SEVERANCE OF JOINT TENANCIES IN MATRIMONIAL PROPERTY

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Married couples in Australia often own property as joint tenants. Where the parties to the marriage become estranged and are contemplating divorce proceedings, it may be important to consider ways of severing the joint tenancy so that, should one spouse die before the marriage is dissolved, the surviving spouse does not acquire the whole property by right of survivorship. The purpose of this article is to consider appropriate ways of effecting a severance in the light of a number of recent cases dealing with the matter.

1. The Right to Sever

Although one of a number of joint tenants cannot defeat the right of survivorship by his will, he is permitted to destroy the joint tenancy by severance during his lifetime. The result is to convert the interest held as joint tenant into one held as tenant in common. For these purposes, a joint tenant is regarded as having a potential proportionate share in the land commensurate with that of his fellow joint tenants.

A joint tenancy may be severed in a number of ways. The *locus classicus* is to be found in the judgment of Sir W. Page Wood, V.-C. in *Williams* v. *Hensman*:

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

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> the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected. . . .[1]

It is clear from this that there are three methods of severing a joint tenancy: (1) by alienation; (2) by agreement; and (3) by a course of dealing. In *Williams* v. *Hensman, supra,* a fund was bequeathed to A for life, "the principal to go to her children at her death". There were eight such children, and there being no words of severance in the gift, they took at law as joint tenants. They had, however, executed a number of documents which showed that they treated themselves as holding as tenants in common. In particular, when one of the eight requested a payment on account of his share, they had joined in a deed indemnifying the trustee against responsibility for overpayment should the fund diminish in the future, such indemnity expressly binding their executors and administrators. It was held that they had entered into this agreement on the implicit understanding that they each had an "interest in the funds". They would not have bound their legal personal representatives had they considered themselves to be holding as joint tenants, for otherwise they would have been binding their estates to an obligation while possibly losing all interest in the fund through their own death.[2]

It is not entirely clear whether the learned Vice-Chancellor regarded the severance as being effected in equity under the second or third category mentioned above. Clearly, the execution of a number of documents showed a "course of dealing" within the third category, but the deed of indemnity itself implied "an agreement among themselves that their interests should be treated as held in severalty . . . so as to exclude the survivorship",[3] which would have come within the second category.

In a later case, *Burgess* v. *Rawnsley*,[4] the Court of Appeal made reference to the second and third of the above categories. Lord Denning, M.R. observed[5] that in distinguishing between the two, Page Wood, V.-C. had shown that a course of dealing "need not" amount to an agreement (express or implied) for severance, from which it may, perhaps, be inferred that he thought the two categories were not necessarily mutually exclusive. Browne, L.J.[6] felt that each was "a separate category". Sir John Pennycuick said that category three was not a mere sub-heading of category two:

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[1] (1861) 1 J. & H. 546 at 557-8; 70 E.R. 862 at 867. This passage has been accepted by the Privy Council as an accurate statement of the law: *Tan Thew Hoe Neo* v. *Chee Swee Cheng* (1928) 56 Ind. App. 112 at 115.
[2] (1861) 1 J. & H. 546 at 560; 70 E.R. 862 at 868.
[3] *Ibid.*
[4] [1975] Ch. 429.
[5] *Id.* 439.
[6] Id. 444.

> It covers only acts of the parties, including, it seems to me, negotiations which, although not otherwise resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed.[7]

Whatever the precise relationship between the categories, any one or more of the three methods may be used to sever a joint tenancy of matrimonial property. Each will now be examined in turn.

2. Severance by Alienation

(a) *General*

In many situations, this will be the most convenient method of severing the joint tenancy. Severance by alienation can be effected by one joint tenant without the consent, or even the knowledge, of the other joint tenant.[8] The alienation may be voluntary[9] or involuntary.[10] There is no need for any notice to be given to the other joint tenant.[11]

Where the right to sever by alienation is exercised, the alienee will hold an undivided share as tenant in common, the extent of his interest depending upon the number of joint tenants. For example, if A and B are joint tenants, and A conveys his interest to X, then X and B hold as tenants in common in equal shares. If A, B and C are joint tenants, and A conveys his interest to X, then X holds a one-third undivided share as tenant in common with B and C who are joint tenants of the remaining two-thirds; the survivor of B and C will take the whole of the two-thirds interest, but X will neither gain nor lose by the survivorship of either B or C. Further, if A, B and C are joint tenants, and A conveys his interest as joint tenant to B and B (by the same or a later instrument) conveys his interest as joint tenant to A, then A, B and C thereafter will hold as tenants in common in equal shares.[12]

Difficult questions arise as to whether dealings with less than the fee simple interest in the land can amount to "an alienation" for these purposes. For example, is there a severance where one joint tenant grants a mortgage of his interest, or a lease, or a charge? It is beyond

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[7] *Id.* 447.

[8] See, e.g., *In the Marriage of Slater* (1979) 24 A.L.R. 501. *Cf.* Land Titles Act, 1965 (Saskatchewan), s. 240 which deprives a joint tenant of his freedom to alienate by requiring that no instrument shall be operative to effect a severance until it is registered and that no instrument purporting to transfer the share or interest of a joint tenant shall be registered unless it is accompanied by the written consent to the transfer of the other joint tenant or tenants. This section has no equivalent in Australia or England.

[9] As in *Wright* v. *Gibbons* (1949) 78 C.L.R. 313; *Fleming* v. *Hargreaves* [1976] 1 N.Z.L.R. 123.

[10] As in *Paten* v. *Cribb* (1862) 1 Q.S.C.R. 40: bankruptcy of joint tenant. See also *Re White* [1928] 1 D.L.R. 846; *Re Holliday* [1980] 3 All E.R. 385.

[11] *Perks* v. *Perks* [1950] 2 W.W.R. 189 at 192.

[12] *Wright* v. *Gibbons, supra* n. 9 at 323.

the scope of this article to deal with such questions.[13] The discussion which follows restricts itself to a consideration of dealings with the fee simple interest of the joint tenant or tenants concerned.

(b) *Declaration of trust*

Generally, when a joint tenancy is severed by alienation, the joint tenant transfers his interest beneficially to a third party. This, however, is not a necessary requirement, as recent cases of severance by alienation of joint tenancies in matrimonial property demonstrate. A convenient starting point is *In the Marriage of Badcock.*[14] The wife executed a memorandum of transfer of her interest as joint tenant to J, and J contemporaneously executed a Deed of Trust whereby he declared (*inter alia*) that he held the interest upon trust for the wife and as tenant in common with the husband, and, further that he would abide by any order of the Family Court which might affect the wife's beneficial interest in the property. The memorandum of transfer had been lodged for registration, but registration had been refused because the mortgagee of the property had declined to produce the certificate of title; in fact, the memorandum of transfer contained no reference to the mortgage. The husband was advised of the existence of the memorandum of transfer and Deed of Trust on the day following their execution.

Murray, J. held that the joint tenancy had been severed. It was true that there had been no alienation of the interest *at law*, and so no severance at law, because registration of the transfer had not been effected; but there had been an alienation *in equity* (the existence of equitable, that is, unregistered, rights or interests being recognized under the Torrens system[15]) and so severance had occurred in equity. In reaching this conclusion, Murray, J. distinguished *Golding* v. *Hands and Ors.*,[16] where a joint tenant had executed a voluntary memorandum of transfer to a trustee with the avowed purpose of severing the joint tenancy, and the trustee had executed a re-transfer, but the trustee had been instructed to hold the transfers, unregistered, until after the death of the joint tenant. In that case, it was held that the transfer to the trustee, not being for value, was ineffectual to vest in the trustee any legal or equitable interest in the land, and hence did not sever the joint tenancy (applying *Brunker* v. *Perpetual Trustee Co. Ltd.*[17])

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[13] For a full discussion, see R. A. Woodman, *The Law of Real Property in New South Wales* (1980, Vol. 1, pp. 155-8; D. Mendes Da Costa, "Co-ownership under Victorian Land Law" (1961-2) 3 *Melb. U.L.R.* at 446-55; R. E. Megarry & H. W. R. Wade, *The Law of Real Property* (4th ed., 1975), 405-6.

[14] (1979) F.L.C. 78,888.

[15] *Barry* v. *Heider* (1914) 19 C.L.R. 197, at 216. *Cf. Stonehouse* v. *A.-G. of British Columbia* (1961) 31 D.L.R. (2d) 118. *Foort* v. *Chapman* [1973] 4 W.W.R. 461 would seem to be wrongly decided; see discussion in A. J. McClean, "Severance of Joint Tenancies" (1979) 57 *Can. B.R.* 1 at 14-15.

[16] [1969] W.A.R. 121.

[17] (1937) 57 C.L.R. 555 at 581 *per* Latham, C.J.

although it was said that had the trustee been instructed to register the transfer, "an interesting question would have arisen if the death of the [transferor] had occurred before registration."[18] But in the instant case, Murray, J. held, there had been an alteration of the wife's beneficial interest. Her right to dispose of her interest had been diminished by the terms of the Deed of Trust obliging the trustee to abide by an order of the Family Court, and:

> This limiting of the beneficial interest and the divesting of the legal interest are declared under seal and are followed by a Memorandum of Transfer granting the legal estate to the trustee pursuant to the terms of the Deed, the giving of notice to the husband and attempted registration of the Transfer; clearly, I would have thought, an act of one of the persons interested in a joint tenancy operating upon his own share within the meaning of *Williams* v. *Hensman*.[19]

Badcock's case appears to be the only reported example in Australia of severance by transfer to a trustee for oneself. But the method had been recognized as effective in England over two hundred and fifty years ago,[20] and there is no reason to doubt its validity. It has been taken a step further in Canada. In *Re Mee*,[21] the husband, shortly after his divorce, executed a declaration of trust whereby he declared himself a trustee for his infant son with respect to his interest as joint tenant in certain land. The British Columbia Court of Appeal held that no distinction was to be drawn between an alienation direct to the person intended to benefit and an alienation to a trustee (albeit the alienor himself) to hold for the benefit of that person, so long as the trust was completely constituted.[22] It was not to the point that the infant could not compel a transfer of the interest during his minority, for the husband had, by the terms of the trust instrument, bound himself to carry out the terms of the trust. Other Canadian cases have since followed *Re Mee* and permitted severance by declaration of trust in this manner.[23]

In the light of these authorities, it would appear that the kind of clause commonly found in maintenance agreements in Australia, whereby husband and wife declare that henceforth they shall hold the matrimonial home in trust for themselves as tenants in common in

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[18] *Supra* n. 16 at 126, citing Dixon J. in *Brunker's Case, supra* n. 17 at 604-5.

[19] (1979) F.L.C. at 78,896.

[20] *Cray* v. *Willis* (1729) 2 P. Wms. 529; 24 E.R. 847: a joint tenant "may sever the joint tenancy by a deed granting over a moiety in trust for himself".

[21] (1971) 23 D.L.R. (3d) 491.

[22] Here, the trust had been completely constituted and, since no power of revocation was reserved, could not be revoked by the husband.

[23] See *Re Sorensen* (1977) 90 D.L.R. (3d) 26; *Earl* v. *Earl* [1979] 6 W.W.R. 600.

equal shares,[24] would be effective to sever the joint tenancy and constitute the parties as tenants in common.[25] Such a clause would also effect a severance by agreement, in accordance with the principles relating to severance by agreement discussed below.

(c) *Transfer to oneself*

The Canadian courts have now introduced the final refinement and held that a joint tenant can sever the joint tenancy by transferring his interest to himself beneficially. In *Re Murdoch and Barry*[26] the wife executed a deed whereby she, as grantor of the first part, granted to herself, as grantee of the second part, her interest in the matrimonial home "TO HAVE AND TO HOLD unto the said Grantee her heirs and assigns, to and for her and their sole and only use for ever". This deed was held sufficient to sever the joint tenancy, as it destroyed the unity of title between husband and wife. Unity of title is one of the so-called "four unities" essential for a joint tenancy, and requires that all joint tenants must take under the same instrument. Godman, J. held that the wife now held her interest under the deed she had executed and not under the deed or document which originally had created the joint tenancy.[27] Of course, the validity of such a conveyance depends upon the statutory provision empowering a person to assure property to himself;[28] such a course would not have been available at common law, where a person could not convey to himself except through the medium of a use operating under the Statute of Uses. Although the precise ambit of the statutory provision may not be clear,[29] *Re Murdoch and Barry* would appear to be correctly decided and to provide a simple and convenient method of unilaterally severing a joint tenancy.

Indeed, the decision in *Re Murdoch and Barry* ought not to surprise. Equity has always leaned against joint tenancies,[30] preferring the certainty and equality of a tenancy in common to the "all or

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[24] See, e.g., Broun and Fowler, *Australian Family Law and Practice*, "Precedents", para. 63-370.

[25] *Cf. Lea* v. *Williams* (*circa* 1734), 2 *Sugden's Vendors and Purchasers*, 11th ed., App. 1116, where it was held that a conveyance by joint tenants to a trustee, without consideration, did not effect a severance. There was, however, no evidence that the conveyance was effected with intent to sever, and the case is consistent with the authorities discussed below that a conveyance by *all* joint tenants does not sever the joint tenancy.

[26] (1975) 64 D.L.R. (3d) 222.

[27] *Cf. Re Sammon* (1979) 94 D.L.R. (3d) 594, where the Ontario Court of Appeal agreed that severance may be effected by transfer to oneself, but held on the facts that the attempted severance was ineffective because the deed by which the transfer was attempted had not been delivered.

[28] See Conveyancing Act, 1919 (N.S.W.), s. 24.

[29] See *Rye* v. *Rye* [1962] A.C. 496 at 505-6, 513-4; *cf. Note* (1962) 36 *A.L.J.* 45.

[30] "Survivorship is looked upon as odious in equity": *R.* v. *Williams* (1735) Bunb. 342 at 343; 145 E.R. 694. See also *Gould* v. *Kemp* (1834) 2 My. & K. 304 at 309; 39 E.R. 959 at 961.

nothing" nature of a joint tenancy, and has not been loathe to lend assistance to devices to nullify the right of survivorship.[31]

3. Severance by Agreement

Joint tenants may sever the joint tenancy by agreement. The agreement must be held commonly by all joint tenants.[32]

(a) *Formal agreement*

Sometimes, the agreement will be embodied in a formal document, such as a maintenance agreement[33] or a separation agreement.[34] A clear example is the Canadian case of *Re McKee and National Trust Co. Ltd.*,[35] where a separation agreement provided that the wife was to have exclusive possession of the jointly owned premises on certain conditions; if those conditions were not met, the property was to be sold and the proceeds divided equally between the parties. The agreement also gave the wife an option to purchase the husband's interest in the premises. It was held that the clear understanding as expressed in the agreement was that each party had, from the date of the agreement, a one-half interest in any proceeds of sale of the property. This, when considered with the grant of the option, severed the joint tenancy from that moment.[36] One commonly used Australian precedent[37] is in similar terms to the agreement in *McKee's* case and would, it is suggested, be effective to sever the joint tenancy in any property covered by the agreement.

By way of contrast, in *Bank of British Columbia* v. *Nelson*[38] the separation agreement provided that the jointly owned matrimonial home was to be sold, that the proceeds of sale were to be applied towards the discharge of mortgages over the property, and that any surplus should be paid to the wife; by another clause, the spouses renounced any other rights to share in the distribution of each other's estates. This agreement was held not to sever the joint tenancy; it was "a joint agreement by husband and wife for the disbursement of proceeds of their joint interest in the matrimonial home, rather than an agreement for a division of their separate and equal interests."[39] This decision is difficult to reconcile with *McKee's* case,

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[31] See, e.g., *Cray* v. *Willis supra* n. 20; *Staples* v. *Maurice* (1774) 4 Bro. P. C. 580 at 585; 2 E.R. 395 at 399; *Wright* v. *Gibbons supra* n. 9 at 326.

[32] *Lindgren* v. *Olson* [1949] 2 D.L.R. 353 at 362-3.

[33] See, e.g., Broun and Fowler, *op. cit. supra* n. 24 para. 63-370; Nygh and Turner, *Family Law Service,* Precedent 2.1.

[34] As in *Public Trustee of British Columbia* v. *Somers* [1979] 6 W.W.R. 763; *Paterson* v. *Paterson* [1980] 2 W.W.R. 683, discussed below.

[35] (1975) 56 D.L.R. (3d) 190.

[36] The Court considered, however, that the grant of an option by one joint tenant to another does not, of itself, effect a severance: *Id.* at 196.

[37] See Nygh and Turner, *op. cit. supra* n. 33 Precedent 2.2.

[38] (1979) 17 B.C.L.R. 223.

[39] *Id.* 227. There was, on the facts, also no indication of a course of dealing between husband and wife which, taken apart from or together with the separation agreement, intimated that the interests had been mutually treated as held in common. Severance by course of dealing is considered below.

and appears to conflict with the generally accepted view[40] that the courts lean towards tenancies in common rather than joint tenancies.

One Canadian case which appears to be wrongly decided is *Paterson* v. *Paterson*,[41] where the separation agreement contained the following provision:

> "7. The Wife agrees with the Husband that she will join in a Transfer of the said property . . . if and when the Husband should wish to sell the same and can obtain a purchaser therefor at a price of Five Thousand Dollars ($5,000.00) or more."

Hamilton, J. held that this clause meant that, so long as the price exceeded $5,000 the wife would sell when asked to do so by her husband and would receive one-half of the proceeds, and that, therefore, the agreement had the effect of severing the joint tenancy. With respect, that meaning is difficult to extract from the clause. Moreover, although it is true that, had the wife refused to sell, the husband could have obtained specific performance of her agreement to sell, neither a sale, nor an agreement to sell, by all joint tenants acting together severs a joint tenancy.[42]

(b) *Informal agreement*

It has always been the law that a formal agreement to sever is not necessary.[43] The English Court of Appeal has now held that there need be no note or memorandum of the agreement for the purposes of the Statute of Frauds,[44] even though an interest in land is the subject of the agreement.

In *Burgess* v. *Rawnsley*,[45] A and B, on the suggestion of A, who thought B was going to marry him, purchased a house as joint tenants, each paying one-half of the purchase price. It later transpired that B had no reciprocal plans for marriage to A. A moved into the house but would not let B into possession. His marriage plans frustrated, A offered to purchase B's interest for £750, and the county court judge held on the evidence that B had orally accepted such offer. The next day, however, B decided she would not sell for £750 and told A that she wanted £1,000. That was how the matter rested for three years. A continued to live in the house himself, paying all the rates and outgoings. Upon A's death, B claimed the house by right of survivorship. A's administrator argued, *inter alia,* that the joint tenancy had been severed either by the agreement to sell for £750 (Page Wood, V.-C.'s second category) or by a course of dealing (third category). All three members of the Court of Appeal were

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[40] See authorities cited above, nn. 30, 31.
[41] *Supra* n. 34.
[42] See authorities cited below, n. 75.
[43] *Frewen* v. *Relfe* (1787) 2 Bro. C. C. 220 at 224; 29 E.R. 123 at 125.
[44] See now Conveyancing Act, 1919 (N.S.W.), s. 54A.
[45] [1975] Ch. 42.

unanimous that the agreement to sell for £750 effected a severance in equity, falling within the second of Page Wood, V.-C.'s categories. It was of no consequence that the agreement was not in writing,[46] or that it was incapable of specific performance.[47] What was important was the *fact* of agreement, serving as an indication that the parties no longer intended the tenancy to operate as a joint tenancy; it was that which severed the joint tenancy.

In Australia, there is an early South Australian case which holds that no note or memorandum is necessary.[48] There is, however, a recent Victorian case which holds that there can be no severance by agreement unless there is a note or memorandum in writing sufficient to satisfy the Statute of Frauds or circumstances giving rise to the doctrine of part performance.[49] It is difficult to appreciate why writing is not required. The subject of the agreement is an interest in land, and falls clearly within the terms of the Statute of Frauds and its modern equivalents. Perhaps the matter can be rationalized on the basis of a constructive trust: once an agreement to sever has been reached, there is a severance in equity, and equity requires the legal title (still held in joint tenancy) to be held by way of constructive trust for the co-owners as tenants in common.[50] If this is the correct explanation, it has not yet found expression in any of the court decisions on severance of joint tenancies.

(c) *Temporary severance?*

It was also held to be of no consequence, in *Burgess* v. *Rawnsley,* that the agreement was not binding, in the sense that B was perfectly entitled to, and in fact did, change her mind the next day. The joint tenancy was severed once and for all. It may be questioned whether such short-lived consensus should effect a severance of the joint tenancy for all time. Would the same result have followed if B had informed A of her change of mind a mere five minutes later? After all, what B really agreed to do was to sell her share for a certain price. In her mind the agreement had nothing to do with the technical matter of severance of the joint tenancy. Why should her temporary agreement be not binding upon her as a matter of contract law (in that she was entitled to change her mind) but have irreversible consequences for the purposes of property law? Perhaps there is room here for a doctrine of "temporary" severance, that is, severance for so long as the agreement lasts, with an automatic

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[46] On this, see also *Caldwell* v. *Fellowes* (1870) L.R. 9 Eq. 410; *Re Hewett* [1894] 1 Ch. 362.

[47] *Supra* n. 45 at 444, 446.

[48] *Gebhardt* v. *Dempster* [1914] S.A.S.R. 287, at 309: "Such an agreement does not necessarily mean a formal contract, but only that the parties were of one mind." See also *Gould* v. *Kemp, supra* n. 30 at 309; 961.

[49] *Lyons* v. *Lyons* [1967] V.R. 169 at 171.

[50] See A. J. McClean, *supra* n. 15 at 17.

reversion to a joint tenancy upon termination of the agreement. There are precedents for the temporary severance of joint tenancies. For example, there is authority that the grant of a lease for a term of years by one joint tenant works a temporary severance only: it "suspends" the joint tenancy for the duration of the lease, so that the reversion expectant on the lease will pass to the surviving joint tenant but the lessee will remain entitled to the enjoyment of the term.[51] There is a Canadian suggestion that a joint tenancy may be "suspended" for the period during which a judgment debt is registered against the title of one of the joint tenants; the right of survivorship does not operate should the debtor joint tenant die whilst the debt remains registered, but upon discharge of the debt and vacation of the charge the suspension is healed and thereafter the right of survivorship applies.[52] There is old authority that an alienation by an infant joint tenant effects only a temporary severance: the infant may, by entering and avoiding the conveyance, restore the joint tenancy.[53] Further, in the Tasmanian case of *In re Real Property Act 1862, s. 111 (Shannon's Transfer)*,[54] it was held that a temporary severance occurred where the husband was ordered to settle his interest as joint tenant upon his wife (the other joint tenant) *dum sola et casta*, and where, before the settlement was made, the wife remarried and died; the order effected a severance, due to the destruction of unity of possession, but the severance was temporary only and upon the remarriage of the wife the joint tenancy reunited.[55] The short-lived agreement of the *Burgess* v. *Rawnsley* type may be another situation where a doctrine of temporary severance is appropriate. Previous cases involving severance by agreement are of no assistance in this context, as they involved agreements which were relatively permanent, and which had been acted upon by the parties for a number of years.[56]

(d) *Severance by joint application to court?*

A recent Australian case involving an alleged severance by agreement is *In the marriage of Pertsoulis*.[57] There it was held that the filing of an application under s. 79 of the Family Law Act 1975 (Cth.), for an order for a settlement of the jointly-owned property by both parties to a joint tenancy, did not effect a severance of the

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[51] See *Wright* v. *Gibbons*, *supra* n. 9 at 330 *per* Dixon, J.; *Frieze* v. *Unger* [1960] V.R. 230 at 242-3 *per* Sholl, J.

[52] *Re Penn* (1951) 4 W.W.R. (N.S.) 452; overruled on another point, *Re Young* (1968) 70 D.L.R. (2d) 594.

[53] *Co. Litt.* 337a, 337b; *Tucker* v. *Coleman* (1885) 4 N.Z.L.R.S.C. 128; *cf. Burnaby* v. *Equitable Reversionary Interest Society* (1885) 28 Ch. D. 416.

[54] [1967] Tas. S.R. 245.

[55] See further on temporary severance, *Co. Litt.* 188a, 193a.

[56] See, e.g., *In re Wilford's Estate* (1879) 11 Ch. D. 267, at 269; *In the Estate of Heys* [1914] P. 192 at 195-6; *In re Lansell* [1934] V.L.R. 129 at 134-5.

[57] (1980) F.L.C. 75,265.

joint tenancy by agreement.[58] The reason was that, at any time prior to an order being made, the parties could withdraw their applications; severance could only take place at the time the order was made.[59] It is suggested, however, that *Pertsoulis'* case should not be regarded as authority for the proposition that in no case where a joint application is made to the Court under s. 79 can there be a severance until an order has been made. It may well be that the making of the application follows an agreement between the parties to sever the joint tenancy. In such a case, it would be the antecedent agreement which severs the joint tenancy, and not the Court order itself. Moreover, it would follow from *Burgess* v. *Rawnsley* that once an agreement (albeit short-lived) to sever has been concluded, the severance is complete, and subsequent withdrawal of the application could not resurrect the joint tenancy.

A related point may be noted here. Where the court makes an order for the settlement of jointly owned matrimonial property, and the order requires a sale or other dealing with the property, there is, of course, no severance at law until the sale or dealing has been effected, and the appropriate assurances executed and (in the case of Torrens title land) registered. Should one of the joint tenants die before these steps have been taken, the survivor takes the whole legal estate. It is now settled, however, that equity will not permit the operation of the order to be thwarted in this fashion, and there will be a severance in equity effected by the court order if that is necessary to ensure that the order is perfected.[60] In any case, where the court order is made by consent, the order itself evidences an agreement between the parties to divide the matrimonial property, and there will thereupon be a severance by agreement.[61]

4. Severance by a Course of Dealing

The final method of severance is by a course of dealing sufficient to intimate that the interests of all are mutually treated as constituting a tenancy in common. It is immaterial that the course of dealing is conducted in ignorance of the existence of a joint tenancy:

> . . . a joint tenancy is a right which any one of the joint-tenants may determine when he pleases; and, if all continue to deal on the footing of their interests not being joint, it would be most inequitable to treat it as a joint-tenancy when all the parties,

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[58] The Family Court has power, under s. 79, to order that property held under a joint tenancy be held under a tenancy in common: *In the Marriage of Apathy* (1977) F.L.C. 76,346 at 76,350; *In the Marriage of Schefe* (1978) F.L.C. 77,430.

[59] *Supra* n. 57 at 75,272, applying *Public Trustee* v. *Grivas* [1974] 2 N.S.W.L.R. 316 at 322.

[60] *Re Johnstone* [1973] Qd. R. 347 at 351; *Public Trustee* v. *Grivas*, *id.* 321-2; *Gillette* v. *Cotton* [1979] 4 W.W.R. 515; *cf. Re Young*, *supra* n. 52.

[61] *Public Trustee* v. *Grivas*, *supra* n. 59 at 322.

whether in ignorance or not, have dealt with their interests as several.[62]

Whether such a course of dealing exists is a matter of evidence. It is not necessary to show a specific act of division of each part of the property "if there has been a general dealing, sufficient to manifest the intention to divide the whole".[63] To establish the requisite course of dealing, there must be an examination of all the indicia of the owners' intentions.[64]

(a) *Some recent examples*

There are a number of recent Canadian cases involving matrimonial property which illustrate severance by a course of dealing. In *Schofield* v. *Graham*,[65] husband and wife had purchased real estate as joint tenants. Following dissolution of the marriage, the wife vacated possession, leaving the husband in sole possession, and both parties agreed that the property should be put up for sale and the proceeds divided equally between them. This was held to be a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. The husband having died before the sale was effected, it was held that the wife was entitled to a one-half interest only as tenant in common. Similarly, in *Ginn* v. *Armstrong*[66] the wife, having left the jointly owned matrimonial property, wrote to the husband demanding a sale of the property and payment to her of one half of the proceeds of sale, or the purchase by the husband of her share. The husband counter-proposed that she convey her share to her son, and prepared a deed for that purpose which the wife refused to sign. These acts were held to sever the joint tenancy, as they indicated that both husband and wife looked upon the wife's interest as an undivided one-half interest only; that is, they mutually treated their interests as held in common. Their course of conduct was wholly inconsistent with the notion that a beneficial joint tenancy in the property was to continue. In *Re Walters*,[67] after the wife commenced divorce and partition proceedings, negotiations were conducted between the parties' respective counsel in an attempt to reach a settlement of the parties' property rights. Each side obtained valuations of the property and made offers to purchase the other's interest in the property, but each offer was rejected. Shortly before the date set for the hearing of the partition application, the husband died. It was held that the parties by their conduct, as evidenced by the instructions they had given to their

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[62] *Williams* v. *Hensman* (1861) 1 J. & H. 546 at 561; 70 E.R. 862 at 868. See also *Flannigan* v. *Wotherspoon* [1953] 1 D.L.R. 768 at 772-3.

[63] *Crooke* v. *De Vandes* (1805) 11 Ves. Jun. 330 at 333; 32 E.R. 1115 at 1116 *per* Lord Eldon, L.C.

[64] *Brown* v. *Brown* (1978) 7 Alta L.R. 262 at 272.

[65] (1969) 6 D.L.R. (3d) 88.

[66] (1969) 3 D.L.R. (3d) 285.

[67] (1977) 79 D.L.R. (3d) 122; affirmed (1978) 84 D.L.R. (3d) 416.

counsel, had established a course of conduct sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

It would appear that the courts in England and Australia are not so ready as their Canadian counterparts to find a severance by conduct. For example, in the English case of *Nielson-Jones* v. *Fedden*[68] husband and wife, following a separation, signed a memorandum authorizing the husband to sell their jointly owned matrimonial home and use the proceeds to buy a home for himself. The husband duly sold the home, and out of the deposit of £1,000 paid by the purchaser there was paid to each an amount of £200 and another small amount for bills. Before completion of the sale, the husband died. Walton, J. held that severance of the joint tenancy had not been effected. The memorandum was merely an agreement that the proceeds of sale were to be available to the husband for the purpose of purchasing a new house: the wife "was simply concerned with the money being made available to [the husband], not with the question of ownership of the money".[69] The memorandum was not an agreement that each thereafter was to be solely entitled to his or her respective one-half share in the proceeds of sale. As to the payment out of part of the deposit, Walton, J. said that had the whole of the deposit been distributed equally between husband and wife, that might have been consistent with an agreement that they should take the whole of the proceeds of the sale in equal shares,[70] but the payments which were actually made (being neither the whole sum nor calculated by reference to the whole sum) were, at best, neutral in their implications.[71] In *Greenfield* v. *Greenfield*[72] (although not a case involving matrimonial property) it was held that there was no severance by the conversion of the jointly owned property into separate and self-contained parts for separate occupation by each of the joint tenants.[73]

Two Australian cases may be cited as examples of the reluctance to find a severance by course of conduct. In *Re Allingham*[74] the husband and wife entered into a contract to sell the jointly owned property. The deposit was paid into the husband's bank account. It was held that no severance of the joint tenancy had occurred. The

[68] [1975] Ch. 222.
[69] *Id.* 227.
[70] *Cf. Re Denny* (1947) 116 L.J.R. 1029.
[71] *Cf. Flannigan* v. *Wotherspoon*, *supra* n. 62, where the full deposit and several small part payments of purchase price were paid to the joint tenant vendor's bank and, by pre-arrangement between the vendors and the bank, were divided and paid into their separate bank accounts. This was held to effect a severance, being a course of dealing indicating that the interests of the vendors were mutually treated as being held in common.
[72] (1979) 38 P. & C.R. 570.
[73] *Cf. Roche* v. *Sheridan* (1857) 9 Ir. Jur. 409, wehre severance was effected by each joint tenant occupying a separate portion of the jointly held property.
[74] [1932] V.L.R. 469.

sale, of itself, had merely converted a joint tenancy in the land into a joint tenancy in the proceeds of sale (following earlier Irish authority that a sale by all joint tenants does not, of itself, sever the joint tenancy in the purchase money[75] and (on the facts) the payment into the husband's account had been made as agent for them both. And in *Ex parte Railway Commissioners (N.S.W.)*[76] property in which M and L held a life estate *pur autre vie* as joint tenants was resumed. Pursuant to a court order, out of the resumption moneys an amount was set aside from which M and L were to be paid the interest "in equal shares". It was held that the order of the court did not work a severance, as it simply gave effect to the existing rights of the parties, and did not alter those rights. Nor did the resumption itself work a severance; it merely converted a joint estate in land into a joint claim for compensation and, on that claim being met by payment into court, a joint interest in the fund. Nor was there any evidence of an agreement between M and L to sever the joint tenancy, and, so Roper, J. held, their conduct in taking the income equally between them was entirely consistent with their interest in the property remaining joint. This last case makes an interesting comparison with *Re Denny*,[77] where the joint tenants, by taking the income equally over a number of years, had treated themselves as separately entitled to their respective proportions of income from the joint fund, thus indicating by their conduct that they regarded themselves as tenants in common and not joint tenants.[78]

(b) *Severance by application to court by one joint tenant?*

A question which has arisen on a number of occasions is whether there can be a severance by course of dealing where *one* only of the joint tenants commences proceedings for a settlement or distribution of the jointly owned matrimonial property. In order to consider this question, it is necessary to return again to *Burgess* v. *Rawnsley*,[79] the facts of which have been given above.

The Court in *Burgess* v. *Rawnsley* considered whether severance had been effected under Page Wood, V.-C.'s third category. Sir John Pennycuick, having found a severance by agreement, intimated that any views expressed on the third category would be *obiter*. He recognized that in some circumstances where one joint tenant negotiates with another for some rearrangement of interest it may be possible to infer from the particular facts a common intention to

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[75] *Hayes' Estate* [1920] I.R. 207; *Flynn* v. *Flynn* [1930] I.R. 337 at 343.
[76] (1941) 41 S.R. (N.S.W.) 93.
[77] (1947) 116 L.J.R. 1029.
[78] It may be argued that in *Ex parte Railways Commissioners (N.S.W.)*, here should have been a severance by court order, as the vesting of property n persons "in equal shares" will create a tenancy in common, the words "in qual shares" being regarded traditionally as words of severance. See *Payne* v. *Webb* (1874) L.R. 19 Eq. 26 at 29.
[79] [1975] Ch. 429.

sever even though the negotiations break down. Such an inference, however, could not be drawn from the facts here. He did proffer the view, nevertheless, that within the third category of cases, "An uncommunicated declaration by one party to the other or indeed a mere verbal notice by one party to another clearly cannot act as a severance".[80] Similarly, Browne, L.J. found it strictly unnecessary to discuss this head of the argument. In any case, he doubted whether there was sufficient evidence as to a course of dealing to raise the question. He also agreed, however, that "an uncommunicated declaration by one joint tenant cannot operate as a severance".[81]

Lord Denning, M.R. took a different view. His Lordship held that there had been a course of dealing which "clearly evinced an intention by both parties that the property should henceforth be held in common and not jointly".[82] With respect, it is a little difficult to draw such an intention from the meagre evidence before the Court, but putting that to one side, Lord Denning pointed out, as is clearly the case, that the third category of severance is applicable where *both* parties have entered upon such a course of dealing.[83] He added, however, that it is also sufficient "if there is a course of dealing in which *one* party makes clear to the other that *he* desires their shares should no longer be held jointly but be held in common", provided that he makes his desire known to the other party.[84] In other words, one joint tenant may by unilateral action (short of actual alienation), communicated to the other, intimate that he regards his interest as severed, thereby cause a severance and effectively compel his co-owner to hold, *vis-à-vis* him, as tenant in common.

As we have seen, one joint tenant can unilaterally sever his joint tenancy by alienation of his share *inter vivos,* either voluntarily or involuntarily. But is Lord Denning correct in permitting the unilateral act of one joint tenant, short of alienation, to constitute such a course of dealing as, in the words of Page Wood, V.-C., "to intimate that the interests of all were mutually treated as constituting a tenancy in common"?[85] Doubtless, Page Wood, V.-C.'s formulation of the methods of severance is not to be applied as though it were an inviolable statutory formula, but, taking the words at face value would appear to require that *all* persons concerned join in the course of dealing; otherwise, how can the interests of *all* be *mutually* treated as held in common?

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[80] *Id.* 448.
[81] *Id.* 444.
[82] *Id.* 440.
[83] *Id.* 439.
[84] *Ibid.* (emphasis added). This part of Lord Denning's judgment was cited with apparent approval in *Greenfield* v. *Greenfield* (1979) 38 P. & C.R. 570 at 577-8.
[85] *Williams* v. *Hensman, supra* n. 2 at 557; 867.

In most of the cases where severance has been effected by a course of dealing, all joint tenants have in fact participated.[86] Such cases are therefore of little assistance in determining whether the communicated declaration of *one* joint tenant is sufficient, except so far as they contain statements of general principle. There are, however, a few cases which are directly in point. Perhaps the earliest is *Partriche* v. *Powlet*[87] where a person entitled as joint tenant to a fund entered into a marriage settlement, the deed of settlement reciting that she should enjoy the fund to her separate use, and that, for want of issue of her body, it should go to the next of kin of her own family. The other joint tenant was not a party to the deed. Lord Hardwicke, L.C. held there was no severance, "for, *first,* here is no agreement for this purpose. . . . [T]he declaration of one of the parties that it should be severed, is not sufficient, unless it amounts to an actual agreement".[88] Then, in *In re Wilks; Child* v. *Bulmer*,[89] an infant held a fund as joint tenant with two other infants. Immediately he turned twenty-one he applied to the Court for an order transferring one-third of the fund to him absolutely. Because of pressure of court business his application was adjourned for four weeks, and in that period the applicant died. Stirling, J. held that there had been no severance, as the applicant had died before the order was made. The basis of his Lordship's reasoning was that until an order is made, an applicant is perfectly free to discontinue his suit, and until such order he has therefore done no act "such as to preclude him from claiming by survivorship any interest in the subject matter of the joint tenancy".[90] Stirling, J. found support for his decision in the assumption that the third category of severance mentioned by Page Wood, V.-C. in *Williams* v. *Hensman* appeared to include "those in which there is no express agreement to sever, but such agreement may be inferred from the conduct and dealings of all the parties".[91] No agreement could be inferred here, because the other two joint tenants were infants. He was able to rely also on a dictum of Lord Thurlow in *Perkins* v. *Baynton*[92] where it was said: "William Baynton . . . brought his bill for the moiety of this money. It is contended that severed the joint tenancy. I do not know that a demand will sever a joint tenancy."

The next case in this line of authority is *Nielson-Jones* v. *Fedden*.[93] Walton, J. there found on the evidence that no agreement

[86] See, for example, *Jackson* v. *Jackson* (1804) 9 Ves. Jun. 591 at 604; 32 E.R. 732 at 737; *Crooke* v. *De Vandes, supra* n. 63 at 333 1116; (*cf. Leake* v. *Macdowall* (1862) 32 Beav. 28; 55 E.R. 11); *Wilson* v. *Bell* (1843) 5 Ir.Eq.Rep. 501 at 507; *Williams* v. *Hensman supra* n. 2 at 558-560; 867-868; *Re Denny, supra* n. 70 at 1037; *Flannigan* v. *Wotherspoon, supra* n. 62.

[87] (1740) 2 Atk. 54; 26 E.R. 430.

[88] *Id.* 55; 431.

[89] [1891] 3 Ch. 59.

[90] *Id.* 62. With respect, this reasoning seems to beg the question.

[91] *Id.* 64.

[92] (1784) 1 Bro. C.C. 118; 28 E.R. 1187.

[93] *Supra* n. 68.

to sever had been reached by the joint tenants, but was prepared to assume for the purposes of argument that one joint tenant had made an unequivocal declaration of his wish to sever the tenancy. He proceeded:

> The question then is, can such a declaration — a unilateral declaration — ever be effective to sever a beneficial joint tenancy? It appears to me that in principle there is no conceivable ground for saying that it can. So far as I can see, such a mere unilateral declaration does not in any way shatter any one of the essential unities.[94]

In reaching that conclusion, Walton, J. followed *In re Wilks*.[95] He declined to follow the decision of Havers, J. in *Hawkesley* v. *May*,[96] where it had been held that a declaration of intention to sever by one party fell within the first method referred to by Page Wood, V.-C. in *Williams* v. *Hensman*. Walton, J. took the view[97] (which would seem, with respect, to be correct) that Havers, J. had failed to appreciate that by the first method Page Wood, V.-C. meant actual alienation. He also pointed out that, so far as the report indicated, Havers, J. had not had cited to him any of the relevant authorities. Walton, J. similarly declined to follow *In re Draper's Conveyance*,[98] where Plowman, J. had referred to the decision of Havers, J. and had concluded: "So from that case I derive this; a declaration by one of a number of joint tenants of his intention to sever operates as a severance".[99] Plowman, J. had held that the issue of a summons with an affidavit in support, in proceedings for determination of property rights under the Married Women's Property Act 1882 (U.K.), asking that property be sold and the proceeds distributed equally, was sufficient to effect a severance, evincing an intention on the part of the applicant that she wished the joint tenancy to be no longer on foot. Because Plowman, J. had "blandy repeated" the conclusion of Havers, J., the decision in *In re Draper's Conveyance* could have no greater authority than *Hawkesley* v. *May*, and Plowman, J.'s decision on the effect of the issue of the summons was, so Walton, J. thought,[100] contrary to *In re Wilks*. Walton, J. concluded that *Hawkesley* v. *May* and *in re Draper's Conveyance* "do not represent the law . . . [being] clearly contrary to the existing well established law . . . and I do not propose to follow them".[101]

It is in this context that we may return to the judgment of Lord Denning, M.R. in *Burgess* v. *Rawnsley*. In stating that a "course o

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[94] *Id.* 230.
[95] [1891] 3 Ch. 59.
[96] [1956] 1 Q.B. 304 at 313.
[97] *Supra* n. 68 at 234.
[98] [1969] 1 Ch. 486.
[99] *Id.* 491.
[100] *Supra* n. 68 at 236.
[101] *Ibid.*

dealing" may be found from the communicated desire of one joint tenant that his share no longer be held jointly but in common, the Master of Rolls was forced to hold[102] that the decision of Walton, J. in *Nielson-Jones* v. *Fedden* was incorrect, and that *Hawkesley* v. *May* and *In re Draper's Conveyance* were to be followed. Similarly, he doubted whether the decision in *In re Wilks* could be supported: "The application to the court [in *In re* Wilks] was a clear declaration of his intention to sever. It was made clear to all concerned. There was enough to effect a severance".[103]

It appears to this writer, with respect, that Lord Denning's opinion ought not to be followed, and that Walton, J. was correct in saying that neither Havers, J. nor Plowman, J. had had the benefit of examining the authorities and that their decisions ought to be regarded as given *per incuriam*. Moreover, it is clear that Page Wood, V.-C., in formulating the three categories (with which, as Lord Denning put it, "nowadays everyone starts") regarded the first category as applying where there is an actual alienation; a mere declaration cannot fall within the first category, and must, unless it forms part of an agreement, fall into the third category. And in the third category, to return to the words of the Vice-Chancellor, one must find "a course of dealing by which the shares of all the parties to the contest have been effected. . . ." Further, Lord Denning appeared to stress the need for the unilateral declaration to be communicated to the other joint tenant. But if one party can unilaterally effect severance by an expression of intention why should communication to the other be necessary? It must be the expression, or formation, of intention that effects the severance, not the communication, because the unwilling co-owner, if Lord Denning's proposition is correct, has no way of preventing the severance taking place. Moreover, it should be noted again that Lord Denning was the only member of the Court to raise this matter, Browne, L.J. and Sir John Pennycuick not expressing any opinion except to state that an uncommunicated declaration by one joint tenant cannot operate as a severance.[104] In any case, such statements (and, indeed, those of Lord Denning) must be read in the context of the "notice" provision of s. 36(2) of the Law of Property Act, 1925, which introduced into English law an entirely novel method of severance, namely, severance by mere notice in writing.[105] This provision has no Australian equiva-

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[102] *Supra* n. 79 at 439-40.
[103] *Id.* 440.
[104] *Id.* 444, 448 respectively.
[105] The revelant portion of s. 36 (2) is in the following terms:

> Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts

lent.[106] Finally, as another commentator has pointed out, if a unilateral declaration suffices to sever a joint tenancy why, on the one hand, is a will insufficient for the purpose, and, why, on the other, is there any need at all for a category of severance by agreement?[107]

There is now some Australian authority that the commencement by one spouse of partition proceedings, or proceedings under s. 79 of the Family Law Act 1975, does not effect a severance of the joint tenancy. In *In the Marriage of Badcock*[108] Murray, J. declined to follow *Hawkesley* v. *May* and *In Re Draper's Conveyance,* and held that the commencement of partition proceedings by the wife did not amount to a severance. There were two reasons: first, there was no local equivalent of the "severance by notice" provision in the English Law of Property Act, 1925; secondly, the wife could withdraw the partition proceedings at any time prior to judgment, leaving her competent to claim by survivorship. There was a more detailed discussion of the same issue in *In the Marriage of Pertsoulis*[109] where proceedings had been commenced for a settlement of property under s. 79 of the Family Law Act 1975. There, Pawley, S.J. traced the English authorities referred to above, concluding with *Burgess* v. *Rawnsley,* and noted some criticisms[110] which had been levelled at Lord Denning's judgment in that case. His Honour concluded:

> . . . taking into account what has been said in criticism of the decision of Lord Denning in that case, and remembering the difference of law in England and in New South Wales, I do not think it appropriate to hold that the mere filing and service of an application and affidavits in support constitute the kind of conduct which would have the effect of severing a joint tenancy. . . .[111]

His Honour held that severance could only take place at the time of the court order in the proceedings.[112]

The same result has been reached in Canada, where it is well-settled that the commencement of partition proceedings by one joint

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Footnote 105 (continued).

which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.

See generally *In re 88, Berkeley Road, N.W.9* [1971] Ch. 648.

[106] See *Tyson* v. *Tyson* [1969] N.S.W.R. 177 at 181.

[107] *Note,* (1968) 84 *L.Q.R.* 463 (P.V.B.).

[108] *Supra* n. 14.

[109] *Supra* n. 57.

[110] See *Note,* (1976) 50 *A.L.J.* 249.

[111] *Supra* n. 57 at 75,272. His Honour went on to hold that the filing of a joint application by both spouses could not amount to an agreement to sever this aspect of the decision has been discussed above.

[112] It might be noted that this is not strictly correct in regard to orders for sale made in partition suits in New South Wales. Under s. 66G (7) of the Conveyancing Act, 1919 (N.S.W.), where property becomes subject to the statutory trust for sale, a sale under the trust does not, of itself, sever the joint tenancy; *a fortiori,* the court order (vesting the property in the trustee for sale) does not effect a severance.

tenant is not sufficient to constitute a severance. This view is based on the conclusion that *Re Wilks* and *Nielson-Jones* v. *Fedden* were correctly decided, and that *Hawkesley* v. *May* and *In re Draper's Conveyance* are wrong.[113]

(c) *Severance by mutual wills*

Recent Canadian case law has pointed up a method of severance by a course of conduct which would, perhaps, come as a surprise to many lawyers. In *Szabo* v. *Boros*,[114] the British Columbia Court of Appeal held that although one joint tenant cannot defeat the right of survivorship by will, where *all* joint tenants agree to, and do, execute wills leaving the property to each other this evinces an intention to treat the joint tenancy as severed. In *Szabo* v. *Boros*, husband and wife agreed to execute, and did execute, mutual wills leaving their jointly owned property to each other for life with remainder to their respective children from earlier marriages. Davey, C.J.B.C. had this to say:

> The question whether a mere inchoate common intention to treat property as held in common will suffice does not arise here, since the common intention was carried into effect by the concurrent execution of wills. This manner of severance provides the answer to all grounds of appeal. It is to be observed that no express act of severance is required as in the case of some other methods of severance. No contract or declaration of trust is necessary, merely an agreement or consensus implemented by a dealing with the property showing that the owners treat it as being held in common. Here that intention and dealing are disclosed by the evidence of the respondent that each of the tenants intended to dispose of his share by leaving it to the survivor for life, and in remainder to the designated beneficiary, and by the concurrent execution of wills to that effect. Such a scheme denies a right of survivorship, and a joint tenancy of which it is an essential ingredient.[115]
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> I doubt if any contract or declaration of trust was proved, but neither was needed, because it was the common intention and dealing with the property that governed.

This decision was followed in *Bryan* v. *Heath*,[116] where husband and wife joint tenants agreed to make mutual wills leaving their respective interests in the property to each other and their respective children in equal shares. On consulting a solicitor they were advised that it would

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[113] See *Munroe* v. *Carlson* (1975) 59 D.L.R. (3d) 763; *Re Sorensen and Sorensen* (1977) 90 D.L.R. (3d) 26; *Rodrigue* v. *Dufton* (1976) 72 D.L.R. (3d) 16; *Johnson* v. *Johnson* (1980) 3 Sask. R. 75; see also *Power* v. *Grace* [1932] 2 D.L.R. 793; *Grant* v. *Grant* [1952] O.W.N. 641. *Cf. Ginn* v. *Armstrong* (1969) 3 D.L.R. (3d) 285.

[114] (1967) 64 D.L.R. (2d) 48.

[115] *Id.* 49.

[116] [1980] 3 W.W.R. 666.

be necessary to sever their joint tenancy by a conveyancing deed. Mutual wills and a deed of conveyance were prepared but only the wills were executed. It was held that there was a severance in two ways, *viz.*, by mutual agreement, and by a course of conduct showing a clear intention to sever which was carried through by execution of the wills.[117]

It may be questioned whether it is necessary in all cases to prove the actual execution of the mutual wills. The mere fact that the joint tenants agree to make mutual wills may indicate an agreement that they no longer wish the right of survivorship to operate,[118] although no doubt that agreement is easier to demonstrate where the wills are made. It may also be questioned whether it is not relevant that the jointly owned property was the only substantial asset of the joint tenants (as appears to have been the situation in both of the Canadian cases referred to above) or merely one of many other assets. In the latter situation, it may be quite unrealistic to assume that the parties no longer wished the right of survivorship to operate in respect of the specific jointly owned property.[119]

There appears to be no Australian authority on the severance of joint tenancies by the execution of mutual wills, but it had been decided in England many years ago that such was the law,[120] and there is no reason to suspect that Australian courts will come to a different conclusion.

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[117] See also *Re Skippen* [1947] 1 D.L.R. 858, where the point was conceded

[118] See *In re Lansell, supra* n. 56 at 134-5.

[119] See the dissenting judgment of Laskin, J.A. in *Re Gillespie* (1968) 3 D.L.R. (3d) 317.

[120] *Re Wilford's Estate, supra* n. 56; *Re Heys, supra* n. 56.