

Joint Tenancy and Tenancy in Common

Terms of Reference

In 1994 the Commission was given a reference 'to review the law relating to joint tenancies and tenancies in common of real and personal property in law and equity in respect to:

- (a) the rules of construction governing the creation of joint tenancies and tenancies in common;
- (b) the severance of joint tenancy by notice; and
- (c) whether the *Inheritance (Family and Dependants Provision) Act 1972* should be amended to empower the court to include a deceased person's interest in a joint tenancy in the property from which provision for an applicant may be made¹.

Background of Reference

The reference arose from concerns about certainty in case law and practice in relation to the rules governing joint tenancies and tenancies in common. Currently, the law in Western Australia requires extensive, technical formalities (in the form of construction of an 'express trust') to be followed in order to enact severance of a joint tenancy. Recent cases¹ where severance intentions have failed because of failure to adhere to trust requirements, demonstrate the need for reform in this area. The current ambit of the law in relation to severance further enables individuals to avoid the legislative intention of the *Inheritance (Family and Dependants Provision) Act 1972 (WA)*.² Through a lifetime transaction the testator can dispose of property and defeat the ability of the court to provide for any dependants.

In view of the technical nature of the project, the Commission engaged Dr John Mugumbwa, a Senior Lecturer in Law at Murdoch University and a specialist in real property law, to prepare a draft report on the subject.

Nature and Extent of Consultation

The draft report was circulated for comment to a number of interested parties, including lawyers specialising in property law. Following consideration of the submissions, the Commission delivered its final report in November 1994.³

Recommendations

After extensive consideration, including detailed analysis of the relevant law in other Australian jurisdictions and overseas, the Commission concluded that:

- the law as to whether a joint tenancy or tenancy in common is created should be made more certain;
- the common law right to sever a joint tenancy secretly should be abolished; and
- notice should become a statutory precondition for severance.

Specifically the Commission recommended that:

1. Section 60 of the *Transfer of Land Act 1893 (WA)* should be repealed. The section should be replaced by a new provision which requires instruments of transfer to two or more persons submitted for registration to specify whether the co-owners are joint tenants or tenants in common. Any instrument which does not state the nature of the co-ownership must not be registered.
2. A simple explanation of the significance of the distinction between a joint tenancy and a tenancy in common should be contained in the instrument of transfer.
3. The presumption of joint tenancy should be replaced by a statutory presumption of tenancy in common as in Queensland and New South Wales. Except where excluded, the presumption should apply to dispositions of personal and real property including land registered under the *Transfer of Land Act 1893 (WA)*.

¹ The primary case in this area is *Corin v Patton* (1990) 169 CLR 540.

² The application of ss 6 and 7 enables the Supreme Court to provide for testator's dependants against the intention of the will.

³ Law Reform Commission of Western Australia, *Joint Tenancy and Tenancy in Common*, Project No 78 (1994).

◀ Joint Tenancy and Tenancy in Common

4. The provision should be modelled on s 35 of the Queensland *Property Law Act 1974*, subject to the following amendments:
 - (a) the statutory presumption should only be operative *in equity* for choses in action;
 - (b) the Queensland provision creating exceptions to the operation of the statutory presumption should be retained and extended to include property disposed of to married people; and
 - (c) the presumption should be rebuttable by evidence of contrary intention. This should be made clear by express provision.
5. Unilateral severance of joint tenancy should not be effective without written notice to the other joint tenants.
6. The law of unilateral severance should be reformed by inserting in the *Transfer of Land Act 1893* a provision along the lines of s 59 of the Queensland *Land Title Act 1994*. However, the section should expressly empower the Registrar at his discretion to dispense with the requirement to produce the certificate of title to enable a transfer to be registered.
7. The common law rule that joint tenancy cannot be severed by will, should not be reversed.
8. The rule that a joint tenancy may be severed if all the joint tenants mutually agree to hold as tenants in common should not be altered statutorily.
9. The rule that a joint tenancy may be severed by a course of dealing sufficient to intimate that interests of all were mutually treated as constituting a tenancy in common should not be altered statutorily.
10. The *Inheritance (Family and Dependents Provision) Act 1972* (WA) should not be amended to deal solely with property the subject of a joint tenancy. However further consideration should be given to the general issue of the extent to which the Act should be amended to bring within its ambit property disposed of by the deceased by lifetime transactions.

Legislative or Other Action Undertaken

There has been no legislative action taken to implement the Commission's recommendations. No practical reference has been made to the report by the courts, Parliament, or relevant government departments. However, the current practice of the Department of Land Administration follows Recommendation 1.

Currency of Recommendations

The recommendations remain current. There are no contingent factors that would impact upon legislative action.

Action Required

Amendments to the *Transfer of Land Act 1893* (WA) should be drafted to reflect Recommendations 1–6. Further consideration should be given to the issue of how the *Inheritance (Family and Dependents Provision) Act 1972* (WA) should be amended, as discussed in Recommendation 10. No further action is required to implement Recommendations 7–9.

Priority – Low-Medium

Due to their relatively non-controversial nature, implementation of the majority of the Commission's recommendations may be undertaken without complication. Implementation of Recommendations 6 and 10 should, however, be given greater priority as they address reforms which will significantly enhance the practical operation of the relevant legislation. The desirability of updating the legislation to achieve conformity with other Australian jurisdictions⁴ that have already addressed this subject reinforces the need for reform.

⁴ See for instance, reforms made to the *Land Title Act 1994* (Qld) and the *Real Property Act 1900* (NSW). For further examples of legislative enactment of relevant reforms in other jurisdictions see Law Reform Commission of Western Australia, *Joint Tenancy and Tenancy in Common*, Project No 78 (1994) 14–51.