

TIL DEATH US DO PART: JOINT TENANCY AS PROPERTY

KATE GALLOWAY*

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What is the true nature and extent of the interest of the joint tenant, as distinct from their joint interest in the property itself? Can the joint tenancy itself constitute property? And, will the extent of a joint tenant's interest always be an undivided moiety? This paper reviews two recent decisions: *Peldan v Anderson* (2006) 80 ALJR 1588 and *Cummins v Cummins* [2006] HCA 7. At first instance, the court in *Peldan v Anderson* conceptualised the severance of a joint tenancy as a transfer of *property*. This was discussed also in the Federal Court decision and in the High Court on appeal. The Federal Court analysed the severance of a joint tenancy in terms of the alienation of a bundle of rights, indicating an understanding of a joint tenancy as itself a property interest. This paper uses Penner's challenge to the 'bundle of rights' theory of property as a framework to reject this. Having determined the nature of a joint tenancy as other than property, the paper refers to *Cummins* to examine the extent of the joint tenant's property interest. This case shows a contemporary application of equitable rules that result in the deconstruction of the joint tenant's undivided moiety. Together, these cases highlight the challenges associated with finding the true extent of 'ownership' and 'property' where a joint tenancy is involved.

Introduction

In 2006, the High Court handed down its decision in *Peldan v Anderson*¹ ending its run through the courts. While the High Court resolved the issues through emphasis on the provisions of the *Bankruptcy Act 1966* (Cth), the lower courts considered the nature of joint tenancy in terms of a proprietary interest. This paper seeks to examine whether it is correct to characterise the joint tenancy itself (by the right of survivorship) as a property interest. After running through the facts of the case and its issues, this paper will look at the conceptual framework of property applied by the Federal Court and assess whether this framework is relevant to the concept of joint tenancy.

Peldan v Anderson

The facts of the case can be briefly outlined as follows:

* Lecturer, School of Law, James Cook University.

¹ [2006] HCA 48 (unreported, Gummow ACJ, Kirby, Hayne, Callinan, Crennan JJ, 4 October 2006).

1. Mr and Mrs Pinna purchased a property at Carindale in Brisbane in 1995 as joint tenants.
2. By August 2003 Mr Pinna was in default of his tax obligations to the tune of \$280,000.
3. On 11 September 2003, Mr and Mrs Pinna executed a form of transfer whereby a 'one-half interest in fee simple' was transferred. Mr Pinna was identified as both transferor and transferee.
4. Consideration for the transfer was expressed as 'the unilateral severance of a joint tenancy pursuant to s59(2) of the *Land Title Act 1994*'.
5. The transfer registered on 5 November 2003.
6. Mrs Pinna died unexpectedly on 12 January 2004.
7. Mr Pinna was declared bankrupt on 21 April 2004.
8. On 28 April 2004 the property was sold to a third party for \$600,000. Half of that was paid to the bankrupt's estate.

The litigation concerned the treatment of the balance sale proceeds. At the time of severance of the joint tenancy Mr Pinna was insolvent. At the time of the sale of the property Mr and Mrs Pinna were each registered as a one-half interest as tenants in common. As a consequence, the share attributable to Mrs Pinna's interest would ordinarily have become part of her deceased estate. Those funds would not have been available to the trustee, or to the bankrupt's creditors.

Mr Pinna's trustee alleged that the severance of the joint tenancy was a transfer which was void as a result of the operation of s121 of the *Bankruptcy Act 1966* (Cth).

Mr and Mrs Pinna intended that the joint tenancy would be severed, and that thereafter they would each hold a half interest in the property as tenants in common. As tenants in common Mr and Mrs Pinna were able to direct, by their wills, who would receive their

interest in the property upon death. In this case Mrs Pinna was able to direct that her share be distributed to her children, rather than her husband.

If the trustee was correct then the severance of the joint tenancy would have been disregarded. Mr and Mrs Pinna would have continued to hold the property as joint tenants until Mrs Pinna's death. Through his survivorship, Mr Pinna would then have become the sole proprietor of the property. As a consequence, the whole of the property (or the proceeds of its realisation) would form part of the bankrupt's estate, and be divisible amongst creditors.

In considering *Anderson v Peldan*, the Federal Court referred to the severance of a joint tenancy in terms of the alienation of a bundle of rights.² This seems to categorise the manner in which property is held (ie as joint tenant) in terms of property itself. This raises the question of whether analysing co-ownership as property in itself is accurate; and whether therefore the change of co-owners' relationship from a joint tenancy to a tenancy in common effects some transfer of *property*.

In the context of s121 of the *Bankruptcy Act 1966* (Cth), the questions are:

1. whether rights particular to a joint tenancy ie the right to survivorship (or estate of a deceased joint tenant upon their demise) is 'property' within s5 of the Act;
2. whether the severance of the joint tenancy creates a *new* right in the co-owner of alienability by will; and
3. therefore whether the severance of a joint tenancy represents a *transfer* of that property in terms of s121(1) of the Act.

Is a joint tenancy 'property'

Jarrett FM³ found that there was consideration for the severance of the joint tenancy: namely 'relinquishing the beneficial interest of a joint tenant of a common property, including the right of accretion by survivorship in return for the share of a tenant in

² *Anderson v Peldan* [2005] FCA 1179 (unreported, Kiefel J, 25 August 2005), [5].

³ *Peldan v Anderson* [2005] FMCA 142 (unreported, Jarrett FM, 21 February 2005).

common'.⁴ Given this, 'and given the nature of the consequences that flow from a change from joint tenancy to tenancy in common, it seems... that what was being disposed of... were property interests'.⁵ Indeed '...the change in the nature of his interest carried with it a change in the bundle of rights attached to his interest in the property.'⁶

A broad interpretation of this analysis implies that there is a transfer of an estate in land: namely the whole of the joint tenant's interest in land, and a taking of a new (proportionate) estate as tenant in common.

Alternatively, this analysis identifies the change as a relinquishment of a property interest: the right of survivorship. Either way, with respect, the federal magistrate does not identify what is the property. Instead the emphasis is on the *consequences* of a transaction rather than the nature of the thing itself the subject of the transaction. This approach was taken on appeal by Kiefel J who said that Mr Pinna could not have 'forfeited his right and transferred to Mrs Pinna the right to alienate her share by will'⁷ as this was simply the *consequence* of the transaction.

In the Federal Court, Kiefel J then identified the transaction as a 'transfer which takes place in the detachment of... new shares in the property ... from one former joint tenant to themselves.' This step represents the broader view of Jarrett FM's analysis of consideration, but is based on the judgment of Deane J in *Corin v Patton* where he describes the transfer of an interest as joint tenant as a staged process. Deane J however makes this analysis in the context of a *transfer* of an interest as joint tenant to a *third party* – who before the transaction had no interest at all in the property (the land). This analysis is valid in those circumstances, and reflects the nature of the interest held by a joint tenant as a potential divisible share in the land.⁸ However it does not seem so clear in circumstances which involve a severance of the joint tenancy by agreement between co-owners – where each co-owner already owns an estate in the land in common.

⁴ *Corin v Patton* (1989) 169 CLR 540, 574.

⁵ *Peldan v Anderson*, [29].

⁶ *Peldan v Anderson*, [28].

⁷ *Anderson v Peldan* [2005] FCA 1179 (unreported, Kiefel J, 25 August 2005), [10].

⁸ Peter Butt *Land Law* (5th ed, 2006), 237.

Although Kiefel J found that this is not a transfer of property *to another person*, it is implied that there is property involved.

Lastly Kiefel J analysed s121(9)(b) of the *Bankruptcy Act 1966* (Cth) to ascertain whether the new ‘character’ of the co-ownership as tenants in common was the creation of a new interest. As mentioned, ‘the enquiry arising under s121(1)(a) does not extend to *Mrs Pinna’s* interest. And it does not... extend to what would likely have occurred to *Mr Pinna’s* interest in the event of *Mrs Pinna’s* death.’⁹ This implies that the property sought by the trustee is really *Mrs Pinna’s* estate in land; that *Mr Pinna’s* interest before the severance does not extend to *Mrs Pinna’s* interest ie that there is no property in her estate. By implication this suggests that the manner in which the estate in land is held is not a property interest itself.

So far the court failed to categorise the *property* nature of the joint tenancy independent of the co-owners’ estate in the land itself.

Different Conceptions of Property

The possibilities canvassed at first instance and on appeal, are that:

- the transaction severing the joint tenancy was a mutual transfer of a half interest in land; and
- there was a shift in the right to alienate by will which would be categorised as property.

Mr Pinna’s estate, always equivalent to a potential one-half share, remained vested in him. The issue is whether he had an interest in *Mrs Pinna’s* estate, amounting to property, which he transferred. This will be examined through the traditional framework of property classification, and through the bundle of rights theory referred to in the Federal Court decision.

Traditional Classification of Property

⁹ *Anderson v Peldan*, [16].

Traditionally property was classified according to the nature of the remedy available at law. Real property was recoverable in a real action and personal property through an action for damages. The claim to property in *Anderson v Peldan* could be characterised as a right to survivorship, or an interest in Mrs Pinna's land – can these be classified within the traditional framework?

A joint tenancy does not represent a 'thing' recoverable if taken away through a transmutation to a tenancy in common. The loss of the right to survivorship which may occur by agreement, by the action of the joint tenant themselves or by intervention of any number of other factors is not recoverable as a thing. The right to survivorship cannot be categorised as real property under the classical framework.

Neither though can the right to survivorship be categorised as personal property. It can be taken away through the actions of either co-owner, neither of whom will be liable in damages to the other. It can be destroyed through an external event such as bankruptcy, but will not be compensated for as against any third party.

Alternatively the right of survivorship may give the joint tenant a property interest in the estate of their co-owner which manifests through that right to survivorship ie the estate will be realised after death of the co-owner. Although clearly identifiable as Mrs Pinna's estate in land when in her own hands, for the duration of the joint tenancy is Mrs Pinna's estate also property of Mr Pinna?

The law of course recognises future interests in land, which are categorised as real property but the potential for enlargement of a joint estate to an estate in severalty is by definition not a reversion or remainder: nor can it be classified as an executory interest in land. In one sense the estate of each co-owner *in the whole* is subject to a contingency, namely death of all other joint tenants (and non-severance otherwise). But the unique nature of joint tenancy is considered separately to any other contingency attached to land under the doctrine of estates.

This conclusion can be tested by asking the question: if the joint tenancy were a contingent or executory interest in the whole of the land, could it be recovered in rem if

the interest were taken away? The answer is no. The joint tenancy represents the relationship and rights between the parties but not an interest in land separate from that owner's own estate in common. Nor can the relationship be categorised as personal property because it cannot be enforced even in an action for damages for loss. The limitations of trying to represent the joint tenancy in terms of the traditional classification of property are clear - joint tenancy per se is clearly not property. And if there is no property right, then upon severance of a joint tenancy, there is no possibility of a transfer of a property right.

The Bundle of Rights Theory of Property

As their honours have made reference to the bundle of rights associated with the joint tenancy it is relevant to consider the nature of the joint tenancy in terms of the bundle of rights theory of property.

Penner in the *ULCA Law Review* identifies the bundle of rights theory of property as emanating from Honore's description of the incidents of property.¹⁰ The rights include the right to possess; to use, manage and receive income; to capital; to alienate; to security; of transmissibility and absence of term; prohibition of harmful use; and the liability to execution.¹¹

If the bundle of rights theory is accepted, none of these incidents can sensibly be applied to the nature of a right of survivorship, nor to any possible interest of Mr Pinna in the estate of Mrs Pinna.

- The right to possess arises from Mr Pinna's estate, as does his right to receive income and to alienate.
- The right to survivorship itself, or any possible right to the balance of the estate do not give him a right to alienate Mrs Pinna's estate, and he cannot alienate his right to survivorship.

¹⁰ JE Penner 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711, n5.

¹¹ *Ibid*, 755-65.

- The right to security implies that ownership continues for as long as the owner chooses, and remains solvent.¹² This is not present in a joint tenancy. There is no absolute interest in Mrs Pinna's estate, and regardless of the choice of Mr Pinna, his right to survivorship may be extinguished by Mrs Pinna.
- Likewise, there is no right to transmit the right to survivorship, or any rights in Mrs Pinna's estate. While Mr Pinna might enter into an enforceable contract to assign the benefit of his right to survivorship, the operation of the *jus accrescendi* will render him the owner first, with the grantee of the right taking a transfer of an interest subsequently. The right of survivorship or his 'interest' in Mrs Pinna's estate are not of themselves transferred.

Remember: Mr Pinna's right to have his estate enlarged depends on the joint tenancy continuing, **and** his survival, **and** Mrs Pinna's death.

- There is no liability for execution subsisting in the right of survivorship or in Mr or Mrs Pinna's estate as joint tenants. The right of survivorship does not transfer to a trustee in bankruptcy – indeed the joint tenancy will be severed and survivorship ends. Severance occurs because of the inherent nature of joint tenancy, which will only exist so long as the four unities (time title possession and interest) remain.

Even if one accepts the validity of the bundle of rights theory of property, it is impossible to see how the right of survivorship falls within what is contemplated as forming the bundle or of representing part of the bundle.

Challenging the Bundle of Rights Theory

Penner seeks to challenge the validity of the bundle of rights theory of property on the basis that it shows property as a natural composite which can be carved into free-standing parts.¹³ In his view, this represents 'a confusion because of the multiple distinct meanings associated with the term,' which creates a flexible concept without a definable

¹² Ibid, 760.

¹³ Ibid, 767.

essence.¹⁴ As flexible as the concept is, it is difficult to grasp the essence of what we are looking for. Could it be that Penner's 'unified' definition of property there is scope for conceptualising as property the right of survivorship, or even the potential for the interest of any other joint tenants?

The very nature of property lies in the relationship between a person and a thing, rather than identification of the thing itself. The relationship must however only be **contingent** – if it is not possible for anyone else to have this relationship with this thing, then our relationship cannot be categorised as property: it must be something else. Penner's analysis is useful here to single out the nature of the joint tenancy. Penner looks at a number of different rights which do *not* constitute property because of the lack of a contingent nature – and because they could not exist outside of ourselves. Contracts of employment are not freely alienable due to the specificity of the employee and their skills; licences for professional practice relate to the skill and qualification of the licensee; body parts which remain attached to our person are contingent on ourselves and cannot constitute a thing capable of being owned by another.¹⁵

A joint tenancy and rights attendant on it is conceivable only in relation to the joint tenants themselves. The four unities¹⁶ as a prerequisite for the existence of a joint tenancy axiomatically create the right of survivorship only in the parties to the transaction creating it. These rights cannot exist outside of those parties, so under this analysis they – in the guise of the right of survivorship or the consequence of that, namely the additional estate itself – cannot be categorised as property.

The Extent of a Joint Tenant's Interest

A joint tenancy characterises the co-ownership relationship rather than property itself, but it does represent the manner in which an estate in land is held, and in that respect represents a potential half share in that land, in common. We turn now to consider the true *extent* of an interest represented by that potential share of a legal joint tenant.

¹⁴ Ibid, 770.

¹⁵ Ibid 803-4.

¹⁶ Of time, title, interest and possession.

Property available to creditors of a joint tenant may not truly be represented in the legal estate. The High Court has recently considered the extent of the joint tenant's interest in *Cummins v Cummins*.¹⁷ Mr and Mrs Cummins had held land registered as joint tenants, but argued that Mrs Cummins' contribution of roughly $\frac{3}{4}$ of the purchase price meant that while the couple held the legal estate as joint tenants, equity should recognise the beneficial estate as tenants in common in the shares (roughly) $\frac{3}{4}$ to $\frac{1}{4}$.

While the court found in *Cummins* that there was no tenancy in common in equity, the process of examining underlying title is one practitioners need to keep in mind when searching for property available to creditors. A joint tenancy at law may indicate an underlying property interest greater than a mere 50%.

In general, despite a legal estate as joint tenants, equity will find in favour of a tenancy in common of the beneficial interest where the parties provided purchase money in unequal shares (in which case they would hold in shares proportionate to their contribution). This presumption could be rebutted by evidence that the parties intended equal ownership with a right of survivorship. This in turn could be rebutted by the presumption of advancement also described as the 'absence of any reason for assuming that a trust arose or... that the equitable right is not at home with the legal title'.¹⁸ Traditionally this has only applied to a husband in favour of a wife, but not vice versa.

The presumption of beneficial tenancy in common was found by the court in *Cummins* to be rebutted. When Mrs Cummins had acquired Mr Cummins' interest, the transfer nominated consideration of **half** the value of the property. The court found this was evidence of the proportion the Cummins considered Mrs Cummins owned. If the parties did intend Mrs Cummins hold a $\frac{3}{4}$ share, then that would have been reflected in the consideration for the transfer.

The court went further though in examining the extent of co-ownership. It found judicial comment to support the rebuttal of the equitable presumption: namely that spousal contribution to property acquisition is taken to indicate an intention of joint beneficial

¹⁷ [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 7 March 2006).

¹⁸ *Calverley v Green* (1984) 155 CLR 242, 247, citing *Martin v Martin* (1959) 110 CLR 297, 303.

ownership.¹⁹ The court seems to be looking to the parties' intention at the time of purchase of the property, but its subsequent discussion and references to the Cummins' marriage relationship reflects the thinking of the 'presumption' of advancement. This sits uneasily with the equitable presumption of tenancy in common.

Gibbs CJ held in *Calverley v Green* that:

the presumption should be held to be raised when the relationship between the parties is such that it is more probable than not that a beneficial interest was intended to be conferred, whether or not the purchaser owed the other a legal or moral duty of support.²⁰

Applied to the Cummins, the court refused to attach a trust to the legal estate 'representing differently proportionate interests as tenants in common'.²¹ It was presumed that because the Cummins were married, Mrs Cummins had intended to confer on Mr Cummins the benefit of her proportionately larger contribution to the purchase of the land.

Deane J in *Calverley v Green* acknowledged that the worth of [the presumption of advancement] may be debateable, but that such presumptions are 'too well entrenched as "land marks" in the law of property to be simply discarded by judicial decision'.²² He identified that the class of relationships to which the 'presumption' applies was not closed, and that it should extend to a wife vis-à-vis her husband. While there has traditionally been no presumption of advancement from a wife to a husband this class appears to have been extended by the court in the *Cummins* case. Alternatively, the discussion about the nature of the marriage relationship serves as evidence as to intention of the parties that they hold as joint tenants. Either way a wife who contributes disproportionately to the purchase of property will bear the onus now of rebutting a presumption that she and her husband held other than equally.

¹⁹ Ibid [67], citing *Pettit v Pettit* [1970] AC 777, 815.

²⁰ Ibid, 250.

²¹ *Cummins v Cummins* [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 7 March 2006) [71].

²² *Calverley v Green* (1984) 155 CLR 242, 265.

The first issue with this is the lack of transparency of the analysis which apparently seeks to establish intention yet using the style of the presumption of advancement. Additionally, the court's comments about the Cummins' transaction highlight the inappropriateness of this kind of presumption in today's law.

The High Court in *Cummins* spent some time examining the nature of the marriage relationship and the presumptions that could be drawn from this about beneficial ownership. The court accepted the view of Professor Scott, author of a 1989 edition on the law of trusts that:

it is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labour to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.²³

The court said that this reasoning 'applies with added force in the present case where the title was taken in the joint names of the spouses'.²⁴ But the fact that the Court sought to justify the application of a presumption which rests solely on the nature of the marriage relationship – whether of advancement or of the nature of property interests between spouses – highlights that the presumption itself must be on shaky ground.

In attempting to examine 'the particular circumstances of the case', the court found it 'unrealistic to suggest that the solicitor for [the] Cummins did not at any point advise his clients on the significance of taking title as joint tenants rather than tenants in common'.²⁵ In fact as the contract settled in 1970, it is not unrealistic at all to assume that the solicitor did no more than present documents to the couple to sign without any such explanation, having assumed that they would hold as joint tenants. It was still not uncommon

²³ *Cummins v Cummins* [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 7 March 2006), [70], citing *The Law of Trusts* (4th ed, 1989), 239.

²⁴ *Cummins v Cummins* [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 7 March 2006), [71].

²⁵ *Ibid*, [72].

conveyancing practice in Queensland in 1990 to nominate husband and wife as joint tenants unless they instructed to the contrary. In addition, a traditional marriage may in 1970 have seen the husband take care of legal affairs in which case the wife may not have been advised at all about property interests. This may be so particularly where the husband, in this case Mr Cummins, was a member of the legal profession.

Kirby P pointed out in *Foregord v Shanahan*²⁶ (discussing co-ownership) that it is inappropriate to permit ‘rules’ to govern judicial discretion ‘where the rules were developed long before the existence of the phenomena to which [the law] must now typically apply’. He referred to:

- exceptionally high incidence of home ownership in Australia, including co-ownership, by women and people in de facto relationships; and
- the changed nature and availability of credit and the widespread availability of consumer credit.

The implication of this is that people have access to money and own property in ways and for reasons unthinkable even 30 years before. It is not clear that Professor Scott’s statement, accepted by the court in *Cummins*, is truly reflective of marriage relationships. There are any number of relationships in which that may be the case, but any number also in which parties may conduct their affairs differently. A presumption may aid trustees of spouses to claw back property, but fails to recognise the diversity in the nature of property holdings in the first place. In the end Mrs Cummins’ disproportionate contribution to the land acquisition, which may have been acknowledged by a court under different circumstances (eg by a Family Court), is denied through the lens of bankruptcy law.

Conclusion

Ultimately, the position of trustees of estates consisting of jointly owned property is not what it may seem on first blush. Firstly, pending the High Court decision on *Peldan v*

²⁶ (1994) 35 NSWLR 206.

Anderson, the nature of a joint tenancy appears too ethereal to benefit a creditor in the unusual situation of attempting to seize a right of survivorship. Secondly, the extent of the interest of a joint tenant of a legal estate may be diminished or enlarged by a presumption of a resulting trust. But the impact of a presumption of advancement on this state of affairs may further alter the extent of the interest, aligning it with the legal estate. As with any equitable remedy its application is discretionary. However a diligent trustee may seek to take advantage of these presumptions for the benefit of creditors – and those structuring their affairs will need to be diligent in the application of their funds to truly represent their intended property rights.