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On the other hand, and perhaps more importantly, the decision clearly puts public housing officials on notice that their actions in the future will be subject to judicial scrutiny. Hopefully, this factor will cause public housing officials to reëvaluate their attitudes and to bring their policies into line with the goals and purposes underlying the public housing program.[56]

Advocates of the system of justice found in the United States have often compared it favorably with judicial practices in other countries. Yet that very system has too often permitted those of our citizens who are dependent on government assistance in such areas as public housing to be treated "as nonpersons in a constitutional sense; as persons who have, in return for welfare payments, surrendered to the state's social workers their constitutional rights to privacy and personal security."[57] To permit this state of affairs to continue would be intolerable.

> We need not go so far as to embrace the argument that the state has a constitutional duty to provide its indigent citizens with support; but if the state chooses to do so, it must proceed with careful regard to the rights of the recipients, for they, too, are persons within our constitutional scheme. Indeed, it may be that in the final analysis, a nation is measured—perhaps its future is determined—not by the protection which its institutions afford to the rich and strong, but by the meticulous care with which the rights of the weak and humble are safeguarded.[58]

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Real Property—Tenancy by the Entirety in Real Property During Marriage

In determining the respective rights and interests of husband and wife (*H* and *W*) in jointly held real property, the common law accepted literally the Biblical statement that *H* and *W* are one. This legal fiction of "unity of person" was utilized to vest title to the real property in *H* and *W* simultaneously, *i.e.*, both owned the whole estate with neither holding

[56] "Because serious injury attends eviciton from public housing, the threat of termination is a dangerous weapon. Used carelessly, it can create a hostile, bitter atmosphere in a housing project. Tenants, made to feel insecure, begin to distrust each other as well as project officials."
Comment, *Public Landlords and Private Tenants* 991.

[57] Fortas 413.

[58] *Id.* at 414.

a divisible portion.[1] This estate is called a tenancy by the entirety and is presently recognized in twenty-two jurisdictions,[2] but its incidents have been modified in most states.[3]

The common law incidents of tenancy by the entirety can be summarized as follows: *H* alone had the right to manage and control the property and was entitled to all rents and profits without having to account to *W*. He could thus lease, mortgage, or convey the property, but subject to *W*'s contingent right of survivorship. Although *H*'s creditors could reach his right to the rents and profits during the marriage, *W*'s creditors had no recourse against the property during coverture. The estate was, however, liable for the joint obligations of *H* and *W*. Each spouse had a contingent right of survivorship that could not be defeated by either spouse alone during the marriage. On the death of either *H* or *W*, the right of survivorship vested the entire fee in the surviving spouse. If *W* survived, she was not bound by any encumbrance of the realty in which she did not join.[4] Thus, the basic theory of the tenancy of the entirety at common law was that there was unity of the spouses with *H* in control of the realty.

Decisions of the North Carolina Supreme Court show that North

[1] 4 R. POWELL, REAL PROPERTY ¶¶ 621-24 (1968) [hereinafter cited as POWELL]; Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. IND. & COM. L. REV. 197 (1960); Lee, *Tennacy by the Entirety in North Carolina*, 41 N.C.L. REV. 67 (1962); Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951) [hereinafter cited as Phipps]. Tenancies by the entirety and joint tenancies with survivorship should not be confused. The basic distinction is that an estate by the entirety can only exist between H and W, whereas a joint tenancy may exist between any number of persons with each tenant having a specific and identifiable interest. In a joint tenancy the interest of each tenant may be executed against for his debts. In most entirety jurisdictions this is not the case. *Id.* at 35-41; POWELL ¶¶ 616-18.

[2] POWELL ¶ 621, at 685 n.7. MISS. CODE ANN. § 834 (1956) allows creation of a tenancy by the entirety with right of survivorship if it manifestly appears that the estate was intended. Cuevas v. Cuevas, — Miss. —, 191 So. 2d 843 (1966).

[3] In Delaware, District of Columbia, Florida, Indiana, Kentucky, Missouri, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming the common law has been modified so that there is joint use and disposition of the rents and profits. *See* Phipps 46-57. One writer includes Tennesssee and Maryland in this group. *Id.* Seven jurisdictions have gone even further and hold that each spouse is entitled to one-half the rents and profits, and use. Pilip v. United States, 186 F. Supp. 397 (D. Alas. 1960); Franks v. Wood, 217 Ark. 10, 228 S.W.2d 480 (1950); *In re* Dean's Trust, 47 Hawaii 629, 394 P.2d 432 (1964) (inference); Wardrop v. Wardrop, 211 Md. 14, 124 A.2d 576 (1956); Dvorken v. Barrett, 100 N.J. Super. 306, 241 A.2d 841 (1968); College Point Sav. Bank v. Tomlinson, 42 Misc. 2d 1061, 249 N.Y.S.2d 938 (Sup. Ct. 1964); Brownley v. Lincoln County, 218 Ore. 7, 343 P.2d 529 (1959). *But see* POWELL ¶ 623 at 703, and Phipps 46-57, who cite only Arkansas, New Jersey, New York, and Oregon in this group.

[4] Material cited note 1 *supra*; *contra*, Note, 14 RUTGERS L. REV. 457 (1960).

Carolina is a "strong" tennacy by the entirety state, *i.e.*, North Carolina adheres to the foregoing common law incidents.[5] Despite its well established traditions, however, changing times continue to produce new situations with which the tenancy must deal. This note will examine some of the continued legal problems raised by the estate by the entirety in real property in North Carolina during the joint lives of the spouses.

The extent of modern day marital problems was unfamiliar to the common law history of the tenancy by the entirety. In today's setting, however, it has been necessary to deal by statute with the effect of the estate on *W*'s right to alimony. Rents and profits from entirety property in North Carolina may be charged with the support of *W* in an action for alimony or alimony pendente lite without divorce.[6] A prior statute[7] allowed the court to issue a writ of possession that gave *W* control of the property so that she could apply the rents and profits, when they had accrued and become personalty, to pay the alimony and counsel fees. Yet, *W* could not get title to the property. Under a new statute enacted by the 1967 General Assembly,[8] if *W* is separated from *H* and is seeking alimony or alimony pendente lite without divorce, the superior court can order payment to *W* by transfer of title or possession of personal property, or an interest therein, or by a security interest in or possession of real property.[9] A subsection[10] gives the court power to order transfer of title to real property under N.C. GEN. STAT. §§ 1-277 and 1-278. Thus, in this domestic setting, the tenancy by the entirety can be conveyed to *W* by the superior court without the joinder or consent of *H*, thereby establishing a statutory exception to the common law rule of exclusive possession and control by *H* during the marriage.

A voluntary transfer of entirety property by both spouses terminates the tenancy and the proceeds are held by *H* and *W* as tenants in common. Where the transfer is involuntary, however, more serious problems may arise.[11] In *North Carolina Highway Commission v. Myers*,[12] the proceeds from the condemnation of entirety property were deposited with the clerk of superior court. *W* brought an action seeking a greater condemnation

[5] Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954).
[6] Porter v. Citizens Bank, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).
[7] N.C. GEN. STAT. § 50-17 (1966).
[8] N.C. GEN. STAT. § 50-16.7 (Supp. 1967).
[9] *Id.*
[10] *Id.* (c).
[11] Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).
[12] 270 N.C. 258, 154 S.E.2d 86 (1967).

award from the state, but also asked that a portion of the deposit be distributed to her pending her current action for alimony without divorce. The North Carolina Supreme Court ruled that an involuntary conveyance of title did not destroy the estate; the compensation award had the same status as the real property that had been owned by the entireties. Thus, *W* had no present right to any portion of the proceeds since neither spouse has a separate interest in the entirety realty.

The North Carolina Supreme Court has also ruled that a private sale under a state statute[13] authorizing such sale when land is held by the entireties and one spouse is incompetent, is an involuntary transfer.[14] The court held that the entirety nature of the estate was not destroyed, but that the right of survivorship attached to the fund. It was further held, however, that *H* held the corpus as trustee for the survivor.[15] Thus, where *W* is incompetent, her interest in the proceeds from an involuntary sale of the entirety property is protected by *H*'s fiduciary status. In the typical situation, however, *W*, even though competent, can not protect her interest in the entirety realty or the proceeds. If *W* continues to live with *H* even though there are serious marital difficulties, or where she is separated from *H* but not seeking alimony, her contingent interest could be destroyed. The proceeds from an involuntary sale are paid to *H* and he would continue to be legally entitled to control the proceeds since they represent the real property. In these latter situations there is no safeguard after payment to prevent an inconsiderate or irresponsible *H* from wasting the entire proceeds, thereby destroying *W*'s contingent right of survivorship, which could not have been defeated by *H*'s individual attempt to convey the realty itself.

One solution to this problem would be to hold *H* as trustee of involuntary sale proceeds for the survivor, even when *W* is competent, rather than simply giving the proceeds to him with no safeguards. Under such an approach, *H* would at least be bound by the usual rules of conduct for a fiduciary and could be made to account if he was delinquent in his duties as trustee. Even then, however, a judicial decree would be of little comfort or benefit to *W* if *H* were insolvent or without assets.

In order to provide *W* with protection when there is disharmony in the marriage, the fund could be deposited in a savings account in the name of *H* and *W* as tenants by the entirety with *H* entitled to the

[13] N.C. GEN. STAT. 35-14 (1935).
[14] Perry v. Jolly, 259 N.C. 306, 130 S.E.2d 654 (1963).
[15] *Id.* at 314, 130 S.E.2d at 661.

interest during the spouses' joint lives and with the survivor entitled to the cash account. A more ideal arrangement might be to authorize the superior courts by statute to appoint a bank or savings and loan company as trustee to invest the fund from an involuntary transfer and order it to pay a reasonable return to *H* with the remainder being accumulated to be paid with the principal to the survivor. Under either arrangement, *H* continues to be entitled to the profits from the estate, but the desired protection is provided for *W*'s contingent right of survivorship.

In determining the respective rights of the spouses to insurance proceeds, North Carolina does not treat the loss of insured entirety property as an involuntary transfer. The North Carolina Supreme Court ruled in *Carter v. Continental Insurance Company*[16] that although the *H* had an insurable interest in entirety property,

> since the proprietary interest of the husband was an inseparable part of the single-entity title held in unity by him and the wife, his insurable interest ran to the whole property and covered the entire estate . . . . [T]he loss benefits created thereby inured to the entire estate . . . .[17]

Since an absolute divorce had terminated the estate subsequent to the fire, the court held *W* was entitled to one-half the proceeds.[18] In a recent decision,[19] the North Carolina Court of Appeals held that insurance proceeds from entirety property received before divorce is personal property, there being no involuntary conversion. The *H* had requested that the fund be deposited in joint savings accounts to the credit of *H* and *W* with right of survivorship, but with the interest payable to *H*. The court upheld the trial court's determination that one-half was to be distributed to each spouse.

Thus, even if a spouse paid all the premiums and had the policy issued in his name alone, the spouse still could not insure to the exclusion of the other spouse. In the insurance area, the "oneness" of the spouses requires that the insurance policy, although purchased by one spouse through a contract with a third party, belongs to both. As a practical matter, the loss of the insured structure can result in a diminution of the rents and

[16] 242 N.C. 578, 89 S.E.2d 122 (1955). *Accord,* Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960) (dictum).

[17] 242 N.C. at 580, 89 S.E.2d at 124. *But see* Henderson v. Stuart, 221 N.C. 37, 18 S.E.2d 705 (1942) (holding *H* had the right to use some of the proceeds of a fire policy to pay individual indebtedness).

[18] For a thorough discussion of the *Carter* case, see Note, *Fire Insurance—Estates by the Entirety—Insurable Interest—Right to Proceeds,* 35 N.C.L. REV. 134 (1956).

[19] Forsyth County v. Plemmons, 2 N.C. App. 373, 163 S.E.2d 97 (1968).

profits going to *H*, even though the land is still there. It would seem therefore that *H*, if he pays all the premiums should be entitled to all the insurance proceeds.

One of the most fertile sources of problems continuing to arise under the tenancy by the entirety is the broad area of creditors' claims. North Carolina has consistently followed the common law immunity of the entirety estate to the separate debts of the spouses, even recently applying it to a political subdivision's attempts to avoid this incident. In *Duplin County v. Jones*,[20] land was owned by the entirety, but listed on the tax records in the name of *H* alone. A county tax on separate personal property owned by *H* and by *W* was not paid. The court held that no lien attached to the tenancy by the entirety because of the unpaid tax levied upon either spouse's separately owned property. Not only a private creditor then, but the state, can be frustrated by this incident of the estate in attempting to satisfy a claim.

Determining when one spouse alone acts for both is important to the creditor seeking to levy execution on entirety property for a joint obligation. North Carolina is in accord with the general rule that marriage alone does not make one spouse the agent of the other.[21] In *General Air Conditioning Company v. Douglass*,[22] *H* had contracted with the plaintiff to install a number of heating systems in homes constructed by *H*, a builder, and owned by the entirety. The plaintiff alleged that *H* was the agent of *W* in entering the written contract in question for the installation of the heating system in a home built for resale by *H*. The plaintiff thereby hoped to be able to levy execution upon the entirety property to satisfy what then would be a joint obligation. The plaintiff had knowledge, however, that all property was owned by the entireties, yet he admitted that he dealt exclusively with *H*, never talking to or reaching any agreement with *W*. A judgment of nonsuit for *W* was sustained. The court said that marriage did not make *H* the agent of *W*, nor did it create a presumption of agency.[23] To establish agency, said the court, it had to be proven. The court also found no evidence of ratification by word

[20] 267 N.C. 68, 147 S.E.2d 603 (1966).

[21] *E.g.*, Lo Medico v. Simkowitz, 158 A.2d 681 (D.C. Mun. Ct. App. 1960); Wohlmuther v. Mt. Airy Plumbing & Heating, Inc., 244 Md. 321, 223 A.2d 562 (1966); Vaughn v. Great American Ins. Co., 390 S.W.2d 622 (Mo. App. 1965); Falk v. Krumm, 39 Misc. 2d 448, 240 N.Y.S.2d 653 (Sup. Ct. 1963); Godwin Bldg. Supply Co. v. Hight, 268 N.C. 572, 151 S.E.2d 50 (1966).

[22] 241 N.C. 170, 84 S.E.2d 828 (1954).

[23] *Id.* at 173, 84 S.E.2d at 831.

or act of *W*. Neither could estoppel apply since no proof was offered that *W* by her words or conduct represented to anyone that *H* was her agent in the transaction.

As the rule now stands concerning agency between the spouses in North Carolina, a correct result was rendered under the facts of the *Douglass* case. However, where *W* is directly benefited by the work performed the question of agency is more difficult to resolve. *Grant v. Artis*[24] involved a suit brought against *H* and *W* for the price of electrical equipment and its installation in a dwelling that was owned by the entireties. Without reviewing the evidence below or even citing *Douglass*, the court in a per curiam opinion held that the evidence was sufficient to go to the jury for a determination of the question of whether *W* was a party to the contract for the services performed. Because the facts are not fully set forth it is hard to distinguish a difference between *Artis* and *Douglass*. The only apparent distinction between them is that there was a direct benefit to *W* from *H*'s actions in *Artis*, since the equipment was installed in a home that was occupied as a dwelling by the couple and not just held for resale as in *Douglass*. The record of appeal of the *Artis* case shows that the *W* had pointed out to the plaintiff where she wanted the stove to go in the house and where she wished other electrical outlets located.[25] The evidence was in conflict as to whether both *H* and *W* agreed with the plaintiff to pay for the work, but the jury found for the plaintiff.

The *Douglass* decision is a good example of an individual creditor of one spouse being prevented by the device of the entirety estate from collecting on his debt. Since *Artis*, however, a creditor may be able to at least get to the jury on some agency theory, even if *W* did not sign a writing, if *W* derived some direct benefit from the contract or if the creditor can show that *W* knew of the work and did not object. Also, the theory of ratification or estoppel is available on the proper set of facts.[26]

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[24] 253 N.C. 226, 116 S.E.2d 383 (1960).

[25] Brief for Appellant at 3, Grant v. Artis, 253 N.C. 226, 116 S.E.2d 383 (1960).

[26] Pennsylvania's rule is unique and seems to better balance the interest involved in the agency question. In J.R. Christ Constr. Co. v. Olevsky, 426 Pa. 343, 232 A.2d 196 (1967), *H* rented heavy equipment to grade farm land owned by the entirety to build a riding ring for their personal enjoyment. *W* had knowledge of the work, but she was not involved in the business transaction. The Pennsylvania Supreme Court affirmed a judgment for the plaintiff construction company and ruled that there is a presumption

> with respect to properties held by the entireties . . . that during the term of a marriage, either spouse has the power to act for both without specific authority, so long as the benefits of such action inure to both. This presumption . . . does not require knowledge on the part of the other spouse in question,

A tenancy by the entirety naturally lends itself to abuse by persons trying to escape creditors because of the property's immunity from levy for either spouse's separate debts. A debtor in North Carolina, however, can not defraud creditors by intentionally transferring his separate land to himself and his *W* as tenants by the entirety in order to avoid levy on the land for his debts.[27] The conveyance is deemed fraudulent on the theory that but for the conveyance the asset would have been a source from which creditors had a right to be paid.[28]

The North Carolina Supreme Court held in *Winchester-Simmons Company v. Cuttler*[29] that a conveyance by *H* and *W* of entirety property to a grandaughter was not fraudulent, even though the purpose and intent of the transfer was to prevent creditors from levying on the realty should *H* survive. *W* was in poor health at the time of the conveyance, and died soon thereafter. The court said that when the entirety land was conveyed *H* had only a contingent right of survivorship which could not be sold to satisfy the judgment.[30] Seven years after *Cuttler*, the court, following the common law rule, held in *Lewis v. Pate*[31] that creditors of *H* could levy upon the rents and profits of the estate to which *H* alone was entitled to satisfy his debts.[32] As a result of these two rulings, if the property conveyed to the granddaughter in *Cuttler* had been producing rents and profits, the important question arises whether the conveyance then would have been fraudulent since the creditors would be denied this present interest upon which to levy execution. The North Carolina Supreme Court chose recently not to avail itself of an opportunity to consider this question, and it was left to a concurring opinion to provide the probable answer.

In *L & M Gas Company v. Leggett*,[33] a judgment lien was obtained against *H* when land was held by the entirety. Subsequently *H* conveyed his interest to *W*. The judgment creditor sought to have the conveyance set aside as fraudulent. The court sustained a demurrer to the complaint,

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but only that it may be rebutted if, in fact, the spouse so acting was not authorized to act by the other spouse.

Id. at 345, 232 A.2d at 199.

[27] Sills v. Morgan, 217 N.C. 662, 9 S.E.2d 518 (1940).

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

[29] 199 N.C. 709, 155 S.E. 611 (1930).

[30] *Id.* at 714, 155 S.E. at 613.

[31] 212 N.C. 253, 193 S.E. 20 (1937).

[32] A receiver will not be appointed to rent the property in order to pay creditor's claims. Grabenhoffer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

[33] 273 N.C. 547, 161 S.E.2d 23 (1968).

reiterating that a tenancy by the entirety is not subject to the separate debts of either spouse. Justice Sharp in a concurring opinion[34] said the main question was whether it would be a fraudulent conveyance for a debtor *H* to convey to *W* his interest in income producing property held by the entirety. She concluded that such a transfer would not be fraudulent. She reasoned that land owned by the entireties is not subject to the claims of either spouse's creditors and an individual creditor's lien can not attach to the property unless the debtor spouse survives. The income, rents, and profits are personalty, not realty. In conveying his interest to *W*, *H* transfers the realty, which includes as an incident the right to all the profits, but does not actually convey the personalty. Therefore the transfer is not fraudulent since the property conveyed, *i.e.*, entirety property, could not be reached initially by the creditors to satisfy any individual claims against *H*.

This conclusion may initially seem unfair to creditors, but it is the only reasonable one considering the relevant incident of the estate by the entirety, *i.e.*, immunity from individual debts of the spouses. Since the spouses can convey the entire fee to a third party, they should be able together to convey the fee to either one or the other. If its income producing nature were to prevent the transfer of the entirety property because a fraud on creditors, the practical effect would be a restraint on alienation since potential purchasers would be concerned that a transfer could be set aside by creditors. The contrary argument, of course, is that the conveyance can be set aside only if it was made with the intent to defraud or hinder creditors. Thus, *H* and *W* need only negate any proof of intent to overcome the voiding of the transfer.[35]

ROBERT A. WICKER

Securities Regulation—Application of Rule 10b-5 to Open-Market Transactions

Securities trading in the United States is growing each year. Daily volume on the New York Stock Exchange now averages in excess of ten

[34] *Id.* at 553, 161 S.E.2d at 28.

[35] Since *H* alone is entitled to the rents and profits, if he assigned only his right to the income, individual creditors might successfully contend that this was a fraudulent transfer, provided the intent to defraud were present. In this instance *H* conveys not the land, but the personal property itself to defraud creditors, and the court has ruled that the rents and profits can be reached by individual creditors.