

# CORIN V PATTON: SOLVING THE RIDDLE OF THE PERFECT GIFT?

By

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In its decision in *Corin v Patton*<sup>1</sup> the High Court has clarified a number of issues relating to unilateral severance of joint tenancies.

## Decision

The court held that a mere statement of intention, even where communicated to the other joint tenant, is not sufficient to effect a unilateral severance of the joint tenancy. Further, the court, in considering the gift doctrine as propounded by Turner L.J. in *Milroy v Lord*,<sup>2</sup> decided that an intending donor must do everything necessary to be done *by him* in order to effect transfer of the legal title. The gift is not complete in equity, however, until the donee is equipped with the means of achieving the transfer.

## Facts

The respondent, Ronald John Patton, and his wife were the registered joint tenants of land under the *Real Property Act 1900* (NSW). On 6 July 1984, some days before Mrs Patton's death, Mr Smallgood, a solicitor, received instruction to take steps aimed at severing the joint tenancy and benefiting Mrs Patton's children. Mr Smallgood prepared the relevant documents and took them to the Patton's house, where the appellant transferee, Mrs Patton's brother, was also present. Mr Smallgood having explained the documents (a memorandum of transfer and a deed of trust), they were executed by Mrs Patton and Mr Corin (the appellant), and subsequently taken by Mr Smallgood who was to do all that was necessary to complete the transaction. There is no evidence Mr Patton knew of these transactions. Prior to her death on 17 July 1984, Mrs Patton had taken no steps to procure the certificate of title which was held by the State Bank of NSW as unregistered mortgagee. The memorandum of transfer remained unregistered.

## Issue

The court was primarily concerned with the state of title to the interest intended to be given at the time of Mrs Patton's death. More precisely, if Mrs Patton had succeeded in alienating her share of the joint tenancy, severance had been effected and Mr Patton would no longer enjoy his rights of survivorship. The court ultimately concluded, albeit for differing reasons, that as, at the time of Mrs Patton's death, the transfer had not been registered and (in the absence of the certificate of title or a dispensation from production) was not then able to be registered, there had been no divesting by Mrs Patton of her interest as a joint tenant. Consequently her interest survived to Mr Patton who acquired, by right of accretion, the whole of her interest.

## Reasons

The court generally agreed that the decision in *Williams v Hensman*<sup>3</sup> was an authoritative statement of the law regarding the circumstances effective to create severance of a joint

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1. (1990) 64 ALJR 256.
2. (1862) 43 ER 1185.
3. (1861) 70 ER 862.

tenancy. The House of Lords in that decision regarded as essential either: (1) an act of any one person interested, operating upon his own share to create a severance as to that share; (2) mutual agreement of the parties; or (3) any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.<sup>4</sup>

The court in *Corin v Patton*<sup>5</sup> agreed unanimously, that in the absence of an express act of severance, a unilateral declaration of intention will not suffice to sever an existing joint tenancy. Consequently, the court declined to adopt the decision of *Burgess v. Rawnsley*<sup>6</sup> in Australia. In the joint judgment of Mason C.J. and McHugh J., four reasons for this decision were stated.<sup>7</sup> First Lord Denning's judgment turned on the construction of s. 36(2) *Law of Property Act 1925* (UK) which permits the severance of a joint tenancy by notice in writing by one joint tenant to the other. Secondly, the severance of a joint tenancy can only be brought about by the destruction of one of the so-called "four unities". As Mason C.J. and McHugh J. stated:<sup>8</sup>

Unilateral action cannot destroy the unity of time, of possession or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the party acting unilaterally is transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estates in the relevant property.

Further, if statements of intention were held to effect a severance, uncertainty might follow; and finally, there would be no point in maintaining as a separate means of severance, the making of a mutual agreement between the joint tenants. Thus for reasons similar to those expressed in *Partriche v Powlet*,<sup>9</sup> the court intimated that where there is no express agreement between the parties there must be an actual alienation in order to amount to a severance. Where this alienation is by way of gift, the courts have imported the logic of Turner J in *Milroy v Lord*<sup>10</sup>:

I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.

To this his Honour added that if the settlement was intended to be effectuated by one mode, the court will only give effect to it by applying that mode.

The court in *Corin v Patton*<sup>11</sup> gave much attention to the ambiguity created by Turner L.J.'s first proposition and paid particular regard to the decisions of *Anning v Anning*<sup>12</sup> and *Brunker v Perpetual Trustee Co Ltd.*<sup>13</sup> The joint judgment of Mason C.J. and McHugh J particularly, draws the conclusion that the differing views in the court in *Anning v Anning*<sup>14</sup> may be taken to imply different understandings of the equitable maxim "Equity will not assist a volunteer". In any event, in light of strong support in later cases for Griffith C.J.'s view and the essential practicality of that view their Honours concluded that:

4. *Ibid.* at 867.

5. *Supra*, n.1.

6. [1975] Ch. 249.

7. *Supra*, n.1 at 258, 259.

8. *Ibid.*, at 259.

9. (1740) 26 ER 430.

10. *Supra*, n.2 at 1189-1190.

11. *Supra*, n.1.

12. (1907) 4 CLR 1049.

13. (1937) 57 CLR 555.

14. *Supra*, n.12.

if an intending donor of property has done everything which is necessary for him to have done to effect transfer of the legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. "Necessary" in this sense means necessary to effect a transfer. From the viewpoint of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part.<sup>15</sup>

The judgment of Dixon J. in *Brunker v Perpetual Trustee Co. Ltd.*<sup>16</sup> came under considerable scrutiny. The joint judgment focused on the failure of Dixon J. to apply the rule in *Milroy v Lord*<sup>17</sup> despite the fact there was no reason for its exclusion from the realm of Torrens title land. As the joint judgment noted, Dixon J. also failed to answer the questions posed by the judges in *Anning v Anning*.<sup>18</sup> Consequently the decision of Dixon J. was considered no longer authoritative in Australia.<sup>19</sup> That judgment was of more interest to the other members of the court in *Corin v Patton*<sup>20</sup>, however, as being instructive on the question whether any estate or interest passes prior to registration of a transfer.

According to the judgment of Dixon J. in *Brunker* the intending donor must, by the donor's acts, place "the intended donee in such a position that under the statute the latter has a right to have the transfer registered, a right which the donor, or his executors cannot defeat or impair".<sup>21</sup> His Honour expressed the view that the donee under such a transfer can have "neither a legal nor an equitable estate in the land". However, such a donee could pending registration, acquire "a right of a new description arising under the statute" by the exercise of which "he could vest the legal interest in himself".<sup>22</sup> This "statutory right" apparently envisages a combination of a right as against the Registrar-General to procure registration and an immunity from "any liability to interference or restraining on the part of" the donor. Importantly, this "new right" is confined by s. 41 *Real Property Act 1900* (NSW)<sup>23</sup> and, unlike a bona fide purchaser's right, gives rise to no equitable estate or proprietary interest. The conclusion of Deane J. in this regard is interesting. His Honour stated:

In my view, Dixon J's judgment in *Brunker* should be accepted not as establishing a new kind of statutory right, but as identifying the test for determining whether the stage has been reached when a gift of Real Property Act land under an unregistered memorandum of transfer is complete and effective in equity. That test is a twofold one. It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor. Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and, that being so, the donor is bound by conscience to hold the property as trustee for the donee pending the vesting of the legal title. In that regard, it is not a matter of equity ignoring the provisions of s. 41 of the Act and treating the unregistered transfer as effective of itself to assign the beneficial interest in the land. It is simply that equity, acting upon the "fact or

15. *Supra*, n.1 at 263.

16. *Supra*, n.13.

17. (1862) 45 ER 1185.

18. *Supra*, n.12.

19. per Mason CJ and McHugh J; *supra*, n.1 at 262.

20. *Supra*, n.1.

21. *Supra*, n.13 at 602.

22. *Ibid.*, at 599, 600.

23. S. 43 Real Property Act 1861 (Qld).

circumstance” that the donor has placed the vesting of the legal title within the control of the donee and beyond the donor’s recall or intervention, looks at the substantial effect of what has been done and regards the gift as complete.<sup>24</sup>

In his judgment, Brennan J. conceded that Dixon J. may have intended to assign to equity no greater role than preventing retraction of what the donee has been given by a donor who has done all in his power to complete the gift of land. On this point, Mason C.J. and McHugh J. agreed that the judgment of Dixon J. could not be seen as establishing a new personal statutory right to registration, but conceded, after examining the decisions in *Cope v Keene*<sup>25</sup> and *Taylor v Deputy Federal Commissioner of Taxation*<sup>26</sup>, it was an appropriate measure for determining the existence of equitable interests in property in accordance with the principles enunciated in *Milroy v Lord*.<sup>27</sup>

An alternative approach discussed by the court dealt with the likelihood of the circumstances giving rise to a trust. The question became important if it could be answered in the affirmative. In those circumstances it would be necessary to consider whether the effect of such a trust was to create a tenancy in common of the subject land in equity which would bind Mr Patton and effectively preclude him from enjoying the benefit of the right of survivorship which he enjoyed at law. Justice Deane felt this was the critical question of the case. In ultimately concluding that the question should be answered in the negative his Honour employed two distinct, albeit related, lines of reasoning. The first, based on intention, largely corresponds with the views of McLelland J. at first instance. That is, Mrs Patton clearly did not intend to constitute herself trustee for Mr Corin and the terms of the instrument provided no support for such a conclusion, notwithstanding the flexibility introduced by the interpretation of Evershed M.R. of *Anning v Anning* in *In Re Rose*.<sup>28</sup> In any case, equity, with its regard for substance rather than form “would not go through the charade of intervening to create a trust of property under which the legal owner held as bare trustee for another who in turn held as bare trustee for the legal owner”.<sup>29</sup>

The second view, based on the perception of Mr Corin as a mere volunteer, accords with the general approach of Mason C.J. and McHugh J. “Where property is capable of assignment at law, a purported legal assignment of the property which is ineffective at law is of itself inoperative in equity in the absence of valuable consideration.”<sup>30</sup> The remainder of the court concluded that no trust arose in the circumstances. The following statement of Brennan J. is typical:

Where, as in the present case, a registerable transfer of land under the Real Property Act is delivered *voluntarily* to enable the proposed transferee to secure registration, there is no fact or circumstance on which a court of equity might fasten as binding the conscience of the donor to hold the land on trust for the transferee. Equity neither compels an owner of property who intends to give it to another to do anything to perfect the gift nor impresses the property with a trust which the owner did not intend to create: *Milroy v Lord*.<sup>31</sup>

24. *Supra*, n.1.

25. (1968) 118 CLR 1.

26. (1969) 123 CLR 206.

27. *Supra*, n.2.

28. [1952] Ch. 499.

29. *Supra*, n.1 at 272.

30. *Ibid.*, at 273.

31. *Ibid.*, at 265; Mason CJ and McHugh J at 264; Deane J at 270; Toohey J at 277.

A final point dealt with by the court was whether the transaction between Mrs Patton and Mr Corin gave rise to any other right short of a beneficial interest under a trust. The answer as stated by Deane J, was in the negative:

All that Mr Corin ever acquired pursuant to the transaction was the property in the actual memorandum of transfer as bare trustee for Mrs Patton and a revocable chance that the Registrar-General would register the transfer without requiring production of the certificate of title. Upon Mrs Patton's death without the memorandum of transfer having ever been lodged for registration, that chance became without content since, even assuming that registration remains permissible after the death of the transferor, Mrs Patton's interest in the property would have already devolved upon Mr Patton by survivorship.<sup>32</sup>

### A Queensland Perspective

In resolving a number of the issues first raised in *Milroy v Lord*<sup>33</sup> and *Anning v Anning*<sup>34</sup>, the High Court's decision lends a guide to the interpretation of s. 200 *Property Law Act 1974* (Qld). The section, which states "A voluntary assignment of property shall in equity be effective and complete when, and as soon as, the assignor has done everything to be done by him that is necessary in order to transfer the property to the assignee ...", may now be construed as requiring the intending donor to do everything which is necessary *on his part* to complete the transaction, and equipping the donee to achieve that purpose. Although there is no authority on s. 200, it would seem that an implicit proviso exists that the donor has placed himself in a position where the gift is no longer revocable by him and his conscience is bound by equity to this extent. On this construction, it is perhaps also necessary that the donor has possession of the document of transfer and the certificate of title thereby avoiding questions of requirement or dispensation of production of the certificate of title in order to effect registration.

It is interesting to note however, the observation of Toohy J. (who did not base his decision on the gift doctrine) that in a joint tenancy situation and from the very nature of a joint tenancy, one joint tenant does not have a separate certificate of title reflecting his or her interest. His Honour considered that "to encompass delivery of the certificate in the steps required of a joint tenant seeking to sever the joint tenancy may be to make a somewhat unreal demand even when the land is not encumbered".<sup>35</sup> It is submitted however, that this view derogates from the relatively clear stance taken by the remainder of the court and retains the element of ambiguity in determining when and how the donee is in a position to have the transfer registered, "a right which the donor, or his executors, can not defeat or impair".<sup>36</sup>

On the assumption, therefore, that assignment is complete when the donor has done everything necessary to be done by him and has equipped the donee to achieve this purpose, the question remains as to what right or interest the donee acquires in the interval between assignment and registration. The judgment of Dixon J. in *Brunker* characterises a "right of a new description"<sup>37</sup> during this period, which involves an immunity from any liability or interference or restraint on the part of the donor although not conferring any estate or interest at law or in equity pending registration. The view taken by Mason C.J. and McHugh J. was that this statement provides a test for "ascertaining the existence of equitable interests

32. *Ibid.*, at 275.

33. *Supra*, n.2.

34. *Supra*, n.12.

35. *Supra*, n.1 at 277.

36. *Brunker v. Perpetual Trustee Co Ltd*; *supra*, n.13 at 602.

37. (1937) 57 CLR 555 at 599-600.

in property in accordance with the principles enunciated in *Milroy v Lord*" rather than for the purpose of "ascertaining whether a personal statutory right to registration has come into existence".<sup>38</sup> Their Honours considered that the completed acts of the donor were sufficient to establish an equitable interest in the donee; however, they found difficulty in accommodating this approach to the injunction contained in s. 41 *Real Property Act 1900* (NSW)<sup>39</sup> to the effect that until registration an instrument of transfer shall be ineffectual to pass an estate or interest in land. In accepting the reasoning of Isaacs J. in *Barry v Heider*<sup>40</sup>, their Honours concluded, however, that this injunction "does not touch whatever rights are behind" the instrument. That is, "an equity arises, not from the transfer itself, but from the execution and delivery of the transfer and the delivery of the certificate of title in such circumstances as will enable the donee to procure the vesting of the legal title in himself".<sup>41</sup>

In relation to the nature of this pre-registration interest, a number of views were expressed by the other members of the court. Deane J. felt that it was more in accord with general principle that the provisions of the NSW Act were such as to recognise rather than preclude the possible existence of unregistered equitable interests than was the notion of a statutory non-equitable right of a new character.<sup>42</sup> Brennan J. considered that in this interval period the donee could obtain no more than a right to registration based on the *Real Property Act* which the donor could not defeat or intercept<sup>43</sup>; while Toohey J. decided that where the transaction is not for value, and where there has been no completed gift, the transferee acquires no estate in the land merely by force of the execution and delivery of the transfer.<sup>44</sup> In any event, while the legislation in other jurisdictions may be silent as to this "supposed statutory right"<sup>45</sup>, s. 48 *Real Property Act 1877* (Qld), a section peculiar to Queensland legislation, states that an unregistered instrument signed by the donor and purporting to pass an interest or estate *in land* is to confer a claim to registration.

The section, as interpreted by Walsh J. in *Breskvar v Wall*<sup>46</sup>, allows a donee, in effect, a statutory right to registration once he is in possession of a signed instrument of transfer. It must be emphasised, however, that this view is different from that of the majority. Barwick C.J. (Windeyer and Owen J.J. concurring) considered that in the circumstances of the case the section added nothing significant to the position of the third respondent, an unregistered bona fide purchaser for value in possession of a signed document of transfer, in his claim for registration against the holder of a competing equity.<sup>47</sup> McTiernan J. simply stated that s. 48 constitutes a recognition of equitable interests in land.<sup>48</sup> Justices Menzies and Gibbs conceded that the third respondent, having paid for the land and obtained a signed memorandum of transfer, acquired a right to registration because it acquired an equitable interest in the land, and s. 48 gave it that right<sup>49</sup>.

Clearly, where the transferee has a pre-existing equity in the land, s. 48 will add nothing substantial to his claim to registration. As the High Court stated in *Chan v Cresdon Pty Ltd*:

38. *Corin v. Patton*; *supra*, n.1 at 262.

39. S.43 *Real Property Act 1861* (Qld).

40. (1914) 19 CLR 197 at 216.

41. *Supra*, n.1 at 264.

42. *Ibid.* at 274.

43. *Ibid.* at 269.

44. *Ibid.* at 276.

45. *Ibid.* at 262.

46. (1971) 126 CLR 376.

47. *Ibid.* at 388.

48. *Ibid.* at 393.

49. *Ibid.* at 391, 413.

Though the unregistered instrument is itself ineffective to create a legal or equitable estate or interest in the land, before registration, the section does not avoid contracts or render them inoperative. So an antecedent agreement will be effective, in accordance with the principles of equity to bring into existence an equitable estate or interest in land. But it is that antecedent agreement, evidenced by the unregistered instrument, not the instrument itself, which creates the equitable estate or interest. In this way no violence is done to the statutory command in s. 43.<sup>50</sup>

In those circumstances, it is submitted that while s. 48 is of limited value to the holder of a pre-existing equity in the land, it may be a significant alternative to a volunteer holding a signed transfer and claiming a right to registration. That is, s. 48 may be applicable where the person seeking registration does not have the benefit of an equitable interest to assist his claim. This view would not seem to violate the operation of s. 43.

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50. (1989) 168 CLR 242 at 257.