

CREDITORS' RIGHTS IN TENANCIES BY THE ENTIRETIES

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Anachronisms are not uncommon in property law but the continuing existence in many states of tenancies by the entireties is an extreme example of feudal remnants in modern law.¹ Study of the ancient land law has a certain charm as an historical exercise. But when a remnant of this law guides our conduct today, three obvious questions arise: (1) Does this ancient estate have any present value? (2) If not, or only partially, is abolition essential or will modification suffice?, and (3) Have those jurisdictions retaining the estate made any modifications modernizing its effects and incidents? The rights of creditors are certainly not the sole element to be considered in the determination as to whether ancient estates should be retained, but they definitely are major factors. The recent New Jersey decision of *King v. Greene*² has again raised the issue of the rights of creditors in estates held by the entireties and focused attention on the necessity for a re-appraisal of the value of this type of land holding.

THE ANCIENT ESTATE

The historical estate known as the tenancy by the entirety varies from the modern holding so denominated in most jurisdictions retaining the concept. Modern variations, however, can only be understood in the background of the ancient estate and thus a brief review of well-known facts may be helpful. The essential ingredient of the ancient tenancy was that, when spouses took property at common law, the husband's control over the concurrent estate was absolute during coverture. Since property solely owned by the woman prior to marriage came under the complete control, both as to management and benefit, of the husband upon marriage, a wife's rights in concurrently owned property acquired during coverture was similarly limited. This common law policy is generally expressed as: The husband and wife are one and the one is the husband.³ The common law

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¹ Abolition of the estate was called for in the Report of the Committee on Changes in Substantive Real Property Principles, Real Property and Trust Law Division, A.B.A. (1944). See also 2 American Law of Property § 6.6 (Casner ed. 1952).

² 30 N.J. 395, 153 A.2d 49 (1959).

³ See, e.g., Phipps, Tenancy by Entireties, 25 Temp. L.Q. 24, 25 (1951).

also favored survivorship in concurrent ownership⁴ so it was not surprising that concurrent estates in the marital unity of husband and wife had as an incident a right in the survivor to take the entire estate on the spouse's death. Thus, the tenancy by the entirety so developed that, although a transfer of property was made to husband and wife, the husband had complete control during the marriage while the survivor took the entire granted estate upon death of the other spouse.⁵ During coverture, the wife's interest was only an expectancy.⁶

THE MODERN ESTATE

While the term, "modern estate by the entirety," may be a contradiction in terms, the form in which it survives in jurisdictions retaining it determines the rights of creditors in the estate. Whether the estate exists is itself a difficult question to determine in some jurisdictions. There are holdings or intimations confirming or suggesting its existence in about half the states. But in some jurisdictions the estate if it does exist, is either seldom used, or its incidents are such that it should properly be classified as a joint tenancy. The estate by the entirety has been recognized in Arkansas,⁷ Delaware,⁸ District of Columbia,⁹ Florida,¹⁰ Hawaii,¹¹ Indiana,¹² Kentucky,¹³

⁴ The common law presumption was that a concurrent estate transferred to other than husband and wife created a joint tenancy, not a tenancy in common. This, of course, tended to return the entire property involved to single ownership and thus complied with the important feudal policy against breaking up obligations to the overlord among a number of tenants. See 4 Powell, *Real Property* ¶ 602 (1954), and authorities there cited.

⁵ Ordinarily the interest in the property that is transferred by the entirety has been a fee simple, but this is not a requirement. The tenancy can be created in any estate in land that is capable of being owned by the husband and wife subject to survivorship. 2 *American Law of Property* § 6.6 (Casner ed. 1952).

⁶ Thus the husband (1) had the exclusive right to occupy the principal and enjoy the income of the entire property; (2) had the power to manage, control and dispose of the possession and income during the marriage; (3) had the benefit of all the assets for use as a base for credit; and (4) was alone entitled to represent the asset or any part thereof in litigation. But the husband alone could not destroy the wife's right of survivorship. Phipps, *Tenancy by Entireties*, 25 *Temp. L.Q.* 24, 25-26 (1951). Note that the result of the ancient estate was essentially no different than if the property had been given entirely to the wife, as long as the marriage continued, or if the wife survived the husband. The only difference occurred when the husband survived the wife, since he would then have full ownership, not just curtesy during his life with the estate going on his death to the heirs of his former wife.

⁷ *Branch v. Polk*, 61 Ark. 388, 33 S.W. 424 (1895).

⁸ *Citizens' Saving Bank v. Astrin*, 44 Del. 451, 61 A.2d 419 (1948).

⁹ *Fairclaw v. Forest*, 130 F.2d 829 (D.C. Cir. 1942).

¹⁰ *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376 (1920).

¹¹ *Peters v. Alsup*, 95 F. Supp. 684 (D. Haw. 1951).

¹² *Baker v. Cailor*, 206 Ind. 440, 186 N.E. 769 (1933).

¹³ *Hoffman v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932).

Maryland,¹⁴ Massachusetts,¹⁵ Michigan,¹⁶ Missouri,¹⁷ Montana,¹⁸ New Jersey,¹⁹ New York,²⁰ North Carolina,²¹ Oregon,²² Pennsylvania,²³ Rhode Island,²⁴ Tennessee,²⁵ Vermont,²⁶ Virginia,²⁷ and Wyoming.²⁸ It exists by statute in Mississippi,²⁹ but no cases determine its incidents. Oklahoma³⁰ and Utah³¹ recognize it nominally in statutes, but the incidents of the estate are identical with those of a joint tenancy.³² There is an intimation in a recent note that the estate could exist in Iowa,³³ but its existence has been denied by the state Supreme Court.³⁴

Only Massachusetts retains the tenancy in its ancient common law form.³⁵ Elsewhere modern legislation, community property principles, or public policy have either resulted in holdings that the estate does not exist or that it has new and different incidents.³⁶ The major reason for the change in these jurisdictions still retaining it, has been the enactment of Married Women's Property Acts. By permitting a wife to hold and control her property, these acts undermine the basic theory of the tenancy by the entirety that the spouses form a single unity whose property is completely under the control of the husband. In some states this change of policy resulted in the reasonable conclusion that the tenancy no longer existed.³⁷ In others, however, the tenancy still remained in modified form. Thus, in some states, the holding became the equivalent of a tenancy in common during the joint lives of the spouses, although the right of survivorship continued

¹⁴ *Keen v. Keen*, 191 Md. 31, 60 A.2d 200 (1948).

¹⁵ *Licker v. Gluskin*, 265 Mass. 403, 164 N.E. 613 (1929).

¹⁶ *Dickey v. Converse*, 117 Mich. 449, 76 N.W. 80 (1898).

¹⁷ *Otto F. Stifel's Union Brewing Co. v. Saxy*, 273 Mo. 159, 201 S.W. 67 (1918).

¹⁸ *In re Marsh's Estate*, 125 Mont. 239, 234 P.2d 459 (1951).

¹⁹ *Buttlar v. Rosenblath*, 42 N.J.Eq. 651, 9 Atl. 695 (Ct. Err. & App. 1887).

²⁰ *Hiles v. Fisher*, 14 N.Y. 306, 39 N.E. 337 (1895).

²¹ *Hood v. Mercer*, 150 N.C. 699, 64 S.E. 897 (1909).

²² *Ganoe v. Ohmart*, 121 Ore. 116, 254 Pac. 203 (1927).

²³ *United States Nat'l Bank v. Penrod*, 354 Pa. 170, 47 A.2d 249 (1946).

²⁴ *Bloomfield v. Brown*, 67 R.I. 452, 25 A.2d 354 (1942).

²⁵ *Cole Manufacturing Co. v. Collier*, 95 Tenn. 115, 31 S.W. 1000 (1895).

²⁶ *Town of Corinth v. Emery*, 63 Vt. 505, 22 Atl. 618 (1891).

²⁷ *Allen v. Parkey*, 154 Va. 739, 139 S.E. 615 (1929).

²⁸ *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936).

²⁹ Miss. Code Ann. § 834 (1942).

³⁰ Okla. Stat. Ann. tit. 60, § 74 (1941).

³¹ Utah Code Ann. § 59-12-5 (1953).

³² See Phipps, *Tenancy by Entireties*, 25 Temp. L.Q. 24, 33 (1951).

³³ Note, 44 Iowa L. Rev. 169, 180 (1958).

³⁴ *Fay v. Smiley*, 201 Iowa 1290, 207 N.W. 369 (1926).

³⁵ Michigan and North Carolina also retain the common law form of the tenancy except on the one issue of creditor's rights. 4 Powell, *Real Property* ¶ 623 (1954).

³⁶ In some states, of course, the very paucity of cases interpreting tenancies by the entireties has prevented any full exposition of all incidents of the estate.

³⁷ 4 Powell, *Real Property* ¶ 621 (1954).

to exist indestructible except by voluntary act of both spouses or termination of the marriage. In other states the main result of modification has been to change one or more the estate's incidents, including the rights of creditors of either spouse to reach the property of the tenancy.

RIGHTS OF CREDITORS

Common law rule. As previously noted the husband at common law completely controlled property held by the entireties, and received all benefits therefrom. Since he could use his interest as a present base for credit, his creditors could reach his entire interest in the estate.³⁸ His estate was, in fact, not unlike a determinable fee simple; he had complete present property rights which continued so long as he survived his wife or the marriage continued. His interest, although involving a future contingency, had considerable present worth and was a valuable asset available to his creditors. The wife's interest, although more substantial than dower, was essentially the same type of contingent interest. To take any beneficial interest the wife had to survive her husband. Her interest, although indefeasible without her consent, was a mere expectancy of speculative value, and was regarded at common law as being unavailable to her creditors.

Massachusetts is the only state continuing to preserve the pure common law concept of the tenancy. The husband's interest in property held by the entireties can be reached by his creditors³⁹ but the wife's cannot.⁴⁰ No Massachusetts cases have been found deciding whether a creditor can reach the property held in such tenancy when the husband and wife are joint debtors. If their obligations are several as well as joint, or merely several, the result would be that the husband's but not the wife's interest could be reached. If only joint, however, although the determination is not free of difficulty, it would seem that the entire tenancy would be exempt, on the ground that to reach it at all would require reaching the wife's exempt interest. Massachusetts has held that one tenant by the entirety can convey his interest to the other,⁴¹ and that both can convey their interests to a third person.⁴² By analogy, it might be argued that reaching the entire estate of joint debtors is possible since the tenancy can be transferred by a joint free act of both spouses. This result would be reached in most states which hold that a creditor can reach any transferable interest, but a Massachusetts court would almost certain-

³⁸ See, e.g., the discussion in *Washburn v. Burns*, 34 N.J.L. 18, 20 (Sup. Ct. 1869).

³⁹ *Raptes v. Pappas*, 259 Mass. 37, 155 N.E. 787 (1927).

⁴⁰ *Licker v. Gluskin*, 265 Mass. 403, 164 N.E. 613 (1929).

⁴¹ *Hale v. Hale*, 332 Mass. 329, 125 N.E.2d 142 (1955).

⁴² *Bernatavicius v. Bernatavicius*, 259 Mass. 486, 156 N.E. 685 (1927).

ly follow the strict common law concept retained in Massachusetts which exempts the wife's interest. Thus the somewhat anomalous result is that, if the husband were sole debtor, or each were severally liable, creditors could reach his interest, but if he were jointly liable with his wife, his interest as well as her's would be protected.

All interests reachable rule. In the four jurisdictions holding a tenancy by the entirety is the same as a tenancy in common for the joint lives of the spouses with an indefeasible right of survivorship in each, absolute equality of rights exists in both husband and wife. Each not only has a right to take the whole as survivor but also has a present possessory interest with control and income rights. This has been deemed sufficient to give a creditor of either spouse the right to go against property held by the entirety to the extent of the debtor-spouse's interest. A creditor thus proceeding becomes a tenant in common with the non-debtor spouse. As such he is entitled to the entire property if the debtor-spouse survives, and conversely loses all rights if the order of survival is reversed. This has uniformly been the holding in Arkansas,⁴³ New York,⁴⁴ and Oregon.⁴⁵

*King v. Greene*⁴⁶ finally settled the law in New Jersey to conform to that of these other three states. Prior to the case, the New Jersey rule was unsettled, no opinion of the highest appellate courts having decided the issue. However two nisi prius decisions had determined that, as to the interest of one spouse, only his present right to half the income and profits of the property could be reached by his creditors, his right of survivorship remaining free of their claims.⁴⁷ The court in *King v. Greene*, analyzing the common law precedents, found that the husband's interest was reachable by his creditors at common law. Consequently, if the husband's and wife's interests became equal

⁴³ *Moore v. Denson*, 167 Ark. 134, 268 S.W. 609 (1924); *Branch v. Polk*, 61 Ark. 388, 33 S.W. 424 (1895).

⁴⁴ *Hiles v. Fisher*, 14 N.Y. 306, 39 N.E. 337 (1895); *Finnegan v. Humes*, 252 App. Div. 385, 299 N.Y. Supp. 501 (4th Dep't 1937), *aff'd*, 277 N.Y. 682, 14 N.E.2d 389 (1938); *Lover v. Fennell*, 14 Misc. 2d 874, 179 N.Y.S.2d 1017 (Sup. Ct. 1958).

⁴⁵ *Brownley v. Lincoln County*, 343 P.2d 529 (Ore. 1959); *Ganoe v. Ohmart*, 121 Ore. 116, 254 Pac. 203 (1927); *Howell v. Folsom*, 38 Ore. 184, 63 Pac. 116 (1900).

Hawaii is probably in this group although there are no decisions. In *Peters v. Alsup*, 95 F. Supp. 684 (D. Haw. 1951), the court, in discussing the tenancy by the entirety, quotes *First Nat'l Bank v. Gaines*, 16 Haw. 731, 733 (1905), to the effect that the Married Women's Property Act in the territory had destroyed the common law unity of husband and wife. This would result in a holding that husband and wife have separate estates in the property, and thus that they hold tenancies in common during their joint lives with rights of survivorship.

⁴⁶ 30 N.J. 395, 153 A.2d 49 (1959).

⁴⁷ *Zanzonico v. Zanzonico*, 24 N.J. Misc. 153, 46 A.2d 565, 166 A.L.R. 964 (Sup. Ct. 1946); *Dworan v. Miloszewski*, 17 N.J. Super. 269, 85 A.2d 550 (Cty. Ct. 1952).

upon adoption of the Married Women's Property Act, each interest should be equally subject to the claims of the individual's creditors.

The original difficulty experienced by the New Jersey courts in settling this issue of creditors' rights is not surprising. When one estate is treated analytically as two, i.e., a tenancy in common and an estate expectant upon survivorship, the two pseudo-estates are likely to be considered separately. Thus, regarded as a tenancy in common during the joint lives of the spouses, the present, possessory and beneficial interests should logically be subjected to creditors' claims. The difficulty arises when each spouse is regarded as having an expectant estate contingent upon survivorship. If this interest were to be treated as a separate estate divorced from the underlying tenancy in common, the common law rule most nearly analogous is that which operates to bar creditors of a married woman satisfying their claims out of her interest in a tenancy by the entirety because of its contingent nature.⁴⁸ As a result the mere expectancies of the husband and wife in property held by the entirety could not be reached. But actually each spouse has one estate, not two, and the expectancy of the spouse is only a portion of his total interest in the estate, which includes present possessory rights. Analytically the New Jersey court reached the correct result in *King v. Greene*, if one accepts its premise as to the effect of the Married Women's Property Acts on tenancies by the entireties. The *nisi prius* decisions did, of course, avoid sale of speculative contingent interests to settle a creditor's claim—and this might as a *de novo* matter be an excellent policy to follow—but they did not recognize the actualities that each spouse has a single, not a dual, estate in the property.

In these four states, since each spouse's interest can be reached by his individual creditors, their interests could be reached as a unit if they were liable to creditors jointly, severally or jointly and severally.

No interests reachable rule. If the Married Women's Property Acts are construed to give the wife equal interests with the husband in an estate held by the entirety, but the tenancy otherwise remains theoretically the same as at common law, the logical result is that creditors cannot reach either the husband's or the wife's interest. This results from the concept of the unity of husband and wife in the common law estate; each spouse takes no separate estate but together as a unity they take the whole. When this estate existed at common law, the husband exercised complete control not because he had an individual interest but because he represented the marital unity. With

⁴⁸ See discussion of common law rule in text of the first part of this section.

the equality of the wife statutorily established however, the husband loses his right to control and both spouses must now act together as a single unit, neither individually having any rights of control. Thus neither spouse can alone receive the income and profits of, nor alone transfer any interest in, the property. If the property cannot be transferred except by the concurrent act of both spouses, creditors of either cannot reach the interest of the debtor-spouse since he has no separate interest to reach. To permit the creditor of the debtor-spouse to reach his interest would interfere with the rights of the other spouse in the enjoyment of the whole property during the continuance of the estate. While land held by the entirety can be subjected to a creditor's lien collectible if the debtor-spouse survives, this interest can be readily defeated by a conveyance of the property by the two spouses during coverture. This result can be had since one of the rights of a spouse in a tenancy by the entirety is to convey the property with the consent of the other spouse, and courts have generally been unwilling to cut down the non-debtor-spouse's interests even to the extent of limiting this right to convey with the consent of the other.

Most states retaining the tenancy by the entirety follow the theory that the interest of neither husband nor wife can be reached by a creditor of either. Such is the holding of the courts of Delaware,⁴⁹ District of Columbia,⁵⁰ Florida,⁵¹ Indiana,⁵² Maryland,⁵³ Michigan,⁵⁴ Missouri,⁵⁵ North Carolina,⁵⁶ Pennsylvania,⁵⁷ Rhode Island,⁵⁸ Ver-

⁴⁹ *Citizens' Saving Bank v. Astrin*, 44 Del. 451, 61 A.2d 419 (1948); *Heitz v. Sayers*, 32 Del. 207, 121 Atl. 225 (1923).

⁵⁰ *Fairclaw v. Forest*, 130 F.2d 829 (D.C. Cir. 1942); *American Wholesale Corp. v. Aronstein*, 10 F.2d 991 (D.C. Cir. 1926).

⁵¹ *Vaughan v. Mandis*, 53 So. 2d 704 (Fla. 1951); *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376 (1920).

⁵² *Baker v. Cailor*, 206 Ind. 440, 186 N.E. 769 (1933).

⁵³ *Keen v. Keen*, 191 Md. 31, 60 A.2d 200 (1948); *Masterman v. Masterman*, 129 Md. 167, 98 Atl. 537 (1916). See also *Arnold, Tenancy by the Entireties and Creditors' Rights in Maryland*, 9 Md. L. Rev. 291 (1948).

⁵⁴ *American State Trust Co. v. Rosenthal*, 255 Mich. 157, 237 N.W. 534 (1931); *Dickey v. Converse*, 117 Mich. 449, 76 N.W. 80 (1898). Cf. *Glazer v. Beer*, 343 Mich. 495, 72 N.W.2d 141 (1955), where it was held that a husband's interest in a tenancy by the entirety could be reached under Mich. Comp. Laws § 566.14 which has been interpreted to prohibit enhancement of a tenancy by the entirety during insolvency. The husband, with no other assets than property held by the entirety, borrowed considerable sums which he spent in improving the entirety property. The creditors were permitted to proceed against his interest because of these special facts.

⁵⁵ *Otto F. Stifel's Union Brewing Co. v. Saxy*, 273 Mo. 159, 201 S.W. 67 (1918); *Hanebrink v. Tower Grove Bank and Trust Co.*, 321 S.W.2d 524 (Mo. Ct. App. 1959).

⁵⁶ *Edwards v. Arnold*, 250 N.C. 500, 109 S.E.2d 205 (1959); *Hood v. Mercer*, 150 N.C. 699, 64 S.E. 897 (1909); *Bruce v. Sugg*, 109 N.C. 202, 13 S.E. 790 (1891). Contra, *Lewis v. Pate*, 21 N.C. 253, 193 S.E. 20 (1937), a *per curiam* decision holding that the husband's creditors could sell crops raised on a tenancy by the entirety; later cases ignore but do not overrule the decision.

mont,⁵⁹ Virginia,⁶⁰ and Wyoming.⁶¹ Montana probably also accepts this view.⁶² The law in Mississippi is uncertain but there is a weak inference in an early case that this view would be accepted.⁶³

The recognition in these states that the husband and wife can join together to transfer all their interest in a tenancy by the entirety permits creditors of joint-debtor-spouses to reach the estate. If the spouses are only severally liable, however, the creditors have no rights in the estate.

Right of survivorship reachable rule. In those states holding that no interest of either spouse in a tenancy by the entirety is reachable by the spouse's creditors, the result rests on the theory, as indicated above, that the rights of the non-debtor spouse would otherwise be jeopardized. This theory does not, of course, consider the right of survivorship as separate from the present possessory estate in the marital unity, except to the extent of acknowledging that a lien may be attached to the survivorship right effective only if the debtor-spouse survives or otherwise takes the property. The right of survivorship can, however, be treated separately and, if it is, this right can be transferred by one spouse without in any substantial way affecting the rights of the other. Both spouses retain their present possessory interests during coverture and if the non-transferring spouse survives he will have the entire estate. The only right lost by the non-transferring spouse is the right to join with the other to transfer the entire estate which, although clearly a right of some value, is not a major incident of this form of ownership. Thus, if the right of survivorship is transferable by one spouse acting without the consent of the other, creditors of each spouse should be able to reach this right. This result has been reached in Tennessee⁶⁴ and Kentucky,⁶⁵ in the latter primarily on the basis of statute.⁶⁶ The major

⁵⁷ *Amadon v. Amadon*, 359 Pa. 434, 59 A.2d 135 (1948); *United States National Bank v. Penrod*, 354 Pa. 170, 47 A.2d 249 (1946).

⁵⁸ *Bloomfield v. Brown*, 67 R.I. 452, 25 A.2d 354 (1942).

⁵⁹ *Citizens' Savings Bank & Trust Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 250 (1916); *Town of Corinth v. Emery*, 63 Vt. 505, 2 Atl. 618 (1891).

⁶⁰ *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951); *Allen v. Parkey*, 154 Va. 739, 149 S.E. 615 (1929).

⁶¹ *Ward Terry & Co. v. Hensen*, 75 Wyo. 444, 297 P.2d 213 (1956); *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936).

⁶² *In re Marsh's Estate*, 125 Mont. 239, 234 P.2d 459 (1951) (inference only).

⁶³ *McDuff v. Beauchamp*, 50 Miss. 531 (1874).

⁶⁴ *Sloan v. Sloan*, 182 Tenn. 162, 184 S.W.2d 391 (1945); *Cole Manufacturing Co. v. Collier*, 95 Tenn. 115, 31 S.W. 1000 (1895). The opinion in the *Cole Manufacturing Co.* case indicates that Tennessee probably adopted this rule under a miscomprehension of the holdings of courts in other states on this issue.

⁶⁵ *Hoffman v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932).

⁶⁶ Ky. Rev. Stat. Ann. § 426.190 (1955), which describes the interest that a defendant must have before land is liable for execution.

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result of the holdings in these states is that a present right is given to creditors; conveyance of the estate by the spouses during their joint lives cannot defeat the right of the creditor to proceed against the estate if the debtor-spouse survives.

In these two states, although there is no authority so holding, it would seem that creditors of joint-debtor-spouses should be able to reach their entire interest in property held by the entirety. If the spouses are only severally liable, only their individually transferable interests, i.e., their rights of survivorship, could be reached.

Federal bankruptcy law. The virtually complete immunity from claims of creditors given to tenants by the entireties in a majority of states retaining the tenancy is an expression of policy generally favoring marital property and property interests over commercial and creditor interests. The Bankruptcy Act on the other hand, being designed to aid creditors and the commercial community, has imposed a limitation upon this common state policy of immunity. Section 70a(7) of the Act,⁶⁷ added in 1938, provides that if an interest in real property nonassignable prior to bankruptcy becomes assignable within six months thereafter, it will vest in the trustee. Thus, if the tenancy is ended by the death of the non-bankrupt spouse, the bankrupt's interest will pass to his trustee. It would seem, however, that the result could be avoided by a conveyance of the property by both spouses prior to the death of the non-bankrupt,⁶⁸ and it is unlikely that the bankrupt's gain from the conveyance would be capturable by the trustee on other grounds. When both spouses individually become bankrupt, it has been held that a tenancy by the entirety will pass to the trustee by consolidating the proceedings.⁶⁹ In the absence of consolidation the full value of the property is listed as an asset in the estate of each bankrupt for the determination of solvency on the date pertinent to the vesting of a creditor's lien.⁷⁰

APPRAISAL AND CONCLUSIONS

The retention of the tenancy by the entirety has resulted, except in a few states, in a partial or nearly total exemption of the property from the claims of creditors. Is this a desirable social and legal result? The only apparent direct benefit is that the marital community is assured of some available resources for support. The state is thus

⁶⁷ 52 Stat. 879 (1938), 11 U.S.C. § 110a(7) (1958).

⁶⁸ Bankruptcy Act § 70d(1), 30 Stat. 565 (1898), as amended 11 U.S.C. § 110d(1) (1958).

⁶⁹ *In re Carpenter*, 5 F. Supp. 101 (M.D. Pa. 1933) (husband and wife jointly liable so under Pennsylvania law creditors could have reached entirety interest if bankruptcy had not intervened).

⁷⁰ *In re Black*, 145 F. Supp. 689 (E.D. Va. 1956) (Virginia law applied).

pro tanto free of the obligation to support an indigent family. This may be particularly important to the wife who thus has an assured amount of property on her husband's death. In a broader sense, the exemption reflects a policy favoring the preservation of property interests over commercial use of property as a base for credit or as an article of commerce itself. But even if it is granted that these policies are sound, does the exemption of the tenancy from the claims of creditors accomplish the desired results? It is believed not. Any amount of property may be put into this form of holding, free from creditors' claims although its value well exceeds any reasonable amounts necessary for support. While, of course, many persons may be aware of the benefit of this type of ownership and act accordingly, many others having a greater need for protection will not be so guided. Thus there can be no assurance of equality of treatment since much depends upon whether the spouses were sufficiently foresighted to take property in this form. As to the elimination of property so held as a base for commercial credit, the general effect of many such ownerships in a state will be to reduce credit and hence limit commercial activity.

Are there means readily available by which the valid portion of the policies favoring restrictions on creditors' rights in property held by a marital community may be effectuated while avoiding excessive restrictions on their rights? There should be a financial limit on the exemption, a limit determined by the requirements of the marital unity for a home and support. There should be a satisfactory way of giving the necessitous widow priority over creditors of her deceased husband. There should be uniform application of the limitation on creditors' rights. Those states retaining the tenancy by the entirety but permitting creditors of each spouse to reach his half possessory interest and his right of survivorship have at least partly solved the problem. There the non-debtor-spouse's interest is protected while the debtor-spouse is still able to use his interest in the estate as a base for credit. But the rule of these states is unsatisfactory in other respects: the non-debtor-spouse's exempt interest is not limited in amount or value; the application of the exemption depends upon the accident of the form of ownership rather than upon any direct social policy of preserving some exempt marital assets; the debtor-spouse is not protected at all if he is the survivor and as such the one who requires some protection from the claims of his creditors.

The social policy favoring protection of the marital community from creditors can best be obtained by the use of devices other than the tenancy by the entirety. The tenancy no longer serves a useful

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social function and the legal consequences of its use are, in many cases, difficult to justify. It should be abolished. Protection of the marital community could be more readily assured by other existing although presently somewhat inadequate devices. Homestead and personal property exemption statutes, modernized as to content and values, should provide protection for the marital community during its existence. Upon its termination by death, the widow and possibly the widower should be given priority over creditors in the assets of the estate, up to a reasonable support value determined in part by other assets available to the survivor, the number of dependents, and the earning capacity of the survivors. Special rules might have to be developed with respect to personal property subject to security interests. It is believed that with appropriate legislation drawn with particular attention to these and other special problems better protection could be afforded the surviving members of the family of the decedent without undue prejudice to the just claims of creditors and the needs of the commercial community.