[80] Given his interpretation of the relevant issues, Toohey J considered that the failure of Mrs Patton to deliver the certificate of title to Mr Corin, or to procure its production, was not crucial to the outcome of the appeal.
[81] 'The duplicate certificate is ... a muniment of title of the proprietor ... Prima facie, then, that person should be regarded as having a proprietary interest or right in the duplicate certificate and a right to its production' *Mitrovic* v *Koren* [1971] VR 479, 481.
[82] See *In the Marriage of Badcock* (1979) 5 Fam LR 672.

application because of the infrequent situations in which a severing joint tenant would have access to the duplicate certificate of title.

Deane J imposed a different test for determining at what stage an unregistered memorandum of transfer is complete and effective in equity. His Honour identified a 'twofold' test: 'It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor.'[83] Can the execution of a self dealing transfer coupled with delivery of the transfer to a third party with instructions to register, ever fall within this formulation and be 'beyond the recall or intervention of the donor'? This is unlikely. For example, suppose that A, a joint tenant, executes a self dealing transfer and hands it to her solicitor with instructions to register the documents. There is no intention to give the solicitor a beneficial interest in the documents. The delivery in these circumstances is for the purpose of effecting registration on behalf of the transferor. The transferor is the principal and the solicitor is the agent, and the terms of appointment would imply that the instructions to register would be revocable at any time prior to registration. The efficacy of the transfer is not improved by delivery to a third party. This was confirmed in *McNab* v *Earle*,[84] where Mrs McNab, a joint tenant, executed a transfer to herself of her interest in Torrens land which she co-owned with Mr McNab. She wished to sever the joint tenancy and devise her share to her son by a previous marriage without her husband's knowledge. On her solicitor's advice, in order to maintain secrecy, she delivered the executed transfer to the solicitor with instructions that he retain it for registration until after her death. According to Needham J, the unregistered transfer was inoperative and therefore revocable.

The High Court was not unanimous in recognising that an unregistered donee of Torrens title land acquired an equitable interest once the stages discussed above had been satisfied. Deane J, along with Mason CJ and McHugh J, formed the majority view that once the appropriate test was satisfied, the gift would be complete and effective in equity, vesting an equitable interest in the land in the donee. Brennan J conceded no more than a personal statutory right to registration in the donee, once 'the donor had done all that was necessary on his part to effect the gift or had done so beyond recall.'[85] Toohey J, as noted above, did not apply principles relating to gifts of land to resolve the case but nevertheless expressed views that accord with Brennan J's approach. A transfer executed without valuable consideration provided no transaction that equity would enforce, and until registration Mrs Patton could have recalled the transfer and taken steps to prevent its registration. Further, his Honour said:

> By the terms of s 41(1), it is upon registration of an instrument that the estate or interests specified in the instrument passes and, in terms of the Act, until registration the estate or interest of the transferor remains undisturbed. If the questions raised by this appeal turned solely upon the language of the Act, it would be enough to say that, the transfer executed by

[83] (1990) 169 CLR 540, 582.
[84] [1981] 2 NSWLR 673, 677.
[85] (1990) 169 CLR 540, 568.

> Mrs Patton remaining unregistered, there had been no alienation of her interest as joint tenant and accordingly, upon her death, her interest passed by survivorship to her husband. And, in the end, it is by reference to the Act that the appeal must be disposed of.[86]

Toohey J's statement expresses a minority view. Furthermore, it is trite law that s 41, in denying effect to an instrument until registration, does not touch whatever rights are behind it.[87]

The role played by formalities

Corin v *Patton* is therefore authority for the view that if a volunteer has a right to proceed to registration,[88] that right, according to the principles relating to gifts of Torrens land and accepted rules of equity, is an estate or interest in land.[89] Thus, if the donor or transferor is a joint tenant, the estate or interest so created will sever the joint tenancy in equity. Does it follow that severance should occur upon execution of the transfer whenever we recognise that a joint tenant who has executed a self dealing transfer has a right to proceed to registration?[90] For example, suppose A wishes to sever his joint tenancy with B. For that purpose, B gives A the duplicate certificate of title and A signs a self dealing transfer and then lodges both the transfer and the duplicate certificate of title for registration. If A dies before the transfer is registered, should B nevertheless become sole proprietor by right of survivorship? It is difficult to see why B should benefit and why A should be denied the testamentary power he anticipated by the attempted severance. The situation would not be caught by the two other categories of severance set out in *Williams* v *Hensman*.[91] B's provision of the duplicate certificate of title does

[86] Id 589.

[87] *Barry* v *Heider* (1914) 19 CLR 197.

[88] That is, by reference to either the Mason CJ and McHugh J test or the view adopted by Deane J and Brennan J respectively.

[89] See *Corin* v *Patton* (1990) 169 CLR 540. Cf: *Brunker* v *Perpetual Trustee Co* (1937) 57 CLR 555.

[90] Self dealing tranfers in New South Wales are permitted under s 24 of the *Conveyancing Act* 1919 (NSW) which enables a person to 'assure property to himself, or to himself or herself and others.' Counsel for Mr Corin, the trustee, contended that special rules needed to be developed in relation to self dealing transfers. Since the rationale for the gift rules was inapplicable where a person conveyed property to himself or herself, they should be treated differently from assignments by way of gift. Mason CJ and McHugh J did not consider s 24 relevant on the facts and readily dismissed the argument by drawing a distinction between a 'transfer' and an 'attempted transfer'. Mrs Patton had not managed to transfer the equitable estate to herself nor had there been a transfer to Mr Corin on trust for herself: (1990) 169 CLR 540, 562. Similarly, Brennan J stated that it was unnecessary to consider the effect of s 24 of the *Conveyancing Act* 1919, for the only way in which severance of the joint tenancy could have occurred was on registration of an instrument transferring Mrs Patton's interest in the land: (Id 571) Deane J admitted that it was illogical to require a joint tenant who desires to convert the joint tenancy into a tenancy in common to go through the charade of assigning his interest to a bare trustee for himself or herself (or, arguably, conveying his or her interest to himself or herself). Nevertheless, his Honour applied the long settled rule that severance of a joint tenancy requires an alienation in law or equity (Id 584). Toohey J found that his analysis and conclusion was unaffected by s 24 because there was no assurance from Mrs Patton to herself or to herself and others (Id 593).

[91] (1864) J&H 546, 557; 70 ER 862,867; see test for fn 27 supra.

not constitute an agreement between A and B to sever the joint tenancy. In any case, since joint tenants each have a proprietary interest or right in the duplicate certificate, they already have the right to its production and there would be problems spelling out an agreement in these circumstances.[92] Nor does B's provision of the duplicate certificate of title constitute a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. The High Court unanimously rejected this approach, taken by the English courts,[93] which regarded 'a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common' as an effective severance.[94] Despite the above arguments, severance in this situation would only be available in a few cases because, as noted above, in most situations involving unilateral severance by a self dealing transfer, the severing joint tenant would not have easy access to the duplicate certificate of title.[95]

It is relevant to note the comment of Mason CJ and McHugh J in *Corin* v Patton explaining why their Honours adopted the approach of Griffith CJ in *Anning* v *Anning*.[96] This approach recognises the donee's equitable interest after the donor has done all that is necessary on his or her part to complete the gift, especially when the instrument of transfer has been delivered to the donee. Their Honours said:

> Viewed in this light, Griffith CJ's approach has the advantage that it gives effect to the clear intention and actions of the donor rather than insisting upon strict compliance with legal forms. It is a reflection of the maxim 'equity looks to the intent rather than the form.' By avoiding unnecessarily rigid adherence to the general rule and endeavouring to give effect to the donor's intention, the law avoids unjust and arbitrary results.[97]

Thus the courts will examine the intention of the donor and are willing to move away from a strict application of legal formalities to give effect to that intention. However, other formalities have been substituted. Mason CJ and McHugh J, speaking in the context of an incomplete gift, stated that:

> 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 certificate of title in such circumstances as will enable the donee to procure the vesting of the legal title in himself.[98]

> Delivery of the duplicate certificate of title to the donee or to the donee's

[92] See *Mitrovic* v *Koren* [1971] VR 479 and fn 81 supra.
[93] *Burgess* v *Rawnsley* [1975] Ch 429, 439, per Lord Denning MR. See *Hawkesley* v *May* [1956] 1 QB 304 and *In re Draper's Conveyance* [1969] 1 Ch 486.
[94] (1990) 169 CLR 540, 548 (per Mason CJ and McHugh J); 565–6 (per Brennan J); 584 (per Deane J) and 591 (per Toohey J).
[95] The duplicate certificate could be held by a mortgagee or a solicitor on behalf of both parties. In practice, release by such parties would normally require the consent of all joint tenants.
[96] (1907) 4 CLR 1049, 1057.
[97] (1990) 169 CLR 540, 558.
[98] Id 560.

representative of the duplicate certificate of title and a valid voluntary transfer to the donee, will put the intention of the donor beyond any doubt. However, it would be simplistic to assume that the formal requirements for a valid gift in equity merely serve to give effect to the donative intention of the donor. Presumably, a donor who delivers a voluntary transfer and title to the donee is fully aware that he or she is relinquishing all beneficial interest to the property. Furthermore, the documentation so delivered provides tangible and reliable evidence of the intention to make a gift of the property in question.[99]

The problems that arise with incomplete formalities in relation to Torrens title land do not arise with general law land. In the case of general law land, a joint tenant who wishes to sever the joint tenancy by assuring property to himself or herself effects a legal severance by merely executing a deed — a document which is expressed to be 'signed sealed and delivered' by the grantor. There is no need for physical delivery to the donee. The nature of the formalities required to convey general law land eliminate any possibility of an equitable severance in the case of a voluntary transfer and nothing short of execution of a deed will suffice to alienate an interest. The execution of the deed of conveyance itself satisfies the formal requirements for conveying a legal interest.[100] It is recognised that the deed itself also readily characterises the transaction as one by which the donor intends to part with the property and provides perpetual evidence that the donor has given the property to the donee.[101]

By contrast, under existing law, the same degree of solemnity and formality in the case of Torrens land is achievable only by registration of the instrument of transfer. The transfer may clearly state the transferor's intention and express a 'desire to sever the joint tenancy' and be executed by the transferor in the presence of a witness. Nonetheless, prior to registration it will be as ineffective to sever the joint tenancy as a joint tenant's void devise contained in his or her will.[102] Thus, Torrens legislation provides that only when registered will the instrument of transfer 'be of the same efficacy as if under seal and shall be as valid and effectual to all intents and purposes as a deed duly executed.'[103]

In the case of imperfect gifts of Torrens land, the courts exercising an equitable jurisdiction have substituted formalities that approximate the broader purposes of strict legal formalities. The formalities reflect various assumptions about human behaviour. They function as a ritual to reinforce the donor's intention to give, thus ruling out impetuous and equivocal motives. The formalities provide reliable evidence of the intention to give, thus serving as objective proof of a donor's benevolence. The formalities protect donors

[99] For a discussion of the functional justification of formalities in relation to gifts, see Ashbel G Gulliver and Catherine J Tilson, Classification of Gratuitous Transfers (1941) 51 *Yale Law Journal* 1.

[100] *Property Law Act* 1958 (Vic) s 52(1).

[101] *Manton* v *Parabolic Pty Ltd* (1985) 2 NSWLR 361.

[102] On the other hand, it is arguable that a joint tenant who purports to devise his or her interest by will is declaring an intention to sever the joint tenancy.

[103] *Transfer of Land Act* 1958 (Vic), s 40(2).

against the fraud and undue influence of people who may otherwise take advantage of the donor. If formalities function in this way, it is obvious why the clear and unequivocal intent of a donor may be defeated by lack of formalities.

The formalities which might substitute for legal formalities may vary, depending on the functions they serve. Thus it would be wrong to attribute a similar effect to the possession of a self dealing transfer and the delivery and possession of a donative transfer,[104] even though both are voluntary transfers. In the case of a self dealing transfer executed to sever the joint tenancy, the possession of both the transfer and the duplicate certificate may, at the most, constitute acts which unambiguously establish an intention to sever the joint tenancy.[105] The possession of documents retained by the severing joint tenant do not meet the ritual evidentiary and protective functions served by the delivery and possession of a donative transfer and the duplicate certificate of title. For example, in the absence of further acts which may be part of a 'ritual', how can we be certain that the severing joint tenant is fully aware of the consequences of executing the self dealing transfer, the most important being that it will take effect irrespective of which joint tenant dies first? Furthermore, since severance of a joint tenancy has a profound effect on the survivorship expectations of the other joint tenants, the formalities must provide safeguards against fraud and remove any opportunity for secret destruction of severance documents should the severing joint tenant survive the other co-owners. The transfer remaining in the possession of the severing joint tenant may be easily destroyed if the severing joint tenant is the surviving owner of the property. In this case, the utility of the transfer document as a piece of tangible and reliable evidence is negligible.

It is suggested that it is possible to impose formalities that serve the stated ritual evidentiary and protective function. This is evident in the example given above, where A wishing to sever his joint tenancy with B, dies before the transfer is registered but after he has lodged both the transfer and the duplicate certificate of title for registration. The lodgement of documents is an additional formality that follows the execution of the self dealing transfer and meets the ritualistic and the evidentiary shortcomings of mere execution and retention of the documents.[106] Furthermore, B's knowledge of the severance, evidenced by the provision of the duplicate certificate of title, serves as an alternative formality which protects B against secret destruction of the self dealing transfer. Thus the execution of a self dealing transfer could operate to sever a joint tenancy prior to registration. The act of executing a self dealing

[104] In this context 'donative transfer' refers to a transfer executed to make a gift of Torrens land.

[105] In *Corin* v *Patton*, counsel for Mr Corin, the trustee, tried to persuade the court to endorse a test less stringent than the gift rule, for the purpose of determining whether there had been an effective transfer which severed a joint tenancy. No member of the court acceded to the request. Mason CJ and McHugh J responded by saying that such an approach cannot be reconciled with principle and would be productive of great uncertainty. Once it is accepted that a transfer is required, it is the general rules relating to transfers of land which must be applied: (1990) 169 CLR 540, 548.

[106] It is arguable that allowing severance from the date of lodgement creates problems with the reliability of the Torrens register.

transfer should only be treated as a severance if it is lodged for registration The production of the duplicate certificate of title is not essential if the Registrar is prepared to exercise his or her discretion and dispense with the submission of the duplicate certificate of title.[107]

There may be other methods of satisfying the identified function of formalities, such as providing formal notice to the other co-owners. This conclusion is consistent with the strong statement from *Williams* v *Hensman* that an intention 'declared only behind the backs of the other persons interested' was insufficient to effect a severance.[108]

Inherent nature of instrument of transfer

There has been some debate regarding the inherent nature of the instrument of transfer. In *Barry* v *Heider*,[109] it was accepted by both Isaacs J and Griffith CJ that a person holding an unregistered but registrable instrument had an equitable interest. Isaacs J clearly based his decision on the existence of the specifically enforceable contract lying behind the registrable transfer.[110] Griffith CJ concluded that the transfer, if valid, 'would have conferred . . . an equitable claim or right to the land in question.'[111] This suggests that the registrable instrument of transfer was the source of the equitable interest. This interpretation of Griffith CJ's view may once have provided scope for endorsing the idea that the execution of the transfer of itself was sufficient to sever a joint tenancy in Torrens land. If this statement is correct, it could then be argued that the voluntary nature of a transfer may be irrelevant. But there are a number of reasons based on principle and authority why this conclusion may be unsound.

First, it is suggested that Griffith CJ's view of the transfer as a source of equitable rights is limited to transfers executed for value and would therefore exclude self dealing transfers executed by a joint tenant. His Honour's conclusion that the instrument of transfer conferred an equitable estate depended upon the view that the opening words of s 2 of the *Real Property Act* 1900 (NSW),[112] which purported to repeal 'all laws, . . . rules, . . . and practice' inconsistent with the provision, were not in themselves sufficient to embrace the body of law recognised and administered by courts of equity in respect of equitable claims to land arising out of contract or personal confidence.[113] His Honour then considered various other provisions of the Act to conclude that the Torrens legislation recognised both equitable rights and claims and the jurisdiction of the court to grant specific performance as against the registered proprietor. In reaching this conclusion, Griffith CJ relied on the early South

[107] This is permitted under s 104(5) *Transfer of Land Act* 1958 (Vic).
[108] (1861) 1 J & H 546, 557; 70 ER 862, 867.
[109] (1914) 19 CLR 197.
[110] (1914) 19 CLR 197, 216 (per Isaacs J).
[111] (1914) 19 CLR 197, 208. Barton J expressed his agreement with the judgment of Griffith CJ.
[112] The relevant New South Wales Torrens legislation.
[113] (1914) 19 CLR 197, 205.

Australian Supreme Court decision of *Cuthbertson* v *Swan*.[114] That case primarily addressed the question whether previous authority, which denied the jurisdiction of the court to grant specific performance of an executory contract for sale of Torrens land, should be followed.[115] The Supreme Court affirmed the court's jurisdiction to grant specific performance because 'equity treats that as done which is agreed to be done, and that an agreement to sell land constitutes the seller the trustee of the land for the purchaser.'[116] The South Australian decision clearly presupposes the existence of a transaction for value behind the instrument of transfer. This narrows the divergence between Isaacs J's approach and Griffith CJ's approach.

Second, it should be noted that the High Court in *Chan* v *Cresdon Pty Ltd*[117] has followed Isaacs J's view. The High Court confirmed that the antecedent agreement, evidenced by the unregistered instrument, and not the instrument itself, creates the equitable estate or interest before registration.[118]

Third, further criticism of the Griffiths approach emerges from Latham CJ's comments in *Brunker* v *Perpetual Trustee Co (Ltd)*.[119] This case dealt with the effect of a voluntary, unregistered transfer to a third party. Latham CJ distinguished a transaction for value which is recorded in a contract followed by an instrument of transfer, from a transaction for value which itself is recorded in a transfer. In the latter case, the transaction behind the instrument and upon which it rests may create an equitable interest in the land.[120] This view was approved in the minority judgments in *Corin* v *Patton*. Toohey J quoted Latham CJ's statement with approval. His Honour also added that where the transaction is not for value, the transferee acquires no estate in the land merely by force of execution and delivery of the transfer.[121] Brennan J said unequivocally that the source of the purchaser's equitable estate or interest is the contract, not the transfer.[122]

A declaration of intention communicated to other joint tenants

The High Court in *Corin* v *Patton* showed no interest in extending existing categories of equitable unilateral severance. It clearly rejected the notion that a declaration of intention by one joint tenant communicated to the other co-owners would sever the joint tenancy. Two previous cases had taken a different view.[123]

[114] (1877) 11 SALR 102.
[115] *Lange* v *Ruwoldt* (1872) 6 SALR 75, and on appeal (1873) 7 SALR 1.
[116] *Cuthbertson* v *Swan* (1877) 11 SALR 102, 109.
[117] (1989) 168 CLR 242, 257.
[118] see *Barry* v *Heider* (1914) 19 CLR 197, 216.
[119] (1937) 57 CLR 555.
[120] Id 581. Latham CJ, in dissent, though not on this point.
[121] (1990) 169 CLR 540, 588.
[122] Id 563.
[123] *Burgess* v *Rawnsley* [1975] Ch 429 and *In the Marriage of Badcock* (1979) 5 Fam LR 672.

Burgess v *Rawnsley*

Corin v *Patton* involved a situation where a joint tenant attempted unilaterally to sever the joint tenancy by what was essentially a voluntary transfer to a third party. Many of the arguments favouring severance prior to registration in that situation equally apply to unilateral severance by a self dealing transfer. Mr Corin's counsel put forward a number of these arguments.

One such argument, apparently based on the approach taken by Lord Denning in *Burgess* v *Rawnsley*, was that severance of a joint tenancy in equity does not require an actual transfer of property, but may be achieved by any act showing an intention to deal with the property in a manner inconsistent with the continuation of the joint tenancy. This argument was raised even though there was no evidence that Mr Patton had been advised of Mrs Patton's purported severance, so it is not entirely clear from the reported decision whether counsel treated the situation as an additional instance of unilateral severance or as severance by a course of dealing.

In *Burgess* v *Rawnsley*, a man (A) and a woman (B) bought a house as joint tenants. When A later realised that B had no intention of marrying him, he asked her to sell him her interest in the property. The parties orally agreed to the sum of £750 but the sale did not go ahead because B later raised her price to £1000. When A died, B claimed the property by survivorship. A's personal representative argued that the joint tenancy had been severed by the agreement to sever or by a course of dealing which was inconsistent with the continuation of the joint tenancy. Lord Denning found evidence that both parties had evinced an intention that the property should 'henceforth be held in common and not jointly'.[124] However, he also said that severance will also be effected 'if there is a course of dealing in which one party makes it clear to the other that he desires their shares should no longer be held jointly but be held in common'.[125] Thus his Lordship would presumably hold that a joint tenant is able to sever the joint tenancy by the execution of a valid transfer which he or she brings to the attention of the other joint tenant. This is because the combined acts of the severing joint tenant are not treated as unilateral acts of a joint tenant operating on his or her own share, but as a course of dealing.

This curious approach raises a number of questions. When does severance take place? In what sense are the combined acts of the severing joint tenants a manifestation of a mutual intention of the joint tenants to treat the co-ownership as a tenancy in common?[126] Would a verbal notice by one party to another suffice to sever the joint tenancy? Sir John Pennycuick, another member of the Court of Appeal in *Burgess* v *Rawnsley*, considered that an 'uncommunicated declaration by one party to the other or indeed a mere verbal notice' cannot act as a severance.[127] The third member of the Court of

[124] Id 440.
[125] Id 439.
[126] Butt, op cit (fn 33) 578–87.
[127] [1975] Ch 429, 448.

Appeal, Browne LJ, agreed 'that an uncommunicated declaration by one joint tenant cannot operate as a severance'.[128]

In some Australian jurisdictions severance by mutual agreement provides an informal mode of severance because it is not necessary that the mutual agreement be in writing or even specifically enforceable. The severance may occur in the course of the parties' negotiations where 'the creation of a tenancy in common must be acknowledged as having been decided upon so that thereafter, whether the negotiations are concluded or not, the mutual attitude of the parties on this aspect is unchanging'.[129] The rationale is that 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 it was indisputably within their power to do'.[130] This is not the position in Victoria, where McInerney J took the view that even where an agreement is to be implied from a course of conduct, conduct falling short of an enforceable contract will not suffice to sever the tenancy.[131] Neither interpretation would be applicable if the other joint tenant will not agree to his or her co-owner's desire to sever. On the other hand, this category of severance would be rendered unnecessary if a unilateral declaration communicated to the other party was deemed sufficient to sever.

The High Court in *Corin* v *Patton* was unanimous in rejecting Lord Denning's approach. Mason CJ and McHugh J gave a number of reasons.[132] First, their Honours understood the decision to be based on the construction of s 36(2) of the *Law of Property Act* 1925 (UK) rather than on the common law. This English statutory provision introduced a new method of severance which permits the severance of a joint tenancy by notice in writing by one joint tenant to the other. Secondly, their Honours re-affirmed that, as a matter of history and principle, the severance of a joint tenancy can only be brought about by the destruction of one of the four unities. At the same time, their Honours accepted that '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'.[133] Clearly, they were not prepared to elevate notice by the severing joint tenant to the other joint tenant as constituting the necessary collaboration between joint tenants to establish a 'course of dealing'. Their Honours regarded the circumstances as an attempted unilateral severance and therefore insisted that severance could not be effected without destruction of one of the four unities.

Lord Denning imputed the receiver of information with participation in a course of dealing despite the fact that there was no affirmative response by that party. His Lordship regarded knowledge as acquiescence thereby

[128] Id 444.

[129] *Slater* v *Slater* (1989) 12 Fam LR 1, 5, quoted in *Magill* v *Magill* (unreported) BC9603940, 22. Also see *Abela* v *Public Trustee* [1983] 1 NSWLR 308, 315 and *Calabrese* v *Miuccio* (No 2) [1985] 1 Qd R 17.

[130] See *Burgess* v *Rawnsley* [1975] Ch 429, 446 per Sir John Pennycuick.

[131] *Lyons* v *Lyons* [1967] VR 169, 172.

[132] (1990) 169 CLR 540, 548.

[133] Id 547, quoting from Page Wood V-C in *Williams* v *Hensman* (1861) 1 J&H 546, 557; 70 ER 862, 867.

evincing a mutual intention of the joint tenants from this conduct. There is considerable potential for overlap between severance by a mutual course of dealing and severance by agreement because an agreement can be inferred from conduct.[134] It is difficult to draw the line between severance by a mutual course of dealing and severance by agreement with any precision because both forms of severance rely on the manifestation by all co-owners of an intention to sever. Lord Denning's readiness to treat a communicated desire of one joint tenant as a severance of the joint tenancy is not necessarily dependent on mutual co-operation between the parties. In fact, it is conceivable that the severing joint tenant by giving notice could compel a co-owner, who fails to communicate unwillingness, to become a tenant in common.

One implication of treating what is manifestly a case of attempted unilateral severance as severance by a course of dealing or by agreement is that it dispenses with the need for destruction of one of the four unities as a prerequisite to severance. It is implicit in the case of severance by agreement or a course of dealing, that destruction of the unities is a consequence of severance. This position is supported by the traditional view that the unities should not be regarded as conditions necessary to the creation of a joint tenancy, but 'rather as the natural and necessary results flowing from the basic concept of a joint tenancy'.[135] This would suggest that using the presence of the four unities as a test of a joint tenancy is circular and self serving. Furthermore, the courts have not articulated any logical basis for insisting on the destruction of the unities in cases of unilateral severance but not in cases of severance by agreement or by a course of dealing. This must cast some doubt about strictly adhering to the rule that destruction of the unities is a prerequisite for unilateral severance.

Lord Denning's approach produces a result that does not discriminate between the intention of one joint tenant and the intention of all joint tenants It is suggested that while the legal reasoning is artificial, the result is sound both in policy and in logic. However, it is clearly not the view preferred by Mason CJ and McHugh J. Their Honours said that to allow notice by one party to effect severance would remove the need to maintain as a separate means of severance the making of a mutual agreement between the joint tenants. This would be true but desirable. The present doctrines of severance by agreement and severance by a course of dealing pay due regard to unequivocal demonstrations of intention to sever but unfairly discriminate against individual joint tenants who wish to sever. Furthermore, these categories of severance are not wide enough to cover all deserving cases of severance, especially situations where the unilateral intention to sever is communicated to other joint tenants. If severance were allowed in such cases, and if the making of a mutual agreement between joint tenants was removed as a separate means of severance, no one would suffer any injustice and the intentions of one or more joint tenants would be accorded equal significance. More

[134] In Victoria, a specifically enforceable agreement can be established by an oral agreement supported by acts of part performance: see *McBride* v *Sandland* (1918) 25 CLR 69, 77–9.

[135] Mendes Da Costa, op cit (fn 16) 149.

situations would be covered than is presently the case. It would also be simpler and would reduce the present volume of litigation about whether the facts support a mutual agreement.[136]

Finally, Mason CJ and McHugh J said that if statements of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interests in land which had been the subject of statements said to amount to declarations of intention. Evidentiary uncertainty is a perennial problem for courts and it is understandable that the courts would be concerned with preventing such uncertainty. Furthermore, unilateral severance by statements of intention may also lead to uncertainty in testamentary planning, although there is already an element of uncertainty where unilateral severance is achieved by alienation of the joint tenant's equitable estate.[137] However, if the statement of intention took the form of an executed registrable transfer, the intention would be evidenced in writing and there would be precise identification of the parties, the land and the interests affected by the declaration of intention.

In the Marriage of Badcock[138]

The facts of *Corin* v *Patton* resemble the facts of *In the Marriage of Badcock* in which Murray J accepted (obiter dicta) that a unilateral declaration of intention communicated to the other joint tenants may sever the joint tenancy.[139] In this case, as in *Corin* v *Patton*, the estranged wife who was registered as joint proprietor of Torrens land with her husband was also suffering from a terminal illness. There was a registered mortgage over the property and the mortgagee held the duplicate certificate of title. Mrs Badcock purported to sever the joint tenancy by executing a deed of trust and an instrument of transfer. The deed of trust appointed a third party to hold the property as tenant in common with her husband and to act as trustee on behalf of herself as beneficiary. The transfer purported to assign her interest as a joint tenant to the trustee. Mrs Badcock could not register the transfer at this stage because the registered mortgagee refused to produce the duplicate certificate of title. The transfer made no mention of the registered mortgage. When copies of the trust deed were served on Mr Badcock, he sought an injunction from the Family Court to restrain his wife and her trustee from pursuing registration of the transfer. He argued that the status quo should be preserved pending his application for a property settlement upon dissolution of the marriage. The injunction would have been rendered unnecessary if Mrs Badcock's actions had already severed the joint tenancy.

Murray J took the view that severance had taken place 'by the two acts

[136] The premature death of a divorcing spouse during negotiations for a property setttlement often raises this issue: see, for example, *In the Marriage of Pertsoulis* (1980) 6 Fam LR 39.

[137] As, for example, where the joint tenant declares herself as trustee, or executes a contract of sale, or attempts a gift of the property which falls within the principles of *Corin* v *Patton*.

[138] (1979) 5 Fam LR 672.

[139] Murray J's analysis and view has been criticised by MacCallum loc cit (fn 6).

subsequent to as well as the execution of the two documents, namely the giving of notice to the husband . . . and the authorisation of the trustee to register as is implied by the attempted registration' and precluded Mrs Badcock from claiming a survivorship interest.[140] Murray J was not bothered by the fact that a transfer that made no mention of a registered mortgage was unregistrable unless accompanied by a corresponding discharge of mortgage. This throws doubt on the validity of Murray J's conclusion. Toohey J was the only member of the court in *Corin* v *Patton* to mention *Badcock's case.*[141] His Honour suggested that the mechanics of a transfer and deed of trust adopted by Mrs Patton seem to have been inspired by those held effective in *Badcock.*[142] Unfortunately, his Honour did not make any further comment about the case. Nevertheless, it would be safe to assume that this part of Murray J's judgment decision can no longer stand, in the light of the decision in *Corin* v *Patton.*

Estoppel

Can estoppel doctrines be used to prevent a joint tenant from asserting the legal right to survivorship to the extent that it is unconscionable to do so? It may be that the courts might properly apply estoppel principles to uphold a purported alienation of property for the purposes of a unilateral severance.[143] In *Corin* v *Patton*, Deane J seemed to accept this proposition. His Honour said that:

> It seems to me, however, that it has long been settled that, where what is involved is unilateral action by but one joint tenant, actual alienation either in law or in equity or at the least something equivalent thereto (for example by operation of estoppel) is necessary for severance of a joint tenancy.[144]

The 'estoppel' advocated in Deane J's judgment is stated in sufficiently general terms to encompass a doctrine that enables equity to do what is required to prevent a party from suffering detriment in reliance upon an assumption whose correctness is later denied.[145] Further, his Honour, speaking in the context of the enforceability of voluntary assignments which are ineffective at law, did not discount the relevance of equitable estoppel to enforce an alienation of property:

> An intended gift under such a voluntary assignment will be effective in

[140] (1979) 5 Fam LR 672, 681.
[141] (1990) 169 CLR 540, 586.
[142] Ibid.
[143] It is arguable that this position is supported by the imprecise dictum of the court in *Re Willes, Child* v *Bullmer* [1891] 3 Ch 59 at 62 (quoted by Murray J in *In the Marriage of Badcock* (1979) 5 Fam LR 672, 681) where it was said: 'If the act of a joint tenant amounts to a severance, it must be such as to preclude him from claiming by survivorship any interest in the subject matter of the joint tenancy'. Sue MacCallum suggests that Murray J has read too much into this dictum and that these remarks merely say that survivorship is inapplicable where there has been an effective severance: op cit (fn 16) 30.
[144] (1990) 169 CLR 540, 584.
[145] See Mason CJ in *Commonwealth* v *Verwayen* (1990) 170 CLR 394, 412.

equity only if the overall circumstances of the case are such that the stage is reached where equity regards the gift as complete, that is to say, as having been actually made. Until that stage is reached, equity will neither recognise the existence of a trust nor protect the donee from the exercise by the donor of any legal rights remaining in him. The reason why that is so is that, in the absence of special circumstances giving rise to particular doctrines such as the doctrine of equitable estoppel, equity does not recognise an obligation in conscience that requires a person who remains the owner of property to adhere to or to give effect to an intention to give it away.[146]

Do estoppel principles constitute a workable framework for relief by severance of a joint tenancy in equity? Take a hypothetical case where death is imminent for A, one of two joint tenants. Assume that when A and B became joint tenants, they enjoyed a close personal relationship that has since broken down. A is desperate to ensure that B does not benefit from A's death. A thus wishes to sever the joint tenancy. A might execute similar documents to those executed in both *Corin* v *Patton* and *Badcock* and additionally, give notice to B and, authorise the third party trustee to register the transfer. But if A is prevented from effecting registration by B's blatant refusal to provide the certificate of title, one could regard B's conduct in withholding the certificate of title as unfair and unjust but not grounds for estoppel. The threefold criteria of representation, reliance and detriment which are basic to the operation of estoppel principles must be present.[147] Before A's death, A would have been entitled to an order that B yield up to the Registrar of Titles possession or control of the duplicate certificate of title to permit A to procure registration of the transfer.[148] However, if A dies before the transfer to the third party is registered, B benefits by right of survivorship and would become sole owner of the property.

If we compare the above situation, where A was prevented from effecting registration by B's blatant refusal to provide the certificate of title, with a situation where A is prevented from effecting registration because, even though B actually undertakes to provide A or A's trustee with the duplicate certificate of title to enable registration, B has no intention to do so. A, who might have sought an appropriate order from the court, does not do so. In the latter case, B, in the knowledge that A's death is imminent, has made a representation to A, which A has relied upon to A's detriment. These may well be circumstances in which equity would regard it unconscionable to allow B to claim the property through the right of survivorship. It is suggested that both A's and B's conduct in these circumstances may be construed as a severance by a course of dealing. B's agreement to provide the duplicate certificate to A to enable severance manifests a mutual intention that both parties will hold as tenants in common. If this is correct, there is no need to rely on an estoppel-

[146] Id 580.

[147] Unconscionable conduct was described by Mason J in *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, 461, as conduct where the 'will of the innocent party even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.'

[148] *Mitrovic* v *Koren* [1971] VR 479.

based means of severance. The narrow range of potential applications of an estoppel-based remedy, and the likely overlap of these situations with severance by a course of dealing, suggests that estoppel is an inefficient and inappropriate means of severance.

In any case, an estoppel-based remedy may not always be proprietary: the minimum equitable relief which is awarded to A where B does not fulfil his promise to provide the duplicate certificate may merely be an order that B provide the duplicate certificate of title.[149] A would then have to arrange for registration before severance is effective. On the other hand, if A's personal representative brings the action after A's death, the most likely remedy would be a constructive trust in favour of A, which would flow to A's estate. A's personal representative would effectively become the nominal beneficiary of the trust and, as a beneficiary of full age and sound mind, could terminate the trust and direct the trustee (ie B) to dispose of the trust property.[150] This enables A's personal representative to insist on a new transfer in which B transfers a half share to A's estate and on the production of the duplicate certificate of title to allow registration.

CONCLUSION

There are at least two significant factors to which we might attribute the popularity of joint tenancy ownership of real property in Victoria.[151] One factor is the existence of the common law presumption in favour of joint tenancies. It is not known what proportion of registered joint tenancies of Torrens title land result from the operation of the presumption rather than by a deliberate choice of the transferees. Victoria has not, at this stage, followed the trend in some other jurisdictions and reversed the common law presumption so that, unless a contrary intention is expressed, two or more transferees become tenants in common.[152] Legislation to this effect should be encouraged as a simple and effective means of reducing the incidence of problems associated with the right of survivorship.

A second factor is that the transferees of property elect to be joint tenants rather than tenants in common in order to take advantage of the right of survivorship, the distinguishing feature of a joint tenancy. Co-owners who voluntarily subject themselves to the right of survivorship are primarily drawn by the fact that each will potentially inherit the other's share of the property. The inherent gamble as to who will die first usually plays a secondary role to the overriding sense of comfort that their personal or familial commitment to one another has been reciprocated. But the right of survivorship operates as a double edged sword. On the one hand, it alleviates the

[149] *Crabb* v *Arun District Council* [1976] Ch 179.
[150] This is the rule in *Saunders* v *Vautier* (1841) Cr&Ph 240, 248; 41 ER 482, 485.
[151] See fn 3 supra.
[152] This presumption may contribute to the belief that many co-owners perceive a joint tenancy is a permanent and immutable arrangement. See further, New South Wales Law Reform Commission Report, op cit (fn 4) para 5.3.

burden of making a will because, as long as the right of survivorship operates, co-owned property will be owned by the surviving joint tenants. On the other hand, survivorship becomes a burden unless all the joint tenants are happy to surrender their powers of testamentary disposition.

It has been said that 'survivorship can be no hardship, where either side may at pleasure prevent it.'[153] The avoidance of hardship caused by the right of survivorship can only be prevented by severance of the joint tenancy. The law, through various methods of severance, empowers each party either alone or together to defeat potential hardship created by survivorship. Severance is the means by which the law allows parties to assume control and to re-adjust their testamentary planning in accordance with altered life styles, unforseen events or renewed aspirations. It enables them to choose their own beneficiaries. It does not diminish present rights because it does not deprive the other co-owners of their fractional shares. Severance also assumes that co-owners consciously accede to survivorship, and therefore provides safeguards against breaches of the survivorship pact.[154] For example, the purpose of treating a sale from a joint tenant to a third party purchaser as a severance ensures that a complete stranger cannot become sole owner by survivorship.

This article has focussed on the extent to which one joint tenant of Torrens land, operating on his or her own share, may take unilateral action to sever the joint tenancy. A joint tenant is not always able or willing to obtain the consent or co-operation of the other joint tenant or joint tenants to sever the joint tenancy. However, if severance is to function efficiently, then it must empower joint tenants fairly and equally by providing them with every reasonable opportunity to avoid hardship either individually or together. The High Court's approach on the question of unilateral severance of Torrens title land is based on a strict application of the legal principles concerning the effect of a Torrens transfer and the consequential impact on the four essential unities. Thus, the execution of a self dealing transfer by a joint tenant in itself is insufficient conduct to sever the joint tenancy. It has been suggested that there is strong justification for changing this position. It is inappropriate that the lack of formality required to subject a co-owner to the right of survivorship[155] should be so disproportionate to the degree of formality required for severance. Further, it is ironic that revocation of a will is easily and simply effected by the execution of a later will. Statutory intervention is needed to ensure the availability of methods of severance which are simple, efficient and certain.

[153] *Cray* v *Willis* (1729) 2 P Wms 529; 24 ER 847, 847 quoted in New South Wales Law Reform Commission Report, op cit (fn 4) para 5.3.

[154] This view accords with the contractarian theory of law discussed by John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale L J* 625, 650–2, 654–60. Thus, it is arguable that the rules relating to severance are basically a default regime, reflecting what the parties themselves would have agreed to do had they in fact considered the position.

[155] This may happen voluntarily or involuntarily by operation of the presumption of a joint tenancy.