

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law

Yong Pung How School of Law

6-2020

Revisiting the presumptions of resulting trust and advancement in the context of joint tenanted matrimonial property: Two innovations by the Singapore Court of Appeal

Ian Hao Ran MAH

Singapore Management University, ian.mah.2016@law.smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Property Law and Real Estate Commons](#)

Citation

Revisiting the Presumptions of Resulting Trust and Advancement in the Context of Joint Tenanted Matrimonial Property: Two Innovations by the Singapore Court of Appeal (2020) 28 APLJ 59

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.



Revisiting the presumptions of resulting trust and advancement in the context of joint tenanted matrimonial property: Two innovations by the Singapore Court of Appeal

Ian Mah Hao Ran*

*In Singapore, the Court of Appeal's decision in **Lau Siew Kim v Yeo Guan Chye Terence** remains the most authoritative pronouncement on the operation of the presumptions of resulting trust and advancement, particularly in the context of joint tenanted matrimonial property. One notable, albeit often overlooked, aspect of the decision is the modification of the presumption of advancement to operate like a rule of survivorship. On one view, the effect of this is to retransform the equitable tenancy in common into an equitable joint tenancy. This article identifies the doctrinal difficulties with this approach but ultimately recommends that the same result, which is merited, can be more directly achieved by employing the maxim 'equity follows the law'. Jurisdictions seeking to formulate a coherent approach to the ever-confusing area of joint tenancy can draw from the approach taken by Singapore's apex court.*

Introduction

The hallmark of joint tenancy is the rule of survivorship. When one joint tenant dies, the deceased joint tenant retains nothing in the property, and nothing passes to his or her next of kin. In other words, the surviving joint tenant takes all. That ultimate ownership depends on the chance of survivorship attracted the abhorrence of equity. This is best evidenced by equity's departure from the position at law by invoking the presumption of resulting trust ('PRT') and, if applicable, the counter-presumption of advancement ('POA'). Where the PRT applies, the beneficial interests of the co-owners are determined by their respective contributions to the purchase price. The PRT can be rebutted by a POA if the relationship between the co-owners falls into one of the recognised categories, such as husband–wife and parent–child.

In Singapore, the landmark decision on this topic is *Lau Siew Kim v Yeo Guan Chye Terence* ('*Lau Siew Kim*').¹ The Court of Appeal considered how the twin presumptions operate in the specific context of joint tenanted matrimonial property. Of particular significance is the Court's two *innovations* in respect of the POA. First, the Court stated that the POA only operates after

* LLB (summa cum laude) (Singapore Management University). An earlier version of this article was written in fulfilment of a Directed Research course under the supervision of Associate Professor Alvin See. I thank him for his invaluable guidance and support. All errors are my own.

1 [2008] 2 SLR(R) 108 (Court of Appeal) ('*Lau Siew Kim*').

the death of one party,² thereby departing from the traditional understanding of the POA as operating immediately at the point of purchase ('the first innovation'). Second, the Court suggested that the POA may be 'developed and extended' to operate like the rule of survivorship ('the second innovation').³ In other words, it does not operate one way as it does traditionally, for example from husband to wife, but both ways such that it can be triggered regardless whichever co-owner dies.

The first innovation, which reflects the flexibility of equity in giving effect to parties' intention, is a welcomed one. In contrast, the second innovation is arguably problematic. Focusing on the second innovation, this article exposes its conceptual and practical difficulties. In particular, due to the vast difference in the scope of operation of the POA and the rule of survivorship, different results will be produced in certain cases. While this article sees the merit of the second innovation in *Lau Siew Kim*, it argues that if the said innovation merely seeks to replicate the operation of the rule of survivorship, the result is better achieved by equity following the law from the outset. Where the parties have made a conscious choice to hold the property as joint tenants upon receiving competent legal advice, there should be no room for equity's intervention by way of the twin presumptions. Any evidential difficulty in identifying the parties' intention can also be mitigated to some extent by taking into account post-purchase conduct.

This first section examines the Court of Appeal's decision in *Lau Siew Kim* in detail while the second section discusses the conceptual and practical difficulties that flow from this decision. The third section then considers the recommendation that equity following the law should be the starting point instead of the twin presumptions. Finally, in the fourth section, this article points out that there are useful evidential tools at the Court's disposal to ascertain parties' intention before concluding.

The two innovations in *Lau Siew Kim*

The facts of *Lau Siew Kim* can be simply stated. A married couple were the registered joint tenants of two properties. Their financial contributions to the purchase prices were unequal, with the husband paying significantly more than the wife. After the husband died, the wife became the sole registered owner of the properties due to the operation of the rule of survivorship at law. However, the husband's sons from an earlier marriage, who were claiming under intestacy rules, sought a declaration that the beneficial interests of the husband and wife be determined based on their respective contributions to the purchase price. The Court of Appeal held that a PRT had arisen due to the unequal contributions towards the purchase of the properties. However, due to the existence of a spousal relationship, a POA had also arisen to rebut the PRT. Accordingly, the wife was found to be the absolute legal and beneficial owner of the properties. On its face, the decision does not seem out of the ordinary. But as earlier alluded to, the two innovations with regard to the POA are of

² Ibid 156–7 [105].

³ Ibid 155–6 [102].

especial note, and it is the second innovation that will be discussed in greater detail.

The Court recognised that the POA, as traditionally understood, would operate to give the entire beneficial interest of the property to the wife *immediately*.⁴ However, also recognising that the equitable principles are flexible enough, the Court opined that ‘the [POA] could similarly operate with respect to only part of the interest in the property in question; it may be rebutted as to the life interest of a property but prevail as to the remainder’.⁵ Therefore, the Court is not precluded from finding that the POA only operates *upon* the death of the husband, and not immediately at the point of purchase, although it makes no difference in this case as the husband had already passed away. This is the first innovation that the POA does not operate immediately at the point of purchase.

In respect of the second innovation, the Court alluded to specific considerations that apply for joint tenanted matrimonial properties. The Court noted that there may be a presumption that married couples intended to hold the property jointly both at law and in equity.⁶ This presumption is that married couples with an ordinary, caring relationship would intend the operation of the rule of survivorship to benefit their spouse after their death.⁷ Building on these observations, the Court modified the POA to operate like the rule of survivorship:

The presumption of advancement that already arises between husband and wife may be developed and extended to additionally apply in the situation where married spouses purchase property as legal joint tenants; an intention may be inferred on the part of the contributing spouse(s) for the operation of the rule of survivorship. In a typical caring and amiable matrimonial relationship, it will be more probable than not that the parties intended the absolute beneficial ownership of the property to be conferred on the survivor. As is the case for the other applications of the presumption of advancement, a fact-sensitive approach must be taken as well. The *nature* and *state* of the relationship are similarly essential when considering the application of the presumption of advancement where spouses hold property as legal joint tenants. In addition, other factors such as the nature of the purchase of the *property* itself may affect the strength of the presumption; where the property was purchased as a matrimonial home for the parties and did indeed so serve, the stronger the presumption that both spouses intended for the rule of survivorship to operate and for the beneficial ownership of the property to devolve to the surviving spouse absolutely.⁸

The starting point for the Court was that regardless of the proportion of their respective contributions, married couples would likely want the surviving spouse to be conferred the full beneficial interest in the property. There is great merit in this approach as it recognises the special relationship that exists between married couples and seeks to give full effect to it. But as will be explained in the later sections of this article, the very same result could be

4 Ibid 156–7 [105]; *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795, 818–19 [51] (*‘Low Gim Siah’*) (Court of Appeal).

5 *Lau Siew Kim* (n 1) 156–7 [105].

6 Ibid 155 [101].

7 Ibid.

8 Ibid 155–6 [102] (emphasis in original).

achieved by simply letting ‘equity follow the law’, without engaging and modifying the twin presumptions of the POA and the PRT. The suggested approach avoids the complications that will be explained in the next section.

Problems with equating the POA with the rule of survivorship

Fundamentally, the POA and the rule of survivorship are two entirely different creatures that should not be equated with one another. This distinction was recognised in *Ng So Hang v Wong Sang Woo* (*‘Ng So Hang’*), where the High Court stated:

the right of survivorship may entitle the surviving owner to a share of the property, but what is gained is only *at law*; it may be that even where the right of survivorship operates to make the sole surviving owner the *sole registered proprietor* of the property, the survivor may not be entitled to the whole of the *beneficial interest*. Such would be the case for instance where a resulting trust operates in favour of the deceased’s estate, which is not displaced by a common intention constructive trust, *intention to gift or presumption of advancement*.⁹

The presumption of advancement is an *equitable* presumption that operates to mitigate the harshness of the PRT in severing the joint tenancy *in equity*. The rule of survivorship on the other hand, as explained in *Ng So Hang* above, operates *at law*. It vests the *legal* title in the surviving joint tenants.¹⁰ As such, it is odd to equate the two doctrines which do not even operate on the same plane. Another conceptual difference is that the POA operates as a *gift* to the surviving spouse;¹¹ the surviving spouse acquires a *new* interest.¹² In contrast, no interest passes under the rule of survivorship.¹³ Instead, the entitlement of the deceased joint tenant to the property is simply eliminated on his death.¹⁴ This results from the fact that each joint tenant holds the whole jointly and nothing severally.¹⁵ Keeping the POA and the rule of survivorship separate is thus desirable as a matter of doctrinal neatness, given the very different conceptual underpinnings of the two.

The more crucial difference, however, is in their scope of operation. The POA is to be applied using a categorical approach,¹⁶ based on certain special relationships, whereas the rule of survivorship applies to all joint tenants. The reason being the POA reflects the moral or equitable obligation of the transferor specifically to provide for the beneficiary.¹⁷ Therefore, the POA

9 [2018] SGHC 162, [47] (emphasis added) (High Court) (*‘Ng So Hang’*).

10 Gary Watt, *Trusts & Equity* (Oxford University Press, 8th ed, 2018) 380.

11 John McGhee (ed), *Snell’s Equity* (Sweet & Maxwell, 33rd ed, 2015) 678–9 [25-008].

12 *Low Gim Siah* (n 4) 809–10 [33]; *Chan Gek Yong v Chan Gek Lan* [2008] SGHC 167, [17] (High Court).

13 *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2010] 2 SLR 1123, 1139 [39] (Court of Appeal) (*‘Shafeeg’*); *Goh Teh Lee v Lim Li Pheng Maria* [2010] 3 SLR 364, 369–70 [12] (Court of Appeal) (*‘Goh Teh Lee’*).

14 *Shafeeg* (n 13) 1140 [41].

15 *Goh Teh Lee* (n 13) 369 [11].

16 Tang Hang Wu and Kelvin FK Low (eds), *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 4th ed, 2019) 138.

17 *Lau Siew Kim* (n 1) 143–4 [76]–[77]; *Low Gim Siah* (n 4) 815–16 [43]–[44].

operates only in certain categories of relationships in which the Court recognises the likely existence of such obligations and presumes that one party intends to make a gift to the other. For instance, the Court in *Lau Siew Kim* and subsequent cases, did not find that the POA would apply to cohabiting couples who were not legally married or siblings.¹⁸ While these categories are not closed, they certainly are limited ones.¹⁹

The scope of operation of the POA is further narrowed because these obligations may not even be congruent. For instance, while the Court may find that a husband has an obligation to provide for his wife, it may not necessarily find that the wife has a similar obligation. In fact, this was recognised by the Court of Appeal in *Lau Siew Kim*, where it affirmed its earlier decision in *Low Gim Siah v Low Geok Khim* ('*Low Gim Siah*'). In *Low Gim Siah*, the Court stated:

The presumption of advancement applies to certain transfers between parties where it may be readily inferred that A would have intended to make a gift to B. It is found therefore where A is under an equitable obligation to support or make provision for B. Examples are where A is the husband or father of B. It is, in effect, a counter-presumption which provides prima facie evidence about A's intentions as to where the beneficial interest in the property should lie. Its effect is to negative any initial presumption that the transfer creates a resulting trust.²⁰

The unidirectional operation of the POA is evident, given that in the example above, 'A' is the husband and 'B' is the wife. The roles of 'A' and 'B' are not interchangeable unless the courts recognise a congruent obligation by both parties to provide for each other. Relatedly, in *Neo Hui Ling v Ang Ah Sew* ('*Neo Hui Ling*'), the High Court stated that a POA from the child to her mother would '[stretch] the presumption in a way which is not entirely easy to accept, since the presumption appeared to be premised on a notion that it was for a parent to provide for his/her child.'²¹ In other words, the POA only operates from parent to child and not in the other way. Thus, the POA does not operate in both directions unless it recognises a congruent obligation for both parties to provide for each other.²²

This unidirectional operation of the POA is also observed by local academics. A leading textbook on land law in Singapore observes that the POA does not apply from the wife to her husband.²³ Similarly, in his excellent note on *Lau Siew Kim*, Low also observed:

It is perhaps telling that whereas the Court of Appeal in *Lau Siew Kim* commented on the continued relevance of the presumption of advancement from husband to wife by appealing to the perceived strength of the spousal relationship, *the logical step of extending the presumption of advancement to apparent gifts from a wife to her husband was not taken.*²⁴

18 *Ng So Hang* (n 9) [114]; *Chan Gek Yong v Chan Gek Lan* (n 12) [17].

19 Alvin See, Yip Man, and Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2018) 183.

20 *Low Gim Siah* (n 4) 809–10 [33].

21 *Neo Hui Ling v Ang Ah Sew* [2012] 2 SLR 831, 847 [45] (High Court) ('*Neo Hui Ling*').

22 *Lau Siew Kim* (n 1) 144–5 [77]–[78].

23 Tang and Low (n 16) 140.

24 Kelvin FK Low, 'Apparent Gifts: Re-examining the Equitable Presumption' (2008) 124

Another author, Yeo, criticised the POA as anachronistic and sexist.²⁵ The criticism was clearly premised on the gender biasness of the POA, particularly its operation from husband to wife. Similarly, Yip understood *Lau Siew Kim* as laying down the proposition that ‘the one-way spousal advancement is still relevant in modern times’.²⁶ It is thus clear that the POA is understood as having only a unidirectional application in Singapore.

The rule of survivorship, in contrast, has a much wider scope of application than the POA. Unlike the POA, it does not have its roots in the recognition of moral or equitable obligations. Instead, it evolved largely due to concerns of administrative efficiency and is the hallmark of joint tenancies,²⁷ which were preferred during the times of feudal England where feudal tenants held their land in return for providing different kinds of services to the King.²⁸ Joint tenancies lessened the burden on the feudal tenants as only one set of services was due from all the joint tenants.²⁹ The divisible services such as rent are not divided, and the entire services such as fealty are not multiplied.³⁰ And when one of the joint tenants passes away, there is no need to consider whether his interest in the property had passed on to his descendants, as it simply remains with the other surviving joint tenants.³¹ The crucial point is that the rule of survivorship therefore does not have a restriction in its scope of application unlike the POA. It entails the elimination of the interest of *any* deceased joint tenant(s).³² The description of its operation is evidently gender-neutral. In short, there need not be a special relationship present to trigger its application and it is not unidirectional.

This difference in the scope of operation raises curious questions. The Court of Appeal in *Lau Siew Kim* stated that its pronouncements on the POA should ‘apply equally to other pre-existing relationships which attract the operation of the presumption of advancement (such as parent–child relationships), as well as to other property (besides real property) which may be held in joint tenancy’.³³ It may therefore be inferred that the Court intended for the second innovation to be restricted in its scope and only apply to special relationships just like the traditional POA. But how can the Court pronounce that the second innovation operate in both directions like a rule of survivorship and yet preserve the unidirectional operation of the traditional POA from husband to wife? Further, in other relationships, such as parent–child relationships, will

(July) *Law Quarterly Review* 369, 372 (emphasis added).

25 Ruth S Yeo, ‘The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman?’ (2010) 24(2) *International Journal of Law, Policy and the Family* 123, 133.

26 Man Yip, ‘The Presumptions of Resulting Trust and Advancement under Singapore Law: Localisation, Nationalism and Beyond’ in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016) 245, 259.

27 *Goh Teh Lee* (n 13) 369–70 [12].

28 Stuart Bridge, Elizabeth Cooke and Martin Dixon, *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 9th ed, 2019) 20.

29 Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (Lawbook, reprint ed, 2007) vol 2, 659.

30 *Ibid.*

31 *Goh Teh Lee* (n 13) 369–70 [12].

32 *Shafeeg* (n 13) 1140 [41].

33 *Lau Siew Kim* (n 1) 158 [108].

the modified POA or the traditional POA apply? Should lower courts be faced with these questions, they would be at a loss as *Lau Siew Kim* offers seemingly no guidance.

In *Lau Siew Kim* and subsequent cases,³⁴ it is always the husband who passes away and the question before the court has always been the beneficial interest that the wife has in the property. In such cases, should the court find the spousal relationship between the husband and wife to be a loving one, the court would apply the POA to give effect to the rule of survivorship (the second innovation). Consequently, the wife would be the sole beneficiary of the matrimonial property, as was the case in *Lau Siew Kim*. Therefore, it does not matter whether the modified POA or the traditional POA arises, since the result would be the same.

However, suppose in a subsequent case, it is the wife who passes away, and the court has to decide the beneficial interest owned by the husband. Assuming that the wife contributed 30% to the purchase price and the husband the remainder 70%, a PRT would arise. As there is traditionally no POA from a wife to her husband, which still remains the position in Singapore, the PRT would remain unrebutted.³⁵ The husband would thus only have beneficial interest in the property proportionate to his 70% contribution to the purchase price of the property. But if we apply the second innovation in *Lau Siew Kim*, a wildly different result would be reached since the wife becomes the sole beneficiary of the property due to the operation of the POA.

If we recall, the court stated that when a married couple jointly purchases property, an intention may be inferred that they likely desired the operation of the rule of survivorship.³⁶ This was the reason why the court modified the POA to operate like the rule of survivorship. The only way to achieve the same result as *Lau Siew Kim* in such cases would thus be to forcefully apply the POA in both directions like the rule of survivorship. However, this goes against the conceptual underpinnings of the POA which resulted in the unidirectional operation, which was recognised even in *Lau Siew Kim* itself. It is suggested that there is simply no need to distort the POA because a much easier way to give effect to the rule of survivorship exists — equity follows the law at the outset.

Equity follows the law

Equity follows the law is a simple approach: if a married couple purchases property as legal joint tenants, then the starting point should be that they *also* intended to be joint tenants in equity. The beneficial interest mirrors what is written on the instrument of registration or rather there is no position in equity to speak of. In fact, two local cases curiously alluded to this approach before reverting to the approach in *Lau Siew Kim*.

³⁴ See, eg, *Ang Hai San Henry v Ang Bee Lin Elizabeth* [2010] SGHC 353 (High Court); *Lai Hoon Woon v Lai Foong Sin* [2016] SGHC 113 (High Court).

³⁵ Recall that in Singapore, there is no POA operating from the wife to the husband, as explained in earlier sections of this article.

³⁶ *Lau Siew Kim* (n 1) 155–6 [102].

The curious presumption of intending a joint tenancy in equity

The first case is *Chan Yuen Lan v See Fong Mun* ('*Chan Yuen Lan*'),³⁷ where the Court of Appeal laid down a six-step approach premised upon the twin innovations in *Lau Siew Kim*, which is instructive in deciding the beneficial interests of the parties. The first step concerns the PRT while the fifth concerns the POA. Both are reproduced below:

(a) Is there sufficient evidence of the parties' respective financial contributions to the purchase price of the property? If the answer is 'yes', it will be presumed that the parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price (ie, the presumption of resulting trust arises). If the answer is 'no', it will be presumed that the parties hold the beneficial interest in the same manner as that in which the legal interest is held.

...

(e) ... does the presumption of advancement nevertheless operate to rebut the presumption of resulting trust in (a)? If the answer is 'yes', then ... *the parties will hold the beneficial interest in the property jointly where the property is registered in their joint names*. If the answer is 'no', the parties will hold the beneficial interest in the property in proportion to their respective contributions to the purchase price.³⁸

The second case is *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff* ('*Pereira Dennis*'),³⁹ which elaborates on the approach in *Chan Yuen Lan* above. There, a dispute between a husband and his wife over four jointly tenanted properties. The court specifically discussed the second innovation in *Lau Siew Kim*, stating that the Court of Appeal in *Lau Siew Kim* was 'alluding to the fact that the POA should be broadened to encompass the operation of the rule of survivorship.'⁴⁰ The court explained that:

What this means is that in every case of joint tenancy, where the presumption of advancement applies, two different intentions will be presumed: (a) the intention of the primary or sole contributor to *share jointly in equity with the co-owner while both spouses are alive* and (b) the intention of the contributor for the rule of survivorship to operate upon his passing. In this connection, *the latter intention is irrelevant at present as both spouses are alive. The key dispute is whether the former intention to share jointly in equity is rebutted*. In rebutting this intention, especially given the considerable strength of the presumption of advancement that arises in the present case, it is not enough for the Plaintiff to merely assert that his intention was exclusively for the rule of survivorship to operate.⁴¹

As can be seen from point (a) in *Pereira Dennis* above, a married couple is presumed to have intended to own a property *jointly* in equity when they are alive. But the rule of survivorship is inherent in a joint tenancy, thereby making the presumption of the second intention in (b) redundant. When we

37 [2014] 3 SLR 1048 (Court of Appeal) ('*Chan Yuen Lan*').

38 *Ibid* 1097–8 [160] (emphasis added).

39 [2017] 5 SLR 529 (High Court) ('*Pereira Dennis*').

40 *Ibid* 557 [59].

41 *Ibid* (emphasis added).

view presumptions (a) and (b) together, the net effect is that of a joint tenancy. In effect, equity follows the law.

Curiously, in *Pereira Dennis*, equity follows the law was not the starting point and this illustrates the roundabout manner of achieving the same outcome. Instead, the PRT and POA analysis was utilised. On the facts of *Pereira Dennis*, the court found that a PRT had arisen for all four properties due to unequal contributions by the husband and the wife. The court also found that a POA had arisen and that there was an intention for the couple to share the properties jointly. The POA for two of the properties were however rebutted as there was evidence that the husband only acquired these properties with the intention of benefiting himself solely. But perhaps there is no contradiction. Should the POA remain unrebutted, *in effect*, equity follows the law. However, this approach is curious given that equity could have followed the law at the outset instead of employing the POA. And as earlier explained, in certain cases where the POA only operates unidirectionally, the court even has to distort the POA to achieve this very same outcome.

The two cases also raise a curious question: where did the POA come from? The existence of a POA is entirely dependent on the establishment and application of a PRT as the POA is meant to negate the harshness of the PRT.⁴² But if parties are presumed to be joint tenants in equity, this would imply that no PRT arose in the first place. If so, there can be no POA. The relationship between the POA and the PRT is ignored. Equity following the law at the outset would have prevented this arduous exercise.

A corollary question that arises is whether the husband or wife can deal with the property without the consent of the other when both of them are alive. If we recall, joint tenants do not have distinct shares in a property; they hold the whole property jointly and not severally.⁴³ Consequently, *all* joint tenants must partake in a dealing before that dealing can bind the entire estate.⁴⁴ On the other hand, tenants in commons have separate and distinct shares in the property.⁴⁵ Therefore, each tenant can deal with his or her own share in the property.⁴⁶ The approach in *Chan Yuen Lan* and *Pereira Dennis* above presumes an intention for both spouses to share the property jointly in equity and as such, both spouses need to act jointly in dealing with the property. However, the PRT that supposedly arises should have severed the joint tenancy in equity, resulting in the parties becoming tenants in common. This presents a potential problem in a dispute regarding the effectiveness of a dealing in the property by only one of the spouses.

The common thread running through *Lau Siew Kim*, *Pereira Dennis*, and *Chan Yuen Lan*, is that the court had consistently sought to give effect to the special relationship of parties to which the POA applies, and their desire for the rule of survivorship to apply or even implicitly, for equity to follow the law at the outset. The court seems to be averse to joint tenancies but yet is willing to give effect to the rule of survivorship. Rajah JA (as he then was), who

⁴² *Lau Siew Kim* (n 1) 134–5 [57].

⁴³ *Goh Teh Lee* (n 13) 369 [11].

⁴⁴ *Ibid* 372 [17].

⁴⁵ *Ibid* 370–1 [13].

⁴⁶ For instance, by assigning it to a third party or to the other tenants in common.

delivered the judgment in *Lau Siew Kim*, astutely noted in his earlier judgment in *Tsu Soo Sin v Oei Tjong Bin* that a joint tenancy cannot be ‘conceptually stripped of all its usual attributes and be mystifyingly reduced to a bare feature of the right of survivorship’.⁴⁷ Therefore, intending for the rule of survivorship to apply should also mean intending for a joint tenancy and vice versa.

It is however acknowledged that there is jurisprudence going against this argument. Notably in *Neo Hui Ling*, the Court stated that intending for the rule of survivorship to apply ‘say[s] nothing whatsoever about what should happen while both tenants are alive’.⁴⁸ Nevertheless, the rule of survivorship remains the ‘grand and distinguishing incident’ of a joint tenancy.⁴⁹ Thus, it is only logical to conclude that to give effect to the rule of survivorship would be essentially the same as giving effect to a joint tenancy. If so, there would be no need for the elaborate application of the twin presumptions. Equity should simply follow the law at the outset.

Why does equity intervene in the first place?

The approach in *Lau Siew Kim* is firmly undergirded by equity’s abhorrent attitude towards joint tenancies. This was what mandated equity’s intervention via the twin presumptions in the first place. But if these reasons are no longer as relevant today, then there would be no need for the approach in *Lau Siew Kim* for joint tenanted matrimonial properties. Instead, equity simply following the law at the outset would be the most logical and direct approach.

Equity abhors joint tenancies and prefers tenancies in common because the latter does not bring with it the rule of survivorship.⁵⁰ The rule of survivorship has long been analogised to gambling:⁵¹ one judge has equated the operation of the rule of survivorship to ‘the gamble of the tontine’,⁵² while another stated that the rule of survivorship is ‘not unlike that enjoyed by the many people who like the risks involved in the well-known game of double or quits’.⁵³ There is an inherent gamble as to which joint tenant will die first⁵⁴ and in the end, the winner takes all.⁵⁵ The application of the rule of survivorship thus

47 [2009] 1 SLR(R) 529 (Court of Appeal) (*Tsu Soo Sin*).

48 *Neo Hui Ling* (n 21) 845 [39]. Interestingly, the same High Court judge delivered the judgment in *Neo Hui Ling* and the High Court judgment in *Tsu Soon Sin* (ibid) (which was overturned on appeal). In light of Rajah JA’s role in both CA judgments of *Tsu Soo Sin* and *Lau Siew Kim* (n 1), perhaps the interpretation of *Lau Siew Kim* in *Neo Hui Ling* (n 21) on this point was a mistaken one.

49 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 915–16, [7.4.8], citing *De Witt v San Francisco* (1852) 2 Cal 289, 297.

50 Tang and Low (n 16) 210.

51 Heather Conway, “Leaving Nothing to Chance?": Joint Tenancies, the “Right” of Survivorship, and Unilateral Severance’ (2008) 8(1) *Oxford University Commonwealth Law Journal* 45, 50.

52 *Corin v Patton* (1990) 169 CLR 540, 573 (Deane J).

53 *McDowell v Hirschfield Lipson & Rumney* [1992] 2 FLR 126, 128 (Stockdale J).

54 Joyce Tooher, ‘Windfall by Wager or Will? Unilateral Severance of a Joint Tenancy’ (1998) 24(2) *Monash University Law Review* 399.

55 *Stack v Dowden* [2007] 2 AC 432, 454 [57] (Baroness Hale).

goes against the equitable maxim ‘equality is equity’,⁵⁶ and was the main reason for equity’s abhorrence of joint tenancies.

But this lack of equality is perhaps overstated. In *Cray v Willis*, the court expressed the following view:

A right of survivorship is as good as a right by descent; neither is there anything unreasonable or unequal in the law of joint tenancy, each having an equal chance to survive; and the duration of all lives being uncertain, *if either party has an ill opinion of his own life, he may sever the joint tenancy by a deed granting over a moiety in trust for himself; so that survivorship can be no hardship, where either side may at pleasure prevent it.*⁵⁷

Presumably, what the court meant by ‘either side may at pleasure prevent it’, was that parties could unilaterally sever the joint tenancy when their relationship breaks down. Indeed, parties have many tools at their disposal to overcome this supposed lack of equality. Traditionally, parties can sever a joint tenancy by operating on their own shares, mutual agreement, or any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.⁵⁸ These methods have been repeatedly recognised by the courts in Singapore.⁵⁹ In addition, s 53(5) of the *Land Titles Act* (Singapore) (*‘Land Titles Act’*) allows for severance by unilateral declaration:

Without prejudice to any rule or principle of law relating to severance of a joint tenancy, any joint tenant may sever a joint tenancy of an estate or interest in registered land by an instrument of declaration in the approved form and by serving a copy of the instrument of declaration personally or by registered post on the other joint tenants.⁶⁰

By serving the instrument of declaration in the approved form on the other joint tenant, the joint tenancy will be severed, and the parties will hold the property as tenants in common in equal shares.⁶¹ While recent developments suggest that these requirements must be strictly complied with,⁶² this does not detract from the fact that parties are able to unilaterally sever a joint tenancy with relative ease. Parties are not helpless to the extent that protection via equity’s intervention using the PRT is warranted. Although it still remains

56 McGhee (ed) (n 11) 90 [5-006]; *Mischel v Mischel Holdings Pty Ltd (in liq)* [2012] VSC 292, [40].

57 (1729) 2 P Wms 529; 24 ER 847 (emphasis added).

58 *Williams v Hensman* (1861) 1 John & H 546, 557; 70 ER 862, 866.

59 Alvin W-L See, ‘Severance by Unilateral Declaration: Lessons from Singapore’ [2019] (2) *Conveyancer and Property Lawyer* 138, 143.

60 *Land Titles Act* (Singapore, cap 157, 2004 rev ed) (*‘Land Titles Act’*).

61 *Ibid* s 53(6). While the parties would be tenants in common in equal shares at law, s 53(6) speaks nothing of the beneficial interest. However, if equity follows the law at the outset, they would have equal beneficial interests too. See *Goodman v Gallant* [1986] 1 All ER 311, 320, where the English Court of Appeal stated that when there is a declaration of a beneficial joint tenancy, by the ‘very nature of a joint tenancy that, upon a severance, each takes an equal aliquot share according to the number of joint tenants’.

62 See generally *Chan Lung Kien v Chan Shwe Ching* [2018] 2 SLR 84 (Court of Appeal) (*‘Chan Lung Kien’*); and See (n 59).

somewhat a gamble, parties are able to fold and withdraw from the gamble at any point in time. In fact, the statutory mechanism was enacted for this very purpose:

[A] joint tenancy, by its very nature, also has *some serious disadvantages in cases where one co-owner, for good reasons, does not wish the survivor to take the whole of the property*. To achieve that, he has to destroy the right of survivorship by severing the joint tenancy. The effect of the severance is to create a tenancy in common under which each co-owner holds a distinct share in the property. In cases where the joint tenants are father/child or husband/wife, the law will presume that each owns a 50% share.

...

Because of these existing legal limitations, injustices can occur. Take the simple example of a father and son who are joint tenants of a house. The son subsequently marries. Unfortunately, later on, let us assume the son dies and the father becomes the sole owner, because of the nature of the joint tenancy; father is unable to get along with the daughter-in-law and her children, and the father ejects her and family from the house which can be done, because the daughter in-law does not inherit the share of her husband.

Therefore, *the proposed amendment will enable a son/daughter or wife to secure his or her interest in the property for himself or herself or her immediate family in a situation where he or she may need to do so*.⁶³

This statutory procedure has been described as granting joint tenants ‘full dispositive power’ to convert their interests into a tenancy in common via a ‘simple procedure’.⁶⁴

Equity’s intervention closes off choices for parties. The Court of Appeal in *Lau Siew Kim* only had in mind cases where one of the spouses passed away, but not a case where both spouses are still alive. Suppose a married couple holds a property as joint tenants and the husband and the wife had contributed unequally to the purchase price. Subsequently, the wife falls out with her husband and is having second thoughts on allowing the rule of survivorship to operate and benefit her husband entirely. However, upon receiving legal advice on her options, she may eventually change her mind and choose not to sever the joint tenancy, intending for her husband to have the entire beneficial interest in the property after her death. Nevertheless, the joint tenancy *may* have already been severed at the point of purchase due to the unequal contribution to the purchase price triggering the operation of the PRT. The wife never had the choice of ‘not severing’ the joint tenancy as it had already been severed by the resulting trust; all she had was the illusion of choice.

There are also cogent reasons in the modern context why parties continue to make a conscious choice to hold property as joint tenants and to intend the rule of survivorship.⁶⁵ For instance, it was recognised in the local parliamentary debates that a joint tenancy is advantageous for probate, sale or mortgage, and succession purposes.⁶⁶ The courts have also recognised these

63 Singapore, *Parliamentary Debates*, 8th Parliament, 18 January 1993, 375–6 (Shunmugam Jayakumar) (emphasis added) (Land Titles Bill).

64 *Chan Lung Kien* (n 62) 99–100 [46].

65 Tang and Low (n 16) 210.

66 Singapore, *Parliamentary Debates*, 8th Parliament, 18 January 1993, 375 (Shunmugam Jayakumar) (emphasis added) (Land Titles Bill). See Gray and Gray (n 49) 916–20

advantages. In *Neo Hui Ling*, the Court stated that despite equity's abhorrence of joint tenancies, the rule of survivorship remains a very powerful tool for property owners to achieve the ends they wished.⁶⁷ This complements the reason above, that equity should not inhibit parties in pursuing whatever ends they desire via a joint tenancy.

Despite these reasons, the court may still not be convinced that parties truly intended for a joint tenancy in equity and understand its consequences. Equity's suspicion towards a joint tenancy may ultimately only be dispelled with concrete evidence. Admittedly, it is often difficult to find evidence of parties' intentions. The requisite intention is usually found in conversations between the joint tenants and there is often no formal documentation of their conversations. The account given by one party may also be perceived as self-serving, especially when one of the joint tenants is deceased, and the court would not place much weight on the evidence given. Thus, there is a special need for convincing proof.⁶⁸

Evidential issues in relation to parties' intentions

The twin presumptions are ultimately 'no more than evidential guidelines distilled from contemporary norms'.⁶⁹ The POA in particular, has been described as a 'last resort device' and should thus not be the court's first port of call.⁷⁰ In the face of better evidential tools to ascertain party intentions, the twin presumptions ought to give way. It is suggested that there are two key factors, which serve as better evidential tools that the court should examine: whether competent legal advice was received by the parties and post-purchase conduct of parties.

Receipt of competent legal advice

The *Land Titles Act* previously mandated parties to consider and decide the manner of holding in the instruments of registration.⁷¹ In those circumstances, it is clear that whatever mode of ownership that eventually appears on the instrument of registration accurately reflects parties' intention. There would thus be no need for the courts to adopt a paternalistic stance and for equity to intervene. However, after the *Land Titles Act* was amended in 2004, such a requirement was removed. In its place is a statutory presumption that parties would hold the property as joint tenants, if they left the original instrument of registration blank.⁷² The Court of Appeal in *Lau Siew Kim* was naturally concerned that parties may not truly intend a joint tenancy. Such a concern is certainly well-founded but can be sufficiently addressed.

[7.4.9]–[7.4.19] for a comprehensive list of advantages; see also New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy* (Report No 73, 1994) [2.14], reproduced in Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 10th ed, 2016) 594 [6.2E].

⁶⁷ *Neo Hui Ling* (n 21) 845 [38].

⁶⁸ *Sacks v Klein* [2011] VSC 451, [32].

⁶⁹ *Lau Siew Kim* (n 1) 113 [2].

⁷⁰ See, Yip and Goh (n 19) 380.

⁷¹ *Land Titles Act* (Singapore, cap 157, 1985 rev ed) s 48(1).

⁷² *Ibid* s 53(1).

Parties' express choice of a legal joint tenancy upon receiving competent legal advice should leave no room for equity to intervene. When choosing the mode of ownership, a competent lawyer would have explained the consequences and gravity of choosing a joint tenancy to the parties and every choice would thus reflect the parties' intention accurately. This comports with reality, evidenced in a qualitative survey, which shows that conveyancers have consistently explained the manner of holding to the clients even after the amendment of the *Land Titles Act* and concluded that most parties have made a considered choice as regards the manner of holding.⁷³

In fact, the Court in *Lau Siew Kim* recognised the strength of this argument, expressing that it would be 'unrealistic to suggest that the solicitor for the purchasers of the property in question did not at any point advise his clients on the significance of taking title as joint tenants rather than as tenants in common.'⁷⁴ The Court was 'prepared to assume' that solicitors would do their due diligence and advise their client specifically on the consequences of their manner of holding.⁷⁵ Oddly, it did not find this factor to be decisive.

After 2006,⁷⁶ it was mandatory for conveyancing of all private properties to be done via the electronic conveyancing system.⁷⁷ The system mandates parties to choose their manner of holding before the transaction could be completed.⁷⁸ In effect, this turns the clock back to the position under the *Land Titles Act* pre-amendment, where there was no statutory presumption. Every choice would thus be a considered one.

Even for properties purchased well before the electronic conveyancing system came into place (as was the case in *Lau Siew Kim*), the court could conduct a search on the original instrument of registration. Such a search would show whether the parties left the 'manner of holding' field blank.⁷⁹ If the parties had left it blank, then the application of the twin presumptions could be justified. However, if the parties, upon receiving competent legal advice, had chosen a joint tenancy, there should be no room for equity's intervention. Unfortunately, the Court in *Lau Siew Kim* passed on such a chance.

Post-purchase conduct as evidence of parties' intentions

Examining subsequent conduct to ascertain intention at the point of purchase goes against the traditional position in *Shephard v Cartwright* ('*Shephard*'), that self-serving statements and conduct of a party seeking to induce them as evidence is inadmissible unless it is so closely connected in time to the

73 Yeo (n 25) 136–7; Yip (n 26) 263.

74 *Lau Siew Kim* (n 1) 168 [136], citing *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 303 [73].

75 *Lau Siew Kim* (n 1) 168 [136].

76 Note that the properties in *Lau Siew Kim* (ibid) were purchased before 2006.

77 Singapore Land Authority, *Registration of Deeds and Instruments* (Web Page) <www.sla.gov.sg/property-boundary-n-ownership/property-ownership/registration-of-deeds-and-instruments>.

78 *Lau Siew Kim* (n 1) 150–1 [91].

79 A title search alone would not yield any meaningful results as the registrar would presume a joint tenancy and fill in all blank fields. Only a search on the original instrument or deed would reflect what the parties have written accurately.

original act that it forms part of the same transaction.⁸⁰ This rule governed the type of evidence that can be relied on to rebut the presumptions of resulting trust and advancement.⁸¹ However, it was relaxed by the Court of Appeal in *Tan Yok Koon v Tan Choo Suan* for three reasons.⁸² First, the rule in *Shephard* is an anachronistic application of the rule against hearsay in the old common law and had since been modified by the *Evidence Act 1997* (Singapore).⁸³ Secondly, foreign jurisdictions such as Canada and England have also abolished the rule in *Shephard*.⁸⁴ Finally, it would be a better approach to admit evidence and leave the court to assess its probative weight as this would allow a more holistic assessment of parties' intention and achieve a fairer result in complex cases.⁸⁵

Specifically, the court stated that '[e]mpirically speaking, there is often relevant subsequent conduct in property disputes involving a deceased transferor.'⁸⁶ This signals that the court recognises the evidential difficulty in ascertaining parties' intention and paves the way for a closer examination of subsequent conduct to determine whether equity should follow the law.

Examples of subsequent conduct include the manner in which rental income is distributed. For instance, if parties had deposited the rental income into a bank account in their joint names, it would suffice as evidence of intention to hold the property jointly, as was the case in *Sacks v Klein*.⁸⁷ There, two brothers were joint tenants of a flat. The court found that one of the brothers, David had 'meticulously ensured that the income and expenses of the flat were shared equally between him and his brother.'⁸⁸ When David used his own funds to renovate the flat, he had repaid himself using monies from the rental income. The court found that these acts were consistent with the parties' intention of a joint tenancy at the time of purchase.

In contrast, the court in *Pereira Dennis* found that the husband and wife did not intend to own two properties jointly as the husband collected the entirety of the rental proceeds for himself.⁸⁹ As such, examination of subsequent conduct could either point towards a joint tenancy and strengthen the inference drawn from the receipt of competent legal advice, or away from it. It is therefore argued that the abovementioned two factors would serve as much better evidential tools and should be examined before the court even considers resorting to the twin presumptions.

80 [1955] AC 431, 445–6 (*Shephard*).

81 See, Yip and Goh (n 19) 382.

82 [2017] 1 SLR 654 (Court of Appeal) (*Tan Yok Koon*); Alvin See, 'Transferor's Intention, Trustee's Undertaking and the Scope of Fiduciary Liability' (2018) 32(1) *Trust Law International* 50, 52–3.

83 *Tan Yok Koon* (n 82) 695–6 [110]; See (n 82) 52–3.

84 *Tan Yok Koon* (n 82) 695–6 [110]. Note that the development in England however, warrants clarification. See (n 82) 53–4.

85 *Ibid*.

86 *Tan Yok Koon* (n 82) 695–6 [110].

87 *Sacks v Klein* (n 68).

88 *Ibid* [65].

89 *Pereira Dennis* (n 39) 557 [61].

Conclusion

There is a delicate tension to be maintained in relation to joint tenanted matrimonial properties. On one hand, the court seeks to give great weight to the special relationship between spouses. To this end, the courts consistently emphasised that married couples likely intended for the rule of survivorship to apply. Yet on the other hand, the courts have adopted a paternalistic approach and abhor joint tenancies due to equitable concerns. From this struggle birthed the two innovations.

Given the seemingly impossible desire to give effect to the rule of survivorship and yet at the same time do without a joint tenancy, conceptual and practical complications flowed from the Court of Appeal's decision. Yet at the end of the day, the very same outcome could have been achieved if equity simply follows the law at the outset. As explained, the reasons against giving effect to a joint tenancy are not insurmountable and the tension between the various considerations can be resolved. This is even more so with evidential tools at the court's disposal to strengthen their inference of parties' intention and guard against wrongful findings.

Co-ownership as it stands is already confusing to laypersons; the nature of their rights is impossible to comprehend given the obscure and complex nature of the law.⁹⁰ Parties have to grapple with the fact that what is on the land register may not reflect their beneficial interests. This raises a pertinent question: Why should the parties' express, informed choice on the instrument of registration be questioned in the first place? In the words of a local academic:

[P]erhaps we should also reflect more deeply just how paternalistic the law should be in protecting non-commercial parties. Overzealous paternalism in this instance could render the law more complex and therefore even less readily comprehensible to the lay purchasers, thereby cementing (or, even exacerbating) the very problem that equity is invoked to resolve ...⁹¹

⁹⁰ Alastair Hudson, *Equity and Trusts* (Routledge, 8th ed, 2015) 793.

⁹¹ Yip (n 26) 264.