# Windfall by Wager or Will? Unilateral Severance of a Joint Tenancy

JOYCEY TOOHER*

*A joint tenant who decides to avoid the gamble inherent in the right of survivorship and regain testamentary power over jointly owned property must end the joint tenancy. This requires conversion of the joint tenancy into a tenancy in common by severance of the joint tenancy. Some difficult issues arise when the severance relates to Torrens title land. The common law position is not satisfactory. This paper examines various statutory alternatives and recent recommendations from other Australian jurisdictions designed to enable simpler, quicker and efficient unilateral severance of a jointly owned Torrens title land.*

## INTRODUCTION

It has been estimated that approximately 80% of co-ownership of real property in Victoria is held in joint tenancy.[1] Joint tenants are usually parties involved in a personal or family relationship.[2] There are far reaching consequences regarding the succession of property, because the right of survivorship, an integral feature of a joint tenancy, means that each co-owner will potentially inherit the other's share of the property. It is arguable that survivorship serves as a convenient pledge of the depth and loyalty of the personal or familial relationship between the joint tenants. This is particularly true of married and defacto couples who purchase their nuptial home in the bloom of their relationship. In exchange for the right of survivorship, all joint tenants renounce their powers of testamentary disposition. Neither joint tenant can be absolutely certain that he or she will be the sole survivor who takes the windfall inheritance, for the right of survivorship carries an inherent gamble as to who will die first.

Unfortunately, the various stimuli that bond personal or familial relationships are not immutable. When relationships weaken or end, intentions change accordingly and it may no longer be attractive to take the chance inherent in the right of survivorship. If the parties decide to retain the co-ownership, a tenancy in common becomes the more attractive option. A joint

* Senior Lecturer in Law, Monash University, Clayton.

[1] Letter of response from Ms Rosalyn Hunt, Registrar of Land Titles, 12 August 1997.

[2] Some co-owners may unwittingly become joint tenants by operation of the presumption in s 33(4) of the *Transfer of Land Act* 1958 which provides that 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'. Where co-owners acquire jointly owned property for commercial purposes, equity may deem these parties to be tenants in common in equity while they hold as joint tenants in law: see *Malayan Credit Ltd* v *Jack Chia-MPH Ltd* [1986] 1 AC 549.

tenancy may be converted into a tenancy in common by the process of severance. The various methods of severance at common law allow joint tenants, acting alone or together, to destroy the right of survivorship and wrest testamentary control. This effectively replaces any windfall by wager with a windfall by will. In 1861 Sir William Page Wood V-C[3] listed three ways in which a joint tenancy may be severed at common law:

> [I]n 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. [4]

In the typical situation, unilateral severance primarily involves an alienation whereby a joint tenant operates on his or her own share, such as by sale or gift to a third party. This mode of severance acknowledges that 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. On the other hand, severance by agreement or a mutual course of dealing recognises the manifest and mutual co-operation of joint tenants to convert the joint tenancy and destroy the right of survivorship.[5]

This article is concerned with statutory solutions to the problem faced by a joint tenant of Torrens land who wishes unilaterally to sever the joint tenancy without disposing of the beneficial interest.[6] This article takes up the conclusions reached in an earlier article by the writer which explored the current position in Victoria and concluded that statutory intervention was not only justified, but necessary to correct present anomalies.[7] Legislation to enable unilateral severance of Torrens title land by registered document exists in both Tasmania and Queensland. In 1980, the Tasmanian Parliament enacted s 63, *Land Titles Act* 1980 (Tas) to provide an additional mode of severance for joint tenants by registration of a declaration of severance. In 1994, the

[3] Sir William Page Wood V-C (who later became Lord Hatherley).

[4] *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.

[5] See infra.

[6] It is interesting to note that effecting a change in registered ownership from a joint tenancy to a tenancy in common in these circumstances generally does not alter the value of the respective co-owner's interest for stamp duty purposes. A conveyance or transfer of land which does not dispose of a legal or beneficial interest would not usually attract stamp duty since ad valorem duty is assessable on the conveyance or transfer of any property upon sale for consideration in money or money's worth. The resolution varies in the different Australian jurisdictions. For example, specific exemption is made in Queensland (*Stamp Act* 1894 (Qld), Schedule 1, Item 4(b)(viii)); a nominal payment of $20 is required in Tasmania for a declaration of severance in respect of any equitable entitlement (*Stamp Duties Act* 1931 (Tas) Schedule 2, Item 10 (b)). There does not appear to be any specific exemption in Victoria despite the provision that 'any instrument for the conveyance of real property made by joint tenants to themselves as tenants in common in equal shares ...[or vice versa]' is exempt (*Stamps Act* 1958 (Vic) Third Schedule, Item 6, exemption 21.

[7] See JG Tooher, "Testate or Intestate: Is There Anything for the Estate? Unilateral Severance of a Joint Tenancy" (1998) 24 *Mon L R* 422.

Queensland Parliament, as part of its consolidation of Queensland real property legislation, enacted s 59, *Land Title Act* 1994 (Qld) which allows for the severance of a joint tenancy through registration of a transfer. In addition, two law reform agencies have examined the unilateral severance of joint tenancies. The New South Wales Law Reform Commission issued a Report[8] 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.[9] In November 1994, the Law Reform Commission of Western Australia[10] recommended an amendment to the *Transfer of Land Act* 1893 (WA) similar to s 59 of the *Land Title Act* 1994 (Qld).

## LEGISLATIVE CHANGE IN TASMANIA AND QUEENSLAND

Each Australian jurisdiction has adopted a Torrens registration scheme and in certain key areas, such as bringing land under the system, the effect of registration and the caveat system, the legislation is reasonably comparable. However, differences are inevitable as different jurisdictions have adopted individual solutions to similar problems. This is particularly evident in s 59 of the *Land Title Act* 1994 (Qld) and s 63 of the *Land Titles Act* 1980 (Tas) which are not identical. Each Parliament has implemented its different views regarding the form of document that must be registered and whether notice is a precondition to effective severance. The divergent approaches are confirmation of the complexity and uncertainty existing in this area. An unfortunate by-product of these differences is a corresponding lack of uniformity produced in Torrens legislation throughout Australia.[11]

### Form of document

Under s 63, *Land Titles Act* 1980 (Tas) a registered joint tenant is able to effect unilateral severance by the execution and registration of a declaration in a form approved under the Act. Once registered, the joint tenant who executed the declaration becomes a tenant in common with the remaining co-owners. The legislation provides a specific and certain method to joint tenants who

[8] New South Wales Law Reform Commission: *Unilateral Severance of a Joint Tenancy*, (Report No 73, July 1994). See also, C Sherry, 'Unilateral Severance of Joint Tenancies' (1995) 3 *Australian Property Law Journal* 1.

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

[10] Law Reform Commission of Western Australia: *Report on Joint Tenancy and Tenancy in Common* (Project No 78, November 1994): See also, T Wilson, "The Western Australian Law Reform Commission Reviews Co-ownership" (1995) 6 *Australian Property Law Bulletin* 182–183

[11] In 1971, Barwick CJ, having referred to the various Torrens Acts of the States of the Commonwealth and acknowledged that these Acts were all not in identical terms and some did contain significant variations, nevertheless added, that it was a matter for regret that complete uniformity of this legislation has not been achieved, particularly as Australians now deal with each other in land transactions from State to State: *Breskvar* v *Wall* (1971) 126 CLR 376, 386.

wish to sever without obtaining the consent of the other co-owners.[12] Section 63(3) clearly states that the method of severance prescribed 'is in addition to, and not in substitution for, any other mode available' to a joint tenant before the enactment of the provision. If the Tasmanian provision was adopted in identical terms in Victoria, it would provide a relatively simple and certain method of severance. The method of severance under the option provided in s 63 requires registration before being effective. However, registration is not dependent on the production of a duplicate certificate and is thus assured for the severing joint tenant because, in practice, the Land Titles Office does not require the production of the duplicate certificate of title to enable registration.[13] It is understood that if the duplicate certificate of title is produced when the declaration is lodged, the declaration of severance is duly endorsed on the duplicate certificate. If the duplicate certificate is not produced, the declaration is simply registered. This practice foreshadows a totally computerised register which dispenses with duplicate certificates of title. However, it impedes the reliability of any existing duplicate certificate which remains unendorsed because the original certificate of title and the duplicate certificate will not be identical. This is not necessarily a bad outcome because at least it will encourage prospective purchasers to search the register to establish the current status of a Torrens title.[14] Furthermore, a mortgagee holding the duplicate certificate of title by way of an unregistered mortgage is unlikely to be prejudiced by the severance since the mortgagee's rights are generally enhanced rather than diminished by the destruction of the right of survivorship.

In Queensland, s 59, *Land Title Act* 1994 replaced the rather archaic, obscure and narrow s 92, *Real Property Act* 1861–1990 which required all co-owners to execute documents relevant to effect a partition.[15] The new provision allows for the unilateral severance of a joint tenancy by registration of a transfer. There is no obvious explanation as to why the Queensland provision prescribes an instrument of transfer rather than a declaration. However, since one of the significant objects of the *Land Title Act* was to improve the registration scheme and simultaneously to reduce the voluminous body of existing legislation, it is understandable that existing machinery and processes for registering an instrument of transfer were preferred to the introduction of a new form of declaration. Further, the anticipated opposition from

[12] In 1994, the New South Wales Law Reform Commission reported that the Examination Section of the Tasmanian Land Titles Office and Registry of deeds estimated that approximately four declarations were lodged per month, the majority dealing with matrimonial cases. See NSW Law Reform Commission Report, op cit (fn 8 supra), para 6.5

[13] Id, para 6.4

[14] There are other interests, such as a caveat, which are notified on the original but not endorsed on the duplicate certificate.

[15] Section 92 dealt with 'partition ... made by coparceners joint tenants or tenants in common'. With the exception of s 187(c) and (d), the *Real Property Act* 1861–1990 (Qld) was repealed in 1994 by s 193, *Land Title Act* 1994 (Qld) which was enacted to consolidate and reform the law relating to registration of freehold land. The Act repealed eighteen other Acts, reducing the body of legislation by some 700 — 800 pages (Qld, Vol 328, 1994, 7220 per Howard Hobbs, MLA). The original s 193 disappeared from the *Land Title Act* within months when the Act underwent further refinement.

conservative political quarters may have encouraged the use of familiar machinery to effect severance.[16]

Like s 63(2), *Land Titles Act* 1980 (Tas), there is no statutory dispensation with the production of the duplicate certificate of title in the Queensland provision. Furthermore, there is no obligation on the severing joint tenant to provide the duplicate certificate of title.[17] Even though the form of document is not identical, the approach taken in each jurisdiction requires an express statement of intention to sever in a prescribed written form. The main advantage of an express written statement is that it provides clear evidence of the joint tenant's intention to sever. Ironically, however, both legislative provisions require registration of the prescribed document before severance is effected which imposes a level of formalism that may frustrate the clear intent expressed in the document. If the requirement of an express written statement was to provide evidence of the joint tenant's intention and determination to sever, strict insistence on registration is not only inflexible, but conflicts with this objective. The effect of compliance with the prescribed formalities is clearly set out in each of the legislative provisions. This, at least in respect of the Queensland provision[18], resolves any concern as to whether registration of a self dealing transfer executed by a joint tenant effects severance.[19] However, insistence on registration does not provide a sufficiently flexible set of formalities to enable effective severance by a joint tenant who, for various reasons, is unable to register an executed document.[20]

[16] For example, during the second reading debate a question was raised about clause 59 although it was acknowledged that the provision was "moving in the right direction". (1994) vol 328, Queensland Parliamentary Debates, page 7222 per Howard Hobbs, MLA.

[17] Under para 2300 of the *Queensland Land Title Practice Manual*, the severing joint tenant who is unable to produce the duplicate certificate of title must execute a declaration to accompany the s 59 transfer document. The declaration includes a statement of who holds the title. It is the Registrar who requests the holder of the title to release it for cancellation in compliance with s 154, *Land Title Act* 1994 (Qld). If the title is not produced within seven days of the request, the Registrar simply dispenses with its production and cancels the old title. New, separate titles automatically issue following registration of the transfer and the subsequent severance of the joint tenancy.

[18] Section 63(3) of the Tasmanian Act provides that the mode of severance prescribed is additional to, and not in substitution for, modes existing prior the proclamation of the provision. Despite the fact that there is no Queensland counterpart to s 63(3) of the Tasmanian provision, the Queensland provision clearly offers additional advantages because the former s 92, *Real Property Act* 1861–1990 did not permit unilateral severance.

[19] The ambit and effect of s 72(3) of the *Property Law Act* 1958 (Vic) is not absolutely clear. The doubt expressed by two members of the High Court in *Corin* v *Patton* (1990) 169 CLR 540 and the position in English case law serves to add to the confusion. See Tooher, loc cit (fn 7, supra).

[20] The intention to sever by a joint tenant whose personal relationship with the other joint tenant has broken down, may be prompted by the impending death of a joint tenant. Ill health or insufficient time may prevent registration. Other reasons include the existence of 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. Some of the problems this causes are addressed in Tooher, loc cit (fn 7, supra).

### Notification of severance

Neither the Tasmanian nor the Queensland provisions require the consent of the other joint tenants as a prerequisite for severance. This reflects the current position regarding unilateral severance at common law which is consistent with the freedom of a joint tenant to deal with his or her interest. For example, a joint tenant who alienates his or her interest to a third party to effect a severance is not required to obtain the consent of the other joint tenants of the severance. However, under existing common law methods of unilateral severance, a severing joint tenant is able to conceal the severance from the other co-owners. Logically, this cannot happen where severance is effected by agreement or a mutual course of dealing where consent and notice are inherent to the method of severance. It is questionable whether a joint tenant acting unilaterally should be permitted to conceal the severance. The most justifiable objection to secret severance of a joint tenancy is the opportunity for fraud if the severing joint tenant is the surviving joint tenant. For example, a fraudulent severing joint tenant may be tempted to conceal severance documents and take the benefit of survivorship. This situation does not arise where registration is a precondition to severance because publicity is intrinsic to the Torrens registration scheme. But there are additional reasons for giving notice of severance to other joint tenants and these are considered below.[21] Both the Tasmanian and the Queensland provisions require that notice of the severance should be given to the other joint tenants but there are significant differences between the two provisions.

Section 63(2) of the *Land Titles Act* 1980 (Tas) imposes an obligation on the Recorder of Titles to 'notify the other co-owners by notice in writing upon registering a declaration of severance'. However, the Queensland Act makes the giving of notice a precondition to severance. Under s 59(2) of the Queensland Act, the Registrar of Land Titles may register the instrument of transfer 'only if a registered owner satisfies the Registrar that a copy of the instrument has been given to all other joint tenants'.

The Tasmanian provision does not spell out what is required of the Recorder to notify the other co-owners.[22] It may also be difficult to implement this provision because notification by the Recorder may be somewhat impractical. Presumably, in the circumstances, notification should require that the change in co-ownership is actually communicated to the other registered owners. It is doubtful whether the Recorder would be discharging the obligation to notify by merely posting a requisite notice to the other co-owners. In any case, if the Recorder must rely on the address recorded at the time the joint tenants originally became registered, it is quite possible that this is no longer the current address of the registered joint proprietors. The consequential administrative difficulties of ascertaining the correct address for

[21] See infra.

[22] Section 30, *Acts Interpretation Act* 1931 (Tas) deems that where service may be effected by post, service is effected at the time when the letter, sent by certified or registered mail to the last known address or usual address of the addressee, would be delivered in the ordinary course of post.

notification would be expensive and time consuming without necessarily guaranteeing compliance with the statutory requirement.

In addition, given that the Tasmanian provision is expressed in mandatory terms, it is relevant to ask whether non-compliance prejudices the validity of the registration, and consequently whether this would have any impact on the issue of severance. The fact that the Recorder's obligation to give notice is subsequent to registration and that the purpose of s 63, is to provide a method of unilateral severance suggest that there is no parliamentary intent to invalidate registration if there is failure to comply with s 63(2). The alternative view would work a 'serious general inconvenience, or injustice to persons who have no control' over the Recorder's actions 'and at the same time would not promote the main object of the Legislature'.[23] If the Recorder's failure to notify the other co-owners has no apparent effect on severance, this provision would seem to be nothing more than an act of courtesy to the other co-owners.

The Queensland provision makes notice a prerequisite to registration, and since registration is a prerequisite to severance, notice plays a very important role in the process of severance. Under s 39(1), *Acts Interpretation Act* 1954 (Qld), a document can be given by personal delivery, 'or by leaving it at, or by sending it by post, telex or facsimile or similar facility to, the address of the place or business of the person last known to the person' giving the document.[24] If notification was the Registrar's responsibility, regardless of the means adopted, registration and thus severance would inevitably be delayed until the administrative procedures of the Registrar's office for giving notice had been completed. Furthermore, an administrative error which causes the Registrar to overlook the giving of notice could remain undetected or unresolved long enough to frustrate the severance process, especially where the severing joint tenant is suffering from a terminal illness. In these circumstances, the death of the joint tenant may precede severance. This example demonstrates that it would be better to place the giving of notice in the control and responsibility of the party lodging the severing instrument for registration. For this reason, the Queensland approach, which requires the severing party to give a copy of the severing instrument to all other joint tenants, is preferred.

Under the Tasmanian approach, a joint tenant's intention to sever is more important than giving notice of the severance to the other joint tenants. Conversely, under the Queensland approach which makes notice a precondition to severance, the severing joint tenants intention to sever is secondary. The difference in the two approaches turns on choosing between conflicting policies: are the interests of the other co-owners in knowing that one co-owner

[23] *Montreal Street Railway Co* v *Normandin* [1917] AC 170, 175. It is interesting to note the comment of McHugh JA that the courts have shown great reluctance to invalidate an act done pursuant to a statutory provision because of failure to comply with an *antecedent* condition: see *Woods* v *Bate* (1987) 7 NSWLR 560, 567. This could suggest there would be more reluctance to invalidate an act done because of failure to comply with a *subsequent* condition.

[24] Under s 39(2) this applies whether the expression 'deliver', 'give' , 'notify', 'send' or 'serve' is used.

intends to effect a unilateral severance more deserving than allowing a joint tenant the freedom to deal with his or her interest in the jointly owned property with the minimum of formality? Secret severance may unfairly mislead other co-owners into relying on survivorship. For example, if A and B are joint tenants of Blackacre, and A secretly severs the joint tenancy, B will wrongly assume that the property will pass by survivorship. On legal advice, B will not make any specific testamentary provision concerning the devise of Blackacre.[25] However, notice given to B after severance will meet this objection. Unilateral severance of a joint tenancy empowers a joint tenant to exercise his or her freedom to deal with the property. Thus A might wish to sever the joint tenancy to defeat the potential hardship that could be created by the right of survivorship and to assume testamentary control in accordance with altered life styles, unforseen events and renewed aspirations. This power is undermined if the intentions of A must first be disclosed to B and be subject to B's scrutiny. This exposes A to the possibility of action by B to delay or prevent the severance, either through personal pressure or injunctive relief.[26]

## RECOMMENDATIONS FOR REFORM

The New South Wales Law Reform Commission[27] and the Law Reform Commission of Western Australia[28] have recommended changes relating to unilateral severance in their respective jurisdictions. The proposals regarding unilateral severance of Torrens title land are not uniform and to a large extent, reflect the differences in the Queensland and Tasmanian legislation.

### The form of the registered document

The Law Reform Commission of Western Australia has recommended the enactment of a legislative provision similar to s 59 of the Queensland legislation. It is not entirely clear whether this indicates a commitment to the registration of a transfer executed by the joint tenant to himself or herself rather than the registration of a declaration of severance.[29] By comparison,

[25] Furthermore, even though Blackacre might be included in the residuary estate, B may not have taken the value of Blackacre into account in directing the benefit of the residuary estate.

[26] *In the Marriage of Badcock* (1979) 5 Fam LR 672, Mr Badcock, sought an injunction from the Family Court to restrain his wife and her trustee from pursuing registration of the transfer which would have severed their joint tenancy of real property. Mrs Badcock was terminally ill, and in an effort to delay registration, he argued that the *status quo* should be preserved pending his application for a property settlement upon dissolution of the marriage.

[27] New South Wales Law Reform Commission Report, loc cit (fn 8, supra). See also, Sherry, loc cit (fn 8, supra).

[28] Law Reform Commission of Western Australia Report, loc cit (fn 10, supra). See also Wilson, loc cit (fn 10, supra).

[29] Paragraph 3.35 of the Report is headed 'Registration of declaration of severance'. Further, the preceding paragraph refers to a 'declaration of severance ... registered as proposed below'.

the New South Wales Law Reform Commission[30] clearly favoured a severance by registration of a declaration. The Commission's ultimate recommendation for severance by registered declaration was seen to be 'simple, affordable and quick'.[31] These were key attributes it perceived necessary for any new procedure for unilateral severance. The New South Wales Commission declined to adopt the suggestion of the Land Titles Office to use the existing Instrument of Transfer for this purpose, preferring a newly developed form of declaration 'in order to distinguish this method of severance from a transfer to self ... and also to avoid characterising the transaction as a transfer'.[32] The different role played by the declaration, and its implications, would be reflected in the additional information required in the proposed prescribed form. For example, a clause in the declaration acknowledging that due consideration had been given to making provision for the disposition of property would help avoid a result which might thwart the very purpose of the severance.[33] Furthermore, given that the proposed method of severance would offer a facility similar to making or redrafting a will, accompanying formalities were necessary to safeguard against forgery or duress. For example, a declaration should be signed by the severing joint tenant in the presence of one or more attesting witnesses. The Commission went so far as to suggest that any regulations should address issues such as whether or not a person likely to benefit under an ensuing will should be disqualified from being a witness. The proposed standard form document is relatively simple and unequivocal. The attestation formalities are sensible and useful to safeguard against forgery or duress.

Both Law Reform Commissions recognised that the registration process can be seriously impeded by the unavailability of the duplicate certificate of title and that existing mechanisms for dispensing with its production were unsatisfactory. This was especially the case for elderly or terminally ill joint tenants whose access to the title was deliberately or accidentally prevented.[34] Both suggested a new statutory provision for dispensing with the need to produce the duplicate certificate to enable registration. However, the solutions recommended were not identical. The recommendation in New South Wales was that the proposed legislation impose an obligation on the Registrar to register a declaration of severance without insisting on the production of the certificate of title.[35] The Law Reform Commission of Western Australia[36]

[30] New South Wales Law Reform Commission Report: loc cit (fn 8, supra). See also, Sherry, loc cit (fn 8, supra).

[31] New South Wales Law Reform Commission Report, loc cit (fn 8, supra), para 7.4.

[32] Id, para 8.24.

[33] The reason for dissolution of the joint tenancy may be to prevent a particular family member from taking by survivorship. In the absence of a will, this very person may take under an intestacy: see New South Wales Law Reform Commission Report, op cit (fn 8, supra), para 8.27.

[34] For example *Freed* v *Taffel* [1984] 2 NSWLR 322 (where the other joint tenant refused to hand it over) and *Patzak* v *Lytton* and the Registrar of Titles [1984] WAR 353, 355 (where the whereabouts of duplicate certificate was unknown).

[35] New South Wales Law Reform Commission Report, op cit (fn 8, supra) para 8.14.

[36] Law Reform Commission of Western Australia Reoprt, loc cit (fn 10). See also Wilson, loc cit (fn 10, supra).

recommended the adoption of a legislative provision similar to that implemented in s 59 of the *Land Title Act* 1994 (Qld) which gives the Registrar express power to exercise discretion to dispense with the requirement to produce the certificate of title to enable a transfer to be registered.[37] The New South Wales approach removes any possibility that inaccessibility of the duplicate certificate of title will obstruct registration because the Registrar has no discretion to refuse to register the declaration of severance on this ground. The Western Australian approach leaves this issue open, relying on the Registrar's discretion in every case. Presumably, if the Registrar always exercises the discretion to promote the purpose of the legislation, registration will not be impeded by non-availability of the title. This approach lacks the certainty and predicability to enable joint tenants to attempt confidently a unilateral severance and diminishes the effect of the leading provision. The New South Wales approach is therefore preferred.

The NSW Law Reform Commission considered whether the consent of registered judgment creditors, mortgagees and chargees or any third party caveator (as distinct from a co-owner caveator) should be obtained before permitting registration of a unilateral severance. Or alternatively, whether notice of the severance should be served upon such parties. Since the Commission concluded that 'not only is no disadvantage suffered by these people, but their position may in fact be enhanced by a severance', it recommended that consent was not required, although as a matter of courtesy notice of the severance should follow registration of the declaration.[38] An amendment to s 74H(5), *Real Property Act* 1900 (NSW), making registration of a declaration of severance an excepted dealing, would ensure that existing caveats lodged by third parties would not prevent the registration of the declaration.[39] Although the position of mortgagees and judgment creditors is enhanced by severance, by extending the security rights beyond the death of the mortgagor or debtor, unless a mortgagee or creditor is told of the severance, such parties are unlikely to appreciate that they have rights after the death of the joint tenant who signed the mortgage or incurred the judgment debt.

The NSW Law Reform Commission also gave two reasons why caveats lodged by the non-severing joint tenants were not a significant problem. First, it believed that, in practice, it would be rare that the opposition to severance would be sufficient in itself to support a caveat. However, this does not take into account the lodgement of a caveat by a registered proprietor who suspects fraud or forgery. In New South Wales, s 74F(2) provides that any registered proprietor who fears an improper dealing with his or her title may lodge a

[37] Op cit (fn 10, supra) para 5.1.6.

[38] New South Wales Law Reform Commission Report, op cit (fn 8, supra) paras 8.31–8.33.

[39] Id, para 8.66. Section 74H(5), *Real Property Act* 1900 (NSW) creates an exception to the general provision that the Registrar General cannot record in the register any dealing prohibited by caveat without the caveator's consent (s 74H(1). Under the exception, certain specified dealings and entries may be recorded despite the caveat unless the caveat otherwise specifies: for example, applications by executors (s 74H(5)(a)) and dealings by mortgagees exercising rights under a mortgage lodged in registrable form before the caveat was lodged (s 74H(5)(g)).

caveat to prohibit the recording of any dealing.[40] Second, s 74P of the *Real Property Act* 1900 (NSW), under which a person who lodges a caveat 'wrongfully and without reasonable cause' is liable to pay compensation, is sufficient to discourage lodgement of a frivolous caveat to obstruct a severance.[41] However, it is suggested that after the death of the severing joint tenant, there may be practical difficulties proving that the non-severing joint tenant who delayed registration by lodging a caveat was acting unreasonably or wrongfully and without reasonable cause. The stakes to prevent severance may be high enough to justify the risk of litigation by the deceased joint tenant's personal representatives.

### Legal and equitable severance

Both the Tasmanian and the Queensland provisions require registration of an appropriate document before unilateral severance is effected. This was also the view of the New South Wales Law Reform Commission. However, although the Law Reform Commission of Western Australia recommended an amendment to its Torrens statute similar to s 59 of the *Queensland Land Title Act* 1994, it accepted, without discussion, that unilateral severance may occur prior to registration. It proposed that in addition to the existing methods, alternatively, 'a joint tenant could opt simply to give written notice'. Notice of severance would be effective in equity until a declaration of severance was registered.[42] The New South Wales Law Reform Commission noted that equitable severance on communication of a written notice had a number of appealing features, but ultimately rejected it because it produced greater uncertainty and a greater chance of fraud than severance by registration.[43]

### Severance in equity: severance by notice

The High Court in *Corin* v *Patton* also unequivocally rejected unilateral severance by notice.[44] The High Court showed no interest in extending the existing categories of equitable unilateral severance.[45] Assuming Parliament

[40] The likelihood of the non-severing joint tenant lodging a caveat in Victoria is even lower because there is no similar statutory provision and the common law position is doubtful. The issue was left unresolved in *Swanston Mortgage Pty Ltd* v *Trepan Investments Pty Ltd* [1994] 1 VR 672, 682, although existing judicial opinion suggests that a registered proprietor is permitted to lodge a caveat if there are additional circumstances giving rise to a further interest in the land, *Re An Application by Haupiri Courts Ltd* (No 2) [1969] NZLR 353.

[41] Arguably, s 118, *Transfer of Land Act* 1958 (Vic) would serve a similar purpose. It provides that: 'any person lodging with the Registrar without reasonable cause any caveat under this Act shall be liable to make to any person who sustains damage thereby such compensation as the Court deems just and orders'.

[42] Law Reform Commission of Western Australia Report, op cit (fn 10, supra) paras 3.34 and 3.35.

[43] New South Wales Law Reform Commission Report, op cit (fn 8, supra) paras 7.8–7.20.

[44] (1990) 169 CLR 540. See also Tooher, loc cit (fn 7, supra).

[45] This happens when alienation of a joint tenant's interest destroys unity of title or interest, which occurs when the interest is the subject matter of a specifically enforceable contract, an unregistered gift of Torrens land or a declaration of trust.

does not share this view, the concept of an equitable severance of Torrens title land based on written notice is nevertheless fraught with problems. One such problem is to decide what constitutes written notice. One of the dangers is that a joint tenant may be presumed to have intended to sever because a particular written communication may be regarded as sufficient to amount to a notice of severance, albeit unintended.

Another problem is that if equitable severance is deemed to exist on communication of a notice to sever, the surviving joint tenant may nevertheless register a transmission application and become sole proprietor. The indefeasible interest so acquired will be subject to the normal operation of general Torrens principles.[46] There are a number of issues here. First, under s 43, *Transfer of Land Act* 1958 (Vic), notice of an unregistered interest does not of itself amount to fraud. Litigation may be necessary to establish whether such action amounts to fraud[47] and it may be necessary to enact a stipulation that registration by a surviving joint tenant in clear disregard of notice of severance constitutes fraudulent conduct.[48] Furthermore, it may be necessary to amend s 43 to prevent a co-owner from obtaining registration pursuant to a survivorship application without first swearing an affidavit that no notice of severance has been received. Second, under the theory of immediate indefeasibility which applies in Victoria,[49] a fraudulent co-owner who obtains registration is able to pass on an indefeasible title to a third party. For example, assume A and B are joint tenants of Blackacre, Torrens land, and A dies. Suppose further that B then fraudulently registers as sole proprietor pursuant to a survivorship application, despite having received notice of severance from A. B is able defeat the interests of A's beneficiaries by selling Blackacre to a bona fide purchaser who takes without notice of the fraud. Third, the accuracy of the Torrens Register would be undermined by the creation of further unregistered interests. It would cease to be an accurate reflection of the relationship of co-owners. In its consideration of equitable severance by notice, the New South Wales Law Reform Commission did not

[46] Speaking of fraudulent joint tenants attempting to conceal assignment if the legal joint tenant dies first, Deane J said in *Corin* v *Patton* (1990) 169 CLR 540, 585–6:

> At least in the case of an assignment which could be kept concealed in the event of the death of the non-assigning joint tenant, there is, however, plainly something to be said for the view that a legal joint tenant should, by analogy with the position of a purchaser for value without notice or by operation of the doctrine of estoppel in pais, be unaffected as against the other joint tenant or a volunteer claiming through him, by an equitable assignment of the other joint tenant's share of which he remained ignorant until after the death of the other joint tenant.

[47] There is no statutory definition of fraud in the *Transfer of Land Act* 1958 (Vic). Fraud under the Torrens system requires 'something more than mere disregard of rights of which the person sought to be affected had notice. It suggests something in the nature of "personal dishonesty" or "moral turpitude"': see *Wicks* v *Bennett* (1921) 30 CLR 80, 91.

[48] New South Wales Law Reform Commission Report, op cit (fn 8) paras 7.13.

[49] The Victorian Court of Appeal has confirmed the acceptance of immediate indefeasibility in Victoria and overruled the decision of Gray J in *Chasfild Pty Ltd* v *Taranto* [1991] 1 VR 225 which favoured deferred indefeasibility. See *Pyramid Building Society (in liq)* v *Scorpion Hotels Pty Ltd* (unreported, Court of Appeal Victoria, 4 February 1997, per Brooking, Tadgell and Hayne JJA).

think this was a compelling argument for a number of reasons.[50] It mentioned the fact that a joint tenancy can already be severed in equity when a joint tenant enters into a valid contract of sale with a third party and by operation of the principles relating to incomplete gifts. The Commission also noted that the courts have consistently recognised unregistered interests. Furthermore, the Register will not necessarily reflect the status between co-owners where there has been severance by agreement or a course of conduct.[51]

In addition, although the New South Wales Law Reform Commission ultimately rejected equitable severance by notice[52], it considered that it had a number of positive features. Under the model it considered, a joint tenant could 'effect a severance in equity on communication of a written notice, provided that the notice evinces a clear intention of effecting an immediate severance of the joint tenancy. Severance at law would not take place until registration of the notice.'[53] The Commission recognised that this relatively simple mode of severance had a number of attractive attributes such as the low cost,[54] speed[55] and informality[56] by which a joint tenant could become a tenant in common. Third parties are unlikely to be disadvantaged, because a bona fide purchaser for value or a non-fraudulent volunteer may still rely on the register. Equitable severance by the means proposed would affect only the co-owners.[57] Furthermore, the possibility of intervening third party rights, which would operate in accordance with normal Torrens system priority rules, would provide sufficient incentive for the severing joint tenant to proceed to registration without delay. The Commission also believed that the severing joint tenant would be protected if the other joint tenant later acquired title to the whole property in disregard of notice of severance because it considered that such registration would amount to fraudulent conduct.[58]

However, since the New South Wales Law Reform Commission considered that several other factors outweighed these advantages, it rejected this equitable severance by notice.

In the view of the Commission, the informality of severance by notice produced manifold uncertainty. Informality demands the absence of specific

[50] New South Wales Law Reform Commission Report, op cit (fn 8) para 7.9.

[51] This is also the case where the registered proprietors are joint tenants at law but tenants in common in equity through the operation of principles set out in *Malayan Credit Ltd* v *Jack Chia MPH Ltd* [1986] 2 AC 549.

[52] See text accompanying fn 43 supra.

[53] New South Wales Law Reform Commission Report, op cit (fn 8) para 7.8.

[54] Id para 7.15. There are no registration costs involved and it should not be necessary to consult a lawyer. In any case legal costs should be minimal because court proceedings (eg, regarding caveats), access to title documents and administrative delays are avoided.

[55] Ibid. The notice becomes effective on communication. It is not clear whether this requires actual communication or various modes involving constructive notice.

[56] Ibid. The notice need not be in an particular form, as long as the severing joint tenant makes clear the intention to sever immediately.

[57] Id para 7.11.

[58] Fraud by the registered proprietor is an exception to indefeasibility of title. In Victoria, this would mean that the title of a fraudulent registered proprietor may be divested at the suit of the defrauded party: see *Transfer of Land Act* 1958 (Vic), ss 42(1) and 44(1).

requirements but this creates uncertainty because there are no absolute assurances, first, whether a document constitutes notice; second, whether a document may impliedly or incidentally sever a joint tenancy; and third, whether there has been communication of the notice. The result would be an increased likelihood of litigation to decide whether a given document had the requisite elements to sever by notice.[59] The Commission also believed that other advantages of informality may be illusory because it doubted whether anyone would attempt to effect a severance without consulting a lawyer. Another significant objection to severance by notice was the increased risk of fraud or duress because it would be less practical to insist on the same safeguards against fraud which exist in respect of wills.[60] Finally, the Commission was concerned that introducing severance by notice admits the possibility of unscrupulous beneficiaries falsely alleging that severance has taken place.[61]

The Commission rejected notice by severance in relation to Torrens title land but recommended that severance by declaration should be available to joint tenants of personal property. Equitable severance is achieved on communication of the written declaration to the other joint tenants in cases where there is a system of registration of title, as for example with company shares, and severance at law is postponed until registration.[62] The different treatment accorded to personal property and Torrens title land followed the Commission's acknowledgment that real property 'will generally be the single most valuable asset a person will ever own, whether alone or in combination with others'[63]. Consequently, it formed the view that the survivorship principle is not as significant or valuable to a co-owner of personal property. Furthermore, most items of personal property could be alienated or divided much more easily than was possible with real property.[64] In particular, severance of personal property was not subject to the same impediments arising by virtue of the requirements peculiar to Torrens system land, such as problems posed by caveats and delays caused by the inability to obtain the duplicate certificate of title.[65]

The differences identified in the preceding paragraph warrant some comment. First, the Commission's focus on the significance of the survivorship principle obscures the central issue which concerns the freedom of joint owners to exercise their right to sever the joint tenancy and reclaim testamentary power. It also contradicts the Commission's recommendation that reforms to simplify methods of unilateral severance are not only desirable but

[59] New South Wales Law Reform Commission Report, op cit (fn 8) para 7.17.
[60] Id para 7.19. The Commission also dismissed as unsatisfactory an equivalent to s 18A of the *Wills, Probate and Administration Act* 1898 (NSW). This section gives the Court discretion to treat as a will a document purporting to embody the testamentary intentions of the deceased even though it has not been executed in accordance with the formal requirements. The Court may take into account *inter alia* statements made by the deceased.
[61] Id para 7.20.
[62] Id paras 8.60–8.63 and see also Recommendation 14, 87.
[63] Id paras 4.27–4.28.
[64] Id para 4.27.
[65] Id para 4.28.

necessary. The Commission itself challenged a possible suggestion that 'any move to simplify the requirements for unilaterally severing a joint tenancy should be resisted because joint tenancies deliberately created should not be too lightly destroyed.'[66] Furthermore, it acknowledged that any perceptions of a joint tenancy as a permanent arrangement would be misconceived and that severance is a present right available to joint tenants to avoid the hardship of survivorship.[67] Second, the fact that most items of personal property can be alienated or divided much more easily than is possible with real property is not in itself a reason for retaining or imposing formalities in connection with real property, especially when the objective is to simplify methods of unilateral severance. Third, the impediments which the Commission attributes to the requirements peculiar to Torrens system land, such as problems posed by caveats and delays caused by the inability to obtain the duplicate certificate of title, may, in some situations, become impediments because registration is a precondition to severance. The formality for unilateral severance by notice can be reduced to the minimum steps required to avoid fraud or duress or to thwart allegations by unscrupulous beneficiaries. For example, a written document indicating a desire to sever the joint tenancy and served on the other co-owners or even a third party would serve this purpose.

The need for an express written notice provides a measure of certainty and a basis for making severance prior to registration a viable option. The Commission had a view that severance by notice presupposes a degree of informality that creates a series of difficulties. It is suggested that informality will have a different impact depending on whether the informality relates to the different steps required to effect severance or the document which communicates the desire to sever. Informality in the requisite steps connected with the notice is more acceptable than informality in the nature of document because the latter creates uncertainty. The Commission, however, was prepared to treat any document which evinces a clear intention of effecting an immediate severance of the joint tenancy as a notice capable of severance. A petition to the court by an applicant in matrimonial proceedings seeking a property settlement is insufficient notice of severance because this is not an intention to effect immediate severance but one to take effect in the future.[68] The Commission's interpretation of the degree of informality required of the written notice is unnecessarily wide and therefore unnecessarily uncertain. It may invite a court to find an implied or imputed intention to sever in order to impose a result which it considers morally justified in the circumstances. On the other hand, a formal written document expressing an intention to sever is capable of avoiding the hardship otherwise caused by requiring nothing short of registration to constitute severance. This position is especially warranted if the mode of severance is additional to existing forms of severance. A prescribed notice similar to a declaration of severance would not only constitute unequivocal intention, but would provide acceptable safeguards to avoid

[66] Id para 5.2.
[67] Id para 5.3.
[68] Id, para 6.13. See *Harris* v *Goddard* [1983] 1 WLR 1203, 1210. Cf *Burgess* v *Rawnsley* [1975] Ch 429, 447.

duress and fraud. The Commission's doubt that 'anyone would attempt to effect severance without consulting a lawyer' lends support to this solution.

A more difficult aspect is what constitutes communication of the notice to the other joint tenants. This issue has arisen in England regarding the notice permitted under s 36(2) of the *Law of Property Act* 1925 (UK) which enables unilateral severance of a joint tenancy by giving notice in writing to the other joint tenants. Under s 196(4) of the Act, any notice required under the Act is sufficiently served if sent by registered mail and is not returned undelivered. Service is deemed to have been made at the time at which the registered letter would in the ordinary course be delivered. In *Re 88 Berkeley Road* v *Turnsek*[69] it was held that a notice which had been posted to the other joint tenant but never been received was sufficiently served for the purposes of s 36(2).[70] It may, at first, seem irrational to treat this situation as an instance of severance by notice, especially if the deemed time of severance supposedly emphasises the significance of communicating the desire to sever to the other joint tenant. However, if it is not necessary that the other joint tenants actually receive the notice (and indeed, intended recipients of the notice may never know of its existence) what is the purpose of such a notice?

First, the answer presupposes that the provision of notice in these circumstances is a mere formality. It is arguable that formalities imposed in the context of severance perform various functions.[71] They function as a ritual to reinforce the severing joint tenant's intention to sever, thus ruling out impetuous and equivocal motives. The formalities provide reliable evidence of the intention to sever, thus serving as objective proof of a joint tenant's intentions. They also serve to protect the parties involved against fraud and undue influence. Second, the rationale underpinning the existing common law methods of unilateral severance assumes that a joint tenancy is not a permanent arrangement. It also acknowledges the right of joint tenants to make individual and independent decisions about their commitment to the right of survivorship, and so speaks in terms of the actions of a joint tenant 'operating' on his or her own share. Third, a statutory method of severance by notice does not require the destruction of the characteristic unities of time, title, interest or possession. This method of severance is a compromise which minimises the formalities and removes the difficult problems associated with Torrens registration.[72] Therefore, the date of execution of the notice is the date on which the severing joint tenant is deemed to have fulfilled the desire to sever. After this time survivorship should be irretrievable because execution of the notice is the operative action to sever rather than the giving of notice to the other co-owners. Despite the terminology, if the other co-owners do not

[69] [1971] Ch 648.

[70] It was also held that in the case of a notice in writing, there was no difference between 'serving' and 'giving': [1971] Ch 648, 652.

[71] For a discussion of the functional justification of formalities in this context, see Tooher, loc cit (fn 7). See also AG Gulliver and CJ Tilson, 'Classification of Gratuitous Transfers', (1941) 51 *Yale Law Journal* 1.

[72] In particular, delays between lodgement and registration caused by caveats, access to the certificate of title and sundry administrative problems.

receive the notice, the executed document is, in effect, no more than a declaration of severance.

### Severance at common law

The other approach to unilateral severance recommended and adopted was severance by registration.[73] Ultimately, a procedure where nothing short of registration will sever means that the intentions of the severing joint tenant will be defeated if he or she dies before completion of the registration process, and the surviving co-owners will benefit under the survivorship rule. The New South Wales Law Reform Commission recognised that this might happen due to a number of reasons, such as time delays in the registration process, institution of court proceedings by other joint tenants and the presence of a caveat on the title.[74] Nevertheless, the obvious disadvantage of making registration a prerequisite for severance in these circumstances did not, in the Commission's view, warrant special provision, because this would only happen rarely.[75] Furthermore, making registration a pre-requisite to severance would maintain the integrity of the Register because this procedure does not create further equitable interests outside the Register.[76] While there is merit in containing the number of equitable interests that can be created in respect of Torrens land, equitable interests can and should exist outside the Register to accommodate changing social needs.[77] Successful severance should not depend on the speed and efficiency of the Land Titles Office. For example, suppose A, one of two joint tenants of Torrens title land, dies a fortnight after he has lodged a severance document for registration and before registration has been effected. The rights of B and of A's beneficiaries to inherit would be dependent on the current fluency of registration at the Land Titles Office unless severance is deemed to have been effected in equity upon lodgement of a valid, executed document of severance.

### A third model: equitable severance by lodgement for registration

Before making its final recommendations favouring severance by registration, the New South Wales Law Reform Commission also considered a conditional severance on the lodgement for registration of the declaration. Under the model it contemplated, effective severance upon lodgement would be conditional upon the Registrar giving notice to the other joint tenants to enable them to take court action within a specified time to prevent registration. If the court action failed, or if no court action was taken, severance

[73] This was supported by the High Court in *Corin* v *Patton* (1990) 169 CLR 540, and adopted in Tasmania and Queensland. It was also recommended by the New South Wales Law Reform Commission and the Law Reform Commission of Western Australia.

[74] New South Wales Law Reform Commission Report op cit (fn 8) para 7.28, fn4

[75] Id para 7.27.

[76] Id para 7.22.

[77] The development of remedial constructive trusts is a good example of judicial recognition of equitable interests existing outside the Torrens Register: see *Hohol* v *Hohol* [1981] VR 221 and *Baumgartner* v *Baumgartner* (1987) 164 CLR 137.

would be effective retrospectively from the date of lodgement. Severance would thus be effected at the date of lodgement rather than the date of registration of the declaration. The net advantage of this mode of severance was seen to be that the severing joint tenant would not be prejudiced by delays in the registration process or delay caused by the presence of a caveat.

The various complexities and uncertainties inherent in this option were not discussed by the Commission and it readily dismissed the option on the basis that the delays targeted were not sufficiently serious to justify such a significant departure from the general thrust of the *Real Property Act* 1900 (NSW).[78] For example, the circumstances in which delay was caused by the presence of a caveat would be minimal, provided s 74H(5) was amended as suggested above.[79] Furthermore, the delays in the registration process were also dismissed because the Commission anticipated that lodgement and registration would be simultaneous within a few years. It is suggested, however, that this is not a matter that should be ignored. Delays in the registration process can present a serious problem, depending on the extent of any backlog in registrations. Sometimes exceptions to the general rule are necessary in the interests of justice. There are special rules relating to gifts of Torrens property because the courts considered this to be a sufficiently serious problem Thus:

> 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.[80]

There is much to be said for equitable severance upon lodgement of documents for registration and perhaps the New South Wales Law Reform Commission too readily dismissed this option. Severance by this method carries many of the significant advantages of severance by notice without the disadvantages which led to the Commission's rejection of this method of severance. Documents prepared for registration would need to comply with prescribed formalities and so the benefits of informality would be lost.[81] Moreover, a formal declaration of severance could be drafted so as to eliminate as far as possible the uncertainties that were inherent in severance by notice. This option for severance is considered further in the conclusion to this article.

### Secret severance

It will be recalled that the both the Tasmanian and the Queensland statutory provisions implement the view, albeit using different approaches, that the other co-owners should be notified of a unilateral severance. Under the Tasmanian approach, notification after severance is sufficient, whereas under the Queensland approach notification is a precondition to severance, the

[78] Presumably this refers to the fact that severance under this model would be effected by lodgement rather than by registration of the declaration.
[79] see page 408 supra.
[80] *Corin* v *Patton* (1990) 169 CLR 540, 559, per Mason CJ and McHugh J.
[81] But see New South Wales Law Reform Commission Report, op cit (fn 8) para 7.18.

severing joint tenant's intention to sever is secondary. The Law Reform Commission of Western Australia recommended the Queensland approach, while the New South Wales Law Reform Commission adopted the Tasmanian approach.

The Law Reform Commission of Western Australia thus recommended that the Registrar may only register the instrument of transfer if satisfied that a copy of the instrument has been given to all the other joint tenants. The Commission considered arguments both for and against making notice a precondition to unilateral severance. Although it attributed some weight to the argument that a joint tenant should have the freedom to deal with his or her interest and that there may even be valid reasons for secret severance, the Commission nevertheless decided that fairness demanded that a joint tenant should be notified of severance before it takes effect. The Commission explained its decision on a number of grounds.

First, property held in joint tenancy is 'unified' and what one joint tenant does with his or her interest will affect another. Thus, a unilateral severance of a joint tenancy will affect other joint tenants by ending 'the gamble of the tontine'[82] and investing co-owners with testamentary power. Secret severance may deprive the other co-owner of the right to provide for the transmission of his or her interest by will. Apart from this consequence, the fact that a joint tenancy is unified[83] has no other intrinsic practical significance for the co-owners. Rights of enjoyment of property between co-owners are largely unaffected by the form of co-ownership and thus will not be affected by a secret severance.

Some third parties may also suffer from a secret severance. For example, 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. Suppose, for example, it was possible to effect severance by the execution of a self dealing transfer. Suppose further that A and B are joint tenants and A executes a self dealing transfer without advising anybody that he has done so. If A dies before B, B's interests are inadvertently served by A's failure to disclose the severance. A's beneficiaries lose the interest that A had intended to give them because they are unaware that severance ever occurred. If B dies before A, A might be tempted to destroy the transfer document and B's beneficiaries are deprived of the share to which B was entitled upon severance. Secured creditors of only one joint tenant may also be adversely affected by a secret severance even though their rights may be enhanced by the severance. One would expect that mortgagees should never normally accept a mortgage from one joint tenant alone because they risk losing their security interest if the mortgagor joint tenant predeceases the other joint tenant. However, suppose that M, a mortgagee, accepts a mortgage from A, one of two joint tenants, and is not notified that the joint tenancy has been severed. If A dies, M continues to have a

[82] *Corin* v *Patton* (1990) 169 CLR 540, 573 per Deane J.

[83] In other words, the four unities are present and the interests of the joint tenants are undivided rights which constitute ownership of the property.

security interest in the property and can, upon default by A's personal representative, exercise a power of sale to the extent of A's interest in the property. M cannot exercise this entitlement without first knowing it exists.

Second, the Law Reform Commission of Western Australia also believed that it is unfair that joint tenants should plan their lives wrongly believing that their co-owned interest was subject to the right of survivorship. There are situations where a secret severance by one joint tenant can unfairly jeopardise life arrangements for the other joint tenant. For example, assume that X and Y have been married for 30 years. Assume further that they hold Blackacre, their matrimonial home, as joint tenants. It would be unfair for X to assume wrongly that she will, during her lifetime, have the right to live at Blackacre. X's plans are not based on who dies first, but on an assumption that she will have a right to live in the jointly owned property, whoever dies first. A secret severance by Y would frustrate X's plans. Furthermore, had X known of Y's severance, she might have been able to take appropriate action under the *Family Law Act* 1975 (Cth) and ensure her entitlement to remain in the matrimonial home. Such a situation must be balanced against the contrary argument that a joint tenant cannot be unfairly prejudiced by a secret severance. This is because a joint tenant cannot depend on plans based on the right of survivorship unless such a joint tenant is absolutely certain that he or she will either predecease or survive the other joint tenants. The utility of any plans based on the survivorship gamble whereby one of two joint tenants stakes all or nothing depending on who will die first, is therefore already dubious.

The New South Wales Law Reform Commission[84] reached a similar conclusion as to the need to notify co-owners of severance. The Commission conceded that it was settled law that severance may be effected unilaterally without the consent, or even the knowledge, of other joint tenants. For example, alienation by a joint tenant to a third party does not need the consent or knowledge of the other joint tenants, but will be effective to sever the joint tenancy.[85] However, the Commission believed that secrecy was not only unfair but might also lead to the suspicion of fraudulent dealing. The Commission therefore recommended that the Registrar, upon registration of a unilateral severance, should notify the other joint tenants of the changed nature of their co-ownership. The Commission also went a step further by recommending that the Registrar should also advise the other joint tenants that they should make other arrangements for the disposition of their interest. This would give co-owners the opportunity to make appropriate provision for the disposition of their co-owned interest by will.

The Western Australian Law Reform Commission made notice by the severing joint tenant to other co-owners a precondition to registration. The New

[84] New South Wales Law Reform Commission Report, *op cit* (fn 8) paras 8.11 — 8.13.

[85] An effective alienation must destroy one of the unities of time, title or interest which characterise a joint tenancy to convert the joint tenancy into a tenancy in common or, depending on the number of co-owners, several tenancies.

South Wales Law Reform Commission's recommendation required the Registrar to give notice once the declaration of severance had been registered. The New South Wales Law Reform Commission further addressed the issue of the extent of the Registrar's obligation to notify. It proposed that the duty to inform would be fulfilled upon the issue of the notice to the last known address of the other joint tenants and that the Registrar was not obliged to conduct enquiries for the purposes of determining the whereabouts of the other joint tenants. This suggests that there is no guarantee that the other co-owners will be notified of the effective unilateral severance. Failure of the non-severing joint tenant to realise the opportunity to make testamentary disposition upon severance does not necessarily mean that the property will pass by intestacy unless the deceased co-owner dies without leaving a will. This scenario is plausible if the co-owned property is the only asset held and its owner recognises that testamentary dispositions of jointly owned property are void. If there is a will, it is quite likely that a named beneficiary or beneficiaries will take the severed interest as part of the residuary estate because most testators devise the 'residue' of the estate to a named beneficiary or beneficiaries. If co-owners are not notified of the unilateral severance, they are denied the opportunity to make specific testamentary provision regarding the property in question. Alternatively, a co-owner who is unaware that the joint tenancy has been severed may have disposed of the rest of his or her estate without taking into account the value of the co-owned interest.

The Western Australian Law Reform Commission's recommendation for written notice to the other joint tenants was not only intended to apply to new methods of severance but also to existing methods of severance.[86] Presumably this would require legislation to abrogate existing common law methods of severance. This is because it would be necessary to nullify, or at least postpone, the effect of the destruction of the unity of title or interest whenever a joint tenant 'operates' on his or her own share. The Western Australian approach was not shared by the New South Wales Law Reform Commission which recommended that the existing law need not be amended to make notification a requirement for all methods of severance, because it did not wish to distract from the main thrust of its recommendations.[87] Nevertheless, the New South Wales Commission acknowledged that unfairness was intrinsic in secret unilateral severance regardless of which form was adopted and that severance could be used as a vehicle for fraud in some situations. The legislation proposed for Western Australia requires very careful consideration and very careful drafting to avoid creating more problems than it attempts to solve. The Law Reform Commission's proposal was not conclusive about the form of written notice, but suggested that 'in the absence of an

[86] Law Reform Commission of Western Australia Report, op cit (fn 10) para 3.34.

[87] New South Wales law Reform Commission Report, op cit (fn 8) paras 8.19 — 8.23. The 'main thrust' was the introduction of a means of severing by registration of a declaration of severance.

express provision, the notice would be served in accordance with s 76 of the *Interpretation Act* 1984 (WA)'.[88]

## CONCLUSION

It is suggested that none of the legislative changes or proposals provide the simple, quick and efficient method of terminating the right of survivorship that is needed. The lack of uniformity in models that have been adopted or proposed demonstrates that an ideal solution is yet to be achieved. On the one hand, registration as a precondition to severance involves excessively onerous formality and has potential to cause unnecessary hardship. On the other hand, mere execution of a declaration of severance without more involves insufficient formality which can allow severance to operate unfairly and become a vehicle for fraud. While there seems to be agreement that secret severance should be avoided, views concerning when notice must be served and by whom notice must be served are not uniform.

Furthermore, statutory intervention is required to enable a joint tenant to effect severance unilaterally using a simple, efficient and certain form. First, an evaluation of existing views demonstrates that a formal written notice of severance is essential. In order to remove any doubts as to the purpose of the written document, it should be a formal declaration of severance. Second, this declaration of severance should be executed and witnessed in accordance with s 107A of the *Evidence Act* 1958 (Vic) as if it was a statutory declaration.[89] This formality offers a reasonable and practical solution which provides certainty of intention and sufficient formality to lessen the possibility fraud or duress. Third, in order to prevent reliance on bureaucratic processes and to ensure a fair result where the joint tenant dies before registration can be effected, a form of equitable severance is recommended. If existing impediments to lodgement of documents can be removed, equitable severance could be effected when documents are lodged for registration. Thus, for example, statutory dispensation with production of the duplicate certificate of title will enable the executed declaration to be lodged without delay irrespective of whether the severing joint tenant has access to the duplicate. The existence of a caveat will not prevent severance, although it may create a priority conflict which can be resolved in accordance with existing principles. Equitable severance at the point of lodgement not only satisfies the needs of the severing joint tenant, but also maintains the spirit of the Torrens registration system. In most cases lodgement of documents for registration will generally lead to registration of the interests claimed therein. Registration of the declaration of severance encourages regularity and compliance with the Torrens registration

[88] Section 76 sets out methods of serving a document where 'a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word is expression is used, without directing it to be served in a particular manner'.

[89] The range of persons is sufficiently wide ranging to make a witness reasonably accessible to a joint tenant who may be bed-ridden.

scheme. Fourth, it should be clear that the Registrar of Land Titles will retain the right to register the lodged document despite the death of the executing party.

Secret severance should not be permitted. Notice should be required in all forms of severance[90] in line with the recommendation of the Western Australian Law Reform Commission.[91] However, severance should not be conditional upon giving of notice. A severing joint tenant ought to have the responsibility of notifying the other co-owners and failure to give notice of severance could be an offence and attract a penalty. In addition, rather than risk adverse effects for a third party by failure to notify other co-owners, a joint tenant should be required to compensate a third party for loss suffered. Another solution would be to require the joint tenant to provide proof that notice has been given within a reasonable time after execution of a contract of sale which severs the joint tenancy.[92] A mechanism for encouraging compliance with the notice requirement would then be to place responsibility for giving notice on the third party purchaser. The responsibility could be discharged by requiring such proof of notice at final settlement. If the vendor is unwilling or unable to furnish such proof, the purchaser would then be required to give notice himself or herself. Further, a new class of severance may be viable to provide special rules for parties who became joint tenants during marriage.[93] Automatic severance might be appropriate at the date of death of a joint tenant who had been separated from the other joint tenant for a substantial period, such as 12 months prior to death.[94] This proposal is especially useful in a social environment where there is a higher incidence of divorce despite a lower incidence of legal marriages. It is in this context, more than any other, that one must conclude that the right of survivorship has become an archaic instrument of hardship.

[90] This would include the giving of notice where one joint tenant severs the joint tenancy by declaring a trust. Thus, where A and B are joint tenants and A declares herself as trustee for X, the beneficial interest acquired by X will sever the joint tenancy such that A and B become tenants in common.

[91] Law Reform Commission of Western Australia Report, op cit (fn 10) para 3.34 and see pages 416–418 supra.

[92] For example, five business days might be considered reasonable.

[93] This could also include those defacto marriages which satisfy certain conditions, such as those stipulated under the *Property Law Act* 1958 (Vic) s 281. This provision permits a court to grant property relief to a defacto partner only where it is satisfied that the de facto partners have lived together in a defacto relationship for at least two years (s 281(1)). However, the length of the relationship is not crucial if the court is satisfied that there is a child of the defacto partners, or that serious injustice would otherwise result where the applicant has made substantial contributions or has the care and control of a child of the other defacto partner (s281(2)).

[94] The issue of severance may be irrelevant where a party dies when proceedings with respect to the property of the parties to a marriage or either of them are completed. In such circumstances, s 79(8) of the *Family Law Act* 1975 (Cth) provides that '(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party ...; (b) *if the court is of the opinion*: (i) that it would have made an order with respect to property if the deceased party had not died; and (ii) that it is still appropriate to make an order with respect to property; the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or either of them; and (c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.'