Severing a joint tenancy by will-making

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A joint tenant who wishes to transfer his or her interest to another person has nothing to convey or give. This means that, depending on the 'gamble of the tontine' (as Deane J called the right of survivorship in *Corin v Patton* (1990) 169 CLR 540, 572), there may be nothing for the joint tenant to give on death. When the joint tenant comes to make their will, he or she may want to change that outcome by ending the joint tenancy.

Snapshot

- When a joint tenant makes a will, in order to be able to convey or give property on death, they may wish to sever the joint tenancy.
- There are three ways that a joint tenant may sever the joint tenancy: unilateral action; mutual agreement; and by a course of dealing intimating the interests of all were treated as tenancy in common.
- When taking instructions for a will, ascertain the nature, extent and ownership of the testator's assets, raise practical solutions and role play scenarios which are provided for in the will.

Means of severing a joint tenancy

There are three ways that a joint tenant may sever the joint tenancy, so that there is separate property to convey or give. First, in some circumstances there may be severance by unilateral action. Secondly, severance can occur by mutual agreement. Lastly, 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 (*McNamee v Martin as Financial Manager for John Boden McNamee* [2021] NSWSC 568 at [28] ('***McNamee***')).

McNamee decided that a joint tenant could unilaterally sever the joint tenancy by assignment of the jointly owned property, being a chose in action, a debt, to herself by deed poll. However, it is by the second and third means of severing a joint tenancy that joint tenants achieve that outcome by making mutual wills. Historically, this occurs where mutual wills deal with an interest in real estate in a manner inconsistent with ownership of the real estate interest passing by survivorship.

Severing a joint tenancy by will

In re Wilford's Estate; Taylor v Taylor (1879) 11 Ch D 267, two sisters owned real estate as joint tenants. They agreed to make mutual wills whereby the survivor would hold the real estate for life only. By their conduct, the sisters agreed to treat the ownership as tenancy in common and there was a severance of the joint tenancy. *In the Estate of Heys* [1914] P 192 concerned a husband and wife who were joint tenants of a number of leaseholds. By their wills, each left the leasehold to each other with gifts over to relatives. The Court concluded that, by making their wills in this manner, they had severed the joint tenancy.

More recently and closer to home, the same outcome was achieved in *In Re the Will of Fernando Masci* [2014] QSC 281 ('***Masci***'). A husband and wife made a joint will, something of a rarity. The will provided for each spouse to live in the jointly tenanted home after the other's death. It gave half the estate to the wife's daughter and half to the husband's children. The Court decided the will evidenced a severing of the joint tenancy in the family home because it granted a life estate to the survivor. The Court observed, 'it is not the making of a will, per se, or even the making of two wills, per se, which severs the joint tenancy, it is the agreement between the joint tenants to dispose of their property in a way which is inconsistent with the continued existence of a joint tenancy' (at [32]).

A variation on the theme

In *Gambacorta v Di Giovanni* [2021] NSWSC 61 **('*Gambacorta*'**) the Court found that, in the course of making wills, a husband and wife severed joint tenancy in property. Two points of difference with earlier cases were: (i) the jointly owned assets were choses in action - a share and bank accounts – rather than an interest in real estate; and (ii) the wills weren't mutual: one will even pre-supposed the continuation of the joint tenancy.

Joint tenancy in a chose in action

The first of the abovementioned differences was discussed in *De Lorenzo v De Lorenzo* [2020] NSWCA 351. The testator owned two shares in two companies. The will gave the shares to her three children as tenants in common in equal shares, but stated that if the shares were not divisible by three, the daughter was to receive more. The issue for the Court was whether the three children would receive two thirds of a share each or whether the daughter inherited both shares. The conclusion at first instance and on appeal was that each child inherited two thirds of a share in the two companies.

In the course of considering the construction issue, Leeming JA referred to literature stating that a chose in action could not be owned as tenants in common. His Honour drew attention to practical difficulties if a share (or another chose in action, a bank account) was owned as tenant in common. Ultimately, the issue didn't need to be, and wasn't, resolved by the Court. However, the relevant property owned as joint tenants in *Gambacorta* were choses in action (as was the relevant property in *McNamee*).

Gambacorta v Di Giovanni

In *Gambacorta*, the testators were husband and wife, Maria and Giuliano Di Giovanni. When Maria died, she and Giuliano were joint owners of 1900 AGL shares worth about $47,500, and the account holders in joint names of various bank accounts, with funds totalling about $474,000.

Maria made a number of wills within a short time which displayed confusion about gifting these jointly owned assets. The relevant will was Maria's last will, in one clause of which she gave one half of the money in the bank accounts jointly owned with Giuliano to her beneficiaries. That clause would only work if Giuliano had died before her or if the joint tenancy had been severed. By the immediately following clause, Maria's will stated that if Giuliano died before her, one half of the jointly owned bank accounts was to be given to Giuliano's beneficiaries and the other half to Maria's beneficiaries. This clause contemplated that the joint tenancy had not been severed.

Giuliano's last will

Giuliano's last will also contained some peculiarities. He gave the joint bank accounts to Maria. This was superfluous if the accounts were owned as joint tenants. However, if Maria predeceased him, he left the joint bank accounts to his beneficiaries as to one half and the other half to Maria's beneficiaries. This clause anticipated Giuliano owning the whole of the bank accounts at his death, something consistent with acquisition by survivorship.

In the course of the costs decision, *Gambacorta v Di Giovanni (No 2)* [2021] NSWSC 803, the Court succinctly stated its reasons for concluding in the substantive proceedings that the joint tenancy in the monies in the joint bank accounts was severed at a time no later than Maria's death: 'the testimonial evidence on balance supported a finding that Maria and Giuliano came to a definite agreement that they would deal separately in their wills with their shares in the jointly owned property, but then they made wills the terms of which cast very considerable doubt on the existence of such an agreement in fact' (at [19]).

This reasoning highlights the difficulties experienced by an executor entrusted with administering an estate where the will discloses conflicting intentions, as in *Gambacorta*. However, there are things to learn from the decision which could guide practitioners taking instructions for a will.

Ascertain the nature, extent and manner of ownership of the testator's assets

It is always important to ascertain the nature and extent of the testator's assets. Apart from other reasons, a testator's ability to recall the nature, extent and value of their estate (at least in general terms) is an essential aspect of testamentary capacity. It is also important to ascertain the manner in which the testator's assets are owned. This is especially important when drafting a will which specifically deals with some of the testator's assets.

A recent case where this doesn't seem to have occurred is *Hill v Cronin* [2021] VSC 480. There, the sole registered proprietor of real estate included a clause in her will which suggested she owned the real estate as joint tenants. Her will stated that, if she became the sole registered proprietor by survivorship, the property was given to three beneficiaries. Failed litigation ensued in an endeavour to establish the non-existent joint tenancy.

Raise practical solutions

A practical solution for Maria Di Giovanni in *Gambacorta* was to close the joint bank accounts, with the agreed share for each account holder being deposited into their separate bank account. Thereafter, Maria could leave the proceeds of the bank account in her name to whoever she wanted. This sort of practical solution is often advised when clients instruct that they have separated. It was this advice which meant the claim against the solicitor was unsuccessful in *Vagg v McPhee* [2013] NSWCA 29. Similar advice may be relevant in other circumstances, such as advising blended families (e.g. *Masci*) or acting for a couple in a childless relationship (e.g. *Gambacorta*).

Careful will drafting

As the case of *Rose v Tomkins* [2017] QCA 157 reminds, careful will-drafting is still needed, even when a practical solution is adopted. That case concerned de facto partners who owned real estate as joint tenants. Each wanted to ensure that a half share of the real estate passed to his and her children. They severed the joint tenancy. One made a will granting the other a right of residence. One half of the residue of her estate was given to her children, and one half was given to the other partner's children. After the first partner's death, her executor successfully applied to rectify the will. The Court found that the deceased's intention was that her half share of the real estate – that is, the whole of her interest in the real estate once it had been severed - be left to her children (once the right of residence fell in). The will did not give effect to that intention.

Role play the scenarios

In *Gambacorta,* the Court was critical of the conceptual errors and poor drafting of the Di Giovannis' solicitor. Conceptual errors are also evident in *Rose v Tomkins*. These types of errors can be largely avoided by explaining the various scenarios dealt with in the will (e.g. where Maria dies first) by reference to the client's specific circumstances, particularly where specific assets are intended to be given to particular beneficiaries. **LSJ**