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Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors

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TENANCY BY THE ENTIRETY AS AN ASSET SHIELD: AN UNJUSTIFIED SAFE HAVEN FOR DELINQUENT CHILD SUPPORT OBLIGORS¹

I. INTRODUCTION

In February of 1993, President Clinton summarized the federal government's position on the country's child support crisis as follows:

We need tougher child support enforcement. An estimated 15 million children have parents who could pay child support but don't. We need to make sure that they do. Parents owe billions of dollars in child support that is unpaid—money that could go a long way toward cutting the welfare rolls and lifting single parents out of poverty, and money that could go a long way toward helping us control government expenditures and reducing that debt. . . . I've said it before because it's the simple truth: governments don't raise children, people do. And even people who aren't around ought to do their part to raise the children they bring into this world.²

Despite the nation's growing intolerance, millions of parents disregard their child support obligation. Some of these parents legally frustrate child support collection attempts through use of a method of owning property unique to married couples and currently recognized by at least twenty-five states,³ known as the tenancy by the entirety.⁴ The entirety concept of concurrent ownership provides the couple with the security of knowing that their property will remain part of the marital estate unless they both decide otherwise.⁵ The couple's interests in the property are virtually unobtainable by third-parties and cannot be

1. In 1989, 88% of all custodial parents were women. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 52, table 69 (1991). Thus, the vast majority of child support obligors were men. Therefore, this note will use the masculine pronoun when referring to delinquent child support obligors and the feminine pronoun when referring to custodial parents. The gender usage herein is meant only to reflect these statistics. Nothing further should be inferred.

2. OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT REPORT, Vol. XV, No. 3 (March 1993) at 1 (quoting President Clinton's address to the National Governor's Association Mid-Winter Meeting, Feb. 2, 1993).

3. See *infra* note 207 and accompanying text.

4. For a description of the tenancy by the entirety and a discussion of its characteristics, see *infra* text accompanying notes 177-238.

5. See *infra* notes 186-89 and accompanying text.

altered or diminished by their individual actions.⁶ This untouchable nature of the entireties estate is a result of a common law notion conceived centuries ago.⁷ While the tenancy's inviolability to third-parties is obviously beneficial to married couples, the effects of this inviolability can result in serious inequities.⁸ The following is an example of one of these side-effects and demonstrates a context where recognition of the estate's common law characteristics is particularly indefensible.

After Julie and Alex Bellwood's contested divorce, Julie received custody of the couple's young children, Madison and Vicky.⁹ The court granted Alex visitation rights and ordered him to pay sixty-five dollars per week in child support. Alex honored the support order for approximately six months then, without notice to Julie, he suddenly disappeared. After several weeks of contacting Alex's friends and relatives, Julie learned that he had moved to Marathon, Florida. She wrote Alex several times asking him to comply with the court-ordered child support. Her letters went unanswered. Finally, approximately one year after the divorce, Julie gambled the small amount of money she had available and hired an attorney, who initiated contempt proceedings.¹⁰

The DeKalb Circuit Court in Indiana found Alex in contempt and ordered him to pay approximately \$2500 in child support arrears. Julie then attempted to enforce the judgment by hiring yet another attorney in Monroe County, Florida, to seek a garnishment of Alex's wages and attachment of his property. Unfortunately, Alex had moved again and could not be located.

6. For instance, in most states that recognize the tenancy by the entirety, if one spouse fails to repay a loan, the creditor cannot seek repayment by attaching a lien to the entireties property and forcing its sale. For purposes of repayment of an individual debt, it is as if the entireties property did not exist as a marital asset. See *infra* note 223 and accompanying text.

7. The precise origin of the tenancy by the entirety is unknown. See *infra* text accompanying notes 177-83.

8. The inviolability of the tenancy by the entirety frustrates creditors seeking to collect a tenant's debts. See *infra* text accompanying notes 222-28. It is often an obstacle in bankruptcy proceedings. See *infra* text accompanying notes 232-38. It permits delinquent taxpayers to avoid the Internal Revenue Service's powerful collection methods. See *infra* note 278 and accompanying text. It can undermine the policies of federal drug forfeiture laws. See *infra* notes 283-335 and accompanying text. In each of these situations, the tenancy by the entirety is an obstacle, from the third-party's viewpoint, to a fair and equitable resolution of the dispute.

9. The case study of the introduction to this note is real. The events occurred in the mid-1980s. The information was provided by attorney Allen R. Stout [hereinafter STOUT—CASE STUDY], a general practitioner in Angola, Indiana, and the inspiration for this note. Mr. Stout agreed to provide the factual details of this example; however, the names have been changed to protect the confidentiality of the parties involved.

10. The Sheriff's Department of Monroe County, Florida, served Alex with a copy of the contempt petition and directed him to appear before the DeKalb Circuit Court in Indiana; he was not present at the hearing. STOUT—CASE STUDY, *supra* note 9.

Julie's Indiana attorney hired a private investigator to locate Alex and determine both his employment status and the extent of his assets. The investigator determined that Alex was re-married, was working as a musician on a cruise ship, lived in a home valued at approximately \$250,000, and owned a forty-foot boat and two cars.¹¹ Meanwhile, Alex's child support arrearage had increased to nearly \$7000 because of his continued nonpayment. Julie had incurred roughly \$2000 in legal expenses,¹² and Madison and Vicky had gone without Alex's support for over two years. Although Alex's wages could be garnished, it would take more than one year before Madison and Vicky were paid the support owed to them.¹³ Julie's arrearage judgment could not be immediately satisfied because none of Alex's property could be reached. This is because he had purchased and held title to all of his property as tenants by the entirety with his new wife.

The foregoing example is representative of the frustration faced by custodial parents across the country.¹⁴ The only obstacle to Julie's immediate satisfaction of her valid arrearage judgment was the fact that Alex placed his assets in a tenancy by the entirety with his second wife. Interestingly, had Alex purchased this property with his new spouse as tenants in common or joint tenants,¹⁵ Julie's arrearage judgment could have been satisfied.¹⁶ The only difference between the way Alex and his second wife possessed their assets and

11. The investigator also found that Alex made a substantial profit by charging tourists for rides on his boat. The investigator could not determine how much, if any, of this income was reported to the Internal Revenue Service. STOUT—CASE STUDY, *supra* note 9.

12. The Rules of Ethics in Indiana, and in many other states, prohibit attorneys from accepting domestic relations cases on a contingency fee basis. See, e.g., *Barelli v. Levin*, 247 N.E.2d 847 (Ind. Ct. App. 1969); *Hill v. Hill*, 415 So. 2d 20 (Fla. 1982); *Thompson v. Thompson*, 319 S.E.2d 315 (N.C. Ct. App. 1984). See generally *Wenona Y. Whitfield, Where the Wind Blows: Fee Shifting in Domestic Relations Cases*, 14 FLA. ST. U. L. REV. 811 (1987).

13. Only a portion of Alex's salary could be applied toward his arrearage. STOUT—CASE STUDY, *supra* note 9. See *infra* note 115 and accompanying text for an explanation of the mechanics of wage garnishment.

14. For an estimation of the frequency with which the tenancy by the entirety precludes immediate recovery of child support arrearages, see *infra* text accompanying notes 244-51.

15. For an explanation of the various methods of concurrent ownership, see *infra* note 185 and accompanying text.

16. Alex did not pay more to enjoy the protection afforded by the entireties method of concurrent ownership. He did not encounter additional legal complexities or file special documents with the court or recorder's office. Alex's purchases undoubtedly occurred without the assistance of an attorney. Indeed, Alex may have been completely unaware of the precise manner in which he and his wife shared ownership of the property.

Many married couples, even those in the legal profession, have absolutely no idea which method of concurrent ownership governs their property. Many couples probably believe that their property is either owned by one spouse, because that spouse's name is on the deed, or both spouses, because both names are on the deed. If both names are on the deed, then most couples probably assume that they own the property "together." Undoubtedly, the nuances of "togetherness" are often unexplored.

the other methods of concurrent ownership was the language of their deeds.¹⁷ Consequently, Julie's attorney was faced with the unpleasant task of explaining that Julie's children must recycle last year's school clothes because of the way the law treats a sentence in the deeds of their father's house and forty-foot pleasure boat. Stated another way, the law permitted Alex to avoid immediate repayment of court-ordered child support by choosing to hold his property by the entirety with his new wife.

Not only does the outcome of Julie's case seem exceedingly unfair, well established public policy mandates a different result.¹⁸ Federal and state legislatures have enacted a litany of statutes seeking to ensure that child support payments are consistently made and, if not, at least are collected.¹⁹ In addition, private organizations have emerged across the country to supplement governmental efforts.²⁰ Nevertheless, billions of dollars in child support remain uncollected at the end of each year.²¹ The reasons for the national default rate are numerous.²² This Note proposes to eliminate one of them: tenancy by the entirety as an asset shield.

This Note's proposal for removing the tenancy by the entirety obstacle to child support collection is straightforward. Although significant differences exist,²³ the custodial parent with an arrearage judgment against her²⁴ former

17. The precise language required to create the various concurrent estates varies significantly from jurisdiction to jurisdiction. As a general illustration, the deeds may read as follows:

- Tenants in common: *Grantor grants to Husband and Wife, as tenants in common, in equal shares. AM. JUR. LEGAL FORMS 2D Cotenancy and Joint Ownership § 75:61 (1989).*
- Joint tenants: *Grantor grants to Husband and Wife, as joint tenants, and not as tenants in common, with full right of survivorship. Id. § 75:21.*
- Tenants by the entirety: *Grantor grants to Husband and Wife, and to the survivor, as tenants by the entirety, and not as tenants in common or joint tenants. AM. JUR. LEGAL FORMS 2D Husband and Wife § 139:115 (1985).*

18. See *supra* note 2 and accompanying text.

19. See *infra* text accompanying notes 86-161.

20. Several for-profit organizations, such as Find Dads, Inc., have a toll-free number, charge no application fee, and keep a percentage of whatever they collect from the delinquent obligers.

21. See *infra* text accompanying notes 82-85.

22. Among them are: the defects in current child support legislation, see *infra* text accompanying notes 132-53, 156-61; the nature of the weekly child support obligation itself, see *infra* text accompanying notes 163-64; and the physical, mental, and financial condition of the child support obligor, see *infra* text accompanying notes 166-70.

23. Indeed, these differences justify the creation of an exception to the entirety estate's insulation from creditors. See *infra* text accompanying notes 56-74.

24. See *supra* note 1 for an explanation of gender usage. The feminine pronoun will not be footnoted in the remainder of this note.

spouse is in a position most closely analogous to a judgment creditor.²⁵ This Note's proposed approach to tenancy by the entirety would change the custodial parent's position. Because of the special nature of the child support obligation, this Note argues that the antiquated notions supporting the impervious characteristics of the entireties estate should yield when a tenant fails to support his²⁶ children from a previous marriage. Under this proposal,²⁷ Julie would be able to obtain a court order forcing a public sale of Alex's property. The proceeds of the sale would be divided between Alex's new wife and Julie for the benefit of Madison and Vicky.²⁸ In sum, the existence of an arrearage judgment against an entireties tenant would convert the entireties estate into a tenancy in common for the purpose of satisfying the judgment.

The proposition of giving a tenancy by the entirety the legal effect of a tenancy in common for the narrow purpose of satisfying a child support arrearage may seem relatively uncontroversial at first glance. However, it necessarily treads on the ancient ground of American property law.²⁹ As a result, its justification must be firmly based on sound policy and reasoning.

This Note seeks to accomplish that task by first providing an overview of the nation's child support crisis in Section II.³⁰ Section II will further explain the social and legal significance of the parent-child relationship, the effects of failure to honor the parental support obligation accompanying the relationship, and the alarming rate at which noncustodial parents neglect their obligations. Section III will discuss the governmental and judicial attempts to address the child support problem, and their various shortcomings.³¹ Section IV will discuss the tenancy by the entirety method of property ownership.³² This section will explain the history of the tenancy, its common law incidents, and the current status of the estate, emphasizing its asset-shielding characteristics. After discussing the unique characteristics of the modern entireties estate, Section IV will attempt to estimate the estate's contribution to the child support

25. In the context of Julie's case, Julie was in no better position to collect Alex's support arrearage through attachment and sale of his entireties property than Alex's credit card company would have been had he failed to make his monthly payments. Neither Julie nor the credit card company could force a sale of the property in order to satisfy Alex's financial obligation.

26. See *supra* note 1 for an explanation of gender usage. The masculine pronoun will not be footnoted in the remainder of this note.

27. See *infra* text accompanying notes 339-49.

28. Of course, the proceeds of the sale subject to division would only include the difference between the estimated fair market value of the property and the amount owed to third parties with an interest in the property. See *infra* text accompanying notes 359-61.

29. See *infra* text accompanying notes 177-83.

30. See *infra* text accompanying notes 37-85.

31. See *infra* text accompanying notes 86-176.

32. See *infra* text accompanying notes 177-258.

crisis discussed in Section II.³³ As a means of establishing precedent for the proposed modification of the entirety estate's inviolability to third parties, Section V will briefly discuss how the similar inviolability of state homestead exemptions can be overcome by the federal government's interest in collecting taxes.³⁴ The remainder of Section V will explore the government's ability to "pierce" the entirety estate through federal civil forfeiture laws.³⁵ Finally, Section VI offers a statute that permits satisfaction of arrearage judgments through the forced sale of entirety property.³⁶ This section will conclude with an analysis of the policies supporting and opposing a child support exception to the tenancy's judgment-proof incidents.

II. THE CRISIS OF CHILD SUPPORT NONCOLLECTION

A. *The Unique Parental Obligation to Provide Child Support*

The relationship between parents and children is unique in many respects.³⁷ A fundamental concept of the relationship, entrenched in society's attitude toward family life,³⁸ is the parents' responsibility to provide for the needs of their children.³⁹ Almost 100 years ago, Sir William Blackstone concluded that this obligation derives from natural law, given to parents not only

33. See *infra* text accompanying notes 244-51.

34. See *infra* text accompanying notes 259-82.

35. See *infra* text accompanying notes 283-335.

36. See *infra* text accompanying notes 339-86.

37. Obviously, the parent-child relationship is a special, non-voluntary familial relationship, resulting from the creation of life. The act of procreation has been described as "at once one of the most selfish and selfless phenomena" because it simultaneously satisfies the human ego's desire for immortality and results in a relationship that often leads to years of parental sacrifice for the benefit of the child. Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1264 (1990).

The depth of a parent's natural concern for the well-being of his or her children is manifest even in the subconscious. One author reported, "The distinguishing trait of all nightmares is that the dreamer is endangered. Parents are the exception: they dream their babies are in trouble." *Id.* at 1265 (citing Sharon Begley, *The Stuff That Dreams Are Made Of*, NEWSWEEK, Aug. 14, 1989, at 41, 43).

38. Paul G. Haskell, *The Power of Disinheritance: Proposal For Reform*, 52 GEO. L.J. 499, 500 (1964). Professor Haskell emphatically suggests that child care is a parental obligation which is woven deeply into the fabric of our society. *Id.* He argues: "If it were suggested that [legal enforcement of] such duties [was] improper, . . . it is doubtful that one would attract a following except from among the dissolute and the depraved. Such is the moral sensitivity of our society." *Id.*

39. JOSEPH I. LIEBERMAN, *CHILD SUPPORT IN AMERICA; PRACTICAL ADVICE FOR NEGOTIATING—AND COLLECTING—A FAIR SETTLEMENT* at xi (1986) (citing Blackstone as suggesting that the parental obligation to provide child care was "so fundamental that it was part of the natural law, the instinctive order of existence").

by nature itself, but by their own act of reproduction.⁴⁰ Blackstone observed that parents “would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish.”⁴¹ Nature, however, is not alone in the crusade to urge compliance with the mandate to provide child care. The legal system is a powerful ally.

In the context of the traditional family unit,⁴² the significance of the parental obligation is reflected generally in the laws of intestacy⁴³ and neglect.⁴⁴ Parents clearly have the right to bear children,⁴⁵ but with that right comes the obligation to care for those children⁴⁶ and, among other things, the requirement that parents provide for their children’s educational needs.⁴⁷ When the traditional family terminates in divorce, however, legal mandates to honor

40. 1 WILLIAM BLACKSTONE, COMMENTARIES *447.

41. *Id.*

42. The traditional family, consisting of two parents living with children, is rapidly becoming a rare phenomenon. In 1990, only 26% of all households fit the traditional family definition. MONTHLY NEWS FROM THE U.S. BUREAU OF THE CENSUS, *Census and You*, Vol. 26, No. 2 (Feb. 1991) at 3. This figure compares with 31% in 1980 and 40% in 1970. *Id.*

43. Batts, *supra* note 37, at 1218. In approximately 20 jurisdictions in the United States, the bond between parent and child, and its imposition of a parental support obligation, to some degree supplants individual testamentary freedom. *Id.* at 1213-14. In jurisdictions following a family maintenance system, dependent children can seek judicial intervention if they are excluded from their parents’ wills. *Id.*

Natural law theorists justified the presumption that, upon death, the property of the deceased should be distributed among family members rather than returning to the common pool by reasoning that such a presumption is “of nature.” HUGO GROTIUS, *DE JURE BELLI AC PACIS, LIBRI TRES* 265, 269 (Francis W. Kelsel trans., 1925). Diordorus Siculus astutely observed that “[n]ature is the best teacher of all animate beings as regards the preservation not only of themselves but also of their offspring, to the end that as a result of this affection for kin the stock by uninterrupted succession may complete the circle of eternity.” *Id.* at 270.

44. All states have enacted statutes to protect children from parental neglect, ill-treatment, and abuse. 42 AM. JUR. 2D *Infants* § 16 (1969). These statutes provide for the removal of the neglected children from their present custodian, punishment of the offender, or both. *Id.* Furthermore, courts have agreed that, in an appropriate case, the state may interfere with the parent-child relationship to insure that the child obtains proper medical treatment, where the child’s life or health is endangered and the parent has unreasonably refused to allow such treatment on religious grounds or otherwise. *See, e.g.,* *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769 (Ill.), *cert. denied*, 344 U.S. 824 (1952); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947).

45. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) (affirming the right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” recognized in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

46. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasizing that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”).

47. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that parents have a natural duty to provide their children with an education suitable to the family’s station in life).

the parental support obligation become far more persuasive.⁴⁸

After divorce, the noncustodial parent's principal means of providing for his children is through child support payments. The nature of the parent-child relationship provides a substantial justification for the unique rules of law governing the enforcement of child support orders.⁴⁹ Unlike other financial obligations, noncustodial parents usually cannot avoid child support through the use of a personal contract.⁵⁰ Further, unlike other financial transactions, including alimony and spousal maintenance,⁵¹ child support payments are not taxable as income to the recipient⁵² and a tax deduction is not allowed to the payor.⁵³ Child support arrearages, unlike many other personal debts, are not dischargeable in bankruptcy.⁵⁴ Most remarkable, however, is that child support noncompliance, unlike nonpayment of any other debt, can result in incarceration.⁵⁵ While the parent-child relationship justifies the parental obligation to provide support, the effects of noncompliance with that obligation justify extraordinary treatment by the law.

B. The Effects of Child Support Nonpayment on Children and Mothers

When a debtor fails to make regular payments on a mortgage or credit card, the creditor can simply impose a penalty or increase the rates for its other customers.⁵⁶ In the long run, the creditor usually recoups the loss. In

48. See *infra* text accompanying notes 89-161.

49. Much of the incentive for strong child support enforcement laws is derived from the government's desire to avoid assuming the financial responsibility of child care. See *infra* text accompanying notes 105-10.

50. The Uniform Marital Property Act prohibits marital property agreements which adversely affect the right of a child to support. UNIF. MARITAL PROP. ACT, 9A U.L.A. 121 § 10(b) (1987); Patrick N. Parkinson, *Who Needs The Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677, 679 (1987).

51. I.R.C. § 215 (1991).

52. *Id.* § 71.

53. *Id.*

54. 11 U.S.C. § 523(a)(5) (1994). The only exception to discharge that applies to both Chapter 7 bankruptcy and non-hardship Chapter 13 bankruptcy is the exception for alimony, maintenance, and support. See 11 U.S.C. § 1328(a) (1994); James H. Gold, *The Dischargeability of Divorce Obligations Under the Bankruptcy Code: Five Faulty Premises in the Application of Section 523(a)(5)*, 39 CASE. W. RES. L. REV. 455, 456 (1988-89).

55. In most states, non-support is a misdemeanor. IRA M. ELLMAN ET AL., FAMILY LAW 418 (2d ed. 1991). In the remaining states, the maximum incarceration is typically three years. *Id.* For a discussion of civil and criminal contempt, see *infra* text accompanying notes 154-61.

56. State law generally enforces contract provisions entitling a creditor to the payment and accrual of a higher interest rate upon a debtor's default. See Melanie Rovner Cohen et al., *Entitlement of Secured Creditors to Default Interest Rates Under Bankruptcy Code Sections 506(b) and 1124*, 45 BUS. LAW. 415 (1989). A default interest rate provision may not be enforceable if the rate is extraordinarily high. See, e.g., CAL. CIV. CODE § 1670.5 (West 1985) (prohibiting

contrast, the intended recipients of child support cannot spread the loss, and the resulting injury is often permanent. Although noncompliance by the obligor affects us all,⁵⁷ dependent children and their mothers experience particularized and continuing injury when obligors fail to pay child support.

Children of delinquent obligors suffer financially, socially, academically, and psychologically.⁵⁸ The direct economic impact of nonsupport on children is obvious—they become poorer.⁵⁹ Less obvious are the related noneconomic consequences.⁶⁰ Lower “income” often forces mothers to relocate to lower cost housing.⁶¹ The move separates the children from their friends and classmates, thereby eliminating a much needed source of support and stability.⁶² The child’s loss of a solid social structure, coupled with the sense of abandonment from the obligor’s apparent disregard for the child’s well-being,⁶³ can lead to both behavioral problems and decreased academic performance.⁶⁴ Finally, the dependent family’s reduced “income” often

unconscionable rates); N.Y. GEN. OBLIG. LAW § 5-501 (McKinney 1989) (explaining that interest cannot be usurious).

57. Simply put, when the obligor disregards his obligation, the taxpayers, through government programs, are forced to assume it. See *infra* text accompanying notes 105-10.

58. LIEBERMAN, *supra* note 39, at 24.

59. *Id.* at 22. National statistics undeniably demonstrate that staggering numbers of children live in poverty because they do not receive the support owed them. S. REP. NO. 1356, 93d Cong., 2d Sess. 42 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8145. Furthermore, since the amount of child support typically cannot be modified after the final decree absent changed circumstances, some commentators argue that children often suffer economic hardship even when child support is paid. Carol S. Bruch & Norma J. Wikler, *The Economic Consequences*, JUV. & FAM. CT. J., Fall 1985, at 5, 20. See also Carol S. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49 (1982), reprinted in 1 AM. BAR ASS’N, IMPROVING CHILD SUPPORT PRACTICE (1986) [hereinafter ABA VOL.1].

The fixed child support award can decrease in buying power because the cost of child care increases as children grow older, due to increased food consumption and greater involvement in activities. Sharon J. Badertscher, *Ohio’s Mandatory Child Support Guidelines: Child Support or Spousal Maintenance?*, 42 CASE W. RES. L. REV. 297, 306 (1992). Of course, the adequacy of even regular child support payments is further reduced by inflation and general cost of living increases. *Id.* The average amount of child support payments received per child per year rose from \$1800 in 1970, to \$2110 in 1981, but after inflation adjustments, the real buying power actually decreased by 16%. LIEBERMAN, *supra* note 39, at 11.

60. LIEBERMAN, *supra* note 39, at 22.

61. *Id.*

62. *Id.*

63. *Id.* at 24. According to one study, children who did not receive regular support “were much more likely to suffer intensely with the recurrent concern that their father did not love them” *Id.* Furthermore, if the father obviously enjoyed a more financially comfortable lifestyle than the mother and children, yet failed to make regular support payments, the children “were likely to be angry and depressed for many years and to remain preoccupied with this discrepancy in living standard.” *Id.*

64. *Id.* at 22.

requires the mother to take on additional jobs or work longer hours, thus reducing the availability of what may be the last source of familial stability—the child's mother.⁶⁵

Although single mothers are not the intended beneficiaries of child support, they are nonetheless often devastated financially as a result of nonpayment.⁶⁶ Usually, women are not the primary breadwinners prior to the divorce.⁶⁷ Therefore, when child support is not forthcoming, or the award amount is inadequate,⁶⁸ mothers often attempt to increase their income in the job market without the necessary skills to compete.⁶⁹ Furthermore, even qualified women are disadvantaged because of persistent inequalities in pay scales between the sexes.⁷⁰ The combination of nonsupport and women's second-class status in

65. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 25 (1980).

66. Even if support is paid regularly, it can lead to a disparate financial effect on women. LIEBERMAN, *supra* note 39, at 19. Since judges tend to base the support award on the father's income, rather than the actual cost of raising children, mothers are forced to continue where the support award leaves off. *Id.* at 20. As discussed in *supra* note 59, the financial burden of child care increases as children get older and inflation rises. As a result, "[m]others with custody pay well over half the costs of childrearing." Laurie Woods, *Child Support: A National Disgrace*, 17 CLEARINGHOUSE REV. 538, 538 (1983). The problem is further exacerbated by women's disadvantaged earning capacity in the labor market. Diana Pearce, *Welfare Is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412, 413 (1985). The overall result of these factors is that men typically enjoy an increased standard of living after divorce, and women suffer a sharp decrease, even if support payments are faithfully paid. Lenore J. Weitzman, *The Economic Consequences of Divorce: An Empirical Study of Property, Alimony, and Child Support Awards*, 8 FAM. L. REP. (BNA) 4037, 4053 (1982) (citing an average increase in a noncustodial father's standard of living of 42% after divorce, compared to an average 73% decrease in a custodial mother's living standard); James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 353 (1987) (stating that "while men enjoy a substantial increase in their per capita income following divorce, women (and children of whom they generally receive custody) experience an equally substantial decline"). In an interview of Los Angeles judges, Lenore Weitzman found that many judges viewed public assistance and remarriage as "preferable solutions" to an inadequate support award, and judges would rather pursue these alternatives than impose a greater financial burden on noncustodial fathers. LIEBERMAN, *supra* note 39, at 20.

67. Badertscher, *supra* note 59, at 303.

68. See *supra* note 66.

69. Badertscher, *supra* note 59, at 303.

70. In 1987, the median hourly wage for men above the age of 16 was \$7.77, while women in the same age group earned \$5.60 per hour, 72% of their male counterparts' earnings. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2307, *LABOR FORCE STATISTICS DERIVED FROM THE CURRENT POPULATION SURVEY, 1948-87*, at 735 (1988). Women over the age of 25 earned \$0.67 for every dollar earned by men over the age of 25. *Id.*

the labor force, known as "feminization of poverty,"⁷¹ is in large part responsible for the disproportionate number of single mothers living below the poverty level.⁷² In 1981, the poverty rate for female householders was triple the rate for male householders and five times the rate for intact families.⁷³ In 1990, 53.4 percent of all children in female-headed families lived in poverty.⁷⁴ As these statistics show, custodial parents desperately need money to support their children. Unfortunately, noncustodial parents often do not respond to this need.

C. *The Extent of the Child Support Nonpayment Problem*

Despite the special character of the parent-child relationship, its correlative parental duty to provide child support, and the harmful effects of nonpayment on children and mothers, many fathers simply refuse to pay child support.⁷⁵ With an alarming divorce rate and increasing numbers of children born out of wedlock,⁷⁶ the need for alternate methods of child support collection is increasingly acute.⁷⁷ According to a 1989 Census Bureau survey, of all

71. See Pearce, *supra* note 66, at 413 (1985) (discussing "feminization of poverty"); Robert D. Thompson & Susan F. Paikin, *Formulas and Guidelines for Support*, JUV. & FAM. CT. J., Fall 1985, at 33 (citing insufficient child support awards and inadequate collection as the cause of "feminization of poverty").

72. Badertscher, *supra* note 59, at 303; Timothy M. McLaughlin, *Tennessee's Prohibition of the Retroactive Modification of Child Support Orders*, 59 TENN. L. REV. 425, 428 (1992); LIEBERMAN, *supra* note 39, at 21.

73. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: MONEY, INCOME AND POVERTY STATUS OF FAMILIES IN THE U.S., 1982, No. 140 (1983).

74. 1992 GREEN BOOK, COM. ON WAYS & MEANS 1166 (1992). One study showed that after couples with a pre-divorce income of \$40,000 or more divorce, the wife and children live at roughly one half their previous income level, while the husband's financial capacity doubles. LIEBERMAN, *supra* note 39, at 19-21.

75. See *infra* text accompanying notes 78-85.

76. The number of children born to unmarried parents and living out of wedlock skyrocketed in the 1980s:

Year	Children born and living out of wedlock
1970	399,000
1980	666,000
1985	828,000
1989	1,094,000

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MONTHLY NEWS FROM THE U.S. BUREAU OF THE CENSUS: CENSUS AND YOU, May 1992, at 10.

77. In 1930, only one out of every six marriages ended in divorce. Keith D. Ross, *Sharing Debts: Creditors and Debtors Under the Uniform Marital Property Act*, 69 MINN. L. REV. 111, 134 (1984). By 1980, the number increased to one in two. *Id.* In 1982, approximately one million couples divorced, leaving roughly 500,000 children in need of support from the non-custodial parent. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 130, POPULATION PROFILE OF THE UNITED STATES 14 (1982). It is estimated that by the end of the 1990s, 1.6 million couples will divorce annually. Darilyn T. Olidge, *Divorce Liens Under Section 522(f) of the Federal*

mothers awarded child support, only fifty-one percent received the full amount due.⁷⁸ Another twenty-four percent received partial payment, and twenty-five percent received nothing.⁷⁹ These percentages translate into the disquieting fact that in 1989, over 2.8 million custodial mothers received either none or only part of the support amounts ordered for the care of their children.⁸⁰ This statistic deserves more than a cursory reading. Stated another way, the number of custodial mothers who received less than full child support payments was greater than the total number of residents of Wyoming, Alaska, Vermont, North Dakota, and Delaware combined.⁸¹

In financial terms, the Census Bureau estimated that \$16.3 billion in child support was due in 1989.⁸² Of the total support due, \$5.1 billion, or thirty-one percent, was not received.⁸³ This amount could feed each of the sixteen million children who lived in a single mother household in 1990⁸⁴ for an entire month.⁸⁵ This low collection rate is especially surprising in light of over forty years of governmental attempts to ensure that child support is paid.

III. EXISTING CHILD SUPPORT COLLECTION METHODS

Family law, including the law of child support, has traditionally been left to the states.⁸⁶ In 1935, the federal government became marginally involved by creating the Aid to Families with Dependent Children (AFDC) program as part of the Social Security Act.⁸⁷ The program provided federal money through the states to relatives of children with deceased fathers so that the children could be removed from community institutions.⁸⁸ The program was soon extended to provide assistance when fathers deserted their children and

Bankruptcy Code: Resolving Tensions Between Family and Bankruptcy Law, 67 N.Y.U. L. REV. 879, 879 (1992).

78. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., SIXTEENTH ANNUAL REPORT TO CONGRESS 4 (1991) [hereinafter 16TH ANNUAL REPORT].

79. *Id.*

80. *Id.*

81. THE BOOK OF THE STATES 637, 640, 653, 659, 661 (Council of State Gov'ts 1994-95 ed.) [hereinafter BOOK OF STATES] (reporting current population for each of the 50 states).

82. 16TH ANNUAL REPORT, *supra* note 78, at 4-5.

83. *Id.* The rate of non-payment typically depends on the type of support arrangement. ELLMAN, *supra* note 55, at 403. In 1985, women with voluntary written support agreements collected 81% of the amount due. *Id.* In contrast, women with court-ordered support awards received only 56% of the amount they were owed. *Id.*

84. In 1990, 16 million children lived in households with an absent father. 16TH ANNUAL REPORT, *supra* note 78, at 3.

85. Assuming three meals per day at roughly \$3.50 each.

86. LIEBERMAN, *supra* note 39, at 5.

87. *Id.*

88. *Id.*

refused to pay child support.⁸⁹

In 1950, following the lead of several state statutes,⁹⁰ the Commissioners on Uniform State Laws and the American Bar Association promulgated the Uniform Reciprocal Enforcement of Support Act (URESA),⁹¹ which was specifically directed at child support collection.⁹² This Act, now adopted by every state,⁹³ improved interstate collections and encouraged similarity in enforcement procedures among the states, by permitting custodial parents to enforce the judgments of local child support lawsuits in foreign jurisdictions.⁹⁴ Unfortunately, the Act was not without defects.⁹⁵ It provided scant motivation to local prosecutors because it did not grant priority status to child support claims.⁹⁶ Also, it was useless to children whose absent fathers had remained in the same state because it governed only interstate child support collection.⁹⁷ Finally, the Act could not keep pace with society's rapid mobility following World War II.⁹⁸

URESA was amended in the 1950s and, in 1968, adopted in a modified form as the Revised Uniform Reciprocal Enforcement of Support Act

89. *Id.*

90. In 1949, New York passed legislation that permitted mothers or children to bring child support lawsuits in their state of residence, and enforce the resulting judgments in the state where the father was located. LIEBERMAN, *supra* note 39, at 5-6. Ten other states quickly followed suit. *Id.* at 6.

91. See *Uniform Reciprocal Enforcement of Support Act (URESA) prefatory note to 1950 Act*, 9B U.L.A. 556 (1987). For state adaptations of URESA, see, for example, ALA. CODE §§ 30-4-80 to -98 (1989 & Supp. 1994); ALASKA STAT. §§ 25.25.010-.270 (1991); CONN. GEN. STAT. ANN. §§ 46b-180 to -211 (West 1986 & Supp. 1994); DEL. CODE ANN. tit. 13, §§ 601-640 (1993); D.C. CODE ANN. §§ 30-301 to -326 (1993 & Supp. 1994); IND. CODE ANN. §§ 31-2-1-1 to -39 (West 1979 & Supp. 1994); MD. CODE ANN. FAM. LAW §§ 10-301 to -340 (1991 & Supp. 1994).

92. ABA VOL.1, *supra* note 59, at II-52; LIEBERMAN, *supra* note 39, at 6.

93. For a description of the various URESA laws throughout the United States, see ABA VOL.1, *supra* note 59, at II-52.

94. LIEBERMAN, *supra* note 39, at 6.

95. *Id.* A recent study found that states fail to act quickly on URESA petitions and that "the Act's reciprocity requirement did not translate into sufficient time, staff, and energy to enforce foreign support orders adequately." ROBERT HOROWITZ ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., REMEDIES UNDER THE CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984, at 1-2 (1985) (citing CENTER FOR HUMAN SERVICES, U.S. DEP'T OF HEALTH & HUMAN SERVS., INTERSTATE CHILD SUPPORT COLLECTIONS STUDY (1985)). As a result, URESA proceedings are notorious for extraordinarily lengthy delays, often leading to less than satisfactory results. 2 AM. BAR ASS'N, IMPROVING CHILD SUPPORT PRACTICE III-160 (1986) [hereinafter ABA VOL.2].

96. LIEBERMAN, *supra* note 39, at 6. Child support enforcement claims are often considered less urgent than other matters requiring prosecutorial attention. ABA VOL.1, *supra* note 59, at II-82.

97. LIEBERMAN, *supra* note 39, at 6.

98. *Id.*

(RURESA).⁹⁹ Although it did not address the shortcomings of URESA, RURESA included two noteworthy provisions. First, it provided that a URESA order in one court could not automatically nullify, nor be nullified by, an order made by a different court, regardless of issuance priority.¹⁰⁰ Second, it provided that the duty to provide support could not be affected by the custodial parent's interference with the obligor's visitation or custody rights.¹⁰¹

In 1974, Congress enacted Title IV-D of the Social Security Act,¹⁰² establishing the federal Office of Child Support Enforcement in the Department of Health and Human Services.¹⁰³ This legislation forced federal, state, and local governments into active involvement in establishing and collecting child support.¹⁰⁴ The rationale for increased government involvement in the field of domestic relations was "a concern for the public purse."¹⁰⁵ Congress hoped to shift the expanding burden of child care from the federally subsidized AFDC

99. See *Revised Uniform Reciprocal Enforcement of Support Act (RURESA) historical note*, 9B U.L.A. 382 (1987). For state adaptations of RURESA, see, for example, ARIZ. REV. STAT. ANN. §§ 12-1651 to -1691 (1994); ARK. CODE ANN. §§ 9-14-101 to -806 (Michie 1993); CAL. CIV. PROC. CODE §§ 1650-1698.3 (West 1982 & Supp. 1994); COLO. REV. STAT. §§ 14-5-101 to -144 (1987 & Supp. 1990); FLA. STAT. ANN. §§ 88.011-.371 (West 1987 & Supp. 1994); GA. CODE ANN. §§ 19-11-40 to -81 (1991 & Supp. 1994).

100. ABA VOL.1, *supra* note 59, at II-154. One interesting result of this section is that an obligor may be simultaneously subject to conflicting orders. *Id.* See Andrea G. Nadel, Annotation, *Construction and Effect of Provision of Uniform Reciprocal Enforcement of Support Act That No Support Order Shall Supersede or Nullify Any Other Order*, 31 A.L.R. 4TH 347 (1984).

101. ABA VOL.1, *supra* note 59, at II-154. RURESA codifies the notion that visitation and support are separate obligations, and the breach of one does not justify the breach of the other. This rule can lead to highly questionable results. See, e.g., *In re Marriage of Tibbett*, 267 Cal. Rptr. 642, 645 (Cal. Ct. App. 1990) (holding that even where the custodial parent had concealed a child from the non-custodial parent for eight years, the non-custodial parent was obligated to honor the support obligation).

102. 42 U.S.C. §§ 651-669 (1988).

103. ELLMAN, *supra* note 55, at 404.

104. ABA VOL.1, *supra* note 59, at II-150. Title IV-D of the Social Security Act conditions state receipt of federal AFDC funds on the state's establishment of child support enforcement agencies (IV-D agencies) to help custodial parents locate absent parents, establish paternity, and obtain and enforce child support orders. ELLMAN, *supra* note 55, at 404. Previously, these agencies had little incentive to provide services to families not receiving AFDC money. *Id.* at 405. Taxpayers finance the AFDC recipients and are therefore financially interested in the IV-D agency's success in collecting support as reimbursement for AFDC awards. *Id.* Non-AFDC families pose a significantly reduced threat to the public's collective pocketbook. *Id.* Under IV-D, however, the agencies are required to give non-AFDC families equal access to their services. *Carter v. Morrow*, 562 F. Supp. 311 (W.D.N.C. 1983).

105. ELLMAN, *supra* note 55, at 404. "In the United States, child support and taxes are the only personal financial obligations routinely enforced by public agencies." David L. Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 MICH. L. REV. 900, 933 (1977).

programs¹⁰⁶ to the delinquent parents.¹⁰⁷ As one Ohio appellate judge correctly observed, "[T]he obligation to support one's own children is one owed to the public generally."¹⁰⁸ The public is owed this obligation because when child support orders are ignored, custodial parents are often forced to apply to AFDC programs, programs that are financed by the federal taxpayers.¹⁰⁹ Simply put, when noncustodial parents do not pay child support, the public does in one way or another.¹¹⁰

Unsatisfied with the existing programs and frustrated by the growing problem of child support nonpayment, Congress significantly modified child support law when it enacted the Child Support Enforcement Amendments of 1984 (CSEA).¹¹¹ Unlike previous statutes, the CSEA, which amended Title IV of the Social Security Act, required that the states improve their child support enforcement by enacting several specific remedies and procedures.¹¹² The mandatory nature of the CSEA was its hallmark.¹¹³

Among other things,¹¹⁴ the CSEA included an automatic wage withholding provision that required each state to impose mandatory wage attachment when an obligor's arrearage equaled one month's support obligation.¹¹⁵ The CSEA directed the states to intercept state income tax

106. In 1992, the AFDC program cost federal taxpayers \$14.8 billion. EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T, FISCAL YEAR 1994, app. at 624 (1994) [hereinafter 1994 BUDGET]. For a description of the origin and evolution of the AFDC program, see LIEBERMAN, *supra* note 39, at 5.

107. ELLMAN, *supra* note 55, at 404. See also ABA VOL.1, *supra* note 59, at II-150.

108. Hacker v. Hacker, 448 N.E.2d 831, 833 (Ohio Ct. App. 1981) (quoting State v. Ducey, 266 N.E.2d 233, 235 (Ohio Ct. App. 1970)).

109. Badertscher, *supra* note 59, at 304 (citing Vicki Pohlman & Geoffrey P. Walker, H.R. 4325 and H. 614: Federal and State Answers to Economic Child Abuse?, 11 U. DAYTON L. REV. 139, 139 (1985)).

110. See McLaughlin, *supra* note 72, at 428.

111. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 42 U.S.C. §§ 651-667 (1988). See LIEBERMAN, *supra* note 39, at 77.

112. HOROWITZ, *supra* note 95, at 2.

113. ABA VOL.1, *supra* note 59, at II-150.

114. The CSEA requires state domestic relations offices to report support arrearages exceeding \$1000 to consumer credit reporting agencies. ABA VOL.1, *supra* note 59, at I-101. It also forbids states from denying paternity actions at any time prior to a child's 18th birthday. *Id.* The CSEA also prohibits retroactive modification of support orders and arrearages, 42 U.S.C. § 666(a)(9) (1988), and requires states to establish child support guidelines either by statute or judicial or administrative action. ABA VOL.1, *supra* note 59, at II-153.

115. *Id.* at I-101. With some exceptions, the withholding process begins the "day the triggering delinquency occurs" when the state agency is to send a proposed withholding notice to the obligor. 42 U.S.C. § 666(b)(3) (1985). Once initiated, the wage withholding procedure continues over time, thereby avoiding the time and expense of return trips to court. HOROWITZ, *supra* note 95, at 2.

The CSEA's automatic wage withholding mandate has been described as by far the most important element of the statute. ABA VOL.1, *supra* note 59, at II-150. Withholding is established

refund checks to satisfy arrearages pursuant to the Tax Refund Intercept Program.¹¹⁶ The CSEA also required states to provide non-AFDC families federal income tax offsets from delinquent obligors' tax returns.¹¹⁷ Further, each state was charged with establishing a process for imposing liens against real and personal property to enforce support orders¹¹⁸ and a process for providing

by a simple court process, and it guarantees predictable and regular payments so long as the obligor remains employed. LIEBERMAN, *supra* note 39, at 84. Depending upon the local statute, income subject to withholding may include wages, salaries, commissions, bonuses, independent contractor income, disability benefits, pension benefits, annuities, workers' compensation, awards from civil lawsuits, interest, dividends, rents, royalties, insurance proceeds, trust income, and partnership profits. HOROWITZ, *supra* note 95, at 7.

Under the CSEA, the amount withheld equals the current support, plus the employer's withholding fee, so long as the total is within the limits of § 303(b) of the Consumer Credit Protection Act (CCPA). *Id.* at 23 (citing 42 U.S.C. § 666(b)(1) (1985)). If an arrearage is due and the support obligation plus the employer's fee does not exceed the CCPA limit, then an additional amount, defined by state law, must be withheld to satisfy the arrearage. HOROWITZ, *supra* note 95, at 23. The CCPA limit for an obligor with a second family is 50% of disposable income and the limit for an unmarried obligor is 60%. *Id.* at 23-24. Each limit increases by five percent if an arrearage is due as defined by the CCPA. *Id.* at 24.

116. ABA VOL.1, *supra* note 59, at I-101. The intercept program may only be used through IV-D agencies. *Id.* at II-152; *see also* HOROWITZ, *supra* note 95, at 41; 42 U.S.C. § 664(a) (1988); 45 C.F.R. § 303.72 (1989). The program cannot be used for spousal support, and the arrearage amount must be at least \$500. ABA VOL.1, *supra* note 59, at II-152. The procedure works as follows: A custodial parent who believes the delinquent obligor is entitled to a tax refund pays an application fee for the intercept service. LIEBERMAN, *supra* note 39, at 88. The support enforcement agency submits the claim to the Internal Revenue Service and state tax office. *Id.* Then the delinquent obligor is notified that his or her refund will be intercepted and given an opportunity to contest the interception. *Id.* Also, if the delinquent obligor is remarried and files jointly with a new spouse, the agency must notify both taxpayers and afford the new spouse an opportunity to claim a portion of the tax refund. ABA VOL.1, *supra* note 59, at II-152. If no extraordinary reason for avoiding the intercept is demonstrated, such as mistake of fact or lack of jurisdiction, the refund is used as necessary in order to satisfy the obligor's support debt. *Id.* Since the limits of the CCPA do not apply, *see supra* note 115, the entire refund is available to the obligee. *Kokoszka v. Belford*, 417 U.S. 642 (1974); *Usery v. First Nat'l Bank of Arizona*, 586 F.2d 107 (9th Cir. 1978).

117. HOROWITZ, *supra* note 95, at 2. The federal income tax refund offset programs, coupled with mandatory wage withholding, were designed to improve interstate collection. *Id.* The IV-D agency may charge an application fee of \$25 or less for the federal income tax refund offset service to non-AFDC clients. ABA VOL.1, *supra* note 59, at II-150.

118. ABA VOL.1, *supra* note 59, at I-101. The CSEA requires states to enact "[p]rocedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the state." HOROWITZ, *supra* note 95, at 71 (citing 42 U.S.C. § 666(a)(4) (1985); 45 C.F.R. § 303.103 (1989)). Liens are basically claims or encumbrances against property that prevent the owner from selling the property until those claims are satisfied. LIEBERMAN, *supra* note 39, at 87. The operation of liens is totally dependent on state law. HOROWITZ, *supra* note 95, at 71. Some statutes treat child support liens separately from other general liens. ELLMAN, *supra* note 55, at 419 (citing, e.g., NEB REV. STAT. § 42-371 (1988); IND. CODE ANN. § 12-1-6.1-22 (1989) (providing an automatic lien on motor vehicle titles)). Some states permit support obligees to overcome the statutory lien exemptions for the type or value of property attached. *Id.* at 420 (citing, e.g., IDAHO CODE § 11-607(1) (1989); *Redick v. O'Brien*, 468 A.2d

bonds, securities, and other guarantees to encourage compliance with support orders.¹¹⁹ The CSEA required that the states provide each of these procedures to all custodial parents, whether AFDC recipients or not,¹²⁰ and regardless of whether the case was intrastate or interstate.¹²¹ States meeting the minimum standards of the CSEA and prior federal legislation were qualified to receive federal reimbursement for the administrative costs of child support collection and their AFDC programs.¹²² Collectively, the CSEA provisions represented a significant improvement on prior governmental enforcement efforts.¹²³

In 1988, Congress imposed additional support enforcement requirements on the states with its passage of the Family Support Act.¹²⁴ The Act established

735 (N.J. Super. Ct. 1983)). Furthermore, lien enforcement procedures, through the use of URESA or Uniform Enforcement of Foreign Judgments actions, can be transferred across state lines. HOROWITZ, *supra* note 95, at 76.

In some instances, the child support lienholder can force a sale of the obligor's property to pay the support obligation. LIEBERMAN, *supra* note 39, at 87. The most common means of enforcing liens are writs of execution and administrative lien processes. HOROWITZ, *supra* note 95, at 83-84. In either of these procedures, accommodations for notice, redemption, and fair market value vary drastically from state to state. *Id.* at 84-85. However, significant restrictions apply to tenancy by the entirety property. *See infra* text accompanying notes 221-38.

119. HOROWITZ, *supra* note 95, at 2. Section 666(a)(6) of the CSEA requires states to adopt procedures by which "absent parent[s] give security, post a bond, or give some other guarantee to secure payment of overdue support . . ." 42 U.S.C. § 666(a)(6) (1988). Section 666(a)(6), although preventative, can be especially effective in ensuring compliance by the self-employed obligor. HOROWITZ, *supra* note 95, at 2. This provision, the federal and state income tax refund offsets, liens, and credit reporting, provide useful means of enforcing support orders where wage withholding may be ineffective. *Id.*

120. Congress realized that IV-D agencies, although required to make some services available to non-AFDC clients by the 1974 Act, seldom paid much attention to non-AFDC cases because, unlike AFDC clients, non-AFDC families were not directly supported by public funds. LIEBERMAN, *supra* note 39, at 78. CSEA required that all mandatory collection procedures be made available to non-AFDC clients to assist women not poor enough to receive welfare, but not financially able to afford private counsel. *Id.*

121. HOROWITZ, *supra* note 95, at 2. The CSEA also required the states to operate at least one parent locator service. *Id.* at 108 (citing 42 U.S.C. § 654(8) (1988)). Under the CSEA, the service must accept AFDC and non-AFDC location requests from local IV-D agencies. *Id.*

122. ELLMAN, *supra* note 55, at 405.

123. HOROWITZ, *supra* note 95, at 2. Congress simultaneously passed the Deficit Reduction Act of 1984 to provide an incentive for women to leave the welfare rolls. ABA VOL. 1, *supra* note 59, at II-150. As a prerequisite to receipt of AFDC funds, mothers must assign to the state their children's rights to be supported by their father. *Id.* Since AFDC mothers receive AFDC funds in lieu of support payments, theoretically their interest in cooperating with support enforcement is low. *Id.* The CSEA gives mothers additional incentive to cooperate with enforcement efforts by permitting them to keep the first \$50 of every monthly child support collection without losing any AFDC benefits. *Id.*

124. Pub. L. 100-485, 102 Stat. 2343, codified at 42 U.S.C. §§ 405, 503-504, 602-704, 1301-1397 (1988). Among other things, the Act requires the states to recognize a rebuttable presumption that support awards were appropriate if computed from the state's guidelines. S. REP. NO. 377,

a national parent locator service to improve collection procedures.¹²⁵ To improve the efficiency of income withholding procedures, the Act required that, beginning in 1994, all support orders must include an income withholding order unless good cause for not ordering it is shown or the parties enter into an alternative payment agreement.¹²⁶

The government has also established a purely federal arrearage collection technique commonly referred to as the I.R.S. Full Collection Procedure.¹²⁷ Title IV-D agencies, state organizations, use this procedure by certifying an arrearage amount to the Office of Child Support which, in turn, requests the Internal Revenue Service (IRS) to collect the support arrearage "as it would attempt to collect federal taxes."¹²⁸ Eligibility requirements include an arrearage of at least \$750 and a showing that the custodial parent has made reasonable attempts to collect the arrearage.¹²⁹

Although the success of the federal effort to improve child support collection has been substantial,¹³⁰ the legislation described above, as well as

100th Cong., 2d Sess. 2, 17-19 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2776, 2779, 2794-96; H.R. CONF. REP. NO. 998, 100th Cong., 2d Sess. 91-92 (1988), *reprinted in* 1988 U.S.C.A.A.N. 2879-80.

125. 42 U.S.C. § 666 (1988).

126. ELLMAN, *supra* note 55, at 416. This requirement was already imposed on IV-D support cases by the CSEA. 42 U.S.C. § 666(b)(3), 666(a)(8) (Prospective Amendments in 1990 Supp.).

127. 26 U.S.C. § 6305 (1988). The IRS Full Collection Procedure is essentially a remedy of last resort. ABA VOL.2, *supra* note 95, at II-168. The service is available only through IV-D agencies, and requirements for its use are stringent. *Id.* In addition to the minimum arrearage requirement of \$750, and the required showing of diligent state efforts to collect, the state must reimburse the costs of federal collection. *Id.* at II-169.

128. ELLMAN, *supra* note 55, at 420 (citing DIANE DODSON, IRS FULL COLLECTION PROCEDURE AND USE OF FEDERAL COURTS IN INTERSTATE CHILD SUPPORT REMEDIES 159 (1989)).

129. *Id.* The minimum arrearage requirement further states that at least six months must have elapsed since the applicant's last request for IRS assistance, sufficient information must be provided to help identify the obligor, and there must be "reason to believe that the debtor has assets that the Secretary of the Treasury might levy to collect the support." ABA VOL.2, *supra* note 95, at II-169 (citing 45 C.F.R. § 303.71(c), (e) (1989)). The fee for the service, successful or not, is \$122.50. *Id.* at II-170A.

Of a typical caseload of 700 to 800 cases per year, in 1985, only about 100 cases resulted in any arrearage collection. *Id.* However, the average collection amount was an incredible \$10,000. *Id.* In some cases, the recovered amount totalled more than \$30,000. *Id.*

130. Annual collections by IV-D agencies have increased steadily since the institution of the federal program. 1 OFFICE OF CHILD SUPPORT ENFORCEMENT, THIRTEENTH ANNUAL REPORT TO CONGRESS 6, 7 (1990). Collections rose from \$2.4 billion in 1984, to \$4.6 billion in 1988. *Id.* In 1986, the states collected 45.8% of the total child support owed. *Id.* In 1988, the figure was 51.7%. *Id.* However, the statistical success of the IV-D agencies is misleading because much of the increase in dollars collected is simply due to a shift from private attorney collection to IV-D agency collection. *Id.*

other support enforcement techniques,¹³¹ has obviously not eliminated the nonsupport problem.¹³² The income withholding procedure, while the most popular and arguably the most effective collection technique, contains several inherent flaws.¹³³ First, not all obligors earn wages.¹³⁴ Second, income withholding is particularly problematic when applied to the self-employed obligor because he pays his own salary.¹³⁵ Third, every time an obligor changes jobs, the court must issue a new withholding order to the new employer.¹³⁶ Fourth, if the obligor gets a job in a different state, locating him and his employer becomes much more difficult.¹³⁷ Fifth, the amount of withholding is limited by the Consumer Credit Protection Act,¹³⁸ and states are free to enact lower ceiling amounts.¹³⁹ Finally, although employers are clearly prohibited from dismissing employees because their wages are subject to withholding,¹⁴⁰ there is a good deal of evidence that some employers disregard this prohibition, thereby eliminating the obligor's income.¹⁴¹

The federal and state tax intercept programs are often an effective means of collecting child support arrearages.¹⁴² However, they are obviously

131. See *infra* text accompanying notes 154-61.

132. See *supra* text accompanying notes 75-85.

133. In 1985, Parents Without Partners began assisting custodial parents by referring them to other support collection services. ABA VOL.2, *supra* note 95, at III-161. The organization provided its toll free number and began keeping track of the commonly reported problems of everyday people seeking support collection. *Id.* Problems associated with wage withholding included: agency personnel's general lack of accurate information regarding the applicable laws; overloaded local agencies charged with instituting the income withholding; jurisdictional problems such as obligors who work in one state but live in another; and deception of employers who have some relationship to the obligor. *Id.* at III-162.

134. ELLMAN, *supra* note 55, at 416. While federal regulations (45 C.F.R. § 303.101(f) (1989)) clearly permit the states to extend their income withholding procedures to other forms of income, federal law requires only wage withholding. ELLMAN, *supra* note 55, at 416.

135. HOROWITZ, *supra* note 95, at 116. Because of the obvious incompatibility between income withholding and self-employment, other enforcement methods must be used. ABA VOL.1, *supra* note 59, at II-159.

136. ELLMAN, *supra* note 55, at 417.

137. *Id.* This problem persists despite state and federal efforts through parent locator services. *Id.*

138. See *supra* note 115 and accompanying text.

139. See, e.g., *Wilcox v. Wilcox*, 575 A.2d 127 (Pa. Super. Ct. 1990) (imposing a limit 15% lower than the federal ceiling); WYO. STATS. § 20-6-210 (1989) (limiting withholding to 35% instead of the CCPA's ceiling of 50-65%).

140. 15 U.S.C. § 1674 (1988); 42 U.S.C. § 666(b)(6)(D) (West Supp. 1985).

141. ELLMAN, *supra* note 55, at 417 (quoting PAULA ROBERTS, TURNING PROMISES INTO REALITIES: A GUIDE TO IMPLEMENTING THE CHILD SUPPORT PROVISIONS OF THE FAMILY SUPPORT ACT OF 1988, at 50 (1989)). In other words, it seems that some obligors are fired because their employer would rather not bother with the wage withholding procedures. As a result, children go without support.

142. See *supra* note 129.

available only when the delinquent obligor is entitled to a tax refund. Again, unemployed and self-employed obligors may escape the reach of this tool.

The CSEA requires the states to facilitate child support liens on real and personal property.¹⁴³ However, unlike its elaborate wage withholding and tax intercept provisions, the CSEA's lien requirement lacks specificity.¹⁴⁴ It simply asks the states to adopt "[p]rocedures under which liens are imposed against real and personal property for amounts of overdue support"¹⁴⁵ Nothing in the provision explains the time when liens must take effect, the duration of a lien's effectiveness, or the type of property that is exempt.¹⁴⁶ Furthermore, custodial parents may incur significant nonrefundable costs when attempting to enforce liens.¹⁴⁷ Because of this, custodial parents are often deterred from attempting lien attachment, especially if their lawyers are unwilling or unable to accept contingency fees.¹⁴⁸ More fundamentally, however, simple lien attachment, like wage garnishment, is an inadequate remedy for custodial parents desperately in need of prompt arrearage collection to support their children. Since the lien itself, regardless of what kind of property is involved, is nothing more than a cloud on the obligor's title, the custodial parent is forced to wait for the obligor to transfer the property.¹⁴⁹ Meanwhile, the delinquent obligor enjoys its use.

The CSEA requirement that the states provide methods enabling custodial parents to obtain securities, bonds, or other guarantees of arrearage payment can be quite effective.¹⁵⁰ However, such guarantees are only preventative.¹⁵¹ If the custodial parent does not incorporate some type of guarantee into the child support agreement or order at an early stage, then the obligation to pay may amount to no more than an easily broken promise.¹⁵² Furthermore, in light of the high rate of support noncompliance, many bonding companies are predictably hesitant to sell child support bonds to insure an obligor's compliance with a support order.¹⁵³

143. See *supra* note 118 and accompanying text.

144. HOROWITZ, *supra* note 95, at 71.

145. 42 U.S.C. § 666(a)(4) (1988).

146. LIEBERMAN, *supra* note 39, at 93.

147. HOROWITZ, *supra* note 95, at 85 (listing sheriff fees, storage costs, towing fees, appraiser's fee, auctioneer's fees, and sale publication and advertising costs).

148. ABA VOL.2, *supra* note 95, at III-165-66.

149. See *supra* note 118. Each day that a support arrearage remains unpaid causes further injury to the children and custodial parent. See *supra* notes 58-74 and accompanying text.

150. See *supra* note 119 and accompanying text.

151. LIEBERMAN, *supra* note 39, at 66.

152. *Id.*

153. *Id.* at 87.

In addition to the procedures outlined above, either a custodial parent or the state may bring an action against an obligor for contempt, assuming that he can be located and subjected to jurisdiction.¹⁵⁴ Historically, the threat of incarceration for contempt has been an effective tool to "encourage" child support payment when other methods, like wage garnishment, are of limited use because the obligor is self-employed, intermittently employed, or fails to report income.¹⁵⁵ Clearly, however, contempt as a method of arrearage collection is not without defects.¹⁵⁶

154. ELLMAN, *supra* note 55, at 413. Both criminal and civil contempt are available for the enforcement of child support obligations. *Id.* The difference between the two actions hinges primarily on the type of sanction imposed. *Id.* Ellman explains:

If the defendant is jailed for a definite period of time or ordered to pay a fine (e.g., equal to the amount of unpaid support) to the court, this will be considered criminal contempt, thus triggering all of the constitutional protections afforded criminal defendants. On the other hand, if the court sentences an obligor to jail with the condition that he can gain release by paying his debts or suspends the jail sentence on the condition that he pay the arrearages to the obligee, this will be considered civil contempt.

Id. In either case, the court must conclude that the obligor was able to pay, knew about the support order, and intentionally failed to make support payments. LIEBERMAN, *supra* note 39, at 81. For a case demonstrating the difference between civil and criminal contempt, see *Murray v. Murray*, 587 P.2d 1220 (Haw. 1978).

Jailing for contempt in child support cases does not violate state constitutional prohibitions against "debtor's prisons," because child support is generally held not to be a debt within the meaning of the prohibitions. *Ex parte Wilbanks*, 722 S.W.2d 221 (Tex. Ct. App. 1986); *Marriage of Lenger*, 336 N.W.2d 191 (Iowa 1983). Some state constitutions prohibiting debt related imprisonment explicitly exempt support obligations. *See, e.g.*, MD. CONST. art. III, § 38.

155. ABA VOL.1, *supra* note 59, at II-15. No discussion of the effect of jailing on support compliance is complete without mention of the Michigan study performed by Professor David Chambers. By analyzing data provided by Michigan Friend of the Court agencies, which are county agencies charged with various authority to enforce child support, Chambers found that the threat of jail and actual jailing induced compliance with support orders. ELLMAN, *supra* note 55, at 414. Chambers concluded that the county's financial burden of jailing was far outweighed by the collection returns. *Id.* at 414 (citing DAVID L. CHAMBERS, MAKING FATHERS PAY—THE ENFORCEMENT OF CHILD SUPPORT 101 (1979)). Nonetheless, a 1983 revision of Michigan's civil contempt procedures limited the length of jail sentences and designated jail as the last judicial resort in nonsupport cases. *Id.* at 415 (citing MICH. COMP. L. §§ 552.633, 552.637 (1988)).

156. The policy of jailing for nonsupport is subject to criticism on grounds separate from its effectiveness. Professor Chambers noted that the behavior associated with the relationship between divorced spouses may be an inappropriate realm for application of criminal sanctions. CHAMBERS, *supra* note 155, at 245. Chambers argued that even willful nonsupport should be considered an intra-family offense, because nonpayment and interference with visitation often reflect an extension of the pre-existing marital relationship. *Id.* He explained that the Committee on One-Parent Families of Britain's Department of Health and Social Security recommended in 1974 that Parliament prohibit jailing for nonsupport because of the "emotional stress" of post-divorce relationships and child support's link to "an intimate personal relationship." *Id.* (citing 1 DEPARTMENT OF HEALTH AND HUMAN SECURITY, REPORT OF THE COMMITTEE ON ONE-PARENT FAMILIES 128-32 (1974)). Chambers suggested that jailing, and the threat of jail, may lead men to either abandon their familial relationships altogether, or reduce the quality of those relationships for both the men and the

In general, criminal contempt proceedings are rare because prosecutors, occupied with arguably more pressing concerns, must bring the action.¹⁵⁷ Also, when delinquent obligors are brought to court, some judges merely scold them for not paying¹⁵⁸ or, more frequently, permit them to avoid incarceration by paying less than the full amount of the arrearage.¹⁵⁹ Similarly, in civil contempt proceedings, public attorneys often fail to prove the obligor's ability to pay because they are unable to devote the time and resources necessary to investigate the obligor's finances.¹⁶⁰ Even assuming that the delinquent obligor can be successfully prosecuted, imprisonment as a method of arrearage collection may, from the custodial parent's viewpoint, seem counter-productive. Custodial parents may fear that the obligor will lose his job as a result of the conviction or will simply flee the jurisdiction upon release.¹⁶¹ In either event, the obligor's propensity to make regular child support payments in the future would likely decrease.

Although the existing procedures for collecting child support are clearly imperfect, it would seem that collectively they form an impossible barrier to the obligor's ability to avoid paying support. What then, explains the massive failure to collect child support?¹⁶² Much of the difficulty stems from the fact that a child support order requires a series of acts over an extended period of

children. *Id.* at 251-52.

In addition to these criticisms, contempt proceedings may be prone to judicial misuse. Many states have conducted delinquent obligor roundups. ELLMAN, *supra* note 55, at 415. In Florida, for example, nearly 500 civil contempt actions were simultaneously assembled before a single judge who disposed of them in four days. *Id.* (citing *Robbins v. Robbins*, 429 So. 2d 424 (Fla. Dist. Ct. App. 1983)). Over \$140,000 was collected during this proceeding. *Id.* Over 100 individuals were found in contempt and immediately jailed. *Id.* Thirty-eight of these convictions were overturned on appeal as violative of due process in light of a "total absence of oaths, court reporters, witnesses, and rules of evidence." *Id.*

157. LIEBERMAN, *supra* note 39, at 80.

158. ABA VOL.2, *supra* note 95, at III-166. In one instance, a woman reported taking her ex-husband to court 30 times for non-payment of child support before he was finally sent to prison. *Id.* Ironically, the woman's husband was a policeman. *Id.*

159. CHAMBERS, *supra* note 155, at 192. Obligor's who lose a civil contempt proceeding essentially have the "keys to the jailhouse" because they can purchase their release. *See supra* note 154 and accompanying text. Release, however, is often granted when the arrearage is reduced to the court's satisfaction, rather than eliminated. CHAMBERS, *supra* note 155, at 192.

160. ABA VOL.2, *supra* note 95, at III-166.

161. Men do, in fact, move away upon release from jail, and they may even leave the area because of the threat of jail. CHAMBERS, *supra* note 155, at 251.

162. It should be noted that many women simply do not seek support collection. ELLMAN, *supra* note 55, at 403. Many women conclude that a support suit would be futile in light of the father's attitude or lack of financial resources. *Id.* Although these mothers may, to some extent, be justified in failing to pursue a support order, the decision is not theirs to make. *Id.* The mothers are failing to enforce the rights of their children. *Id.*

time.¹⁶³ Obviously the risk of noncompliance is greater when compliance requires multiple, periodic payments.¹⁶⁴ Also, obligors and their assets are often difficult to locate.¹⁶⁵ Some obligors are simply unable to pay due to unemployment, imprisonment, or disability.¹⁶⁶ Other obligors lose motivation to pay for noneconomic reasons, including their psychological intactness,¹⁶⁷ their ex-wives' economic status,¹⁶⁸ the presence of step-children or the birth of natural children upon the obligor's remarriage,¹⁶⁹ and the infrequency and inadequacy of their child visitation time.¹⁷⁰

In addition to the father's failure to provide support, many mothers do not seek enforcement once an arrearage occurs.¹⁷¹ These women are often emotionally deterred from pursuing a judgment because they dread future contact with their ex-husbands.¹⁷² Also, although inexpensive methods of child support enforcement exist,¹⁷³ many women are unaware of the alternatives to private counsel or the possibility for recovery of attorney fees.¹⁷⁴ In sum, these women, who often have little time and even less money, feel intimidated by the thought of initiating legal action and often believe that their chances for successful collection are low.¹⁷⁵ Unfortunately, if a woman's ex-husband has remarried and placed his assets in a tenancy by the entirety with his new spouse, her fears of wasting time, effort, and money in an attempt to obtain her

163. ELLMAN, *supra* note 55, at 404.

164. *Id.*

165. *Id.* See also *supra* text accompanying notes 133, 136-37.

166. McLaughlin, *supra* note 72, at 428.

167. LIEBERMAN, *supra* note 39, at 16-17. Judith Wallerstein and Dorothy Huntington of the Center for the Family in Transition at Corte Madera, California conducted a study from 1971 to 1977 on the reasons for nonsupport. *Id.* at 15 (citing J. WALLERSTEIN & D. HUNTINGTON, *THE PARENTAL CHILD-SUPPORT OBLIGATION* (Judith Cassetty ed., 1983)). The study showed a high incidence of alcoholism and "disabling psychological dysfunction" among fathers who failed to fulfill their support obligations. *Id.* at 16.

168. While the custodial mother's economic difficulties do not seem to prompt the obligor to comply with the support order, the mother's financial success seems to greatly reduce the obligor's incentive to pay. LIEBERMAN, *supra* note 39, at 17.

169. While remarriage seems to have little effect on the rate of an obligor's compliance with the support order, he clearly pays less to his children from his first marriage if he remarries and supports another set of children. LIEBERMAN, *supra* note 39, at 17.

170. Fathers who have regular, satisfactory visits with their children are much more likely to continue to pay child support over long periods of time. LIEBERMAN, *supra* note 39, at 17.

171. ELLMAN, *supra* note 55, at 404.

172. *Id.*

173. Through IV-D agencies, the wage withholding procedure, see *supra* note 115 and accompanying text, state income tax intercept programs, see *supra* note 116 and accompanying text, and federal income tax offset programs, see *supra* note 117 and accompanying text, are all relatively inexpensive and often effective collection techniques.

174. Badertscher, *supra* note 59, at 309.

175. ELLMAN, *supra* note 55, at 404.

children's support may be absolutely justified. In many of the states that still recognize the concept,¹⁷⁶ the entirety method of property ownership provides the obligor with a simple and effective vehicle for avoiding his child support obligation.

IV. THE TENANCY BY THE ENTIRETY METHOD OF ESCAPE

A. History of the Tenancy by the Entirety

The precise origin of the tenancy by the entirety is unknown.¹⁷⁷ It developed as part of the English feudal system of land tenures that permitted only male ownership of property.¹⁷⁸ Under this system, a woman's already insignificant legal identity was merged into her husband's upon marriage.¹⁷⁹ The legal fiction of marital unity, where man and woman were considered one person,¹⁸⁰ made true concurrent ownership of property conceptually impossible,¹⁸¹ thus creating the need for the tenancy by the entirety. At early common law, any property brought into the marriage by the wife, transferred during marriage to either spouse, or transferred during marriage to both husband and wife was held by the fictional "entirety."¹⁸² A valid tenancy by the entirety was created in each of these instances because the transfer satisfied the unities of "time," "title," "interest," "possession," and the additional unity of

176. See *infra* note 207 and accompanying text.

177. RICHARD R. POWELL, 4A POWELL ON REAL PROPERTY ¶ 620.3 (Richard R. Powell & Patrick J. Rohan eds., Bender 1993). The tenancy was recognized by both Littleton and Blackstone. See THOMAS LITTLETON, LITTLETON'S TENURES § 291; 2 WILLIAM BLACKSTONE, COMMENTARIES *182.

178. Oval A. Phipps, *Tenancy by Entireties*, 25 TEMPLE L.Q. 24 (1951).

179. *Id.* Not only did the wife's legal identity cease to exist upon marriage, her personal property was generally considered to be owned by her husband. William G. Craig, Jr., *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 259 (1974). Since marriage amounted to an absolute gift of the wife's personalty to her husband, there was no function for the entirety in personal property. *Id.* See also 2 JOSEPH STORY, EQUITY JURISPRUDENCE §§ 1378, 1402 (Arno Press photo. reprint 1972) (1836).

180. Because of the male dominated society of the early common law, the metaphysical entity which represented the marital unit of husband and wife was clearly a masculine creature. Nearly 200 years ago, Blackstone wrote: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (citations omitted).

181. POWELL, *supra* note 177, ¶ 620.3.

182. Phipps, *supra* note 178, at 24; Jane Harper Porter, Comment, *Real Property—Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?*, 58 N.C. L. REV. 997, 998 (1980); POWELL, *supra* note 177, ¶ 620.3.

“person” resulting from marriage.¹⁸³

Because the marital unit was the owner of the entirety estate, both spouses were considered seized¹⁸⁴ of the entire ownership interest in the property, rather than merely possessing an undivided fractional interest, as with tenancy in common.¹⁸⁵ The most important incident or ownership characteristic of the

183. POWELL, *supra* note 177, ¶ 620.1. At common law, one spouse could not convey property to himself and his spouse to create a tenancy by the entirety because the transfer would not satisfy the unity of *time* requirement for creation of the estate. *Id.* ¶ 621.5; Craig, *supra* note 179, at 257. The unity of *time* requirement meant that the tenants' interests in the property must vest simultaneously. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 109 (3d ed. 1989). Unity of *title* was met when the tenants took their interests by the same deed, will, or other instrument. *Id.* Unity of *interest* was met when the tenants held estates of the same type and duration. *Id.* Unity of *possession* was met when the tenants held undivided interests in the whole of the property, rather than a divided interest in distinct parts of the estate. *Id.*

184. “Seized” is defined as the status of legal ownership and possession of real estate. BLACK'S LAW DICTIONARY 1359 (6th ed. 1990).

185. Rodger A. Heaton, Note, *Administration of Entireties Property in Bankruptcy*, 60 IND. L.J. 305, 305 (1985). A tenant by the entirety is “deemed to be seized of the whole [estate], and not of a moiety or any undivided portion thereof.” Melissa H. Hill, *Survey of Developments in North Carolina Law, 1985: XI, Property Law: Branch Banking & Trust Co. v. Wright—Creditor's Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce*, 64 N.C. L. REV. 1471, 1474 (1986) (quoting *Davis v. Bass*, 124 S.E. 566, 568 (N.C. 1924)).

The tenancy by the entirety is functionally similar to the joint tenancy. Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 578 (1993). Both estates can be created only by deed or will, and do not arise from interests acquired by intestate succession or adverse possession. Phipps, *supra* note 178, at 36. Like the tenancy by the entirety, the joint tenancy's right to survivorship is its centerpiece. Zajac, *supra*, at 578. Under the survivorship concept, when a joint tenant or tenant by the entirety dies, his or her interest is extinguished and the deceased's heirs take nothing. *Id.* Correspondingly, the survivors of the estates take nothing new since each already owned an interest in the whole of the property. *Id.* Both estates require the four unities of time, title, possession, and interest. *Id.* The tenancy by the entirety, however, requires the additional unity of person, satisfied by marriage. *Id.* An important distinction between the estates is the joint tenant's ability to unilaterally convey his or her interest without the consent of the other joint tenants. *Id.* Since the grantee of such a conveyance does not have unity of time or title with the remaining joint tenants, he or she holds title with respect to those tenants as a tenant in common. *Id.* This type of unilateral conveyance is not permitted with the tenancy by the entirety. *Id.*

A tenancy in common is markedly different from both the joint tenancy and the tenancy by the entirety. *Id.* at 579. The only unity required to create a tenancy in common is the unity of possession. *Id.* Tenants in common do not enjoy a survivorship right, and their undivided interest in the estate passes to their heirs upon death. *Id.* Like joint tenants, however, the tenants in common can unilaterally convey their interest without the consent of co-owners. *Id.*

Joint tenants and tenants in common, unlike tenants by the entirety, have the right to seek partition of the property. *Id.* This procedure, which varies from state to state, results in either a sale of the property with the proceeds distributed among the co-tenants, or a physical division of the land. *Id.* Tenants by the entirety cannot seek partition, as the procedure would be contrary to the principle prohibiting unilateral conveyance. *Id.*

estate was, and still is, its indestructible right of survivorship.¹⁸⁶ Unlike the co-tenants of the other estates, neither spouse could force partition.¹⁸⁷ The right of survivorship was not a contingent future interest¹⁸⁸ but, rather, it was presently vested in each spouse.¹⁸⁹ At common law, the husband, as manager of the realty, had the exclusive right to control, use, and possess the property, including the right to all rents, income, and profits, subject only to the wife's right of survivorship.¹⁹⁰

The genesis of the tenancy by the entirety was, therefore, a result of legal necessity; it resolved the tension between the need for marital co-ownership and the presumed incapacity of women to hold property,¹⁹¹ by creating a metaphysical third party, the marital unit, to hold title to the couple's property.¹⁹² In other words, the tenancy by the entirety was justified in part because women, like infants or the mentally ill, were considered legally incompetent.¹⁹³ The husband's exclusive right to use and control of the estate was further justified because the husband almost always provided the funds for

186. Craig, *supra* note 179, at 256. Estates by the entirety, like joint tenancies, are not considered part of the decedent's estate for distribution. Batts, *supra* note 37, at 1262. This is because sole title is passed to the surviving spouse by operation of law upon death of the other spouse. *Id.*

187. Craig, *supra* note 179, at 256. At common law, a tenancy by the entireties could be terminated only by the death of a spouse. Phipps, *supra* note 178, at 25. Termination by divorce was theoretically possible, but divorce was exceedingly rare. JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 328 (1990); Porter, *supra* note 182, at 998. However, today the estate does terminate upon divorce. *See infra* note 212.

188. A contingent future interest in property is an interest or right to property that becomes effective upon the happening of an event in the future which may or may not occur. BLACK'S LAW DICTIONARY 321 (6th ed. 1990).

189. *Id.* One result of this characteristic was that upon the death of one spouse, the surviving spouse took nothing new in terms of property ownership. Phipps, *supra* note 178, at 25. Since, conceptually, both spouses owned the entire estate prior to its termination, the death of one spouse did not result in a transfer of property. *Id.*

190. Hill, *supra* note 185, at 1471. The husband's present enjoyment of the land was limited only by the inability to alienate or encumber the fee. *Id.* *See also* Phipps, *supra* note 178, at 27. The husband's exclusive control and possession has been the subject of constitutional challenge. *See, e.g.,* D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976); Robinson v. Trousdale County, 516 S.W.2d 626 (Tenn. 1974).

191. *See D'Ercole*, 407 F. Supp. at 1383.

192. POWELL, *supra* note 177, ¶ 620.3.

193. The common law of property afforded women, as property of their fathers or husbands, the same status as children and mental incompetents. Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 934-35 (1987) (book review). For a description of the treatment of women by the common law of property, see Diane Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294 (David Kairys ed., 1982); Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW, *supra*, at 117.

the purchase.¹⁹⁴

Today, some argue that the motivation behind using tenancy by the entirety is purely emotional.¹⁹⁵ However, the primary reason for the survival of the estate seems to be a desire to financially protect the marital unit.¹⁹⁶ The indestructible right of survivorship and the inalienability of the estate accomplishes this protection by rendering the tenancy inviolable to the actions of individual spouses or third parties.¹⁹⁷ Society affords this benefit to the marital unit because of its high regard for family life¹⁹⁸ and the public values derived from the institution of marriage.¹⁹⁹ In this regard, the tenancy by the entirety performs much the same function as statutory homestead exemptions.²⁰⁰

194. Porter, *supra* note 182, at 1003.

195. It is thought that spouses may desire to hold entireties property "simply to promote subjective impressions of unification, of companionship, and of economic interdependency." Phipps, *supra* note 178, at 45.

196. See Heaton, *supra* note 185, at 318; Phipps, *supra* note 178, at 41. As articulated by a Pennsylvania judge:

Husband and wife own an estate in entireties as if it were a living tree, whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade and fruit as much as the other.

Sterrett v. Sterrett, 166 A.2d 1, 2 (Pa. 1960). This colorful description of the marital unit seems to be a clear result of the religious and "ancient mysticism of the marriage sacrament, embodying the avowal that the two were indissolubly joined as one flesh . . ." CRIBBET, *supra* note 183, at 328.

197. See *supra* notes 186-89 and accompanying text.

198. Hill, *supra* note 185, at 1483.

199. Phipps, *supra* note 178, at 41.

200. Homestead laws originated in an 1839 statute of the Republic of Texas. Edward N. David, Note, *Ignoring State Homestead Laws: Satisfying Federal Tax Liens Through The Sales of Homestead Property*, 60 CHI.-KENT L. REV. 683, 692 (1984) (citing ACT ON JAN. 26, 1839, ART. 684, 1839 LAWS OF THE REPUBLIC OF TEXAS, 3d Cong., 1st Sess. 113). Generally, homestead property is considered an "artificial estate in land, devised to protect the possession and enjoyment of the owner against the claims of his creditors, by withdrawing the property from execution and forced sale, so long as the land is occupied as a home." BLACK'S LAW DICTIONARY 734 (6th ed. 1990). The purpose of the homestead exemption is to give debtors a stable place of abode by placing their home, sometimes to a set statutory amount, outside the reach of their creditors. Denzer v. Prendergast, 126 N.W.2d 440, 443-44 (Minn. 1964). The exemption is intended to promote family security by protecting the family from financial destitution. David, *supra*, at 685. Like the tenancy by the entirety, homestead exemption statutes restrict an individual spouse's ability to incur obligations to the detriment of the other spouse. Ross, *supra* note 77, at 118. These statutes prohibit spouses with sole title to homestead property from unilaterally alienating or encumbering it. *Id.*

Obviously, the policy behind the homestead exemption is in conflict with creditor's rights in bankruptcy because its protection of the homestead is accomplished by exempting the property from attachment, judgment levies, and sales for the payment of debts incurred by the owner. David, *supra*, at 685. This same conflict is presented by the tenancy by the entirety. Heaton, *supra* note 185, at 319. See *infra* text accompanying notes 222-38.

B. Modern Treatment of the Tenancy by the Entirety

The tenancy by the entirety has run the gauntlet of common law and statutory modification.²⁰¹ The estate was abolished in England in 1925 with the Law of Property Act.²⁰² As society and the law has evolved, the tenancy by the entirety has been rejected in the United States as repugnant to common law,²⁰³ inconsistent with community property systems,²⁰⁴ and inconsistent with adaptations of the Uniform Marital Property Act.²⁰⁵ As a result, the present status of the tenancy by the entirety is extremely varied among the states.²⁰⁶

201. The estate has, however, to a large extent survived. It is estimated that as much as two-thirds of all residential property is purchased in joint tenancy or tenancy by the entirety. Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 862.

202. Craig, *supra* note 179, at 257 (citing C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 230 (1962)).

203. ROGER CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.5, at 211 (1984). Marriage has little effect on property rights in states that use a common law title system. Ross, *supra* note 77, at 114. Under common law title systems, both spouses own and manage the property to which they hold title individually. *Id.*

204. Community property states typically afford equal property ownership rights to women. Hill, *supra* note 185, at 1474. In these jurisdictions, the state grants rights to spouses who hold no title to the marital property. Olidge, *supra* note 77, at 888. As of 1992, only eight community property states existed. *Id.* (listing Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington). Typically, only property acquired after marriage, excluding property acquired by a single spouse by gift or inheritance, is considered marital property in these states. Parkinson, *supra* note 50, at 677.

In addition to sharing ownership of the marital property, however, under most community property systems, spouses share debts. Ross, *supra* note 77, at 119. Therefore, the community property of a married couple may become liable for a single spouse's debt. *Id.* Clearly, this fundamental aspect of community liability runs counter to the tenancy by the entirety's prohibition of a spouse's unilateral encumbrance of the entireties estate. Parkinson, *supra* note 50, at 715.

205. The concept of male personification of the marital unit made the tenancy by the entirety an obvious target for reform as the United States began to recognize property rights in women. POWELL, *supra* note 177, ¶ 620.3. The recognition of property rights in women began in the early 19th century. *See infra* note 220.

The Uniform Marital Property Act (the Act) was passed by the Commissioners of Uniform State Laws in July, 1983 and has had a profound effect on American marital property law. UNIF. MARITAL PROP. ACT, 9A U.L.A. 21 (Supp. 1986), *cited in* Parkinson, *supra* note 50, at 678. The Act proposed that the interests of all property acquired after the "determination date" vest jointly and equally in each spouse. Parkinson, *supra* note 50, at 678. The "determination date" is either the date of marriage, the date when the Act becomes effective, or the date of domicile in the enacting state, whichever is later. *Id.* Although ownership is shared equally under the Act, unlike most community property and common law title systems, management and control of the property belongs to the spouse who holds legal title. *Id.* The Act, and similar state statutes, removes the common law disabilities of married women and destroys the legal fiction of marital unity. Hill, *supra* note 185, at 1474. Therefore, some courts have reasoned, the entireties concept has been eliminated. *Id.* *See also* Craig, *supra* note 179, at 257.

206. POWELL, *supra* note 177, ¶ 620.4.

Although estimates of the number of states that recognize the estate are somewhat inconsistent, property law scholar Richard R. Powell reports that the tenancy by the entirety is affirmatively recognized by twenty-five states and the District of Columbia.²⁰⁷ Another five states make statutory mention of the

207. *Id.* The jurisdictions that recognize tenancy by the entirety are as follows:

- Alaska:* Recognized by statute. ALASKA STAT. § 34.15.140(a) (1990).
- Arkansas:* Mentioned in several concurrent ownership statutes. ARK. CODE ANN. §§ 9-12-315, 9-12-317, 18-13-113, 28-10-103 (1993).
- Delaware:* Recognized by statute. DEL. CODE ANN. tit. 12, § 703 (1953).
- D.C.:* Explicitly recognized in several code provisions. D.C. CODE ANN. § 30-201 (1993 & Supp. 1994); D.C. CODE ANN. §§ 45-216, 45-1705, 45-1803 (1990 & Supp. 1994).
- Florida:* Recognized by statute. FLA. STAT. ANN. § 689.11 (West 1969 & Supp. 1994); FLA. STAT. ANN. § 708.10 (West 1988 & Supp. 1994).
- Hawaii:* Recognized by statute, but explicit intent to create tenancy by the entirety is required to overcome presumption of tenancy in common. HAW. REV. STAT. § 509-1, 509-2 (1985).
- Indiana:* Presumed by statute to be created by all conveyances to husband and wife. IND. CODE § 32-1-2-6 (1979 & Supp. 1994).
- Kentucky:* Mentioned incidentally in tax and simultaneous death statutes. KY. REV. STAT. ANN. § 397.030 (Michie 1994); KY. REV. STAT. ANN. § 140.050 (Michie 1994).
- Maryland:* Recognized by statute. MD. CODE ANN., CTS. & JUD. PROC. § 10-802 (1989); MD. CODE ANN., REAL PROP. § 4-108 (1994).
- Massachusetts:* Recognized by statute, but explicit intent to create tenancy by the entirety is required to overcome presumption of tenancy in common. MASS. ANN. LAWS, ch. 184, § 7 (West 1991). Conveyance to married couple as joint tenants creates a tenancy by the entirety. *Id.* § 8.
- Michigan:* Recognized by statute. MICH. COMP. LAWS ANN. §§ 557.81, 557.101 (West 1988).
- Mississippi:* Recognized by recent case law. *Ayres v. Petro*, 417 So. 2d 912 (Miss. 1982); *Cuevas v. Cuevas*, 191 So. 2d 843 (Miss. 1966).
- Missouri:* Recognized by statute. MO. ANN. STAT. § 442.025 (Vernon 1986).
- Montana:* Recognized by case law. *Clark v. Clark*, 387 P.2d 907 (Mont. 1963).
- New Jersey:* Recognized by statute. N.J. STAT. ANN. § 37:2-18 (West 1968 & Supp. 1994).
- New York:* Recognized by statute. N.Y. REAL PROP. LAW § 240-b (McKinney 1989).
- North Carolina:* Recognized by statute. N.C. GEN. STAT. §§ 39-13.3, 39-13.5, 39-13.6 (1984 & Supp. 1994).
- Ohio:* Recognized by statute. OHIO REV. CODE ANN. § 5302.17 (Anderson 1986). However, tenancy by the entirety was criticized as anachronistic prior to enactment of § 5302.17. *Wilson v. Fleming*, 13 Ohio 68 (1844); *Sergeant v. Steinberger*, 2 Ohio 305 (1826).
- Oklahoma:* Recognized by statute. OKLA. STAT. ANN. tit. 60, § 74 (West 1971 & Supp. 1994).
- Oregon:* Recognized by statute. OR. REV. STAT. §§ 91.020, 91.030, 108.090 (1990).
- Pennsylvania:* Recognized by statute. PA. STAT. ANN. tit. 69, § 541 (1994).
- Rhode Island:* Recognized by case law. *Bloomfield v. Brown*, 25 A.2d 354 (R.I. 1942).
- Tennessee:* Recognized by statute. TENN. CODE ANN. § 66-1-109 (1993).

tenancy by the entirety, but neither approve nor restrict its use.²⁰⁸ Only thirteen states clearly reject the tenancy by the entirety.²⁰⁹ The remaining seven states have taken either an unclear position or no position at all.²¹⁰ Of these seven states, all but Louisiana have adopted common law rules of decision, thus supporting the inference that they would recognize the tenancy by the entirety.²¹¹

The states that still recognize the tenancy by the entirety have altered its common law characteristics to varying degrees. A valid marriage, however, remains a firm requirement.²¹² The indestructible right to survivorship still exists.²¹³ As a result, neither the husband nor the wife can unilaterally partition or convey the entireties property.²¹⁴ The presumption that any conveyance to a married couple creates a tenancy by the entirety has also survived in many states.²¹⁵ Of the twenty-six jurisdictions that recognize the

Vermont: Recognized by case law. *Buzzell v. Edward H. Everett Co.*, 180 F. Supp. 893 (D. Vt. 1960).

Virginia: Recognized by case law. *In re Bishop*, 482 F.2d 381 (4th Cir. 1973); *Vasilion v. Vasilion*, 66 S.E.2d 599 (Va. 1951).

Wyoming: Recognized by statute. WYO. STAT. § 34-1-140 (1994).

208. The five states that mention tenancy by the entirety in their legislative codes are Arizona, Georgia, Kansas, Nebraska, and Utah. *Id.*

209. The thirteen states that have abolished tenancy by the entirety are California, Connecticut, Iowa, Maine, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Washington, West Virginia, and Wisconsin. *Id.*

210. *Id.*

211. POWELL, *supra* note 177, ¶ 620.4.

212. *Id.* ¶ 621.1. In the majority of states that still recognize tenancy by the entirety, divorce, since it destroys the essential unity of person, converts the estate into a tenancy in common. Hill, *supra* note 185, at 1474. Therefore, the tenants become owners of an undivided one-half interest in the property. *Id.* at 1475; *see also* Phipps, *supra* note 178, at 35.

213. POWELL, *supra* note 177, ¶ 622.1.

214. *Id.* At common law, the husband had exclusive control over the entireties property and could convey or encumber it without his wife's consent. *Id.* ¶ 622.2

215. *Id.* ¶ 621.2. These jurisdictions include Arkansas, District of Columbia, Florida, Indiana, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Rhode Island. *Id.* The common law requirement of unity of time, which required a "strawman" conveyance to create the estate from property previously held solely by one spouse, has been abolished by statute or decision in many states. *Id.* ¶ 621.5. "Strawman" refers to any individual other than one of the spouses. The "strawman" conveyance occurred as follows: X holds title to property. X marries Y and wishes to hold title to the property as tenants by the entirety with Y. X conveys the property to Z (the "strawman") who has agreed to convey the property back to X and Y as tenants by the entirety. The result of this strange formality is that X and Y take title to the property simultaneously, thus satisfying the unity of time requirement for creation of a valid tenancy by the entirety. Creation of a tenancy by the entirety by direct conveyance of one spouse is permitted in Arkansas, Florida, Iowa, Massachusetts, Missouri, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee. *Id.*

tenancy by the entirety,²¹⁶ only five have retained the common law rule of prohibiting the estate in personality.²¹⁷ Unlike the common law tenancy by the entirety, the modern estate can end in various ways, including divorce.²¹⁸ A significant difference between the common law tenancy by the entirety and the modern estate is the abolition of the husband's exclusive right to control.²¹⁹ The enactment of married women's property acts has resulted in equal rights for tenants by the entirety.²²⁰

C. Creditors' Ability to Reach Tenancy by the Entirety Property

While the mutual control characteristic of the modern tenancy by the entirety makes it much less offensive to our sense of fairness, the shift from exclusive male control has had a significant adverse effect on creditors.²²¹ Prior to the advent of mutual control, creditors were sometimes able to encumber the husband's income interest or survivorship interest in the tenancy.²²² Today, mutual control, combined with the tenants' inability to unilaterally encumber the property, removes both spouses' interests from the reach of either spouse's creditors in many states.²²³ Other states permit one

216. The jurisdictions include 25 states and the District of Columbia. See *supra* note 207 and accompanying text.

217. *Id.* ¶ 621.6. At common law, tenancy by the entirety in personal property was not possible because the wife's personal property became the property of the husband upon marriage. *Id.* The states which do not recognize tenancy by the entirety in personality are Indiana, Michigan, New Jersey, New York, and North Carolina. *Id.*

218. Craig, *supra* note 179, at 264. An estate by the entirety can terminate when: one or both spouses die; the spouses divorce or obtain an annulment; one of the spouses becomes permanently insane or legally incompetent; the spouses agree, either expressly or impliedly, to divide the proceeds of sale of the estate; one spouse conveys all of his or her interest in the property to the other spouse; or the estate is equitably converted by an executory contract for sale in states that do not recognize tenancy by the entirety in personality. *Id.*

219. POWELL, *supra* note 177, ¶ 622.2.

220. *Id.* See generally John D. Johnson, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033 (1972). Married women's property acts have been enacted in all the common law states and essentially make the fact of marriage irrelevant, giving both husband and wife rights in property as if the marriage had not taken place. See, e.g., IND. CODE ANN. § 31-1-9-2 (Burns 1980); KY. REV. STAT. ANN. § 404.020(1) (Baldwin 1993); MINN. STAT. ANN. § 519.02 (West 1990); MISS. CODE ANN. § 93-3-1 (1973); N.J. STAT. ANN. § 37:2-16 (West 1968).

221. POWELL, *supra* note 177, ¶ 622.3.

222. *Id.*

223. POWELL, *supra* note 177, ¶ 622.3. These states are as follows:

<i>Delaware:</i>	Mitchell v. Wilmington Trust Co., 449 A.2d 1055 (Del. Ch. 1982).
<i>D.C.:</i>	Estate of Wall v. Preston, 440 F.2d 215 (D.C. Cir. 1971).
<i>Florida:</i>	Miller v. Rosenthal, 510 So. 2d 1127 (Fla. Dist. Ct. App. 1987).
<i>Hawaii:</i>	Sawada v. Endo, 561 P.2d 1291 (Haw. 1977).
<i>Indiana:</i>	Myler v. Myler, 210 N.E.2d 446 (Ind. App. Ct. 1965).
<i>Maryland:</i>	Diamond v. Diamond, 467 A.2d 510 (Md. 1983); Elko v. Elko, 49 A.2d

spouse's creditors to levy and execute against the property, but the creditor's interest is subject to the nondebtor spouse's right of survivorship.²²⁴ Overall, twenty of the twenty-six tenancy by the entirety jurisdictions prohibit creditors, including noncustodial parents seeking to collect a child support arrearage judgment, from obtaining prompt satisfaction of one spouse's debts.²²⁵

The majority rule is that a creditor of one spouse can levy and execute only upon whatever property interest that spouse is free to convey, which, in most states recognizing the tenancy by the entirety, is nothing.²²⁶ This rule also applies to child support obligees. A child support arrearage judgment essentially converts the custodial parent into an unsecured creditor. Therefore, if the delinquent obligor holds property as tenants by the entirety with a new spouse, most entirety jurisdictions prohibit the custodial parent from even securing the

- 441 (Md. 1946).
- Michigan:** Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971).
- Missouri:** Wry v. Wade, 814 S.W.2d 655 (Mo. Ct. App. 1991); Farmer v. Miller, 746 S.W.2d 661 (Mo. Ct. App. 1988).
- North Carolina:** Union Grove Milling & Mfg. Co. v. Faw, 406 S.E.2d 508 (N.C. Ct. App. 1991), 436 S.E.2d 131 (N.C. 1993).
- Ohio:** Wolff v. Kuralak, 1991 Ohio App. LEXIS 6096 (1991); Central Nat'l Bank v. Fitzwilliam, 465 N.E.2d 408 (Ohio 1984).
- Oregon:** Brownley v. Lincoln County, 343 P.2d 529 (Or. 1959).
- Pennsylvania:** Stauffer v. Stauffer, 351 A.2d 236 (Pa. 1976).
- Rhode Island:** Bloomfield v. Brown, 25 A.2d 354 (R.I. 1942).
- Vermont:** Lowell v. Lowell, 419 A.2d 321 (Vt. 1980).
- Virginia:** Hausman v. Hausman, 353 S.E.2d 710 (Va. 1987).
- Wyoming:** Ward Terry & Co. v. Hensen, 297 P.2d 213 (Wyo. 1956).

POWELL, *supra* note 177, ¶¶ 620.4, 622.3. Of course, joint creditors still enjoy access to the entirety, and tenants cannot remove the property from the reach of individual creditors by creating an entirety estate with the intent to defraud creditors. *Id.* ¶ 622.3.

224. In other words, the creditor cannot force partition. *Id.* ¶ 622.3. The states recognizing limited access to tenancy by the entirety property are as follows:

- Alaska:** Pilip v. United States, 186 F. Supp. 397 (D. Alaska 1960).
- Arkansas:** Moore v. Denson, 268 S.W. 609 (Ark. 1942).
- New Jersey:** Freda v. Commercial Trust Co., 570 A.2d 409 (N.J. 1990); Newman v. Chase, 359 A.2d 474 (N.J. 1976).
- New York:** V.R.W., Inc. v. Klein, 503 N.E.2d 496 (N.Y. 1986).

POWELL, *supra* note 177, ¶ 622.3.

225. See *supra* notes 223-24 and accompanying text.

226. Hill, *supra* note 185, at 1475-76. See also Parkinson, *supra* note 50, at 723 n.201. The only exception to this rule is found in Massachusetts. See Drury v. Abdallah, 46 B.R. 718, 719 (D. Mass. 1984), cert. denied, 476 U.S. 1116 (1986) (observing that Massachusetts law permits the husband-tenant, but not the wife, to convey his interest in the entireties estate and thus, creditors may attach or levy upon his individual property interest). Sandra Murphy, of the American Academy of Matrimonial Lawyers, explained that holding joint title to marital property is preferred by most married couples "because at least 24 states . . . have something called 'tenancies by the entirety' which protects the home from the creditors of either spouse." Andree Brooks, *Wedding Joy, with Separate Checking*, N.Y. TIMES, May 22, 1993, § 1, at 31.

debt by attaching a lien to the property.²²⁷ In contrast, if that same delinquent obligor held the property with a new spouse as joint tenants or tenants in common, most states would permit the custodial parent to attach a lien to the property, compel partition, and force the sale of the obligor's interest to satisfy the child support arrearage.²²⁸ This "asset shielding" characteristic of the tenancy by the entirety deprives custodial parents of a much needed avenue of compelling child support payment.

Critical writings on the tenancy by the entirety concept are not difficult to find.²²⁹ Commentators primarily attack the estate based on its adverse effect on individual creditors.²³⁰ In fact, in 1944 the American Bar Association recommended that the tenancy by the entirety be abolished because it frustrates the individual creditors of spouses.²³¹ Much of this frustration is a result of the entirety tenant's ability to exempt his or her property from bankruptcy distribution.²³² Specifically, when one spouse files for bankruptcy, he or she may choose between two distinct exemption systems:²³³ the exemptions

227. HOROWITZ, *supra* note 95, at 79, 85. The rules regarding the ability of creditors to levy upon entireties property vary among the states. Some states permit creditors to levy and execute upon a spouse's individual interest in the entireties estate. POWELL, *supra* note 177, ¶ 622.3 (listing Alaska, Arkansas, Hawaii, New Jersey, and New York). After an execution sale, the purchaser of the debtor-spouse's interest becomes a tenant in common with the non-debtor spouse, but has no right to force partition. *Id.* Oklahoma and Tennessee permit individual creditors to sever the estate and destroy the right of survivorship to satisfy debts of either spouse. *Id.* See *Gilles v. Norman Plumbing Supply Co.*, 549 P.2d 1351 (Okla. Ct. App. 1975); *James S. Cox & Assocs. v. King*, 1992 Tenn. App. LEXIS 283 (1992). Furthermore, if the debtor-spouse survives the non-debtor spouse, a valid lien against the debtor's interest in the estate will become collectible. POWELL, *supra* note 177, ¶ 622.3.

228. HOROWITZ, *supra* note 95, at 85. Joint tenants own an undivided portion of the whole property with equal rights to enjoy its use. Frank J. Spivak, *Estates by the Entirety in Bankruptcy*, 15 U. MICH J.L. REF. 399, 402 n.17 (1982). Their rights to survivorship are therefore destructible. *Id.* Tenants in common own merely a separate fractional interest with their co-tenants. Therefore, their property interests are freely subject to levy and sale. If the tenancy is destroyed, individual divided interests are created, thus enabling creditors to levy upon those interests. *Id.* Under the majority treatment of the tenancy by the entirety, however, the tenants each own the entire estate, not merely an undivided interest. *Id.* Therefore, the estate is indestructible and generally cannot be reached by creditors. *Id.*

229. See generally Craig, *supra* note 179; Zajac, *supra* note 185; William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769 (1980); Spivak, *supra* note 228; Porter, *supra* note 182; Phipps, *supra* note 178.

230. See, e.g., Vukowich, *supra* note 229; Spivak, *supra* note 228; Porter, *supra* note 182; Craig, *supra* note 179.

231. ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, REPORT OF THE COMMITTEE ON CHANGES IN SUBSTANTIVE REAL PROPERTY PRINCIPLES 82-83 (1944). See also Porter, *supra* note 182, at 1003.

232. See generally Vukowich, *supra* note 229; Spivak, *supra* note 228.

233. 11 U.S.C. § 522(b)(1), (2) (1988).

provided by the Bankruptcy Code itself,²³⁴ or any immunity existing under state law.²³⁵ In other words, what constitutes an interest in property under the Bankruptcy Code is governed by state law.²³⁶ In most states which recognize the tenancy by the entirety, the debtor-spouse may choose the state law exemptions and place all of the couple's entireties property beyond the reach of the debtor-spouse's individual creditors.²³⁷ Again, the special treatment of entireties assets in bankruptcy is grounded in the philosophy that the "marital home and the familial benefits of dependent children" deserve protection.²³⁸

D. *The Effect of the Tenancy by the Entirety on Child Support Collection*

While the debtor's protection provided by the tenancy by the entirety is clearly an aggravating obstacle to creditors in general, it may seem incomprehensible to a custodial parent who holds a valid judgment for a child support arrearage, like Julie from this Note's case study.²³⁹ Unfortunately, it is difficult to quantify the frequency with which efforts to collect arrearage judgments are frustrated by the delinquent obligor's choice to place his assets in entireties property with a subsequent spouse.²⁴⁰ In states where judgment liens against entireties property are not permitted, many custodial parents and attorneys are no doubt deterred from even attempting to collect child support judgments through attachment of the obligor's joint assets.²⁴¹ Where the law is well settled, it is generally not challenged, especially by single parents in poverty.²⁴² Furthermore, a change in a jurisdiction's tenancy by the entirety doctrine may involve at least one level of appeal. Therefore, a mother with two

234. *Id.* § 522(b)(1).

235. *Id.* § 522(b)(2).

236. 9A AM. JUR. 2D *Bankruptcy* § 1152 (1991) (citing *In re Gorski*, 85 B.R. 371 (Bankr. W.D. Pa. 1988)).

237. Spivak, *supra* note 228, at 400. See generally 9A AM. JUR. 2D *Bankruptcy* § 1152 (1991); POWELL, *supra* note 177, ¶ 622.5. Debtors are prohibited, however, from converting their non-exempt assets into entireties property on the eve of bankruptcy. Spivak, *supra* note 228, at 401.

238. POWELL, *supra* note 177, ¶ 622.5. Note, however, that entireties property need not serve as the marital home. In many states, couples may hold investment property and even personalty by the entirety. See *supra* note 217 and accompanying text.

239. See *supra* text accompanying notes 9-13.

240. For an estimate of the annual number of child support arrearage collection attempts that are frustrated by the tenancy by the entirety, see *infra* text accompanying notes 244-51.

241. For a list of states that prohibit judgment liens against entireties property for individual obligations, see *supra* note 223.

242. This is a common sense observation. If, for decades, a jurisdiction has continued to sustain a particular doctrine without question, then the chances of a successful challenge to that doctrine would seem lower than if it had been either recently adopted or the subject of growing judicial criticism. Clearly, in light of the disproportionate number of custodial parents in poverty and the costs of litigation, see *supra* text accompanying notes 70-74, custodial parents as a class would seem unlikely to pursue a modification to the state's property law where their chances of success or anticipated recovery are low.

jobs and six children badly in need of delinquent support payments must not only be willing to challenge existing property law, but may also need the extraordinary tenacity of enduring the process of judicial appeal.²⁴³ The scenario described above may explain the absence of reported case law on attempts to proceed against entireties property as a means of child support collection.

Although the actual number of frustrated support collection efforts is an elusive figure at best, the possibility of such frustration can be estimated. In the twenty jurisdictions that prohibit individual creditors from executing on entireties property,²⁴⁴ approximately 16.3 million married couples hold title to property used as a residence.²⁴⁵ Approximately 7.5 million of these couples include at least one spouse who was previously married.²⁴⁶ Approximately 823,000 child support obligors are married to a subsequent spouse and have some child support

243. Studies of general civil litigation show that, at the trial court level, roughly 50% of all plaintiffs lose. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 274 (1990). Certainly, if a custodial parent loses at the trial court, the prospect of the time, tears, cost, and sometimes low anticipated recovery, will serve as a deterrent to an appeal. For representative studies of successful judicial challenges in general, see KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 25-32 (1988); GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 34-40 (1987). Even if the custodial parent is successful at trial, the possibility that the obligor will appeal the decision is always present.

244. See *supra* notes 223-24.

245. This estimate is based on 1992 data and was calculated as follows: 82,200,000 persons in the United States were married and held title to property used as a residence in 1992. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS: HOUSEHOLD & FAMILY CHARACTERISTICS* 1992, No. 467 (1992) (reporting 41.1 million couples). Using a total United States population of 248,779,873, see *BOOK OF STATES, supra* note 81, 33.04% of all people in the United States were married and held title to property used as a residence $((82,200,000/248,779,873)(100) = 33.04)$. The 20 states that prohibit individual creditors from executing on entireties property (TBE states) have a total population of 98,395,515. *Id.* Assuming that state of residence has no effect on the percentage of married persons holding title to property as a residence with respect to the total population, 32,511,116 people in the United States were married, held title to property used as a residence, and lived in a TBE state $((98,395,515)(0.3304) = 32,511,116)$. Therefore, since these people must have been married to each other, 32,511,116 represents 16,255,558 married couples $(32,511,116)/(2) = 16,255,558)$.

246. In 1988, 45.9% of all marriages were not the first marriage for at least one of the spouses. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1993*, at 100, table 141 (1993) [hereinafter *ABSTRACT* 1993]. This calculation assumes that the 1988 remarriage rate is representative of the current number of couples that consist of at least one spouse who had been previously married, and who reside in states that prohibit individual creditors from executing on entireties property (TBE states). This calculation further assumes that this class of couples is as likely to hold title to property used as a residence as couples consisting of first time brides and grooms. Under these assumptions, 7,461,301 married couples hold title to property used as a residence, live in a TBE state, and include at least one spouse who had previously been married $((16,255,558, \text{ see } \textit{supra} note 245) (0.459) = 7,461,301).$

arrears.²⁴⁷ This number of delinquent, remarried obligors constitutes approximately 3.54% of all couples comprised of at least one spouse who was previously married.²⁴⁸ Assuming this 3.54% applies to the 7.5 million married couples who (1) hold title to residential property, (2) include at least one spouse who had previously been married, and (3) live in one of the twenty jurisdictions described above,²⁴⁹ then approximately 264,000 obligors live in one of these twenty jurisdictions, hold title to residential property, are remarried, and have some arrears.²⁵⁰ All of these delinquent obligors either hold their property as tenants by the entirety, or are in a position to convert their property to a tenancy by the entirety.²⁵¹ As a result, approximately 264,000 individuals who have broken the law by failing to support their children are capable of legally removing their assets from the reach of collection pursuant to

247. This figure is based on 1989 data, and incorporates two assumptions. First, obligors are as likely to remarry as are obligees. Actually, men remarry at a slightly higher rate than women. See ABSTRACT 1993, *supra* note 246, at 100, table 141. Second, an obligor's marital status has an insignificant effect on his propensity to pay child support. Remarriage, alone, has been shown to have either no effect, or a slightly positive effect, on an obligor's propensity to pay child support. Batts, *supra* note 37, at 1250 (citing studies reported in Raymond I. Parnas & Sherry Cermak, *Rethinking Child Support*, 22 U.C. DAVIS L. REV. 759, 766 (1989)). However, if children result from the subsequent marriage, reduced payments to the prior family often result. *Id.*

Using these assumptions, the number of remarried obligors who failed to make full payments was calculated as follows: In 1989, 48.86% of all obligors failed to make full child support payments. ABSTRACT 1993, *supra* note 246, at 385, table 611. Approximately 1,685,000 obligees were married to a subsequent spouse in 1989. *Id.* at table 612. Under the first assumption, therefore, 1,685,000 obligors were married to a subsequent spouse in 1989. Under the second assumption, 823,291 obligors were married to a subsequent spouse and failed to make full child support payments $((0.4886)(1,685,000) = 823,291)$. This calculation further assumes that none of these obligors were married to each other.

248. This figure is based on 1990 data. In 1990, the number of married couples living in the United States was 50,708,000. ABSTRACT 1993, *supra* note 246, at 58, table 69. Using the remarriage rate of 45.9% (and the assumption explained in *supra* note 247), 23,274,972 of all married couples in the United States included at least one spouse who had previously been married $((50,708,000)(0.459) = 23,274,972)$. The figure of 823,291 (rounded to 823,000 in *supra* text accompanying note 248) constitutes 3.54% of the 23,274,972 married couples in the United States that included at least one spouse who had previously been married $((823,291)/(23,274,972)(100) = 3.54)$.

249. This assumption asserts that no relationship exists between a remarried obligor's propensity to pay support, his state of residence, or his ability to hold title to property used as a residence.

250. 7,461,301 (rounded to 7.5 million in *supra* note 246 and accompanying text) multiplied by 0.0354 equals 264,130 (rounded to 264,000 in text).

251. Not all married couples who hold title to property in jurisdictions that recognize tenancy by the entirety take advantage of that form of concurrent ownership. It follows that not all of these 264,000 obligors hold tenancy by the entirety property. However, some states presume that all married couples take title to property as tenants by the entirety, unless a contrary intent is clearly indicated. See *supra* note 215 and accompanying text. Furthermore, the estimate of 264,000 remarried, delinquent obligors living in tenancy by the entirety jurisdictions does not include obligors who hold investment property or personal property as tenants by the entirety with a subsequent spouse. See *supra* note 217 and accompanying text.

a valid arrearage judgment against them.

While some of these obligors may eventually be forced to pay their arrearage through alternate collection methods, their children will nonetheless go without that money temporarily while the obligors enjoy its use.²⁵² In light of the devastating effects of nonsupport on both children and custodial parents and the tremendous effort and expense devoted by the government to ensure effective collection techniques, not even a single child should be denied support by the anachronistic incidents²⁵³ of the tenancy by the entirety. If one obligation exists to which the entireties estate's creditor protection characteristic should yield, it is the obligation to support one's children.²⁵⁴

However, creating any exception to the insulation provided by the entireties estate runs headlong into the policy most commonly raised to defend it—protection of the family home.²⁵⁵ In this regard, the tenancy by the entirety is functionally equivalent to statutory homestead exemptions existing in most states.²⁵⁶ Homestead exemptions represent “a policy decision designed to give protection to the family unit by granting a certain exemption to the head of a family against the claims of creditors.”²⁵⁷ The privilege is usually claimed by married couples.²⁵⁸ Since the policy of family financial protection is common to both the homestead exemption and the tenancy by the entirety, it is instructive to examine the instances in which the policy of the former can be defeated. An interesting example, provided by the IRS, is examined in the next section.

V. POLICIES COMPETING WITH FAMILY ASSET PROTECTION

A. Federal Tax Collection

The obligation to pay taxes, like death, is unavoidable. Furthermore, little property, personal or real, is exempt when the IRS seeks collection of unpaid taxes.²⁵⁹ The justification for the IRS's virtually unlimited ability to recover

252. See *supra* text accompanying notes 56-74.

253. Specifically, the fiction of property ownership by the marital unit coupled with the indestructible right of survivorship.

254. See *supra* text accompanying notes 37-55.

255. See *supra* text accompanying notes 196-99.

256. See *supra* note 201 and accompanying text.

257. CRIBBET, *supra* note 183, at 92.

258. *Id.* at 93.

259. IRS code § 6334 exempts nine types of property from administrative levy to enforce a federal tax lien. David, *supra* note 200, at 687. Those properties include the following: (1) necessary clothes and school books; (2) personal household items like fuel, furniture, livestock, poultry, and arms not exceeding \$1500 in value; (3) books and tools needed to perform a trade not

delinquent taxes is predictably financial. At the end of fiscal year 1984, the amount of delinquent taxes owed the Treasury totaled \$29.4 billion.²⁶⁰ With its obvious financial commitments and a growing federal deficit,²⁶¹ the government has placed tremendous pressure on the IRS to collect every dollar of unpaid taxes.²⁶² If a taxpayer fails to pay any tax within ten days after the IRS provides notice and demand, Section 6321 of the Internal Revenue Code (IRC) creates a lien for the unpaid amount plus any interest and civil penalties in favor of the United States "upon all property and rights to property . . . belonging to such person."²⁶³ One of the Service's primary collection tools

exceeding \$1000 in value; (4) federal or state unemployment benefits; (5) undelivered mail; (6) "[a]nnuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code"; (7) federal or state workers' compensation benefits; (8) child support judgments entered prior to the date of tax levy; and (9) a minimum amount of wages. I.R.C. § 6334(a)(1)-(a)(9) (1994).

260. TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 1986: HEARINGS ON H.R. 3036 BEFORE A SUBCOMM. OF THE SENATE COMM. ON APPROPRIATIONS, 99th Cong., 1st Sess. 387 (1985) (statement of Rosco L. Egger, Jr., Commissioner, Internal Revenue Service). See also Michael J. Young, *Levying on Joint Bank Accounts: A Ticking Bomb for the Nondelinquent Joint Account Holder*, 70 MINN. L. REV. 1308 (1986).

261. Young, *supra* note 260, at 1308-09 & n.5 (noting an estimated federal deficit of \$167 billion in 1985).

262. *Id.* at 1308.

263. I.R.C. § 6321 (1994). Section 6321 provides as follows:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Id. For an in-depth discussion of the operation of § 6321 on joint bank accounts, see Young, *supra* note 260. For a critical analysis of the application of federal tax liens to homestead property, see David, *supra* note 200.

Three procedural requirements are imposed on the IRS before the tax lien arises. Young, *supra* note 260, at 1310. First, the Service must make a tax assessment. I.R.C. § 6201(a) (1994). Second, it must give the taxpayer notice of the amount of the assessment and demand payment. I.R.C. § 6303(a) (1994). Finally, the Service must provide a 10-day grace period before the lien attaches. Young, *supra* note 260, at 1311. As a practical matter, the grace period is considerably longer due to delays in the Service's internal procedures. *Id.* at 1311 n.14. Once these requirements are met, the lien is perfected and the government takes automatic priority over most other creditors with an interest in the taxpayer's property. *Id.* at 1311.

Tax lien priority is governed by § 6323, which accommodates the applicable provisions of the Uniform Commercial Code (U.C.C. § 9-301 (1993)), the Bankruptcy Act (11 U.S.C. § 507(a) (1989)), and state law governing the rights of secured creditors. David, *supra* note 200, at 690. Under § 6323, until the Service files the tax lien, good faith purchasers for value, security interest-holders, entities with mechanic's liens, and judgment lien creditors have priority over the federal tax lien. *Id.* at 690 n.72. After the lien is filed, it remains subordinate to 10 classes of creditors. *Id.* at 690-91 (citing I.R.C. § 6323(b) (1984)).

is the lien-foreclosure suit.²⁶⁴

IRC Section 7403, the lien-foreclosure provision, authorizes a judicial sale of any property in which the delinquent taxpayer has any right, title, or interest to enforce a federal tax lien.²⁶⁵ Under this section, the government may bring a civil action in federal district court to foreclose its tax lien or subject the delinquent taxpayer's property to the satisfaction of the outstanding tax debt.²⁶⁶ The Supreme Court has interpreted this forced sale provision to permit the government to obtain satisfaction on its tax lien to the full extent of the debtor's interest in the subject property.²⁶⁷

In *United States v. Rodgers*,²⁶⁸ the Supreme Court held that IRC Sections 6321 and 7403 permit the sale of homestead property in its entirety, so long as nondelinquent co-owners of the property receive just compensation for their interest.²⁶⁹ In so holding, the Court reversed the lower court's holding that only the portion of the homestead property representing the delinquent taxpayer's interest could be subject to a forced sale under section 7403.²⁷⁰ The lower court reasoned that since the delinquent taxpayer's widow held a present interest in the homestead under Texas law, the entire homestead could not be sold to satisfy the federal tax lien, which attached to her deceased husband's interest in the property when he failed to pay taxes.²⁷¹ The Supreme Court, while agreeing that a lien under Section 6321 could not extend beyond the delinquent taxpayer's interest,²⁷² interpreted Section 7403 to permit a district court to force a sale of the *entire* subject property, not just the portion representing the delinquent taxpayer's interest.²⁷³

The Court based its conclusion on several grounds. Among them was the Court's observation that forced sale of the entire property was superior to sale of only the delinquent taxpayer's interest because it would bring a higher return for the government.²⁷⁴ Furthermore, nondelinquent interest-holders were

264. I.R.C. §§ 7401, 7403 (1994). See Young, *supra* note 260, at 1312-13. After a tax lien is perfected, the Service may also collect taxes by administrative levy. I.R.C. § 6331 (1994). See Young, *supra* note 260 for a detailed discussion of the application of § 6331 to homestead property.

265. I.R.C. § 7403 (1994).

266. Young, *supra* note 260, at 1312-13.

267. For a discussion of application of the lien-foreclosure provision to homestead property, see David, *supra* note 200.

268. 461 U.S. 677 (1983).

269. *Id.* at 698.

270. *United States v. Rodgers*, 649 F.2d 1117, 1123, 1125 (5th Cir. 1981), *rev'd*, 461 U.S. 677 (1983).

271. *Rodgers*, 649 F.2d at 1124-25.

272. *Rodgers*, 461 U.S. at 690-91.

273. *Id.* at 692-95.

274. *Id.* at 698.

protected by the assurance that they would receive just compensation for their interests and that the government's proceeds from the sale could not exceed the delinquent taxpayer's proportional interest.²⁷⁵ Finally, the Court recognized that lien-foreclosure was not mandatory and set out guidelines to aid lower courts in the decision to authorize a forced sale.²⁷⁶

An important message underlies the IRS's ability to force a sale of an entire parcel of homestead property to obtain the proceeds representing the delinquent taxpayer's interest. Despite state law enacted to protect families from financial ruin, the IRS can sell the family home to collect taxes so long as it reimburses the nondelinquent interest-holders for their interest in the property.²⁷⁷ Therefore, while the IRS is currently unable to defeat the entirety estate's indestructible incidents,²⁷⁸ it can, in pursuit of delinquent taxes, trump the remarkably similar policy behind homestead exemptions. This result is

275. *United States v. Rodgers*, 461 U.S. 677, 698 (1983).

276. *Id.* at 709-11. The Court recognized that there were virtually no circumstances under which a court could not order a forced sale of homestead property to satisfy a federal tax lien. *Id.* at 709. It therefore required consideration of four factors before ordering the sale of property. *Id.* at 710-11. First, courts should consider the extent to which the government would be denied satisfaction if only the delinquent taxpayer's interest in the property was sold. *Id.* at 710. For example, if the government would not be able to obtain a fair market price for a portion of the property by selling that portion alone, then the government's financial interest would be prejudiced. *Id.* Second, courts should consider what legally recognized expectations the nondelinquent taxpayer had in the property under the state law such that a partial interest in it would not be sold. *Id.* at 710-11. In other words, could a co-owner of the property force partition? Third, courts should consider the adequacy of the nondelinquent taxpayer's compensation, and the potential relocation costs those individuals might incur. *Id.* at 711. Finally, courts should consider the relative character and nature of the non-delinquent taxpayer's interest in the property. *Id.* For example, a forced sale would not be advisable if a non-delinquent taxpayer possessed most of the interest in the property. *Id.*

277. *See supra* text accompanying notes 196-99.

278. In all states except Massachusetts, the government cannot levy on entirety property because under the "peculiar legal fiction governing tenancies by the entirety . . . no tax lien [can] attach in the first place because neither spouse possess[es] an independent interest in the property." *Rodgers*, 461 U.S. at 703 n.31. *See also* *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971); *United States v. American Nat'l Bank of Jacksonville*, 255 F.2d 504, 506-07 (5th Cir. 1958); *United States v. Hutcherson*, 188 F.2d 326, 331 (8th Cir. 1951). To determine whether a tax lien can attach to jointly held property, federal courts look to the applicable state definition of the owners' rights to the property. *Geiselman v. United States*, 961 F.2d 1, 6 (1st Cir. 1992). The Eighth Circuit Court of Appeals explained:

[I]t has long been the rule that in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute. . . . [Section 6321] creates no property rights but merely attaches consequences, federally defined, to rights created under state law"

Tony Thornton Auction Serv., Inc. v. United States, 791 F.2d 635, 637 (8th Cir. 1986) (quoting *Aquilino v. United States*, 363 U.S. 509, 512-14 (1960)). For an example of Section 6321's application to the tenancy by the entirety under Massachusetts law, see *Geiselman*, 961 F.2d at 1.

illustrative of the manner in which a national interest can defeat the policy of protecting the family home, and it supports the argument that the policy behind the entirety estate should similarly yield to the need to collect child support arrearages.

The parallel, however, is not perfect because of the contention that a homestead is a mere exemption from debts, rather than a true estate.²⁷⁹ The tenancy by the entirety, on the other hand, is clearly a recognized estate.²⁸⁰ Therefore, unlike tax liens as applied to homestead property, this Note's proposed child support exception to the family protection provided by the entirety estate conflicts directly with common law property rights.²⁸¹ This Note argues that those property rights should be modified to enable custodial parents to obtain prompt and complete collection of child support arrearages.²⁸² If adopted, however, this proposed child support exception would not be the first exception to the traditional incidents of the entirety estate. One party can already pierce the entirety shield—the United States government.

B. Drug Forfeiture Laws

Since the Reagan administration's declaration of a war on drugs, Congress has played an active role in strengthening the government's ability to stem the tide of illegal drugs flowing into the United States.²⁸³ In 1984, Congress amended the Drug Abuse Prevention and Control Act of 1970²⁸⁴ to permit forfeiture of real property used in the commission or facilitation of specified drug felonies.²⁸⁵ In addition to President Reagan's policy declaration one year

279. CRIBBET, *supra* note 183, at 94. Tiffany contends that the right of an owner to exempt his or her land from liability for debts does not logically elevate the homestead to the dignity of an estate. 5 TIFFANY, REAL PROPERTY § 1332 (3d. ed. 1939). Therefore, even where a statute labels the homestead as an estate, the term should be given a new meaning. *Id.*

280. *See supra* note 207.

281. *See supra* text accompanying notes 177-90.

282. *See infra* text accompanying notes 363-86.

283. For a discussion of President Reagan's plan to address the nation's drug problem, see Leslie Maitland, *President Gives Plan to Combat Drug Networks*, N.Y. TIMES, Oct. 15, 1982, at A1, cited in STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 3 (1990).

284. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. (84 Stat.) 1437 (codified as amended at 21 U.S.C. §§ 801-971).

285. 21 U.S.C. §§ 881-904 (1988). The forfeiture provision provides in pertinent part:

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

.....

(7) All real property, including any right, title, and interest (including any leasehold

earlier, congressional enactment of a potent civil forfeiture provision²⁸⁶ was prompted by the recognition that the traditional penalties of imprisonment and fines were inadequately addressing the nation's drug crisis.²⁸⁷

The primary shortcoming of the traditional penalties was their failure to strip criminals and their organizations of power gained through the profits of illicit activities.²⁸⁸ Section 881, the property forfeiture provision of the 1984 Amendment, was designed to address this shortcoming by permitting the seizure of property, both personal and real, that was connected with the criminals' illicit activities.²⁸⁹ Application of the forfeiture provision to entireties property

interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment

21 U.S.C. § 881(a)(7) (1988).

286. 21 U.S.C. § 881 (1988).

287. S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374 ("[F]ew in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs").

288. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) ("Congress finds that . . . organized crime derives a major portion of its power through money obtained from such illegal endeavors as . . . the importation and distribution of narcotics and other dangerous drugs").

289. Until very recently, seizure occurred as follows. First, the prosecutor seized the property, real or personal, pursuant to a warrant of the appropriate district court. 21 U.S.C. § 881(b) (1988). Since civil forfeiture is an *in rem* proceeding, the government must bring suit in the district court in the jurisdiction where the property is located. S. REP. NO. 225, 98th Cong., 2d Sess. 191, 193 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3376. The warrant was issued upon the government's showing of probable cause for the belief that the property was used to traffic drugs, which could be established using hearsay and circumstantial evidence. *See, e.g., United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989); *United States v. 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989); *United States v. \$364,960 in U.S. Currency*, 661 F.2d 319 (5th Cir. 1981).

After seizure, the burden was on the owner to prove that the property was not used as alleged, or that it was so used without the owner's knowledge or consent. *See, e.g., United States v. 141st St. Corp. by Hersh*, 911 F.2d 870, 876 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. 3639 Second St.*, 869 F.2d 1093, 1095 (8th Cir. 1989). The owner's failure to rebut the government's prima facie showing consummated the forfeiture. *See, e.g., 3639 Second St.*, 869 F.2d at 1095 (stating that a judgment of forfeiture is appropriate where the property owner fails to rebut the government's prima facie showing of probable cause).

The forfeiture judgment activated the relation-back provision of § 881(h), which ensures that the government's interest in the property remains superior to any interest obtained by subsequent heirs or donees. 21 U.S.C. § 881(h) provides: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h) (1988) (emphasis added).

Finally, the United States Marshals Service placed the property with a private real estate broker for public sale, the proceeds of which were distributed pursuant to § 881(e). Damon G. Saltzburg, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 228 (1992) (citing 21 U.S.C. § 881(e))

demonstrates that even deeply rooted property law must sometimes yield to facilitate urgent national objectives such as the war on drugs. This Note argues that the national child support crisis provides a similarly compelling justification.

The extent of the property subject to forfeiture under Section 881 is immense.²⁹⁰ Although some courts interpret the extent of property forfeiture

(1988)). Actual distribution depended upon the facts of the case. Regardless of the factual context, however, § 881(e)(2) authorized the Attorney General to apply the proceeds to, among other things, the costs of the seizure, maintenance of the property, advertising for the sale, and court costs. 21 U.S.C. § 881(e)(2) (1988). Distribution becomes somewhat complicated, however, when the individual charged with the drug offense is not the only party with an interest in the forfeited property. See *infra* text accompanying notes 295-335.

290. See *infra* text accompanying notes 292-93. The Supreme Court recently limited the ease with which the government can seize and sell real property under § 881 of the Comprehensive Drug Abuse Prevention and Control Act, a development that was arguably long overdue. The procedure described in *supra* note 289 was modified in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). Under the prior interpretation of § 881, the government, merely by establishing probable cause, could seize an alleged offender's residence, evict him, prohibit sale, modify the property, condition occupancy, receive rents, and "supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property," all without a hearing. *James*, 114 S. Ct. at 501. Despite longstanding holdings to the contrary, the Court concluded that the Fourth Amendment's *ex parte* warrant requirement did not provide adequate due process protection to property owners in forfeiture proceedings. *Id.* at 505. The Court held that, absent certain circumstances, "the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." *Id.* at 497. Therefore, in light of the decision in *James*, pre-hearing seizures of real property under § 881 are apparently a thing of the past.

However, because the Court did not clarify the requisite connection between the property subject to forfeiture and the underlying crime, it did nothing to change the depth of the statute's bite. Justice Thomas, dissenting in *James*, stated that, like the majority, he was "disturbed by the breadth" of forfeitures permissible under § 881(a)(7). *Id.* at 515 (Thomas, J., dissenting) (citing, as examples of other courts sharing his concern, *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes . . ."); *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992), *rev'd sub nom.*, *Austin v. United States*, 113 S. Ct. 2801 (1993) ("[W]e are troubled by the government's view that any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.")). Justice Thomas recognized that under § 881(a)(7)'s "immense scope," vast tracts of land with no real connection to the crime are subject to forfeiture, yet the fiction underlying *in rem* forfeiture was "that the *thing* is primarily considered the offender." *James*, 114 S. Ct. at 515 (citing *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)) (emphasis added). Because of the tenuous connection between the current practice and the legal fiction supporting it, Justice Thomas warned that "it may be necessary—in an appropriate case—to reevaluate [the Court's] generally deferential approach to legislative judgments in this area of civil forfeiture." *James*, 114 S. Ct. at 515.

under the statute more narrowly,²⁹¹ others read Section 881 broadly, permitting forfeiture of property only remotely related to the alleged crime.²⁹² In *United States v. 4492 South Livonia Road*,²⁹³ for instance, the government obtained forfeiture of an entire "120-acre parcel of land with a house, two barns and several small outbuildings," even though most of the estate had no direct relationship to either of the defendant's two cocaine transactions.²⁹⁴

Section 881's "innocent owner" defense is particularly relevant to the focus of this Note.²⁹⁵ Most courts have interpreted the provision to prohibit forfeiture of property if the owner can demonstrate that the illicit drug activity took place without his or her knowledge or consent.²⁹⁶ Typically, application of the provision is straightforward.²⁹⁷ If the owner can satisfy the court's interpretation of "innocence," then none of the property is forfeited.²⁹⁸ However, if more than one party has an interest in the property, but only one party can establish innocence, then only the innocent party's interest in the

291. These courts interpret § 881(a)(7) to require a "substantial connection" between the property and the drug offense. *See, e.g., United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *United States v. 31 N.W. 136th Court*, 711 F. Supp. 1079, 1081 (S.D. Fla. 1989).

292. These courts interpret § 881(a)(7) to permit forfeiture where the property and crime are only remotely connected. *See, e.g., 141st St. Corp. by Hersh*, 911 F.2d at 880 (holding that "the plain language of the statute indicates Congress' intent that an entire parcel of land may be subject to forfeiture even if only part of it is directly connected to drug activity"); *4492 S. Livonia Rd.*, 889 F.2d at 1271 (stating that the forfeiture of property with no direct relationship to the crime falls "squarely within the statutory framework for civil forfeitures that Congress has expressly provided").

293. 889 F.2d 1258 (2d Cir. 1989).

294. *4492 S. Livonia Rd.*, 889 F.2d at 1260-61, 1270. The court in *4492 S. Livonia* was unable to entertain the defendant's challenge to the scope of the forfeiture because he had failed to raise it in the district court. *Id.* at 1270. The court stated that the harsh outcome fell "squarely within" § 881(a)(7), but rhetorically indicated its concern about the scope of the section's application by asking whether a drug transaction in a shed on King Ranch would result in the loss of its entire 800,000 acres. *Id.* at 1270, 1271.

Another example of the relatively weak connection required between the property subject to forfeiture and the alleged crime is provided by *United States v. 141st St. Corp. by Hersh*. The court permitted forfeiture of 41 units of an apartment building when only 15 units had been used for drug activity. *141st Street Corp. by Hersh*, 911 F.2d at 882. The court reasoned that the "natural construction [of § 881(a)(7) was] that 'the whole' of any tract of land is subject to forfeiture if any 'part' of it is used to facilitate narcotics activity." *Id.* at 880.

295. Section 881(a)(7) states that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted *without the knowledge or consent of that owner.*" 21 U.S.C. § 881(a)(7) (1988) (emphasis added). For an in-depth discussion of the interpretation of this provision, see Zajac, *supra* note 185, at 566-77.

296. Zajac, *supra* note 185, at 567. There is currently a split among the federal courts concerning whether the statute requires a lack of both knowledge and consent. *Id.* However, the correct interpretation is of no consequence for the purpose of this note.

297. *Id.* at 579.

298. 21 U.S.C. § 881(a)(7) (1988).

property is exempt from the forfeiture.²⁹⁹ Therefore, the court must determine the innocent owner's interest and order a forfeiture of the remaining property.

If a married couple holds property as tenants in common or joint tenants, the court's determination is simple.³⁰⁰ Under the relation-back provision of Section 881, the commission of the crime operates as a conveyance of the property to the government.³⁰¹ In the case of tenants in common, because either spouse is free to alienate his or her interest, the commission of the offense simply creates a tenancy in common between the innocent owner and the government.³⁰² The government can then seek partition and sell its fifty percent interest without the innocent owner's consent.³⁰³ Similarly, if a married couple holds property as joint tenants, the guilty spouse's illegal act operates as a unilateral conveyance to the government and severs the estate through the destruction of the unities of time and title.³⁰⁴ As a result, the government holds title to one-half of the property as tenants in common with the innocent spouse.³⁰⁵ Again, the government can force a sale.³⁰⁶ However, the tenancy by the entirety cannot be terminated by a unilateral conveyance.³⁰⁷ Its right to survivorship is indestructible.³⁰⁸ Therefore, the difficult question for the courts is what interest in the property, if any, vests in the government when one tenant by the entirety commits a Section 881 offense without the knowledge or consent of the other tenant.³⁰⁹

The majority of the courts have resolved the conflict by prohibiting forfeiture altogether, reasoning that state law should be applied to determine what interests, if any, are available to the government.³¹⁰ The majority view,

299. Zajac, *supra* note 185, at 579.

300. *Id.*

301. 21 U.S.C. § 881(h) (1988).

302. Zajac, *supra* note 185, at 579.

303. *Id.* at 580.

304. *Id.* at 579.

305. *See supra* note 185.

306. Zajac, *supra* note 185, at 579.

307. *See supra* notes 185-89 and accompanying text.

308. *See supra* notes 186-89 and accompanying text.

309. Zajac, *supra* note 185, at 579.

310. *See, e.g.,* United States v. 35 Acres, More or Less, in Cherokee Country, 940 F.2d 654 (4th Cir. 1991); United States v. 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990); United States v. One Parcel of Real Estate at 11885 S.W. 209th Ave., 669 F. Supp. 1531 (S.D. Fla. 1988). 2525 Leroy Lane, 910 F.2d at 343, demonstrates the reasoning typically relied upon by courts that remove the entireties estate from § 881's operation when one tenant is deemed innocent. The Leroy court found no language in the civil forfeiture provisions that required application of the federal common law of property. *Id.* at 347. As a result, the court applied state law to determine the interest of the "innocent owner." *Id.* The court noted that "state laws governing tenancies by the entirety have been applied by federal courts in determining the interests available for the satisfaction of a federal tax lien, where the tax lien statute, like the forfeiture statutes, contained no definition of property

however, is not unanimous. The Third Circuit Court of Appeals explicitly rejected the notion that the government is entitled to nothing when an entireties estate co-owned by an innocent spouse is subject to civil forfeiture under Section 881.

In *United States v. 1500 Lincoln Avenue*,³¹¹ the court recognized that various outcomes were possible in such a circumstance.³¹² The court explained, however, that absolute denial of forfeiture was contrary to the important public interest in forfeiture of property as used in drug related crimes.³¹³ The court further reasoned that the majority rule³¹⁴ denying forfeiture, but permitting the government to file a *lis pendens*³¹⁵ and wait for

rights." *Id.* at 347-48. The court held that since the entireties estate could not be terminated by the unilateral act of one tenant under Michigan law, the "[g]overnment [was] precluded from obtaining [the guilty spouse's] interest in the property unless and until [the innocent spouse] predecease[d] her husband or the entireties estate [was] otherwise terminated by dissolution of marriage or joint conveyance." *Id.* at 351.

The court's holding placed the government in essentially the same position as a judgment creditor who, under Michigan law, could not force a sale of an entireties estate to satisfy the debt of an individual tenant. *Id.* at 350. As a result, the only recourse available to the government was to wait for the estate to terminate in a manner which would allow the government to satisfy its interest. *Id.* at 352. The government could satisfy its interest only if one of the following occurred: (1) the innocent spouse died before the guilty spouse; (2) the couple divorced; or (3) "their interests [became] transmitted into some divisible form by their actions or by law." *Id.*

311. 949 F.2d 73 (3rd Cir. 1991). In *Lincoln Avenue*, a pharmacy was owned by a husband and wife as tenants by the entirety. *Id.* at 74. The husband was convicted of conducting illegal drug activities on the premises of the pharmacy. *Id.* The wife was found innocent of any wrongdoing and satisfied the requirements of § 881(a)(7)'s "innocent" owner defense. *Id.*

312. *Id.* at 76. The court listed three possible outcomes. *Id.* First, because under Pennsylvania law each entireties tenant owns the whole estate, forfeiture of the guilty spouse's interest could result in forfeiture of the whole estate, thus leaving nothing for the innocent spouse. *Id.* Second, the innocent spouse's interest in the whole estate could require that the innocent spouse retain the whole estate, leaving nothing for the government. *Id.* Finally, an intermediate resolution of forfeiture of one-half of the property could be possible. *Id.* The alternatives available for the court's selection, however, were "substantially narrowed" by the government's motion to alter or amend the judgment, which essentially requested immediate forfeiture of the guilty spouse's interest but agreed to leave the innocent spouse's property rights entirely intact. *Id.* at 77. The court granted the government's motion. *Id.*

313. *Id.* at 78.

314. The court explicitly referenced *United States v. 15621 S.W. 209th Avenue*, 894 F.2d 1511 (11th Cir. 1990), because it was used as the foundation of the district court's decision. *1500 Lincoln Avenue*, 949 F.2d at 78.

315. *Lis pendens* literally means a "pending suit." BLACK'S LAW DICTIONARY 932 (6th ed. 1990). It is a common law doctrine that is effective in many states only after filing a notice. *Id.* Upon filing, subsequent purchasers or encumbrancers of the property are bound to the results of "any pending lawsuit which may affect the title to, any lien on, or possession of the property." *Id.* Courts that prohibit forfeiture of tenancy by the entirety property when one tenant is innocent generally follow the *Leroy Lane* approach. *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990). See *supra* note 310.

the estate to terminate, likewise frustrates the strong national interest in forfeiture.³¹⁶ Frustration occurs because the guilty spouse is allowed to retain title and enjoy the property used in illegal drug activities for the remainder of his or her lifetime.³¹⁷ Clearly, at least the Third Circuit views the thick armor surrounding the entireties estate as penetrable by federal forfeiture laws.

The dissenting opinion in *United States v. 2525 Leroy Lane*,³¹⁸ a recent case following the majority approach, was also harshly critical of the majority rule.³¹⁹ The dissent's fundamental criticism of the majority's decision was that it overlooked the policy underlying the federal criminal penalty³²⁰ of forfeiture—swift, certain, and severe punishment, of uniform implementation, to deter future participants in the growing nationwide drug trade.³²¹ The dissent argued that because of the important policy behind the forfeiture provision, its application to the entireties estate could not be governed by the standard judgment creditor/single-spouse debtor analysis.³²² The dissent further argued that the policies underlying the forfeiture provisions would be seriously eroded if application of the provisions was made to depend upon diverse state property laws.³²³

After accusing the majority of an "overweening solicitude for state property law,"³²⁴ the dissent summarized the majority's disposition as a "public announcement to criminal defendants [that the] penal consequences of their conduct will vary from jurisdiction to jurisdiction, despite their violation of federal laws."³²⁵ The dissent was especially critical of the majority's reliance on what it termed the "arcane and archaic" approach to the estate by the entireties, rather than on the clear policy determinations underlying the federal

316. *1500 Lincoln Avenue*, 949 F.2d at 78.

317. *Id.* The court also concluded that the majority rule is procedurally cumbersome because, upon filing a *lis pendens*, the forfeiture proceeding is indefinitely suspended, while the government waits for the guilty spouse to acquire a separate interest in the estate, an event which may never occur if, for instance, the innocent spouse outlives the guilty spouse. *Id.* Furthermore, the court observed that termination of the estate may occur years later, when proof of relevant facts "would often be extremely difficult if not impossible." *Id.*

318. 910 F.2d 343 (6th Cir. 1990) (Krupansky, J., dissenting).

319. *Id.* at 353.

320. The government sought forfeiture in *Leroy Lane* under both the civil and criminal Title 21 forfeiture provisions, 21 U.S.C. §§ 881, 853, respectively. *Leroy Lane*, 910 F.2d at 345. The dissent argued that the majority's decision was not supported under either provision. *Id.* at 353 (Krupansky, J., dissenting).

321. *Leroy Lane*, 910 F.2d at 353.

322. *United States v. 2525 Leroy Lane*, 910 F.2d 343, 353 (6th Cir. 1990).

323. *Id.*

324. *Id.*

325. *Id.* (emphasis in original).

forfeiture schemes.³²⁶ Under the dissent's approach, the entireties estate would be severed upon commission of the crime and converted into a tenancy in common between the government and the innocent spouse.³²⁷

The government's ability to pierce the tenancy by the entirety and force partition and sale of entireties property demonstrates that the traditional treatment of the tenancy by the entirety must be reevaluated when its continued recognition frustrates important policy goals.³²⁸ Drug forfeiture cases have recognized that the rights of even truly "innocent" co-tenants, derived from the ancient genesis of the entireties estate, should not frustrate implementation of important public policy.³²⁹ The immense scope of the drug forfeiture laws is justified on several grounds. It is consistent with the government's directive to "crack down" on drug offenders.³³⁰ It fills the gaps left by existing drug legislation.³³¹ Also, drug offenders should not be permitted to benefit from their wrongdoing.³³² Finally, swift, certain, and severe consequences for drug

326. *Leroy Lane*, 910 F.2d at 354. The dissent further characterized the alternative of a *lis pendens* as "a forfeiture in name only, devoid of practical consequence." *Id.* at 356.

327. *United States v. 2525 Leroy Lane*, 910 F.2d 343, 356 (6th Cir. 1990). *United States v. 11885 S.W. 46th St.*, which was reversed on remand, further demonstrates the propensity of judges, faced with a nationwide social crisis, to overcome the antiquated restrictions accompanying the entireties estate. *United States v. One Parcel of Real Estate at 11885 S.W. 46 St.*, 715 F. Supp. 355 (S.D. Fla. 1989) (on remand from *United States v. One Parcel of Real Estate at 11885 S.W. 46 Street*, 751 F. Supp. 1538 (S.D. Fla. 1990)). In *46th Street*, the husband was arrested at his home when he attempted to purchase cocaine from a government agent. He and his wife held the property as tenants by the entirety. The wife was completely unaware of the events surrounding her husband's arrest. The court applied state law to determine the innocent wife's interest in the property, but determined that the interest must be calculated at the time the offense was committed. *46th Street*, 715 F. Supp. at 359. The court reasoned that forfeiture upon commission of the crime through the relation-back provision placed the government in co-possession of the property with the innocent owner. *Id.* As a result, the unities of time, title, possession and marriage were destroyed. *Id.* Accordingly, the estate became a tenancy in common, leaving the government free to seek partition of the property and sell its one-half interest without the innocent wife's consent. *Id.* at 359-60.

United States v. Moises Ponce & Ramona Ponce, 751 F. Supp. 1436 (D. Haw. 1990) serves as another example. The court granted summary judgment in favor of the government on the issue of forfeiture of the husband's interest in property that he held with his wife as tenants by the entirety. *Ponce*, 751 F. Supp. at 1441. The husband conceded that his interest in the property was forfeitable, but the wife contended that she was an innocent owner. *Id.* at 1439. The court held that disposition of the issue of forfeiture of the wife's interest was inappropriate through a summary judgment motion but, without explanation on division of the entireties estate, ordered that the husband's interest be forfeited. *Id.* at 1441-42.

328. See *supra* text accompanying notes 311-27.

329. *Id.*

330. See *supra* text accompanying notes 283-87.

331. See *supra* text accompanying note 288.

332. See *supra* text accompanying note 315.

offenses will deter future offenders.³³³ On balance, these policies outweigh the "innocent" co-tenant's rights to an undisturbed interest in the entirety estate. Accordingly, the government can convert the entirety estate into a tenancy in common,³³⁴ sell it, and reimburse the innocent spouse for his or her one-half interest.³³⁵

Arguably, if the primarily punitive policy behind civil forfeiture laws can justify forced partition of the entirety estate, then a policy designed to provide support for children and reduce society's responsibility for their care should demand a similar result.³³⁶ By way of analogy, the theory behind this Note's proposal and the theory underlying property forfeiture for drug-related offenses are remarkably similar. Implementation of this Note's proposal would be consistent with the national commitment to strict child support enforcement.³³⁷ Eliminating the tenancy by the entirety method of escaping child support would eliminate a gap in the existing enforcement techniques. Like the drug offender, the delinquent obligor should not be permitted to benefit from his illegal act.³³⁸ Moreover, unlike the drug offender, the delinquent obligor benefits at the direct expense of his dependent children. Finally, like the deterrent achieved through aggressive drug forfeitures, implementation of this Note's proposal will send a clear message to delinquent obligors that their irresponsibility will not be tolerated. These policies, combined with the assurance that the "innocent" subsequent spouse is adequately compensated, justify a narrow exception to the entirety estate's inviolability to third parties for child support enforcement. The following proposal provides a means to achieve that end.

333. See *supra* text accompanying note 321.

334. Perhaps the more realistic view is that the actions of the offending co-tenant, not the forfeiture laws, sever the entirety estate. See *United States v. 6109 Grubb Road*, 890 F.2d 659, 665 (3d Cir. 1989) (Greenburg, J., dissenting).

335. Admittedly, only a small minority of decisions actually subscribe to this view. However, the protection of the entirety estate is typically only extended to the "innocent" spouse because the court determined that the language of the federal law, unlike this note's proposal, did not explicitly demand a contrary result. See *supra* note 309.

336. See *supra* notes 283-87 and accompanying text.

337. President Clinton, when addressing a joint session of Congress on February 17, 1993, stated that his administration will strive to "give this country the toughest child support enforcement it has ever had." OFFICE OF CHILD SUPPORT ENFORCEMENT, *Child Support Report*, Vol. XV, No. 3 (Mar. 1993) at 1. The President insisted that "[i]t is time to demand that people take responsibility for the child they bring into this world." *Id.*

338. Admittedly, under this note's proposal, property need not be purchased with money earmarked for child support to be subject to forced sale. However, such a requirement also does not exist under drug forfeiture laws. Although forfeiture laws were originally justified by the fiction that the property was considered the offender, they, like this note's proposal, currently extend beyond property that is directly connected with the wrongful activity. See *supra* note 289.

VI. PROPOSAL AND ANALYSIS

A. *Proposed Statute to Create a Child Support Exception to the Tenancy by the Entirety Asset Shield*

Because the problem presented by the tenancy by the entirety is that it permits the obligor to insulate his property interest from a money judgment against him, the logical place to create a new child support remedy is in the lien provision of the CSEA.³³⁹ As explained in Section IV, the characteristics of the tenancy by the entirety vary significantly from state to state.³⁴⁰ Therefore, federal legislation is required to achieve uniform treatment of the estate as a resource available for the satisfaction of child support arrearages. The CSEA is an ideal vehicle to achieve this end; it already imposes a number of specific requirements on states wishing to qualify for federal reimbursement for their AFDC programs.³⁴¹ Because conditioning reimbursement on compliance amounts to a multi-million dollar threat, most states have steadfastly obeyed.³⁴² Furthermore, the CSEA requires that its provisions be applicable to all child support cases.³⁴³

Section 666(a)(4) of the CSEA requires states to enact "[p]rocedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State."³⁴⁴ The House Committee on Ways and Means envisioned this provision as a compliment to the CSEA's income withholding provisions, and particularly useful in obtaining child support payments from obligors who are not salaried employees, but have substantial assets or income.³⁴⁵ Because of its vague language, however, the provision leaves much to be desired.³⁴⁶ While the following amendment to Section 666(a)(4) makes no attempt to define the precise mechanism for lien attachment and execution, an area which is "often the subject of minute statutory regulation,"³⁴⁷ it does ensure that the will of Congress and the interests of dependent children will not be frustrated by the anachronistic entireties estate. It further ensures that the subsequent spouse of a delinquent obligor is compensated for her interest in the entireties property.

339. 42 U.S.C. § 666(a)(4) (1988). See *supra* text accompanying notes 118, 143-46.

340. See *supra* text accompanying notes 201-38.

341. See *supra* text accompanying notes 111-23.

342. LIEBERMAN, *supra* note 39, at 92.

343. See *supra* text accompanying notes 120-21.

344. 42 U.S.C. § 666(a)(4) (1988).

345. H.R. REP. NO. 527, 98th Cong., 1st Sess. 37 (1983).

346. See *supra* text accompanying notes 143-46.

347. HOROWITZ, *supra* note 95, at 82.

The amendment to Section 666(a)(4) should read as follows:³⁴⁸

(a)(4) Procedures under which liens are imposed and executed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the state. These procedures shall be modeled after existing procedures for lien attachment and execution applicable to money judgments with the following exceptions:

(i) Property Rights Subject to Attachment and Execution.

The following shall be subject to attachment and execution for the purpose of obtaining satisfaction of a child support arrearage judgment:

All personal property, as limited by state statutory exemptions, to the extent of the absent parent's interest therein, and all real property, notwithstanding state statutory homestead exemptions, including any right, title, and interest (including any leasehold interest) in the whole of any tract of land and any appurtenances or improvements thereon to the extent of the absent parent's interest therein.

Where personal or real property, as defined above, is held by the entirety by the absent parent and a subsequent spouse, entry of a final judgment against the absent parent for a child support arrearage shall operate to convert the entirety to a tenancy in common for the purposes of lien attachment and execution.³⁴⁹

(ii) Distribution of Proceeds.

The proceeds from any sale of property under procedures fashioned in accordance to this subsection shall be distributed in the following order:

(A) First, to pay the full extent of any ownership interest that is held by a party other than the absent parent as determined by court order including, in the case of a party with a security interest in the property sold, any outstanding principle and interest due under the security agreement plus attorney's fees and other reasonable costs

348. The original language of 42 U.S.C. § 666(a)(4) is shown in italics in this proposed amendment.

349. This conversion would permit the custodial parent to force a sale of the entireties estate. See *supra* note 185.

recoverable under the agreement;

(B) Second, any remaining proceeds shall be used to reimburse the costs incurred by the custodial parent in lien attachment and execution;

(C) Third, any remaining proceeds shall be applied to reduce or satisfy the arrearage judgment.

(D) Fourth, any remaining proceeds shall be used to pay the full extent of any unsecured ownership interest that is held by a party other than the absent parent as determined by court order;

(E) Fifth, any remaining proceeds shall be awarded to the absent parent.

The purpose of proposed subparagraph (a)(4)(i) is fourfold. First, it is intended to provide explicit language defining property rights in child support cases so as to avoid application of state law which, to the extent it governs tenancy by the entirety, would frustrate the goal of the amendment.³⁵⁰ Second, the provision is intended to remain consistent with state personal property law, except as it applies to tenancy by the entirety, by limiting the personal property subject to attachment and execution by state statutory exemptions.³⁵¹ Third, the provision's preemption of state statutory homestead exemptions is intended to prohibit the use of homestead exemptions to frustrate

350. The Supreme Court has often instructed that "federal law will preempt state law if Congress expressly provides for preemption, . . . if the state law and the federal law are in actual conflict so that compliance with both is physically impossible or the state law obstructs the accomplishment of the full objectives of Congress." *United States v. One Single Family Residence*, 894 F.2d 1511, 1517 (11th Cir. 1990) (citing *International Paper Co. v. Ovellette*, 479 U.S. 481, 491-92 (1987); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987)). In federal tax lien and drug forfeiture cases, the majority of the courts apply state law to determine the extent of the nondelinquent taxpayer or innocent owner's interest in the property, reasoning that application of state law was intended by Congress because the federal statutes fail to expressly require application of federal law. *See, e.g., Aquilino v. United States*, 363 U.S. 509, 513 (1960) (applying state law to determine the legal interest of a federal taxpayer); *United States v. Leroy Lane*, 910 F.2d 343, 347 (6th Cir. 1990) (applying state law to determine the interest of an innocent owner under 21 U.S.C. § 881(a)(7)).

351. Some state statutes permit child support obligees to defeat personal property exemptions. *IDAHO CODE* § 11-607(a)(1) (Supp. 1985); *TENN. CODE ANN.* § 26-2-107 (1980) (providing that no property is exempted from attachment and garnishment). Furthermore, some courts have held that certain benefits are unprotected by these exemptions in domestic relations cases. *Meadows v. Meadows*, 619 P.2d 598 (Okla. 1980) (holding that exemptions for social security benefits do not apply to alimony); *Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. Civ. App. 1961) (holding that veteran benefit's anti-assignment provision is inapplicable to support payments).

the purpose of the amendment.³⁵² This clause is consistent with the policy of removing barriers to child support collection and is not without precedent.³⁵³ Not only has the Supreme Court determined that state homestead rights do not protect property from tax lien-foreclosure under I.R.C. Section 6321,³⁵⁴ but many state courts have held that child support liens may defeat homestead exemptions.³⁵⁵ Such holdings are based on recognition of the absurdity of denying maintenance to children under exemption laws which were originally designed to protect them.³⁵⁶

Finally, and most importantly, subparagraph (a)(4)(i) is intended to effectuate the goal of this Note. The provision requires that tenancy by the entirety property be converted to tenancy in common immediately upon entry of an arrearage judgment against the absent parent.³⁵⁷ The automatic transformation of the property to a tenancy in common permits the custodial parent to proceed against the property and force its sale.³⁵⁸

The purpose of the exception detailed in proposed subparagraph (a)(4)(ii) is primarily to ensure that co-tenants by the entireties and secured interest-holders are adequately compensated for their interests in the entireties estate.³⁵⁹ This provision places the spouse of a delinquent obligor first in the line to recover any equity she may have in the entireties estate, as calculated upon conversion of the estate to a tenancy in common. Unlike the existing law on real property forfeitures under 21 U.S.C. Section 881(a)(7), no determination of the nondelinquent spouse's "innocence" is required.³⁶⁰ In other words, she is reimbursed for her one-half interest in the property regardless of her knowledge or consent of her husband's failure to pay child support to his

352. See *supra* note 200 for a discussion of homestead exemptions.

353. Proposed § 666(a)(4)(i) is admittedly somewhat beyond the scope of this note. Homestead exemptions may apply to any real property, regardless of how it is held. The homestead exemption may therefore serve as an obstacle to recovery of child support arrearages in addition to the tenancy by the entirety. See *supra* note 200.

354. *United States v. Rodgers*, 461 U.S. 667 (1983). See *supra* text accompanying notes 269-76.

355. See, e.g., *Bickel v. Bickel*, 495 P.2d 154 (Ariz. App. 1972); *Winter v. Winter*, 145 N.W. 709 (Neb. 1914); *Breedlove v. Breedlove*, 691 P.2d 426 (Nev. 1984).

356. HOROWITZ, *supra* note 95, at 78.

357. This provision was modeled after a similar provision offered in Zajac, *supra* note 185, at 587, as a resolution of the conflict between the rights of the government and innocent tenants by the entirety in the context of federal civil forfeiture under 21 U.S.C. § 881(a)(7).

358. See *infra* text and accompanying notes 363-85 for justification of this modification to the common law.

359. This provision is modeled after an amendment to 21 U.S.C. § 881(e)(2) in Saltzburg, *supra* note 289, at 241, proposed to ensure that innocent ownership rights are protected in federal drug forfeiture proceedings.

360. See *supra* text accompanying notes 295-99.

children from a previous marriage.³⁶¹ The provision further requires that the custodial parent's collection expenses be reimbursed before the arrearage amount is reduced.³⁶²

B. Analysis of Proposed Modification to the Tenancy by the Entirety

Public policy is the basis for creating a child support exception to the asset shield enjoyed by entireties property holders. A balance must be struck between the policies supporting the current forms of tenancy by the entirety and the policies served by the exception. This Note contends that the scales weigh heavily in favor of elimination of the entireties obstacle to allow quick and complete arrearage collections.

As discussed in Section IV, the tenancy by the entirety estate is ancient in origin.³⁶³ Much of the original justification for the creation of the estate is, today, offensive and obsolete. The legal identity of women is no longer considered subsumed by their husbands upon marriage. No one can seriously argue that women are generally incapable of owning and maintaining property or fail to contribute financially to the marital assets. As a result, the anachronistic, male-dominated tenancy by the entirety is a thing of the past.³⁶⁴

Ironically, the demise of the husband-controlled entireties estate, while a victory for women in general, ultimately exacerbated the problem of child

361. By comparing the spouse of a drug felon to the spouse of a delinquent child support obligor, a strong argument can be made that the non-delinquent spouse should lose some, if not all, of her interest in the entireties estate if she knows of and consents to her husband's failure to honor his child support obligation. Like the drug felon's spouse, the non-delinquent spouse may enjoy the benefits of the money saved by her husband's disregard for the law. Indeed, the property subject to forced sale may have been purchased in whole or in part with money gained as a result of child support non-payment. In most instances, the non-delinquent spouse is no doubt aware of her husband's support obligation and knows that he is ignoring it. Like the drug felon's spouse, it is reasonable to expect the non-delinquent spouse to make some effort to prevent her husband's illegal activity or incur some loss as a result of her acquiescence.

While permitting "innocent" spouses to recover their full interest in entireties property sold pursuant to this note's proposal may not adequately address collusive conduct between spouses, this author believes that the threat of a forced sale of the family home will be sufficient to discourage such activity. As one judge observed in the context of drug forfeitures, "[I]f the destruction wrought by [lawbreakers] is brought home to their own families, perhaps at least some of them may be dissuaded from their activities." *United States v. 6109 Grubb Road*, 890 F.2d 659, 665 (3d. Cir. 1989).

362. In other words, this provision, unlike many traditional lien attachment and execution schemes, ensures that all of the expenses incurred in collecting the arrearage are paid for by the delinquent obligor who, after all, is responsible for the arrearage in the first place.

363. See *supra* text accompanying notes 177-94.

364. No state continues to recognize the common law incident of a husband's exclusive right to control of the estate. POWELL, *supra* note 177, ¶ 620.4.

support collection and, therefore, contributed to the negative effects of nonsupport on women. In the past, states that viewed the marital unit as personified by the husband—that is, states which rejected the concept of mutual control—permitted the husband's individual creditors to levy on the marital property to satisfy his debts.³⁶⁵ Today, mutual control of the estate protects both spouses' interests and denies third parties, including custodial parents, access to either spouse's interest.³⁶⁶ As a result, the custodial parent's support arrearage judgment cannot be satisfied. Unpaid support, in turn, contributes to the "feminization of poverty."³⁶⁷ Therefore, the intention behind the shift to mutual control of entireties property, removal of gender-based inequity, would be furthered by a child support exception to the estate's inviolability.

The entireties estate's inviolability to creditors is primarily defended on grounds that it protects the marital unit.³⁶⁸ Since neither spouse can encumber or alienate the marital property, each is provided security from the other's poor judgment.³⁶⁹ By protecting the institution of marriage from financial ruin, families remain intact and the attendant benefits of family life are reaped by society.³⁷⁰ The judgment-proof entireties estate clearly protects spouses from financial set-backs, albeit at the direct expense of creditors. Beyond that, however, its value to the institution of marriage and society in general has been speculative at best, as evidenced by the steady decline in the traditional family unit.³⁷¹ The twenty-five states that refuse to affirmatively recognize the tenancy by the entirety are apparently equally unimpressed with its purported social value.³⁷²

Furthermore, the concept of marital unity, from a legal viewpoint, has become increasingly less viable. In 1972, Justice Brennan wrote that a married couple is "not an independent entity . . . but an association of two individuals" ³⁷³ Some argue that personal autonomy as an ideology is as pressing

365. See *supra* text accompanying note 222. Creditors were able to access either the husband's income interest or survivorship interest. POWELL, *supra* note 177, ¶ 622.3. See, e.g., *Friedman v. Harold*, 638 F.2d 262 (1st Cir. 1981); *Whetstone v. Coslick*, 157 So. 666 (Fla. 1934); *Beland v. Estey*, 351 A.2d 62 (N.H. 1976); *King v. Greene*, 153 A.2d 49 (N.J. 1959).

366. POWELL, *supra* note 177, ¶ 622.3.

367. Pearce, *supra* note 66, at 413. See *supra* text accompanying notes 66-74.

368. See *supra* text accompanying note 196.

369. Craig, *supra* note 179, at 294.

370. See *supra* text accompanying notes 198-99.

371. Craig, *supra* note 179, at 294. See *supra* note 42.

372. Only 25 of the 50 states recognize some form of the tenancy by the entirety. See *supra* notes 207-11 and accompanying text.

373. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

as that for marital partnership.³⁷⁴ Others believe that marriage is becoming a matter of personal fulfillment.³⁷⁵ Of course, if the rights and privileges of individual spouses are worthy of recognition, enforcement of individual obligations must follow. Mary Ann Glendon posits that recognition of the individual is a natural legal trend of progressive societies.³⁷⁶ Quoting Sir Henry Maine, she observed:

The movement of progressive societies has been uniform in one respect: Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family as the unit of which civil laws take account.³⁷⁷

This Note's objective is not to diminish the significance of marriage as an institution. Nor does this Note propose wholesale abolition of the tenancy by the entirety.³⁷⁸ The proposition herein merely asserts that persons who assume the obligation of supporting their children should not be permitted to escape that responsibility under the guise of a deteriorating policy that is defended on the ground that it fosters the very family life which, in this context, it injures.³⁷⁹ Even accepting the proposition that protection of the marital unit is a sufficient justification for erecting the entireties shield against creditors, a child support exception should have a relatively small effect when compared to the potential effects of opening the estate to creditors in general.³⁸⁰

The policies supporting a modification of the tenancy by the entirety for child support collection are compelling. Most fundamental is the fact that the noncustodial parent is morally obligated to provide for his children. Parental responsibility, usually instinctual, has long been observed as a principle of

374. *Id.* at 699. In the context of opposing the concept of community property, Ruth Deech argued that "the submergence of individual claims involved in the equal division of property on divorce amounts to a denial of rights and an attack on individual responsibility." *Id.*

375. *Id.* at 700.

376. MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 42-43 (1981).

377. *Id.* (quoting SIR HENRY MAINE, *ANCIENT LAW* 139-40 (Oxford Univ. Press 1959) (1861)).

378. An elimination of the tenancy by the entirety, while accomplishing the goal of this note, would admittedly sweep more broadly than necessary.

379. For a discussion of the effects of child support non-payment on dependent children and their mothers, see *supra* text accompanying notes 56-74.

380. In 1990, there were 91.9 million households in the United States. ABSTRACT 1993, *supra* note 246, at 58, table 69. The total liabilities of these households was 3.892 trillion dollars. *Id.* at 506, table 787. Therefore, the average liability per household was approximately \$42,000. In contrast, if, solely for the purpose of gross comparison, the 5.1 billion dollars in unpaid child support in 1989, see *supra* text accompanying note 83, was distributed among all United States households, then the average household "child support liability" would be approximately \$55.

natural law.³⁸¹ Therefore, failure to care for one's offspring may be fairly characterized as an act against nature.

In addition to disregarding this fundamental mandate, the delinquent obligor in effect thumbs his nose at a landslide of well-intentioned legislation directed at ensuring his compliance with his child support order.³⁸² Few areas of law boast such an impressive array of regulation. Yet, with the protection of the entirety estate, the delinquent obligor can legally circumvent the application of some of the nation's most effective collection weapons. Neither the shrewdness, nor fortuity of individuals who have broken a court-ordered support schedule, backed by a litany of state and federal laws, should be rewarded by being granted refuge in an entirety estate. Courts permitting the entirety shield to protect the delinquent obligor's assets demonstrate rote deference to a relic of American property law, and unjustifiably thwart the government's policy of protecting our nation's children.

Retaining the entirety obstacle to child support collection is especially unjustified when its impact on children and mothers is considered. Unlike true creditors who loan money for a profit and can absorb delinquencies as part of the normal cost of doing business,³⁸³ many families entitled to child support are dependent upon the support payments for their economic livelihood, and they face undue hardship if it is not forthcoming. Nonpayment of child support contributes to the instability of the already vulnerable single-parent home, resulting in lasting emotional and psychological injury to dependent children.³⁸⁴ Furthermore, nonpayment of child support is in large part responsible for the disproportional number of single mothers living in poverty.³⁸⁵

From a pragmatic viewpoint, this Note's proposal makes sound financial sense. When it is the delinquent obligors' irresponsibility that forces thousands of single-parent families onto the welfare rolls, the rest of society should not be forced to pay the price. If the plight of the dependent family does not appeal to our sense of fairness and equity, then it should, at a minimum, appeal to our desire to reduce our huge annual contribution to their support.³⁸⁶ Elimination

381. See *supra* text accompanying notes 40-41.

382. See *supra* text accompanying notes 90-129.

383. See *supra* note 56 and accompanying text.

384. See *supra* text accompanying notes 58-65.

385. See *supra* text accompanying notes 71-74.

386. In 1992, the AFDC program cost federal taxpayers \$14.8 billion. 1994 BUDGET, *supra* note 106, at app-624. Furthermore, even though the child support collected by the federal-state Child Support Enforcement program reduced the number of families qualified to receive AFDC benefits, the program incurred a net loss. 16TH ANNUAL REPORT, *supra* note 78, at 6. In fiscal year 1991, program expenditures exceeded revenues by \$201 million. *Id.* at 7.

of the entireties obstacle to collection of support arrearage would place at least some of this financial burden where it belongs—on the delinquent obligor. This end is consistent with the policies underlying virtually all federal and state child support legislation.

VII. CONCLUSION

The nation's attitude toward delinquent child support obligors has clearly reached the level of intolerance.³⁸⁷ Yet, despite tough political rhetoric and in the midst of a national blizzard of child support enforcement initiatives, millions of delinquent obligors avoid their obligation. A portion of these do so under the ancient umbrella of the tenancy by the entirety. The financial protection provided by the entireties estate, however, seems to be weakening.³⁸⁸

Legislatures and courts are becoming increasingly less reverent of the estate's heritage as they recognize its incompatibility with modern society.³⁸⁹ In light of the outdated premise underlying the entireties estate and the destructive effects of nonsupport on dependent families and society, closure of the entireties loophole is long overdue. So long as nondelinquent co-tenants are adequately compensated, no sound rationale exists for permitting the obstacle presented by the entireties asset shield. After custodial parents, like Julie,³⁹⁰ endure the long and frustrating process of locating the obligor, identifying his assets, and obtaining a judgment against him, the law should ensure that dependent children receive prompt and complete payment of the support to which they are legally entitled.

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387. See *supra* text accompanying note 2.

388. Symptoms of the erosion of the tenancy by the entirety are the number of states that do not recognize it, see *supra* note 207, the abundance of scholarly writings critical of the characteristics of the estate, see *supra* notes 229-32 and accompanying text, the subordination of the similar family-protection policy of statutory homestead exemptions to the IRS's objective to collect delinquent taxes, see *supra* text accompanying notes 260-78, and the occasional destruction of tenancies by the entirety to effect forfeitures of property used in the commission of drug felonies, see *supra* text accompanying notes 310-35.

389. See *supra* text accompanying notes 310-35 (explaining federal civil forfeiture).

390. See *supra* text accompanying notes 9-13.