IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: HCV 00981 OF 2009

BETWEEN	**HORACE HOWE**	**1st CLAIMANT**
AND	**JOHN FRANCIS**	**2ND CLAIMANT**
AND	**VALERIE HOWE-SMITH**	**DEFENDANT**

IN CHAMBERS

Mr. Brian Moodie and Ms. Danielle Chai instructed by Samuda and Johnson for the Claimants; Mr. Andre Earle and Ms. Anna Gracie instructed by Rattray, Patterson, Rattray for the Defendant. (Second Claimant and Defendant both present.

Application for declaration that joint tenancy severed; whether the claimants are entitled to that declaration; whether the bases in Williams v Hensman, or any of them, has been satisfied; whether voluntary gift may give rise to severance; meaning of "necessary" in phrase " donor doing all that is necessary"; Application of Section 81 of the Registration of Titles Act.

Heard: December 13, 2010 and January 2011.

ANDERSON J.

1. This is another of those familiar intra-family disputes over land within the context of family ownership, regrettably so prevalent in our jurisprudence. The land in the instant case is that land registered at Volume 628 Folio 79, a family-owned property in Four Paths, in the Parish of Clarendon. The dispute is fairly typical of such actions and reflects, in my view, the historical importance which has been attached to that factor of production since the emergence of the post-slavery society in Jamaica, in the first half of the Nineteenth Century. The Claimants in question, Mr. Horace Howe ("Horace") and Mr. John Francis ("Francis") are respectively the brother and the nephew of the late Sybil Jean Howe ("Sybil"). Sybil and another of her siblings, the

defendant, Valerie Howe-Smith ("Valerie") had been the legal owners of the property in question from in or around 1993, holding as joint tenants. The Claimants are the purported beneficiaries of a gift from Sybil of her interest in the joint tenancy which it is alleged, has been severed. They seek a declaration that they were now beneficial owners of a fifty per cent (50%) interest in the property pursuant to the severance of the joint tenancy by Sybil and her having gifted her severed half interest in the property to them.

2. It is not in dispute that Sybil and Valerie had been owners as joint tenants of the subject property, at least since their father had bestowed upon them, as joint tenants, a gift of the said property, sometime around 1993. The Claimants allege that in or around 2001 Sybil determined that she wished to end the joint tenancy and transfer her severed 50% interest to Francis and Horace. It is the evidence of the Claimants that pursuant to that decision, Sybil had instructed her then attorneys-at-law, Messrs Piper and Samuda to write to Valerie to advise her of that decision and to seek to secure the registered certificate of title in order to effect the registration of the transfer to Francis and Horace thereon. It is the Claimants' evidence that despite the notification in letters from the Claimants' attorneys to the defendant, the receipt of which is acknowledged by the defendant, Valerie either failed, neglected or refused to co-operate in enabling the severance and transfer to be effected. It is the case for the Claimants that in order to give effect to her decision, Sybil gave a power of attorney to another of her siblings, Claire Ann McMorris, which empowered Mrs. McMorris to effect the transfer of Sybil's interest to the Claimants, her nephew and brother. A Deed of Gift in

consideration of natural love and affection was prepared and the stamp duty and transfer tax duly paid.

3. At no time has Valerie provided the Duplicate Certificate of Title so as to allow the registration of the purported transfer. In 2003, Sybil succumbed to sickle cell anaemia. Shortly thereafter, Valerie's attorneys wrote to the attorneys for the Claimants indicating that in light of Sybil's death, she was now the beneficial owner of the entire property by virtue of the jus accrescendi. Indeed, after Sybil's death, Valerie duly had the death of Sybil noted on the duplicate certificate of title in order to secure that Sybil's interest is transferred to her. The Claimants, in order to forestall the transmission, have placed a caveat on the title and have commenced this action. They deny that Valerie is entitled to the entire property by virtue of the rights of survivorship and seek relief in the form of Orders against her in the following terms.

    1. A Declaration that the Claimants are jointly entitled, as tenants-in-common with the Defendant, to a fifty percent (50%) share in the property described in Certificate of Title registered at Volume 628 Folio 79 of the Register Book of Titles.
    2. An order that the Defendant deliver up to the Claimants' Attorneys-at-Law, the Duplicate Certificate of Title or the property described in Certificate of Title registered at Volume 628 Folio 79 of the Register Book of Titles within seven (7) days of the date of this order for the purpose of effecting a transfer to the Claimamts as tenants-in-common as aforesaid on the said title at the Office of the Registrar of Titles and that, the Defendant executes a Transfer to the Claimants of a fifty percent (50%) share of the said property within the time limited for

delivery of the title to the Claimants' Attorneys-at-Law, failing which the Registrar of this Honourable Court is hereby authorized to execute the same on behalf of the Defendant.

3. An Order that if the Defendant does not deliver up the said Duplicate Certificate of Title within the time limited, the Registrar of Titles is directed to cancel the said Duplicate Certificate of Title and issue a new Certificate of Title in the names of the Claimants and the Defendant as tenants-in-common in the proportions set out in Order number 1 herein.
4. A Declaration that the Defendant holds the said property in trust for the Claimants until the transfer of the fifty percent (50%) share of the said property to the Claimants is registered on the said title.
5. An injunction restraining the Defendant her servants and/or agents from transferring, parting or dealing with the said property in any manner adverse to the interests of the Claimants until after the transfer to the Claimants is effected.
6. An order that upon said Transfer being noted on the said Duplicate Certificate of Title, the Registrar of Titles be directed to deliver the said Duplicate Certificate of Title to the Claimants' Attorneys-at-Law, Messrs Piper & Samuda.
7. Costs of the claim filed herein by the Claimants.

4. **Preliminary Objections by Defendant**

At the start of these proceedings the defendant's counsel raised preliminary objections. Firstly, counsel submitted that the statement of case on behalf of the second claimant did not contain a "statement of truth" as required by CPR 3.13 (2). It was submitted for the Claimants that there had indeed been a statement of truth provided by the then

attorneys at law for the 2nd claimant who had been unavailable to provide the statement of truth at the time it was made.

Secondly, counsel for the Defendant submitted that the Claimants had no locus standi to bring this suit as they had not established that they, or either of them, was either an executor of the will of the deceased Sybil, or had secured letters of administration in respect of her estate.

5. In ruling on the objections, the court accepted that CPR 3.12 allowed for attorneys to provide the required statement of truth and since this had been done, there had been compliance with the requirement of the Rules. Additionally, the Court also ruled that since the Claimants were not seeking to enforce any right of the deceased Sybil, but rather sought a declaration of their own rights, if the facts they alleged were proven on a balance of probabilities, then there was no difficulty with respect to locus standi. This conclusion is also supported by dicta in the case of ***Lennon v Bell and Gabbot*** (2005) QSC 286, cited below at paragraph **33** of this judgment. There the Respondents were sued as personal representatives and no issue was taken as to whether they were proper parties since as purported beneficiaries of the severance, it was felt that "On any view they had a sufficient interest in the issue raised by the application". I concluded respectfully that the same applies here and found that there was no basis to strike out the Claimants' claim and the court would proceed to hear the matter.

6. **The Issue**

The issue in this case is whether the acts purportedly carried out by the deceased Sybil and/or her duly appointed attorney-in-fact, were sufficient to sever the joint tenancy which it is not disputed, existed between Sybil and the Defendant at least up until sometime in 2002.

The law in relation to severance has been succinctly stated in the case of **Williams v Hensman** (1861) Vol 70 E.R. page 862 at page 867 by Sir William Page Wood V.C.

> "A joint tenancy may be severed in three ways. In the first place, an act of anyone 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 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 particular share, declared only behind the backs of 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, as happened in the cases of ***Wilson v Bell*** (1843) 5 Eq. R 501 and ***Jackson v Jackson*** (1804) 9 Ves. Jun, 591."

7. **Evidence for the Claimants**

The evidence in support of the claim by the Claimants is contained in the affidavit of the 1st Claimant and two affidavits of Claire Ann McMorris, the grantee of the Power of Attorney given by the deceased joint tenant, Sybil. Both affiants who were cross examined by way of video link (from Japan and the United States respectively) averred that they knew of Sybil's stated intention to sever the joint tenancy and to give her interest, so severed, to her brother Horace, the 1st Claimant and her nephew Francis, the 2nd Claimant. Where the information had been secured by hearsay, and certainly Francis confirmed that he had heard of the intention from someone other than Sybil, it had been

confirmed by the receipt of documents including letters passing between attorneys for Sybil and the Defendant. These documents included copies of letters dated April 2, 2002, January 10, 2003 and April 16, 2003 from Sybil's attorneys, and letters from the Defendant's attorneys dated February 5, 2003, April 4, 2003 and May 1, 2003. The terms of those letters which are all appended as exhibits to the affidavit of John Francis, are set out below.

The first letter is dated April 2, 2002 and is from Piper and Samuda on behalf of Sybil, to Ms. Valerie Howe, the Defendant herein.

> "We act for and on behalf of Mrs. Dorothy Francis and Ms. Sybil Howe regarding the subject property and are instructed that Ms. Sybil Howe wishes to transfer her interest in the subject property to your brother Mr. Horace Howe and your nephew Mr. John Francis but that you are in possession of the Duplicate Certificate of Title for the property.
>
> We hereby formally request that you immediately deliver to Mrs. Dorothy Francis the Duplicate Certificate of Title for the property to facilitate the aforesaid transfer.

8. While there had been no response from the defendant to this letter, she confirmed in her evidence that she had received the letter. Subsequently, on January 10, 2003 another letter was sent from Piper and Samuda to Mrs. Valerie Howe.

> Re: Duplicate Certificate of Title registered at Volume 628 Folio 79 Transfer by way of gift – Claire-Ann McMorris (by Power of Attorney granted by & Sybil Jean Howe) to Horace Howe and John Francis as Tenants-in-Common with Valerie Howe
>
> Please be advised that the Instrument of transfer by way of gift has been stamped and we are now in a position to

have the Transfer registered on the Duplicate Certificate for the subject premises.

We therefore request that you furnish us with same so as to enable us to have the said Transfer endorsed thereon and thereafter we will return the Title to you.

We look forward to hearing from you urgently so as to place us in a position to advance the matter.

9. Receipt of this letter was also confirmed by the defendant. A letter dated February 5, 2003 was then sent from Rattray, Patterson, Rattray, the Defendant's attorneys at law, to Piper and Samuda in the following terms:

> We refer to the captioned matter and advise that we will be representing Mrs. Valerie Howe-Smith in same.
>
> We also refer to the telephone conference (Wilson/Samuda) on the 3rd instant in which we advised that the Joint Tenancy will have to be severed prior to the transfer by way of gift to Horace Howe and John Francis.
>
> *We also confirm that we will be forwarding to you the duplicate certificate of title shortly* and we should be grateful if you would advise us as soon as the joint tenancy has been severed to tenants in common.

10. In my view, the words which I have italicized are very instructive.

However, on April 4, 2003, Rattray Patterson Rattray wrote to the then attorneys, Piper and Samuda in the following, very perfunctory, terms:

> "We have been advised by our client that her sister is now deceased. As the property was jointly owned at the time of her death, our client being the survivor is the sole owner.
>
> Please be guided".

11. This was followed by a letter from Piper and Samuda to Rattray Patterson Rattray, dated April 16, 2003.

> "We acknowledge receipt of your letter dated 4th April 2003.
>
> As you are aware, it was the clear intention of the parties that the half interest of Sybil Jean Howe be transferred in accordance with the deceased's wish, to Horace Howe and John Francis as tenants in common.
>
> Notwithstanding the death of Sybil Jean Howe, the intention and wish can still be effected and in this regard, we invite the co-operation of your client and yourselves.
>
> Sybil Jean Howe granted a Power of Attorney to Claire Ann McMorris to effect the transfer and, in fact, documents relating to the severance of the tenancy had already been prepared and executed and, as you are aware, your letter of the 5th February 2003 confirmed that you would be sending the Duplicate Certificate of Title to us.
>
> Kindly let us hear from you urgently.

12. This letter was followed by one from Rattray Paterson Rattray to Piper and Samuda dated May 1, 2003.

> "I refer to the captioned matter and your letter dated April 16, 2003.
>
> Pursuant to the instructions of our client, we hereby advise that Valerie Howe-Smith, is not consenting to the severance of the joint tenancy to tenants in common as was stated in our letter of April 4, 2003. Upon the death of Sybil Jean Howe, our client being the survivor is the sole owner".

13. The evidence which has been proffered for the Claimants is that Sybil had expressed her intention to sever the joint tenancy which she held with her sister Valerie and to divest herself of her half interest therein.

In furtherance of the decision to sever and to give her interest to her brother and nephew, there was executed a transfer by way of gift in consideration of natural love and affection. This had been effected pursuant to a Power of Attorney duly given to Claire Ann McMorris, another sister of Sybil and Valerie. That transfer had been duly stamped and Transfer Tax paid on the transaction. It is clear that the transfer of the interest has not been registered, as in ***Brynhild M. Gamble v Hazel Hankle*** (1990) 27 JLR 111, discussed more fully below, and that the duplicate certificate of title on which the transfer is to be noted has been and continues to be in the possession or control of the Defendant.

14. According to the affidavit evidence of Claire Ann McMorris, Valerie had not objected to this course until late in the day. As borne out by the correspondence between the attorneys for Sybil and the Defendant, the first indication that she was not consenting to the severance was the letter of April 4, 2003 from her attorneys, *after* Sybil had died.

15. The only assertion from the above litany which may be disputed is that the Defendant only refused to consent to the severance after the death of her sister, Sybil. In her affidavit evidence, Valerie stated that her opposition to the severance was that the property was the family home where she had grown up and stayed each time she came to Jamaica. She believed that their father wanted the property to stay in their joint possession. On the other hand, in answer to questions in cross examination and questions from the court, she suggested that there were other reasons why she resisted any attempt to sever the joint tenancy. However, an examination of the affidavits shows that those "other reasons" were not stated in either of her two affidavits.

16. It is also worth noting that according to Valerie's evidence, she first became aware of Sybil's intention to sever the joint tenancy when she received a letter from her attorneys in "January 2003". She subsequently, in oral evidence, said that she might have been confused with that date and the letter in question could have been April 2002 which she had admitted receiving. In any event she said that when she"became aware of her (Sybil's) desire" she informed her attorneys that she had no intention of consenting to the severance. I pause here to note that there was no submission made, nor could it have been made, that Valerie's opposition to the severance could, *ipso facto,* have denied Sybil her right to sever her interest in the joint tenancy and to have created a tenancy in common.

17. It is interesting to note, however, that a letter had been sent to Valerie dated January 10, 2003 which she admitted receiving, in which the request for the duplicate certificate had been articulated. The letter from the Defendant's attorneys to Sybil's attorneys dated February 5, 2003 clearly confirmed that the duplicate certificate would be sent as requested. The Defendant avers that after she saw the letter of February, she had a telephone conversation with Ms. Wilson of Rattray Patterson Rattray, in which she gave instructions that she would not be consenting to the severance and that the duplicate certificate should be delivered to a Mr. Leo Lawson. Indeed, it is only after that, in April 2003, that the Defendant's attorneys confirmed that they would *not* be sending the duplicate certificate.

18. **Evidence for the Defendant.**

The defendant does not deny the evidence as adduced by the Claimants but suggests that despite some regular contact between

Valerie and the deceased Sybil in the year leading up to her death the deceased had not intimated to her that she intended to dispose of her interest in the manner claimed by the Claimants. She invited the Court to infer from this that there was no such intention. However, there is no denial of the receipt of the letters from Sybil's attorneys-at-law as is set out in the correspondence referenced above.

One question which arises therefore is whether her instructions that she would not consent were communicated after the receipt of the April 2002 letter when she first "became aware of Sybil's intention", or after the January 2003 letter which she also admits receiving. It is certainly not clear from her evidence what was the sequence of events. In either event, it seems clear that either the accuracy of recall or the credibility of this Defendant is in question. I would hold that where there are conflicts between her evidence and that given by the witnesses for the Claimants, the latter is to be preferred.

19. **Submissions for the Parties**.

Both sides agree that the point of departure is the seminal decision, ***Williams v Hensman*** (1861) Vol 70 E.R. page 862, and the principles laid out therein, as providing the bases for severing the joint tenancy and giving rise to a tenancy in common. But that is as far as the agreement goes.

20. **The Defendant.**

Apart from the preliminary objections raised by the Defendant and which I have dealt with above, counsel for the defendant submitted that the Claimants' action should fail because it did not satisfy the tests laid down in the *locus classicus*, ***Williams v Hensman***, referred to above. The Defendant contended that the Claimants were relying

upon the basis of an act amounting to disposal under the principles enunciated in ***Williams v Hensman***. It was submitted that there had not been a sufficient act of disposal here and on that basis, the Claimants' action should fail. In particular, it was submitted that an act, if it were to be sufficient to sever the joint tenancy, must be such as to deprive joint tenant of any right of survivorship. See ***In Re Wilks Child v Bulmer*** (1891) 3 Ch 59.

21. It was the submission that "the act" of the joint tenant Sybil for the purposes of severance in this case, was "*the execution of the Power of Attorney*". Such an act was not sufficient to divest Sybil of all her rights of survivorship and so the joint tenancy had not been severed. It was further argued that the other "act" upon which reliance was placed by the Claimants was the execution of the transfer pursuant to the powers given in the Power of Attorney. This transfer, it was pointed out, was signed only by the attorney and the Claimants but not by the Defendant. Defendant's counsel proffered the view that there was no power to transfer the deceased's interest *by way of gift* and that accordingly, also precluded reliance upon those "acts" as being sufficient to achieve "disposition".

22. Defendant's counsel also cited the Australian case of ***Corin v Patton*** [1990] 169 CLR 540. There, according to the headnote, a joint tenant of land registered under the Torrens System in New South Wales executed a transfer of her interest to a trustee (her brother) to be held on trust for herself. She died before the transfer was registered. The Certificate of Title to the land was held at all times by a mortgagee. It was held by the Court of Appeal of New South Wales, firstly, that the execution of the transfer did not sever the joint tenancy, and that at

the date of her death the joint tenant had not alienated any interest in the land to the transferee.

23. It was decided that, "a unilateral declaration of intention or other unilateral act inconsistent with the continuation of the joint tenancy does not sever the joint tenancy". No issue need be taken with that proposition. But it was also held secondly: "That, at the date of her death, the joint tenant had not alienated any interest in the land to the transferee per Mason C.J and Deane and McHugh JJ, on the ground that she had not done all that was necessary for her to have done to effect a transfer, *because she had not authorized the mortgagee to hand over the certificate of title to the transferee*; by Brennan J on the ground that in the absence of the certificate of title or dispensation from production the transfer was not then able to be registered; and by Toohey J, on the ground that no consideration having been given for the transfer, there was no transaction that equity would enforce". (Emphasis Mine)

24. It was the further submission of the Defendant's counsel in this regard that dicta of the learned Chief Justice (Mason C.J.) in ***Corin v Patton*** had suggested that the Australian approach should eschew the approach of the English authorities exemplified by ***Burgess v. Rawnsley*** [1975] 3 All ER, 142. It was suggested that since in our jurisdiction we also use the Torrens System, we should be more inclined to follow the Australian view.

25. It was a further submission that the statement in the transfer executed by the attorney, (Claire), that the transferor "intends to and hereby does sever the joint tenancy as between herself and the said

Valerie Howe" falls within the principle of "unilateral declaration" and is insufficient to sever the joint tenancy. Counsel for the Defendant cited in support the English cases of ***Moyse v. Gyles*** [1700] Prec. Ch, 24 and ***Patriche vs. Powlet*** [1740] 2 Atk. 54, where it was held that only an actual alienation could sever a Joint Tenancy. A mere declaration of one of the parties that it shall be severed is not sufficient. These two cases, it is stated, were cited by Mr. Justice Walton in ***Nielson-Jones v. Fedden & Others*** [1974] 3 All ER, 47 as he looked at the question of whether a unilateral declaration of intention to sever can amount to a severance of a join tenancy.

26. Defendant's counsel therefore concludes that what is necessary is an actual alienation by the transferor of his interest and not a mere declaration and therefore states, correctly in my view, that the critical issue then becomes *whether alienation has taken place.* (My emphasis) It was submitted that it had not. In that regard, it was the submission for the Defendant that it was an essential part of the Torrens System of land registration that alienation required the transferor give to the transferee a registrable transfer *and* the duplicate certificate of title, *or alternatively*, the transfer must have been registered on the duplicate certificate of title, as only either of these alternatives would be adequate to preclude the transferring joint tenant from retaining her rights of survivorship.

27. Notwithstanding the aforesaid proposition and perhaps incongruously therewith, it was then submitted that actual registration of the "Deed of Gift" (read "Transfer") was an essential part of alienation; "that in the Torrens system, prior to the registration of the transfer, the proposed transferee has no legal estate or interest in the property in

question". The Defendant's counsel submitted that "In fact, until the Deed was registered the joint tenant or the donor of the power (in our case) was at liberty to revoke the Instrument at anytime".

28. Indeed, in its amended submissions, counsel for the Defendant sought to suggest that section 81 of the Registration of Titles Act ("RTA") was authority for the proposition that registration was a necessary element of alienation and further, that the failure to institute legal proceedings to compel the delivery up of the duplicate certificate of title, was proof that not everything had been done that was necessary to be done to ensure that there had been alienation.

29. Finally, Defendant's counsel referred to the local case of ***Brynhild M. Gamble v Hazel Hankle*** (1990) 27 JLR 111 cited by the Claimants' attorneys, {a decision of Wolfe J. (as he then was)} as a case providing authority for the opposing proposition that an unregistered deed of conveyance was adequate to prove an intention to sever the joint tenancy and create a tenancy in common. But the reference is merely to point out that in counsel's opinion the learned judge had relied upon the cases of ***Drapers v. Conveyance*** and ***Hawskley v. May*** which, it was suggested, had both been rejected by Mr. Justice Walton in ***Nielson-Jones v. Fedden and Others*** [1974] 3 All ER 47. It was also suggested that Wolfe J had failed to take account of the clarification and refinement (by Sterling J in ***In Re Wilks Child*** [1891] 3 Ch 59) of the first basis of severance in articulated by Sir William Page Wood V.C. in ***Williams v Hensman*** and suggests that reliance on this case is inappropriate.

30. In Supplemental submissions the Defendant's counsel also rejects the view that the case of ***Mascall v Mascall*** (1985) 50 P & CR 119, cited by the Claimants' attorneys at law, supported their case, on the basis that in that case the English Court of Appeal had held that "*equity regarded a gift as completed where the donor had done everything that he had to do and the donee had within his control everything necessary to constitute his title completely without any further assistance from the donor...*". However, it was counsel's submission that in this case, in view of the evidence that the various members of the family were not on speaking terms, the donor had not done everything that she had to do, as the attorney in fact had not instituted legal proceedings as she might have done.

31. By way of support of this proposition it seems, Defendant's counsel also cited section 81 of the Act (RTA) which is in the following terms:

> 1) Whenever any transaction or transmission under this Act is proposed to be registered and it is required by this Act that a memorandum of such transaction or transmission shall be endorsed upon the duplicate certificate of title, the Registrar may dispense with the production of such duplicate and the making of such endorsement thereon.
> 2) In every such case, upon the registration of such transaction or transmission the Registrar shall notify, in the memorandum in the Register Book, that no entry of such memorandum has been made on the duplicate and such transaction or transmission shall thereupon be as valid and effectual as if such memorandum had been entered thereon.
> 3) Provided always that the Registrar before registering such transaction or transmission shall require proof to his satisfaction by statutory declaration that the duplicate is not deposited or held as security or otherwise, and whether it is subject to any lien, and shall give as least fourteen days' notice of his intention to register such transaction or transmission in at least one newspaper and such other notice, if any, as he may think fit.

32. It was said that not everything necessary had been done because the Claimants could have applied under this section to the Registrar to dispense with the production of the duplicate certificate to facilitate registration and accordingly the gift had not been perfected.

33. In supplemental submissions, Defendant's counsel cited two further authorities. These were ***Lennon (Applicant) v Richard Bell and Janice Marie Gabbot As Personal Representatives of the Estate of the Late Pauline Mary Lennon (Respondents)*** [2005] QSC 286 (October 14, 2005), a decision of the Queensland Supreme Court and ***Sheila Miller-Weston v Paul Miller and Leithia Yvonne Miller,*** *Claim No.* CL 2002 M O94, a decision of the Supreme Court in this jurisdiction. In both cases the court held that there had not been severance of the joint tenancy. In the former case, it was held that the donor who had purported to give away her share of property and sever the joint tenancy she held with her former husband, had failed to effect a severance of the joint tenancy because she had not registered the transfer as required under section 59 of the Queensland **Land Title Act** which permitted unilateral severance of the joint tenancy provided there was registration.

34. With respect to the question as to whether she could be found to have severed under the third basis of ***Williams v Hensman***, (that is, evinced by a course of conduct an intention to sever), it was held that there was not sufficient evidence of such a course of conduct. In particular, it also seems that the Court was mindful of the fact that negotiations between the donor and her husband were still continuing and may not have arrived at a conclusive agreement. In those circumstances it would appear to be correct to hold as well, that the

donor/transferor had not done everything necessary to be done to put an end to any rights of survivorship which she may have had.

35. In the ***Sheila Miller-Weston*** case, the claimant brought an action against the two defendants, who were husband and wife, to recover money she lent to them to prevent foreclosure on property owned by them as joint tenants. The claimant obtained judgment against the husband which she wished to enforce by sale of the property. Accordingly, she applied to the court for a declaration that the joint tenancy had been severed by virtue of the execution of two documents by the husband. The first was a document in which the husband confirmed his indebtedness to the claimant, asserted that the debt was a charge on the property and agreed to sell the property to repay the debt. The second was a document headed "Instrument of Transfer for Change of Tenancy" and purported to have the joint tenancy changed to a tenancy in common. The wife was not a party to the execution of either of these documents and it appears, did not have notice of them. Both documents were unilaterally executed by the husband. McDonald-Bishop J held that there was no severance.

36. **Claimants' Submissions**

As noted above, the Claimants also accept that the bases for severing the joint tenancy are as set out in the judgment of Sir William Page Wood V.C. in ***Williams v Hensman***. It was the submission of the Claimants' attorneys-at-law that Sybil had severed the joint tenancy with her sister Valerie and had divested herself of her interests in her share and all her rights of survivorship. In particular, counsel cited the ***Brynhild M. Gamble v Hazel Hankle*** case where Wolfe J had held that a deed of gift came within the first of the three ways of severing

the joint tenancy (alienation) and that this was the case even if there had not been registration of the deed of gift on the duplicate certificate of title.

37. The Claimants also rely upon the Australian case of ***Corin v Patton,*** which had also been cited by counsel for the Defendant. The Claimants submit that the principle enunciated in that case is equally applicable to the instant case as both jurisdictions use the Torrens System of land registration. While it was held in ***Corin*** that there had not been severance because the donor had not done all that was necessary to divest herself of her rights of survivorship since she had failed to instruct the mortgagee who held the duplicate certificate to hand it over as she should have done. In that regard the Claimants concede that the facts of ***Corin v Patton*** are distinguishable from the instant case. In particular, the donor had purported to transfer to her brother as trustee to hold the interest for herself. To that extent there was also a legitimate question as to whether she had truly relinquished all rights she may have had under the doctrine of survivorship.

38. The Claimants' attorneys also cited the case of ***Mascall v Mascall*** (1985) 50 P. & C.R. 119) a decision of the English Court of Appeal where the Court had held that equity will aid a volunteer in circumstances where there has been an attempt to sever the joint tenancy. In that case a father executed a transfer of property to his son, a volunteer, and handed over the land certificate. After the transfer had been sent to the Inland Revenue for stamping, and returned the father, (having fallen out with the son), sought a declaration that the transfer was ineffective. The son had not yet sent the documents to the Land Registry in order to become registered

proprietor and had, therefore, not acquired legal title. It was held that the gift was complete as the father had done all that was necessary to complete the transfer.

39. The Claimants' counsel also, in response to the authorities of ***Lennon*** and ***Miller-Weston*** cited by counsel for the Defendant, submitted that these cases were distinguishable but that the principles enunciated therein, were fully consistent with the bases set out in ***Williams v Hensman*** and in fact supported the grant of the reliefs claimed by the Claimants in the instant case. It is not disputed and as articulated by McDonald-Bishop J in ***Miller-Weston***, a unilateral declaration by the transferor, by itself, is not sufficient to sever the joint tenancy and, *a fortiori*, where notice of this unilateral declaration is not communicated to the other joint tenant. It was submitted that neither case derogated from the principles established in ***Williams v Hensman*** but rather reinforced them.

40. **The Power of Attorney**

I wish to comment briefly upon a line of attack which counsel for the Defendant mounted, not directly upon the issue of whether severance had been effected, but upon the validity of the Power of Attorney. It was sought to impugn the integrity and therefore the efficacy of the Power of Attorney granted by Sybil. It was pointed out that the document had, in its body, referred to another Power of Attorney and no other Power had been produced. With respect, the Power having been admitted into evidence, (and there has been no attempt to exclude it), the issue raised is one which goes to weight and is a matter which the Court must consider in that light. Whatever may have been in any other Power of Attorney not before the court, cannot

affect the admissibility of the present Power. Nor is the existence of any other such power, without more, a derogation from the validity or the integrity of the one now before me.

41. The second line of attack on the efficacy of the Power was the submission that it must be strictly construed within "the context and general object of the power". It was submitted that the Power of Attorney gave no authority to transfer the interest in terms NOT for valuable consideration. The case of ***Jonmenjoy v Coondoo*** (1884) 9 App Cases 561, was cited in support of this proposition.

42. There it was held that a power "to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred," did not include a power to "pledge". It is not difficult to agree with the general proposition for the court must be clear that the intentions of the grantor of the power are strictly adhered to. The difficulty for the Defendant in this case as far as this objection is concerned, and as articulated by the Claimants' attorneys, is that the Power here specifically grants a power to "take charge of, sell, transfer or manage any interest which I may have in any property" and "For me, and in my name to sign all such transfers and other instruments or Deeds of Conveyance or documents of whatever nature that may be required under the Registration of Titles Act..." This is what the grantee of the power purported to do. In my view, it is wholly misconceived to suggest that a general power to transfer must be limited to exercise the power to transfer ONLY, for valuable consideration. There can be no legitimate basis for concluding that the donee of the power exceeded her authority. I also do not believe that the authority ***Jacobs v Morris*** [1901] 1 Ch 261 called in aid by the

Defendant provides any assistance. There is no basis in the evidence for the submission that the "general object of the Power of Attorney was to manage the affairs of the donor who was ailing".

43. **Severance of the Joint Tenancy – Discussion and Ruling**

I should say that, as far as the evidence which to be accepted is concerned, on a balance of probabilities I accept the averments of the Claimants' witnesses over those of the Defendant. In particular, I accept that Sybil had evinced an intention, and had communicated that intention to Claire, and through her attorneys at law to Valerie, to sever the joint tenancy. I also do not believe the Defendant when she says that she was unaware of Sybil's intention, although there is evidence that there was a breakdown in the relationship among the family members. I also find as a fact and as a matter of law that the Power of Attorney was a valid grant of the powers contained therein and that its exercise was a proper exercise of the powers granted by the donor, Sybil. Having also seen the witnesses, the two for the Claimants by video link and the Defendant in person and observed their demeanour, I reiterate my view that where there is any conflict between the evidence of the Defendant and other witnesses, I accept that of other witnesses.

44. **The Law**

The statement of the law by Sir William Page Wood in Williams v Hensman (supra) was quoted with approval in this jurisdiction by Her Ladyship McDonald–Bishop J. (Ag). (as she then was) in a very well-reasoned judgment in the case of ***Sheila Miller-Weston v Paul Miller and Leithia Yvonne Miller,*** *Claim No.* CL 2002 M O94**.** As was pointed out by her ladyship in that case, it needs to be borne in mind

that the statutory remedies with respect to severance which have been provided in the United Kingdom Law of Property Act 1925, do not apply in this jurisdiction and it is to the common law as it is existed before that date that this court must look for its solutions.

45. The first basis on which severance may occur is alienation. In fact in the ***Miller-Weston*** case referred to above and which had been cited by the Defendant in support of the proposition that no severance took place in this case, Her Ladyship summarized this basis in the following way:

> "The first rule of ***Williams v Hensman*** stipulated *that any act of any of the joint tenants operating upon his share is enough to sever his share*. The authorities all establish that this is usually by alienation or by any act that affects the beneficial interest to the extent that the right of survivorship in favour of that joint tenant is precluded. It is therefore well established that a party may alienate his interest *inter vivos* thereby creating a tenancy in common." (My emphasis)

46. In the ***Miller-Weston*** case, the claimant sought to assert that by purporting to give a charge over property, notwithstanding that no mortgage or charge had been created or registered under the RTA, the defendant had made a disposition sufficient to amount to alienation and which would be adequate to sever the joint tenancy. Her ladyship, quite correctly in my view, rejected this assertion.

47. In ***Miller-Weston***, the learned judge had had cited to her, some decisions in English cases including ***Re Dennis*** [1992] 3 All E.R. This latter case supported the proposition that disposal of an interest in a joint tenancy may be sufficient to sever the joint tenancy and create a tenancy in common and that, moreover, such a disposition may be

voluntary or involuntary. It appears, however, that only the first instance decision of the case was cited to the Court where it had been held that the adjudication of bankruptcy did not operate retrospectively to sever the joint tenancy. The effect of that decision at first instance would have been quite different from that arrived at by the Court of Appeal.

48. In ***Re Dennis***, D and his wife were joint tenants of two properties. On September 21, 1982 D committed an act of bankruptcy by failing to comply with a bankruptcy notice and on December 20, 1982, a petition to declare D bankrupt, was presented. Mrs. D died on February 23, 1983 leaving her entire estate to her children. Mr. D was not adjudicated bankrupt until 11 November 1983 and the trustee sought a declaration that he was solely entitled to both properties.

49. The question was whether severance had occurred *before the death* of Mrs. D. If the date of severance was the date of the order, the whole estate passed to D by survivorship and therefore vested in the trustee in bankruptcy. The trustee could therefore use the proceeds of sale to satisfy creditors. If, on the other hand, the date of severance was the date on which the act of bankruptcy had taken place the estate was already severed by the time Mrs. D died and the proceeds from the sale of the property would be divided equally between the trustee and Mrs. D's estate.

50. At first instance it was decided that the severance was at the date of the order and that both properties vested in the trustee. Mrs. D's personal representative appealed claiming that the severance had taken place before Mrs. D's death. They claimed that according to

section 37 of the Bankruptcy Act 1914, severance occurred at the time of D's original act of bankruptcy. The Court of Appeal allowed the appeal. It was held that the date of severance was September 21, the date of D's original act of bankruptcy. As the trustee could rely upon the doctrine of relation back to found a claim when the debtor died in the interim, it followed that the personal representative of the deceased joint tenant, could also rely upon the doctrine to defeat the trustee's claim to property by survivorship.

51. A case which was cited to the Court in ***Miller-Weston*** and which was also cited by the Claimants herein in support of their submission that the joint tenancy had been effectively severed, was ***Brynhild M. Gamble v Hazle Hankle*** (1990) 27 JLR 115. In that case according to the headnote:

> The plaintiff sought to recover possession of an estate in which she had been registered as a joint tenant with her late husband. The plaintiff tendered a copy of a death registration in evidence of proof of the fact that the other registered proprietor, her husband, had died. Also tendered in evidence was an indenture whereby the deceased joint tenant purported to convey to the defendant the subject matter by way of a deed of gift.
>
> The plaintiff claimed that by virtue of the jus accrescendi, upon the death of her husband she became the sole proprietor and that the purported deed of gift was of no effect because it was not a document which complied with the stipulated forms in the Fourth Schedule of the Registration of Titles Act. The plaintiff further claimed that even if the tenancy was severed section 63 of the Registration of Titles Act operates to make the deed of gift of no effect as it had not been registered.
>
> The plaintiff also sought reliefs by way of mesne profits.
>
> Held: (i) That the deed of gift evidenced dealing with an interest in land which manifests a clear intention to sever

> the joint tenancy and to create a tenancy in common and the appellant's (sic) right of jus accrescendi was therefore extinguished.
>
> (ii) Section 88 of the RTA is directive and not mandatory and section 63 does not operate to make the registered instrument void but only postpones the passing of the interest created by the instrument until the instrument is registered.

52. Wolfe, J. (as he then was), came to the view that the deed of gift was adequate evidence of a dealing with an interest in land which manifested a clear intention to sever the joint tenancy and to create a tenancy in common and that, accordingly, the right of survivorship had been extinguished. At pages 116-117 he stated:

> "I am satisfied that the Deed of Gift is an act which comes within the ambit of the first of the three ways of severing a joint tenancy mentioned by Sir William Page Wood, V.C. in Williams v Hensman. Following the line of cases referred to above, I hold that the Deed of Gift executed by Robert Hankle in favour of the defendant had the effect of severing the joint tenancy which existed between himself and the plaintiff".

53. Defendant's counsel had in submissions cited the Australian Case of ***Corin v Patton*** [1990] 169 CLR 540. I have found that case and dicta therein to be very instructive. There, the joint tenant purported to effect the transfer of her interest to a trustee to be held on her behalf. She died before the transfer could be registered. It was held that she had *not* done all that was necessary for her to have done to effect a transfer "because she had not authorized the mortgagee to hand over the certificate of title to the transferee....." The submission had been made for the Defendant herein, that a part of the judgment supported the further proposition that where no

consideration had been given for the transfer, equity would not enforce it. However, as rightly pointed out by counsel for the Claimants, and a submission I accept, that view reflected the minority opinion of Toohey J in that case.

54. It seems clear to me that the essential failure of the efforts to effect the severance in ***Corin's case*** was the fact that the transferor had failed to authorize the mortgagee to deliver the certificate of title to the transferee, an essential element of alienation. She had not done all that was necessary to be done to divest herself of all her rights of survivorship. Accordingly, I would distinguish that case from the present and find that merely to look at the decision, does not provide the answer to the issues raised here. In particular, it is not authority for the proposition that a voluntary transfer is not enforceable in Equity, or that Equity will not assist a volunteer. Rather one must look carefully at the analyses. In that regard, the following dictum from the joint judgment of Mason CJ and McHugh J in **Corin** is instructive.

> "The rationale for refusing to complete an incomplete gift is that the donor should not be compelled to make a gift, the decision being a personal one for the donor to make. However, that rationale cannot justify the continued refusal to recognize any interest in the donee after the point when the donor has done all that is necessary to be done on his part to complete the gift, especially when the instrument of transfer has been delivered to the donee... The need for compliance with subsequent procedures such as registration, procedures which the donee is able to satisfy, should not permit the donor to resile from the gift. Once the transaction is complete so far as the donor is concerned, he has no locus poenitentiae." (Emphasis supplied)

55. Defendant's counsel had also cited ***Corin*** as authority for another proposition: that the "unilateral expression of intention" on the part of

the transferor is not adequate to sever the joint tenancy, even if communicated to the other joint tenant. It was submitted that this approach was exemplified in judgments of Mason C.J and McHugh J in the ***Corin's*** case where it was stated:

> "...But in any event there are powerful reasons for declining to adopt in Australia the approach which was taken in ***Burgess v Rawnsley***. First, as the Judgment of Sir John Pennycuick makes clear the decision turned on the construction of 5.36 (2) of **The 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, rather than on the state of the pre-existing law. Secondly, as a matter of history and principle, the severance of a joint tenancy can only be brought about by the destruction of one of the so-called four unities: see Blackstone, Commentaries on the Law of England (1778), Volume 2, pages 185-186. 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. *A statement of intention without more does not affect the unity of Title*. Thirdly if mere statement of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interests in land which had been the subject of statements said to amount to declarations of intention. Finally, there would be no point in maintaining as a separate means of severance the making of a mutual agreement between the Joint Tenants." (Emphasis Mine)

56. I would hold that the underlined section of the dicta cited above is the most instructive. It is that mere statement of intention "*without more*" is not adequate to effect severance. Indeed, the Defendant's counsel's submission that "the severance of a joint tenancy can only be effected by an agreement to that effect *or an actual alienation:* A declaration is insufficient", is undoubtedly correct. I find that in this case there is

considerably more than a "mere statement of intent" by Sybil and her attorney in fact.

57. It must, therefore, follow inexorably that the real question at issue is whether the acts purportedly done by or on behalf of the joint tenant, Sybil, amount to an "alienation" as submitted by the Claimants' counsel. That this is the test to be satisfied, is not disputed by the Defendant's counsel. It is the essence of the submission for the Defendant that under the Torrens System which is practiced in this jurisdiction, it is necessary for the transfer to have been registered in order to have amounted to alienation. This would mean that one joint tenant who had possession of the duplicate certificate of title could always frustrate the wishes of the other joint tenant and prevent the severance of the joint tenancy. Such a proposition needs only to be stated to be seen for the misconception that it is. In these circumstances, I respectfully reject the submission. I find support for my position in the judgment of Wolfe J. quoted above where he discusses the import of registration under the RTA.

58. A simple example may suffice to demonstrate this point. Consider a situation where a husband (H) and wife (W) recently married, jointly contribute to the purchase of property as joint tenants. W is the mother of two grown children and within months she finds out that she is terminally ill and that H who has possession of the duplicate certificate of title, is planning to leave her for another woman. She advises H that she wishes to sever the joint tenancy and leave her interest in the property to her children. She also advises her lawyers to produce a document transferring her interest to her children in consideration of natural love and affection and instructs them to write

to H requesting the duplicate certificate of title so as to register the transfer. These instructions are carried out. H refuses to answer to the lawyer's letter or hand over the certificate. She dies leaving a will in which she states that "my severed 50% interest in the said property previously held in a joint tenancy with H, if not finally transferred to my children A and B at the time of my death, is held by me on trust for A and B or is hereby devised to them as tenants in common". H, as soon as he becomes aware of W's death instructs his attorneys to have the death noted on the duplicate certificate of title. A and B seek a declaration that they are entitled to an interest in the property. Is it conceivable that a court of Equity would refuse to grant the relief sought by the children for a declaration that the joint tenancy had been severed? I think not.

59. With a few relatively minor changes to the above fact pattern, (especially as it relates to the will) the situation outlined is very similar to the facts in the Australian case of ***Lennon (Applicant) v Richard Bell and Janice Marie Gabbot*** referred to above and cited by Defendant's counsel. The applicant and the late Pauline Lennon (Mrs. Lennon) commenced a relationship in about 1971 and were married in 1987, but separated about June 3, 2004. Mrs. Lennon died on December 3, 2004. The issue to be determined on the application which was brought by the applicant was whether the joint tenancy in which they held the matrimonial home which they had purchased in 1999 (and was unencumbered) was severed prior to the death of Mrs. Lennon. The application was brought against Mr. Bell and Ms. Gabbot who were the children of Mrs. Lennon from her first marriage. They were sued as personal representatives of Mrs. Lennon. No issue was taken as to whether they were in fact the appropriate respondents. On

any view, they had a relevant interest in the issue raised by the application.

60. In that case it was held that severance had not been achieved but it seems that the reason was that negotiations were still ongoing between the parties as to appropriate valuations and therefore any act was revocable if not agreement on the valuation were arrived at. Put another way, the acts, such as they were, were not adequate to amount to alienation so as to deprive the joint tenant of his right to survivorship. The transferor had not completed doing everything "necessary" to divest herself of her rights of survivorship. It was also held that this case did not satisfy the third test in ***Williams v Hensman*** being a course of dealing between the parties that was sufficient to allow the inference to be drawn that they had mutually acted inconsistently with the continuance of the joint tenancy.

61. There is some question as to whether necessary means the transferor must have done all that was necessary or only all that was necessary to be done by him. I am prepared to hold that the better view of the definition of the concept of alienation is to be found in the answer to the question: Has the joint tenant who is asserting the severance of the joint tenancy done everything *required of him* that is "necessary" to give effect to that severance? Indeed, the question posed at the beginning of this paragraph was adverted to by Mason C.J and McHugh J. in their joint judgment in **Corin**. They were of the view that that question had first arisen clearly in ***Anning v Anning*** (1934) 50 C.L.R. 341 and had been dealt with differently by the three judges, Higgins, J., Isaacs J. and Griffith C.J. Griffith C.J. was of the view that it meant "necessary to be done by the donor". Isaacs J. took a stricter view

and said if the legal title is assignable and has not been assigned, then the gift will fail. Higgins J. stated that the word "necessary" referred to the nature of the property not to any obligation on the donor and went on to say: "What the Courts look at is what the donor might have done". It was suggested that based upon Higgins J's formulation, it seemed that he "would have been prepared to recognize in equity a gift which the donor could have done no more to perfect, for example, a gift incomplete simply because the transfer remained unregistered the donor having done all that he could do".

62. The judgment of Mason C.J. and McHugh J also referred to dicta of Dixon J in ***Bruckner v Perpetual Trustee Co. Ltd***. (1937) 57 C.L.R. 555 at pages 599 to 600 of that decision where his lordship said in words which I adopt:

> "There is no *a priori* reason why statutory provisions making title depend upon registration should not confer upon a person in whose favour a registrable instrument has been made, a right to procure its registration notwithstanding that it is voluntary, and no reason why it should not leave the transferor powerless to countermand his instrument. Such a right would not depend upon the remedies or doctrines of a court of equity.....".

63. It is convenient at this time to deal with the case of ***Mascall*** to which reference has been made above, as well as the submission by the Defendant on the applicability of section 81 of the RTA. The headnote of that case is as follows:

> In March 1976 the Plaintiff bought a house for £9,000 close to his own intending to get his daughter, who was ill, to move into it. The daughter declined the offer. The Plaintiff was thinking of selling the house when the defendant, his son, offered to buy it. But the Plaintiff did not want to charge the Defendant any money. After some discussions the defendant began treating the house as his.

In early 1981 following the Defendant's persuasion the Plaintiff executed a transfer on February 12 which was expressed to be in consideration of £9,000 and transferred the house to the Defendant although no money exchanged hands, the Plaintiff also handed the land certificate of the house to the Defendant. The transfer was then sent to the Inland Revenue for Stamp Duty purposes. There was some delay there. Meanwhile, the Plaintiff and Defendant had a serious row and the Defendant went abroad. The transfer was returned by the Inland Revenue to the Plaintiff's solicitors. The Defendant had not yet sent it to the Land Registry for registering him as the proprietor. The Plaintiff brought an action seeking inter alia, a declaration that the transfer was void and of no effect and that he was not bound by contract or otherwise to transfer the house to the Defendant. The deputy judge found that the Plaintiff intended to make a gift of the house to the Defendant and that the gift had been completed, he refused to grant the relief.

On appeal by the Plaintiff:-

Held, dismissing the appeal, that equity regarded a gift as completed where the donor had done everything that he had to do and the donee had within his control everything necessary to constitute his title completely without any further assistance from the donor; and that, accordingly, as the plaintiff in the instant case had executed the transfer in favour of the defendant, and had handed over the land certificate to him, the Plaintiff had done everything in his power to transfer the property to the Defendant, and it was for the Defendant to apply to the Land Registry to register him as the proprietor, so that the gift of the property had been completed in the Defendant's favour and the deputy judge reached the right conclusion.

64. The Defendant's argument in relation to this authority, as set out in her submissions, is that Sybil had not done everything necessary to perfect her gift to the Claimants and therefore ***Mascall*** does not assist. In particular, there is the reference to section 81 of the RTA (set out above) of which it is suggested the Claimants could have

availed themselves to secure registration and complete the gift. The gift being imperfect, the maxim "Equity will not perfect an imperfect gift" comes into play to deny the Claimants the reliefs sought.

65. Although it is greatly concerned with the operation of a local statute, I have found the decision of ***Corin*** extremely useful for the examinations of various propositions which are made in this area of the law. With particular reference to the proposition that the maxim of Equity referred to in the preceding paragraph, and another that Equity will not assist a volunteer, damage the Claimants' case, I would cite the following dicta from the ***Corin*** case.

> "Of course it would be a mistake to set too much store by the maxim. Like other maxims of equity it is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain".

66. It should not be surprising therefore, that doctrines such as proprietary estoppel have been developed which often impinge upon the strictness with which such maxims may otherwise be applied. Moreover, with respect to the application of section 81 of the RTA, I agree with the Claimants' submissions that an application under that section would not be feasible. No registrar would have been able to note the transfer in the face of the other joint tenant having noted the death of Sybil, in the absence of an order of a court of competent jurisdiction. In any event, I am of the view that the proper application of section 81 is where a title has been lost or misplaced and not in circumstances where there is an extant title but a dispute as the relevant interests.

67. It is finally necessary to deal very shortly with a further submission on behalf of the Defendant; that because the Deed of Gift was one for which there was no valuable consideration, a court of Law will not assist by conferring any equitable interest on the Claimants. This is misconceived on two bases: Firstly, this Court has all the powers of a Court of Equity and may give effect to all equitable remedies. Secondly, it is not correct to say that a transfer "in consideration of natural love and affection" is one without "valuable consideration". In that regard, the dictum of Toohey J in **Corin v Patton** set out below is not, in my view, a correct statement of the law in this jurisdiction. In any event, it is not binding on me and I would refuse to follow it.

> "...An Instrument of Transfer is not effectual of itself to vest in the transferee, either a legal or an equitable estate, in the land... Where however, there is a transaction for value, which is recorded in a contract followed by an instrument of Transfer of which is recorded in the Transfer itself, there will be an equitable interest in the land commensurate with the transferee's ability to obtain specific performance of the contract... But where the transaction is not for value, the transferee acquires no estate in the land merely by force of execution and delivery of the transfer."

68. In conclusion, there is no doubt that ***Williams v Hensman*** remains good law in this jurisdiction. Further, despite the suggestion that the Australian approach to severance of the joint tenancy has diverged from the English approach, in Lennon it was confirmed that Williams continues to be a respected authority in Australia. In those circumstances the Court must consider whether there has been severance under any or all of the three bases laid down in ***Williams v Hensman***. Given the facts that I have accepted as proven by the evidence, I am of the view that there was a sufficient alienation by virtue of a valid transfer pursuant to a legitimate Power of Attorney.

69. I am satisfied that the acts of Sybil and her duly authorized attorney and the correspondence exchanged between the attorneys and the Defendant comprise a clear alienation of her interest so as to have given rise to a severance of the joint tenancy and the creation of a tenancy. Moreover, I would also be prepared to hold that the course of dealings between the parties clearly evinced a course of dealing from which it could be inferred that the joint tenancy had been severed.

70. It is equally clear that there was no agreement and so the second basis does not apply and I do not discuss this further.

71. Nevertheless, I feel that while I have already come to the view that there was alienation within the first basis of ***Williams v Hensman*** sufficient to found severance I should, out of deference to the vigourous submissions of the Defendant on the issue of the effect of a unilateral declaration by the transferor, make a few observations. It will be recalled that it had been submitted on behalf of the Defendant that the "declaration" in the transfer that the transferor "intends to and hereby does sever the joint tenancy as between herself and the said Valerie Howe" was a unilateral declaration and that as such was of no effect. The authorities show a divergence of views as to whether such a declaration is effective to achieve severance. I am indebted to my learned sister, McDonald-Bishop J. for the review of the authorities on unilateral declarations provided in the unreported decision ***Bertram Cooper (As Executor in the Estate Lucille Adela Coleman) v Linford Coleman*** Claim No: HCV 01803 of 2004, decision given June 15, 2007. There, the learned judge pointed out that at common law,

"a mere declaration of an intention to sever without the agreement of the other joint tenant was not effective to sever a legal joint tenancy". She cited the dicta of Lord Hardwicke L.C. in ***Partriche v Powlet*** (1740) 2 Atk. 54 where his lordship stated:

> "If no agreement then there must be an actual alienation to make it amount to a severance. The declaration of one of the parties that it be severed is not sufficient unless it amounts to an actual agreement"

72. She noted that the principle was followed in the cases of ***In Re Wilks***, and ***Neilson-Jones v Fedden*** (both mentioned above). One of the observations which is made in ***Coleman*** is that in ***Neilson-Jones v Fedden*** "the correspondence disclosed an unequivocal declaration by the husband that he intended to sever the joint tenancy". In that case Walton J. came to the conclusion that a unilateral declaration was insufficient to sever the joint tenancy. He stated:

> The question then is: can such a declaration – a unilateral declaration – ever be effective to sever the joint tenancy? It appears to me that in principle there is no conceivable ground for so 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. Moreover, if it did, it would appear that a wholly unconscionable amount of time and trouble has been wasted by conveyancers of old in framing elaborate assignments for the purpose of effecting a severance when all that was required was a simple declaration".

73. McDonald-Bishop J. notes that while there are those authorities, there is however, another line of authorities which supports the proposition that such a unilateral declaration is indeed adequate to sever the joint tenancy. These include ***Hawksley v May*** (1955) 3 All ER 353; ***Re Draper's Conveyance Nihan v Porter and Another*** (1867) 3 All ER

853 and ***Burgess v Rawnsley*** (1975) 3 All ER 142. She referred to dicta of Lord Denning in Burgess which re-asserted the view that a unilateral declaration of intention by one joint tenant communicated to the other is sufficient to sever the joint tenancy. He stated:

> It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly, but be held in common. I emphasize that it must be made clear to the other party. That is implicit in the sentence in which Page Wood V.C says:
>
> > "It will not be sufficient to rely on an intention with respect to the particular share declared behind the backs of the other persons interested."

74. As McDonald-Bishop observes, the view of Lord Denning is shared by the learned authors of **Commonwealth Caribbean Land Law.** The learned author maintains that what is essential is that there is communication of the intention to the other joint tenant(s).

75. It is clear that it is not essential that there be agreement to sever the joint tenancy. It is also clear that where there is property held in trust by A for B and C as joint tenants and A and B are *sui juris*, that a trust for sale exists which either beneficiary may determine and claim their interest in the proceeds of sale. Given those facts, I can find nothing logically and conceptually wrong with this approach and I would endorse it. It should be noted that I have, in any case found that in this case there has not been a "mere declaration of intention" as the correspondence is bolstered by the terms of the transfer executed pursuant to the Power of Attorney.

76. In light of the foregoing, I have little difficulty in finding in favour of the Claimants and make an order in terms of paragraphs 1-6 of the Fixed date Claim Form filed by the Claimants on the 7th day of April 2005.

77. I award costs to the Claimants to be taxed if not agreed.

Roy K. Anderson
Puisne Judge
January 2011

SCANNED