Section 28 of the Land and Conveyancing Law Reform Bill 2006 provides that any conveyance of land held in a joint tenancy by a joint tenant without the prior consent in writing of the other joint tenant(s) is void [1] unless such consent is dispensed with by the court under s.29(2)(d). [2] If a property is owned by two joint tenants this provision will, when enacted, prevent one of them unilaterally severing the joint tenancy by executing a conveyance of his interest to a nominal third party to hold to the use of himself as a tenant in common. Currently, the Statute of Uses (Ireland) 1634 operates to execute such a use ensuring that this co-owner receives a legal interest by virtue of the conveyance to uses. However, as he now holds his interest pursuant to the latter deed and not the original assurance, unity of title and time are destroyed. His interest in the property is therefore severed, with the result that he now holds an undivided moiety in the property as a tenant in common. 

Section 28 will also invalidate the two-step assurance required where a joint tenant wishes to unilaterally sever a joint tenancy over leasehold land. The Statute of Uses does not apply to leaseholds and to achieve the same effect the joint tenant must assign his interest to a third party who immediately assigns this interest back to him as a tenant in common.

Unilateral severance of a joint tenancy destroys the right of survivorship and converts the arrangement into a tenancy in common, permitting the severing joint tenant to make a will leaving his moiety to whomever he wishes. After the severing joint tenant dies, his successor becomes a co-owner and, as the law currently stands, he will be able to force a sale of the property on the surviving co-owner by bringing an action pursuant to s.4 of the Partition Acts 1868 and 1876. Section 28 of the 2006 Bill is based on a 2004 Law Reform Commission recommendation that unilateral severance be prohibited. [3] The Commission noted that with a joint tenancy each joint tenant has the chance of ultimately ending up with the entire property through the right of survivorship. It seemed unjust to the Commission “that a joint tenant may be deprived of this chance by the unilateral actions of a fellow joint tenant.” [4] The Commission also described the current law as flying “in the face of the basic idea of contract law … that agreements freely entered into should be honoured.” [5] Professor John Mee, in an article recently published in this journal, [6] argued that unilateral severance should be retained. He suggested that s.28 should be deleted from the Bill and that the introduction of a notification requirement for an effective unilateral severance should be considered at a future date. [7] This article seeks to examine in more detail the case for the abolition of unilateral severance.

As Professor Mee notes, the severance of a joint tenancy has been possible for many centuries. [8] The unilateral severance by a joint tenant of his interest through a conveyance to uses or an assurance to a strawman coupled with a re-conveyance back to the co-owner is regarded as acceptable in many jurisdictions across the common law world. In more recent times, the need for a conveyance to uses or a strawman transaction has been eradicated by judicial decision or by legislation in a number of jurisdictions and a self-conveyance, [9] a notice in writing served on the other joint tenant [10] or the registration of a declaration of severance in the land registry [11] will now suffice. Academics have noted a movement away from formalism and an insistence on the destruction of one or more of the unities towards an approach which upholds the intention of the party who wishes to sever. [12] In Ireland, conveyancers are still relying on conveyances to uses and strawman transactions [13] to effect a severance at common law. Regardless of whether unilateral severance should be permitted, if both joint tenants agree that they wish to hold as tenants in common they should no longer be required to use such cumbersome and archaic devices to formally regularise their position. Fortunately, once the Land and Conveyancing Law Reform Bill 2006 is enacted, a simple deed of conveyance will achieve the same effect. [14]
The tenancy by entireties

Against the backdrop of this widespread acceptance of unilateral severance it is interesting to note that an alternative form of joint tenancy, known as a tenancy by entireties, is available to married couples in many jurisdictions in the United States which confers an indestructible right of survivorship. While a joint tenancy is described as requiring the four unities of title, time, interest and possession, the tenancy by entireties involves a fifth unity, namely, the unity of person between a husband and his wife. This estate evolved because the common law regarded a husband and wife who purchased property together as a single unit of ownership. Indeed, the tenancy by entireties was not originally regarded as a type of concurrent ownership as technically there was only one tenant.\cite{15} Due to the inferior legal status of married women before the nineteenth century, the husband was considered to be that tenant.\cite{16} He had exclusive control over the land and he alone possessed the right to alienate it, although he could not do so without her assent. This unity of person also meant that the “whole must remain to the survivor”.\cite{17} In Ireland, it seems to be generally accepted that the Married Women’s Property Act 1882, which recognised the legal capacity of married women with respect to property, prevented the creation of any new tenancy by entireties after 1882.\cite{18} In England, “the flickering flame was snuffed out altogether”\cite{19} by ss.37\cite{20} and 39(6)\cite{21} of the Law of Property Act 1925. In the United States, although there were diverging views on the impact of the enactment of the married women’s property legislation on the tenancy by entireties,\cite{22} in a substantial number of jurisdictions\cite{23} the estate seems to have “survived the earthquake”\cite{24} although without its original sexist incidents.\cite{25} A unique feature of the estate is its indestructibility by a unilateral act of either spouse. It cannot be severed through alienation and neither can one party bring a partition action in relation to the property.\cite{26} In a number of jurisdictions, tenancies by entireties are also recognised as creating “impregnable fortresses against the claims of an individual spouse’s creditors.”\cite{27} This exemption can be abused since any property can be held as a tenancy by entirety although the purpose of the exemption was obviously to prevent families from being forced out of the marital home due to the financial difficulties of one spouse.\cite{28} The tenancy by entireties can be terminated by a joint conveyance to a third party and most jurisdictions also allow termination by mutual assent or a conveyance of the interest of one spouse to the other.\cite{29} Divorce or annulment usually transforms the tenancy by entireties into a tenancy in common although the execution of a separation agreement by the spouses, which does not show an intention to terminate the estate, will not sever it.\cite{30}

Although the tenancy by entireties has many critics,\cite{31} its ability to preserve the family home has also been recognised and some academics have discussed whether the estate or something similar to it should be extended to same sex and unmarried opposite sex couples.\cite{32} Carrozzo proposes the introduction of a new tenancy which resembles a modified tenancy in common with dual life estates.\cite{33} Tenants would hold in undivided equal shares but the surviving tenant would also possess a life estate in the other tenant’s moiety which would only be triggered on the latter’s death. The life estate ensures that the original intention to preserve the family residence is not frustrated as it prevents the successors of the deceased co-owner from bringing a partition action. The interest of the successors of the deceased co-owner would not be activated until the survivor dies. The estate also protects the interests of the successors of both co-owners as on the death of the surviving co-owner they can inherit their shares in the property.\cite{34} Although arguments for clarifying or extending the law on unilateral severance of joint tenancies seem to be very fashionable,\cite{35} the continued existence of the tenancy by entireties and these proposals for the creation of something similar for unmarried couples illustrate that support also exists for the notion of a joint tenancy which cannot be unilaterally severed.

Unilateral severance in Ireland

Although the current law in Ireland permits unilateral severance, it is important to consider the context in which this law is operating. Professor Mee speculates that some or many people entering into a joint tenancy understand that the survivor will take the property but fail to realise that the other joint tenant may prevent this happening by severing the joint tenancy during her life.\cite{36} This may indicate that
many practitioners are unaware that it is possible to unilaterally sever a joint tenancy. It seems likely that the last time most solicitors would have heard that a conveyance to uses may be used to unilaterally sever a joint tenancy was during a land law lecture while they were at university. A solicitor may not remember this in the context of a purchase by or a dispute between married or cohabiting co-owners. It is only recently that conveyancers are being encouraged to consider and advise on the implications of a breakdown in the relationship between purchasing co-owners and, to-date, the emphasis has been on promoting the execution of co-ownership agreements. Laffoy’s *Irish Conveyancing Precedents* includes two deeds of severance in the format of a conveyance to uses of a fee simple interest and a two-step strawman transaction in relation to a leasehold interest. As they are designed to be executed by both joint tenants, a rushed practitioner could easily assume that a severance is not possible without the consent of the other joint tenant. Professor Mee recommends deleting s.28 of the Bill, “taking comfort in the short term in the fact that our close neighbours in England and Wales have appeared unconcerned about the potential problems resulting from unilateral severance.” This author would suggest that in England and Wales joint tenants are operating on a more level playing field than in Ireland. The references to the possibility of unilateral severance are less oblique in English textbooks catering to practitioners and, therefore, they are better equipped to advise a joint tenant on this issue in the event of a relationship breakdown. English conveyancers are not required to use the archaic conveyance to uses to sever a joint tenancy but may instead avail of the more modern notice of severance, which was specifically designed for unilateral severance. As Irish practitioners may not have been in a position to adequately advise on this issue, this author suspects that the right to unilaterally sever may not have been utilised by many joint tenants. It could even be argued that it is unlikely to be missed! Although this article will argue that unilateral severance is not the best way to deal with a co-ownership relationship which has turned sour, it is clear that if it is to be retained, conveyancers should be better appraised of the law, including the danger that it may not be effective in certain situations.

The impact of section 3 of the Family Home Protection Act 1976

The Circuit Court case, *McCarthy v McCarthy*, concerned an attempted unilateral severance of a joint tenancy of a family home and a 58-acre farm in the joint names of a husband and wife. By a deed dated December 16, 1983 the wife transferred her interest in the property to a third party unto and to the use of herself. By her will of the same date she purported to devise her undivided share in the property as tenant in common to her children. Despite Sheridan J.’s considerable sympathy for the wife, he held that the deed of severance was void by reason of s.3(1) of the Family Home Protection Act 1976. Section 3 provides that “where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then … the purported conveyance shall be void.” Sheridan J. commented that the harshness of the 1976 Act in relation to joint tenancies may not have been appreciated when it was originally enacted. Although there is no equivalent English legislation, it is interesting to consider the antipathy towards unilateral severance of the marital home expressed by Lord Denning M.R. in *Bedson v Bedson*:

“No long as the house is in the possession of the husband and wife as joint tenants or of one of them, there can be no severance of their equitable interests … Neither of them can sell his or her equitable interest separately. If he or she could do so, it would mean that the purchaser could insist on going into possession himself with the other spouse there which is absurd. It would mean also that one of them could, of his own head, destroy the right of survivorship which was the essence of the joint tenancy. That cannot be correct.”

Although Lord Denning M.R. was mistaken on this issue, he clearly felt that to permit a unilateral severance of a joint tenancy over a family home would be harsh and unjust.

Professor Mee describes Sheridan J.’s decision in *McCarthy* as a “somewhat unsatisfactory piece of legislative interpretation” as it does not advance the aim of the Act, which is to protect the spouse’s right to occupy the family home. This right is not affected where the other spouse, through a unilateral
conveyance to uses converts the joint tenancy of the family home into a tenancy in common. [44] It is true that the spouse’s right to occupy is not endangered while the severing spouse lives. Unity of possession is preserved and, because of the approach taken by the courts in O’D v O’D,[45] the severing spouse will not be able to force a sale of the family home pursuant to the Partition Acts 1868 and 1876. However, if the wife was forced to leave the family home because of her husband’s domestic violence and he then executed a deed of severance before dying shortly afterwards, the wife may be prevented from re-occupying the property if Sheridan J.’s approach is not taken. If the 1976 Act does not operate to invalidate the deed, her husband’s successors become entitled to his undivided moiety and they could force a sale of the property pursuant to s.4 of the Partition Acts. [46] Although s.36 of the Succession Act 1965 confers on a surviving spouse the right to appropriate the family home in or towards satisfaction of that spouse’s legal right share or her share on intestacy, it only operates in relation to a dwelling in which the surviving spouse was ordinarily resident at the time of the deceased’s death. In contrast, the Family Home Protection Act 1976 defines a “family home” as including a dwelling in which a spouse ordinarily resided before leaving the other spouse. [47] Sheridan J.’s interpretation of the 1976 Act could, therefore, be construed in such circumstances as preserving the spouse’s right to re-occupy the family home following the death of the other joint tenant. Unfortunately, the 1976 Act will be of no assistance to her if her husband executed the deed of severance more than six years before his death as, unless the spouse is in occupation, s.54(1) of the Family Law Act 1995 provides that proceedings to have a conveyance declared void may not be instituted more than six years after the date of the conveyance. Therefore, a loophole seems to be available to the stealthier separated co-owner who effects a severance well in advance of his or her death. In other jurisdictions there is conflicting case law on whether legislation similar to our Family Home Protection Act 1976 invalidates a deed of severance executed by one spouse in relation to the matrimonial home [48] and a future Irish court could reject the approach taken by Sheridan J. in McCarthy. In New Zealand the matter has been put beyond doubt by s.9(2)(proviso) of the Joint Family Homes Act 1964, which provides that neither spouse may sever the statutory joint tenancy under which a registered joint family home is held. [49] It is most unsatisfactory to allow a question mark to remain over the validity of such deeds of severance given that this is one of the most likely scenarios in which a severance may be contemplated.

Secret unregistered deeds—The requirement for delivery of the deed and the potential for fraud

The fact that the current law creates the potential for fraud has been raised on a number of occasions. [50] Professor Mee discusses a typical scenario where X and Y are living together and are joint tenants of their family home. [51] X executes a severance deed, which is left unregistered, and places it in a safety deposit box, along with a will leaving everything to a child from a previous relationship. If X dies first, then the severance deed will be found and its effect will be that Y will be entitled only to a one-half share under a tenancy in common, with X’s child taking the other one-half share. On the other hand, if Y dies first, X can simply destroy the secret severance deed and take the entire property by virtue of the operation of the right of survivorship. As Professor Mee notes, [52] our courts could follow the decision of the Ontario Court of Appeal in Re Sammon [53] which held that the requirement for the delivery of the deed was not satisfied in such circumstances. The husband, who was separated from his wife, the other joint tenant, executed a conveyance of his interest in the joint tenancy to the use of himself and delivered it to his solicitor but requested that it not be registered until after his death in case his wife discovered what he had done. Following his death, the court held that the deed was ineffective to sever the joint tenancy as there was no clear proof that he intended to be immediately and unconditionally bound by the deed. [54] The inference was that he intended it only to become operative in the event that he predeceased the wife, in which case the deed amounted to an invalid attempt to defeat the right of survivorship by a testamentary disposition. The court also commented that: “in the absence of proof that the deceased intended to be bound by the document at the time of signing it there would be nothing wrong with any subsequent destruction of it.” [55] In contrast, in an earlier decision, Burke v Stevens, [56] the California Court of Appeal was satisfied that an immediate intention to pass title to one-half of the joint tenancy property was present in connection
with the secret unrecorded severance deed. The court dismissed the argument by counsel that if the non-severing party had died first, nothing would have been said about the unrecorded deed and the severing joint tenant would have become the owner of the entire land. The court held that fraud could not be contingently assumed and described the nefarious scenario suggested by counsel as pure guess and contrary to the presumption of fair dealing. [57]

It is difficult to predict whether an Irish court would be satisfied that a secret, unregistered deed of severance was “delivered” and it is submitted that much will depend on the attendance taken by the severing joint tenant’s solicitor and whether it indicated an intention that the deed was to be immediately effective. If the joint tenant intended the deed to be operative only in the event that he predeceased the other joint tenant, there is a danger that it will be treated as an invalid attempt to defeat the right of survivorship by a testamentary disposition. [58] A joint tenant could, however, avoid this danger by creating a future fee simple in favour of the person he wishes to benefit on his death, which is contingent on him pre-deceasing the other joint tenant and limited to take effect in possession on his death. [59] Currently, he would be required to create this interest behind a use or a trust in order to avoid the common law contingent remainder rules, which prohibit springing interests. [60] Swenson and Degnan note that if such a deed is delivered to the third party during the grantor’s lifetime, it will effect a severance. [61] This approach, they claim:

“… is not inconsistent with the cases dealing with testamentary dispositions because the conveyance of the future interest is a present, irrevocable transfer. It is no more testamentary than any fee to commence in possession upon the death of the conveyor.” [62]

Therefore, it would appear that through astute drafting and the inter vivos delivery of the deed to the person to benefit, a joint tenant can benefit from the right of survivorship, if the other joint tenant pre-deceases him, but also ensure severance in the event that he dies first. He can effectively “have his cake and eat it”. The only disadvantage associated with such a deed is that it is irrevocable.

The impact of a notification requirement

In Burke v Stevens the court noted that the severing joint tenant’s actions could be subjected to ethical criticism and stated that her stealthy approach to the solution of the problems facing her was not to be acclaimed. [63] It was thus the secret aspect of the unilateral severance which the court found objectionable. Professor Mee argues that the solution to this problem is to require the severing joint tenant to notify the other joint tenant of the severance. [64] He also suggests that if a notification requirement is introduced the law should be clarified that the Family Home Protection veto will not apply in this situation. [65] A notification requirement would ensure that the non-severing joint tenant is not faced with the shock that her right of survivorship has been defeated and would ensure that she is aware that there is now an opportunity to dispose of her interest by will. [66]

It is submitted that although notification of the unilateral severance would clearly improve the position of the notified joint tenant, it may provoke a married co-owner into instigating premature matrimonial proceedings to ensure that her right to occupy the family home is preserved on the death of her spouse. Having received notification of the severance, if the requirements for a judicial separation [67] or a divorce [68] have been satisfied, the non-severing joint tenant is likely to apply for a property adjustment order. The court may order that the co-owned property be transferred into her sole name or grant an order creating a life estate [69] or an exclusive right of residence in her favour. [70] Such remedies are only available as ancillary orders to a divorce or a judicial separation and, therefore, the notification of unilateral severance may result in a marital atmosphere where the negotiation of a mediated separation agreement dealing with the co-owned property is an unrealistic prospect. A married joint tenant who wishes to ensure that his share of the property passes to someone besides his spouse on his death may have been prepared to agree to a severance subject to an exclusive right of residence in favour of his spouse for a specified period of time.
If the notified spouse is not in a position to seek a judicial separation or a divorce or chooses not to do so, her right of occupation is protected during her husband’s lifetime as the court will not order a sale of the family home of married co-owners where one of them applies for such an order pursuant to the Partition Acts. However, once her husband dies, she will have to resort to her succession rights to secure her right to occupy the family home. As was discussed earlier, she will not be able to rely on s.56 of the Succession Act 1965 to appropriate her husband’s share in the family home if she was not residing there when he died. Her husband’s successors will most likely be successful in an application for an order for the sale of the premises pursuant to the Partition Acts and she will lose her right to re-occupy the premises. The current judicial approach, which prevents a married co-owner from unilaterally severing a joint tenancy over the family home and thus preserves the right of survivorship, indirectly protects the surviving spouse from being forced into a sale of the premises by the deceased co-owner’s successors.

Unmarried co-owners do not have the protection of the Family Home Protection Act 1976 and, if an application is made by one of them for an order for sale pursuant to the Partition Acts, it will usually be successful. Therefore, it is not unilateral severance which deprives such joint tenants of their right to occupy the family home, but the manner in which the courts currently exercise their jurisdiction to grant an order for the sale of co-owned property pursuant to the Partition Acts. The position of such co-owners may be improved by the enactment of s.29 of the Land and Conveyancing Law Reform Bill 2006. Section 29 replaces the jurisdiction of the courts pursuant to the Partition Acts and confers a much broader jurisdiction on the courts to make orders responding to co-ownership disputes. On the application of a co-owner, the court is expressly empowered to make an order for partition, an order directing that accounting adjustments be made between the co-owners or such order as it thinks fit in the circumstances of the case, with or without conditions or other requirements. Section 29 also grants the courts the power to refuse an order, which may indicate that an order for sale will no longer be automatically forthcoming on the application of an unmarried co-owner. Perhaps the court will refuse an order for sale if the property is the family home of the respondent. It is difficult to predict the factors which will be considered by the courts in exercising its jurisdiction under s.29 and the absence of criteria is unfortunate. It is also unclear whether the courts could use this jurisdiction to adjust property interests in a manner similar to that available to them on a divorce or a judicial separation.

Although an unmarried joint tenant runs the risk of being presented with an order for the sale of the home at any time during the co-ownership relationship, receiving notice that the other joint tenant has unilaterally severed the joint tenancy would surely amount to a metaphorical slap in the face and make her rights in relation to the home seem very precarious. In the future, an unmarried cohabitant may have the option of applying for a property adjustment order on the breakdown of the relationship and it is submitted that a notified joint tenant who qualified for access to such a remedy would be likely to avail of it with the hopes of securing her position. At least she would be aware of the factors that the court is required to consider in making such an order and the adjustive powers of the courts would be beyond doubt. Therefore, such co-owners would inevitably respond to the notification of severance in a confrontational and adversarial manner in circumstances where the possibility of an agreed severance was never explored.

An agreed severance or a court order

It is submitted that unilateral severance, even if notified, is not the most logical manner to deal with a breakdown in the relationship between joint tenants. The co-owners originally agreed to hold as joint tenants and, regardless of whether unilateral severance was permissible in the past, it makes sense to permit a change in the co-ownership arrangement only if they both agree to it. It is, of course, possible for co-owners to agree in advance that certain circumstances will effect a severance. For example, a co-ownership agreement could include a clause providing that if the joint tenants voluntarily choose to live apart, after a certain period of time the joint tenancy will be severed and they will henceforth hold
as tenants in common in equal shares or in unequal shares. Unilateral severance is quite an aggressive way to resolve the issues which arise on the breakdown in the relationship between co-owners. Parties are more likely to be satisfied with agreements they negotiate themselves and the abolition of unilateral severance is consistent with a family law approach which aims to encourage parties to resolve their disputes before recourse to the courts.

It is only where agreement cannot be reached that an application to dispense with consent to severance will be made. The courts will be in a position to examine whether such consent is being unreasonably withheld and, if necessary, to impose conditions to protect vulnerable individuals. For example, it may be appropriate, to permit a severance but to make it subject to an exclusive right of residence in favour of one of the co-owners which will bind the other co-owner’s successor but also preserve his long-term entitlements.

**Severance in equity**

Section 28(4) of the Land and Conveyancing Law Reform Bill 2006 provides that nothing in this section affects the jurisdiction of the court to find that all the joint tenants by mutual agreement or by their conduct have severed the joint tenancy in equity. These two methods of severance were set out by Sir Page Wood VC in *Williams v Hensman*. If one of the joint tenants dies after their relationship has broken down it may be of crucial importance to establish whether there was a severance by mutual agreement or by their course of conduct. In *Burgess v Rawnsley* one joint tenant orally agreed to sell her interest in the property to the other for a particular price and then changed her mind. The court held that the agreement severed the joint tenancy and it was of no consequence that it was not in writing or that it was incapable of specific performance. It would seem, therefore, that if the joint tenants orally agree that one of them will purchase the share of the other or if one of them chooses to exercise a right of pre-emption conferred by an earlier co-ownership agreement this will effect a severance in equity. A separation agreement may also contain sufficient evidence of the requisite mutual agreement or course of dealing. Although an agreement between the separated joint tenants to sell the property does not, of itself, sever a joint tenancy, if it includes an agreement to divide the proceeds equally between them, this effects a severance. If one of the joint tenants dies while they are still negotiating whether the property should be sold or whether one of them should buy out the interest of the other, this is not generally viewed as a course of conduct from which a severance can be inferred. If one of the joint tenants institutes proceedings for an order for sale and the division of the proceeds and then dies before the case is heard, the courts are unlikely to view this as severing the joint tenancy. The typical reasoning employed is that the application could be withdrawn by the joint tenant before the case is heard. In addition, insofar as such an application amounts to a declaration by one party to the other that he desires their shares to be held in common, the predominant view seems to be that this does not constitute a course of dealing between the parties. If the joint tenant dies following the institution of proceedings for a property adjustment order the courts have pointed out that there is no certainty in relation to the type of order that the court would had made if such proceedings had been heard and therefore it would be inappropriate to infer a severance. It is submitted that this approach, which maintains the status quo in the absence of evidence of a mutual agreement or course of dealing, sits easily with the prohibition on unilateral severance contained in s.28 of the Bill.

The question of property ownership and its occupation naturally has to be revisited on the breakdown of the relationship between co-owners. Section 28 of the Bill ensures that a joint tenancy is not severed unilaterally or without a court order to ensure the protection of more vulnerable co-owners. Although co-ownership disputes will never be eradicated, it is clearly preferable for co-owners to agree to any changes in their co-ownership arrangement. To permit unilateral severance is to condone an approach which ignores the possibility and the advantages of reaching agreement on how the co-ownership arrangement should be changed.

[1] [Section 28 of the Land and Conveyancing Law Reform Bill 2006 also invalidates any contract]
for a conveyance of land held in a joint tenancy or acquisition of another interest in such land without the prior consent in writing of the other joint tenant(s). Section 28(3) provides that the registration of a judgment mortgage against the estate or interest in land of a joint tenant does not sever the joint tenancy and if the joint tenancy remains unsevered, the judgment mortgage is extinguished upon the death of the judgment debtor.

[2] Section 29(1)(d) of the 2006 Bill provides that a co-owner at law or in equity may apply to the court for an order dispensing with consent to severance of a joint tenancy where such consent is being unreasonably withheld.


[4] ibid., para.5.09


[8] ibid., at 93.


[10] Section 36(2) of the (English) Law of Property Act 1925.


[14] Section 64(2)(b) of the Bill clarifies that a conveyance by two persons to themselves is valid. Note that the Statute of Uses (Ireland) 1634 is repealed by s.8 of the Bill.


[16] ibid., at 40.

[17] 2 Blackstone, Commentaries 182 (R Burn ed., 1783)


[19] Orth, above, n.15 at 41.
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[20] Which provided that “a husband and wife shall, for the purposes of acquisition of any interest in property, under a disposition made or coming into operation after commencement of this Act, be treated as two persons.”

[21] Which converted existing tenancies by entireties into joint tenancies.


[25] Carrozzo, above n.27 at 444. See also Orth, ibid. at 43.

[26] ibid, at 430.

[27] ibid.

[28] ibid at 431.

[29] ibid. at 431-432.


[33] ibid. 

[34] He also proposes the option of creating a right of survivorship instead of the life estate and suggests that this would be more likely to be used by couples with mutual offspring. It would only be possible to create this new tenancy over the familial residence of a couple and it would be exempt from the claims of the creditors of either or both of the parties unless the creditors possessed a mortgage secured by the premises; ibid. 


[36] Above, n.6 at 93.

[37] It is difficult to know how prevalent such a misunderstanding may be amongst solicitors and it is acknowledged that such a misunderstanding may not exist at all.

[38] Above, n.6 at 97.

[39] See Wood, Lush and Bishop, Cohabitation Law, Practice and Precedents (3rd ed, Family Law,
Bristol, 2005), pp.21 and 69-70.]

[40] [See the Law of Property Act 1925 s.36(2).]


[42] [Sheridan J. was not willing to sever the farm from the family home so as to uphold the portion of the conveyance which applied to the land only. Contrast the approach taken in Allied Irish Banks v O’Neill [1995] 2 I.R. 473.]


[44] [Above, n.6 at 96. A similar view was expressed by Walsh J. in Lamanna v Lamanna 32 R.F.L. (2d) 386 in connection with the Family Law Reform Act 1980 s.42 (now the Family Law Act 1986, s.21), the Canadian equivalent of the Family Home Protection Act 1976 s.3. He felt that s.42 was concerned only with the protection of the possessory rights of spouses and that proprietary rights were not intended to be affected. This view was rejected by the Ontario Court of Appeal in Timko v Kozub’s Estate and Kozub (1984) 45 O.R. (2d) 558 but subsequently re-endorsed in Re Horne and Evans (1987) 39 D.L.R. (4th) 416.]

[45] [Unreported, High Court, November 18, 1983. Murphy J. refused the husband’s application for an order for sale pursuant to the Partition Acts and held that such actions must fail unless the court is of the opinion that it would be reasonable to dispense with the respondent’s consent under the Family Home Protection Act 1976. A contrary interpretation would be absurd as it would result in a spouse with no beneficial interest in the family home enjoying the statutory veto on its sale whereas another spouse who had a beneficial interest could have his or her statutory veto overborne by a sale directed under the Partition Acts (at 10-12 of transcript).]

[46] [Unless protective legislation such as the Family Home Protection Act 1976 applies, the courts seem to be very reluctant to refuse an order for sale where an application is made pursuant to ss.3 or 4 of the Partition Acts. See Woods, “Property Disputes Between Co-owning Cohabitees — A Conveyancer’s Perspective” (2007) 12 (1) C.P.L.J. 18.]

[47] [The Family Home Protection Act 1976 s.2(1).]


[51] [See n.6 at 96. His example is based on a similar scenario outlined by Fetters, ibid., at 175.]

[52] [ibid.]


[54] [Contrast the approach taken in Feinstein v Ashford [2005] B.C.J. No. 2087.]

[55] [Contrast the approach taken in Feinstein v Ashford [2005] B.C.J. No. 2087.]
[55] [Above, n.57.]

[56] [264 Cal App 2d 30 (1968).]

[57] [Ibid., at 35-36.]


[59] [See Swenson and Degnan, “Severance of Joint Tenancies” (1953-54) 38 Minn. L. Rev. 466 at 474-475.]

[60] [See Lyall, Land Law in Ireland (Round Hall Sweet & Maxwell, Dublin, 2000) pp.277-282. The Land and Conveyancing Law Reform Bill 2006 s.16(1) abolishes the common law contingent remainder rules.]

[61] [Above, n.63 at 475, n.49. They contrast the position in Green v Skinner (1921) 185 Cal. 435 where a conveyance of a remainder interest was not held to effect a severance as it was not delivered and accepted during the grantor’s lifetime.]

[62] [Above, n.63 at 475.]

[63] [Above, n.60 at 34.]

[64] [Above, n.6 at 96-97.]

[65] [See ibid. and his comment in n.53.]

[66] [See Fetters, above, n.54 at 196.]

[67] [See s.2 of the Judicial Separation and Family Law Reform Act 1989.]

[68] [See s.5 of the Family Law (Divorce) Act 1996.]

[69] [See the Family Law Act 1996 s.9 and the Family Law (Divorce) Act 1996, s.14.]

[70] [See the 1995 Act s.10(1) and the 1996 Act s.15.]

[71] [See O’D v O’D, above, n.49.]

[72] [See n.50, above.]

[73] [Ibid.]

[74] [See Woods, above, n.50 at 20-21; Woods, “Property Disputes Between Co-owning Cohabitees — England and Ireland Compared” (2006) 35(4) C.L.W.R. 297 at 323-325.]

[75] [Note that qualified cohabitants who can establish economic dependency arising from the ending of the relationship will have access to property adjustment orders if the recommendations set out in the Law Reform Commission Report on the Rights and Duties of Cohabitants (LRC 82-2006) are implemented.]
[76] [See Wood, Lush and Bishop, above, n.43 at 69-70 where the clause provides that certain circumstances will trigger a deemed sale and re-acquisition and replace the declaration of a beneficial joint tenancy with a declaration of a floating trust. See also Slade L.J. in Goodman v Gallant [1986] 1 F.L.R. 513 who stated at 525C that “it would no doubt be possible for a trust in terms to provide that the beneficial interests of two parties should be equivalent to those of joint tenants unless and until severance occurred, but that in the event of severance their interests should be otherwise than in equal shares.”]

[77] [(1861) 1 J. & H. 546 at 577-8.]

[78] [[1975] Ch. 429.]

[79] [See Re Hayes Estate [1970] I.R. 207 (a sale, of itself, merely converts a joint tenancy in the land into a joint tenancy in the proceeds of sale).]

[80] [See McKee and National Trust Co Ltd (1975) 56 D.L.R. (3d.) 190; Schofield v Graham (1969) 6 D.L.R. (3d.) 88. Contrast the approach taken in Nielson-Jones v Fedden [1975] Ch. 222; Bank of British Columbia v Nelson (1979) 17 B.V.L.R. 223 (which concerned a joint agreement for the disbursement of proceeds of their joint interest in the matrimonial home, rather than an agreement for a division of their separate and equal interests).]

[81] [See McDowell v Hirshfield [1992] 2 F.L.R. 126. Note that the Canadian courts seem more prepared to find that such negotiations are a course of dealing from which a severance can be inferred, see Ginn v Armstrong (1969) 3 D.L.R. (3d.) 285; Re Walters (1977) 79 D.L.R. (3d.) 122.]

[82] [See the Australian Cases, In the Marriage of Badcock (1979) F.L.C. 78,888; In the Marriage of Pertosoulis (1980) F.L.C. 75,265. Pertosoulis involved a joint application by the joint tenants under s.79 of the Family Law Act 1975 for an order for a settlement of the jointly owned property. Butt suggests that a joint application may be preceded by an agreement between the parties to sever the joint tenancy in which case the mutual agreement will sever the joint tenancy.]

[83] [See Butt, Severance of Joint tenancies in Matrimonial Property 9 (1980-82) Sydney L. Rev. 568 who discusses at 581-587 Lord Denning M.R.’s view to the contrary in Burgess v Rawsley, above n.78. See also Re Draper’s Conveyance [1969] 1 Ch. 486.]