



Western Australia

ADVISING FAMILIES ACROSS GENERATIONS

3 May 2021

Mr Bruce Roberts,
General Manager Registration Services
Landgate
By email only: customerservice@landgate.wa.gov.au

Dear Sir

**Law Reform Commission of Western Australia - Project #78
Unilateral Severance of Joint Tenancy; Extension to Legislative Perpetuity Period**

My name is Jonathan Haeusler. I am a solicitor practicing in the area of Wills and Estates and a committee member of the Western Australian branch of the Society of Trust and Estate Planners. I write to you in the latter capacity.

About STEP

By way of background:

- The Society of Trust and Estate Planners (**STEP**) was set up in 1993. It has over 21,000 members worldwide in 110 branches and chapters across 96 countries. The WA Branch (**STEP WA**) has been operating since 2009 and has over 80 members.
- Our branch represents professionals from across WA who are specialists in trusts, estate planning and in supporting the needs of families generally. Our membership includes lawyers, accountants, financial wealth advisers and trustee company professionals. Our members bring a multi-disciplinary approach for the benefit of their clients.
- The objective of STEP professionals is to advance the interests of families across generations. This often involves us identifying issues of relative importance to families and bringing those issues to the attention of those who can make a positive difference.

Unilateral Severance of Joint Tenancy

I write to you regarding the procedures for unilateral severance of joint tenancy in Western Australia.

In November 1994, the Law Reform Commission of WA delivered a report titled "Project Number 78: Joint Tenancy & Tenancy in Common" (the **Report**). The Report contained a series of recommendations for changes to be made in relation to joint tenancy, including the introduction in Western Australia of a scheme to allow for unilateral severance of joint tenancy.

The Report noted that existing procedures to sever joint tenancy were too onerous and unclear, unlike the simple provisions that had already been adopted in other States (including New South Wales, Queensland, and Tasmania) which have had legislation in place for several decades.

The Report's recommendations are straightforward and are reproduced below:

Recommendation 5: Unilateral severance of joint tenancy should not be effective without written notice to the other joint tenants.

Recommendation 6: The law of unilateral severance should be reformed by inserting in the Transfer of Land Act 1893 a provision along the lines of section 59 of the Queensland Land Title Act 1994. However, the section should expressly empower the Registrar at his discretion to dispense with the requirement to produce the certificate of title to enable a transfer to be registered.

In 2002, the Law Reform Commission published a further Report which contained (amongst other things) a review of developments with respect to the implementation of the recommendations contained in the 1994 Report.

The 2002 review noted that no legislative action had been taken to implement the 1994 recommendations. Significantly, the 2002 review also noted that the 1994 recommendations remained current and worthwhile. STEP WA shares this view and considers there is now a more pressing need to give these reforms priority.

The Report pointed to cases where severance intentions have failed because of the failure to adhere to trust requirements. In our view these demonstrate the need for reform in this area.

We at STEP WA are aware of recent cases that highlight the importance of having a clear enabling provision to allow unilateral severance of a joint tenancy.

Our members have brought our attention to cases where families have had no option but to resort to litigation in order to achieve the desired outcome, including in circumstances where the relevant joint tenant whose interests would be served by severing the joint tenancy is elderly and incapacitated.¹

In some matters, court proceedings have ultimately been to no avail, as the relevant family member has died before the application went to trial. The average waiting time for trial and a decision in the Family Court of Western Australia is 2 to 3 years.

The simple reforms proposed by the Law Reform Commission (and advocated by us) would reduce the need to undertake costly and time consuming litigation. If enacted, these measures would give families another option and may help take pressure off our already overworked and backlogged court system.

We have previously written to the Western Australian Government in respect of these matters. By way of response the then Minister for Lands the Hon Ben Wyatt MLA indicated that Landgate is broadly supportive of the Report's recommendations and would consider those that relate to unilateral severance of joint tenancy as part of its future legislative reform program. The (former) Minister suggested we write to you for further assistance.

Could you please confirm:

- Would Landgate would be willing to support the proposed reforms to unilateral severance of joint tenancy?
- Do these reforms form part of Landgate's legislative reform program?
- Are there any other matters in Landgate's legislative reform program that you think STEP WA may be able to assist with?

¹ See for example *Layton and Layton* [2019] FCWA 145

Perpetuity Period

On a separate note, you may be aware of a recent trend across common law jurisdictions towards extending the legislative perpetuity period. Both the UK and New Zealand for example have, in recent years, extended the perpetuity period from 80 to 125 years and there are moves afoot in both Queensland and the Northern Territory to do the same.

STEP WA are of the view that the Western Australian perpetuity period (presently 80 years under s.101 of the Property Law Act) should be similarly extended. Would Landgate support an amendment to our perpetuity period (i.e. under s.101) so that it too defaults to 125 years?

Please let us know if you would like a more substantive submission from STEP WA in support of any of the above matters.

Do not hesitate to contact me if you have any queries.

Yours sincerely



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