SEVERANCE OF A MATRIMONIAL JOINT TENANCY BY A SEPARATED SPOUSE

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INTRODUCTION

It is a very common state of affairs for husband and wife to hold the matrimonial home as joint tenants. The consequence of so holding property is that on the death of either party, his or her interest in the property automatically passes to the other by the right of survivorship; the surviving party becomes the sole owner.[1] If the marriage breaks down, and the parties separate, one or both spouses may consider that the operation of the *jus accrescendi* is no longer desirable. Where both parties agree that each of them should have the power to dispose by will of their respective interests, it is a simple matter for them to sever the joint tenancy by mutual agreement,[2] thus converting the joint tenancy into another form of co-ownership, a tenancy in common. Under a tenancy in common, each party has the power to devise his or her share.[3] Often the parties would not pursue such a course of action on separation. However, if they proceeded to a dissolution at the expiration of the required twelve month separation period,[4] the result of any court order regarding the matrimonial home would include, inter alia, a severance of the joint tenancy.[5]

However, various difficulties may occur during the twelve month hiatus period when one party wishes to sever the joint tenancy and the other does not. Questions arise as to how a severance can be effected unilaterally and as to actions that may be taken by the non-consenting party to prevent severance. The recent case of *Badcock* and *Badcock*[6] involved an attempt by the wife to sever unilaterally the joint tenancy of the matrimonial home which she held with her husband. The purpose of this article is to analyse the decision of Murray J. Particular attention will be focussed on the method of severance attempted by the wife for it is in this area that the comments of Murray J. are of the most interest.

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1 See R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed., London, Stevens, 1975) 391-392; *Swift & Neale* v. *Roberts* (1764) 3 Burr. 1488; 97 E.R. 941.

2 *Williams* v. *Hensman* (1861) 1 J. & H. 546; 70 E.R. 862.

3 See R. E. Megarry and H. W. R. Wade, op. cit. 396; *Fisher* v. *Wiggs* (1700) 12 Mod. 296; 88 E.R. 1332.

4 *Family Law Act* 1975 (Cth.), s. 48.

5 *Family Law Act* 1975 (Cth.), s. 79.

6 (1979) F.L.C. 90-723.

Mr and Mrs Badcock held the matrimonial home as joint tenants. The land was under the Torrens system of land registration and was subject to a mortgage. The marriage broke down and the wife left the matrimonial home. One month after the separation, the wife instituted proceedings in the South Australian Supreme Court for partition and sale of the home. The husband responded by applying to the Family Court for an order for sole use and occupation of the home and an injunction restraining the wife's proceedings in the Supreme Court. The wife allowed the partition proceedings to lapse and conceded that her husband had the right to the use and occupation of the home. However, she was suffering from a terminal illness and she was determined that her interest in the property should not accrue to her husband by the right of survivorship in the likely event of her earlier death. Thus, the wife endeavoured to sever the joint tenancy by executing a deed of trust, and a memorandum of transfer pursuant to the trust deed with one Jones, a stranger. The transfer, said to be made in consideration of and pursuant to the trust deed, purported to transfer her interest as joint tenant in the matrimonial home to Jones. Jones was to hold the interest on trust for the wife.

The trust deed set out the following matters.

"1. The trustee HEREBY DECLARES THAT subject to the provisions contained herein he holds an interest as tenant in common with the said HORACE JOHN BADCOCK in the said land UPON TRUST for the beneficiary and further that, subject to the provisions contained herein, he agrees to deal with that interest in the said land in such manner as the beneficiary shall from time to time direct.

2. Notwithstanding the provisions of the preceding paragraph, the trustee agrees to abide by any order or orders of the Family Court of Australia at Adelaide which may affect the estate and interest of the beneficiary in the said land and shall do any things necessary to give effect to any such order or orders of that Court.

3. The beneficiary will at all times indemnify and keep indemnified the trustee, his personal representatives, estate and effects against all liabilities costs and expenses incurred by the trustee in the execution of the trusts of this deed.

4. The power to appoint a new trustee hereof is vested in the beneficiary while living."[7]

The transfer was not registered as the mortgagee refused to produce the duplicate certificate of title. The transfer made no reference to the mortgage. Copies of the transfer and the trust deed were served on the husband and he immediately applied to the Family Court for injunctions to restrain the wife and the trustee from pursuing the registration of the transfer.

As the legal argument extended over four occasions, Murray J. issued interim injunctions under s. 114(1) of the *Family Law Act* 1975 (Cth.) to

[7] (1979) F.L.C. 90-723, 78,890.

operate against the wife during the adjournment periods.[8] However, her Honour was not prepared to make any order against the trustee. It was unclear which sections of the Act the husband relied upon in requesting an injunction against the trustee: Murray J. took the view that the husband relied upon s. 114(3). However, it is submitted that injunctions can only be issued in the context of the division of property pursuant to s. 114(3) in aid of other proceedings under Part VIII of the Act (apart from proceedings under s. 114(1)).[9] No such proceedings were on foot and therefore it seems that any reliance upon s. 114(3) was misplaced. Is it possible for an injunction to be issued against a third party under s. 114(1)? In *Tansell* and *Tansell*[10] and *Rickie* and *Rickie*,[11] the view was expressed that an injunction pursuant to s. 114(1) can never be issued against a third party. However, there is some authority to suggest that in certain instances, an injunction may issue against a third party under s. 114(1). The statements of Anderson J. in *Vodeniciotis* and *Vodeniciotis*[12] are relevant in this regard:

> "The injunction that affects persons other than the husband and wife must in my view be the only immediately practicable means of protecting the parties or property concerned. . . . It may be that when a third party . . . acts entirely in concert with one spouse or is clearly in all cases the agent of one spouse, the injunctive power of the court will extend to restrain . . . the third party."[13]

Murray J. referred to these statements of Anderson J. with approval. However on the facts of *Badcock's* case, her Honour held that as the wife was not seeking to dispose of her interest in the matrimonial home, an injunction under s. 114(1) against the wife was sufficient to protect the husband's interests. In any event, the view of Anderson J. that an injunction under s. 114(1) may sometimes be issued against a third party must be open to doubt. The Full Court of the Family Court in *Tansell* and *Tansell* stated emphatically that the power under s. 114(1) is ". . . a power which is directed to a spouse personally . . .".[14] Further, Anderson J. appeared to rely upon *Sanders* v. *Sanders*[15] and *Antonarkis* v. *Delly*[16] in deciding that the power of the court may extend to granting injunctions involving third

[8] After the first hearing, Murray J. ordered first that the wife be restrained from producing the Certificate of Title and secondly, that the wife be restrained from encumbering or otherwise dealing with her beneficial interest in the land. After the second and third hearings, Murray J. continued only the first order for it was clear that the wife was not seeking to dispose of her interest, but simply seeking to sever the joint tenancy.

[9] See *Sieling* and *Sieling* (1979) F.L.C. 90-627.

[10] (1977) F.L.C. 90-307.

[11] (1979) F.L.C. 90-626.

[12] (1979) F.L.C. 90-617.

[13] (1979) F.L.C. 90-617, 78,196. See also *Page* and *Page* (1978) F.L.C. 90-525, 77,790-77,791.

[14] (1977) F.L.C. 90-307, 76,634.

[15] (1967) 116 C.L.R. 366.

[16] (1976) F.L.C. 90-063.

parties. Both *Sanders'* case and *Antonarkis* v. *Delly* involved a consideration of the ambit of the injunctive powers set out in s. 124 of the *Matrimonial Causes Act* 1959 (Cth.), s. 124 being the forerunner of s. 114(3) of the *Family Law Act* 1975 (Cth.). Thus it is submitted that reliance upon these cases in a consideration of s. 114(1) was misplaced.

Several issues were raised by the facts of *Badcock's* case. At the outset, it had to be decided whether or not the Family Court had jurisdiction to adjudicate on the husband's claim in light of the fact that there were no proceedings for principal relief. Did the court have jurisdiction to preserve the status quo while the parties awaited the expiration of the twelve month separation period? Assuming the court had jurisdiction to hear the matter, the question arose as to whether the court should exercise its discretion to grant the injunctions sought. The answer to this involved two steps. First, the court had to decide if the joint tenancy had already been severed by the actions of the wife. If severance had occurred, then any injunction restraining registration would be of little point. Secondly, even if it were found that there had been no severance, the court could, in the exercise of its discretion, refuse to grant the injunction.

JURISDICTION

During the twelve month separation period, State law arguably remains applicable, but in any event use of such law is unsatisfactory for in most instances ordinary principles of property law are applied, without regard to the marital relationship.[17] Thus attempts have been made to invoke the

[17] Section 17 of the *Married Women's Property Act* 1882 (U.K.) provides that in the event of property disputes between husband and wife, either may apply to the court and the court may make such order with respect to the property in dispute as it thinks fit. In all Australian States, except Victoria, substantially similar legislation exists: *Married Persons (Property and Torts) Act* 1901 (N.S.W.), s. 22; *Married Women's Property Acts* 1890-1952 (Qld.), s. 21; *Law of Property Act* 1936-1972 (S.A.), s. 105; *Married Women's Property Act* 1892-1962 (W.A.), s. 17; *Married Women's Property Act* 1935 (Tas.), s. 8; *Married Women's Property Ordinance* 1968 (A.C.T.). The High Court in *Wirth* v. *Wirth* (1956) 98 C.L.R. 228 held that the s. 17 provision was strictly limited. The court is unable to make orders on the basis of what appears to be fair in the circumstances: rather the proprietary rights of husband and wife must be ascertained in accordance with the strict rules of property law. The court has no power to alter existing interests: it only has the power to declare existing rights. The House of Lords took a similar view in *Pettitt* v. *Pettitt* [1970] A.C. 777.
Cf. the situation in Victoria under s. 161 of the *Marriage Act* 1958 which was designed to allow a court discretion to vary existing proprietary rights. However, even s. 161 is limited in its operation: see R. Sackville and M. A. Neave, *Property Law Cases and Materials* (2nd ed., Sydney, Butterworths, 1974) 644-645 and R. Sackville, "The Emerging Australian Law of Matrimonial Property" (1970) 7 *M.U.L.R.* 353, 366-370. In Western Australia, the Family Court of Western Australia has non-federal jurisdiction in relation to matrimonial property disputes under the *Family Court Act* 1975 (W.A.). Sections 29 and 30 are in the same form as ss. 78 and 79 of the *Family Law Act* 1975 (Cth.): a spouse wishing to sever a joint tenancy can do so under the *Family Court Act* during the twelve month hiatus. *Quaere*, the relationship between the *Family Court Act* 1975 (W.A.), the *Married Women's Property Act* 1892-1962 (W.A.) and the *Property Law Act* 1969-1973 (W.A.), Part XIV.

jurisdiction of the *Family Law Act* 1975 (Cth.) with regard to property matters during the twelve month separation period. The course of action taken by the husband in *Badcock's* case was such an attempt. It comprised an application under s. 114(1) of the Act for an injunction in relation to the property of a party to the marriage in circumstances arising out of the marital relationship. An application for an injunction in circumstances arising out of the marital relationship is, by s. 4(1)(e), a matrimonial cause whereby an application can be brought without proceedings for principal relief. The court's jurisdiction under s. 114(1) and s. 4(1)(e) has been the subject of a number of judicial decisions.

In *McCarney* and *McCarney*,[18] the Full Court of the Family Court (Asche, Marshall and Joske JJ.) took a narrow view of the ambit of the Court's jurisdiction under s. 114(1). It held that injunctions could not be granted under s. 114(1) solely to protect or preserve prospective rights under s. 79 of the *Family Law Act* 1975 (Cth.), the section dealing with distribution of property between spouses upon dissolution. That is, injunctions were not available solely to maintain the status quo with respect to the property of the spouses during the twelve month separation period. The reasoning behind the decision in *McCarney's* case can be summarized in the following manner. An injunction can only be granted to protect existing rights and the rights conferred by s. 79 do not arise until that section can be invoked (at the expiration of the twelve month separation period).[19] However, later decisions of the Family Court have afforded a broader interpretation to the injunction power in s. 114(1). In *Tansell* and *Tansell*[20] the Full Court of the Family Court, (Evatt C.J., Demack and Fogarty JJ.) in obiter dicta, took the view that the analysis of s. 114(1) had been unnecessarily restrictive in *McCarney's* case.

> "In our view the Family Court may in a proper case . . . during the pending period properly grant injunctions restraining a spouse from taking any steps to in any way dispose of or encumber the matrimonial home during such period.
> . . . It is not a question of preserving prospective rights under sec. 79 as referred to in *McCarney's* case but of defining the proper ambit of power under para. (e) and sec. 114(1) although in the result there may be some overlap.
> . . . What, however, must be kept clearly in mind is that this power under sec. 114(1), . . . is a power which is both temporary and personal. It cannot be used to affect in a permanent way interests in property and it is a power which is directed to a spouse personally, prohibiting or restraining him or her from certain actions."[21]

[18] (1977) F.L.C. 90-200.
[19] It was recognized by the court in *McCarney's* case that there may be instances where an injunction under s. 114(1) can be granted even where there are no proceedings for principal relief. If a claim can be shown to arise, such claim not depending upon prospective rights under s. 79, it may be supported by injunction.
[20] (1977) F.L.C. 90-307.
[21] (1977) F.L.C. 90-307, 76,634.

In even more direct terms, the Full Court of the Family Court in *Sieling* and *Sieling*,[22] albeit in obiter dicta and with Asche J. dissenting, disapproved *McCarney's* case:

> ". . . the question cannot be disposed of simply by stating that the right to bring proceedings under sec. 79 is non-existent or that it has not arisen . . . [A] party's right to bring proceedings under sec. 79 should be considered as an inchoate right. . . . The power to grant an injunction can be used where necessary to protect that incipient right. . . ."[23]

This broader interpretation given to the injunction power is to be welcomed. Murray J. relied upon both *Tansell* and *Tansell* and *Sieling* and *Sieling* in holding that the court did have jurisdiction to grant the injunction sought by the husband in *Badcock's* case. It is submitted that the finding of her Honour was correct and in line with the current state of the law. It is interesting to note that Hogan J. in the recent case of *Craven* and *Craven*[24] took the view that the Full Court in *Sieling* and *Sieling* had said ". . . in the clearest possible terms that the decision in *McCarney's* case was erroneous . . . and that the conclusions in *Sieling's* case should thereafter be treated as a correct statement of the law."[25]

The wife in *Badcock's* case propounded a further argument in an attempt to show that the court lacked jurisdiction to hear the husband's application. She argued that the right of severance of a joint tenancy was not concerned with the matrimonial relationship and that therefore the court had no power to intervene as there were no "circumstances arising out of the marital relationship" as required by s. 4(1)(e).

Several cases[26] have made it clear that the "mere fact that something happens between a husband and wife does not mean that it involves 'circumstances arising out of the marital relationship' [and] events which raise issues of criminal law, industrial law or fiscal law cannot be brought within the 'marital relationship' simply because the circumstances involve a husband and wife. . . . The event must be one which raises issues of law that are within the body of law defining marital relationships."[27] For instance in *Mills* and *Mills*,[28] a wife failed to obtain an injunction to restrain her husband from selling soil from land which they held as joint tenants and on which the former matrimonial home was situated. It was held that the proceedings concerned solely the rights of joint tenants *inter se* and did not involve circumstances arising out of the marital relationship.

[22] (1979) F.L.C. 90-627.
[23] (1979) F.L.C. 90-627, 78,264.
[24] (1980) F.L.C. 90-802, 75,057.
[25] (1980) F.L.C. 90-802, 75,061. Similar views were expressed in *Esmore* and *Esmore* (1979) F.L.C. 90-711 and in *Murkin* and *Murkin* (1980) F.L.C. 90-806.
[26] *Mills* and *Mills* (1976) F.L.C. 90-079; *Re Dovey; Ex parte Ross* (1979) F.L.C. 90-616; *Murkin* and *Murkin* (1980) F.L.C. 90-806, 75-082.
[27] *Mills* and *Mills* (1976) F.L.C. 90-079, 75,381.
[28] (1976) F.L.C. 90-079.

Whilst agreeing with such statements, Murray J. in *Farr* and *Farr*[29] gave a broader interpretation to "circumstances arising out of the marital relationship":

> ". . . the moment that the marital difficulty or breakdown occurs, events thereafter involving disputes between husband and wife arising because of that difficulty or breakdown must be circumstances which arise out of the marital relationship whether or not fiscal, property, criminal or some other area of law is involved, but the spouses must be able to find their remedies within the boundaries of the *Family Law Act*."[30]

Murray J. cited *Farr* and *Farr* with approval in *Badcock's* case and dismissed the wife's argument. Marital breakdown had occurred and this was the reason for the wife attempting to sever the joint tenancy. Even on the narrower interpretation of "circumstances arising out of the marital relationship" expressed in *Mills* and *Mills*, it is submitted that the claim of the husband was one brought as a spouse and not simply one arising out of the general law of property. Having decided that the court did have jurisdiction to hear the matter, Murray J. then had to determine if the joint tenancy had already been severed by the actions of the wife.

SEVERANCE OF THE JOINT TENANCY

In a joint tenancy, the unities of possession, interest, title and time are present. Severance of a joint tenancy is effected by destroying one of the unities. The classic statement on severance of joint tenancies is set out in *Williams* v. *Hensman*:[31]

> "A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such a manner as to sever it from the joint fund—losing, of course, at the same time, his own right to survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to that particular share, declared only behind the backs of the persons interested."[32]

It appears to be clear from this statement that the only way in which a joint tenant can unilaterally sever a joint tenancy is by the first method,

[29] (1976) F.L.C. 90-133.
[30] (1976) F.L.C. 90-133, 75,636. See also *Murkin* and *Murkin* (1980) F.L.C. 90-806.
[31] (1861) 1 J. & H. 546; 70 E.R. 862.
[32] (1861) 1 J. & H. 546, 557; 70 E.R. 862, 866.

an act of any party operating on his own share.[33] The accepted means in which this can occur involves a joint tenant alienating his or her interest[34] or a joint tenant acquiring a greater interest in the land than the other joint tenants.[35]

Thus, on the facts of *Badcock's* case for there to have been a *clear* severance of the joint tenancy, it had to be shown that the acts of the wife amounted to an effective alienation of her interest. Murray J. also mooted the possibility that severance without alienation in the usual sense, could occur on an estoppel basis. Further, her Honour discussed the suggestion that a unilateral declaration of intention to sever by one joint tenant may be sufficient to sever the joint tenancy in equity.[36]

1. Alienation

(a) *Legal Principles*

There was no doubt that there had been no alienation of the wife's interest at law. The land in question was held under the Torrens system of registration of land titles and this sets up a system of title by registration. By s. 67 of the *Real Property Act* 1886-1979 (S.A.), no transfer until registered is effectual to pass any estate or interest in the land.[37] The High Court in *Wright* v. *Gibbons*[38] made it clear that the Torrens statutes did not alter this law with respect to joint tenancies: for alienation, and thus severance to occur at law, registration of the transfer is essential. The transfer from the wife to Jones of her interest had not been registered. Therefore, it was clear that there had been no severance of the joint tenancy at law.[39]

The real question was whether or not there had been an effective alienation in equity. Section 67 of the *Real Property Act* 1886-1979 (S.A.) and the corresponding sections in the Torrens Statutes of the other States[40] seem to imply that no interest at all can be created or pass except by registration. However, it is well established law now that prior to registration equitable interests in land can exist under the Torrens system.[41]

33 However see the judgment of Lord Denning in *Burgess* v. *Rawnsley* [1975] Ch. 429 where there is an inference that rule three may also operate on the basis of the unilateral intention of one joint tenant.

34 *Partriche* v. *Powlet* (1740) 2 Atk. 54; 26 E.R. 430.

35 *Morgan's Case* (t. Eliz. 1) 2 And. 202; 123 E.R. 620.

36 See *Hawkesley* v. *May* [1956] 1 Q.B. 304; *Re Draper's Conveyance* [1969] 1 Ch. 486.

37 For the corresponding sections in the other Torrens statutes see infra fn. 40.

38 *Wright* v. *Gibbons* (1949) 78 C.L.R. 313.

39 *Cf.* the position in Canada—see A. J. McClean, "Severance of Joint Tenancies" (1979) 57 *Can. Bar. Rev.* 1, 40-42 for a discussion of *Stonehouse* v. *Attorney-General of British Columbia* [1962] S.C.R. 103.

40 *Transfer of Land Act* 1958 (Vic.), s. 40(1); *Real Property Act* 1861-1963 (Qld.), s. 43; *Real Property Act* 1900 (N.S.W.), s. 41(1); *Transfer of Land Act* 1893-1969 (W.A.), s. 58; *Real Property Act* 1862 (Tas.), s. 39(1); *Real Property Ordinance* 1925-1970 (A.C.T.), s. 57(1).

41 *Barry* v. *Heider* (1914) 19 C.L.R. 197.

The setting up of a caveat system to protect holders of unregistered, equitable interests and the provision for the lodgment of declarations of trust with the Registrar make it clear the legislatures intended that equitable interests could exist under the Torrens system.[42]

Thus, it is possible for there to be a severance of a joint tenancy in equity of land held under the Torrens system if it can be shown that there has been an effective alienation of the beneficial interest of one of the joint tenants. This effective alienation can occur in the following ways. First, where a joint tenant declares himself a trustee of his interest for another, assuming that the statutory requirements in relation to declarations of trust have been complied with,[43] equity will enforce the trust. The declaration of trust will sever the joint tenancy in equity.[44] Secondly, where a joint tenant enters into an enforceable contract to sell his interest, equity will deem as done that which ought to be done and regard the purchaser as the owner of the land in equity.[45] Despite the fact that severance of the joint tenancy will not occur at law until registration of the transfer, severance will occur in equity at the time of the contract of sale. The transaction behind the transfer, the contract of sale, is the means by which the equitable interest is deemed to pass.[46]

However, where the transaction behind the transfer is a voluntary one rather than one for consideration, the position is different. The general rule, the declaration of trust being an important exception, is that equity will not give its assistance to the volunteer. This is the result of the two equitable maxims that equity does not assist a volunteer and that equity will not perfect an imperfect gift. In certain circumstances it may be possible to show that although legal title has not passed, the gift is not imperfect. Sometimes, the legal requirements for transfer of the gift involve several steps. It is well settled law since *Milroy* v. *Lord*[47] that if the donor has done "everything which, according to the nature of the property comprised in the settlement, was necessary to be done [by him] in order to transfer the property . . ."[48] equity will view the gift as being complete and perfect and hold that equitable title has passed to the volunteer. The settlor retains the legal title holding it on trust for the donee.[49]

Thus, where the legal requirements for the valid transfer of property require acts to be done by the donee *and* acts to be done by a third party, equity will regard the gift as being complete when the donor has performed

42 Ibid.
43 See e.g. *Property Law Act* 1958 (Vic.), s. 53(1)(b).
44 *Re Sorensen* and *Sorensen* (1977) 90 D.L.R. (3d) 26; *Ogilvie* v. *Littleboy* (1897) 13 T.L.R. 399, aff. 15 T.L.R. 294 sub nom. *Ogilvie* v. *Allen*.
45 *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9; *Lysaght* v. *Edwards* (1876) 2 Ch. D. 499.
46 *Barry* v. *Heider* (1914) 19 C.L.R. 197, 216 per Isaacs J.
47 (1862) 4 De G.F. & J. 264; 45 E.R. 1185.
48 (1862) 4 De G.F. & J. 264, 274; 45 E.R. 1185, 1189.
49 See *Re Rose* [1952] Ch. 499; *Anning* v. *Anning* (1904) 4 C.L.R. 1049 per Griffiths C.J. and per Higgins J. (Isaacs J. dissented on this issue).

the acts required of him. Transfer of legal title in Torrens system land requires acts to be done by the transferor and acts to be done by a third party before legal title passes: the transferor must execute a transfer and hand over the duplicate certificate of title to the transferee,[50] but the third party, the Registrar, must register the transfer before legal title passes.

The applicability of the *Milroy* v. *Lord* principle to voluntary transfers of Torrens system land was considered by the High Court in *Brunker* v. *Perpetual Trustee Co.*[51] The view was taken that the *Milroy* v. *Lord* principle does not apply to Torrens system land.[52] Even where the transferor has done everything necessary to pass legal title,[53] the transferee does not acquire equitable title before registration. The reason for this view appears to have its origin in the provision of the Torrens statutes stating that no instrument until registered is effectual to pass any estate or interest.[54] Although a contractual transaction behind the instrument will be sufficient to pass equitable title,[55] a purely voluntary transaction behind the transfer will not have this effect.[56] Despite the rejection of the application of the *Milroy* v. *Lord* principle to Torrens system land, Dixon J. used the test laid down in *Milroy* v. *Lord* to determine whether the transferee had acquired ownership of the indicia of title and thus the right to use them to seek registration and so acquire legal title. According to Dixon J., if the donor of Torrens system land has done everything necessary to pass legal title, although the donee fails to acquire equitable title at that point, he will acquire ownership of the indicia of title and thus have a right to be registered which cannot be prevented by the donor, for the donor cannot claim back the transfer and the duplicate certificate of title.

The inapplicability of the *Milroy* v. *Lord* principle to Torrens system land has been the subject to stringent criticism.[57] Sykes states that the Dixonian view is misconceived.[58] He argues that the Torrens system section providing that no instrument until registered is effectual to pass an estate or interest, refers only to the effect of the instrument.

> "The *Milroy* v. *Lord* doctrine refers to the effect not only of what was in the document but also of what the donor did with the document and the other significant documents—with indeed the greater emphasis on

[50] See *Brunker* v. *Perpetual Trustee Co. Ltd* (1937) 57 C.L.R. 555, 603-605 per Dixon J. as to the necessity of handing over the duplicate certificate of title.
[51] (1937) 57 C.L.R. 555.
[52] (1937) 57 C.L.R. 555, 580-581 per Latham C.J.; 599 per Dixon J.; 609 per McTiernan J.
[53] Ibid.
[54] See supra fn. 40.
[55] See supra fn. 52.
[56] Ibid. Except in relation to a declaration of trust.
[57] See E. I. Sykes, *The Law of Securities* (3rd ed., Sydney, Law Book Co., 1978), 256-261; N. Sedden, "Imperfect Gifts of Torrens Title Land" (1974) 48 *A.L.J.* 13; L. Zines, "Equitable Assignments: When Will Equity Assist a Volunteer" (1965) 38 *A.L.J.* 337.
[58] E. I. Sykes, op. cit. 260.

the latter aspect. In other words, in the *Barry* v. *Heider* language there may still be a transaction behind the document."[59]

He further argues that the results of a number of cases decided since *Brunker's* case may be difficult to reconcile with *Brunker's* case. For instance, in *Re Ward*[60] a registered proprietor had executed a transfer of his land by way of gift to his son. Although the donor had done everything necessary to complete the transaction, for various reasons the transfer had not been registered at the date of his death. It was held that the land did not form part of the donor's estate for death duty purposes. In *Taylor* v. *Deputy Federal Commissioner of Taxation*,[61] the executors of a will had done everything necessary to enable the devisee to become the registered proprietor of the devised land. The devisee had not become registered. The question was whether the land formed part of "the taxpayer's estate in the executor's hands" for the purpose of income tax owed by the testator. It was held that the land did not form part of such estate. These cases do appear to imply that beneficial title had passed from the transferor, for how can it be that a transferor retains legal and equitable title to the land in question and yet be divested of that land for duty and tax purposes?

The logic is clear. Nevertheless, in both *Re Ward* and *Taylor's* case, the courts purported to follow the reasoning of Dixon J. in *Brunker* v. *Perpetual Trustee*. In *Re Ward* it was held that the land did not form part of the assets of the donor's estate because although the lands were part of the estate at the date of death, the estate was liable to be divested by registration. The donee had a right to present the transfer for registration and the exercise of this right could not be prevented by the donor or his executors. Similarly, in *Taylor's* case, it was held that the donee had the right to be registered and that there was nothing the executors could do to prevent the exercise of this right. In both cases, there was no real value in the deceased's estate which could be taxed.

Despite the lucid criticism of the Dixonian view, it appears that it is the prevailing view in Australia. The only reported decision which directly upholds the application of the *Milroy* v. *Lord* principle to Torrens system land is *Caratti* v. *Grant*,[62] the decision of a single judge in the Supreme Court of Western Australia. In that case, the transferee of land was endeavouring to establish that it had acquired an equitable interest in the land before registration of the transfer had occurred. Brinsden J. was prepared to hold that the transferee was a purchaser for value and had therefore acquired an equitable interest according to the principle enunciated in *Barry* v. *Heider*.[63] However, there was some doubt as to whether a

[59] E. I. Sykes, op. cit. 259.
[60] [1968] W.A.R. 33.
[61] (1969) 123 C.L.R. 206.
[62] (1978) 3 A.C.L.R. 322.
[63] (1914) 19 C.L.R. 197.

true consideration had passed from the transferee[64] and thus the judge considered what the position would be if the transfer had been a voluntary instrument in registrable form. After considering *Brunker's* case, and Sykes' discussion of it, Brinsden J. came to the conclusion that

> "an equitable interest passes if the donor has done everything on his part necessary to enable the donee to procure registration."[65]

The statement of Brinsden J. is obiter dicta and cannot in view of the authorities be considered to be correct.

(b) *Application of Principles to* Badcock *and* Badcock

In *Badcock's* case, Murray J. treated the transfer from the wife to Jones as a voluntary instrument. Although the transfer was purported to be made in consideration of the terms of the trust deed, it seems clear that such consideration would not be adequate, and that the transfer should, as indeed it was, be treated as a voluntary one. It is thought that a simple application of the rule in *Brunker's* case by Murray J. would have led to the conclusion that there had been no severance of the joint tenancy by way of alienation of the beneficial interest. Even if it could be shown that the transferor had done everything necessary to pass legal title,[66] if the Dixonian view is applied, the *Milroy* v. *Lord* principle is inapplicable to Torrens system land and cannot operate to pass equitable title.

However, Murray J. came to the conclusion that there had been a severance of the joint tenancy in equity by way of alienation. She held that the execution of the trust deed and the memorandum of transfer followed ". . . by the giving of notice to the husband and attempted registration of the Transfer . . ."[67] amounted to an effective alienation of the beneficial interest. Her Honour stated that there had been an alteration of the beneficial interest in that

> "the wife's right to dispose of her interest in the land has been diminished by the terms of the Deed of Trust which binds the trustee to abide by an order of the Family Court."[68]

There are a number of problems with this analysis. First, it is in direct conflict with the view of the High Court in *Brunker's* case. It is interesting to note that *Brunker's* case had been considered and applied by Jackson J. in *Golding* v. *Hands*,[69] a case involving a similar situation to that in *Badcock's* case. A joint tenant of Torrens system land wished to sever the joint tenancy. To this end, she executed a memorandum of transfer to a trustee. However, she postponed registration of the transfer and on her death the transfer remained unregistered. A question arose as to whether

64 (1978) 3 A.C.L.R. 322, 326-327.
65 (1978) 3 A.C.L.R. 322, 329.
66 Infra p. 25.
67 (1979) F.L.C. 90-723, 78,896.
68 Ibid.
69 [1969] W.A.R. 121.

the joint tenancy had been severed in equity. Jackson J. followed *Brunker's* case and held that there had been no severance in equity.

> "In my opinion the deed being voluntary cannot of itself be more than an ineffectual declaration of unilateral intention on her part; and the transfer, not being a transaction for value, was ineffectual to vest in Mr Fabricius any legal or equitable estate in the land, and hence did not sever the joint tenancy."[70]

Murray J. attempted to distinguish both *Brunker's* case and *Golding* v. *Hands*. She stated that the relevant passages in *Brunker's* case contrasted an unregistered transfer purporting to effect a gift with an unregistered transfer pursuant to a transaction for value. As the transaction in *Badcock's* case constituted neither a gift nor one for value, her Honour appeared to conclude that *Brunker's* case was not relevant to the facts before her. It is submitted with respect that it is not possible to draw such a distinction between different kinds of voluntary transactions. If the transaction in *Badcock's* case is to be considered a voluntary one, even though not in the nature of a "gift" as such, the statements of the learned judges of the High Court must apply to it. This was clearly the view taken by Jackson J. in *Golding* v. *Hands*.

Murray J. distinguished *Golding* v. *Hands* from the facts before her on the basis that the joint tenant purporting to sever had not attempted to obtain registration of the transfer to the trustee: indeed, she had specifically given instructions that the transfer was not to be registered until her death. Such a distinction lacks substance for it was the fact of non-registration of the transfer which persuaded the court in *Golding* v. *Hands* that no alienation had occurred. Even if the joint tenant had given instructions that registration should be attempted, it is submitted that the court would have taken the view that severance had not occurred before actual registration of transfer.

Secondly, the holding that the wife's right to dispose of her beneficial interest had been diminished by the terms of the trust deed must be open to question. The deed of trust was executed so that the wife's share of the legal estate would be received by the trustee on trust for the wife. The deed of trust was predicated on the fact that the trustee would obtain the legal estate. Until this event occurred, it is submitted that the trust deed would have no effect: the trustee would not and could not be bound to abide by its terms. Thus, to hold that the wife's beneficial interest had been altered before the legal estate had been transferred to the trustee, is to change the order of things.

2. Estoppel

Murray J. appeared to take the view that severance could occur in equity, even without alienation. She relied upon the case of *In Re Wilks;*

[70] [1969] W.A.R. 121, 126.

Child v. *Bulmer*.[71] In that case, the court after commenting that the accepted modes of severing a joint tenancy were by alienation or agreement, stated:

> "Without going so far [as to say that these are the only possible means of severance] I think that 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."[72]

At the outset, it should be stated that the remarks in *Re Wilks* really say no more than if there has been a severance, the right of survivorship is inapplicable. It is submitted that the court in *Re Wilks* was not attempting to formulate a new method of severance by estoppel. Nevertheless, Murray J. seemed to interpret the comments in *Re Wilks* in a wider sense and concluded that the passage did set out a possible new method of severance. Her Honour took the view that by executing the documents and subsequently notifying the husband and authorising the trustee to register, the wife had precluded herself from claiming by survivorship on an estoppel basis and thus the joint tenancy had been severed. In a recent Canadian decision, *Re Murdoch and Barry*,[73] the estoppel argument was used to hold that a joint tenant was precluded from claiming by survivorship and that therefore the joint tenancy had been severed.

The use of the doctrine of estoppel in this context has been criticized.[74] Generally equitable estoppel can only arise where there has been a representation by one party to the other, the representee acting to his detriment on the basis of the representation so that it would be inequitable to allow the representor to go back on his representation.[75] Although the collective actions of the wife may be seen as amounting to a representation to the husband that she did not intend to claim by survivorship, it is difficult to take the further step and show that the husband proceeded to act to his detriment on the basis of the representation. In other words, an estoppel was not raised.

Again it must be emphasised that it is doubtful if the decision in *Re Wilks* does actually support the use of estoppel as a means of severing a joint tenancy. It is submitted that the relevant statement in *Re Wilks* does not purport to define what constitutes a severance: all that is said is that if there is a severance, the right of survivorship cannot be claimed.[76]

Thus, in conclusion it is suggested that it is difficult to support the decision of Murray J. that there had been a severance of the joint tenancy on either the basis of alienation or estoppel.

[71] [1891] 3 Ch. 59.
[72] [1891] 3 Ch. 59, 62.
[73] (1975) 64 D.L.R. (3d) 222.
[74] McClean, op. cit. 1, 29-30.
[75] I. C. F. Spry, *Equitable Remedies* (Sydney, Law Book Co., 1971) 168-172.
[76] McClean, op. cit. 30. Murray J. also mooted the possibility that the wife may, on a practical basis, have precluded herself from being absolutely entitled to the whole

3. Declaration of Intention

The question as to whether a unilateral declaration of intention to sever by one joint tenant can operate to sever a joint tenancy has been the subject of much debate in recent years. It should be noted that in England, there is legislation which allows for severance of a joint tenancy by notice in writing given by one joint tenant to the other joint tenants.[77] However, there is no similar legislation in Australia and the common law position is in a confused state.

As has already been indicated, the traditional view is that a severance can be effected by alienation (and thus destruction of one of four unities) or by agreement and that therefore a unilateral declaration of intention will not suffice.[78] As early as 1740, in the decision of *Partriche* v. *Powlet*[79] Lord Hardwicke stated that a unilateral declaration of intention to sever by one joint tenant was insufficient to sever the joint tenancy. This view has been restated a number of times, most recently by Walton J. in *Nielson-Jones* v. *Fedden*.[80]

However, there is some authority, in England at least, for the proposition that a mere declaration of intention to sever should be viewed as the act of one party operating on his own share within the *Williams* v. *Hensman* principles,[81] and thus a severance. In *Hawkesley* v. *May*,[82] Havers J. stated that the first method of severance set out in the judgment of Page-Wood V.C. ". . . namely, an act of any one of the persons interested operating

of the estate in the unlikely event of her husband's earlier death. Her Honour quoted from the judgment of Dixon J. in *Brunker's* case: "[where the donor gives property in the piece of paper, the transfer document, to the donee, the donor] . . . has no legal title to recall it or prevent its use by the donee for any purpose allowed by law including registration and no equity upon which an injunction . . . would be granted". Thus, according to Dixon J. although the donor is still possessed of the legal and equitable interest in the land, he is liable to be divested of that interest by the donee registering the transfer and there is nothing the donor or his executor can do to prevent that registration. The argument is unambiguous where an outright gift is involved. Assume A and B are joint tenants of a piece of Torrens system land. A executes a transfer of his interest to C by way of gift and hands over the transfer and duplicate certificate of title to C. B dies. Although A may be able to obtain the whole estate by the right of survivorship, his interest may be shortlived. According to *Brunker's* case, A may have precluded himself from being absolutely and finally entitled to the estate, for theoretically there is nothing A can do to prevent C registering the transfer from himself to C. (*Quaere*, whether a court would take account of the intention of A, that is to pass only one-half interest to C.) The argument is not as clear in relation to facts such as existed in *Badcock's* case. The purpose of the arrangement was not to confer an outright gift on the trustee. If the unlikely occurred, and the husband died first, presumably the trust deed could have been set aside at the wife's request and the trustee then would not have pursued registration of the transfer. In this event, the practical result would be that the wife would be absolutely and finally entitled to the interest of the husband.

77 See *Law of Property Act* 1925 (Eng.), s. 36(2).
78 Supra p. 23.
79 (1740) 2 Atk. 54; 26 E.R. 430.
80 [1975] Ch. 222.
81 Supra p. 23.
82 [1956] 1 Q.B. 304.

upon his own share, obviously includes a declaration of intention to sever by one party."[83] In that case, a letter from one joint tenant to her trustees requesting that her share of the income be paid into her bank account was held to constitute a severance of the capital.[84] In *Re Draper's Conveyance*,[85] Plowman J. also considered that ". . . a declaration by one of a number of joint tenants of his intention to sever operates as a severance."[86] The issue of a summons by one joint tenant for sale and distribution of the proceeds and an affidavit in support of the summons were held to constitute a declaration of intention to sever and thus a severance of the joint tenancy.[87]

In *Nielson-Jones* v. *Fedden*,[88] Walton J. held that these cases had been decided *per incuriam*. His Honour referred to the earlier decisions of *Moyse* v. *Gyles*,[89] *Partriche* v. *Powlet*[90] and *Re Wilks*[91] which had all rejected the proposition that a declaration of an intention to sever is effective to sever a joint tenancy. Walton J. noted that neither Havers J. in *Hawkesley* v. *May* nor Plowman J. in *Re Draper's Conveyance* had been referred to these important decisions and for this reason his Honour held that these two cases should not be followed. Walton J. took the view that the ". . . first method of severance of which the Vice-Chancellor [in *Williams* v. *Hensman*] was talking was actual alienation or something equivalent thereto".[92] Thus, on the facts of *Nielson-Jones* v. *Fedden*, a declaration by one joint tenant of an intention to sever, which declaration was disclosed in correspondence, was insufficient to sever the joint tenancy.

One might have thought that the views of Walton J. expressed after a full review of all the authorities, would have provided the final word on the subject. However, in *Burgess* v. *Rawnsley*,[93] Lord Denning enunciated the proposition that one joint tenant, by a unilateral declaration of intention communicated to the other joint tenants, may sever the joint tenancy. His Honour took the view that such a method of severance falls not within the first category of severance set out in *Williams* v. *Hensman* but within the third. That is, it constitutes a course of dealing which clearly evinces an intention by both parties that the property be held in common. The conclusion reached by Lord Denning must be open to doubt. "A course of dealing" such that the interests be mutually treated as held in common as

83 [1956] 1 Q.B. 304, 313.
84 It is difficult to see how a declaration of intention as to income could have had any effect (i.e. a severing effect) on the capital. Nevertheless, there can be no doubt that there was a severance of the capital when the trustees paid one joint tenant's share of the capital into her bank account.
85 [1969] 1 Ch. 486.
86 [1969] 1 Ch. 486, 491.
87 It was also held that there had been compliance with s. 36(2) of the *Law of Property Act* 1925 (Eng.) and thus severance on this basis too.
88 [1975] Ch. 222, 236.
89 (1700) Prec. Ch. 124; 24 E.R. 60.
90 (1740) 2 Atk. 54; 26 E.R. 430.
91 [1891] 3 Ch. 59.
92 [1975] Ch. 222, 234.
93 [1975] Ch. 429.

is required by category three, seems to mean that all joint tenants must be parties to negotiations constituting the course of dealing. Browne L.J. and Sir John Pennycuick decided the case on another basis. However, both of them expressed the view that an uncommunicated declaration of intention cannot operate to sever a joint tenancy:[94] without any detailed discussion, they implied that a unilateral declaration of intention to sever communicated to the other joint tenants may constitute a severance.

In Australia, there is less authority on the point. However, the authority which does exist suggests that the view of the court in *Nielson-Jones* v. *Fedden* rather than the views expressed in *Hawkesley* v. *May* and *Re Draper's Conveyance* or *Burgess* v. *Rawnsley* will prevail. In the Supreme Court of Western Australia, in *Golding* v. *Hands,* it was argued that an express declaration of intention to sever in a deed executed by one joint tenant was sufficient to sever the joint tenancy. Reliance was placed upon *Hawkesley* v. *May* and *Re Draper's Conveyance.* Jackson J. rejected the argument and held that the declaration of intention could not and did not operate to sever. His Honour was of the view that *Hawkesley* v. *May* and *Re Draper's Conveyance* had been decided without regard to earlier authorities and that those earlier authorities clearly stated that a declaration of intention to sever was not an effective method of severance. Similarly, in the recent decision of *Pertsoulis* and *Pertsoulis,*[95] Pawley J., after a careful review of the relevant English authorities, adopted the view of Walton J. in *Nielson-Jones* v. *Fedden* that a declaration of intention to sever does not suffice to sever a joint tenancy.[96]

However, in *Badcock's* case, Murray J. appeared to accept the notion that a declaration of intention could operate to sever a joint tenancy. The comments of her Honour on this point were obiter for she was satisfied that severance had occurred by alienation. Murray J. relied upon *Hawkesley* v. *May* and *Re Draper's Conveyance.* It appears that counsel did not refer Murray J. to the decisions of *Nielson-Jones* v. *Fedden, Burgess* v. *Rawnsley* or *Golding* v. *Hands* on this point. In light of the foregoing analysis, the holding of Murray J. that a unilateral declaration of intention is an effective means of severance is difficult to accept.

Despite the fact that on the authorities this part of the judgment is open to serious doubt, it has been argued that a declaration of intention to sever *should* be an acceptable means of severing a joint tenancy.[97] At present, a joint tenant may by the unilateral action of alienating his interest sever the

[94] [1975] Ch. 429, 444 and 448.
[95] (1980) F.L.C. 90-832.
[96] It seems that it was unnecessary for Pawley J. to decide whether or not there had been severance for his Honour held that the property should be sold and the proceeds divided in any case. (Presumably, s. 79 of the *Family Law Act* 1975 (Cth.) formed the basis for this decision.) Thus, the comments of Pawley J. are obiter dicta.
[97] McClean, op. cit. 30.

joint tenancy without the approbation or knowledge of the other co-owner, or co-owners. There seems little reason why a declaration of intention should not be deemed to have the same effect. In fact it has been argued that the declaration has a number of advantages over the accepted modes of severance:

> "It states clearly what it is intending to do. It is simpler than the procedures some joint tenants [are] compelled to adopt. So far as it is accepted in England, it is on the basis that the declaration must be made to the other joint tenants; that is preferable to a severance behind their backs."[98]

It is suggested that legislation should be introduced to provide that severance by declaration is an acceptable means of severance of a joint tenancy. However, until such legislation is introduced or until the High Court decides that a declaration of intention to sever will so sever, it is submitted that the authorities do not justify a finding, such as that made by Murray J. in *Badcock's* case, that a declaration of intention is effective to sever a joint tenancy. Nevertheless, if the declaration of intention does become an acceptable means of severance in the future, an important question arises as to what will amount to a sufficient declaration. Should the declaration be express or should an implied declaration suffice? Should it be necessary that the other co-owners be informed?

The English courts which have accepted the declaration as an effective means of severance, have been prepared to accept an implied declaration.[99] For instance, in *Re Draper's Conveyance*, it was held that an application for partition constituted a sufficient declaration and thus severed the joint tenancy.[100] There is no doubt that if an order for sale is actually made on a partition application, the joint tenancy is severed.[101] However, there is strong authority to suggest that the mere filing of an application for partition (and thus by inference, severance) is insufficient to effect a severance.[102] Even Murray J., who was prepared to accept severance by declaration, refused to accept that the wife's issue of the summons for partition in the Supreme Court amounted to a sufficient declaration of intention. She stated:

> ". . . the wife could withdraw the partition proceedings at any time prior to judgment leaving her competent to claim by survivorship."[103]

98 Ibid.
99 *Hawkesley* v. *May* [1956] 1 Q.B. 304; *Re Draper's Conveyance* [1969] 1 Ch. 486.
100 It was also held that there had been a valid notice in writing under s. 36(2) of *Law of Property Act* 1925 (Eng.) and that severance had occurred in this way too.
101 *Re Wilks* [1891] 3 Ch. 59; *Public Trustee* v. *Grivas* (1975) 25 F.L.R. 1; *Gillette* v. *Cotton* (1979) 99 D.L.R. (3d) 693.
102 *Re Wilks* [1891] 3 Ch. 59.
103 (1979) F.L.C. 90-723, 78,897.

Pawley J. in *Pertsoulis* and *Pertsoulis* also rejected the proposition that the mere filing and service of an application for division of property and affidavits in support can have the effect of severing the joint tenancy.[104]

It is submitted that the reasoning of Murray J. in *Badcock's* case is preferable to that which prevailed in *Re Draper's Conveyance.* If the declaration of intention is accepted as a means of severance in Australia in the future, an application for partition and affidavit in support should not constitute a sufficient declaration. This is not to suggest that any acceptance of the declaration as a means of severance should be confined to express declarations. However, the implication of a declaration of intention should only be drawn in the clearest circumstances[105] and an application for partition, which can be withdrawn at any time, should not constitute such circumstances. It is interesting to note that in *Badcock's* case, Murray J. took the view that the contents of the trust deed amounted to a declaration of intention to sever by the wife. Apart from the basic problem of the initial acceptance of severance by declaration, this finding of Murray J. was an unobjectionable one for the trust deed did clearly evince such an express intention.

If legislation is introduced to provide for severance by declaration, it is suggested it should ensure that before any declaration is effective, it must be communicated to the other joint tenants and it must be in writing. It would remove any problem of proof that the declaration had been made.

INJUNCTION

Murray J. concluded that the wife had effected a severance of the joint tenancy in equity and that therefore it was

> ". . . pointless to continue the injunction, [restraining the registration of the transfer] especially as it appeared . . . that the trustee could protect that severance in equity by caveat . . . notwithstanding the non-registration of the Transfer."[106]

Her Honour pointed out that the injunction power is discretionary and should only be used where there are circumstances making it necessary to restrain temporarily a spouse from exercising his or her property rights to the detriment of the other spouse.[107] As the wife had already ". . . used her property rights . . ."[108] to sever the joint tenancy an injunction restraining registration would be meaningless: the only way of restoring the joint tenancy would be to obtain an order under s. 85 of the *Family Law Act* 1975 (Cth.) setting aside the trust deed and memorandum of transfer.[109]

104 (1980) F.L.C. 90-832, 75,272.
105 McClean, op. cit. 30.
106 (1979) F.L.C. 90-723, 78,898.
107 (1979) F.L.C. 90-723, 78,898; *Sieling* and *Sieling* (1979) F.L.C. 90-627, 78,624.
108 (1979) F.L.C. 90-723, 78,898.
109 It is interesting to note from the judgment of Murray J. that the husband has filed an application to set aside the Deed and Memorandum of Transfer.

However, any s. 85 application by the husband would appear to have little chance of success. Far from defeating an anticipated order for a declaration or alteration of property interests, the wife's action in severing the joint tenancy would seem to anticipate such an order. The right of survivorship is inappropriate in the context of property owned jointly by estranged spouses and the Family Court would, inter alia, in exercising its powers at the time of dissolution, order a severance of the joint tenancy. Murray J. noted that claims to property should be settled on the principles set out in the *Family Law Act* not on the "chance of death".[110]

Interestingly, Murray J. considered what the position would have been, had she held that the joint tenancy was not severed in equity. Her Honour stated:

> "I am, and was, disinclined in the exercise of my discretion to prevent the wife registering the Memorandum of Transfer. I would not countenance the wife being able to dispose of her share in the matrimonial home to a stranger so as to place it beyond the reach of the husband in a prospective claim for property settlement. But . . . this [is] not her avowed aim at all—it is merely to sever the joint tenancy."[111]

Thus it appears that Murray J. would have been loath to restrain registration of the transfer even in the absence of severance. Evatt C.J. and Marshall S.J. in a joint judgment in *Sieling* and *Sieling* set out succinctly the ambit of the court's power in relation to injunctions.

> "The power to grant injunctions is of course a discretionary power, not to be exercised lightly. The Court must balance the hardship to each party of granting or refusing an order, and frame its order in such a way *as to impose no further restriction than is necessary to achieve the protection of the applicant's interest.* It will not lightly interfere with the rights of an owner of property on the basis of a vague or uncertain claim. *There must be circumstances arising out of the marital relationship which make it necessary to restrain, temporarily a spouse from using his or her property rights to the detriment of the other party.*"[112]

In the light of this statement, it is submitted that a refusal to grant an injunction, in the absence of severance, would have been a proper exercise of the court's discretion in *Badcock's* case. Once the transfer was registered, the deed of trust would become operative and its terms would ensure the protection of the husband's interest for the trustee was bound to abide by any order of the Family Court. Murray J. commented:

> "[I]t is not . . . severance which [would cause] any detriment to the husband's rights to a property settlement as they are preserved by the Deed of Trust. It is the wife's prior death. . . . The husband's claim for property settlement if and when it arises should be determined on the proper principles set out in sec. 79, not on the chance of death."[113]

[110] (1979) F.L.C. 90-723, 78,898.
[111] Ibid.
[112] (1979) F.L.C. 90-627, 78,264. (Emphasis mine.)
[113] (1979) F.L.C. 90-723, 78-898.

It is submitted that Murray J. reached the correct decision in refusing the injunction restraining registration but that her refusal should have been based upon the exercise of her discretion rather than on the basis that an injunction would be pointless as severance had already occurred.

CONCLUSION

It is respectfully submitted that the actions of the wife in *Badcock's* case should not have been held to sever the joint tenancy in equity. An actual alienation, either at law or in equity, must be established for severance to occur and it is submitted that there was no such alienation. A question then arises as to what methods may be used by a spouse who wishes unilaterally to sever the joint tenancy during the twelve month separation period.

If the joint tenant wishes to retain the beneficial interest in the property as did the wife in *Badcock's* case, (albeit as a tenant in common), it seems that at present, a completed version of the device adopted in *Badcock's* case is the only possible means of severance. That is, the joint tenant must execute a transfer of his or her legal estate to a trustee, the trustee holding the legal estate on trust for the joint tenant, and the transfer must be registered. If there is an impediment to the registration of the transfer, as existed in *Badcock's* case, it may not be possible for severance to be effected by this method. It has been suggested that a provision such as s. 72(3) of the *Property Law Act* 1958 (Vic.), which provides that a person may convey land to himself, may permit a joint tenant to execute a transfer of his interest to himself and by registration of that transfer, sever the joint tenancy.[114] However, if registration of this transfer is impeded, by for instance a mortgagee refusing to present the duplicate certificate of title, severance could not occur. It is thought that a mortgagee would be less likely to object to such a transfer than a transfer to a stranger: thus, reliance on s. 72(3) may provide a joint tenant with an effective means of severance where the joint tenant wishes to retain the right to the use and enjoyment of the property.

If a joint tenant is not concerned to retain beneficial ownership and wishes to obtain consideration for his share, he can do so by entering into an enforceable contract to sell the interest.[114a] The alienation of the equitable interest would effectively sever the joint tenancy. However, the value of the interest of the joint tenant may be considerably more if the entire interest in the property is sold. For this reason, a joint tenant may bring an application under State law during the twelve month separation period for sale of the jointly owned property and distribution of the proceeds.

[114] D. Mendes da Costa, "Co-Ownership under Victorian Land Law" (Part III) (1962) 3 *M.U.L.R.* 433, 456-460.

[114a] See *Rickie* and *Rickie* (1979) F.L.C. 90-626.

Jurisdictional questions arise as to whether such proceedings can be instituted validly after the breakdown of the marriage but before proceedings for principal relief can be instituted in the Family Court. The law in this area is in an uncertain state.[115] Even if it can be said that State procedures can be invoked and can continue to be heard after proceedings have been instituted in the Family Court, it seems clear that in most instances a State court would stay the State proceedings once the jurisdiction of the *Family Law Act* 1975 (Cth.) has been invoked.[116] Further, the decision in *Esmore* and *Esmore*,[117] makes it clear that the Family Court will grant an injunction under s. 114(1) to restrain a spouse-joint tenant from proceeding with a State partition proceeding, at least where the property involved is the matrimonial home. Thus, although a spouse-joint tenant *may* be able to obtain an order for sale and distribution of the proceeds under State law, his chances of doing so are somewhat remote if the other spouse objects. The non-consenting spouse may attempt to invoke the jurisdiction of the *Family Law Act* 1975 (Cth.) during the twelve month separation period by obtaining an injunction under s. 114(1) to prevent the continuation of the State proceedings. If it is not possible to do this, the non-consenting spouse may employ delaying tactics in relation to the State proceedings until proceedings for principal relief can be invoked under the *Family Law Act* 1975 (Cth.) at the expiration of the twelve month separation period.

The preceding analysis demonstrates the difficulties a spouse-joint tenant may encounter when endeavouring to sever a joint tenancy of land held under the Torrens system during the twelve month separation period.

A simple method of severance should be available. As suggested earlier, legislation, such as exists in England, allowing severance by notice in writing to the other joint tenants, should be introduced.[118] In the context of separated spouses holding property as joint tenants, the spouse wishing to sever could then simply do so by giving notice in writing to the other spouse.

[115] See *Tansell* v. *Tansell* (1977) F.L.C. 90-280 (State case) where Jacobs J. was of the opinion that the *Family Law Act* 1975 (Cth.) covered the field in relation to property disputes between spouses and that State law was inoperative even during the twelve month hiatus. In the same case, Bray C.J. took the view that State law would remain operative at least until the s. 114(1) provisions of the *Family Law Act* 1975 (Cth.) came into operation. *Cf.* the statements of Waddell J. in *Reynolds* and *Reynolds* (1979) F.L.C. 90-728 where his Honour took the view that proceedings can be instituted in a State court during the twelve month separation period and further that the *Family Law Act* 1975 (Cth.) did not evince an intention to cover the field in respect of determining which court has jurisdiction over proceedings instituted, but uncompleted, before the institution of proceedings for principal relief.

[116] *Tansell* v. *Tansell* (1977) F.L.C. 90-280, 76,493 per Bray C.J.; *Reynolds* and *Reynolds* (1979) F.L.C. 90-728, 78,928 per Waddell J.

[117] (1979) F.L.C. 90-711.

[118] Supra p. 34. See *Law of Property Act* 1925 (Eng.), s. 36(2).