

TENANCY BY THE ENTIRETY:
THE TRADITIONAL VERSION OF THE TENANCY IS THE
BEST ALTERNATIVE FOR MARRIED COUPLES, COMMON
LAW MARRIAGES, AND SAME-SEX PARTNERSHIPS

DAMARIS ROSICH-SCHWARTZ*

I. INTRODUCTION

Harry and Wanda, husband and wife, own real property not protected by any homestead laws of the state in which the property is located. Harry is sued by his creditors, who want to attach the judgment obtained to all of the properties that Harry owns, including those he owns with his wife. Whether these creditors will succeed in attaching a judgment to the property depends on whether the jurisdiction in question recognizes the tenancy by the entirety form of concurrent interest. In jurisdictions that follow the traditional version of the tenancy, Harry's creditors would not be able to attach the property to the individual debt, and the property would be fully protected.

Today, many couples like Harry and Wanda benefit from owning property under tenancy by the entirety in some form or another.¹ The basic characteristic of property owned under this type of tenancy is the non-divisibility of interests in the property, unless agreed upon by both spouses, or after a decree of divorce, or the death of one of the spouses.² In the

*Damaris Rosich-Schwartz, Esq., M.B.A., obtained her degree from St. Thomas University School of Law in Miami, Florida, graduating Summa Cum Laude and second in her class. Originally from Puerto Rico, Mrs. Rosich-Schwartz earned both a B.B.A. and M.B.A. in Corporate Finance from the University of Puerto Rico, and was an accountant for nearly seven years. Mrs. Rosich-Schwartz has written articles related to medical malpractice lawsuits in the Commonwealth of Puerto Rico, the First Amendment and in-person solicitation of public accounting services (published in 20 St. Thomas L. Rev. 91 (2007)), and an article related to accounting expertise and attorney compliance with the Sarbanes-Oxley Act (forthcoming from the Thomas M. Cooley Law Review in 2008). Mrs. Rosich-Schwartz was Articles Editor of the St. Thomas University Law Review in 2006-2007 and was also a member of the St. Thomas Moot Court Team. She is currently a member of the Florida Bar and practices Bankruptcy Law in Miami, Florida.

1. The tenancy by the entirety property interest is recognized in approximately thirty states and the District of Columbia. 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 52.01[3] (MB 1995). *See, e.g.*, ALASKA STAT. § 34.15.140 (2006) (recognizing tenancy by the entirety by statute); DEL. CODE ANN. tit. 25, § 309 (1989) (allowing conveyance of an interest in property in tenancy by the entirety); FLA. STAT. § 689.115 (2006) (making tenancy by the entirety the presumed form of tenancy when married couples sign mortgages in the state of Florida).

2. *See, e.g.*, DEL. CODE ANN. tit. 25, § 309 (1989) (explaining that neither spouse may individually alienate tenancy by the entirety property, and creditors are not allowed to reach such

states that follow the traditional tenancy, neither an individual creditor³ of one of the spouses nor a unilateral transaction can sever the tenancy. Since protection of marital property is one of the most important advantages of owning property as tenants by the entirety, couples owning property under this type of interest are able to protect their assets from any external and internal circumstances seeking severance.⁴ For these reasons, the traditional version of the tenancy by the entirety is the best alternative for couples who own property concurrently.⁵

There is no uniformity between the states concerning tenancy by the entirety, and most critics believe that this type of interest is obsolete. However, this author maintains that the tenancy by the entirety still provides important benefits to married couples, especially with respect to asset protection and probate avoidance.⁶ Furthermore, though the current benefits derived from property owned under the tenancy are not among those contemplated at its creation, tenancy by the entirety is still useful in those states that follow the traditional form of the tenancy.⁷

Because tenancy by the entirety still provides important benefits, this author maintains that this concurrent interest should not be abolished, as there is no alternative method for couples to own property jointly, which includes protection against individual creditors, protection against unilateral severance, and survivorship rights.⁸ Couples have the option of owning property as joint tenants or as tenants in common, but neither of these interests provides all of the advantages of the tenancy by the entirety.⁹ This author argues that the tenancy should not only be preserved in its most traditional form, but should also be expanded and made available to

property for individual debts); *In re Estate of Wall*, 440 F.2d 215, 218 (D.C. Cir. 1971) (holding that no creditor of an individual spouse may reach property owned under tenancy by the entirety).

3. See 2-20 FLORIDA REAL ESTATE TRANSACTIONS § 20.03 at 4 [hereinafter REAL ESTATE] (stating that unilateral creditors cannot attach their debt to property owned under tenancy by the entirety in the state of Florida).

4. *Id.* Joint creditors of both spouses can attach their debt to property held by the entirety and sell it to satisfy the obligations jointly incurred by husband and wife, but cannot do so when it is an individual creditor of one of the spouses. *Id.*

5. See POWELL, *supra* note 1, § 52.03 (explaining that property held under tenancy by the entirety cannot be partitioned or conveyed by the unilateral act of one of the spouses).

6. See *generally* REAL ESTATE, *supra* note 3 (describing the characteristics of property held under tenancy by the entirety).

7. See POWELL, *supra* note 1, § 52.03. Under early common law, husband and wife could not own property jointly because they were considered one person under the law. *Id.* To provide an alternative for married couples to own property jointly, the tenancy by the entirety was created. *Id.*

8. See *id.* (describing the characteristics of a tenancy by the entirety).

9. Compare POWELL, *supra* note 1, § 50.01 (describing the characteristics of a tenancy in common) and POWELL, *supra* note 1, § 51.03 (describing the characteristics of a joint tenancy), with POWELL, *supra* note 1, § 52.03 (describing the characteristics of a tenancy by the entirety).

common law marriages and other mutual beneficiaries, including same-sex partnerships. Tenancy by the entirety is constantly changing to accommodate the needs of the citizens in the states in which this interest is recognized, and the tenancy by the entirety should accommodate these quasi-marital relationships as well.

This article provides a brief history of the concurrent interests, the reasons for their creation, and the evolution of the tenancy by the entirety. In addition, this article discusses the present status of the concurrent interests throughout the United States, and answers some of the most important criticisms against tenancy by the entirety. This article also addresses how married couples will be adversely affected should this tenancy be abolished in favor of a less beneficial joint tenancy. Half of the states recognize the tenancy.¹⁰ Therefore, the tenancy should continue to provide further protection to couples that choose to own property in this way. Finally, this article recommends tenancy by the entirety to other groups of joint owners, including couples in common law marriages and same-sex partnerships, so that these couples can also take advantage of the benefits provided by the tenancy.

II. CONCURRENT ESTATES: A BRIEF OVERVIEW

To better understand concurrent interests, as well as the reasons that some critics consider tenancy by the entirety obsolete and worthy of extinction, it is important to understand the historical background that promoted the creation of concurrent estates in English common law. By analyzing the historical background of tenancy by the entirety and the other tenancies still in existence, the reader will be able to understand the author's proposition that this tenancy is not obsolete and should remain in existence as a viable alternative for married couples, same-sex couples, and common law marriages.¹¹

Five types of concurrent interests developed throughout the centuries under early common law: (1) joint tenancy, (2) tenancy in coparcenary, (3) tenancy in common, (4) tenancy in partnership, and (5) tenancy by the

10. POWELL, *supra* note 1, § 52.01. The following states and the District of Columbia still recognize tenancy by the entirety in either form: Alaska, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Wyoming. *Id.*

11. *See generally* WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *passim* (1836) (providing an introduction to the history of concurrent interests in English common law).

entirety.¹² Concurrent estates date back to the thirteenth century, when only the oldest forms of concurrent interests, tenancy in coparceny and joint tenancy, were in existence.¹³ Only tenancy in common, joint tenancy, and tenancy by the entirety exist today; tenancy in coparcenary¹⁴ and tenancy in partnership have either been abolished or other options have been created to make them obsolete.¹⁵ A brief explanation of these concurrent interests is

12. See John W. Fisher, II, *If Judgment Creditors Cannot Set Asunder a Debtor Spouse's Interest in the Marital Home, What Can They Do?*, 97 W. VA. L. REV. 339, 342-44 (1995) (describing the history of concurrent estates in early common law and the disappearance of coparcenary and tenancy in partnership).

13. POWELL, *supra* note 1, § 49.01. See BLACKSTONE, *supra* note 11, at 179 (describing these two forms of concurrent interests). The idea of concurrent ownership is very old, stemming from early common law in England. POWELL, *supra* note 1, § 49.01. The law needed to create several legal relationships that contain the concurrent ownership of land because the cooperative acquisition of land was so desirable. *Id.* These legal relationships were created for that purpose. See discussion *infra* Part II (discussing these relationships throughout).

14. POWELL, *supra* note 1, § 50.09. "Tenancy in coparcenary arose when two or more heirs took real property by descent." *Id.* Coparcenary is considered a relic of the past now undistinguishable from tenancy in common. *Id.* This type of interest initially appeared in English common law, along with joint tenancy, by the thirteenth century. John W. Fisher, II, *Creditors of a Joint Tenant: Is There a Lien After Death?*, 99 W. VA. L. REV. 637, 639 (1997) [hereinafter Fisher II]. Even though coparcenary interest could be held by either male or female descendants, it was generally used when there were only female descendants to inherit, as they were not allowed to inherit property under early common law. BLACKSTONE, *supra* note 11, at 187-91.

"Coparceners had an undivided interest in the property which they acquired as female heirs of the owner [when] there were no male heirs of equal degree who survived the owner's death." Fisher II, *supra* note 14, at 639. These female descendants then acquired property by descent under this form of concurrent ownership as undivided interests without the right of survivorship. See POWELL, *supra* note 1, § 50.09 (explaining the concept of the unities that comprised a tenancy in coparcenary). Like joint tenancy, coparcenary was characterized by the unities of time, title, interest, and possession. See Fisher II, *supra* note 14, at 640 (requiring the unities of time, title, interest, and possession to create a tenancy in coparcenary). However, more similar to tenancy in common and contrary to joint tenancy, coparcenary carried no right of survivorship. POWELL, *supra* note 1, § 50.09.

This form of concurrent ownership has been abolished in most jurisdictions, mostly because of the married women's property acts, which provide more property rights to women and allow them to own property in their own right, even separate from her husband. POWELL, *supra* note 1, § 50.09. See discussion *infra* Part III (describing the creation and history of the tenancy in coparcenary). The married women's property acts permitted women not only to acquire property on their own, but also gave women the right to deny the husband's alienation of property during the marriage without her consent. POWELL, *supra* note 1, § 50.09.

15. POWELL, *supra* note 1, § 50.08. Another form of concurrent interest no longer available is the tenancy in partnership. *Id.* Couples holding tenancy in partnership were unable to own land because partnerships were not natural persons. *Id.* Hence, property could only be held by the partners in a form of concurrent ownership similar to a tenancy in common because early common law established that neither the king nor a business entity could be joint tenants of property with a private person. *Id.* Since neither the king nor company could die, they were not considered a person for property purposes. *Id.*

However, after the Uniform Partnership Act was enacted in most jurisdictions, a partnership was able to own property either by itself or concurrently with a natural person or other entity, making this form of interest obsolete. *Id.* A partnership is now permitted to own and alienate any interest in property owned by the business entity. *Id.*

appropriate in order to understand why they were created and how they evolved through the centuries.

A. JOINT TENANCIES AND THE RIGHT OF SURVIVORSHIP

A joint tenancy is created when land or property is held by two or more persons and the interest includes the right of survivorship.¹⁶ To create a joint tenancy the unities of time, title, interest, and possession are essential.¹⁷ The unity of *time* requires the property to be vested to all joint tenants at the same time.¹⁸ Unity of *title* means that all of the joint tenants' estates must be created by the same act and in the same instrument.¹⁹ Unity of *interest* in the property means that none of the joint tenants is entitled to have a different interest than the others.²⁰ The unity of *possession*²¹ was explained by *Blackstone* as including the following:

Joint-tenants [sic] are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*; that is they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.²²

Blackstone's explanation means that only joint tenants have the right to possess the entire interest while also possessing equal fractions of the whole.²³ Originally, joint tenancies could only be created by purchase or grant, and never by a "mere act of law."²⁴ By the fifteenth century it was well established that joint tenancies could not arise, even out of

16. BLACKSTONE, *supra* note 11, at 180.

17. *Id.*

18. *Id.* at 181.

19. *Id.* In most circumstances, this document is a deed. *Id.* at 180.

20. *Id.* at 181.

21. *Id.* at 182.

22. *Id.* (emphasis added). The four unities that comprised the creation of a joint tenancy under early common law are still in existence. See Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 TEX. TECH L. REV. 629, 633 (1985) (stating that to hold a valid joint tenancy, "the co-owners must have identical interests, accruing from one conveyance, commencing at the same moment in time, and held in identical and undivided possession").

23. BLACKSTONE, *supra* note 11, at 182 (explaining that joint tenants possess equal fractions of the whole interest, as compared to tenants in common). See *Powell v. Powell*, 325 B.R. 6, *17 (Bankr. N.D. Ala. 2005) (holding that the rules of creation of a joint tenancy require physically undivided interests in the property as equal fractions of the whole).

24. See THOMAS LYTTLETON, HIS TREATISE OF TENURES 324-36 (W. M'Dowell Printer 1841) (describing the ways in which joint tenancies could be created in early common law).

inheritance.²⁵ Inheritance and acts of law did not create a joint tenancy because all of the four unities were not present at the time of the conveyances. Therefore, under its legal definition, the interest did not exist.²⁶

By the thirteenth century, there was a preference for joint tenancies, and they became the presumed form of concurrent interest.²⁷ Today this presumption has been replaced, primarily by statute, with a presumption favoring tenancies in common unless the instrument contains a clear indication that a right of survivorship is intended by the cotenants.²⁸ For example, in some jurisdictions, words in the deed that purport to grant a “joint tenancy with the right of survivorship” may suffice for the creation of a joint tenancy.²⁹ However, in most jurisdictions, words such as “to A and B as joint tenants” are insufficient to create a joint tenancy.³⁰ Such words are considered sufficient to create a tenancy in common but, because the right of survivorship is not clearly indicated in the instrument, no joint tenancy is formed.³¹

A joint tenancy was originally subject to partition by consent of all of the joint tenants. However, under early common law, partition could not be forced on an unwilling joint tenant.³² In the sixteenth century partition began to be treated as an appropriate remedy for both the willing and unwilling joint tenant. However, English statute required a judicial decision before partition could be forced upon the unwilling joint tenant, compared to the simple procedure followed when consent was provided.³³ Partition is a remedy that is still available today for either joint tenant.³⁴

25. *Id.*

26. BLACKSTONE, *supra* note 11, at 180.

27. *Id.* at 186 n.14. The modern presumption favors tenancies in common, instead of joint tenancies, as the favored form of concurrent interest. *Id.*

28. *See, e.g.*, IND. CODE § 32-17-2-1(c)(1) (2002) (providing for the presumption in favor of tenancies in common, unless the document specifies that a joint tenancy was intended); FLA. STAT. ANN. § 689.15 (2007) (abolishing the joint tenancy presumption in favor of a tenancy in common presumption, unless the instrument specifically provides for the right of survivorship).

29. JESSEE DUKEMINIER & JAMES E. KRIER, PROPERTY 341-42 (5th ed., Aspen Publishers 2002) [hereinafter DUKEMINIER].

30. *See* Spitzer, *supra* note 22, at 632-33 (discussing a brief history of the concurrent interests and providing for several ways in which joint tenancies may be constructed).

31. *Id.*

32. *See id.* at 636 (describing the evolution of some of the joint tenancy incidents of partition); LITTLETON, *supra* note 24, § 283 (describing incidents of partition in joint tenancies).

33. Spitzer, *supra* note 22, at 636 n. 34 and accompanying text.

34. *See* DUKEMINIER, *supra* note 29, at 359 (describing partition as an option for concurrent interest holders, including joint tenants).

B. THE TENANCY IN COMMON: CO-OWNERS WITHOUT THE RIGHT OF SURVIVORSHIP

By the thirteenth century, joint tenancy, tenancy in coparcenary, and tenancy by the entirety were recognized under early common law.³⁵ In the centuries that followed their creation, society's increased desire for cooperative acquisition of real property led to the creation of other forms of concurrent interests as well.³⁶ One of the interests created was the tenancy in common.³⁷ The tenancy in common allows the unity of possession in real property between two or more owners, but lacks the right of survivorship available in other interests.³⁸ The co-owners of a tenancy in common, also called cotenants, share a single right of possession in the estate as a whole.³⁹ Cotenants own a fractional share or undivided interest in the property, and have a right to possess the estate as a whole until division of the estate, or partition, occurs.⁴⁰ Since cotenants may alter their relationship by contract, any tenant in common is free to alienate, mortgage, devise, or lease his or her interest in the property.⁴¹

Originally, voluntary partition without a court's mandate was permitted only when the co-owners owned the property as tenants in common. A court order was necessary before a joint tenant could partition the property from the unwilling joint tenants.⁴² There is no right of survivorship between cotenants under a tenancy in common and, at the death of one cotenant, his portion is distributed to his descendants as part of the estate and not to his cotenant as survivor.⁴³ The tenancy in common is the most used and

35. 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 126-28 (1942). Although these concurrent interests were already recognized by the thirteenth century, the tenancy by the entirety was considered a sub-species of the joint tenancy and may not have been considered a separate tenancy until much later. See BLACKSTONE, *supra* note 11, at 182-83 n.4 (stating that if a joint tenancy was created for husband and wife, husband and wife take one moiety by the entirety, and the husband could not alienate or dispose of it by himself).

36. POWELL, *supra* note 1, § 49.01 (providing a brief historical background of all concurrent interests).

37. *Id.*

38. *Id.* § 50.01 (distinguishing joint tenancies from tenancies in common in that tenancies in common lack the right of survivorship).

39. *Id.*

40. *Id.*

41. See Spitzer, *supra* note 22, at 633 ("Co-tenants [sic] in common can alter the relationship among themselves by contract. A single co-tenant [sic] in common may sell, lease, or mortgage his fractional share to an outsider, without impact on the basic co-tenancy [sic] in common.").

42. BLACKSTONE, *supra* note 11, at 193-94. Partition of a joint tenancy was only permitted by statute, even when there were unwilling joint tenants. See Spitzer, *supra* note 22, at 636 n. 34 and accompanying text (discussing the laws of England that created a joint tenant's statutory right to request partition from the unwilling joint tenant through a judicial decision).

43. See POWELL, *supra* note 1, § 50.01(2) (comparing joint tenancies' right of survivorship with tenancies in common).

most popular form of concurrent interest, and most jurisdictions have a presumption favoring tenancies in common over joint tenancies.⁴⁴ These characteristics of the tenancy in common still exist.⁴⁵

C. TENANCY BY THE ENTIRETY: ASSET PROTECTION AND SURVIVORSHIP RIGHTS

The last form of concurrent interest still in existence, and the most important in this article, is the tenancy by the entirety. In order to understand why some critics believe that this tenancy should be abolished, a brief explanation of what this interest entails, as well as its original characteristics, is appropriate. Furthermore, a brief description of the women's property acts and other legislative developments favoring women's rights in property ownership is included to illustrate the changes that they have brought to the tenancy by the entirety.

At early common law, a tenancy by the entirety was considered a "sub-species of joint tenancy."⁴⁶ It was not considered a separate form of ownership until some time after the thirteenth century.⁴⁷ Because husband and wife were considered one person under the law for purposes of concurrent ownership, the tenancy by the entirety was created to permit concurrent ownership between spouses.⁴⁸ Under the typical joint tenancy, such concurrent ownership was not possible until much later.⁴⁹ To create a tenancy by the entirety, all of the unities of the joint tenancy need to be satisfied,⁵⁰ and the tenants need to be legally married.⁵¹ Spouses hold *per tout et non per my* interest in the property: both spouses hold the entire interest, rather than one-half of the whole.⁵² Although this tenancy was originally created for married couples, some jurisdictions today recognize the tenancy by the

44. See, e.g., FLA. STAT. § 689.115 (2007) (making tenancy by the entirety the presumed form of tenancy when married couples sign mortgages in the state of Florida).

45. *Id.*

46. BLACKSTONE, *supra* note 11, at 181-83.

47. Spitzer, *supra* note 23, at 630-32. "Tenancy by the entirety 'is, in effect, a sub-species of joint tenancy narrowly confined to married couples as co-tenants [sic], and it includes the right of survivorship.'" *Id.* See BLACKSTONE, *supra* note 11, at 181-83 (explaining the creation of the tenancy by the entirety as a sub category of the joint tenancy).

48. POWELL, *supra* note 1, § 52.01[2].

49. *Id.* § 52.01[3].

50. See *supra* notes 18-23 and accompanying text (describing the unities required to create a joint tenancy).

51. See *Robinson v. Robinson*, 651 So. 2d 1271, 1273 (Fla. Dist. Ct. App. 1995) (establishing the five unities necessary to create a tenancy by the entirety in the state of Florida: time, title, interest, possession, and marriage).

52. See *Napotnik v. Equibank & Parkvale Sav. Ass'n.*, 679 F.2d 316, 319 (3d Cir. 1982) (holding that under a tenancy by the entirety, spouses are considered to be seised of an undivided whole and not by a share).

entirety in common law marriages as well, unless the marriage resulted from a bigamous relationship.⁵³ In addition, some jurisdictions also recognize the tenancy by the entirety in other types of quasi marital relationships, such as same-sex partnerships.⁵⁴

Under early common law, the tenancy by the entirety was characterized by the husband's exclusive control over his wife's property, giving his creditors access not only to his own interest, but to the whole property.⁵⁵ The tenancy was created upon the belief that the unity of marriage was personified in the figure of the husband, and that all property was owned and controlled by him, including property owned by the wife before marriage.⁵⁶ The recognition of greater property rights in married women has greatly affected the status of the tenancy by the entirety in many states.⁵⁷ A brief history of these property acts is discussed in the next section.

The enactment of the married women's property acts in most jurisdictions created mutual control of property between spouses, and brought protection to both spouses' interests by denying unilateral creditors access

53. See *Maliska v. Dion*, 62 So. 2d 4, 5 (Fla. 1952) (holding that tenancy by the entirety is not a valid way to hold property concurrently in common law marriages that were based on a bigamous relationship).

54. HAW. REV. STAT. § 509-2 (2007) (permitting any type of concurrent interest in real property, including tenancy by the entirety, to exist in reciprocal beneficiaries, which includes same-sex couples and parent-child relationships). Hawaii is one of the few states that recognizes tenancy by the entirety in common law marriages and other reciprocal beneficiaries, including same-sex partnerships:

Land, or any interest therein, or any other type of property or property rights or interests or interest therein, may be conveyed by a person to oneself and another or others as joint tenants, or by a person to oneself and one's spouse or reciprocal beneficiary, or by spouses to themselves, or by reciprocal beneficiaries to themselves, as tenants by the entirety, or by joint tenants to themselves and another or others as joint tenants, or tenants in common to themselves or to themselves and another or others as joint tenants, or by tenants by the entirety to themselves or themselves and another or others as joint tenants or as tenants in common, or by one tenant by the entirety to the tenant's spouse or reciprocal beneficiary of all of the tenant's interest or interests, without the necessity of conveying through a third party, and each such instrument shall be construed as validly creating a joint tenancy, tenancy by the entirety, tenancy in common, or single ownership, as the case may be, if the tenor of the instrument manifestly indicates such intention.

Id.

55. See POWELL, *supra* note 1, § 52.03[2]-[3] (describing how the advent of women's property rights and the elimination of the husband's control of property affected the husband's creditors' rights upon property, held concurrently between husband and wife).

56. *Id.*

57. *Id.* § 52.01[2].

Through enactment of married women's property acts, every state has abolished this right of exclusive control in the husband. Indeed, either spouse presumptively has the power to act for both, without any authorization from the other, provided that the fruits or proceeds of such action inures to the benefit of both.

Id. § 52.03[2].

to property owned under a tenancy by the entirety.⁵⁸ These statutes also served to protect the wife's interest in the property by prohibiting the husband from alienating, encumbering, or otherwise transacting with the property without the wife's consent.⁵⁹ Before these statutes were enacted, the wife had no authority or control over what her husband could do with her property.⁶⁰ However, after their enactment, some jurisdictions completely abolished the tenancy by the entirety considering it no longer needed, and enacted either community property statutes or homestead laws in their stead.⁶¹

Contrary to joint tenancies, no spouse under a tenancy by the entirety may force partition of the estate.⁶² A tenancy by the entirety may be severed only by agreement of the spouses, a decree of divorce, or the death of one of the spouses.⁶³ Until 2002, not even the federal government could force a partition of property owned by married couples as tenants by the entirety.⁶⁴ Today, the federal government is permitted to attach tax liens to

58. *Id.* § 52.03[3].

The main impact of the shift to mutual control of the property has fallen on creditors of individual spouses. Whereas the husband's exclusive control sometimes resulted in giving his creditors access to his interest, either of income or of his survivorship, the advent of mutual control prompted protection of both spouses' interests and consequent denial of creditor access to either spouse's interest.

Id.

59. *Id.* The married women's property acts provided either spouse with the "power to act for both, without any authorization from the other, provided that the fruits or proceeds of such action inures to the benefit of both." *Id.*

60. *See id.* § 52.03[2] ("At common law, the husband had the right of exclusive control over entirety property, which included the right to possess, convey, and encumber without the wife's consent, but subject to her contingent right of survivorship.").

61. DUKEMINIER, *supra* note 29, at 419-22. The community property system exists in only ten states—Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *Id.* at 419. Under this system, both spouses own each other's earnings equally in undivided shares. *Id.* at 420. Each spouse owns an equal share of all of the property acquired during the marriage. *Id.* Examples of non-community property, considered owned by a spouse separately, include property acquired before marriage and property acquired during marriage either by gift, devise, or descent. *Id.* There is a presumption that all property purchased or possessed during the marriage is community property, unless the couple has stated otherwise. *Id.*

Homestead laws are statutes exempting the individual's homestead from execution or judicial sale for payment of any debt unless all owners, usually husband and wife, have jointly mortgaged the property or otherwise subjected it to creditors' claims. BLACK'S LAW DICTIONARY 323 (2d pocket ed. 1996).

62. The only way to destroy the tenancy is by mutual consent, divorce, or death.

63. *See* POWELL, *supra* note 1, § 52.03 ("Both spouses acting in concert can convey or encumber their tenancy by the entirety, as may one spouse acting as the agent of the other. Neither, acting alone, can do so.").

64. *See* United States v. Craft, 535 U.S. 274, 288 (2002) (holding that property owned under tenancy by the entirety can be attached by a federal tax lien, even when the tax lien is owed by one spouse only); *see also* Colleen M. Feeney, *Lien on Me: After Craft, a Federal Tax Lien Can*

any property, even when that property is owned under this type of interest.⁶⁵ However, in the jurisdictions that follow the traditional version of the tenancy, no other unilateral creditor may attach a lien upon any property held under tenancy by the entirety.⁶⁶

Tenancy by the entirety is still recognized in thirty states.⁶⁷ In these states, there is no uniform law that can characterize this type of interest.⁶⁸ Some states permit a presumption of tenancy by the entirety,⁶⁹ while others allow creation of tenancy by the entirety only by specific words in the instrument.⁷⁰ Some states recognize tenancy by the entirety in real property only, while others recognize this interest in personal property as well.⁷¹ Finally, some jurisdictions permit tenancy by the entirety property to be reached by unilateral creditors, while others do not.⁷² The states are free to approach the tenancy in the manner they consider best for their citizens, and may even abolish it if so desired, as nearly half of the states have already done.⁷³ The result has been that each state has approached the tenancy in

Attach to Tenancy by the Entirety Property, 34 LOY. U. CHI. L.J. 245, 252-90 (2002) (analyzing *Craft*'s effect on tenancy by the entirety property).

65. *See, e.g.*, *Craft*, 535 U.S. at 288 (holding that property owned under tenancies by the entirety can be attached by a federal tax lien upon an individual spouse, even when state law dictates otherwise).

66. However, some jurisdictions do allow such lien or judgment to be attached to tenancy by the entirety property. *See Sawada v. Endo*, 561 P.2d 1291, 1294-95 (Haw. 1977) (describing the four types of tenancies by the entirety recognized throughout the jurisdictions and their main characteristics).

67. *See POWELL, supra* note 1, § 52.01[3] (enumerating the states' positions concerning tenancy by the entirety and how they vary among the jurisdictions); *English v. English*, 63 So. 822, 822-23 (Fla. 1913) (discussing whether tenancies by the entirety are recognized in the state of Florida). *Compare ALASKA STAT.* § 34.15.140(a) (2007) (recognizing tenancy by the entirety by statute), *FLA. STAT.* § 689.115 (2007) (recognizing tenancy by the entirety as the presumptive form of concurrent interest between husband and wife), *and MASS. ANN. LAWS*, ch. 184 § 7 (2007) (recognizing tenancy by the entirety by statute), *with Siberell v. Siberell*, 7 P.2d 1003, 1005 (Cal. 1932) (abolishing joint tenancies and tenancies by the entirety by judicial decision in the state of California because of the state's community property laws).

68. *See POWELL, supra* note 1, § 52.01[3] (stating that legal attitudes towards tenancy by the entirety have varied among the different states that recognize it).

69. *See, e.g.*, *FLA. STAT.* § 689.115 (2007) (establishing a presumption of tenancy by the entirety for mortgages unless the deed specifies that this interest was not intended).

70. *See e.g.*, *ALASKA STAT.* § 34.15.140(a) (2007) (requiring specific words in the deed when creating a tenancy by the entirety to overcome the presumption).

71. *See Beal Bank v. Almand & Assoc.*, 710 So. 2d 608, 612 (Fla. Dist. Ct. App. 1998) (permitting the creation of a tenancy by the entirety in personal property in the state of Florida).

72. *See Sawada v. Endo*, 561 P.2d 1291, 1294-95 (Haw. 1977) (describing the four types of tenancies by the entirety recognized throughout the jurisdictions).

73. *See POWELL, supra* note 1, § 52.01[3] (enumerating the number of states that still recognize tenancies by the entirety and those that do not).

Colorado had previously held that the tenancy by the entirety form of concurrent interest was abolished by judicial decision. However, some Colorado statutes still recognize its existence. *See, e.g.*, *COLO. REV. STAT.* § 15-15-216 (2007) (enacting a statute that does not affect the law of tenancies by the entirety). Furthermore, even though Georgia does not belong within any of the

different ways.⁷⁴ This author proposes that, although these jurisdictional differences provide fuel for the critics of the tenancy by the entirety,⁷⁵ this flexibility is what has preserved the tenancy's existence throughout the centuries.

Notwithstanding the fact that jurisdictions approach the tenancy by the entirety in different ways, this author further proposes that the traditional tenancy by the entirety, followed in most states that recognize the tenancy, is the best alternative for couples owning property under this type of interest. Most jurisdictions should follow this traditional version of the tenancy to better provide asset protection and probate avoidance to citizens. An analysis of the four versions of tenancy by the entirety which exist throughout the United States is needed to understand why the traditional form of the tenancy is the best alternative not only for married couples, but also for common law marriages and same-sex partnerships.

In *Sawada v. Endo*,⁷⁶ the Supreme Court of Hawaii discussed at length the different jurisdictional approaches to the rights of married couples and their individual creditors under tenancy by the entirety.⁷⁷ The *Sawada* court

four groups described by the *Sawada* court, tenancy by the entirety is still mentioned in some of its statutes. *See, e.g.*, GA. CODE ANN. § 14-8-7 (2007) (mentioning tenancy by the entirety in a statute relating to partnerships). However, judicial decisions in Georgia have established that when parties intend to hold property under tenancy by the entirety, a joint tenancy results instead. *Sams v. McDonald*, 160 S.E.2d 594, 597 (Ga. Ct. App. 1968).

74. *See, e.g.*, *Sawada*, 561 P.2d at 1294-95 (enumerating the different types of tenancies by the entirety and the jurisdictions that follow them).

75. *See* POWELL, *supra* note 1, § 52.01[3] (stating that there is no consensus between jurisdictions concerning tenancy by the entirety).

76. 561 P.2d 1291 (Haw. 1997).

77. *Sawada*, 561 P.2d at 1294. In *Sawada*, the Supreme Court of Hawaii reviewed four groups of jurisdictions that still recognize tenancies by the entirety, before deciding to what group Hawaii belonged. *Id.*

In Group I, at the time comprised of Massachusetts, Michigan, and North Carolina, the concurrent estate is basically the common law tenancy by the entirety. *Id.* Under this group, the tenancy is unaffected by the married women's property acts enacted in those states, and any common law assumption that the marriage is personified in the figure of the husband, with him possessing and profiting from the estate, is still a valid presumption. *Id.* *See Pineo v. White*, 70 N.E.2d 294, 297 (Mass. 1946) (holding that a wife may not transfer any interest in the property owned under tenancy by the entirety). In addition, the husband may convey the entire property. However, this right is subject to the wife's surviving the husband and becoming entitled to the whole estate. *See Arrand v. Graham*, 298 N.W. 281, 282 (Mich. 1941) (stating that the husband has rights incident to the property, as per the common law). There are currently no states within this group.

In Group II, the interests of the unilateral debtor in the property can be attached upon his or her individual debts, contingent to the other spouse's survivorship right. *Sawada*, 561 P.2d at 1294. *See Pilip v. United States*, 186 F. Supp. 397, 403 (D. Alaska 1960) (agreeing with jurisdictions that hold that property under tenancy by the entirety can be attached by unilateral creditors, unless the property is the homestead). Alaska, Arkansas, Massachusetts, New Jersey, Mississippi, New York, Ohio, Oklahoma, and Oregon are currently within this group. *Sawada*, 561 P.2d at 1294.

found that the traditional version of the tenancy was the best alternative for the state of Hawaii.⁷⁸ The jurisdictional differences described by the *Sawada* court is proof of the tenancy's flexibility.⁷⁹ In addition, these differences demonstrate that the states have sought to balance the couples' property rights with the rights of their creditors, and that each state has decided what is best for its citizens.⁸⁰ Unfortunately, the protections provided by this tenancy are not available in the jurisdictions that fail to recognize it. The reasoning of these jurisdictions is discussed in further sections of this article.

III. TRADITIONAL PROPERTY RESTRICTIONS ON MARRIED WOMEN AND THE EVOLUTION OF COMMUNITY PROPERTY

To understand why critics believe that the tenancy no longer serves its purpose, it is important to understand some basic traditions surrounding married couples in early common law. It is also important to note how these traditions came to evolve into what is now known as community property and the evolution of property rights. Both concepts revolutionized property law by giving women the same property ownership rights as men.⁸¹ Some critics of the tenancy by the entirety maintain that, because women now have more property rights than when the tenancy was created, this tenancy should be abolished, as it is no longer necessary.⁸² However, it

In Group III, property held under tenancy by the entirety cannot be attached by unilateral creditors, and any unilateral conveyance is invalid. *See* *Hunt v. Covington*, 200 So. 76, 77 (Fla. 1941) (holding that a husband cannot convey property held under tenancy by the entirety without his wife's approval); *Citizens Sav. Bank, Inc. v. Astrin*, 61 A.2d 419, 421 (Del. Super. Ct. 1948) (holding that creditors cannot attach the individual debt on property held under tenancy by the entirety). Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, Missouri, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming belong to this group. *See* *Sawada*, 561 P.2d at 1294 (finding that this is an issue of first impression in Hawaii and deciding to join jurisdictions that presume tenancy by the entirety, and prohibiting unilateral creditors from attaching to property owned under tenancy by the entirety). This group provides the most protection for married couples that hold property under tenancy by the entirety, and is the group most favored by this author.

Finally, in Group IV, there is a contingent right of survivorship on either spouse that is separately alienable by that spouse and attachable by his individual creditors while the couple remains married. *Id.* at 1295. Only Kentucky and Tennessee belong in this group. *See* *Hoffman v. Newell*, 60 S.W.2d 607, 609 (Ky. Ct. App. 1932) (holding that each spouse has a contingent interest in property held under tenancy by the entirety and that this interest is freely alienable by the spouse).

78. *Sawada*, 561 P.2d at 1295-96.

79. *Id.* at 1294-95.

80. *Id.*

81. *See* POWELL, *supra* note 1, § 6.02 (explaining the concepts of dower and curtesy and their evolution into the modern property rights in women).

82. *See* discussion *infra* Part VI and accompanying notes (answering to critics that believe that tenancy by the entirety is obsolete as a form of property ownership).

is important to remember that married women's property rights are not the sole reason for tenancy by the entirety's current existence.⁸³ Today, asset protection and probate avoidance are the most important benefits of owning property under this type of interest.⁸⁴

As early as the thirteenth century, marriage created rights of dower and curtesy.⁸⁵ Dower was defined at common law as the wife's right, upon her husband's death, to a life estate in *one-third* of the land that the husband owned in fee simple.⁸⁶ Curtesy was the husband's right, upon his wife's death, to a life estate in *all* of the land that his wife owned during their marriage, assuming that a child was born alive to the couple.⁸⁷ In addition to dower, it was common for the husband to make other gifts of property or chattels to his wife during this period.⁸⁸ For example, the husband could make a gift of property to his wife by executing a document with her father called "libelum dotis," which specified the nature and extent of the property the husband would give to his wife at the time of their marriage.⁸⁹ Another type of gift was the "morning gift," which consisted of a gift of property or chattels given to the wife on the morning following the wedding.⁹⁰ Although the wife was eventually permitted to alienate the property that was given to her under these two types of "gifts," this was not permitted prior to the thirteenth century.⁹¹

Under the rights provided by dower, the wife was entitled to a life interest in one-third of any real property the husband seized at any time during the marriage, unless the husband specifically endowed her with less just before the marriage.⁹² The wife's interest could not be eliminated by

83. See discussion *infra* Part VI and accompanying notes (enumerating the current advantages of owning property under tenancy by the entirety).

84. *Id.*

85. See POWELL, *supra* note 1, § 6.02 (explaining the concepts of dower and curtesy and their evolution into the modern property rights in women).

86. BLACK'S LAW DICTIONARY 220 (2d pocket ed. 1996).

87. *Id.* at 167.

88. See KENELM E. DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 127-28 (Clarendon Press 1897) (explaining the concepts of dower and curtesy).

89. *Id.* at 128.

90. *Id.*

91. *Id.*

92. See A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 65 (Oxford University Press 1961) (describing the characteristics of dower in third century England); DIGBY, *supra* note 88, at 127 (enumerating the few rights the wife had upon her own property before marriage); SIR FREDERICK POLLOCK, ET AL., THE HISTORY OF ENGLISH LAW 420 (Cambridge Univ. Press 1968) (explaining how the husband could limit the wife's dower to less than one-third of the usual interest conferred by the dower). By the thirteenth century, the property rights of women had evolved from limiting the wife's share of her husband's estate to one-third of all property owned by him, to be entitled to one-third of her husband's estate at the time of the marriage unless her husband endowed her with less at the church's door. *Id.*

divorce and could not be attached by any of her husband's creditors.⁹³ In addition, dower attached to any property owned by the husband at the time of marriage and to any other property the husband acquired at a later time.⁹⁴ If the wife predeceased her husband, the dower was extinguished. If the husband predeceased the wife, the dower became possessory and the wife acquired the right to possess her interest in the husband's property for life.⁹⁵ However, this interest usually entitled her only to the one-third previously mentioned, and not to the estate as a whole. Her right to alienate such property was also restricted, because she only acquired a life estate.⁹⁶

At common law, curtesy consisted of the husband's right, upon his wife's death, to a life estate in the land that his wife owned during their marriage. This right required that a child of the couple was born alive and that "his cry could be heard within the four walls of the house."⁹⁷ The husband's interest consisted of approximately one-half of the wife's property.⁹⁸

Because the husband had the sole right to control the land held by the couple and the land owned by the wife prior to the marriage,⁹⁹ he could convey any property owned by the marriage without the wife's approval. This right was limited only if the property was attached by dower, in which case the husband needed her consent.¹⁰⁰ However, the wife could not convey any property without her husband's approval, even when she owned the property before marriage, unless she granted him an interest less than a life estate.¹⁰¹

Characteristics of dower and curtesy can be seen in the characteristics of the tenancy by the entirety, including the requirement of mutual consent

93. See POWELL, *supra* note 1, § 6.02 (describing the rights to dower and curtesy in English common law).

94. See POLLOCK, *supra* note 92, at 401 (explaining that property was considered part of the "community" or "conquests" of the marriage). Property treated as part of the community of the marriage usually consisted of property acquired before or after the marriage, while property treated as part of the conquests of the marriage consisted of property that the husband and wife acquired during their marriage. *Id.*

95. POWELL, *supra* note 1, § 6.02.

96. *Id.*

97. BLACK'S LAW DICTIONARY 167 (2d pocket ed. 1996). See POLLOCK, *supra* note 92, at 403-04 (explaining that the curtesy right was only available to the husband if the child was born and drew the first breath).

98. See SIMPSON, *supra* note 92, at 66 (explaining that the husband's interest extended to any lands of which the wife had an heritable interest, even land not owned by the marriage).

99. See POWELL, *supra* note 1, § 6.02[1] (explaining how the husband controlled the land held under his wife's name and even sold the property if he wanted).

100. *Id.* See POLLOCK, *supra* note 92, at 325 (describing the husband's limitations to the power of alienation of property, subject to the wife's dower or interest in the property or her approval in the transaction).

101. POLLOCK, *supra*, note 92, at 325.

for transactions upon property held by both spouses, and the prohibition against unilateral conveyances of the property.¹⁰² Such rights were not available upon property held as dower or curtesy until after the thirteenth century.¹⁰³ Notwithstanding that fact, couple's rights upon real property under early common law evolved later into the tenancy by the entirety in a majority of the jurisdictions that still recognize it.¹⁰⁴

Beginning in the nineteenth century, the uniform national judicial recognition of women's property rights resulted in the abolishment of dower and curtesy in most jurisdictions.¹⁰⁵ By abolishing dower and curtesy, states provided more rights to married women and granted them a separate legal existence, permitting married women to alienate their property without their husbands' approval.¹⁰⁶ After the Industrial Revolution and the introduction of women into the workplace, it was approximately a century before the different states would create more property rights in married women.¹⁰⁷ These new property rights included a wife's right to enter into contracts, write wills, and alienate property that she inherited or purchased separate from her husband.¹⁰⁸ By the end of the nineteenth century, most jurisdictions enacted married women's property acts, permitting married women to own property separate from their husbands.¹⁰⁹ The elimination of the restrictions on married women with respect to property ownership has brought other changes in property rights of married couples as well. These changes include the elimination of the tenancy by

102. See POWELL, *supra* note 1, § 52.03 (establishing the characteristics of the tenancy by the entirety).

103. POLLOCK, *supra* note 92, at 403.

104. See POWELL, *supra* note 1, § 52.03 (describing the evolution of the tenancy by the entirety from its beginning in early common law).

105. See *id.* § 6.02[2] (explaining the concepts of dower and curtesy and their evolution into modern property rights in women).

106. See POLLOCK, *supra* note 92, at 325 (detailing the evolution of modern property rights in women).

107. *Id.*

108. See generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, *passim* (1983) (providing a detailed historical perspective of the married women's property acts and the evolution of property rights in married women).

109. POWELL, *supra* note 1, § 52.03. See *People v. Wallace*, 434 N.W.2d 422, 422-23 (Mich. Ct. App. 1988) (explaining how the several married women's property acts enacted in the state abolished the common law rule that impeded women from owning, alienating, devising, or granting her property); *In re Thomas*, 14 B.R. 423, 425 (Bankr. N.D. Ohio 1981) (providing that a tenancy by the entirety is based on equality after the nationwide enactment of the married women's property acts); *Columbian Carbon Co. v. Knight*, 114 A.2d 28, 31 (Md. 1955) (explaining that the married women's property acts protect the wife's property from the control of the husband).

the entirety in approximately half of the states, the creation of homestead protection laws, and the enactment of community property statutes.¹¹⁰

IV. CURRENT HOMESTEAD PROTECTION LAWS AND COMMUNITY PROPERTY STATUTES ARE INEFFECTIVE FOR MOST COUPLES THAT OWN PROPERTY JOINTLY

A majority of states have enacted homestead protection statutes.¹¹¹ These statutes exempt homestead property owned by any person or married couple from attachment by creditors of unsecured debts.¹¹² Most of these statutes also confer a survivorship interest to the surviving spouse, and prohibit any encumbrance and attachment on the property.¹¹³ Those jurisdictions that have abolished the tenancy by the entirety believe that homestead protection laws are sufficient to protect the homestead owned by the married couple.¹¹⁴ However, homestead protection laws provide insufficient protection against individual creditors: they only apply to one property—property that is generally used as the couple’s permanent residence—and do not protect any additional property that the couple may own.¹¹⁵ These homestead statutes are ineffective for married couples, common law spouses, and same-sex partners owning more than one property concurrently, as the rest of their property remains unprotected from individual creditors and the probate process.¹¹⁶

In addition to homestead protection laws, some jurisdictions recognize the right of each spouse to have separate property that cannot be attached to

110. See POWELL, *supra* note 1, § 52.01[3] (enumerating the states that have eliminated the tenancy after the enactment of the married women’s property acts in most of the states).

111. See, e.g., FLA. CONST. art. X, § 4 (stating that the homestead is exempted from judicial sale and for payment to creditors); *Brock Candy Co. v. Elson*, 100 So. 94, 94-95 (Ala. 1924) (holding that a lien created from judgment cannot attach to homestead property); *Spracher v. Spracher*, 17 Alaska 698 (Alaska 1958), available at 1958 WL 2197 at *3 (Alaska 1958) (“[H]omestead protection was created to protect the family from total loss of its abode due to judgments and executions on unsatisfied debts.”).

112. See FLA. CONST. art. X, § 4 (stating that the homestead is not subject to judicial sale or payment to creditors); *Brock Candy Co. v. Elson*, 100 So. 94, 94-95 (Ala. 1924) (holding that a judgment lien cannot attach to the homestead); *Spracher v. Spracher*, 17 Alaska 698 (Alaska 1958), available at 1958 WL 2197 at *3 (Alaska 1958) (“[H]omestead protection was created to protect the family from total loss of its abode due to judgments and executions on unsatisfied debts.”).

113. See *Todok v. Union State Bank*, 281 U.S. 449, 455-56 (1930) (finding that homestead property laws provide special exemptions from execution and forced sale, inhibiting conveyances unless joined by both spouses).

114. See, e.g., CAL. CIV. PROC. CODE § 704.910 (2007) (providing homestead protection on property used as the permanent home of the individual or couple); FLA. CONST. art. X, § 4 (establishing constitutional protection to homestead property).

115. See FLA. CONST. art. X, § 4 (exempting from attachment the homestead property only).

116. See CAL. CIV. PROC. CODE § 704.720 (2007) (allowing only the homestead to be exempt from attachment).

any creditors of the other spouse.¹¹⁷ These are known as community property statutes.¹¹⁸ Although most community property jurisdictions have enacted homestead protection laws, these jurisdictions only protect an innocent spouse's interest, which is treated as separate from the other spouse's interest in community property.¹¹⁹ These laws are ineffective because they do not protect the community property from being sold as a whole to pay creditors, forcing partition of the property upon the unwilling or innocent spouse, which is not permitted under the traditional tenancy by the entirety.¹²⁰ Furthermore, these states do not protect other properties owned by the couple jointly, because they do not recognize the unity created by a tenancy by the entirety, and instead divide all assets and property equally between husband and wife.¹²¹ These laws are not helpful to couples when an individual creditor is trying to attach, garnish, or create a lien upon jointly held property.

Most jurisdictions today favor married couples owning real property by enacting statutes similar to those mentioned above.¹²² Even where the tenancy by the entirety is recognized, the states provide additional protections to those properties, including the aforementioned homestead protections, to protect the family nucleus.¹²³ Tenancy by the entirety is only one of many alternatives provided by the states to protect property owned by married couples.¹²⁴ However, due to the rise of married women's property rights in most, if not all, jurisdictions, the tenancy has been considered obsolete by some legal scholars and commentators, though more than half

117. *See* *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 578 (1979) (defining community property as a system whereby the property owned by husband and wife is common property that belongs to both spouses).

118. *Id.*

119. *See, e.g.,* CAL. CIV. PROC. CODE § 704.720 (2007) (treating one spouse's interest as separate from the other spouse's interest).

120. *See supra* note 78 and accompanying text (explaining the traditional version of the tenancy by the entirety, currently enacted under Group III, according to the *Sawada* court).

121. *Id.*

122. *See id.* (detailing the jurisdictions that have enacted tenancy by the entirety statutes).

123. For example, Florida recognizes tenancy by the entirety and homestead protection laws. *See, e.g.,* FLA. STAT. ANN. § 689.115 (2007) (recognizing tenancy by the entirety and homestead protection laws); MASS. GEN. LAWS ANN. ch. 188, § 1 (2007) (enacting homestead protection statutes preventing conveyance, descent, devise, attachment, levy, or execution of sale, except in limited situations, to protect the homestead of any person, including tenants by the entirety).

124. Jurisdictions have the option of enacting community property statutes, joint tenancy statutes, homestead protection laws, and others, to complement property ownership. *See* ALASKA STAT. § 34.15.140(a) (2007) (recognizing tenancy by the entirety); FLA. STAT. § 689.115 (2007) (recognizing tenancy by the entirety between husband and wife as the presumptive form of concurrent interest); MASS. ANN. LAWS, ch. 184 § 7 (2007) (recognizing tenancy by the entirety); *see also* FLA. CONST. art. X, § 4 (stating that homestead property is exempted from judicial sale and payment to creditors); *Brock Candy Co. v. Elson*, 100 So. 94, 94-95 (Ala. 1924) (holding that a judgment lien cannot attach to the homestead property).

of the jurisdictions still believe in its usefulness.¹²⁵ Critics do not take into account the advantages that tenancy by the entirety provides for married couples wanting to protect their jointly held assets from the probate process and the reach of individual creditors.

V. TENANCY IN COMMON AND JOINT TENANCIES: NO REAL OPTIONS FOR ALL COUPLES¹²⁶

Most critics believe that the tenancy by the entirety should join the tenancy in coparcenary and the tenancy in partnership because of its growing obsolescence.¹²⁷ However, critics are unable to present a better alternative for couples seeking to protect their interests from external creditors seeking to attach a debt to their concurrently owned property.¹²⁸ These critics believe that other protections, such as homestead laws, the married women's property acts, and community property statutes, are sufficient to protect couples' interests in the property.¹²⁹ As this author has previously stated, these options are insufficient to protect couples' property from the reach of individual creditors or the probate process. Aside from the tenancy by the entirety, the only other alternatives for those couples are the tenancy in common and the joint tenancy, used together with, or in lieu of, homestead protection laws and community property statutes.¹³⁰ However, owning property under these types of interests does not fully protect the couples' assets from being attached by unilateral creditors, and does not protect

125. See Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 423-24 (2001) (proposing modernization of concurrent ownership of real property, enumerating the flaws and inadequacies of the current methods of concurrent interests, and arguing that tenancy by the entirety should be abolished in every state).

126. This author refers to couples as including married couples, common law marriages, and same-sex partnerships.

127. See discussion tenancies by the entirety *infra* notes 131-37 and accompanying text (enumerating the main criticisms of the tenancy by the entirety).

128. See generally Carrozzo, *supra* note 125, at 423-24 (criticizing tenancy by the entirety as a relic of the past that has not evolved nor provided any usefulness to today's relationships); John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U. L. REV. 35, 47-49 (1997) (explaining the historical context that created the tenancy by the entirety from early common law and the difficult questions that have not been resolved by its continued presence).

129. See Carrozzo, *supra* note 125, at 465 (advocating the elimination of tenancy by the entirety and application of joint tenancies instead, to provide greater protection for all couples).

130. See *supra* notes 112-22 and accompanying text (describing the ineffectiveness of other concurrent interests in providing protections not found in tenancies by the entirety). These alternatives are used in states that either recognize tenancies by the entirety and enact homestead laws to supplement the tenancy, or do not recognize the tenancy but provide homestead protection to its citizens. See *id.* (detailing the alternatives available to couples in states that do not recognize the tenancy by the entirety).

against unilateral severance of the tenancy as the tenancy by the entirety accomplishes.¹³¹

Although both tenancy in common and joint tenancy have existed for as long as the tenancy by the entirety, each interest possesses a different set of characteristics which confirm this author's proposition that neither the tenancy in common nor the joint tenancy is the best alternative for married couples, common law spouses, or same-sex partners. No couple can reap as much benefit from a tenancy in common or joint tenancy as they can with the tenancy by the entirety, because couples may want to protect their assets from individual creditors and individual severance, as was available under early common law,¹³² and because these tenancies were not originally created with such couples in mind.

A. TENANCIES IN COMMON: NO RIGHT OF SURVIVORSHIP

The tenancy in common is the least advantageous form of concurrent interest for married couples, common law spouses, and same-sex partners owning property jointly. Tenancies in common may be severed at any time by either cotenant and do not provide any survivorship rights.¹³³ Tenancies in common are useless for couples seeking to protect their property from outside creditors and individual conveyances, while also avoiding the probate process. This tenancy is not the best alternative for asset protection, as either cotenant can unilaterally sever the tenancy by alienating, devising, or assigning his or her interest in the property, even without the other cotenant's knowledge or consent.

A tenancy in common is automatically created between two or more persons owning property concurrently unless the instrument specifies that the interest includes the right of survivorship. In this case a joint tenancy or, if appropriate, a tenancy by the entirety is created.¹³⁴ Although couples may own property as tenants in common if they desire, couples usually prefer to own property as tenants by the entirety or joint tenants, because

131. See Carrozzo, *supra* note 125, at 426-27 (citing 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 4 (1995)) (demonstrating that unilateral severance is possible under joint tenancy as long as the intent to sever is present).

132. Tenancies by the entirety and joint tenancies were already in existence under early common law. By the sixteenth century, tenancy in common was already recognized by the courts. See generally BLACKSTONE, *supra* note 11, *passim* (describing the characteristics of the tenancy by the entirety).

133. See *Dieden v. Schmidt*, 128 Cal. Rptr. 2d 365, 369 (Cal. Ct. App. 2002) (holding that there are no rights of survivorship in a tenancy in common, and each tenant may pass his or her interest in the property to his or her heirs and devisees).

134. See *Dixon v. Davis*, 155 So. 2d 189, 191 (Fla. Dist. Ct. App. 1963) (permitting the creation of tenancy in common in husband and wife if the document specifies the intent of this tenancy).

the right of survivorship is more attractive for probate avoidance reasons.¹³⁵ Since tenancies in common do not protect property against individual creditors and do not provide survivorship rights, they are not a good option for couples wanting to own property jointly and with the right of survivorship.¹³⁶ At any moment a spouse's interest may be attached to any judgment, lien, debt, or other financial responsibility that the other spouse may have, which would sever the tenancy.¹³⁷ Furthermore, a cotenant may be forced to partition the property at any time, even without the other's consent or knowledge.¹³⁸

B. JOINT TENANCY: AN EASILY DESTROYED TENANCY

Joint tenancy, the other favored concurrent interest utilized by married couples, is also ineffective for several reasons.¹³⁹ In a joint tenancy, each joint tenant has the right to unilaterally sever the tenancy without the other's knowledge or consent.¹⁴⁰ This presents opportunities for fraud and other actions adverse to the other tenant's survivorship rights.¹⁴¹ Such unilateral transactions are not valid when a couple owns property as tenants by the entirety, as any unilateral conveyance is rendered invalid, and there are few ways to destroy this tenancy.¹⁴²

The readily available opportunities for unilateral severance of joint tenancies present several problems for couples, as the right of survivorship is one of the most important and attractive aspects of owning property jointly.¹⁴³ As long as the couple remains together, property held under tenancy

135. Spitzer, *supra* note 22, at 634. Survivorship rights are an aspect of joint tenancies, which have led to their use as a substitute for testamentary devise. *Id.*

136. POWELL, *supra* note 1, § 50.01. Property held under tenancy in common may be freely alienated, severed, partitioned, or devised. *Id.*

137. *See* Spitzer, *supra* note 22, at 633 (explaining the ways in which a tenancy in common may be severed).

138. *See id.* (describing the ways in which tenancy in common can be severed through the partition method).

139. *See* POWELL, *supra* note 1, § 51.04 (describing the ways in which joint tenancies are easily severed, partitioned, and terminated).

140. *Id.*

141. *Id.* Although the right of survivorship is part of a joint tenancy, it is not a property interest, but rather a mere expectancy incident to joint tenancy ownership. *Id.*

142. *See* discussion *supra* Part II.C (describing the main characteristics of the tenancy by the entirety).

143. *See* Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 *FORDHAM L. REV.* 173, 176 (1986) (describing the ways in which joint tenancies can be severed). In his article, Professor Fetters maintains that most couples take title as joint tenants or as tenants by the entirety because of the right of survivorship available to them with these two types of interests. *Id.* In addition, he maintains that most couples believe that nothing can affect their survivorship rights absent their consent. *Id.* at 177 (citing *Burke v. Stevens*, 70 Cal. Rptr. 87, 90 (Cal. Ct. App. 1968)). This is not necessarily true. *See*

by the entirety is presumed to be protected not only from the actions of individual creditors, but also from the actions of the other tenants.¹⁴⁴ When couples own property under tenancy by the entirety, the possibility of losing part of their interest and the survivorship rights through the unilateral actions of the other tenant need not be contemplated.¹⁴⁵ However, these characteristics are not available when couples own property as joint tenants. Thus, joint tenancies are ineffective ways of owning property jointly.¹⁴⁶

Some critics argue that joint tenancies provide survivorship rights similar to those of tenancies by the entirety, and that joint tenancies are an efficient way for married couples to hold property jointly.¹⁴⁷ Though the joint tenancy is the most popular form of concurrent interest among all types of cotenants,¹⁴⁸ it is ineffective for married couples in several ways.¹⁴⁹ For example, any joint tenant may unilaterally sever the tenancy without the other tenant's knowledge or consent.¹⁵⁰ A unilateral severance of the joint tenancy destroys the right of survivorship and the tenancy itself, converting the joint tenancy into a tenancy in common, which is a totally different tenancy from that which was originally created.¹⁵¹ When joint tenants are married or have an otherwise long-term relationship, they would usually prefer that their property be protected and not severable unless they divorce, separate, or one of the tenants dies. Thus, the fact that severance converts

DUKEMINIER, *supra* note 29, at 343 (“[J]oint tenancies are popular . . . because a joint tenancy is the practical equivalent of a will[,] but at the joint tenant’s death probate of the property is avoided.”).

144. See POWELL, *supra* note 1, § 52.03 (describing the characteristics of a tenancy by the entirety, and noting that such property cannot be partitioned or conveyed by the unilateral act of either spouse).

145. See *id.* (listing the ways that tenancy by the entirety can be terminated: release or joint conveyance, divorce, or death or incompetence of one of the spouses).

146. See generally *supra* Part II.A and accompanying notes (providing a detailed description of the characteristics of joint tenancies, compared to tenancies by the entirety).

147. See Carozzo, *supra* note 125, at 464-65 (advocating for tenancy by the entirety’s elimination and substitution with joint tenancy).

148. Joint tenancy is the most used concurrent interest in jurisdictions that do not recognize tenancy by the entirety. See Fetters, *supra* note 143, *passim* (describing joint tenancies).

149. See, e.g., Fetters, *supra* note 143, at 173-74 (“Joint tenancy is the most popular form of spousal residential property ownership in the United States. Indeed, it is safe to say that millions of land titles representing billions of dollars of capital investment are held in joint tenancy in this country. Yet these titles are seriously flawed.”).

150. *Id.* at 174 n.2.

Several rules of law relating to joint tenancy ownership of real property, to conveyancing, and to the recording of deeds, all well-established and salutary in their own right, can be used in combination by one joint tenant to assure his own survivorship right while defeating the survivorship right of his spouse. In other words, one joint tenant, while secure in his own survivorship right, can defraud his cotenant of his survivorship right with impunity.

Id. at 174-75.

151. *Id.*

the tenancy into a tenancy in common is of special importance.¹⁵² Furthermore, joint tenants may sever the tenancy by forcing partition at any time, which cannot be done under a tenancy by the entirety unless the parties divorce.¹⁵³ Any joint tenant's debt may be attached to the property, successfully severing the joint tenancy even when the other joint tenant is not involved with creditors.¹⁵⁴ This severance will not only turn a joint tenancy into a tenancy in common, but will destroy the precious right of survivorship shared by the joint tenants.¹⁵⁵

With respect to Harry and Wanda, the married couple in our hypothetical: if their property is located in a jurisdiction where the tenancy by the entirety is not recognized, the creditors may attach the judgment to the couple's property.¹⁵⁶ In addition, if the jurisdiction considers Harry and Wanda to be joint tenants with rights of survivorship and not tenants in common, as would be the case in California, the state will permit attachment and severance of the tenancy by either a creditor or by the individual tenants.¹⁵⁷ In this example, not only will Harry lose his interest in the property, but to satisfy the judgment against him, the court may authorize the creditors to sell his interest in the property. Wanda, as joint tenant with Harry, will lose her right of survivorship and will receive only her one-half interest in the property, if one-half of the interest remains, after it is sold.¹⁵⁸ The same scenario and outcome can be applied to all couples,

152. See *Napotnik v. Equibank & Parkvale Sav. Ass'n*, 679 F.2d 316, 319 (3d Cir. 1982) (“[U]ntil the end of the marriage (by divorce or death of one spouse), neither spouse may compel partition nor sever the entirety property by a unilateral conveyance nor affect the survivorship interest of the other spouse.”); see also *DUKEMINIER supra* note 29, at 343 (stating that joint tenancies are popular because they are the practical equivalent of a will, but at one of the joint tenant's death probate of the property is avoided).

153. See *POWELL, supra* note 1, § 51.01 (explaining the characteristics of a joint tenancy).

154. See *E. Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 A.2d 367, 370 (Md. 1969) (holding that once a judgment has been executed against one joint tenant, the judgment attaches to the tenant's interest in the property, severing the joint tenancy).

155. See *DUKEMINIER, supra* note 29, at 340 (explaining that once a joint tenancy is severed, all four unities cease to exist and a tenancy in common is created). Tenancies in common carry no right of survivorship. *Id.*

156. See, e.g., *Musker v. Gil Haskins Auto Leasing*, 500 P.2d 635, 638 (Ariz. Ct. App. 1972) (holding that a creditor can garnish the husband's interest held in joint tenancy, as a state that does not recognize the tenancy by the entirety form of interest). In *Musker*, the Court of Appeals held that a creditor could garnish the husband's interest in a bank account held as joint tenants with his wife because, when husband and wife own property as joint tenants, each owns his or her respective interest as separate property. *Id.*

157. See, e.g., CAL. CIV. CODE § 682 (Deering 2007) (abolishing tenancy by the entirety in California, while also excluding the tenancy from the enumerated types of property ownership recognized in the state); see also CAL. CIV. CODE § 683 (Deering 2007) (defining a joint interest as property ownership by, among others, husband and wife).

158. See *Reddy v. Gonzalez*, 10 Cal. Rptr. 2d 55, 56-57 (Cal. Ct. App. 1992) (holding that judgment liens attach to dwellings, even when they are potentially subject to a homestead

common law marriages, and same-sex partnerships that own property by joint tenancy. Couples are only protected in these jurisdictions if the concurrently owned property is the couple's homestead. However, if the property is used only as a rental, investment, or other secondary property, Harry and Wanda will most likely lose their whole interest in the property.

On the other hand, if the property is located in a state in which a presumption of tenancy by the entirety exists, and in which the property will be protected against unilateral creditors, the state will not permit the creditors to attach the judgment to the property, and the property will remain intact.¹⁵⁹ These jurisdictions will protect Harry and Wanda's right of survivorship, so long as the tenancy was not created to defraud their creditors.¹⁶⁰ For example, if Harry and Wanda's property is in Florida, a state which follows the traditional version of the tenancy by the entirety, Harry's individual creditors cannot attach their judgment against the property. Thus, both Harry and Wanda's interests in the property will be protected and retained, as severance of the tenancy will not be permitted.¹⁶¹

Furthermore, a joint tenancy is less stable than a tenancy by the entirety.¹⁶² Under a tenancy by the entirety, the couple is assured that his or her interest will remain stable and untouched unless: (1) both of the parties agree; (2) the tenants divorce or separate; (3) a federal tax lien attaches to the property; or (4) one of the tenants dies.¹⁶³ When the couple owns property as joint tenants, their interests are unstable because their property rights may be unilaterally destroyed whenever either of the joint tenants desires.¹⁶⁴ Adding to this instability, the destruction of a joint tenancy may

exemption and judgment creditors may obtain a court-ordered sale of such dwellings to satisfy the judgments).

159. *See, e.g.*, FLA. STAT. § 689.115 (2005) (allowing a presumption of tenancy by the entirety on mortgages in the state of Florida).

160. *See id.* (creating a presumption of tenancy by the entirety in married couples, unless the transaction is performed to defraud creditors).

161. *See* State Dep't of Commerce v. Lowery, 333 So. 2d 495, 496 (Fla. Dist. Ct. App. 1976) (stating that so long as the property is held under tenancy by the entirety, a judgment or lien against only one spouse cannot attach to property owned by both spouses). However, in *United States v. Craft*, the Supreme Court allowed a federal tax lien to attach to a tenancy by the entirety when only one spouse owed the tax, making it likely that any federal judgment or lien will attach to the same property. *United States v. Craft*, 535 U.S. 274, 288 (2002).

162. *Compare* discussion *supra* Part II.A (describing joint tenancy), *with* discussion *supra* Part II.C (describing tenancy by the entirety).

163. *See* discussion *supra* Part II.C (discussing tenancy by the entirety); *Craft*, 535 U.S. at 288 (holding that a federal tax lien will attach to the husband's interest in a tenancy by the entirety).

164. Fetters, *supra* note 143, at 176.

Spouses who take title to their property as joint tenants assure themselves not only of survivorship rights in their property but also of the right of either spouse to destroy those rights unilaterally. In other words, either spouse can terminate his own and his spouse's survivorship right without the other's consent or knowledge. If either spouse

even be performed in secret, presenting opportunities for fraudulent transactions against the other joint tenant's interest.¹⁶⁵

For example, suppose Harry and Wanda own the property as joint tenants with rights of survivorship rather than as tenants by the entirety. Wanda, without Harry's knowledge, conveys her interest in the property to Charlie, her son from a previous marriage. As there is no requirement for recording a severance deed in most jurisdictions, Wanda decides not to record the conveyance.¹⁶⁶ Assume that Wanda does not record it because she intends to destroy the deed if Harry dies first, thereby retaining her survivorship rights and becoming sole owner of the property as if the previous severance had never occurred. However, Wanda intends to destroy Harry's survivorship rights if she dies first by signing the severance document and destroying the joint tenancy, thus making her son a tenant in common with Harry.¹⁶⁷

It may surprise the reader to learn that most couples owning property as joint tenants truly believe that they are guaranteed an absolute and inviolate survivorship right, so long as they both own the property.¹⁶⁸ This is not true.¹⁶⁹ Most couples owning property as joint tenants believe that a joint tenancy has the typical characteristics of a tenancy by the entirety.¹⁷⁰ Professor Samuel Fetters maintains that this is mostly due to the

effects a secret severance without recording his severance instrument, he has, whether he realizes it or not, created a situation in which he can terminate the survivorship right of his spouse while retaining his own.

Id.

165. *Id.* at 179 (noting that there are no statutory requirements for recordation of transactions severing joint tenancies, presenting opportunities for a joint tenant to create a fraudulent transaction merely by signing an unrecorded deed, which destroys the other joint tenant's survivorship right while preserving his or her own survivorship right).

166. *See id.* at 187 ("No state recording statute requires recordation prior to the grantor's death. For that matter, there is no requirement that the deed be recorded at all."); *Carmack v. Place*, 535 P.2d 197, 198 (Colo. 1975) (holding that failure to record a deed severing a joint tenancy has no effect upon an otherwise valid conveyance).

167. *See* Robert W. Swenson & Ronan E. Degan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 468 (1953-1954) (explaining that the purchaser of owner B's interest in a joint tenancy takes as a tenant in common with owner A, because two of the four unities necessary to create a joint tenancy are not present at the time of the transaction).

168. Fetters, *supra* note 143, at 177.

169. *See id.* at 177-78 ("[Joint tenants] probably believe, at least for the time being, that they are assured of absolute and inviolate survivorship rights so long as they own their property. Their expectations could not be more wrong, their ignorance more profound.").

170. *Id.* Because the inviolate right of survivorship is available only in properties held by the entirety (unless the parties divorce, die, or otherwise agree), most people believe that a joint tenancy is basically a tenancy by the entirety. *See* Fetters, *supra* note 143, at 147-48 (describing how most individuals believe joint tenancies have the same characteristics as tenancies by the entirety).

misinformation that couples receive from uninformed realtors and attorneys.¹⁷¹

For example, in *Burke v. Stevens*,¹⁷² a wife executed a power of attorney severing a joint tenancy before her death and left a will devising all of her property to her two sons.¹⁷³ After her death, her husband brought suit to quiet title upon the property, alleging that his wife's sons claimed an interest in the property that did not exist because he, as husband and joint tenant, had a right of survivorship in the property.¹⁷⁴ *Burke* arose in California, a state that does not recognize tenancy by the entirety, and where a conveyance between husband and wife, which includes the right of survivorship, is presumed to create a joint tenancy.¹⁷⁵ The *Burke* court held that although the transaction between the wife and her sons was made in secret and may have been ethically questionable, a joint tenant has the right to sever the tenancy without proper notice to the other joint tenant and without recording the document.¹⁷⁶ Thus, the court held that the husband was not entitled to the property as a whole and was now a tenant in common with his wife's sons.¹⁷⁷

This case demonstrates the inefficiency of joint tenancies, which makes them less favorable for couples owning property jointly. First, Mrs. Burke's actions were made with the intention that, if her husband died before her, the severance of the tenancy would be ignored as though it had never occurred.¹⁷⁸ After destroying the severance document, she would be entitled to the whole property as the surviving joint tenant.¹⁷⁹ Although the

171. *Id.* at 177.

How the general public comes to “learn” of joint tenancy ownership, I do not know. I suspect that most purchasers of family residence property receive their introductory law course on joint tenancy titles from their real estate agent who also assists them in executing a standard form purchase offer, a standard form contract of sale and even assists them in drafting the language of joint tenancy title to be included in their grantor's deed. I also suspect that most attorneys involved in real estate closings rarely inform purchasers of the implications of holding title to property as joint tenants. The attorney's role is usually limited to preparing and inspecting the deed and seeing to its proper execution at the closing.

Id.

172. 70 Cal. Rptr. 87 (Cal. Ct. App. 1968).

173. *Burke*, 70 Cal. Rptr. at 89-90.

174. *Id.* at 88.

175. *Id.* at 91.

176. *See id.* (“It was unnecessary in connection with the execution of such a deed that there should be notification to the other joint tenant and unnecessary that the deed be recorded; neither acknowledgment or recordation is necessary.”).

177. *See id.* (“The deed passed immediate title to Mr. Moran, and when he in turn deeded the same interest in the land to Mrs. Burke, that deed was also effective.”).

178. *Id.*

179. *Id.*

court found that the transaction was morally questionable, the court held that, under state law, this type of transaction was a valid way to sever a joint tenancy.¹⁸⁰

These are only a few examples of how couples may be adversely affected by owning property under concurrent interests other than tenancy by the entirety. No matter how obsolete the tenancy by the entirety may appear to its critics, this type of interest provides advantages to couples that are not available under any other concurrent interest. For example, if *Burke* had occurred in a jurisdiction that followed the traditional form of tenancy by the entirety, this type of unilateral transaction would have been prohibited.¹⁸¹

The following section will address the criticisms concerning the tenancy by the entirety's obsolescence and future. This author will compare the criticisms with the advantages provided by this tenancy to further demonstrate that the traditional form of the tenancy by the entirety is the best alternative for married couples, common law marriages, and same-sex partnerships owning property jointly.

VI. TENANCY BY THE ENTIRETY: ANSWER TO THE CRITICS

Most critics maintain that the tenancy by the entirety should be abolished, altered, or limited in every state where it is currently in use.¹⁸² Alternatively, these critics argue that the tenancy by the entirety should be made available to everyone, including unmarried persons, because it is unfair to allow such benefits to married couples while not making it available to any other group of persons seeking to own property jointly.¹⁸³ Professor Orth proposes the following:

Today, no discussion of the tenancy by the entirety would be complete without addressing one final question: Why is the tenancy by the entirety still limited to married persons? The unity now produced by matrimony is, after all, considerably attenuated in practice as well as in theory, and there are pairs today that function as couples but that are not, for one reason or another, legally united. Why should the law—to use fashionable jargon—“privilege” one relationship above others? No combination of

180. *Id.* at 91-92.

181. *See, e.g.*, *State Dep't of Commerce v. Lowery*, 333 So. 2d 495, 496 (Fla. Dist. Ct. App. 1976) (holding that a unilateral lien does not attach to property held under tenancy by the entirety).

182. *See* Orth, *supra* note 128, at 47-48 (encouraging the abolishment of tenancy by the entirety in all of the states where it is currently recognized).

183. *Id.*

joint tenancy or tenancy in common plus contracts not to partition and to make a will can give the unmarried couple all the benefits automatically conferred on spouses holding property as tenants by the entirety. . . . Should unmarried persons ever be allowed the benefits of the tenancy by the entirety (perhaps calling it by some other name), it would only add a new twist to the estate's already strange career. Having survived the earthquake of the married women's property acts (at least in some states), the tenancy by the entirety could probably survive the shock.¹⁸⁴

Although this author agrees with Professor Orth's position that the tenancy should be made available to others, it is this author's contention that it should only be made available to married couples, same-sex partners, and common law marriages, as these are the only quasi-matrimonial relationships currently in existence. The special and advantageous characteristics of the tenancy by the entirety should protect these relationships only because they are similar to the matrimonial relationship, and thus need the same protection that married couples currently possess.

In addition, Professor Peter Carrozzo articulates the criticisms of the tenancy by the entirety and why it should be abolished, altered, or changed into a more "equitable tenancy."¹⁸⁵ He states the following:

In the last fifty years, radical changes have taken place in the concept of relationships and the definition of family. With the emergence of same-sex relationships and cohabiting heterosexual couples, the idea of a family as a husband, wife and child as depicted in numerous television shows and appliance advertisements from the 1950s . . . certainly is becoming just one type of family among numerous options.¹⁸⁶

Though Professor Carrozzo would like to make the tenancy more equitable, he does not provide a valid solution to the current problems that he alleges the tenancy possesses.¹⁸⁷ It is this author's contention that no such changes

184. *Id.*

185. Carrozzo, *supra* note 125, at 459.

186. *Id.* at 446.

187. *See id.* at 465 (criticizing tenancies by the entirety and how the tenancy is not broadly available to others).

Creating a new and more equitable tenancy will *not* remedy the injustices prevalent in a system that affords numerous marital benefits to those few that fall under the traditional definition of a married couple. Nor will it counteract any intolerance for these individuals who feel that they are as much a family as any husband and wife. Other aspects of the law will continue to deny rights to all of the groups discussed throughout the course of this Article.

Id. (emphasis added).

are merited, because the tenancy functions well in the jurisdictions that recognize it.

Although both professors raise important points concerning the tenancy by the entirety, they also believe that the tenancy should be abolished.¹⁸⁸ This author disagrees with the critics on that point, as ownership under this tenancy still provides great benefits to couples including asset protection, probate avoidance, and protection against unilateral severance. In addition, this author disagrees with Professor Orth's argument for expansion of the tenancy to make it available to all individuals, as only quasi-matrimonial relationships, similar to marriage, should be entitled to the protections currently possessed by married couples.

Most couples need asset protection against unilateral conveyances and unilateral creditors, due to the permanent aspect of their relationship. Since marriage is entered as a long-term relationship, it is important for married couples to protect their assets by owning property jointly in a way that prevents unilateral partition or unilateral attachment to creditors' debt. Common law marriages and same-sex partners that have the same long-term relationship as married couples should also be allowed to take advantage of the tenancy by the entirety to protect their assets from unilateral conveyances and unilateral creditors in the same way as married couples. However, unmarried individuals owning property outside of any type of permanent relationship do not need the asset protection available to married couples and mutual beneficiaries, because most of this property is later devised, divided, sold, or otherwise encumbered as they wish.

Some jurisdictions already permit ownership of property under tenancy by the entirety in common law marriages, and one jurisdiction already permits this tenancy to exist in same-sex relationships.¹⁸⁹ In these jurisdictions, these types of permanent relationships between unmarried couples are as protected as marriage with regard to unilateral severance, probate avoidance, and unilateral attachment.¹⁹⁰ It will surprise the reader to learn that these two jurisdictions follow the traditional version of the tenancy.¹⁹¹

188. *Id.* at 455-57. See Orth, *supra* note 128, at 47-48 (explaining the historical context that created the tenancy by the entirety and the questions that have not been resolved by its continued presence).

189. See *Maliska v. Dion*, 62 So. 2d 4, 5 (Fla. 1952) (arguing against tenancy by the entirety's validity in common law marriages based on a bigamous relationship); HAW. REV. STAT. § 509-2 (2005) (permitting any type of concurrent interest in real property, including tenancy by the entirety, to exist for reciprocal beneficiaries, which include same-sex couples and parent-child relationships).

190. See HAW. REV. STAT. § 509-2 (providing the same protections that tenancies by the entirety provide to common law marriages).

191. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977).

Other jurisdictions should follow the example of these states and permit these types of relationships to own property as tenants by the entirety, just as married couples currently do.

Furthermore, some critics maintain that the tenancy is no longer useful and should be abolished; it has not evolved while property rights in women and property ownership have evolved.¹⁹² Professor Orth states:

Over the years, the common-law marital estate has evolved into its present shape. The legal existence of married women and their capacity to handle their own property has everywhere been recognized. The unfairness inherent in a male-dominated tenancy has also now been eliminated; insofar as interest and possession are concerned, the tenancy by the entirety is today indistinguishable from the joint tenancy In practice, however, the real estate that is protected is usually the marital residence, often compensating for a miserly homestead exemption.¹⁹³

As stated by Professor Orth, one of the main criticisms of the tenancy by the entirety is that it looks more like a joint tenancy than the original tenancy by the entirety ever appeared.¹⁹⁴ Although Professor Orth argues that the tenancy should be abolished because it is now practically indistinguishable from a joint tenancy, most jurisdictions still recognize the traditional form of the tenancy by the entirety, which has characteristics that are very different from those of the joint tenancy.¹⁹⁵ The fact that property owned under tenancy by the entirety is protected from unilateral creditors and unilateral conveyances is one of the main reasons that most married couples, common law spouses, and same-sex partners would prefer the tenancy by the entirety over a joint tenancy. That is also one of the main differences between these two tenancies.¹⁹⁶

Furthermore, just because the marital residence, which is usually the property protected under the tenancy by the entirety, is also protected by homestead protection laws does not negate the current usefulness of the

192. See, e.g., Carozzo, *supra* note 125, at 446 (criticizing tenancy by the entirety as a relic of the past that has not evolved nor provided any usefulness to today's relationships); Orth, *supra* note 129, at 47-48 (explaining the history of the tenancy by the entirety and the difficult questions that have not been resolved).

193. Orth, *supra* note 128, at 48.

194. See *id.* (describing how the tenancy by the entirety has been considered, since its origins, a sub-species of joint tenancy and a severalty rather than a concurrent interest).

195. See, e.g., *Sawada*, 561 P.2d at 1294-95 (listing the jurisdictions that follow the tenancy by the entirety form of interest).

196. Compare POWELL, *supra* note 1, § 51.01 (describing the characteristics of a joint tenancy), with POWELL, *supra* note 1, § 52.01 (describing the characteristics of the tenancy by the entirety).

tenancy. Joint tenancies will not protect any other property owned by the couple as the tenancy by the entirety does, neither will the homestead laws of the state.¹⁹⁷ All other properties owned by the couple as investment properties would not fall within the homestead exception, and therefore could be partially attached by unilateral creditors unless those properties are owned under the traditional tenancy by the entirety.¹⁹⁸

Some critics believe that the tenancy by the entirety does not provide the “easy escape hatch” that is currently provided to joint tenants in the form of partition or alienation of the property.¹⁹⁹ These critics believe that such an “escape hatch” should be available to any couple that desires to sever the tenancy by the entirety, because they may wish to have separate interests in their property.²⁰⁰ However, the so-called “escape hatch” is generally not necessary for married couples, common law spouses, or same-sex partners. These relationships are presumed to be of longer duration, and the couples generally prefer to own property jointly for tax, probate, and other purposes. The fact that properties owned under tenancy by the entirety cannot be unilaterally alienated or partitioned is one of the most important advantages of this tenancy, as most couples prefer to avoid situations that would put their joint interest in jeopardy.²⁰¹ As married couples generally have other ways to sever the tenancy, either by joint agreement or divorce, there is no use for the “escape hatch” mentioned by the critics, so long as the parties intend to remain together. Finally, if the couple prefers to own property separate from each other, the tenancy by the entirety states will allow them to do so, so long as that is their intent.

Other critics argue that current judicial decisions confuse and complicate the application of tenancy by the entirety, creating the need for improvisations of the traditional version of the tenancy.²⁰² For example, states did not recognize the creation of a tenancy by the entirety when a husband deeded property, which he initially owned individually, to himself and his wife.²⁰³ This was also prohibited under a joint tenancy.²⁰⁴ One of

197. Fetters, *supra* note 143, at 177-78.

198. *Id.*

199. *See* Orth, *supra* note 128, at 44 (criticizing tenancy by the entirety because of the absence of an “escape hatch” that is provided by the joint tenancy).

200. *Id.*

201. *See* POWELL, *supra* note 1, § 52.03 (describing the characteristics of the tenancy by the entirety, including the non-divisibility of the estate and the right of survivorship).

202. *See* Orth, *supra* note 128, at 46 (describing several judicial improvisations with respect to unilateral conveyances between husband and wife as part of the tenancy by the entirety doctrine).

203. *See* Dolley v. Powers, 89 N.E.2d 412, 414-15 (Ill. 1949) (holding that under the law, a joint tenancy cannot be created when the unities are not present at the time of conveyance).

204. POWELL, *supra* note 1, § 51 01[3].

the main reasons for this general rule was that, to create a tenancy by the entirety, the five unities of time, title, interest, possession, and marriage were required at the time of conveyance.²⁰⁵ Since at the time of conveyance one spouse already owned the property purportedly being transferred to both as tenants by the entirety, the unities were not met and the transaction could not exist.

Most jurisdictions today will recognize formation of a tenancy by the entirety whenever one spouse grants the property to him or herself and the other spouse without the use of a straw man.²⁰⁶ Rather than an improvisation or judicial creation, this type of transaction is only one of the many flexibilities that courts have permitted to couples when the couples wish to own property as tenants by the entirety. These transactions are made to facilitate the intent of the parties, especially the married couple that wants to own property currently held by one spouse individually as tenants by the entirety. Since a straw man is no longer necessary for joint tenancy transactions, it should not be required for tenancy by the entirety.²⁰⁷ This flexibility should not be considered confusing or creative, because it is only part of the evolution of these types of interests.

Another criticism of the tenancy by the entirety concerns the unilateral creditors' rights upon the property.²⁰⁸ Under a joint tenancy, unilateral creditors may force partition of the tenancy in order to attach their debt to the joint tenants' interest in the property.²⁰⁹ However, under the traditional tenancy by the entirety, unilateral creditors are not permitted to sever the tenancy.²¹⁰ Most critics believe that this is the biggest flaw of the tenancy by the entirety, because the tenancy denies attachment of creditors' rights based on a false belief that marriage is a unity of two becoming one.²¹¹ However, one of the original characteristics of the tenancy by the entirety is the non-divisibility of the estate, either by unilateral conveyance or

205. *See* *Robinson v. Robinson*, 651 So. 2d 1271, 1273 (Fla. Dist. Ct. App. 1995) (establishing the five unities necessary to create a tenancy by the entirety in the state of Florida: time, title, interest, possession, and marriage).

206. *See* *Orth*, *supra* note 128, at 46 (criticizing the fact that a large majority of jurisdictions allow such improvisations, and stating that such manipulation signals the demise of the tenancy).

207. *Id.*

208. *See id.* (comparing creditors' rights in a joint tenant's interest in the property, with the protection that tenancy by the entirety property provides against unilateral creditors).

209. *See* *DUKEMINIER*, *supra* note 29, at 359 (describing partition as an option for concurrent interest holders, including joint tenants).

210. *See id.* (describing the tenancy by the entirety form of interest).

211. *See* *Orth*, *supra* note 128, at 46 (stating that the traditional justification for tenancy by the entirety is rooted in the notion of spousal unity, and that the unity is a fallacy requiring "Alice-in-Wonderland logic" to explain how one person under the law really means two).

unilateral creditor.²¹² The non-divisibility of the tenancy by the entirety estate is not a flaw of the tenancy, but rather is its main distinction from the joint tenancy and, as this author maintains, is its most important advantage.

The final issue that critics would like jurisdictions to address is the treatment of tenancy by the entirety property in bankruptcy proceedings.²¹³ Many critics believe that the tenancy by the entirety provides opportunities for a tenant to lie to his or her creditors and hide assets under the tenancy blanket during bankruptcy proceedings.²¹⁴ Some jurisdictions already provide property law protections to bankruptcy proceedings that involve property owned under tenancy by the entirety.²¹⁵ The general rule followed in bankruptcy proceedings is that properties owned as tenants by the entirety are exempt from the process unless both parties file for bankruptcy.²¹⁶ However, if both spouses file for bankruptcy separately to defraud creditors, the courts will join the bankruptcies and divide the property between the creditors to prevent fraud.²¹⁷ Since the courts have been able to discern which owners of property held under tenancy by the entirety are trying to defraud creditors in bankruptcy proceedings, this author maintains that there is no need to address the tenancy by the entirety interest as a separate issue in bankruptcy proceedings.²¹⁸

VII. RECOMMENDATIONS

This section presents several recommendations that jurisdictions may follow when determining whether to extend the tenancy by the entirety to common law marriages, same-sex partnerships, or to any other quasi-marital relationship. Some of these recommendations may also be applied in jurisdictions that do not recognize the tenancy by the entirety doctrine.

212. See *Robinson v. Robinson*, 651 So. 2d 1271, 1273 (Fla. Dist. Ct. App. 1995) (establishing the five unities necessary to create a tenancy by the entirety in the state of Florida).

213. See, e.g., Julio E. Castro III, *Florida's Treatment of Entirety Property: Do Unsecured Joint Creditors Lose the Benefit of Their Bargain or Achieve a Higher Status Than Specifically Provided by the Bankruptcy Code?*, 45 FLA. L. REV. 275, 275-99 (1993) (analyzing the state of Florida's treatment of property owned under tenancy by the entirety as bankruptcy proceedings).

214. See, e.g., Carozzo, *supra* note 125, at 456 (criticizing tenancy by the entirety); Orth, *supra* note 128, at 47-48 (explaining the history of the tenancy by the entirety).

215. Castro, *supra* note 213, at 276.

216. In re Wetzler, 192 B.R. 109, 116-17 (Bankr. D. Md. 1996).

217. See *id.* at 117 (holding that a debtor and his wife cannot foil a creditor's joint claim against them by filing separate bankruptcy cases).

218. See *Sawada v. Endo*, 561 P.2d 1291, 1297 (Haw. 1977) (holding that debtors cannot use tenancy by the entirety to defraud creditors). In *Sawada*, the plaintiffs alleged that defendant sold the property because of their pending tort lawsuit. *Id.* at 1293. The court held that, although the creation of a tenancy by the entirety cannot be used as a device to defraud creditors, the plaintiffs did not prove that the defendants sold the property for this reason, and held that the sale of the property was not made in order to defraud his creditors. *Id.* at 1297.

Tenancy by the entirety should be made available to some unmarried couples, among them couples from common law marriages and same-sex partnerships. Society has changed since the thirteenth century and these relationships are quasi-matrimonial in nature, so jurisdictions should start recognizing that common law marriages and same-sex partnerships are similar to married couples with respect to the tenancy by the entirety doctrine. The jurisdictions should define the unity of marriage as including these two types of relationships, among similar others, to permit these mutual beneficiaries to obtain the benefits of the tenancy that married couples already possess.

There are several factors for jurisdictions to consider when determining whether to allow these types of relationships to benefit from the tenancy. First, the length of the relationship is very important. Jurisdictions should set a specific period of time which will serve as a cut-off line for quasi-matrimonial couples seeking to own property as tenants by the entirety. For example, jurisdictions could allow common law spouses and same-sex partners to own property under tenancy by the entirety if they have been living together for more than three years. By setting a specific timeframe as a cutoff period, it will be easier for an attorney creating a property transaction for these individuals to determine whether the tenancy by the entirety is an option for them.

Second, joint property ownership can also be a requisite, or at least an important factor when determining whether the couple satisfies the definition of “mutual beneficiary” for tenancy by the entirety purposes.²¹⁹ If a couple wishes to own property as tenants by the entirety and they already own property together as joint tenants or tenants in common, the permanency of their relationship is easier to prove. Having this requirement will provide couples with an easy means to prove that their relationship is permanent, or at least is of long-term duration, making this type of tenancy available to them.

Third, in the states that allow taxes to be filed jointly by mutual beneficiaries, a requirement may be created concerning joint tax returns. If a couple, in either a common law marriage or a same-sex partnership, is already filing taxes jointly, this may become a determinative factor for whether the couple may own property as tenants by the entirety. This requirement will be easier for common law spouses to satisfy, as some states already recognize the existence of common law marriages. On the other hand, this requirement may be difficult for same-sex relationships, as

219. This author uses the term “mutual beneficiaries” to include both common law marriages and same-sex partnerships.

it depends upon whether the jurisdiction allows them to file taxes jointly. This requirement may be ignored for couples that are unable to file joint taxes, or may be disregarded altogether as a requirement.

A fourth factor to take into consideration is whether the couple has any children between them. Having children, either natural or adopted, further demonstrates the permanency of the relationship and whether the couple will be benefited by owning property as tenants by the entirety. However, since not all couples may be able to have or even want children, this should be considered a factor and not a requirement for property ownership purposes.

Finally, only these mutual beneficiaries should be allowed to own property under tenancy by the entirety. This interest should not be made available to other individuals that do not have a long-term relationship. Tenancy by the entirety provides maximum asset protection to its tenants, and should be allowed only to those that need this type of protection the most: married couples, common law marriages, and same-sex partnerships. Jurisdictions should establish a length of time that is required for these types of relationships to be considered “couples” for purposes of the tenancy. These jurisdictions should substitute the unity of marriage for the unity of the relationship, based on the length of the relationship as previously mentioned, or based on some other important factor.

As this author has previously mentioned, the tenancy by the entirety should not be abolished in those jurisdictions that currently recognize it. Tenancy by the entirety provides the best asset protection available to married couples in comparison to tenancies in common and joint tenancies. Instead of abolishing this useful tenancy, expanding it to couples is the best way to take advantage of this existing tenancy.

VIII. CONCLUSION

The current tenancy by the entirety contains different characteristics than the tenancy of thirteenth century England. Apart from the non-divisibility of the estate and its position against unilateral conveyances and unilateral alienation of the estate, some jurisdictions that recognize the tenancy have changed its characteristics over time. The fact that the tenancy by the entirety has changed over time is not a disadvantage that should convey its demise, but rather reflects a shift in society’s attitudes towards ownership of property under this interest.²²⁰

220. See N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 582 (1965-1966) (stating that the basic tenets of property law change over time to reflect shifts in society’s attitude toward property ownership).

Since approximately half of the states still recognize that tenancy by the entirety is one of the many options a couple has to own real property jointly, the tenancy is alive and well, and should not be abolished as some critics would prefer. Those jurisdictions that do not recognize the tenancy by the entirety should provide some means of protection against unilateral severance of a joint tenancy, and the unilateral destruction of the joint tenant's survivorship rights in order to provide all couples within those jurisdictions the same protection that tenancy by the entirety provides.

Tenancy by the entirety is not a relic of the past and is not an antiquated form of property ownership. It has changed over time and is still changing today. By increasing the types of tenants that can take advantage of the tenancy to include common law marriages and same-sex partnerships, the jurisdictions can protect these individuals against unilateral severance and unilateral creditors, protection that is not currently available to them under any existing concurrent interest.

There is no better alternative for couples to own property jointly than the traditional form of the tenancy by the entirety. Tenancies in common and joint tenancies do not provide the same advantages as tenancies by the entirety. Only by allowing this tenancy to continue to exist and extending it to other long-term relationships such as common law marriages and same-sex partnerships, will it continue to provide an alternative for couples to own property jointly without fear that an action, either by creditors or tenants, will destroy the tenancy.