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## If Judgment Creditors Cannot Set Asunder a Debtor Spouse's Interest in the Marital Home, What Can They Do

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## IF JUDGMENT CREDITORS CANNOT SET ASUNDER A DEBTOR SPOUSE'S INTEREST IN THE MARITAL HOME, WHAT CAN THEY DO?

JOHN W. FISHER, II\*

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### I. INTRODUCTION

During the past two decades, there have been a number of significant changes in spousal rights as evidenced by the interpretation of traditional property rights by the Supreme Court of Appeals of West Virginia. In its 1983 decision, *LaRue v. LaRue*,<sup>1</sup> the court adopted equitable distribution, which revolutionized property settlements when a marriage ends in divorce.<sup>2</sup> Under this "new" law, "fairness" consider-

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1. 304 S.E.2d 312 (W. Va. 1983).

2. *Id.* The *LaRue* decision led to a complete revision of the divorce sections of the West Virginia Code by the legislature in 1984. H 1694, Reg. Sess. passed March 20, 1984, amended and reenacted W. VA. CODE §§ 48-2-1, -2, -13, -15, -16, -17, -22, -3-10. Five

ations overcome "title" considerations. Essentially, the same judicial concerns that led to the *LaRue* decision when marriage ends in divorce were reflected in the *Johnson v. Farmers & Merchants Bank*<sup>3</sup> decision, which established that when a marriage ends as a result of death, the probate estate no longer defines the assets that are subject to a spouse's elective share rights.<sup>4</sup> While the *case by case* approach of resolving elective share disputes adopted in *Davis v. KB & T Co.*<sup>5</sup> and applied in *Johnson v. Farmers & Merchants Bank*<sup>6</sup> achieved "fairness" in individual cases, that approach provided no guidance for practitioners advising clients on whether to renounce a will and take an elective share of the estate. The advantages of planability and predictability, as opposed to a *case by case* determination of which assets are subject to the elective share, provided a compelling argument in favor of the adoption of House Bill 4112, which revised the law of intestate succession and elective share.<sup>7</sup>

The defining and refining of how spousal rights have altered traditional property rights has not been limited to the major areas of divorce and death. In the last twenty years, related issues have come before the West Virginia Supreme Court of Appeals on a number of occasions.<sup>8</sup> Among the cases were two decisions authored by Justice Neely that raised the issue of what rights, if any, a judgment creditor has to a judgment debtor's interest in property owned by the judgment

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new code sections were also added. See W. VA. CODE §§ 48-2-32 to -36.

3. 379 S.E.2d 752 (W. Va. 1989).

4. For an excellent discussion of the *Johnson* decision and the practical problem presented by it, see Scott A. Curnutte, Note, *Preventing Spousal Disinheritance: An Equitable Solution*, 92 W. VA. L. REV. 441 (1989).

5. 309 S.E.2d 45 (W. Va. 1983).

6. 379 S.E.2d 752 (W. Va. 1989).

7. For discussions of the new law of intestate succession and elective share see John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Share: New Solution to Age Old Problems*, 93 W. VA. L. REV. 61 (1990); Patricia J. Roberts, *The 1990 Uniform Probate Code's Elective Share Provisions—West Virginia's Enactment Paves the Way*, 95 W. VA. L. REV. 55 (1992); John W. Fisher, II, *Statutory Reforms Revisited: Toward A Comprehensive Understanding of the New Law of Intestate Succession and Elective Share*, 96 W. VA. L. REV. 85 (1993).

8. See John W. Fisher, II, *Joint Tenancy in West Virginia: A Progressive Court Looks At Traditional Property Rights*, 91 W. VA. L. REV. 267 (1989).

debtor and his or her spouse as joint tenants with the right of survivorship.<sup>9</sup> In *Harris v. Crowder*,<sup>10</sup> Justice Neely stated:

It all gets terribly complicated and the whole subject provides a field day for law school professors and law review editors. But, as is so often the case in the law, the point is that complications is what humane public policy has strived for: the more complicated the better! In the wake of complication comes uncertainty and exorbitant legal fees that chill the exercise of creditors' rights against family homes!<sup>11</sup>

Justice Neely is correct in that one of the advantages of being a law professor is the opportunity to delve into such issues and to then share our findings and conclusions with others. In the instant case the "complicated" does not need to be nearly as complicated as portrayed, and "common humanity and sound public policy" is, in fact, consistent with the "ineluctable logic of received property law."<sup>12</sup> It is submitted, that despite its gyration, the court in *Vincent v. Gustke*<sup>13</sup> did resolve the issue discussed at length in *Harris* on the basis of the received property law and that the received property law provides the most logical solution as to a judgment creditors' rights. Because it has been nearly a decade since the court handed down its decision in *Vincent*, which left unanswered the judgment creditors' rights or options, and because the court has not addressed the matter since that time, law professors are now entitled to our "field day."

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9. *Harris v. Crowder*, 322 S.E.2d 854 (W. Va. 1984); *Vincent v. Gustke*, 336 S.E.2d 33 (W. Va. 1985).

10. 322 S.E.2d 854 (W. Va. 1984).

11. *Id.* at 859.

12. The court began the decision in *Harris* as follows:

Our task today, for the first time in West Virginia decisional law, is to determine whether creditors can execute upon a husband's undivided interest in property held jointly with his wife. In the case before us the ineluctable logic of received property law strain in one direction while common humanity and sound public policy strain in the other.

*Id.* at 855.

13. 336 S.E.2d 33 (W. Va. 1985).

## II. IN THE BEGINNING THERE WAS THE COMMON LAW OF CONCURRENT ESTATE

As is so often the case in property law, to fully appreciate and understand the law of today, one must understand its origin and how it evolved from the ancient feudal concepts through the centuries to the present day.<sup>14</sup> Therefore, a brief “return” to feudal England and the roots of the common law concept of concurrent estates will be helpful.

Joint tenancy and tenancies in coparceny existed as early as the thirteenth century.<sup>15</sup> At that time, other than coparceny, the only form of co-ownership was joint tenancy. Because coparceny only occurred as a result of an inheritance, any conveyance of a freehold estate created a joint tenancy. The grantees in such conveyance were treated as though they constituted one person—a fictitious unity.<sup>16</sup> Since joint tenants were seised as a fictitious unity, there was necessarily a community of interest which required that their individual interests be equal in all respects. The description of this community of interest evolved into the four unities which were essential to a joint tenancy; *e.g.*, time, title, interest, and possession.<sup>17</sup> If one conceptualizes a

14. The court’s decision in *Herring v. Carroll*, 300 S.E.2d 629 (W. Va. 1983), which recognized the role of the four unities of joint tenancy in answering the question of whether a conveyance by one joint tenant of her interest severed the survivorship feature, is an excellent example of how understanding and applying traditional property concepts helped to produce a well-reasoned decision which not only answered the question before the court but also provided legal guidance for the future.

15. 2 AMERICAN LAW OF PROPERTY § 6.7 (1974). Coparceny originated as the estate of the female heirs of a deceased owner in fee, who inherited the property because no male heirs survived the deceased. The coparcenies were considered as holding a single estate by unity of possession, title and interest, but there was no survivorship. Except for the fact the estate was limited to estates arising in two or more heirs by inheritance where primogeniture could not apply, the estate was like a tenancy in common. *Id.*

16. 2 MINOR ON REAL PROPERTY § 838 (2d ed. 1929) explains the reason as follows: “[f]ormerly, joint tenancy was much favored for the feudal reason that it prevented the division of the useful services, such as military or agricultural services, or rent, and the multiplication of the merely honorary services, such as fealty.” *Id.*

17. Unity of time meant that the interests of all tenants must vest at the same time. Unity of title meant that all must acquire title by the same deed, will, or by a joint adverse possession. Unity of interest meant that the joint tenants have identical interests both as to the share of the common property and as to the period of duration of the interest of each.

cotenant's ownership as a community of interest, then joint tenants take as one. They must take at the same time and by the same deed, and they must also have interests which are identical.<sup>18</sup>

In the fourteenth century, tenancies in common were recognized when one or more of the four unities were missing. Therefore, a conveyance to each of two or more persons of an individual one-half, one-third, or any other fraction created a tenancy in common because the conveyance was to the grantees as separate individuals and not to them as a unit. However, the essence of a joint tenancy was the existence of a single estate in the unit, not separate interests in the individual tenants. Therefore, the requirement of the four unities necessarily arose as a result of the basic concept rather than as a pre-requisite to the creation of the estate.

The right of survivorship is not considered a type of future interest. The survivorship of the joint tenancy is based on the concept that the estate is held by the fictitious entity made up of the cotenants collectively and that the "entity" continues so long as any of the joint tenants survive. Therefore, when the first joint tenant dies, his or her individual right to share in possession and enjoyment ceases. The deceased tenant's interest is extinguished on his or her death, and therefore, there is no interest to devise in a will or descend to heirs. The joint tenant's estate continues in the survivor or survivors. Obviously, the last survivor owns the whole estate because he or she no longer shares the estate with the former cotenants.<sup>19</sup>

The ability of an individual joint tenant to alienate his interest during his lifetime was recognized as early as the thirteenth century. The conveyance of one joint tenant's interest to another necessarily ended the unities. The grantee of the interest obtained the conveying joint tenant's interest at a different time and by a different conveyance, and therefore, the unities of time and title were destroyed as to the share which had been conveyed. If only two joint tenants existed, sev-

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Unity of possession was not peculiar to joint tenancies. All co-owners, whether joint tenants, tenants in common, or coparceners, had a common right to share, possess and enjoy the property. 2 AMERICAN LAW OF PROPERTY § 6.1 (1974).

18. 2 AMERICAN LAW OF PROPERTY § 6.1 (1974).

19. *Id.*

ering the unities ended the joint tenancy and the grantee of the share conveyed and the remaining joint tenant became tenants in common. If there were three or more joint tenants, the grantee of the conveyed interest became a tenant in common of the interest conveyed; however, the joint tenancy continued as to the remaining joint tenants, with survivorship between the remaining joint tenants. If the conveyance was by one joint tenant to one of the other joint tenants, the grantee cotenant held the share conveyed as a tenant in common since that interest was obtained by a different title at a different time.<sup>20</sup>

By the end of the fourteenth century, it was well-established that if one of the four unities was missing when the cotenancy was created, or if the unities were severed after a joint tenancy had been established, a tenancy in common would result in which each tenant owned an undivided, inheritable share free from the incident of survivorship. Accordingly, the only unity necessary for a tenancy in common is the unity of possession.<sup>21</sup>

A tenancy by the entirety is an estate held by husband and wife as a unity arising as a result of the common law fiction of the unity of husband and wife. Because tenancy by the entirety requires a valid marriage, a divorce destroys such tenancy. In addition to a valid marriage, the four unities of joint tenancy are also essential to a tenancy by the entirety. Again, as in the case of joint tenancy, a tenancy by the entirety must arise by "purchase," therefore, no such tenancy can arise where a husband and wife take as co-heirs.<sup>22</sup>

At common law, if the four unities were present, a conveyance to two or more individuals created a joint tenancy, and if the grantees were husband and wife, a tenancy by the entirety was created. In order to prevent a survivorship relationship, the intent that the parties hold as tenants in common had to be affirmatively established.<sup>23</sup> While the

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20. *Id.* § 6.2.

21. *Id.*

22. *Id.* § 6.6.

23. According to 2 AMERICAN LAW OF PROPERTY § 6.5. (1974):

It was once thought that a conveyance of real property to husband and wife necessarily resulted in the creation of a tenancy by the entirety: the husband and wife were not considered to be separate legal entities. A conveyance to husband and

American colonies initially followed the English common law rules, shortly after the American Revolution, states began to adopt statutes to reverse the common law presumption which favored joint tenancy. Generally, the statutes provided that a conveyance to "two or more persons in their own right" created a tenancy in common unless an intent to create a joint tenancy was expressly declared.<sup>24</sup>

### III. CONCURRENT ESTATES IN WEST VIRGINIA

#### A. *Tenancy by the Entirety: Even If We Were Wrong, We Were Right*

As noted above, the first significant change from the common law concurrent estate in this country was the reversal of the presumption in favor of joint tenancy. In West Virginia, the next significant departure from the concurrent estate's common law heritage involved the tenancy by the entirety. An article in an earlier issue of the West Virginia Law Review traces the development of joint tenancy and tenancy by the entirety in West Virginia by beginning with the early statutory provisions in Virginia.<sup>25</sup> For present purposes, the first significant development occurred in 1903 when the West Virginia Supreme Court of Appeals first addressed the issue of tenancy by the entirety in *McNeeley v. South Penn Oil Co.*<sup>26</sup> In *McNeeley*, real estate had been conveyed to a husband and wife. Of the several issues raised in this case, the issue of whether the husband and wife owned the real estate by tenancy by the entirety was central. In deciding this question, the court noted that when the land was conveyed to the husband and wife, Section 3 of Chapter 66 of the 1868 West Virginia Code was in force.<sup>27</sup> That statute granted a wife the power to take and to hold for

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wife as 'tenants in common' or as 'joint tenants' was nevertheless construed to create a tenancy by the entirety.

*Id.* § 6.6.

24. *Id.* § 6.3.

25. Robert L. Merricks, *Joint Estates in Real Property in West Virginia*, 61 W. VA. L. REV. 101 (1958).

26. 44 S.E. 508 (W. Va. 1903).

27. W. VA. CODE § 66-3 (1869) provided that:

Any married woman may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use,



her separate use land and the rents and profits therefrom as if unmarried. In addition, the statute prohibited the husband from disposing of the land or its rents and profits. The court reasoned that this statute "would give the wife sole possession, and it would seem to prevent estates by entirety from arising thereafter as they did before the statute."<sup>28</sup> In so holding, the court acknowledged that a majority of its sister states that had considered this question had reached a contrary conclusion as to the effect of the "separate estate acts" on tenancies by the entirety. However, the court distinguished the holdings in sister states by noting that effective July 1, 1850, Virginia had abolished survivorship<sup>29</sup> and that the Virginia statute had been carried into West Virginia law.<sup>30</sup> Therefore, the court concluded that the "married woman's act," in combination with the provision altering common law survivorship, abolished tenancy by the entirety in West Virginia.<sup>31</sup>

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and convey and devise, real and personal property and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts. Provided, that no married woman, unless she is living separate and apart from her husband shall sell and convey her real estate, unless her husband joins in the deed or other writing by which the same is sold or conveyed.

*Id.*

28. 44 S.E. at 511.

29. VA. CODE ANN. § 116-18 (1849).

30. W. VA. CODE § 71-18 (1868) states:

When any joint tenant shall die, whether the estate be real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts, courtesy, dower, or distribution, as if he had been a tenant in common. And if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, courtesy, or dower, as the case may be.

*Id.*

31. According to *McNeeley*:

[A] reason exists from this, [West Virginia Code Chapter 71, section 18] in this State of saying that estates by entirety have ceased since the married woman's act, that does not exist in other states. Survivorship has perished under the Code of 1849. The right of the husband to control and take the profits of and convey for his life the interest of the wife in entirety estates has been taken away by the separate estate act. What is left of an estate by entirety? Is its indivisibility or impartibility still left? I think not, as I think the statute of partition applies to it. From these considerations, I conclude that we cannot say that the statute of limita-

Fifty years later, the issue of what estate was created when property was conveyed to a husband and wife "as joint tenants with the right of survivorship" was again before the court in *Wartenburg v. Wartenburg*.<sup>32</sup> In *Wartenburg*, the precise question before the court was whether a husband could partition land conveyed to him and his wife as joint tenants with the right of survivorship. The circuit court had denied partition because it considered the conveyance to have created a tenancy by the entirety which was, therefore, not susceptible to partition. In reversing the circuit court, the West Virginia Supreme Court of Appeals noted that this precise question had already been decided in *McNeeley v. South Penn Oil Co.*<sup>33</sup> In addition, the court in *Wartenburg* noted that even if the *McNeeley* decision could be assumed to be erroneous, the amendments and additions to the married woman's acts since it was decided, would now make the result of the *McNeeley* decision clearly correct.<sup>34</sup> While there is nothing in the court's decision in *Wartenburg* which provides any insight into why the court made the statement "though we assume the holding in *McNeeley v. South Penn Oil Company, supra* to be erroneous," it may reflect that

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tions does not apply because Higgins and wife had an estate by entirety, since I think that, by the joint operation of the act abolishing survivorship between husband and wife and the separate estate act, Higgins and wife held the land as joint tenants, not an estate by entirety.

44 S.E. at 512.

32. 100 S.E.2d 562 (W. Va. 1957).

33. 44 S.E. 508 (W. Va. 1903).

34. The court explained its reasoning as follows:

In addition to the change in the language contained in Section 18 of Chapter 71 of the 1868 Code by the adoption of the 1931 Code, it may be helpful to point out that important and pertinent amendments and additions have been made to the statutory provisions relating to the rights of married women since the decision of *McNeeley v. South Penn Oil Co., supra*. For example, Section 13 of Article 3 of Chapter 48 first became a part of our statutory law with the adoption of the 1931 Code. The section reads: "Any property to which a married woman is entitled, either at law or in equity, may not be subjected to any restraints upon alienation or other restrictions that may not lawfully be placed upon the property of persons not married". Though we assume the holding in *McNeeley v. South Penn Oil Company, supra*, to be erroneous, how can we now say that the interest of a married woman in real estate is not susceptible of partition, in view of such changes in the married woman's statutes, while the same interest, if owned by a woman "not married", would be susceptible of partition?

100 S.E.2d at 565.

portion of the *McNeeley* decision where the court recognized that its decision as to the effect of the married woman's act on tenancies by the entirety was in the minority and that even though our statute was based on the statute in New York, our court would not follow New York's decision.<sup>35</sup>

To the extent there may have been any questions as to the precedential value of the *McNeeley* decision that tenancy by the entirety had been abolished in West Virginia, the *Wartenburg* case removed all doubts by clearly holding that tenancies by the entirety were abolished in West Virginia. In *Wartenburg*, the court concluded its decision by holding:

In considering the effect of the several pertinent statutory provisions, we have not overlooked Code, 36-1-20, relating to the rights of survivorship. We think, however, that section cannot be given controlling effect as to the question involved. The rights of survivorship do not depend on the continued existence of common law estates by entireties. Such estates were created and existed at common law only by virtue of a fiction, a fiction not recognized in this State, that a husband and wife constitute a unity, and that, therefore, separate and distinct interests in property could not be created by a conveyance to them.

The effect of the statutes mentioned, especially Code, 36-1-19, we believe, *completely abolishes common law estates by entireties*. This being true, the deeds mentioned created joint tenancies in the grantees, vesting in each an undivided one half interest in the properties conveyed, subject to the survivorship rights of each other. Partition of the real estate conveyed by the deeds, therefore, is compellable.<sup>36</sup>

One of the statutes relied upon in the *Wartenburg* case was West Virginia Code Section 36-1-19,<sup>37</sup> which "reversed" the common law

35. See 44 S.E. at 509-12; see also Merricks, *Joint Estates*, *supra* note 25, at 111-12. Merricks' article, which was written after the *Wartenburg* decision, cites several instances where the Virginia court construed a statute identical to one in West Virginia to give effect to the intent of the parties to create a tenancy by the entirety.

36. 100 S.E.2d at 565 (emphasis added).

37. W. VA. CODE § 36-1-19 (1985) provides that:

When any joint tenant or tenant by the entireties of an interest in real or personal property, whether such interest be a present interest, or by way of reversion or remainder or other future interest, shall die, his share shall descent or be disposed of as if he had been a tenant in common.

*Id.*

presumption in favor of "survivorship." The common law had preferred survivorship because it was in the interest of the feudal lord that each feudal holding comprise a single estate continuing until the death of the survivor rather than a separate interest in individual tenants. Therefore, at common law, a conveyance or devise to two or more individuals, if the four unities were present, created a joint tenancy unless the intent that the grantees hold as tenants in common was affirmatively established.<sup>38</sup>

In his 1961 law review article, Professor Londo Brown referred to this common law presumption in favor of joint tenancy as a "trap for the unwary" and stated that this "trap" was part of the reason that chancery courts began to hold a conveyance to two or more individuals as creating a tenancy in common if there was anything in the creating instrument to negate an intent to create a joint tenancy.<sup>39</sup> The bias against survivorship is reflected in the fact that most states have enacted statutes similar to West Virginia, which, in effect, provide that a grant or devise to two or more persons in their own right shall create a tenancy in common unless an intent to create a joint tenancy is expressly declared.<sup>40</sup>

The companion statute to West Virginia Code Section 36-1-19 is Section 36-1-20. This latter section provides that Section 36-1-19 shall not apply where the grantor or testator expresses an intent that there shall be survivorship.<sup>41</sup> In 1981, Section 36-1-20 was amended, adding subsection (b) which reads:

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38. 2 AMERICAN LAW OF PROPERTY § 6.5 (1974).

39. Londo H. Brown, *Some Aspects of Joint Ownership of Real Property in West Virginia*, 63 W. VA. L. REV. 207, 209 (1961).

40. 2 AMERICAN LAW OF PROPERTY § 6.3 (1974).

41. Specifically, W. VA. CODE § 36-1-20(a) (1985) provides that:

The preceding section [§36-1-19] shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies.

*Id.*

When the instrument of conveyance or ownership in any estate, whether real estate or tangible or intangible personal property, links multiple owners together with the disjunctive "or," such ownership shall be held as joint tenants with the right of survivorship, unless expressly stated otherwise.<sup>42</sup>

While it would be interesting to speculate as to what type of incident gave rise to the 1981 amendment, what is apparent is that its addition to the existing statute brings about an unusual circuitousness between these two statutes. In fact, the drafting of these two statutory provisions was recently criticized by the West Virginia Supreme Court of Appeals in *Lieving v. Hadley*.<sup>43</sup> In *Lieving*, the court made the following observation in a footnote:

We recognize that the law defining the survivorship principles of joint tenancies, tenancies by the entirety and tenants in common are very old. At common law, when two (or more) people owned a piece of property in both of their names and all four unities existed (time, title, interest and possession), then they held as joint tenants with a right of survivorship. This often created traps for the unwary and forced many to go through straw transactions in order either to create or break the unities. The legislature wanted to create a scheme based on the intent of the parties as opposed to the common law unities. See *Herring v. Carroll*, 171 W.Va. 516, 300 S.E.2d 629 (1983). First, the legislature "outlawed" joint tenancies by abolishing the common law rules in *W.Va. Code* 36-1-19 [1923]: When any joint tenant or tenant by the entireties of an interest in real or personal property . . . shall die, his share shall descent [sic] or be disposed of as if he had been a tenant in common.

However, *W.Va. Code* 36-1-20 [1981] both modifies and probably makes manifest the original legislative intent of *W.Va. Code* 36-1-19 [1923] by creating an exception that nearly swallows the *Code* 36-1-19 rule by allowing for joint tenancies with rights of survivorship:

(a) The preceding section [§36-1-19] shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to persons in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one belong to the others. Neither shall it affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies.

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42. W. VA. CODE § 36-1-20(b) (1985).

43. 423 S.E.2d 600 (W. Va. 1992).

(b) When the instrument of conveyance or ownership in any estate, whether real estate or tangible or intangible personal property, links multiple owners together with the disjunctive "or," such ownership shall be held as joint tenants with the right of survivorship, unless expressly stated otherwise. [Emphasis added]

Analysis of these statutes show us that what we, in fact, have is a general default rule that all "joint tenancies" are to be treated as tenancies in common unless there is an explicit agreement as to the existence of the right of survivorship. We note that this statutory scheme badly needs re-writing by the Legislature into English that anybody can readily understand without a detailed knowledge of Anglo-American property law.<sup>44</sup>

### B. *Back to the Future: Reverse One and Follow the Other*

Several other cases construing these code sections are of interest for present purposes. The first case of interest is *Miller v. Sencindiver*.<sup>45</sup> In *Miller*, the wife, who held property as a joint tenant with right of survivorship with her husband, killed him, was indicted for his murder, and pled guilty to the lesser included offense of involuntary manslaughter—a misdemeanor. The court "permitted" the slaying spouse to become the sole owner of the property she held as a joint tenant with the right of survivorship with her "murdered" husband. It has been argued and is submitted that *Miller* was incorrectly decided, based upon both existing statutory provisions and earlier decisions in this jurisdiction and that the decision is in opposition to the modern and better reasoned decisions in our sister jurisdictions.<sup>46</sup> For present purposes, it is the court's observation in *Miller* that "the Taylor's rights were established by deed and did not involve descent or inheritance"<sup>47</sup> which is of interest. While this is a correct statement of the common concept of joint tenancy that recognized the "slayer" spouse as the "surviving tenant," the common law result does not preclude a constructive trust from being imposed upon the surviving

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44. 423 S.E.2d at 605 n.6.

45. 275 S.E.2d 10 (W. Va. 1981).

46. See Fisher, *Joint Tenancy in West Virginia*, *supra* note 8, at 294.

47. 275 S.E.2d at 13.

spouse's property to prevent unjust enrichment and to deprive a wrongdoer from profiting from her wrongful act.<sup>48</sup>

Two years after the court's decision in *Miller*, an issue involving joint tenancy with the right of survivorship was again before the court in *Herring v. Carroll*,<sup>49</sup> a case which provides a very instructive discussion of joint tenancy. In *Herring*, the wife held an interest in real property with her husband as a joint tenant with the right of survivorship. She then conveyed her interest in the property to her son by an earlier marriage. The court held that the wife's conveyance destroyed the four unities, and therefore, severed the survivorship. Accordingly, after the conveyance, the son and the husband held the property as tenants in common. The appellants in *Herring* relied upon the *Miller* decision to argue that the legislature had altered the common law concepts of joint tenancy.<sup>50</sup> However, the court in *Herring* explained that its holding in *Miller* was not a rejection of the common law concepts of joint tenancy, but was essentially an interpretation of West Virginia Code Section 42-4-2. In an excellent example of judicial scholarship, the court rejected the premises on which the appellant's argument was based and held that West Virginia Code Sections 36-1-19 and 36-1-20, do not abolish the common law requirements of the four unities in a joint tenancy.<sup>51</sup> An important aspect of the *Herring* decision is that it

48. See Fisher, *Joint Tenancy in West Virginia*, *supra* note 8, at 294.

49. 300 S.E.2d 629 (W. Va. 1983).

50. The appellants in *Herring* were relying upon Syllabus Point 1 in *Miller* which stated: "[j]oint tenancy with the right of survivorship is a statutorily created estate in real property, Code, 36-1-20, and property rights in a joint tenancy with survivorship vest when the property is conveyed to the parties." 275 S.E.2d at 10, Syl. Pt. 1. The appellants in *Herring* also relied on that portion of the decision in *Miller* that stated:

[B]ecause by the Legislature's modifications of the common law concerning joint tenancies, tenancies by the entireties, and cotenances which allow creation by the parties of the incidents of survivorship when intention to do so has been made clearly evident in a titling document, the Legislature has in effect preempted the matter.

*Id.* at 14.

51. The court in *Herring* stated:

This argument misreads *Sencindiver* and our prior case law interpreting W.Va. Code, 36-1-19 and 20. In *Sencindiver*, we were confronted with an interpretation of W.Va. Code, 42-4-2, which precludes a person convicted of conspiring to or feloniously killing another from inheriting the deceased person's property. The statute

established that the *Miller* decision was limited to a specific issue involving the interpretation of West Virginia Code Section 42-4-2<sup>52</sup> and

enumerated specific modes of obtaining the property, i.e. "either by descent and distribution, or by will, or by any policy or certificate of insurance or otherwise." W.Va. Code, 42-4-2.

The specific issue in *Sencindiver* was whether this statute foreclosed the taking of an undivided ownership of real property owned by the deceased in which the defendant had a right of survivorship. We found that the right of survivorship was established in the deed and did not come within the terms of W.Va. Code, 42-4-2. There was no issue in *Sencindiver* relating to the creation of a joint tenancy with the right of survivorship since all parties agreed this was the type of property estate that existed. Consequently, we had no occasion in *Sencindiver* to discuss the four unities that are essential to the creation and maintenance of a joint tenancy.

Moreover, our cases which discuss W.Va. Code, 36-1-9 and 20, have never suggested that these statutes have abolished the common law four unities that are essential to a joint tenancy. In *Neal v. Hamilton Company*, 70 W. Va. at 262, 73 S.E. at 975, this statement was made:

True in this State as in Virginia the right of survivorship, at common law, is abolished by statute, but this is not so, if the deed, or as here, the will, expressly limits the estate granted or devised to the survivor. When so limited the grantees or devisees take joint estates only, *subject to all the limitations attaching to such estates as at common law*. 2 Minor's Inst. 410. (Emphasis added).

Furthermore, had the Legislature intended to abolish the four common law unities for a joint tenancy when it enacted W.Va. Code, 36-1-19 and 20, there would have been no need for its enactment in 1974 of W.Va. Code, 48-3-7a. This statute authorizes a direct conveyance between husband and wife of an interest in property with a right of survivorship. At common law, such a direct conveyance could not create a joint tenancy because the four unities requirement was lacking. The grantor making the direct conveyance of an undivided interest did not hold his title from the deed to his grantee but under the original deed to the grantor. *E.g.*, *Deslauriers v. Senesac*, 331 Ill. 437, 163 N.E. 327 (1928); *Wright v. Knopp*, 183 Mich. 656, 150 N.W. 315 (1915); *Stuehm v. Mikulski*, 139 Neb. 374, 297 N.W. 595 (1941); *Hass v Hass*, 248 Wis. 212, 21 N.W.2d 398 (1946).

The familiar rule of statutory construction that we presume the Legislature will not enact a meaningless or useless statute reinforces our belief that W.Va. Code, 48-3-7a, was enacted because the Legislature believed that the four unities requirement precluded a direct conveyance. Thus, the statute was designed to create a legislative exception to the common law bar. This statute would not have been necessary if the Legislature had believed that W.Va. Code, 36-1-19 and 20, had abolished the four unities requirement.

For the foregoing reasons, we conclude that W.Va. Code, 36-1-19 and 20, do not abolish the common law requirement of the four unities in a joint tenancy.

300 S.E.2d at 633-34.

52. W. VA. CODE § 42-4-2 (1982) provides that:



that the substantial body of law which had evolved from the common law still provided the basis for answering questions relating to joint tenancy.

#### IV. AND THE COURT SAID, "IT ALL GETS TERRIBLY COMPLICATED"<sup>53</sup>

One year after the court had cleared up the confusion created by its decision in *Miller* in its well-research decision in *Herring*, it again "muddied the water" in *Harris v. Crowder*.<sup>54</sup> In *Harris*, the issue before the court was a judgment creditor's rights to the husband's interest in the marital home owned by the husband and his wife as joint tenants with the right of survivorship. The court began its decision with the following observation:

Our task today, for the first time in West Virginia decisional law, is to determine whether creditors can execute upon a husband's undivided interest in property held jointly with his wife. In the case before us the ineluctable logic of received property law strains in one direction while common humanity and sound public policy strain in the other.<sup>55</sup>

At the time of the creditors' suit against the husband (debtor spouse), he had separated from his wife, and Mrs. Crowder was occupying the "marital home." The plaintiff's (judgment creditor) lien was eleventh in priority against the husband. The circuit court certified to the Supreme Court of Appeals of West Virginia the question of wheth-

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No person who has been convicted of feloniously killing another, or of conspiracy in the killing of another, shall take or acquire any money or property, real or personal, or interest thereon, from the one killed or conspired against, either by descent and distribution, or by will, or by any policy or certificate of insurance, or otherwise; but the money or the property to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had been dead at the date of the death of the one killed or conspired against, unless by some rule of law or equity the money or the property would pass to some other person or persons.

*Id.*

53. *Harris v. Crowder*, 322 S.E.2d 854, 859 (W. Va. 1984).

54. 322 S.E.2d 854 (W. Va. 1984).

55. *Id.* at 855.

er the judgment creditor could sell the judgment debtor's interest in the jointly owned property.<sup>56</sup>

What had been a fairly straight forward question and answer at common law was not considered as such by the court. The court stated:

Unfortunately, the answer to this certified question is neither a simple "yes" nor "no." Each case of this type must be processed individually with due attention to considerations that we shall illuminate below.

In Anglo-American law there have been two methods by which a husband and wife can hold property and more or less protect that property from the judgment creditors of one of them alone. The first of these methods is the tenancy by the entirety that survives in twenty-two common law states and the second is the joint tenancy. We held in *Wartenburg v. Wartenburg*, 143 W.Va. 141, 100 S.E.2d 562 (1957) that tenancies by the entirety have been abolished in West Virginia by statute. Under *W.Va. Code*, 36-1-20 [1981], however, joint tenancies continue to flourish here.<sup>57</sup>

The court provided no citation of authority for the statement that joint tenancy was a method by which a husband and wife could hold property "more or less protected" from the judgment creditors of one of them. In fact, the statement is not consistent with the common law because a conveyance to a husband and wife created a tenancy by entirety and not a joint tenancy. In addition, this statement is not consistent with the concurrent estate of joint tenancy either at common law or as it evolved in this country in the post-revolutionary war period.<sup>58</sup>

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56. In *Harris*, the court stated the issue as follows:

Where Husband and Wife are joint owners of a parcel of land and the only encumbrance against Wife's undivided one-half interest is a recorded deed of trust securing a note signed by she [sic] and Husband, but where there are numerous judgment and tax liens filed against Husband solely, in addition to the deed of trust, should the Circuit Court grant Wife's Motion to Dismiss, where one of Husband's judgment lien creditors files suit seeking a judicial sale of both Husband's and Wife's interest in the said parcel; or, simply put: Can a judgment lien creditor maintain a creditor's action to sell jointly-owned property where his judgment is against only one of the joint property owners?

*Id.* at 856.

57. *Id.* at 856.

58. 2 AMERICAN LAW OF PROPERTY § 6.24 (1974).

As the court ultimately recognized, as will be discussed below, the issue in *Harris* concerns partition and not the attributes or characteristics of joint tenancies.<sup>59</sup> With this thought in mind, it is interesting to review the court's "reasoning" in *Harris*.<sup>60</sup> The court began its analysis in *Harris* with a brief summary of the early common law statutes on partition and their modern counter-part in West Virginia.<sup>61</sup>

The equitable heritage of the law of partition is illustrated in the following excerpt from the American Law of Property:

Partition by Court Action. Compulsory partition by an action at law or in equity originally existed only between tenants in coparceny, as explained heretofore, and the right of a joint tenant or tenant in common to enforce partition against his cotenants was first created by a statute enacted in the reign of Henry VIII. Early in the development of the Chancery Court in England, equity assumed jurisdiction wherever partition at law, operating by a physical division of the property without regard to special interests or equities of the parties, would result in injustice to any of them. In 1833, by statute, equitable partition, in England, was made the only form of action by which this kind of relief could be obtained. In the United States

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59. The right of partition between the cotenants is a necessary incident to every tenancy in common or joint tenancy, and the individual interest of each co-owner is necessarily subject to it. Therefore, it follows that derivative rights attaching to the cotenant's interest such as dower, curtesy, mortgage, or judgment liens attach subject to that right, and must abide the result of any valid partition made fairly and in good faith, whether by judicial action or by voluntary deed. We may safely disregard statements of the courts that these results follow because the partition by deed affects only the unity of possession, without any other change of title—statements which are obviously not true. 2 AMERICAN LAW OF PROPERTY § 6.20 (1974).

60. It is noted that in those states which still recognize tenancy by the entirety, the legal characteristics of the concurrent estate may affect the rights of a judgment creditor of only one of the tenants. A very good discussion of the status of tenancy by the entirety is found in *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977). The *Sawada* decision provides both a summary and an update of *Oval A. Phipps, Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951).

61. According to the court in *Harris*, "this proviso from the 1540 statute on partition is carried forward in an even stronger version in our own *W. Va. Code*, § 37-4-3 [1957]," which states:

[I]n any case in which partition cannot be conveniently made, if the interests of one or more of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, and the interest of the other person or persons so entitled will not be prejudiced thereby, the court . . . may order such sale.

322 S.E.2d at 857.

partition at law is actually obsolete, partition in equity being made exclusive by statute in some of the states; and in all of them courts of equity or courts with equitable powers have jurisdiction over partition suits, and exercise that jurisdiction to the practical exclusion of the ancient common law action. In several states statutory partition is provided for, but in those, as in other states, courts of general equity jurisdiction have concurrent power to partition land between cotenants in accordance with the principles of equity and these statutes provide for partition according to equitable principles.<sup>62</sup>

As a prelude to its discussion of the reluctance of courts to allow the creditors of one spouse to sell the family home to satisfy his or her debts, the court in *Harris* noted that under the unrelenting logic of property law, the creditor of either the husband or wife "may enforce his judgment lien against the debtor spouse's interest in the property by bringing an action to partition, and where partition cannot be accomplished in kind it may be accomplished by sale."<sup>63</sup> This standard blurs the distinction between the severance of joint tenancy and the separate issue of whether partition is appropriate. As discussed below, it appears that this "merger" of severance with partition was intentional.

It is noted that in the immediately preceding paragraph the court had correctly applied the *Herring* decision in holding that because the survivorship feature of joint tenancy could be destroyed by a conveyance by one of the joint tenants, it could also be destroyed by the "debtor."<sup>64</sup> The court then summarized the efforts in sister states to protect the non-debtor spouse's interest and noted that in some states

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62. 2 AMERICAN LAW OF PROPERTY § 6.21 (1974).

63. 322 S.E.2d at 858.

64. The court in *Harris* also explained:

But, as *Herring v. Carroll* . . . holds, the debtor "owns" the right to destroy the survivorship interest by a voluntary conveyance during his lifetime. Under syl. pt. 4 of *Herring* . . . whenever a joint tenant conveys his interest in the tenancy to a third party there is a rupture of the four unities necessary for a joint tenancy and the owners thereupon become tenants in common. The initial question, then, that must be answered in the case before us is whether a creditor can stand in the shoes of his debtor and do what the debtor could do himself, namely (1) partition the joint tenancy, (2) convert the joint tenancy into a tenancy in common, and (3) destroy the survivorship interest of the other joint tenant.

*Id.* at 858.

protection is afforded by the use of homestead exemptions and that others states protect that interest by preserving the common law estate of tenancy by the entireties.

The seeds of confusion are sown in *Harris* by the court "savoring at length" a New Jersey Supreme Court decision involving tenants by the entireties.<sup>65</sup> The court concludes its lengthy quote from the New Jersey case as follows:

Although New Jersey is different from West Virginia in that a limpid version of the common law tenancy by entireties survives there, we believe that the Supreme Court of New Jersey has reached a near-perfect result and should be emulated in West Virginia under the partition statute . . . that accords our courts power to inquire into "prejudice" to a non-debtor joint tenant.<sup>66</sup>

Following a brief "economic lesson" the court notes:

We are not disposed, therefore, to allow the inexorable logic of property law to be entirely dispositive of the issue before us. When a creditor seeks to sell a family's home to satisfy the debts of one spouse alone, a whole new dimension is given to the equitable provision in our partition statute when prejudice occurs to another tenant.<sup>67</sup>

The court in *Harris* succinctly explains the case law as follows:

[W]e hold that creditors of one joint tenant may reach that joint tenant's interest and force partition either in kind or by sale, but only if "the interest of the other person or persons so entitled will not be prejudiced thereby." *W.Va. Code*, 37-4-3 [1957]; *See also Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782, 247 S.E.2d 712 (1978). Obviously, the interest of a non-debtor spouse in jointly-held property can never be reached by the creditors of the other spouse.<sup>68</sup>

The troubling aspect of the *Harris* decision is that it equated the severance of the survivorship element of the joint tenancy with an action of partition.<sup>69</sup> In effect, the court took separate and distinct

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65. *Newman v. Chase*, 359 A.2d 474 (N.J. 1976).

66. 322 S.E.2d at 860.

67. *Id.*

68. *Id.* at 861.

69. As the court explained:

The appellants in the case before us urge us to rule that the sale of a debtor's interest in jointly held property and the partition of that property be two separate proceedings. We decline to so rule, however, because under modern court procedure both proceedings can be most efficiently done at the same time. *W.Va. Code*, 38-3-9 [1923] provides for the sale of a debtor's property to satisfy a judgment lien. It specifically states that such a lien may be foreclosed by a suit in equity, provided a writ of execution has issued against the judgment debtor's property within two years before the bringing of the suit and the writ of execution has been returned showing no property of the judgment debtor could be found. *W.Va. Code*, 38-3-10 [1923] specifies that all persons having liens against the real estate sought to be sold be made parties to the suit; it does not require that co-owners, who are not lienholders, be made parties.

Since the enactment of the Married Women's Property Acts, a wife's property is not liable for her husband's individual debts. See 4A Thompson, *Real Property*, § 1904. The interest of Mary Ann Crowder in the subject property cannot be reached to satisfy her husband's individual debts, but that does not mean that the property in question cannot be sold and the part of the proceeds attributable to her husband's interest attached to satisfy the judgment against him. *Morris v. Baird*, 72 W.Va. 1, 78 S.E. 371 (1913).

In the ordinary course of events, the judgment creditor of one joint tenant can, under *W.Va. Code*, 38-3-9 [1923] cause the sale of that joint tenant's interest. The purchaser at such a sale would then be a co-tenant with the remaining cotenants in the property. Under our partition statute, *W.Va. Code*, 37-4-1 [1936], the purchaser at the judgment lien sale, after becoming an owner of an interest in the property, could, by meeting the requirements of the statute and showing the reasonableness of the sale, partition the property. It hardly requires an efficiency expert, however, to recognize that the foreclosure of the judgment lien and the partition of the property can and should be done in the same proceeding if both the highest possible sale price for the property obtained and economy for the courts and the litigants is to be achieved.

Under Rule 18, *W.Va.R.C.P.*, the party asserting a claim may join claims against an opposing party. Rule 18(b) specifically provides:

(b) *Joinder of remedies; fraudulent conveyances.*—Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

In light of the wording of Rule 18 we see no impediment to allowing a proceeding to enforce a judgment lien to be joined with a proceeding partition the property in kind or by sale. However, when the two proceedings are joined, both the jurisdictional and procedural requirements relating both to judgment lien enforcement sales and partition sales must be met. As a result of our holding in Section III, *supra*, it is conceivable that a creditor could succeed in his claim for judgment lien enforcement but fail to meet the showing of no prejudice to the

substantive acts which could be combined procedurally and opined that because they could be consistent procedurally, they must be combined.

The court concluded its discussion in *Harris* by providing guidance to the equitable consideration relevant in deciding whether partition should be granted as follows:

The equitable considerations that should instruct a circuit court's determination of when forced partition of a joint tenancy is equitable are too varied to be addressed in the abstract here. Certainly, however, the favored treatment that sound public policy would extend to family houses need not necessarily be extended to jointly owned business property. There should be a fairly strong presumption that business property may be reached in a creditor's suit. Similarly, both the size and the nature of joint holdings must be taken into consideration. Finally, it is an ancient maxim of equity that those who seek equity must be willing to do equity. Of course, there is a limit to this obligation: creditors cannot demand the life's blood of an innocent spouse.<sup>70</sup>

After the *Harris* decision, it seemed reasonable to wonder whether the court had "created" a hybrid form of concurrent ownership, somewhere between joint tenancy and tenancy by the entirety, or had decided the case on procedural grounds by merging the act of severance of the survivorship with an action of partition. Fortunately, we were not left to ponder these questions for long.

Within a year of the *Harris* decision, the issue of the rights of a judgment creditor to a judgment debtor's interest in a family residence, owned by the judgment debtor and his non-debtor spouse as joint tenants with the right of survivorship, was again before the court in *Vincent v. Gustke*.<sup>71</sup> In *Vincent*, the judgment creditor sought the sale of the judgment debtor's interest in two tracts of land. The first tract included a building which contained the marital residence and the judgment debtor's professional offices. The second tract was an undeveloped lot a few blocks from the residence. The complaint, which had been filed before the court's decision in *Harris*, sought only the sale of

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other joint tenant necessary for a partition sale.

322 S.E.2d at 861-62.

70. *Id.* at 862.

71. 336 S.E.2d 33 (W. Va. 1985).

the judgment debtor's interest and did *not* seek a partition of the debtor's interest from the non-debtor's interest. The judgment creditor asserted that nothing in the *Harris* decision precluded a judgment creditor of one spouse from subjecting a jointly owned family residence to a suit to enforce its judgment lien as long as the suit did not seek partition.

The court agreed that the judgment lien could be enforced against the husband's interest under West Virginia Code Section 38-3-9, and that "prejudice" to the non-debtor spouse was relevant only if the judgment creditor (or purchaser of the interest) sought partition.<sup>72</sup> *Vincent*

72. The court stated that:

Our holding in *Harris* was based upon explicit statutory language in *W.Va. Code* 37-4-3 [1957], the partition statute, that allows a court of equity to take into consideration possible prejudice to a joint tenant whenever another tenant seeks partition in kind or by sale. Unfortunately for Dr. Vincent, the language of *W.Va. Code* 38-3-9 [1923] does not authorize a court to inquire into the equities of proceedings to enforce judgment liens. There is nothing to prevent a judgment lien's immediate enforcement. *Jones v. Hall*, 177 Va. 658, 15 S.E.2d 108, 111 (1941). A judgment lien creditor of a debtor who owns property in joint tenancy may execute his lien against the debtor's share of the property. *Johnson v. Muntz*, 364 Ill. 482, 4 N.E.2d 826 (1936); 4 *Thompson on Real Property* § 1780 (1979) (material accompanying notes 41-47). Sale on execution of a joint tenant's interest in joint property is sufficient to operate as a severance of a joint tenancy. 4 *Thompson on Real Property* § 1780 (1979) (material accompanying notes 48-49). See, Annot. 161 A.L.R. 1139, 1140 n.1 (1946). The creditor and the remaining joint tenant hold the property as tenants in common. *Herring v. Carroll*, \_\_\_ W. Va. \_\_\_, 300 S.E.2d 629 (1983). The creditor may then ask for a partition pursuant to *W.Va. Code* 37-4-3 [1957]. But in a suit for partition, we would be free to consider the equities discussed in *Harris v. Crowder*, \_\_\_ W. Va. \_\_\_, 322 S.E.2d 854 (1984) before granting the partition.

We are at a loss to know what stranger would want to buy a family residence to be shared with the debtor's wife and children, and on which the stranger would owe half the taxes and half the maintenance. Yet if the hospital insists on selling Dr. Vincent's one-half interest in his residence, and the purchaser is willing to take the residence subject to Mrs. Vincent's right to live there with her husband and her children, then the hospital is within its rights. The sale of such an asset would hardly be calculated to bring a very high price and Mrs. Vincent would appear to be the most likely bidder.

Accordingly, we hold that if the hospital proceeds under its general complaint simply to force a sale of Dr. Vincent's undivided interest in the property held jointly with his wife, *W.Va. Code* 38-3-9 [1923] does not require the circuit court to hold a hearing because such a sale will not prejudice Mrs. Vincent's rights to



makes it clear that, in fact, the act which severs the survivorship of joint tenancy is separate and distinct from an action to seek partition and that the *Harris* decision rested upon the statutory language pertaining to partition. Implicit in the decision is that we continue to adhere to the established body of law relating to concurrent ownership interests, including the recognition that the survivorship feature of a joint tenancy can be severed without the court delving into the issue of "prejudice" that is relevant under the partition statute.

What the *Harris* case does make clear is that as to a marital home, a party seeking partition will have an extremely difficult task of convincing the court that a partition by sale will not be prejudicial to the non-debtor spouse. While both *Harris* and *Vincent* involved the marital home,<sup>73</sup> it is important to remember that married couples frequently own property, other than their marital home, as joint tenants with the right of survivorship, and the court in *Harris* indicated that such property will not be "protected" to the extent of the marital home.<sup>74</sup> One of the important benefits of *Vincent's* clarification of *Harris* is that we can continue to look to the common law rules as they have evolved for guidance as to the respective parties' rights and responsibilities.

The *Vincent* case raised the question, without suggesting an answer, of "what stranger would want to buy a family residence to be shared with the debtor's wife and children."<sup>75</sup> This comment acknowledges the existence of the unity of possession which is an inherent part of both tenancy in common and joint tenancy. At common law, each tenant was entitled to enjoy possession of the whole, subject to similar

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live in the house as her marital home. But it follows, then, that if the hospital seeks not only to sell Dr. Vincent's interest but also seeks to subject the jointly held property to partition by sale, the circuit court must inquire into whether partition will prejudice Mrs. Vincent's rights in the premises and whether the partition comports with the rules we laid down in *Harris v. Crowder*, \_\_\_ W.Va. \_\_\_, 322 S.E.2d 854 (1984).

336 S.E.2d at 35-36.

73. In *Vincent*, the judgment debtor also owned an underdeveloped lot as joint tenant with the right of survivorship with the non-debtor spouse.

74. 322 S.E.2d at 862.

75. 336 S.E.2d at 35.

rights in the other cotenants.<sup>76</sup> For obvious practical reasons, the sharing of the typical family residence by the non-debtor spouse with the purchaser of the debtor spouse's interest (as tenants in common) is not likely to receive judicial approval as an acceptable way for the respective parties to exercise their rights. Therefore, it is assumed that since the court, on policy grounds, finds a partition of the marital home to be prejudicial to non-debtor spouse to pay the sole or individual debts of one spouse, it would also find unacceptable the enforcement of each tenant's right to possession of the concurrent estate. To hold otherwise would mean the non-debtor spouse would have to share the marital home with the purchaser of the debtor spouse's interest as a tenant in common.

However, the rejection of an action for partition and the denial of the right of possession of the concurrent estate does not mean the purchaser of the debtor spouse's interest is without a legal remedy. While at common law, a tenant out of possession had no right to collect rent from the tenant in possession<sup>77</sup> except in limited situations discussed below, this aspect of the common law has been changed by statute in West Virginia.<sup>78</sup>

In *Ward v. Ward's Heirs*,<sup>79</sup> the court stated in Syllabus Point 1 that:

By common law, one joint tenant, tenant in common, or parcener using the common land exclusively, but not ousting or excluding his co-owners, is not chargeable to them for use and occupation; but this rule has been changed by section 14, c. 100, Code, as to joint tenants and tenants in common, but not as to parceners.<sup>80</sup>

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76. 2 AMERICAN LAW OF PROPERTY § 6.1 (1974).

77. *Id.* § 6.14.

78. According to W. VA. CODE § 55-8-13 (1994):

An action of account may be maintained against the personal representative of any guardian or receiver; and also by one joint tenant, tenant in common, or coparcener or his personal representatives against the other, or against the personal representative of the other, for receiving more than his just share or proportion.

*Id.*

79. 21 S.E. 746 (W. Va. 1895).

80. *Id.* at 746, Syl. Pt. 1. The addition of the term coparceners was added as part of the general revision of the Code in 1931. See W. VA. CODE § 55-8-13 (1931).

Twenty years later in *Smith v. Smith*,<sup>81</sup> the court reiterated that under the statute:

[A] tenant in common who receives more than his just share of the annual returns for the common property must render compensation to his associate in title who is denied his just and equal portion thereof, in this respect altering the common-law rule applicable to such cases. Nevertheless, such compensation must necessarily be based upon the condition of the property and its rental value at the time the titled devolved upon the cotenants, or upon the actual returns therefrom received by one of them, and not upon its condition or value due to improvements made thereon after such devolution.<sup>82</sup>

Therefore, an action for accounting appears to be the logical, and probably the sole remedy available to the purchaser of the debtor spouse's interest in the marital home in most situations.

The suggestion that the tenant out of possession, who obtained the interest as a result of the judgment creditor's sale of the debtors spouse's interest,<sup>83</sup> may be entitled to an accounting from the tenant in possession is made with knowledge of the court's decision in *Blevin v. Shelton*.<sup>84</sup> The *Blevin* case involved a divorce where the divorce decree awarded the exclusive possession of the marital home to the husband who was awarded custody of the minor children. The exclusive possession of the marital home was to end upon the husband's remarriage. The home involved was owned by the husband and his ex-wife as tenants in common and was built on land given to the couple by the husband's parents. Two years after the divorce, the ex-wife sought a partition sale of the former marital home. The former husband appealed the court's order that he pay rent to the ex-wife for the period of time his new wife occupied the former marital home.<sup>85</sup> In re-

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81. 87 S.E. 355 (W. Va. 1915).

82. *Id.* at 357.

83. Given the fact that the decision in *Vincent* is based on the law of partition, it should be equally applicable whether the debtor's interest is as a joint tenant with the right of survivorship or as a tenant in common.

84. 383 S.E.2d 509 (W. Va. 1989).

85. There were other legal issues raised on appeal not relevant to the present discussion.

versing the award for rent, the Supreme Court of Appeals of West Virginia explained that there were both economic and psychological reasons for the award of exclusive possession.<sup>86</sup>

In *Blevins*, the court specifically addressed the applicability of West Virginia Code Section 55-8-13 to the facts of the case before it by explaining:

West Virginia does have a statute, outside the divorce statutes, which provides, *inter alia*, for an accounting to and the recovery of rent by a joint tenant or a tenant in common who has not had possession of jointly owned property from another joint tenant or tenant in common who has had exclusive possession of the property. *W.Va. Code*, 55-8-13 [1931] states in relevant part: "An action of account may be maintained . . . by one joint tenant [or] tenant in common . . . against the other, . . . for receiving more than his [or her] just share or proportion." Following a Virginia precedent, this Court early decided that this statute alters the common law and makes a joint tenant or a tenant in common who has had exclusive possession of jointly owned property accountable to the other joint tenant(s) or tenant(s) in common, whether or not the tenant in

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86. The court's reasoning is summarized in the following paragraphs:

In *Stillings*, we observed that one of the primary purposes of the exclusive possession rule is an economic reason, specifically, to enable the divorce court to utilize the family home property as the living situs for the spouse who has obtained custody of the minor children, thereby minimizing the monetary payments necessary to maintain the existing standard of shelter for the spouse and the minor children. In *Fischer*, a more important purpose for the exclusive possession rule, a psychological reason, was set forth: it is in the best interest of the minor children to avoid the traumatic effects of displacing them from their home. This point has also been made elsewhere: "[F]amily home awards are meant to benefit minor children by providing them with a stable home environment[.]" Therefore, a partition sale of the marital home will ordinarily be denied in this context because it would frustrate the purposes of the exclusive possession award.

Similarly, an award of rent from the possessory spouse to the nonpossessory spouse would frustrate the purposes of the exclusive possession award. It would reduce the financial resources available to the possessory spouse for the support of the minor children. Nothing in the divorce statutes authorizes such an award of rent in a modification proceeding, when, as here, it is sought solely as an exaction from the possessory spouse's current spouse who is also residing in the marital home. That is, the relief requested here in the modification proceeding involved only compensation sought for the property interest of the nonpossessory spouse in the former marital home; it did not involve alimony, child custody or child support.

383 S.E.2d at 512-13 (citations omitted).

exclusive possession has denied the other tenant(s) the right to enter and whether the tenant in exclusive possession has received rent from strangers or has merely derived the benefits of exclusive occupation.

We believe *W.Va. Code*, 55-8-13 [1931] does not authorize rent to be awarded to a nonpossessory spouse from a spouse who has been awarded by a divorce decree the exclusive possession of the marital home to accommodate the rearing of minor children, for the spouse in exclusive possession, by virtue of the exclusive possession award itself, has not received more than his or her just share or proportion. Instead, the court ordering exclusive possession of the marital home as an incident to child custody determined necessarily that the custodial parent was *entitled to exclusive* occupancy of the marital home *vis-a-vis* the noncustodial parent. Consequently, no obligation for rent to the nonpossessory spouse/noncustodial parent can arise.<sup>87</sup>

While the court's decision in *Blevins* is specifically based upon the applicable divorce statutes,<sup>88</sup> the court's discussion provides a helpful insight into the motivational aspects involved in divorces that are not present in judgment creditor situations.<sup>89</sup>

87. 383 S.E.2d at 514-15 (citations omitted). The court did recognize that two statutes, *W. Va. Code* §§ 48-2-32(d)(7)(C) (1984) & 48-2-15(b)(4) (1986) were enacted after the divorce decree in the *Blevins* case which touched on the subject of rent, but held neither would be applicable here. See 383 S.E.2d at 514 n.9.

88. The court in *Blevins* explained the applicable divorce statutes as follows: The statutory law of this state is controlling on this issue, and it does not authorize the rent awarded by the trial court. Accordingly, a circuit court lacks jurisdiction under *W.Va. Code*, 48-2-15(e), as amended, to modify a divorce decree by awarding rent, retroactively or prospectively, to a former spouse who is a co-owner of the marital home which is occupied under the divorce decree by the other former spouse and one or more of their minor children, when the rent is sought solely because a new spouse is also residing in the marital home.

383 S.E.2d at 514.

89. The court also explained that:

Underlying the appellee's request for rent are feelings of resentment, rather than concern for the minor child's welfare. With respect to the feelings of resentment, it has been said:

While the continual presence of a third person in the residence might well have an adverse emotional impact upon a non-possessory father [or mother], any such effect would be far outweighed by the benefits accruing to the children from occupancy of the family home. It would be unduly harsh to penalize the children for the possessory owner's personal relationship with third parties.

A leading commentator also recognizes this point: "The non-custodial spouse's jealousy and bitterness [are] understandable, particularly when the custodial spouse remarries and the children then live [also] with a stepparent, but [such feelings] cannot be allowed to jeopardize

Not only is the motivation for actions to obtain rent in divorce cases different from judgment creditor cases, the facts will usually be significantly different. In many "Vincent" type cases, the debtor spouse may continue to live with the nondebtor spouse in the marital home, and there would seem to be no justification that he or she should do so "rent free." Even if the debtor spouse does not live in the marital home with the nondebtor spouse, the *Blevins* policy considerations would not justify denying the nonpossessory co-owner an accounting subject to an offset for the nonpossessory co-owner's proportionate share of the taxes, necessary maintenance to preserve the estate, etc. It is therefore submitted that under the provisions of West Virginia Code Section 55-8-13, the purchaser of the judgment debtor's interest in the marital home should be permitted to obtain an accounting for the fair rental value from the non-debtor's possessory spouse in situations such as those that occurred in *Harris* and *Vincent*. Obviously, if the non-debtor spouse ceases to occupy the "marital" home, there should be no obstacle to a partition by sale. Such a result would comport with the policy of the court articulated in *Harris* and *Vincent* and at the same time provide fairness to the purchaser of the debt spouse's interest in the property.

#### V. THE INTERNAL REVENUE SERVICE CAN DO WHAT OTHER JUDGMENT CREDITORS CANNOT

At about the same time the issue of a judgment creditor's rights to a joint tenant's interest in real property was before the court in West Virginia, a related issue was being decided in the United States Supreme Court. In 1983, the year before the *Harris* decision in West Virginia, the issue of the effect state property law had on the enforcement of federal tax liens was decided by the Supreme Court in *United*

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dize the future of the children." 2 H Clark, *The Law of Domestic Relations in the United States* § 18.1, at 351 (2d ed. 1987). The emotional impact upon the nonpossessory spouse arising from the fact that a stranger is also living in the former marital home with the minor children and the possessory spouse does not support the giving of "relief" in the form of rent from the possessory spouse, as the minor children's support interests would be prejudiced by the payment of that rent.  
383 S.E.2d at 515 (citations omitted).

*States v. Rodgers*.<sup>90</sup> The specific issue in the *Rodgers* case was whether the protection afforded by the Texas homestead provision protected a non-debtor spouse's interest in the marital home (homestead) from sale by the government of the delinquent taxpayer's interest. Under Texas law, the homestead protection was valid against judgment creditors and would prevent such a sale. However, the Internal Revenue Service argued that under Title 26, Section 7403 of the United States Code,<sup>91</sup> it could sell the marital home, including the non-debtor spouse's interest, to enforce its tax lien against the delinquent taxpayer spouse.

The Court in *Rodgers* explained that while the tax lien could not extend beyond the property interest of the delinquent taxpayer and that while the government cannot "ultimately collect, as satisfaction for the

90. 461 U.S. 677 (1983).

91. 26 U.S.C. § 7403 (1988) provides:

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary [of the Treasury], may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

*Id.*

indebtedness owed to it, more than the value of the property interests that are actually liable for that debt . . . in this context, at least, the right to collect and the right to seek a forced sale are two quite different things."<sup>92</sup> In the course of its decision, the Court noted that the government was not the same as an "ordinary creditor" because it has the power granted by Section 7403, which is rooted in the constitutional mandate to "lay and collect taxes."<sup>93</sup>

In *Rodgers*, the Court summarized the government's authority under the Internal Revenue Code as follows:

In sum, the Internal Revenue Code, seen as a whole, contains a number of cumulative collection devices, each with its own advantages and disadvantages for the tax collector. Among the advantages of administrative levy is that it is quick and relatively inexpensive. Among the advantages of a § 7403 proceeding is that it gives the Federal Government the opportunity to seek the highest return possible on the forced sale of property interests liable for the payment of federal taxes. The provisions of § 7403 are broad and profound. Nevertheless, § 7403 is punctilious in protecting the vested rights of third parties caught in the Government's collection effort, and in ensuring that the Government not receive out of the proceeds of the sale any more than that to which it is properly entitled. Of course, the exercise in any particular case of the power granted under § 7403 to seek the forced sale of property interests other than those of the delinquent taxpayer is left in the first instance to the good sense and common decency of the collecting authorities. 26 U.S.C. § 7403(a). We also explore in Part IV of this opinion the nature of the limited discretion left to the courts in proceedings brought under § 7403. But that the power exists, and that it is necessary to the prompt and certain enforcement of the tax laws, we have not doubt.<sup>94</sup>

The Court then discussed at some length the "equitable" considerations which should guide a district court in the exercise of its limited discretion.<sup>95</sup>

Although four Justices dissented in the *Rodgers* case, the basis of the dissent provides no comfort to joint tenants in West Virginia.<sup>96</sup>

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92. 461 U.S. at 691.

93. *Id.* at 697.

94. *Id.* at 699-700.

95. *Id.* at 703-12.

96. Specifically, the dissent opined that:



The dissenting opinion is principally based on statutory construction and legislative history. The dissenting Justices did not question the legislative "power" to enact such a statutory right, but argued that the legislature had not passed such a statute. They, in effect, concluded "that Congress did not extend § 7403 to permit federal courts to grant property rights to the Government greater than those enjoyed by the tax debtor."<sup>97</sup> Therefore, they held "that the Government may not sell Mrs. Rodgers' homestead without her consent."<sup>98</sup>

## VI. CONCLUSION

The decisions in *Harris* and *Vincent* follow the general common law principle that the sale of the judgment debtor's interest severs the survivorship feature of a joint tenancy. In other words, the "mere"

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In most situations in which a delinquent taxpayer shares property with an unindebted third party, it does no violence to this principle to order a sale of the entire property so long as the third party is fully compensated. A joint owner usually has at his disposal the power to convey the property or force its conveyance. Thus, for example, a joint tenant or tenant in common may seek partition. See generally W. Plumb, *Federal Tax Liens* 35 (3d ed. 1972). If a joint tenant is delinquent in his taxes, the United States does no more than step into the delinquent taxpayer's shoes when it compels a sale.

461 U.S. at 714. The dissent also stated:

"Every jurisdiction permits partition by sale in a proper case." 4A R. Powell, *Real Property* ¶613, p. 655 (1982). The same treatise observes: "Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish it or because courts are easily convinced that sale is necessary for the fair treatment of the parties." ¶612, p. 652. The Government views application of § 7403 as constrained by like principles. Tr. of Oral Arg. 7; see *id.*, at 13; n. 14, *infra*.

Thus, stepping into the shoes of the tennant in common or joint tenant, the Government may force a sale of the entire property where sale is necessary for fair treatment of the parties or where the parties desire it. For these reasons, I agree with the Court that the Court of Appeals in these cases erred in relying on *Folsom v. United States*, 306 F.2d 361 (CA5 1962), which held that the Government cannot seek the sale of jointly owned property, even when the tax debtor's rights in the property include the right to partition the property or seek a forced sale.

461 U.S. at 714 n.2.

97. 461 U.S. at 729.

98. *Id.*

docketing of a judgment does not sever the survivorship, it is the "execution" of the judgment by the creditor's sale of the debtors' interest which severs the survivorship. When read together, these decisions place West Virginia's law of joint tenancy in accord with generally received common law principles and the law in similar (*i.e.* those states which no longer recognize tenancy by the entirety) sister jurisdictions. The *Vincent* decision correctly recognized that since a joint tenant can sever survivorship by a conveyance of his or her interest, a judgment creditor, through the judgment creditor sale, can do the same thing. In addition, the court in *Vincent* clearly stated that "*Harris* was based upon the explicit statutory language in W.Va. Code 37-4-3 [1957], the partition statute."<sup>99</sup>

The *Harris* decision is most helpful if it is viewed as the court's expression of how it will interpret prejudice if partition of a marital home is sought when a non-debtor spouse exists. What is suggested herein is an answer to the court's comment in *Vincent* that "[w]e are at a loss to know what stranger would want to buy a family residence to be shared with the debtor's wife and children."<sup>100</sup> If the cotenant is permitted to collect a fair rental value from the occupying cotenant, then there is a fair and equitable answer to the question posed by the court. While such a solution would allow the non-debtor spouse to be protected in the marital home, it is also reasonable to ask the non-debtor spouse to pay a fair rental for the use of the non-occupying cotenant's interest. Such a solution also provides a "value" to the debtor spouse's interest, and therefore, an asset which can be applied toward payment of a valid debt obligation. As has been true on other occasions, when properly understood, the received property law can provide both a logical and reasonable solution to protecting the non-debtor spouse's interest as well as those of the judgment creditor.

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99. 336 S.E.2d at 35.

100. *Id.*

