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COMMENT

Real Property—Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?

As long ago as 1906, the Chief Justice of the North Carolina Supreme Court characterized tenancy by the entirety as an anomaly.¹ Today this anomaly still exists in North Carolina much as it did at common law.² Only in Massachusetts and Michigan is tenancy by the entirety preserved in as pure a form as in North Carolina.³ The estate has always been a stumbling block to recovery for creditors of either

1. *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906) (Clark, C.J.).

2. *L. & M. Gas Co. v. Leggett*, 273 N.C. 547, 550, 161 S.E.2d 23, 26 (1968); *Harris v. Parker*, 17 N.C. App. 606, 610, 195 S.E.2d 121, 124 (1973).

3. See, e.g., *Page v. Donnelly*, 346 Mass. 768, 193 N.E.2d 682 (1963); *MacNeil v. MacNeil*, 312 Mass. 183, 43 N.E.2d 667 (1942); *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1954); *In re Estate of Thomas*, 341 Mich. 158, 67 N.W.2d 85 (1956).

A number of western states such as Texas and California adopted community property systems and never recognized tenancy by the entirety. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 31 (1951). This nonrecognition may be explained by the living conditions of the period. "[I]n many colonies the woman tended to occupy a position of practical equality because of her equal participation in all of the activities essential to survival." 1 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 117, at 450 (P. Rohan ed. 1977). Several other states, namely Connecticut, Nebraska and Ohio, never recognized tenancy by the entirety because of its inconsistency with judicial interpretations of the common law of those states. Phipps, *supra*, at 32. The remaining states adopted the estate in some form because "[t]he early English view of woman's complete lack of capacity as to instruments affecting the ownership of land persisted . . . at some places and as to some aspects of the law." 1 R. POWELL, *supra*, § 117, at 450.

All states, however, eventually enacted Married Women's Property Acts. See 41 Am. Jur. 2d §§ 29-31 (1968). These statutes awarded married women control over their separate property and the power to contract, sue and be sued with respect to this property. Phipps, *supra*, at 27.

With the passage of the Married Women's Property Acts, courts were faced with the question whether the rights granted to married women by these statutes extended to all property interests, joint as well as separate. The answers of the states were not uniform. The courts of fifteen states decided that entirety estates could no longer be created because of their inconsistency with the Married Women's Property Acts (Alabama, Colorado, Illinois, Iowa, Maine, Minnesota, New Hampshire, South Carolina and Wisconsin) or with the Acts in combination with other legislation (Georgia, Kansas, Montana, North Dakota, South Dakota and West Virginia). Phipps, *supra*, at 29, 33. The courts of these states interpreted the statutes to destroy the "unity of person" of *H* and *W* on which tenancy by the entirety depended for its justification. See, e.g., *Walthall v. Goree*, 36 Ala. 728, 735 (1860) ("Both of the grantees being capable of taking separately, it is impossible that they should take by entireties, as if they constituted a single person."); *Green v. Cannady*, 77 S.C. 193, 201, 57 S.E. 832, 835 (1907) ("We think it was within the design and effect of the separate estate legislation to destroy the oneness of husband and wife as to property rights, and therefore that a married woman may become a tenant in common with her husband in property upon a grant to both.").

Courts in Massachusetts, Michigan and North Carolina, however, reasoned that the silence of their legislatures on the question of tenancy by the entirety implied an intent that the estate be unaffected by the statute. *Pray v. Stebbins*, 141 Mass. 219, 4 N.E. 824 (1886); *Morrill v. Morrill*, 138 Mich. 112, 101 N.E. 209 (1904); *Long v. Barnes*, 87 N.C. 329 (1882). The characteristics of tenancy by the entirety derived, reasoned these courts, not from any individual status of the par-

spouse⁴ and for tort plaintiffs suing a wife for injuries suffered on entirety property.⁵ In other states, tenants themselves have recently attacked the constitutionality of the estate,⁶ and the North Carolina version of the estate may be vulnerable to attack as well. Additionally, a line of tax cases strongly suggests that a North Carolina husband who transfers appreciated entirety property to his wife pursuant to a divorce settlement will suffer undesirable tax consequences by having to recognize gain on the transfer.⁷ For all of these reasons, North Carolina should abolish or alter this outmoded estate.

Tenancy by the entirety developed at common law as a unique way for a husband and wife, who were considered to be one flesh, to hold property jointly. Both present and future rights in this estate vested at once, not in separate persons, but in a metaphysical entity, the "entirety." Like parties to a joint tenancy, entirety tenants had a survivorship right; unlike a joint tenant's right, however, the entirety tenant's survivorship right could not be defeated. The problem of what to do if the entirety should be dissolved by a divorce never came up, as absolute divorce was not recognized. Like a corporation, however, an entirety had to conduct itself; at common law, it could only conduct itself through *H* because married women were legally nonexistent. Married women could not convey property, contract, sue, or be sued;

ties to the tenancy, but from the marital state itself. Because *H* had a duty to support and a right to control *W* property owned by the marital unit logically should be controlled by him.

In North Carolina the property rights of married women were apparently assured in the Constitution of 1868:

[t]he real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female . . . and may be devised or bequeathed, and, with the written assent of her husband, conveyed, by her as if she were unmarried.

N.C. CONST. Art. X, § 6 (amended 1956, deleting "with the written assent of her husband" and substituting "subject to such requirements and limitations as the General Assembly may prescribe" for "as if she were unmarried"), the North Carolina Supreme Court, however, interpreted this constitutional guarantee in *Long v. Barnes*, 87 N.C. 329 (1882), to apply only to property acquired by married women "in their own right." *Id.* at 333. The framers of the constitution did not intend, reasoned the court, to "change the *properties* and *incidents* belonging to estates, or to give married women any greater estates than are conveyed to them by the terms of the instruments under which they derive title." *Id.* (emphasis in original).

4. See, e.g., *Grabenhoffer v. Garrett*, 260 N.C. 118, 131 S.E.2d 675 (1963) (creditor with outstanding judgment against *H* may not have receiver appointed to possess and rent entirety property); *Edwards v. Arnold*, 250 N.C. 500, 109 S.E.2d 205 (1959) (tax foreclosure proceeding brought solely against *H*, in whose name entirety property listed on tax rolls; foreclosure sale against entirety property ineffective).

5. *Freeze v. Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970).

6. See, e.g., *D'Ercole v. D'Ercole*, 407 F. Supp. 1377 (D. Mass. 1976); *Robinson v. Trousdale County*, 516 S.W.2d 626 (Tenn. 1974).

7. See text accompanying notes 83-136 *infra*.

nor, of course, could they take up arms to defend their property.⁸ To the feudal mind, therefore, it was practically as well as legally consistent to deny *W* all present rights in entirety property.

I. THE STATE OF THE LAW IN NORTH CAROLINA

A tenancy by the entirety is created in North Carolina whenever a husband and wife take joint title to real property,⁹ in the absence of evidence of an intention that the property be held in some other way.¹⁰ As at common law, *H* has exclusive rights to use and control entirety property and to receive all rents¹¹ and profits therefrom for the duration of the estate.¹² *W* has no right to an accounting for profits,¹³ and should *H* elect to lease the property, conveying his exclusive right to present possession to a third party, the third party can exclude *W* from the property.¹⁴ Neither tenant is entitled to partition.¹⁵ Each tenant

8. See generally Phipps, *supra* note 3.

9. *E.g.*, Combs v. Combs, 273 N.C. 462, 465, 160 S.E.2d 308, 311 (1968).

10. The North Carolina Court of Appeals found the words "to share equally" in a conveyance to *H* and *W* sufficient to rebut the presumption of a tenancy by the entirety and create a tenancy in common. Dearman v. Bruns, 11 N.C. App. 564, 181 S.E.2d 809, *cert. denied*, 279 N.C. 394, 183 S.E.2d 241 (1971). The court noted that had the conveying words "to my daughter Minnie and [her husband] Shaw Brown" not been accompanied by "to share equally", the presumption of tenancy by the entirety would have survived. *Id.* at 565-66, 181 S.E.2d at 811. In Freeze v. Congleton, 276 N.C. 178, 171 S.E.2d 424 (1970), for example, the court inferred that a tenancy by the entirety had been created solely on the basis of *H* and *W*'s joint ownership of real property. *Id.* at 181, 171 S.E.2d at 426.

North Carolina does not recognize tenancy by the entirety in personality. Turlington v. Lucas, 186 N.C. 283, 119 S.E. 366 (1923).

11. See, *e.g.*, Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937) (right to crops grown on entirety property exclusively *H*'s); Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800 (1971) (right to rents from entirety property exclusively *H*'s).

In Robinson v. Trousdale County, 516 S.E.2d 626, 632 (Tenn. 1974), Justice Henry in dictum posed the hypothetical of a husband and wife with no assets other than an apartment house purchased as tenants by the entirety with money inherited by each and pooled. The court indicated that at common law *H* would be free to appropriate all rents and *W* would have no remedy short of divorce. In North Carolina such a *W* may have a resulting trust remedy, but no case has presented these facts.

12. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

13. North Carolina Bd. of Architecture v. Lee, 264 N.C. 602, 610, 142 S.E.2d 643, 649 (1965).

14. Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937).

15. Jones v. W.A. Smith & Co., 149 N.C. 317, 319, 62 S.E. 1092, 1093 (1908). If both parties desire partition, they must first execute jointly an instrument conveying the property to each other as tenants in common. Branstetter v. Branstetter, 36 N.C. App. 532, 534-35, 245 S.E.2d 87, 89 (1978).

A partition sale may be desirable yet unobtainable when *H* and *W* are separated but not divorced. This was the situation in Klein v. Mayo, 367 F. Supp. 583 (D. Mass. 1973), *aff'd*, 416 U.S. 953 (1974), and D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976). "If the two spouses are not in happy relations, and no divorce is obtainable, the veto power of each on a sale places a premium on the aggressiveness, bargaining skill and obstinacy of the more persistent spouse." 4A R. POWELL, *supra* note 3, ¶ 623 at 702.

has a right of survivorship that cannot be directly defeated by the other tenant.¹⁶ Unless both tenants join in a voluntary conveyance, the estate endures until one party dies or until an absolute divorce is decreed.¹⁷

When entirety property is voluntarily sold, the tenancy is dissolved and the proceeds are held in common, with each spouse entitled to one-half.¹⁸ When entirety property is condemned, however, the North Carolina Supreme Court has held¹⁹ that the involuntary sale²⁰ does not destroy the character of the tenancy by the entirety. Because the proceeds from the sale are under *H*'s exclusive control, nothing prevents him from spending the entire amount, thereby indirectly defeating *W*'s survivorship interest. Under no circumstance, however, can *W* defeat *H*'s survivorship right.

Various judicial presumptions have developed around the entirety estate in North Carolina. In addition to the presumption that a conveyance of real property to *H* and *W* creates a tenancy by the entirety, North Carolina law presumes that when *H* contributes the entire purchase price of entirety property he intends to make a gift of a half interest to *W*.²¹ This presumption can be rebutted only by "clear, strong and convincing evidence" that *H* intended the property to be held for his benefit alone.²² When *W* contributes the entire purchase price, however, the law presumes that she acted under *H*'s coercion and that her true intent is to create a resulting trust for herself alone rather than make a gift of a half interest to *H*.²³ Although early cases described this presumption as irrebuttable,²⁴ the question has not been

16. *L. & M. Gas Co. v. Leggett*, 273 N.C. 547, 552, 161 S.E.2d 23, 27 (1968); *Moore v. Shore*, 208 N.C. 446, 448, 181 S.E. 275, 276 (1935).

17. *Lanier v. Dawes*, 255 N.C. 458, 121 S.E.2d 857 (1961); *Branstetter v. Branstetter*, 36 N.C. App. 532, 245 S.E.2d 87 (1978).

18. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E.2d 468 (1947).

19. *N.C. Highway Comm'n v. Myers*, 270 N.C. 258, 154 S.E.2d 87 (1967). The case was criticized in Note, 47 N.C.L. REV. 963 (1969).

20. What constitutes an "involuntary sale" is hard to predict in North Carolina. The supreme court has held that a loss by fire dissolved a tenancy by the entirety, entitling each spouse to one-half the insurance proceeds. *Carter v. Continental Ins. Co. of New York*, 242 N.C. 578, 89 S.E.2d 122 (1955). The court gave no reason for the distinction it drew between condemnation and insurance loss; it focused only on the interest of *W* in the proceeds despite *H* being the sole beneficiary under the policy. *Cf. Perry v. Jolly*, 259 N.C. 306, 130 S.E.2d 654 (1963) (sale involuntary because *W* was incompetent; therefore tenancy by entirety not terminated and *H* the trustee of sale proceeds for survivor).

21. *Morton v. Blades Lumber Co.*, 154 N.C. 278, 70 S.E. 467 (1911); *Rauchfuss v. Rauchfuss*, 33 N.C. App. 108, 234 S.E.2d 423 (1977).

22. *Bowling v. Bowling*, 252 N.C. 527, 531, 114 S.E.2d 228, 231 (1960); *Huss v. Huss*, 31 N.C. App. 463, 467, 230 S.E.2d 159, 162 (1976).

23. *Smith v. Smith*, 249 N.C. 669, 107 S.E.2d 530 (1959).

24. *Sprinkle v. Spainhour*, 149 N.C. 223, 62 S.E. 910 (1908).

litigated recently, and contemporary commentators assume that the presumption is rebuttable.²⁵ When *W* conveys property to herself and *H*, however, the law does not presume a resulting trust; by statute, a tenancy by the entirety is created absent a contrary intention expressed in the conveyance.²⁶ Furthermore, the resulting trust theory applies only when *W* contributes the purchase price; it does not apply when *W* makes contributions for improvements to property paid for by *H*.²⁷ While North Carolina law is clear when either party paid the entire purchase price, no North Carolina case establishes the interests of spouses when both of them make contributions to the purchase of entirety property.²⁸

These presumptions, however, have not been accepted wholeheart-

25. See 2 R. LEE, NORTH CAROLINA FAMILY LAW § 113, at 63 (1963); J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 102, at 112 (1971). See also Note, *Taxation—The Creation and Termination of Tenancies by the Entirety—A Comparison of Federal and North Carolina Estate, Inheritance and Gift Taxation*, 15 WAKE FOREST L. REV. 307, 308 (1979).

26. N.C. GEN. STAT. § 39-13.3(b) (1976). In *Skinner v. Skinner*, 28 N.C. App. 412, 222 S.E.2d 258 (1976), the North Carolina Court of Appeals rejected a resulting trust claim by defendant *W*, who paid for real property prior to her marriage, then conveyed the property to *H* and *W* after their marriage. No contrary intention having been expressed in the conveyance, a tenancy by the entirety was found; *W*'s claim that she did not intend a gift to *H* was unavailing. The court noted that a different result would obtain if the land had been deeded to *H* and *W* for consideration furnished by *W*. *Id.* at 416, 222 S.E.2d at 262.

27. G.G. BOGERT & G.T. BOGERT, LAW OF TRUSTS, § 74, at 276 (5th ed. 1973). In *Branstetter v. Branstetter*, 36 N.C. App. 532, 245 S.E.2d 87 (1978), the court of appeals declined to find a resulting trust in improvements to real property paid for by *W* several years after the acquisition of the property, when *H* had paid the original purchase price. *Id.* at 537, 245 S.E.2d at 91.

28. Under general resulting trust theory, a trust can result from payment of part of the purchase price. G.G. BOGERT & G.T. BOGERT, *supra* note 27, at 277-79.

Most courts will decree a resulting trust based on part payment, regardless of its size or the fraction of the price paid. *Id.* at 277. Strong evidence of part payment, however, must be presented by the claimant. See, e.g., *In re Estate of Jarodsky*, 122 Ill. App. 2d 243, 248, 258 N.E.2d 365, 368 (1970) ("clear, convincing, unequivocal and unmistakable"). A few courts require that such payment be for a specific fractional interest in the property and not a general contribution toward the entire purchase price before a resulting trust can arise. See *Staton v. Moody*, 208 Okla. 372, 256 P.2d 409 (1953). This requirement would rarely be met when *H* and *W* purchase property as tenants by the entirety. The requirement runs counter, however, to the implied-in-fact theory of resulting trusts, under which it is assumed that the parties did not expressly agree regarding who would own how much of the property.

As the resulting theory was developed for cases in which title was taken in the name of one person, its application to joint ownership such as tenancy by the entirety is understandably difficult. G.G. BOGERT & G.T. BOGERT, *supra* note 27, at 271. The part-payment issue could arise in an entirety situation if, for example, *H* claimed beneficial entitlement to entirety property, and *W* counterclaimed for a portion of the property for which *W* allegedly to have paid. The counterclaim would not be reached unless a resulting trust were found in favor of *H* because, without such a finding, the estate would be a tenancy by the entirety, in which there are no divisible interests. Should the counterclaim be reached, it is hard to predict the result in North Carolina. The *Branstetter* rule against finding a resulting trust on improvements to previously purchased property is consistent with the general rule on that question, suggesting that North Carolina may follow the general rule regarding part payments and allow a resulting trust if all requirements were met and the evidence were strong. It could be argued, however, that *Branstetter* reflects a

edly. An authority on North Carolina family law challenged these presumptions, questioning whether *H* is more aware of the legal effect of his act or more likely to have intended a gift than *W*; he stated, "[i]t is not believed that husbands have a greater affection for their wives than wives have for their husbands."²⁹ In addition, the enactment of G.S. § 39-13.3(b),³⁰ under which a conveyance of property from *W* to *W* and *H* creates a tenancy by the entirety, and the unwillingness of the court of appeals to extend the resulting trust theory to improvements to real property,³¹ suggest that both the legislature and the courts are somewhat uncomfortable with these sex-based presumptions. These developments, therefore, may foreshadow the elimination of these presumptions altogether.

An underlying reason for the retention of the entirety estate may be the idea that *H* provides the purchase price in most cases and is, therefore, entitled to exclusive use and control of the property. Today, with sixty-eight percent of all married women in North Carolina in the labor force, either working or actively seeking work³², this rationale is questionable. Whether or not *W* contributes directly to the purchase of entirety property, her economic contribution frees money that otherwise would not be available for housing. *W* should not be penalized for spending her earnings on groceries rather than the house payment. Yet, short of divorce or the death of her *H*, the *W* who contributes

general discomfort with resulting trusts on entirety property; if this is true, the issue of part payment could be avoided altogether by denying the original claim.

In *Wall v. Wall*, 24 N.C. App. 725, 212 S.E.2d 238, cert. denied, 287 N.C. 264, 214 S.E.2d 437 (1975), both husband and wife had made contributions to the mortgage payments on real property, but the question of the affect under a resulting trust theory was not raised. Plaintiff former husband in *Wall* sued to partition entirety property, and his former wife counterclaimed for reimbursement for mortgage payments that she alone had made for more than 5 of the 25 years during which they had owned the property. The court of appeals upheld the trial court's denial of the former wife's claim, stating that, although the divorce dissolved the tenancy by the entirety, the payments for which she sought reimbursement had been made during its duration and that reimbursement can be claimed only by a tenant in common, not by an entirety tenant. The former wife did not advance a resulting trust theory, perhaps out of an awareness that mortgage payments cannot be the basis for a resulting trust claim, both because they are not made directly toward the purchase price and because they are made after the conveyance occurred. G.C. BOGERT & G.T. BOGERT, *supra* note 27, § 74 at 199.

29. 2 R. LEE, *supra* note 25, § 113, at 64-65 n.39. The author expressed no opinion regarding the presumption of coercion by *H*.

30. N.C. GEN. STAT. § 39-13.3(b) (1976) provides that "[a] conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance."

31. *Branstetter v. Branstetter*, 36 N.C. App. 532, 245 S.E.2d 87 (1978).

32. NORTH CAROLINA DEP'T OF ADMINISTRATION, CURRENT POPULATION SURVEY OF 1978 (1980).

economically to the household has no more rights in entirety property than the full-time homemaker.³³

Present rights to entirety property are clearly unequal and that inequality is obviously based on sex. The inequality is especially apparent when a separated *W* petitions a court for the right to occupy entirety property. While she may be successful in her petition, her success depends on a showing, not of joint ownership, but of entitlement to alimony.³⁴

In 1944 a committee of the American Bar Association recommended that tenancy by the entirety be abolished because of the "opportunity it affords for frustrating the rights of the creditors of one spouse."³⁵ Under the pure form of the estate, creditors cannot attach any part of entirety property,³⁶ but because of *H*'s superior present rights in such property, *H*'s creditors can reach his interest.³⁷ This rule has prevailed in Massachusetts, where entirety property is completely unprotected from *H*'s creditors,³⁸ who can attach and sell his interest.³⁹ Few entirety states, however, follow the pure Massachusetts rule; most protect entirety property from creditors of both spouses to some de-

33. Cf. Starling, *The Tenancy by the Entireties in Florida*, 14 U. FLA. L. REV. 111 (1961), advocating the retention of tenancy by the entirety in Florida where, unlike North Carolina, entirety tenants share equally in use and control of entirety property. Starling states:

The wife's contribution may consist only of keeping the house and rearing the children, but who is to say that this contribution is not as important as that of the wage earner? Recognition of the tenancy by the entireties partially gives effect to the theory of community property that husband and wife should share equally in property acquired during coverture.

Id. at 152.

34. *Hinton v. Hinton*, 17 N.C. App. 715, 195 S.E.2d 319 (1973). The trial court had found *W* not dependent and denied alimony pendente lite, yet granted her exclusive possession of entirety property. The court of appeals rejected this decision as "contradictory and mutually inconsistent," *id.* at 17, 195 S.E.2d at 321, because N.C. GEN. STAT. § 50-16.7 (1976) authorizes transfer of possession only as a means of paying alimony or alimony pendente lite, for which a showing of both dependency and need is a prerequisite under N.C. GEN. STAT. § 50-16.1 (1976). The court stated that "[u]nless the wife claiming support is entitled to alimony or alimony pendente lite, she is not entitled to exclusive possession and use of her husband's entirety property." 17 N.C. App. at 717, 195 S.E.2d at 321 (emphasis added).

Under this rule *W* could not occupy entirety property if she failed to show entitlement to alimony. An adulterous *W*, then, could never occupy entirety property because she would never be entitled to alimony. See N.C. GEN. STAT. § 50-16.6 (1976).

35. ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, REPORT OF THE COMMITTEE ON CHANGES IN SUBSTANTIVE REAL PROPERTY PRINCIPLES 82-83 (1944).

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

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

38. Whether the Massachusetts rule still prevails in regard to *W*'s creditors is not certain. The creditors of a bankrupt *W* in Massachusetts brought a successful equal protection challenge to their unequal treatment in *Friedman v. Harold*, [1977-78] BANKR. L. REP. (CCH) § 9502.205 (D. Mass. 1977).

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

gree.⁴⁰

In North Carolina the uncertain position of the *H*'s creditors has caused much litigation.⁴¹ The rule to be drawn from the cases is that income from entirety property can be reached by *H*'s creditors once *H* himself has severed the income, or the income-producing product, from the land, but creditors cannot reach *H*'s interest if the entirety property is not producing income.⁴² For example, in 1906 the North Carolina Supreme Court upheld the grant of an injunction to *W* to restrain the cutting of timber on entirety property by a purchaser of the timber from *H*.⁴³ If the property is used for farming, the 1937 decision of the supreme court in *Lewis v. Pate*⁴⁴ apparently permits a creditor to attach severed crops. In *Lewis*, a creditor of defendant *H* successfully claimed the right to levy upon severed crops raised on entirety property to satisfy a judgment against *H*. In a more recent case, *Hodge v. Hodge*,⁴⁵ the North Carolina Court of Appeals upheld an order placing rents from entirety property into receivership to be applied against *H*'s debts. Three years later, however, in *L.E. Johnson Produce v. Massengill*,⁴⁶ the court limited the application of *Hodge* to cases in which entirety property was already being rented. In *Johnson Produce*, a judgment creditor of *H* sought unsuccessfully to have a receiver appointed to possess and rent the land. Thus, if the property is already producing rental income, these funds are vulnerable to *H*'s creditors; but the debtor-*H* cannot be compelled to rent the property. *H* can escape all liability to creditors, however, by conveying his interest in entirety property to *W*

40. Phipps, *supra* note 3, at 39. The degree to which present and future rights in entirety property can be reached by separate creditors varies considerably from state to state.

41. See, e.g., *Grabenhofer v. Garrett*, 260 N.C. 118, 131 S.E.2d 675 (1963) (creditor with outstanding judgment against *H* may not have receiver appointed to possess and rent entirety property); *Edwards v. Arnold*, 250 N.C. 500, 109 S.E.2d 205 (1959) (tax foreclosure sale against entirety property ineffective, even though property listed on tax rolls in *H*'s name only). Cf. *L.E. Johnson Produce v. Massengill*, 23 N.C. App. 368, 208 S.E.2d 709 (1974) (appointment of receiver for *H*'s creditor "to collect the rents and profits from the tobacco allotment on said [entirety] lands" upheld).

42. See, e.g., *L. & M. Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968) (*H*'s creditor may not challenge conveyance of entirety property from *H* to *W* as fraudulent because creditor had no right to be paid out of conveyed property); *Grabenhofer v. Garrett*, 260 N.C. 118, 121, 131 S.E.2d 675, 677 (1963) (*H*'s creditor not entitled to appointment of receiver to possess and rent entirety property).

43. *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906).

44. 212 N.C. 253, 193 S.E. 20 (1937).

45. 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

46. 23 N.C. App. 368, 208 S.E.2d 709 (1974). The trial court had appointed a receiver "to rent and collect the rents and profits from the tobacco allotment on said land." *Id.* at 368, 208 S.E.2d at 710. The court of appeals deleted "rent and" and affirmed the order as modified. *Id.*

without fear that the conveyance will be set aside as fraudulent.⁴⁷

No North Carolina case deals with the question of a claim by a creditor of *W* against entirety property. A North Carolina court would probably reach the same result as did the Massachusetts Supreme Judicial Court in *Page v. Donnelly*,⁴⁸ however, and deny creditors the right to reach *W*'s interest.

Tort plaintiffs as well as creditors may find themselves disadvantaged by entirety rules. A tort plaintiff who has been injured on entirety property may recover against *H*; whether *W* can be held personally liable, however, is uncertain. In *Whitehead v. Margel*,⁴⁹ a case involving a claim against *H* and *W* for personal injury occurring on entirety property, then United States District Judge Craven asserted that "[h]owever peculiar a tenancy by the entirety may be, it is not a shield for a tortious wife."⁵⁰ Noting that in North Carolina the attributes of tenancy by the entirety derive at least in part from the marital relationship rather than from the estate itself,⁵¹ Judge Craven interpreted North Carolina law to allow a negligence claim against a *W* who could be shown to have exercised control over the property. Finding the question of control of entirety property not determined by the mere fact of an entirety estate, Judge Craven denied *W*'s motion to dismiss the case against her on the ground that she was an improper party.⁵² Should *W* be found to have exercised control in fact, then her inferior position would not protect her from liability.

The North Carolina Supreme Court, however, seems to have rejected this view. In *Freeze v. Congleton*,⁵³ a case factually similar to *Whitehead*, *W* moved for involuntary nonsuit of a personal injury claim on the ground that she had no recognizable legal right to control of the entirety property and, therefore, no duty to keep the premises safe. Agreeing with *W*, the supreme court held that because *H* had exclusive control of the property, *H* was solely responsible for the condition of the premises.⁵⁴ While a tort claimant seeking recovery against

47. 346 Mass. 768, 193 N.E.2d 682 (1963). The court in *Page* upheld *H*'s trespass claim against a third party to whom *W* had given permission to cut trees on the basis of *H*'s exclusive right to possession of entirety property.

48. *L. & M. Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968).

49. 220 F. Supp. 933 (W.D.N.C. 1963).

50. *Id.* at 937.

51. See *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924) and note 3 *supra*.

52. The case was praised for its flexible application of the spousal unity theory in Note 44 B.U. L. REV. 247 (1964).

53. 276 N.C. 178, 171 S.E.2d 424 (1970).

54. *Id.* at 181, 171 S.E.2d at 426.

a *W* must contend with *Freeze*, a successful argument under *Whitehead* may not be foreclosed. Arguably, *Whitehead* survived *Freeze*: the North Carolina court did not refer to *Whitehead*; and the court mentioned alternate grounds for the decision in the failure of the infant plaintiff's accompanying parents to warn the infant of a dangerous condition of which the parents were aware. The *Whitehead* test of control in fact, however, had it been used in *Freeze*, would have resulted in a denial of *W*'s nonsuit motion, as it was *W* who closed the unmarked glass door that injured the infant plaintiff.⁵⁵

II. THE CONSTITUTIONALITY OF TENANCY BY THE ENTIRETY

While the constitutionality of *W*'s exclusion from the use and control of entirety property has not been addressed in North Carolina,⁵⁶ it has been litigated elsewhere.⁵⁷ For example, in *D'Ercole v. D'Ercole*,⁵⁸ an entirety *W* sought a determination in federal court that Massachusetts' tacit approval of *H*'s right to exclusive possession and control of entirety property constituted state action in violation of her rights to equal protection and due process.⁵⁹ The court found state action based

55. *Id.* at 180, 171 S.E.2d at 425 (uncontradicted testimony of plaintiff's witness).

56. Although the constitutionality of the estate itself has not been litigated, a North Carolina district court judge in an unpublished opinion considered the constitutionality of former N.C. GEN. STAT. § 31A-5 (amended 1979), which provided for the disposition of entirety property following the slaying of one spouse by the other. Under the statute, if *H* slays *W*, *H* holds the property until his death, at which time it passes to *W*'s estate. If *W* slays *H*, however, one half of the property passes at once to *H*'s estate, and *W* holds the other half until her death, at which time it also passes to *H*'s estate. The judge concluded that because the treatment of *H* and *W* is unequal, the statute impermissibly discriminated against *W*, in violation of the fourteenth amendment of the United States Constitution. The North Carolina Court of Appeals rejected this view. *Homanich v. Miller*, 28 N.C. App. 451, 221 S.E.2d 739 (1976). The court of appeals found no discriminatory state action, as is required for violation of the fourteenth amendment, because "tenancy by the entirety is a purely voluntary method of acquiring and retaining realty." *Id.* at 455, 221 S.E.2d at 741. Further attacks on this statute have been foreclosed because the legislature amended the statute to equalize the interests in 1979. Law of May 1, 1979, ch. 572, 1979 N.C. Sess. Laws —.

57. See, e.g., *D'Ercole v. D'Ercole*, 407 F. Supp. 1377 (D. Mass. 1976); *Robinson v. Trousdale County*, 516 S.W.2d 626 (Tenn. 1974).

58. 407 F. Supp. 1377 (D. Mass. 1976).

59. Mrs. D'Ercole provided some portion of the down payment for the disputed property. *Id.* at 1379 n.2. During the entire 35 years of her marriage, she was steadily employed and, by agreement with *H*, she "assumed financial responsibility for all household expenses, except for mortgage payments and real property taxes." *Id.* at 1379.

When the couple separated in 1971, Mr. D'Ercole refused to leave the home and refused to sell it or share its occupancy with Mrs. D'Ercole. *Id.* Because he wanted a divorce and she contested, he used his exclusive right of control of the property as a bargaining tool, offering her one-half the equity in the house if she would agree to a divorce. As the court noted, had she agreed to a divorce, the tenancy would have been converted to a tenancy in common, and her right to partition would have been automatic. *Id.* at 1379 n.4.

on "custom or usage" enforced by the "persistent practices of state officials."⁶⁰ It also conceded that the concept of tenancy by the entirety created a sex-based classification favoring males over females.⁶¹ It did not, however, find this classification impermissible; it took the position that the classification was legal because tenancy by the entirety was only one of several options available to married persons taking title to real property and because, on the facts presented, *W* had freely chosen tenancy by the entirety.⁶² The court reserved the question whether tenancy by the entirety is unconstitutional if it is selected "through coercion, ignorance or misrepresentation."⁶³

The *D'Ercole* court's reasoning was based largely upon the enactment in 1973 of a statute⁶⁴ eliminating the presumption that property taken by married persons in Massachusetts was taken as tenants by the entirety.⁶⁵ This reasoning is not persuasive given the facts of *D'Ercole*, however, because the presumption still existed in 1965 when the *D'Ercoles* acquired their property. It is questionable, therefore, whether tenancy by the entirety was freely, or even knowingly, chosen by the parties.⁶⁶ The court also recognized the importance of preserving both the parties' and the state's expectations that arise out of the estate. The court pointed out that *H* and *W* may have chosen tenancy by the entirety "despite or even, perhaps, because of its male oriented aspects"⁶⁷ and noted the salubrious effect that the impossibility of partition has in "preserving the family homestead even during bitter but temporary periods of separation."⁶⁸

60. *Id.* at 1381 n.8. The court was not required to clarify its finding of state action because defendant did not contest this point. *Id.* In concluding that the requirement had been met, the court cited *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), for the proposition that a common law creation can constitute a "custom or usage" for purposes of 42 U.S.C. § 1983, under which Mrs. *D'Ercole* brought her suit. *Id.* The court's decision that state action existed may have been influenced by its desire to reach the merits of the case.

61. *Id.* at 1382.

62. *Id.* The court did not discuss the due process claim.

63. *Id.*

64. Law of April 23, 1973, ch. 210, § 7, 1973 Mass. Acts (codified at MASS. ANN. LAWS ch. 184, § 7 (1977)).

65. 407 F. Supp. at 1381 n.8. The statute may have been enacted in response to the decision of a three-judge panel in *Klein v. Mayo*, 367 F. Supp. 583 (D. Mass. 1973), *aff'd*, 416 U.S. 953 (1974), which upheld the constitutionality of a Massachusetts statute denying partition to entirety tenants. Plaintiff in *Klein* urged the court to address the question of the constitutionality of tenancy by the entirety itself; finding the question not properly presented, the court expressly left it open. *Id.* at 586.

66. See, e.g., *Finn v. Finn*, 348 Mass. 443, 446, 204 N.E.2d 293, 295-96 (1965) (presumption of tenancy by entirety in jointly owned stock absent express negation in instrument of transfer).

67. 407 F. Supp. at 1382 (quoting *Klein v. Mayo*, 367 F. Supp. at 585).

68. *Id.* at 1382. The *D'Ercole* court offered no authority for these justifications, nor for its

Under North Carolina law, it would be more difficult to justify the sex-based classification inherent in tenancy by the entirety than in *D'Ercole* because the presumption that real property acquired by a married couple is acquired as tenants by the entirety continues in North Carolina.⁶⁹ It has been estimated that ninety percent of married couples in North Carolina "elect" tenancy by the entirety⁷⁰; quare how many of these elections are knowingly made. Relying on the suggestion in *D'Ercole* that the court may have found the D'Ercoles' tenancy by the entirety unconstitutional if *W*'s choice of that estate over other forms of property ownership had been induced by "coercion, misrepresentation or ignorance," an entirety *W* in North Carolina may be able to successfully allege that the estate deprives her of equal protection because at the time she and *H* took title to property as tenants by the entirety she was ignorant of the nature of the estate. Such a lack of knowledge, combined with the North Carolina presumption favoring tenancy by the entirety, provides the basis for a strong argument that tenancy by the entirety in North Carolina impermissibly discriminates on the basis of sex.

The "irrebuttable presumption theory" offers another theory under which a constitutional challenge to tenancy by the entirety might be mounted. This theory has been described as "a strange hybrid of equal protection and due process scrutiny"; it is essentially a method of analysis sometimes utilized by the United States Supreme Court when confronted with a state statute or regulation that allegedly deprives a class of citizens of some benefit on the basis of a presumption about that class.⁷¹ The Supreme Court has employed this theory in cases involving an Illinois statute that denied unwed fathers custody of their chil-

observation that the legislature arguably had not abolished common-law tenancy by the entirety as a vehicle for acquiring title "because it serves as an effective means for the Commonwealth to quiet disputes as to possession pending a determination of that issue by the probate court." *Id.* at n.11.

69. See, e.g., *Freeze v. Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970), in which the court, without examining language of the deed, inferred from plaintiff's allegations that *W* and *H* jointly owned their home that they held it as tenants by the entirety. See also *Combs v. Combs*, 273 N.C. 462, 160 S.E.2d 308 (1968) (conveyance or devise to *H* and *W* creates tenancy by entirety, not joint tenancy or tenancy in common); *Dearman v. Bruns*, 11 N.C. App. 564, 181 S.E.2d 809, cert. denied, 279 N.C. 394, 183 S.E.2d 241 (1971) (conveyance of land to *H* and *W*, nothing else appearing, creates tenancy by entirety).

70. 2 R. LEE, *supra* note 25, § 112, at 57 (1963). In a 1980 telephone survey by the author, 68% of persons surveyed owned their own homes; 82% of those owned jointly with her or his spouse; 79% of those did not know whether they owned as tenants by the entirety and did not know what was meant by the term.

71. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1548 (1974) [hereinafter cited as *Irrebuttable Presumption*].

dren,⁷² a Connecticut statute that defined "nonresident" for tuition purposes according to one's legal address at the time application was made to attend a Connecticut university,⁷³ and Cleveland regulations that required pregnant teachers to take a leave of absence beginning with their fifth or sixth month of pregnancy and continuing until three months after delivery.⁷⁴ In each of these cases the Court focused on the presumption that attached to the class once the classification had been chosen: the presumption that unwed fathers are unfit to care for their children, that pregnant teachers are unfit to teach children, and that an out-of-state applicant is a nonresident for tuition purposes.⁷⁵ In no case did the Court find the free choice to select inclusion within a classification to be determinative of whether the classification was violative of due process as did the court in *D'Ercole*.⁷⁶ In *Vlandis v. Kline*⁷⁷ the Court stated that a presumption about a class must be "necessarily or universally true in fact" to survive scrutiny and that a presumption that fell short of this standard may violate due process. If the presumption is not "universally true," the classification is not held illegal under this theory, however. The remedy for a finding of a violation is a hearing in which the complainant has an opportunity to show that she or he was erroneously included within the classification.⁷⁸

Applying the irrebuttable presumption theory to tenancy by the entirety in North Carolina, *W* could challenge the presumption underlying this estate that *W*'s who hold property as tenants by the entirety are not competent or not entitled to manage real property. To justify the presumption, the state must show that it is necessarily true in fact. It is hard to imagine, however, what sort of evidence the state could produce to prove its case. If the presumption is held to violate due process, the state must provide *W* the opportunity for a hearing at which *W* could try to establish that she was as capable as any other property holder, including a *W* who holds property as a tenant in common with *H*, of managing the property.

North Carolina could probably present state interests in support of retaining the characteristics of tenancy by the entirety, such as the reliance of thousands of property owners on them. In using the irrebut-

72. *Stanley v. Illinois*, 405 U.S. 645 (1972).

73. *Vlandis v. Kline*, 412 U.S. 441 (1973).

74. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

75. See generally *Irrebuttable Presumption*, *supra* note 71, at 1534.

76. For a discussion of *D'Ercole*, see notes 58-68 and accompanying text *supra*.

77. 412 U.S. 441, 452 (1973).

78. See *Irrebuttable Presumption*, *supra* note 71, at 1548.

table presumption theory, however, the United States Supreme Court has focused less on the state's purpose in so classifying citizens than on the significance of the right that may be infringed upon by the presumption.⁷⁹ While *W*'s right to deal with property held in her name may not rise to the level of the right to care for one's natural children as in *Stanley v. Illinois*⁸⁰ or the right to bear children as in *Board of Education v. LaFleur*,⁸¹ it is certainly equally, if not more, significant than the right to claim a lower tuition rate, which was upheld in *Vlandis*.⁸² Therefore, if a North Carolina *W* can persuade a court to apply the irrebuttable presumption theory, she should be successful in challenging her unequal treatment as a tenant by the entirety.

III. DEVELOPMENTS IN INCOME TAX LAW RELEVANT TO TENANCY BY THE ENTIRETY

Aside from the unequal treatment North Carolina accords tenants by the entirety, an entirety *H* has reason to challenge the constitutionality of the estate because of the undesirable tax consequences he must often face when transferring appreciated entirety property to *W* pursuant to a divorce settlement. This transfer is typically a taxable event, causing *H* to recognize gain. In a 1974 Revenue Ruling⁸³ the Commissioner described three situations, each of which depicts a "species of common ownership," in which gain would not be recognized on a transfer of appreciated property between spouses pursuant to a divorce settlement: when title to property is taken jointly under state property law, when the state is a community property state, and when state property law is found to be similar to community property law.⁸⁴ The Commissioner stated that when commonly-owned property is unevenly divided, gain must be recognized by the spouse who receives the lesser amount. These guidelines, combined with the Commissioner's treatment in *Beth W. Corp. v. United States*⁸⁵ of a division of entirety prop-

79. See Comment, *The Privy Examination: An Analysis of its Constitutionality*, 12 WAKE FOREST L. REV. 1007, 1024 (1976).

80. 405 U.S. 645 (1972).

81. 414 U.S. 632 (1974).

82. 412 U.S. 441 (1973).

83. Rev. Rul. 74-347, 1974-2 C.B. 26.

84. *Id.* at 27.

85. 350 F. Supp. 1190 (S.D. Fla. 1972), *app'd*, 481 F.2d 1401 (1973), *cert. denied*, 415 U.S. 916 (1974). See also *Hornback v. United States*, 298 F. Supp. 977 (W.D. Mo. 1969) in which *W* sold her interest in entirety property to her *H* for cash, causing her to recognize capital gain. Because Missouri is a community property state as well as a state that recognizes tenancy by the entirety, a mere division of the property would not have been a taxable transfer.

erty as a nontaxable event when the property had been distributed evenly, suggested that gain would not be recognized unless an uneven division of entirety property were made pursuant to a divorce.

The North Carolina Attorney General had taken an even broader position in 1969. In his opinion no taxable event would occur upon the distribution of entirety property pursuant to a divorce settlement until the property was later sold by the former *H* or *W*, regardless of the share of the property received.⁸⁶ In the fact situation under consideration in the opinion, the parties held their former entirety property as tenants in common until the year following their divorce, when *W* sold her interest. While the question of a transfer of entirety property between spouses was not squarely presented, the opinion nevertheless addressed the basis question presented in *Beth W. Corp.* and concluded, similarly to the federal court in Florida, that half the basis in entirety property⁸⁷ is attributable to each spouse. The attorney general supported this conclusion with citations to North Carolina cases that characterized *H*'s right to use and control entirety property as an incident of his common-law right of *jure uxoris*, not as an incident of the entirety estate itself.⁸⁸

In a 1975 Revenue Ruling concerning the federal gift tax, however, the Commissioner placed a somewhat different interpretation on North Carolina law.⁸⁹ This ruling stated that, because an entirety *W* in North Carolina has no present right to use or control entirety property, her interest is only a future interest. The donor of real property given to his son and daughter-in-law as tenants by the entirety can, therefore, claim an annual gift tax exclusion only against the son's half.⁹⁰

On the basis of the authorities considered to this point, the income

86. 40 N.C. ATT'Y GEN. REP. 838 (1969). See also 2 R. LEE, *supra* note 25, § 120, at 94 n.158 (Cum. Supp. 1976) (Following absolute divorce, a taxable event occurs for the first time when property, or an interest therein, is sold).

87. 40 N.C. ATT'Y GEN. REP. 839-40 (1969).

88. *Id.*

89. Rev. Rul. 75-8, 1975-1 C.B. 309.

90. *Id.* The Commissioner's interpretation of North Carolina law is criticized in Note, *Taxation—The Creation and Termination of Tenancies by the Entirety—A Comparison of Federal and North Carolina Estate, Inheritance, and Gift Taxation*, 15 WAKE FOREST L. REV. 306, 315-16 (1979). North Carolina courts, as the writer noted, have carefully distinguished between *W*'s interest in entirety property and the interest of a remainderman, whether vested or contingent. See, e.g., *Davis v. Bass*, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924): "[T]he right of survivorship is merely an incident of the estate, and does not constitute a remainder, either vested or contingent" "Future interest" has been defined as "a legal term, [which] includes reversions, remainders, and other interests or estates" Treas. Reg. § 25.2503-3(a) (1958). The phrase "other interests or estates" indicates a clear intent that the definition not be exhaustive; the position taken

tax treatment of a transfer of entirety property pursuant to a divorce settlement is unclear. A line of cases suggests, however, that *H* would have to recognize gain. In *United States v. Davis*,⁹¹ the United States Supreme Court required a Delaware *H* to recognize capital gain when, pursuant to a divorce settlement, he transferred his separately-owned, appreciated DuPont stock to *W* in return for the release of her marital rights. *H* tried to claim that he and *W* had merely divided their property, and that such a division should be nontaxable as it would be in a community property state. He argued that, because a Delaware divorce court is permitted by statute⁹² to allocate to *W* out of *H*'s separately-owned property "such share as the Court deems reasonable," *W* had inchoate rights in his property as well as her own and thus no transfer occurred. The Court rejected *H*'s argument, stating that:

the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest—passive or active—over the management or disposition of her husband's personal property. Her rights are not descendable, and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems "reasonable."⁹³

While the property in *Davis* was personal property owned solely by *H*, the Court's language can be applied easily to property held by *H* and *W* as tenants by the entirety in a state like North Carolina. In North Carolina, if *H* exchanges entirety property for valuable consideration from *W* such as the release of her marital rights, a "sale or exchange" will occur, requiring *H* to recognize as capital gain⁹⁴ the difference between his basis in the asset and the fair market value of the consideration received.⁹⁵ Under *Davis* the consideration furnished by *W* is presumed to be equal in value to the property received by *W* in the

by North Carolina courts that *W*'s interest is not a remainder therefore does not compel a conclusion that it is not a future interest.

The writer also noted the reference in Internal Revenue Code section 2515(c)(1), dealing with gift tax treatment of tenancies by the entirety, to "the exclusion provided by section 2503(b)," from which she inferred a congressional intent to allow an exclusion for a gift of entirety property to *W*. Note, *supra*, at 315-16. Because the law of entirety estates varies so much from state to state, however, it could as easily be inferred that Congress intended to allow the exclusion only to gifts of entirety property in states in which ownership is accompanied by present rights.

91. 370 U.S. 65 (1962).

92. DEL. CODE ANN. tit. 13, § 1527(a)(3) (1974).

93. 370 U.S. at 70.

94. I.R.C. § 1222 defines capital gains and losses.

95. I.R.C. § 1001.

exchange.⁹⁶ Therefore, the fair market value of the property determines the amount of gain.

Most of the cases following *Davis* have concerned separately-owned personal property. It might have been expected that such property would be found to be co-owned, regardless of inchoate rights granted by state law. In several cases, however, taxpayers were able to establish that *W*'s interest in *H*'s separately-owned property did, under state law, rise to the level of co-ownership for purposes of property division pursuant to a divorce.

In *Collins v. Oklahoma Tax Commission*,⁹⁷ the facts were similar to those in *Davis*. *H* transferred separately-owned stock to *W* pursuant to a divorce decree, and a state tax deficiency was assessed against *H* on a *Davis* theory. Collins, having paid the tax under protest, appealed his case as far as the Oklahoma Supreme Court. Presented with the question whether the taxpayer's transfer constituted a "sale or exchange" within the meaning of the Oklahoma tax code,⁹⁸ the court, finding that no taxable event had occurred, answered in the negative. The court accepted Collins' contention that record title did not determine ownership for purposes of property division pursuant to divorce under the Oklahoma statute. The court reasoned that, because the statute required a divorce court to divide equitably all property acquired by the parties during their marriage, without regard to record title, the statute created "a species of common ownership" more nearly analogous to community property ownership than to the inchoate rights of Mrs. Davis in her husband's property under Delaware law.⁹⁹

In its decision, the court distinguished an earlier Tenth Circuit

96. 370 U.S. at 72. *W*'s basis in the property is its fair market value at the time of the transfer. *Id.* at 73.

97. 446 P.2d 290 (Okla. 1968). Before the assessment of the state tax deficiency, Collins had been assessed a federal tax deficiency. He sought relief in the Tax Court. *Collins v. Commissioner*, 46 T.C. 461 (1966). Seeking to distinguish his situation from *Davis*, he argued that, under Oklahoma law, divorce courts are required to recognize *W*'s present interest in *H*'s property, regardless of title. ("As to such property . . . which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties as may appear just and reasonable. . . ." Okla. Stat. tit. 1961, § 1278 (1979)). The Tax Court rejected this argument, as did the United States Court of Appeals for the Tenth Circuit, which found Oklahoma law indistinguishable from the Delaware law under consideration in *Davis*. *Collins v. Commissioner*, 388 F.2d 353 (10th Cir. 1968). The court of appeals was later vacated and remanded, 393 U.S. 215 (1968), and on remand the Tenth Circuit reversed the Tax Court's decision, holding that the transfer was a nontaxable division among co-owners, 412 F.2d 211 (10th Cir. 1969).

98. OKLA. STAT. tit. 1951, § 883 (repealed 1971) (recodified at OKLA. CODE ANN. § 2358 (Cum. Supp. 1979)).

99. 446 P.2d at 295.

case, *Pulliam v. Commissioner*,¹⁰⁰ in which a taxable event was found on similar facts, on the basis of the different wording of the state statutes under consideration. The Colorado law construed in *Pulliam* gave a divorce court discretion to consider various factors in making property awards, whereas Oklahoma's law was mandatory, subjecting all property acquired by the parties jointly during their marriage to equitable division.¹⁰¹ The *Collins* court chastised the Oklahoma Tax Commission and the federal court, which had reached the opposite result in a federal tax case involving the same taxpayer, for ignoring Oklahoma's clear law on the subject.¹⁰²

After his success in the Oklahoma Supreme Court, Collins used this favorable judgment as the basis for a petition for certiorari to the United States Supreme Court to review the earlier decision of the Tenth Circuit. The Supreme Court vacated the judgment of the court of appeals and remanded for reconsideration in light of the decision of the Oklahoma Supreme Court.¹⁰³ On remand, the court of appeals applied Oklahoma law as stated by the Oklahoma Supreme Court to the federal tax question and held the transfer by Collins to have been a nontaxable event.¹⁰⁴ The court thus reversed its previous affirmation of the tax court.

Application of the "species of common ownership" rule in states other than Oklahoma has resulted in holdings varying according to state law. In *Imel v. United States*¹⁰⁵ a Colorado *H*, having paid capital gains tax under protest in a situation factually similar to that in *Davis*

100. 329 F.2d 97 (10th Cir.), *cert. denied*, 379 U.S. 836 (1964).

101. 446 P.2d at 296-97.

102. *Id.* at 295.

Oklahoma taxpayers in subsequent cases have sought to apply the "species of common ownership" rule to transfers between spouses during an ongoing marriage. These attempts have failed because under Oklahoma law, the ownership rights of the spouse who is not the record owner arise by virtue not of the marital relationship, but of the divorce action. In *Sanditen v. Sanditen*, 496 P.2d 365 (Okla. 1972), *W* sought to set aside *H*'s gratuitous lifetime transfers of property, acquired during coverture, of which *H* was the record owner on the theory that *H* did not have the power to transfer this property without *W*'s consent. The court, however, rejected *W*'s argument that her "common ownership" rights voided the transfers, but reversed the trial court's grant of defendant-estate's demurrer to allow *W* a chance to show that the transfers were fraudulent because intended to deny her rights of succession as surviving spouse. In *McDaniel v. Oklahoma Tax Commission*, 499 P.2d 1391 (Okla. 1972), *H* protested a state gift tax imposed on a transfer to *W*, without consideration, of property formerly held in his name alone. Citing *Collins*, *H* argued that the property in question was "commonly owned" before the transfer and therefore not a gift. The Oklahoma Supreme Court, however, upheld the imposition of the tax, stating that *W*'s interest recognized in *Collins* was not a "vested interest." *Id.* at 1394.

103. 393 U.S. 215 (1968) (*per curiam*).

104. 412 F.2d 211 (10th Cir. 1969).

105. 375 F. Supp. 1102 (D. Colo. 1974).

and *Collins*, sought a refund in the United States District Court. The court found itself in an awkward position. Colorado law viewed in the light of the *Collins* cases appeared to provide the requisite "common ownership";¹⁰⁶ yet in *Pulliam*, decided prior to *Collins*, the Tenth Circuit had found a Colorado *W* to have no ownership rights in *H*'s property. To resolve its dilemma, the *Imel* court certified the question whether, under Colorado law, *W*'s interest amounted to a "species of common ownership" to the Colorado Supreme Court. The Colorado Supreme Court responded that a "species of common ownership" vested in *W* at the time the divorce action was filed.¹⁰⁷ In view of this response, the United States District Court found the transfer nontaxable.¹⁰⁸ The court of appeals affirmed this decision,¹⁰⁹ but did not expressly overrule its earlier decision in *Pulliam*. The court noted that *W* in *Imel* had materially aided the accumulation of the family wealth,¹¹⁰ a factor that distinguished *Imel* from *Pulliam*.

Courts in Wisconsin,¹¹¹ Iowa,¹¹² and West Virginia,¹¹³ have interpreted state law to create no "species of common ownership" of one spouse in the separate property of the other spouse. In Kansas the United States Court of Appeals for the Tenth Circuit found no "species of common ownership" in a *Davis/Collins* fact situation.¹¹⁴ More recently, however, the Kansas Supreme Court reached the opposite result in a declaratory judgment action to construe Kansas law regarding equitable division of property pursuant to a divorce.¹¹⁵

In summary, if a "species of common ownership" is found in separately-held property, this property can be transferred between spouses pursuant to a divorce settlement without tax consequences. Whether "common ownership" exists depends on the interpretation by state courts of the state statute governing property division in divorce cases. If the statute is interpreted to make an equitable property division mandatory regardless of record ownership, "common ownership" will

106. *Id.* at 1113. The court conjectured that Colorado law may have been incorrectly interpreted in *Pulliam* and quoted from several Colorado cases in which spouses were found to have entitlements to property of which the other spouse was record owner. *Id.* at 1113-15.

107. *In re* Questions Submitted by United States District Court, 517 P.2d 1331 (Colo. 1973).

108. *Imel v. United States*, 375 F. Supp. 1102, supplemental opinion at 1117 (D. Colo. 1974).

109. *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975).

110. *Id.* at 857.

111. *Kraut v. United States*, 316 F. Supp. 740 (E.D. Wisc. 1970).

112. *Wallace v. United States*, 439 F.2d 757 (8th Cir. 1971), *cert. denied*, 404 U.S. 831 (1971).

113. *McKinney v. CIR*, 64 T.C. 263 (1975).

114. *Wiles v. Commissioner*, 499 F.2d 255 (10th Cir. 1974), *cert. denied*, 419 U.S. 996 (1974).

115. *Cady v. Cady*, 224 Kan. 339, 581 P.2d 358 (1978).

be found. If property division is discretionary, however, record ownership determines whether tax consequences will result from a transfer of the property.

When property is owned jointly by *H* and *W*, as in a tenancy by the entirety, the same basic question of the spouses' true rights under state law is presented. This issue, however, has not been heavily litigated. It was presented rather indirectly in *Beth W. Corp.*¹¹⁶ Several years after *H* and *W* in *Beth W. Corp.* conveyed various entirety properties to each other pursuant to a divorce settlement, *W* transferred some of the property she received in the settlement to plaintiff-corporation in exchange for all of the corporation's common stock. When the corporation sold the property, the issue of the corporation's basis in the property was raised. If the property settlement was a taxable event, *H* should have been taxed on his gain at the time of the transfer to *W*. Accordingly, *W*'s basis in the property would have been its fair market value at the time of the transfer, which basis would be carried over to the corporation, resulting in less taxable gain to the corporation upon its sale of the appreciated property. If, however, the property settlement was a nontaxable division between co-owners, and, consequently, the corporation took the property with the same basis it had when owned as entirety property.¹¹⁷ The Commissioner asserted the latter position and prevailed. The corporation paid the deficiency, then sought a refund in the United States District Court for the Southern District of Florida. The court distinguished *W*'s inchoate interest in *H*'s property under Delaware law, as in the *Davis* case, from *W*'s concrete interest in entirety property under Florida law.¹¹⁸ After describing the features of an entirety estate, such as indivisibility and insulation from individual debts, the court asserted that under a tenancy by the entirety in Florida *W* is "in actuality as well as in theory, a co-owner of the subject property."¹¹⁹ Unlike in North Carolina, however, Florida tenants by the entirety have equal rights to use and control entirety property.¹²⁰

More recently the question of spouses' rights in entirety property has arisen in Massachusetts, where *W* has no present right to use or

116. 350 F. Supp. 1190 (S.D. Fla. 1972), *aff'd*, 481 F.2d 1401, *cert. denied*, 415 U.S. 916 (1974).

117. I.R.C. § 362(a).

118. 350 F. Supp. at 1191.

119. *Id.* at 1191.

120. See, e.g., *Quick v. Leatherman*, 96 So. 2d 136 (Fla. 1957); *New York Life Ins. Co. v. Oates*, 122 Fla. 540, 166 So. 269 (1936).

control entirety property. In *Forbes v. United States*,¹²¹ a case with disturbing implications for North Carolina entirety *Hs*, the Commissioner found, *H*'s conveyance of his interest in entirety property to *W* pursuant to a divorce decree to have been a taxable exchange and assessed a deficiency against *H* in the amount of one-half the difference between the cost basis in the property and its fair market value at the time of the transfer. In suing for a refund in the United States District Court for the District of Massachusetts, *H* argued that, in granting unequal rights in entirety property on the basis of sex, the common law of Massachusetts violated both the state and federal constitutions. *H* based his claim on the right to equal protection under the fourteenth amendment of the United States Constitution and on the equal rights amendment to the Massachusetts Constitution.¹²² *H* asked the court to decree equal rights in entirety property and, accordingly, to find a transfer of the property a nontaxable division between co-owners.¹²³

The court in *Forbes* summarily rejected *H*'s fourteenth amendment argument with citations to *D'Ercole*,¹²⁴ which upheld the constitutionality of tenancy by the entirety against an equal protection challenge by *W*, and *Klein v. Mayo*.¹²⁵ The equal rights amendment argument might have been successful if the property transfer had not occurred in 1973, three years prior to the ratification of the amendment; the court, however, declined to apply the amendment retroactively, stating that the question would have to wait until properly presented.¹²⁶

No reference was made in *Forbes* to *Beth W. Corp.*, perhaps because a claim of common ownership would have been inconsistent with a claim that Massachusetts law was unconstitutional. It is unlikely, however, that the *Forbes* court would have found *Beth W. Corp.* controlling. In analogizing Massachusetts law to the Delaware law applied in *Davis*, the *Forbes* court asserted that "[i]n Massachusetts a wife's interest in property held by the entireties is no greater than that [incho-

121. 472 F. Supp. 840 (D. Mass. 1979).

122. MASS. CONST. art. CVI (1976) amended art. I by adding, "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

123. 472 F. Supp. at 842.

124. 407 F. Supp. 1377 (D. Mass. 1976). Like the *D'Ercole* court, the *Forbes* court apparently overlooked the date on which the property was purchased. As in *D'Ercole*, the property was purchased before 1973, at which time the presumption that property acquired as *H* and *W* was acquired as tenants by the entirety still existed. The existence of the legal presumption undercuts the court's inference of free choice by *H*. See text accompanying notes 50-51 *supra*.

125. See note 65 *supra*.

126. 472 F. Supp. at 842-43.

ate] interest Delaware grants to a wife in her husband's property."¹²⁷ This is in contrast to the character of a Florida entirety *W*'s interest, which as stated in *Beth W. Corp.*, is "considerably greater than a mere liability imposed on the interest of the husband" and "attains 'the dignity of co-ownership,' as that phrase is used in *Davis*."¹²⁸

The transfer of appreciated entirety property from *H* to *W* pursuant to a divorce settlement would almost certainly result in taxable gain to *H* in North Carolina. Although North Carolina courts have persistently distinguished between the entirety estate and *H*'s rights of exclusive use and control, finding these rights to arise not from the entirety estate but from *H*'s common-law rights over *W*'s property,¹²⁹ this reasoning probably would not persuade the Commissioner to treat a transfer of appreciated entirety property to *W* incident to a divorce as a division of commonly-owned property. Tax cases since *Davis* have focused on the rights of the transferee spouse to the property at issue. If, as in tenancy by the entirety in North Carolina, *W* has no present rights to the property, the Commissioner is unlikely to consider the origin of *W*'s non-rights to be of much importance. While it is true that under *Davis* state law on the nature of property rights is controlling, North Carolina law could hardly be construed as conferring equal property rights upon an entirety *W*. Unlike the court that interpreted Florida law in *Beth W. Corp.*, a North Carolina court could not, consistently with its prior decisions regarding the unequal rights of entirety tenants during their joint lives, find an entirety wife to be "in actuality as well as in theory"¹³⁰ a co-owner with *H*.

Nor could a North Carolina court find, as have courts in Oklahoma,¹³¹ Wisconsin,¹³² and elsewhere, a "species of common ownership" deriving from mandatory language in the state's statute regarding property division pursuant to a divorce. North Carolina has no statute regarding division of marital property as such. G.S. 50-16.7,¹³³ concerning how alimony shall be paid, confers on the court the right to transfer title to or possession of personal property or a security interest

127. *Id.* at 842.

128. 350 F. Supp. at 1191. It is curious that *H* in *Forbes* was charged with gain on only one-half the property, although *W*'s interest in all the property was held to be inchoate. In contrast, *H* in *Davis* was charged with gain on all the transferred stock.

129. *Duplin County v. Jones*, 267 N.C. 68, 147 S.E.2d 603 (1966); *Johnson v. Leavitt*, 188 N.C. 682, 125 S.E. 490 (1924).

130. 350 F. Supp. at 1191.

131. *Collins v. Okla. Tax Comm'n*, 446 P.2d 290 (Okla. 1974); see note 97 *supra*.

132. *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1974).

133. N.C. GEN. STAT. § 50-16.7 (1976).

therein, or to transfer possession of or a security interest in real property, but not title to real property. This power in the court is discretionary¹³⁴ and therefore does not correspond to the mandatory duty of property division imposed on the courts of Oklahoma, Colorado and Kansas.¹³⁵ The inability of a North Carolina court to transfer title to real property, even upon a determination that such a transfer would be equitable, widens the gap between North Carolina law and the law of states where the "species of common ownership" rule has been found applicable.

Under the present law of North Carolina, therefore, an entirety *H* could not be protected from the recognition of gain from the transfer of appreciated entirety property to *W* pursuant to a divorce settlement.¹³⁶ If he chooses to challenge the assessment of a tax deficiency, he could make a persuasive argument that the superior rights that he enjoys in entirety property solely because of his sex, and which had the undesir-

134. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976).

135. See text accompanying notes 97-115 *supra*.

136. Alternate arrangements to the described transfer could be made if practical considerations aside from tax consequences would permit. For example, the transfer could be characterized as a gift rather than an exchange for a release of *W*'s marital rights. If the gift were effected prior to the divorce, the gift tax marital deduction as well as the annual exclusion presumably would be available.

Whether the Commissioner would accept the characterization of the transfer as a gift, however, is uncertain. In *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir.), *cert. denied*, 379 U.S. 836 (1964), *H* did not try to attach the "gift" label; however, in attempting to distinguish his case from *Davis*, he pointed out the absence of any express release by *W* of her marital rights. The court found the release of marital rights to be implicit in the proceedings. See also *Wallace v. United States*, 439 F.2d 757 (8th Cir. 1971), *cert. denied*, 404 U.S. 831 (1971), in which *H* claimed *W* had exchanged her marital rights as consideration for property other than the appreciated stock at issue. The court rejected this argument as an attempt to artificially distinguish *Davis* by means of "subtleties in the mechanics by which a husband divests himself of appreciated property in favor of his wife." *Id.* at 761. An attempt by a West Virginia *H* to characterize his stock transfer to *W* as voluntary because state law, at the time the transfer was made, gave *W* no *Davis*-type right to a share of *H*'s property pursuant to divorce was also unsuccessful. *McKinney v. Commissioner*, 64 T.C. 263 (1975). The court found, however, that *W* relinquished her rights of descent, distribution and dower and that the amount of property owned by the parties after the divorce was closely related to the settlement of the parties' "respective contractual obligations and rights growing out of dissolution of the marriage contract." *Id.* at 268. Although these cases all involved transfers made pursuant to a divorce decree, the approach of the courts in looking beyond the form of the transaction suggests the possible application of a step-transaction theory by which a "gift" may be re-characterized as an "exchange" of appreciated property for marital rights, with capital gain consequences to the transferor.

Alternatively *H* and *W* could continue to hold the property after a divorce as tenants in common. If the property were later sold to a third party, each tenant in common apparently would recognize gain on one-half the difference between the basis in the property and the selling price, regardless of inequality of contributions. *Wall v. Wall*, 24 N.C. App. 725, 212 S.E.2d 238, *cert. denied*, 287 N.C. 264, 214 S.E.2d 437 (1975). A full consideration of this or other possible arrangements, such as a transfer of the property to *H* rather than *W*, are beyond the scope of this Comment.

able effect of exposing him to this tax liability, violated his right to equal protection.¹³⁷ This argument would be stronger in North Carolina than in Massachusetts because North Carolina, unlike Massachusetts, has not statutorily removed the presumption favoring tenancy by the entirety. *H* could also argue that tenancy by the entirety violated his right to due process on an irrebuttable presumption theory. All entirety *H*s are presumed to have some sort of superior competence to use and control real property held by the entirety; because the state affords no opportunity for *H* to rebut this presumption, a due process violation could be found.¹³⁸

IV. A PROPOSAL FOR CHANGE

In the early years of this century the North Carolina Supreme Court more than once invited the legislature to change the entirety estate into a tenancy in common.¹³⁹ The legislature, however, never accepted this invitation, and in more recent years the court has ceased extending it.¹⁴⁰ The court, however, has never fully accepted the pure entirety estate. For example, it has followed the "Massachusetts rule" of allowing *H*'s creditors to reach entirety property to a limited extent.¹⁴¹ More significantly, it has never extended the estate to personal property.¹⁴² The rationale offered for not allowing entirety estates in personal property could easily be applied to real property as well. In discussing entirety estates in personal property, the court in *Turlington v. Lucas* stated:

[It] is not only that it is an anomaly in our judicial system, without any statute recognizing it, and that it is contrary to our policy as to property rights of women, as stated in the Constitution, but that it abstracts the property embraced in it from liability to debt during the joint lives, and that during all this time the husband enjoys the in-

137. A North Carolina *H* could not, of course, argue that tenancy by the entirety violates the state equal rights amendment, as North Carolina has not so amended its constitution.

138. See text accompanying notes 71-82 *supra*.

139. See, e.g., *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906), *Jones v. W.A. Smith & Co.*, 149 N.C. 318, 320, 62 S.E. 1092, 1093 (1908), in which Judge Walker stated:

It may be that the present state of the law as to married women, under the Constitution and statutes and a wise public policy, call for a change in the incidents and properties of this anomalous estate . . . , so that it may be turned into a tenancy in common, but this is a question which addresses itself to the Legislature, and not to us.

140. "The wisdom of an estate by the entireties may be debatable. Nevertheless the principle is firmly imbedded in our decisions . . ." *Perry v. Jolly*, 259 N.C. 306, 315, 130 S.E.2d 654, 661 (1963).

141. See text accompanying notes 37-39 *supra*.

142. *Accord*, *Indiana*, *New Jersey*, *New York*, *Oregon* and *Wyoming*. *Phipps*, *supra* note 3, at 43.

come from the wife's half of the property, as well as from his own half.¹⁴³

North Carolina should follow the example of other states and revise tenancy by the entirety, retaining some aspects of the estate such as the right of survivorship,¹⁴⁴ while relinquishing its discriminatory features.¹⁴⁵ Despite legislative inaction,¹⁴⁶ the North Carolina Supreme Court could effect changes in the law if presented with a proper case. For example, the court could equalize the judicial presumptions that arise when one spouse furnishes the entire purchase price for entirety property¹⁴⁷ and eliminate the judicial presumption that a transfer of real property to *H* and *W*, nothing else appearing, creates a tenancy by the entirety. The court could also, as did the Tennessee Supreme Court in *Robinson v. Trousdale County*,¹⁴⁸ extend to *W* the same rights to use and control entirety property that *H* enjoys.

Such a modification of the entirety estate would remove North Carolina from the tiny minority of states that still retain tenancy by the entirety in its pure common-law form.¹⁴⁹ North Carolina entirety *W*'s would then be actual as well as theoretical property owners, and a division of appreciated entirety property pursuant to a divorce would not cause North Carolina entirety *H*'s to recognize gain, as under present law they almost certainly would. In addition, the fiction of "resulting trusts" employed to protect *W*'s who furnished the purchase price for

143. 186 N.C. 283, 287, 119 S.E. 366, 368 (1923).

144. In North Carolina no estate other than tenancy by the entirety has a right of survivorship; the legislature abolished the survivorship feature of a common-law joint tenancy in 1784. N.C. GEN. STAT. § 41-2 (1976).

145. This is the form tenancy by the entirety takes in the majority of states that continue to recognize the estate. *Phipps*, *supra* note 3, at 31-32.

146. A bill was introduced in the North Carolina General Assembly in 1977 "to equalize between married persons the right to control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety." H. 94, 1977 Gen. Assembly, reprinted in *Inst. of Gov't Daily Bull.* No. 12, at 73-74 (Jan. 27, 1977)). This bill has now been "postponed indefinitely." H. 94, 1978 Gen. Assembly, (reprinted in *Inst. of Gov't Daily Bull.* No. 14, at 129 (June 16, 1978)).

147. See text accompanying notes 21-30 *supra*.

148. 516 S.W.2d 626 (Tenn. 1974). Prior to *Robinson*, two distinct lines of Tennessee cases reflected judicial uncertainty whether the common law disabilities of coverture remained in effect in Tennessee. In resolving the conflict, the Tennessee Supreme Court stated: "We do not abolish the estate of tenancy by the entirety, but we strip it of the artificial and archaic rules and restrictions imposed at the common law, and we fully deterge it of its deprivations and detriments to women and fully emancipate them from its burdens." *Id.* at 632.

149. Only Massachusetts and Michigan retain the estate in as pure a form as North Carolina. Although the position of tenancy by the entirety appears precarious in Massachusetts, the law in Michigan remains unchanged. See, e.g., *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964) (conveyance to *H* and *W* "as joint tenants" creates tenancy by the entirety; presumption of tenancy by the entirety extended to personal property); *In re Estate of Thomas*, 341 Mich. 158, 67 N.W.2d 85 (1954) (*H* entitled to rents from entirety property).

entirety property could be abandoned. One reason for this fiction—the presumed coercion of *W* by *H*—has been statutorily rejected in another context.¹⁵⁰ A perhaps stronger reason for the fiction—*W*'s unequal rights in entirety property—would, of course, be negated by the abolition of the discriminatory aspects of the entirety estate.

Certain aspects of the estate would remain the same, but their effects would be ameliorated by the suggested modifications. For example, tenants by the entirety would still have no right to partition without an absolute divorce; but, with equal rights in entirety property, a North Carolina *W* who is divorced from bed and board or separated would not find herself locked out with no remedy, as in *Klein* and *D'Ercole*.

The extension to *W* of present rights in entirety property would presumably render those rights vulnerable to creditors to the same extent as are *H*'s present rights; the creditors of neither spouse could claim more than half these present rights. While this effect would not be beneficial to entirety tenants themselves, it would be much fairer to *W*'s creditors than is the present state of the law. Full fairness to creditors would require North Carolina to go still further, and allow access by the creditors of both spouses to as much as the spouses may voluntarily transfer.¹⁵¹

Tenancy by the entirety developed during a feudal age, when *W* was legally nonexistent and disadvantaged by lack of education in handling property. Today, however, *W* exists in the eyes of the law, her education level may be higher than *H*'s, and she is likely to hold a job outside the home from which she contributes to family purchases. Yet exclusive use and control of entirety property continues to reside in *H*. For his superior rights *H* may, however, pay a price in capital gains tax.

Tenancy by the entirety may have been a good idea in a feudal age. Today, however, no possible justification can be conjured up in

150. Former N.C. GEN. STAT. § 52-6, which required that *W* be privily examined in connection with any contract made with *H* regarding her real estate, was repealed in 1977. Law of May 13, 1977, ch. 375, § 1, 1977 N.C. Sess. Laws 375.

151. In (Arkansas, New Jersey, New York and Oregon), states where the interest of one spouse can be sold at an execution sale the purchaser becomes a tenant in common with the other spouse but cannot force partition. 4A R. POWELL, *supra* note 3, ¶ 623, at 703-04 (1979). In Kentucky and Tennessee, however, each spouse can convey her or his contingent right of survivorship but not present possession. *Id.* at 702. Similarly, in North Carolina the transferee of an entirety tenant's right of survivorship may be able to assert that interest under the doctrine of after-acquired title by estoppel. *Harrell v. Powell*, 251 N.C. 636, 112 S.E.2d 81 (1960); *Keel v. Bailey*, 224 N.C. 447, 31 S.E.2d 362 (1944). See also J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 114 (1971).

support of its continued existence in its present form. The General Assembly should change the estate; in the absence of legislative action, the supreme court should itself take the opportunity, if presented in a proper case, to modernize the estate.

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