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McCally v. McCally: Divestiture Through Divorce of Guilty Spouse's Interest in Property Purchased Solely with Funds of Innocent Spouse

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McCALLY v. McCALLY: DIVESTITURE THROUGH DIVORCE OF GUILTY SPOUSE'S INTEREST IN PROPERTY PURCHASED SOLELY WITH FUNDS OF INNOCENT SPOUSE

In *McCally v. McCally*,[1] the Court of Appeals of Maryland permitted the guilty spouse in a divorce action to take one-half of jointly held marital property, including property bought entirely with funds of the innocent spouse. The court recognized an element of unjust enrichment of the guilty spouse, but nevertheless followed the weight of authority which emphasizes historic judicial preference for predictable results concerning property rights whenever a husband-wife relationship is severed.[2] This majority view is the result of common law technicalities concerning the usual concurrent ownership relationships of a husband and wife, that is, tenancy by the entireties or joint ownership. A minority view, which at first appears to be a fairer solution to the problem, permits the court to decide the equities of the spouses' property holdings in each divorce case.[3] When applied, the minority doctrine may completely divest the guilty spouse in a divorce action of any property bought solely with funds of the innocent spouse. Under the minority view, however, it is difficult to adopt any set standards or ensure predictability in the law. This Note will analyze both views to demonstrate that in their judicial application the results of either view have been almost identical and that only the District of Columbia strictly adheres to the minority rule.

FACTS

McCally v. McCally was a partition suit filed by the wife for the sale of a house formerly owned by the parties as tenants by the entireties. The parties had been married in 1953. Later, the husband inherited a one-half interest in a District of Columbia dwelling. He subsequently acquired the other half interest, and the title for the house was taken in the names of husband and wife

1. 243 A.2d 538 (Md. 1968).

2. *See, e.g., In re* Webb, 160 F. Supp. 544 (S.D. Ind. 1958); Anderson v. Anderson, 215 Md. 483, 138 A.2d 880 (1958); Barche v. Shea, 335 Mass. 367, 140 N.E.2d 305 (1957); Hosford v. Hosford, 273 App. Div. 659, 80 N.Y.S. 2d 306 (1948).

3. Schultze v. Schultze, 112 App. D.C. 162, 300 F.2d 917 (1962); Oxley v. Oxley, 81 App. D.C. 346, 159 F.2d 10 (1946); Richardson v. Richardson, 72 App. D.C. 67, 112 F.2d 19 (1940); Moore v. Moore, 51 App. D.C. 304, 278 F. 1017 (1922).

as tenants by the entireties. Then, according to the husband's uncontradicted testimony, his wife "began a systematic course of conduct to persuade and coerce him"[4] into selling the District of Columbia property and purchasing the Maryland property which was the subject of the suit. The husband further alleged that his wife had threatened to leave him, for which reason he purchased the Maryland property. The wife made no monetary contribution towards the purchase of the property. The deed was taken out in both names as tenants by the entireties. In a divorce action prior to *McCally* the husband was awarded a decree *a vinculo matrimonii* because of the wife's adultery.

The husband contended that the court should have decreed a constructive trust in his favor for the one-half interest of the wife since (1) the wife had used undue influence and coercion and forced him to place the deed in both names, thus negating any intention of a gift to the wife;[5] (2) the gift of property to the wife was a conditional one, the condition being that the wife remain "faithful, chaste and dutiful";[6] and (3) public policy and the principle of unjust enrichment should preclude the wife from retaining any interest in any property towards which she made no contribution.[7]

The wife contended that the divorce *a vinculo matrimonii* granted by the court converted the tenancy by the entireties into a tenancy in common. She was therefore entitled to her one-half share in the property in question regardless of her guilt in the divorce action.

The Court of Appeals of Maryland affirmed the lower court's decision in favor of the wife and appointed a trustee for the sale of the property.[8] The court held that ". . . the rule that a decree *a vinculo* awarded one spouse because of the adultery of the other works divestiture of the wrongdoer's interest in realty purchased solely with funds of the innocent spouse and held in entirety, does not apply in Maryland," notwithstanding the aspects of public policy and unjust enrichment to the wrongdoer.[9]

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4. McCally v. McCally, 243 A.2d 538, 539.
5. McCally v. McCally, 243 A.2d 538, 540. The Court of Appeals found that there were no material allegations which, if proven, would have supported a finding of fraud, coercion, misrepresentation or undue influence on the part of the wife.
6. *See* notes 24 and 49 *infra* and accompanying text.
7. McCally v. McCally, 243 A.2d 538, 542. *See also* Note, *Divorce and Tenancy by the Entireties*, 50 MASS. L.Q. 45 (1965).
8. McCally v. McCally, 243 A.2d 538, 540.
9. *Id.* at 542.

Tenancy by the entireties is the standard common law form of concurrent ownership of land by married couples.[10] A joint tenancy is similar except that the *res* involved is not necessarily held by a husband and wife.[11] Both types of ownership involve four unities: (1) unity of interest; (2) unity of title; (3) unity of time; and (4) unity of possession. Joint tenants or tenants by the entireties hold one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.[12] On the other hand, the only prerequisite for a tenancy in common is that the property is held by one and the same undivided possession.

Both tenancies by the entireties and joint tenancies include the right of survivorship. A tenancy by the entireties differs from a joint tenancy in that tenants in entirety have no individual interests which they can convey so as to break the unities and defeat survivorship. However, for all practical purposes of discussion the effect of a divorce decree on property held either by the entireties or jointly is the same since in a majority of states a divorce automatically works a transfer to a tenancy in common.[13] In a tenancy in common each of the co-tenants has a distinct and separate interest in the property but the right to possession is common to all of the co-tenants. There is no unity of title, interest or time. There is no right of survivorship.[14]

Community property laws are in effect in eight states.[15] In these jurisdictions, unless proven otherwise, all property acquired by a husband or wife during their marriage is assumed to be com-

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10. Tenancy by the entireties is recognized in twenty-two states: Alaska, Arkansas, Delaware, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. *See* 4 R. POWELL, THE LAW OF REAL PROPERTY § 621 n.7 (1967) [hereinafter cited as POWELL].

Use of the tenancy by the entireties has slowly been falling into disfavor. It has been repudiated as being inconsistent with modern ideas of the relationship between husband and wife. Some jurisdictions have eliminated it as a necessary consequence of the destruction of the spousal unity by the married women's acts. *Id. See also* 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN PROPERTY].

11. The historic distinction between a joint tenancy and a tenancy by the entireties has been in the manner of holding the estate. Joint tenants were seised of a share and of the whole—*per my et per tout.* Tenants by the entireties were seised of the whole and not of a share—*per tout et non per my.* In a tenancy by the entireties no conveyance could be made without joinder of husband and wife. See 2 AMERICAN PROPERTY § 6.1 and § 6.6.

12. *See* 4 POWELL § 615.

13. *See* note 19 *infra* and accompanying text.

14. See generally 2 AMERICAN PROPERTY § 6.5 and 4 POWELL § 602.

15. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington all have community property laws.

munity property, that is, each possessing one-half. For example, if Maryland were a community property state the deed in *McCally*, being in both names, would justify a presumption of one-half ownership by each party. At divorce, all property would be divided equally.[16] California is the only community property state claiming to adhere to the minority view.[17]

Therefore, the manner in which property is held, whether jointly, by the entireties, or as community property will not vary the presumptive disposition of property on termination of the marriage relationship under either the majority or minority viewpoints.

Effect of Divorce on Property Holdings

Maryland and Majority View

The majority view followed in *McCally* has been adopted by all but six states[18] and the District of Columbia. Its major premise is that a tenancy by the entireties or a joint tenancy is converted automatically into a tenancy in common by a divorce action. The court stated: "It is virtually conceded that the effect of the decree of divorce *a vinculo* was to convert the tenancy by the entireties into a tenancy in common."[19] The practical reason for this result is that a tenancy by the entireties cannot be partitioned. This is in accord with the modern trend which prefers a tenancy in common over a joint tenancy.[20] Especially in a divorce situation, the ultimate ownership of the property should not depend on survivorship. This would be true, however, if the property remained in joint tenancy.[21]

An automatic transformation has been codified in Pennsylvania as follows:

> Whenever any husband and wife, hereafter acquiring

16. *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-211 to 25-217 (1956); Cal. Civ. Code § 162-164 (West 1954); Nev. Rev. Stat. § 123.030 (1959).

17. *See* notes 63-66 *infra* and accompanying text.

18. The exceptions to the majority noted in *McCally* are California, Colorado, Georgia, Illinois, Michigan and Nebraska. The stand which these six states and the District of Columbia *supposedly* take will be referred to as the minority position.

19. Gunter v. Gunter, 187 Md. 228, 49 A.2d 454, 456 (1946). *See also* Meyers v. East End Loan and Savings Ass'n., 139 Md. 607, 116 A. 453 (1922); Reed v. Reed, 109 Md. 690, 72 A. 414 (1909); Tippen v. King, 187 Misc. 150, 61 N.Y.S.2d 298 (1946); Hatcher v. Allen, 200 N.C. 407, 17 S.E. 2d 454 (1941) (a case based on almost identical facts); Humphreys v. Humphreys, 39 Tenn. App. 99, 281 S.W.2d 270 (1954).

20. See 4 Powell § 602.

21. *Id.*

> property as tenants by the entireties, shall be divorced, they shall thereafter hold such property as tenants in common of equal one-half shares in value and either of them may bring suit in the court of common pleas, sitting in equity, of the county where the property is situated, against the other to have the property sold and the proceeds divided between them.[22]

This statutory provision makes the transfer a legal requirement and is in agreement with the common law of the state.[23]

The second premise of the majority view is that the husband intended an absolute gift to the wife when he took title in both names as tenants by the entireties. *McCally* quoted with approval from *Anderson v. Anderson*:[24]

> The controlling fact in the instant case is that the whole property was acquired as tenants by the entireties. In legal effect, and in the absence of proof that it was not her voluntary act, the transaction on its face amounted to an *absolute gift.*

The mere fact that one of the spouses had paid a greater proportion of the consideration does not eliminate the creation of a tenancy by the entireties. The presumption of an absolute gift has been adopted almost unanimously by the majority courts.[25] The cases indicate, however, that this presumption is not conclusive but rather rebuttable.[26]

It is important to emphasize that the *McCally* court found no evidence of bad faith, fraud, coercion, misrepresentation or undue influence.[27] The court said:

> The husband's pleadings do set forth that she later threatened to leave him unless he purchased a home for her and the family in Montgomery County, but they do

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22. PA. STAT. ANN. tit. 68, § 501 (1965).

23. *In re* Holme's Estate, 414 Pa. 403, 200 A.2d 745 (1964); Miller v. Miller, 36 Northumb. L.J. 201 (C.P. Pa. 1964).

24. 215 Md. 483, 488, 138 A.2d 880, 883 (1958). This case rested on facts similar to *McCally*. A wife was trying to obtain reimbursement for a property for which she had made a major contribution prior to divorce.

25. *See, e.g., In re* Holme's Estate, 414 Pa. 403, 407, 200 A.2d 745, 747 (1964). The Pennsylvania Supreme Court held:

> The husband's acquisition of property with his funds and placement of the property in the names of himself and his wife constituted a gift and created a tenancy by the entireties even though the husband exclusively received income therefrom during his lifetime and the property was placed in both names without his wife's knowledge or consent.

See also Reed v. Reed, 109 Md. 690, 72 A. 414 (1909); Stalcup v. Stalcup, 137 N.C. 305, 49 S.E. 210 (1904); Annot., 43 A.L.R.2d 917 (1955).

26. *See, e.g.*, United States v. Trilling, 328 F.2d 699 (7th Cir. 1964); Perryman v. Pugh, 269 Ala. 487, 114 So. 2d 253 (1959); Fullerton v. Fullerton, 233 Ark. 656, 348 S.W.2d 689 (1961); *In re* Putney's Will, 213 A.2d 57 (Del. Ch. 1965); Weeks v. Weeks, 72 Nev. 268, 302 P.2d 750 (1956); Dorf v. Tuscarora Pipe Line Co., 48 N.J. Super. 26, 136 A.2d 778 (1957); Sirianni v. Sirianni, 14 App. Div. 432, 221 N.Y.S.2d 693 (1961).

27. 243 A.2d 538, 540.

> not state that she coupled this threat with the demand that any purchase of a new home be acquired *in their joint names as tenants by the entireties.*[28]

Both the majority and minority states unanimously agree that the existence of fraud, duress, misrepresentation, coercion or bad faith warrants the abandonment of the principle of equal distribution.[29] For example, if property is conveyed to spouse *A* in violation of the rights of spouse *B*, equity will prevent spouse *A* from taking by survivorship, or otherwise receiving benefits to *B*'s disadvantage, by impressing a trust on the property for *B*'s benefit. Illustrative are cases where the wife is entitled to a deed in her name alone and the conveyance is placed in both names by the husband or where spouse *A* uses spouse *B*'s money to purchase property without consent.[30] In these situations, a constructive trust is imposed in order to prevent unjust enrichment. In such a case, the wrongdoer holds the property upon a constructive trust for the person from whom he obtained it.[31] The constructive trust theory was advanced by the husband in *McCally*,[32] but it can be fairly assumed that since there was no finding of the prerequisite conditions to impose a constructive trust, the court saw no reason to discuss the issue.

The court in *McCally* discounted the policy arguments set forth by the plaintiff[33] and formulated a three-pronged policy statement of its own:

> [T]o incorporate the doctrine of divestiture of the culpable spouse . . . into the law would open a Pandora's box, possibly affecting the stability of land titles long thought secure, not to mention the engrafting of complications into divorce laws already less than perfect.[34]

The desire for stability in land ownership is historic,[35] and there is a great deal to be said for minimizing any doubts of ownership of land. For example, envision a husband who buys a property and deeds it to his wife in the first year of a ten year marriage now ending in divorce. Declaring a constructive trust of the property would throw havoc into the law. This is especially true with respect to the rights of the beneficiary of the constructive trust

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28. *Id.*
29. *See* 2 AMERICAN PROPERTY § 6.6.
30. Annot., 25 L.R.A. 167 (1908).
31. A.W. SCOTT, THE LAW OF TRUSTS §§ 461-464 (1956).
32. 243 A.2d 538, 540.
33. *See* note 7 *supra* and accompanying text.
34. McCally v. McCally, 243 A.2d 538, 542.
35. Two obvious examples of this policy would be the Statute of Limitations and the Rule Against Perpetuities.

and any buyer of the land if the land was sold or conveyed prior to the divorce. Of course, this would be more particularly the case if the courts were willing to apply the constructive trust doctrine to land acquired and conveyed any time during the marriage, and not just that in possession at the time of the divorce.

The policy argument respecting the further complication of the divorce laws is not well founded. Some of the minority states have statutes which logically and fairly deal with divorce and property rights.[36] The Pandora's box argument in context relates directly to the land title problem. As an argument *per se* it is not specific enough to be arguable.

The Minority View—Does it Exist?

The minority viewpoint is recognized in varying degrees in seven jurisdictions.[37] The minority doctrine when strictly applied would completely divest the guilty spouse in a divorce action of any property which was bought solely with the innocent spouse's funds. This would be true without the necessity of showing any element of fraud, duress, bad faith, misrepresentation or coercion since the purpose of the minority view is to prevent unjust enrichment.[38]

A comparison of statutes among states which purportedly adhere to either the majority or minority views demonstrates that there is little difference in their literal reading. Furthermore, close analysis reveals that the results achieved by the "minority" view are no different from application of the majority rule.

Connecticut, which follows the majority view, provides by statute:

> When any married person derives any estate from his spouse in consideration of their marriage, or of love and affection, and such spouse is granted a divorce from such person under the laws of the state, the court which grants the divorce, as a part of the decree, may provide that such estate or any part thereof in the possession of such person or standing in his name shall belong to the spouse granted the divorce.[39]

Minnesota, another majority state, provides:

> Upon a divorce for any cause, or upon an annulment, the court may make such disposition of the property of the parties acquired during coverture as shall appear just and equitable, having regard to the nature and determination of the issue in the case, the amount of alimony or support money, if any, awarded in the judgment, the manner by

36. *See, e.g.*, CAL. CIV. CODE § 146 (West 1954); COLO. REV. STAT. ANN. § 46-1-5(2) (1963); D.C. CODE ANN. § 16-910 (Supp. V. 1966); MICH. COMP. LAWS § 552.102 (1948). See pp. 670, 671, 672 *infra*.

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

38. *See* note 73 *infra* and accompanying text.

39. CONN. GEN. STAT. ANN. § 46-22a (1958).

> which said property was acquired and the persons paying or supplying the consideration therefor, the charge or lien imposed thereon to secure payment of alimony or support money, and all the facts and circumstances of the case.[40]

Both of these statutes are similar to the statute of Illinois which is considered to follow the minority rule.

> Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to the party entitled to the same, upon such terms as it deems equitable.[41]

The Illinois statute has been extensively interpreted, and whether it will be invoked in a particular case depends upon four requirements. First, a divorce must be granted.[42] A divorce will convert a tenancy by the entireties into a tenancy in common, whereas a mere separation, whether voluntary or judicial, will neither destroy the estate nor change the essential character of the property holdings.[43] Second, the statutory provisions may be invoked only when a reward of alimony or property settlement on the merits of the divorce decree could possibly be entered. Therefore, the prime concern of the statute is not applying the equities of the property situation but rather ensuring that the property settlement reached by the court will be paid.[44] Third, if the first two conditions are met and if a wife made no contribution to a property with title in the husband's name, "it is the right of the husband to remain vested with title."[45] Fourth, if, however, property is voluntarily conveyed by husband to wife without fraud or coercion, a gift is presumed and the wife may hold the property against him.[46]

The Illinois rule is therefore not much different from the majority doctrine. If property is taken out in both names with contribution having been made by only one spouse, a gift is presumed to have been made to the non-contributing spouse. The

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40. MINN. STAT. ANN. § 518.58 (1967). *See also* WIS. STAT. § 247.26 (1959) (another example of a majority state statute with very similar wording).
41. ILL. REV. STAT. ch. 40, § 18 (1957).
42. Bateman v. Bateman, 337 Ill. App. 7, 15, 85 N.E.2d 196, 201 (1949).
43. 2 AMERICAN PROPERTY § 6.6(a). *See generally* Annot., 168 A.L.R. 260 (1947). *See also* Harrier v. Wallner, 80 Ill. 197 (1875); Cisel v. Cisel, 352 Mo. 1097, 180 S.W.2d 748 (1944); Stely v. Schreck, 128 N.Y. 263, 28 N.E. 510 (1891).
44. Cross v. Cross, 5 Ill. 2d 456, 466, 125 N.E. 2d 488, 494 (1955).
45. Bissett v. Bissett, 375 Ill. 551, 557, 31 N.E.2d 955, 957 (1941).
46. Baker v. Baker, 412 Ill. 511, 514, 107 N.E.2d 711, 713 (1952).

third requirement adds nothing to the analysis since title was taken out in only one name; and requirements one and two note that the statute will be invoked by the court only for the purpose of attaching property to ensure full settlement of the divorce decree.

An Illinois decision which appears at first glance to be contrary to *McCally* is *Brixel v. Brixel.*[47] There the wife deserted the husband without cause. She was induced to return only when the husband executed a $1,000 judgment note to her as a gift. The husband also wanted to sell some real estate held in both names; but the wife refused to sign the deed unless the husband agreed to invest the proceeds in other real property, which he did. The wife left him and sued for divorce. The court held that the husband was entitled to have the entire title to the real estate vested in him. The court said:

> If we found for the wife, such a decision would enable the wife to consummate a fraud upon the husband. If Appellee [wife] had continued to live with Appellant [husband] and discharged her duties as his wife, or if it had been judicially determined that she was compelled to live separate or apart from him without her fault, she might then have some standing in a court of equity to assert her right to the judgment and the interest in real estate.[48]

This decision introduces a new element to the discussion—the idea of a conditional gift—which is recognized in at least four of the minority states.[49] In the *Brixel* case, however, the court speaks of

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47. 230 Ill. 441, 82 N.E. 651 (1907).

48. *Id.* at 453, 82 N.E. at 656.

49. *See, e.g.*, Meldrum v. Meldrum, 15 Colo. 478, 490, 24 P. 1083, 1087 (1890), where the court said:

> He [husband] was induced by false profession of love and affection to cause the conveyance of the Denver property to be made to her as a house for the family. . . . She [wife] with her deceit and false professions of affection, held complete mastery over him. She was false to her marital vows, and by fraud procured an unjust advantage of her husband. From such a fraud courts of equity will grant relief, either by setting aside the conveyance or by converting the offending party into a trustee of the property for the benefit of the party defrauded.

Brixel v. Brixel, 230 Ill. 441, 452, 82 N.E. 651, 655 (1907) in which the court said:

> In causing the deed to be made to her jointly with himself, there is no doubt that appellant [husband] was moved by his desire to satisfy the unreasonable and burdensome demands made by his wife for the purpose of trying to induce her to live with him as his wife. Appellant was evidently very much attached to appellee, as is shown by the sacrifices that he was willing to make in order to induce her to live with him peaceably.

In re Lewis, 85 Mich. 340, 344, 48 N.W. 580, 581 (1891) (an unusual case as the wife had placed her property in trust for the benefit of both the husband and wife) where, *citing* Babcock v. Smith, 22 Pick. 61 (1840), the court said:

> We see no reason in holding that a husband or wife can, by a violation of the marital obligation, obtain an interest in land which she or he does not possess while fulfilling such obligation. The

a fraud which really makes the Illinois result little different from the majority view.

In the Colorado case of *Meldrum v. Meldrum*[50] the plaintiff-husband transferred property to his wife and sought to regain possession after divorce. Again, the court invoked the conditional gift theory; but the decision was also dependent upon a factual finding of fraud and undue influence.[51]

The minority courts therefore appear to really find that an absolute gift will be construed in the absence of a finding of fraud, coercion, bad faith, misrepresentation or undue influence. These decisions are actually speaking constructive trust language when any of the above five elements exist.[52] Thus they are actually similar in result to the majority view.

The actual similarity of the Colorado result with the majority view is anomalous since Colorado has a statute which resembles the minority position as conceived by *McCally*.

> At the time of the issuance of the divorce decree, or at some reasonable time thereafter as may be set by the court at the time of the issuance of said divorce decree,

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common law should not, and in our judgment does not, permit a person to thus profit by his own gross wrong and a violation of the most sacred obligation.

Dickerson v. Dickerson, 24 Neb. 530, 531, 39 N.W. 429 (1888):

> Having obtained the property under the implied agreement that the marriage relation should continue to exist, and the parties reside together, the defendant [wife] will not be permitted to retain property which she acquired from her husband by deceit and imposition.

Note either the expressed or implied presence of either fraud, coercion, undue influence or deceit in these cases, all of which are, therefore, incorrectly cited by the courts as adhering to the minority doctrine.

50. 15 Colo. 478, 24 P. 1083 (1890).

51. *Id.* at 478, 24 P. at 1083. The court said:

> The relation of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other; and where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, Chancery may relieve against the transaction.
>
> Where the wife, while harboring a determination to abandon her husband and dissolve the marital relation, fraudulently procures from him valuable property as a home for the family, and afterwards institutes proceedings for a divorce, equity may restore the title to the husband after a decree of divorce has been granted.

Id. See also Stone v. Wood, 85 Ill. 603 (1877) in which the court stated:

> Where either the husband or wife becomes untrue to the other, and by fraud obtains an unjust advantage over the other, a court of equity will readily afford relief as it will between other persons not occupying the relationship.

Id. at 609.

52. McCally v. McCally, 243 A.2d 538, 540. *See also* note 12 *supra* and accompanying text.

> on application of either party, the court may make such orders, if any, as the circumstances of the case may warrant relative to division of property, in such proportions as may be fair and equitable.[53]

This statute can be interpreted to allow the court to divest a non-contributing, guilty spouse in a divorce action; but again the courts have been reluctant to invoke a literal reading except when the guilty spouse (1) had intentions of separation or divorce at the time the property was purchased; and (2) as a means of awarding property based on the merits of the divorce decree rather than on the basis of financial contribution to the property purchased.[54]

Michigan similarly has a statute which applies to realty owned jointly or by the entireties and also to situations where a divorce decree is issued without any determination of property ownership.

> Every husband and wife owning real estate as joint tenants or as tenants by the entireties shall, upon being divorced, become tenants in common of such real estate, *unless the ownership thereof is otherwise determined by the decree of divorce.*[55]

In *Witschi v. Witschi*[56] the court said: "This section [of the statute] is solely for the purpose of providing for the disposition of entirety property when a decree divorcing the owner omits to award such property." In *Allen v. Allen*[57] the Michigan court held:

> An award under this section must be equitable in the light of the facts and circumstances surrounding each case . . . and where there is neither allegation nor proof of wife's adultery and property held by the entireties was all that was owned by either spouse, a decree giving it to the husband is inequitable. . . .[58]

This case gives full expression to the equitable nature of the minority doctrine. It differs from the *McCally* case, however, in that it doesn't speak of contribution, and further, the court saw no need to apply the equitable principles which it expresses since in the divorce action there was no guilt element on the part of either spouse.

Georgia was also cited as a minority jurisdiction in *McCally*.[59] In *Evans v. Evans*[60] the wife had already committed adultery

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53. COLO. REV. STAT. ANN. § 46-1-5(2) (1963).
54. Green v. Green, 139 Colo. 551, 342 P.2d 659 (1959); Drake v. Drake, 138 Colo. 388, 333 P.2d 1038 (1959); Nunemacher v. Nunemacher, 132 Colo. 300, 287 P.2d 662 (1955).
55. MICH. COMP. LAWS § 552.102 (1948) (emphasis added).
56. 261 Mich. 334, 337, 246 N.W. 139, 140 (1933).
57. 196 Mich. 292, 162 N.W. 987 (1917).
58. *Id.* at 296, 162 N.W. at 988. *See also* Lukshaitis v. Lukshaitis, 314 Mich. 426, 22 N.W.2d 825 (1946).
59. 243 A.2d 538, 541.
60. 118 Ga. 890, 45 S.E. 612 (1903).

when the husband made a gift of property to her. The court gave the property entirely to the husband after divorce. The court indicated that the result would be the same if at the time of obtaining the gift the wife has in contemplation a subsequent adultery or elopement. Once more, the underlying reason behind the court's decision was the wife's fraud. However, the court by dicta speaks of adultery alone without any contemplation of divorce or separation on the wife's part.

> Adultery is the most serious of marital offenses; that it poisons the marriage relation . . . that, as it would be insulting and indecent to incorporate in a deed a gift provision making it void if the wife should be guilty of that crime, the husband must be supposed to have given, and the wife to have accepted, with the implied condition that the property should not be used for the support of the paramour, or for the maintenance of one who had not only violated the vows under which he had promised to endow her with his worldly goods, but had outraged him as a man, and repudiated him as a husband; that the real condition of such a conveyance was the marriage and the continuation of the married state.[61]

Here is an excellent minority policy argument. It is broader than the conditional gift concept.[62] However, as stated, the facts of the case do not allow a pure application of the minority doctrine, and there has been no such application in Georgia.

A California statute implies that under certain circumstances the minority doctrine can be applied to its fullest extent.

> One: If the [divorce] decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the conditions of the party may deem just.
>
> Two: If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties.[63]

Thus, upon grounds of adultery, incurable insanity and extreme cruelty the court is given a great deal of discretion. Yet, the courts have been reluctant to exercise this discretion. In *Morris v. Berman*[64] the California court spoke of the equities of the situation but based its holding on undue influence. In *Schotte v. Schotte*[65]

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61. *Id.* at 892, 45 S.E. at 613.
62. *See* note 49 *supra* and accompanying text.
63. CAL. CIV. CODE § 146 (West 1954).
64. 159 Cal. App. 2d 770, 324 P.2d 601 (1958).
65. 203 Cal. App. 2d 28, 21 Cal. Rptr. 220 (1962).

a husband had advanced money to his wife to build rental units on the wife's property. In return she promised to give him a deed in joint tenancy to the property. The court enforced the wife's agreement by a constructive trust of the property in favor of the husband because the "break of her oral promise constitutes a violation of the confidential relationship between them."[66]

The question may therefore be properly posed as to whether there is really a split of authority as *McCally* indicated. California, Colorado, Georgia and Michigan have statutes by which they could completely divest a non-contributing guilty spouse in a divorce action of any interest held in joint property. But those courts have refused to apply their statutes except in situations involving fraud, misrepresentation, coercion, undue influence or bad faith.

The District of Columbia is the only jurisdiction adhering to the concepts of the minority position. Its statute is comparable to others previously discussed.

> Upon the entry of a final decree of annulment or absolute divorce, in the absence of a valid ante-nuptial agreement or post-nuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and, in the same proceeding in which the decree is entered, the court may award the property to the one lawfully entitled thereto or apportion it in such a manner as seems equitable, just and reasonable.[67]

The judicial application of the statute distinguishes the District of Columbia view. The courts there have been willing to grant the innocent-contributing spouse the entire property, even when there is no fraud, coercion or undue influence.[68] But a close reading of the statute indicates that application of the statute is mandatory unless there is a valid agreement to the contrary.[69] The statute authorizes the court to settle the partners' marital status and rights to property in one proceeding.[70] If a husband furnishes all the consideration, the inclusion of the wife in a joint deed is supported by no consideration except her faithful observance of the marriage vows. Of course, this faithful observance has ceased if the wife is judged the guilty party in a divorce case.[71] The division of jointly held property is left to the sound judgment of the trial court. In addition, judicial interpretations of the statute have noted the

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66. *Id.* at 223. *Accord* Brison v. Brison, 75 Cal. 525, 17 P. 689 (1888).
67. D.C. CODE ANN. § 16-910 (Supp. V. 1966).
68. Moore v. Moore, 51 App. D.C. 304, 278 F. 1017 (1922).
69. Leibel v. Leibel, 190 A.2d 821 (D.C. App. 1963); Hipp v. Hipp, 191 F. Supp. 299 (1960), *aff'd*, 111 App. D.C. 307, 296 F.2d 429 (1961).
70. Wheeler v. Wheeler, 88 App. D.C. 193, 188 F.2d 31 (1951).
71. *See, e.g.*, Schultze v. Schultze, 112 App. D.C. 162, 300 F.2d 917 (1962); Oxley v. Oxley, 81 App. D.C. 346, 154 F.2d 10 (1946); Richards v. Richards, 72 App. D.C. 67, 112 F.2d 19 (1940).

implied presence of the conditional gift concept.[72]

The minority position is aimed at the prevention of unjust enrichment. Courts should take note of the background facts of a divorce case and distribute property in accordance with rules of fair play. A divorce should not be used as a weapon to gain a financial windfall.[73] The days are past when the divorced woman was unable to go out on her own and make a living for herself. Equity is not to be equated with chivalry.

Alternate Bases for the McCally Decree

The McCally court may have had more authority to support its opinion than it realized. The "wrongdoer" in even the minority states is almost always guilty of fraud, coercion, undue influence, misrepresentation or bad faith. In cases involving an adultery or desertion situation which occurs years after the gift of property and without any evidence of fraudulent element, even the minority courts have been unwilling to invoke the statutory discretion allowed them.

As a practical matter, it is hard to prove fraudulent intent on the wife's part at the time of the transfer of property. The court cannot prove a subjective state of mind without reference to objective evidence or standards. The main difference between the two views set forth in *McCally* is probably the extent to which various courts have gone to find fraud. In *McCally* the court said that no material issue of fact was raised. Therefore, it accepted the husband's contentions.[74] Yet it was unable to find any fraud.[75] Certainly, at least coercion or undue influence was present in the wife's actions to force the husband to move from the District of Columbia to Maryland. This same coercion could have been inferred to have been present to influence the husband to place the deed in both names.

An aid in ascertaining whether the guilty spouse had any fraudulent intent at the time of a property transfer would be in the establishment of a rebuttable presumption that such intent existed if the divorce takes place within a specified number of years after the property transfer. However, just as it is difficult to prove the subjective state of mind in proving fraud, it may be

72. Lundregan v. Lundregan, 176 A.2d 790 (D.C. Mun. App. 1962).
73. *See* Note, *Divorce and Tenancy by the Entireties*, 50 Mass. L.Q. 45 (1965).
74. *See* notes 5, 7, 24 and 49 *supra* and accompanying text.
75. McCally v. McCally, 243 A.2d 538, 540.

just as difficult and unfair to ask a party to disprove the presumption.

Conclusion

McCally considered whether an innocent spouse in a divorce action has the right to have the guilty spouse completely divested of his one-half interest in joint property. The *McCally* expression as to the existence of majority and minority viewpoints is correct upon a reading of relevant statutes. However, there is only one jurisdiction, the District of Columbia, which strictly adheres to the minority doctrine. Statutes of representative jurisdictions dealing with the disposition of real property at the time of divorce, could all be interpreted as permitting their courts to apply the minority doctrine of equitable distribution of the property based on the two factors of (1) guilt in the divorce proceeding and (2) contribution at the time of the property purchase. Yet, the majority courts adhere to the common law rule of one-half distribution to each spouse except where either bad faith, misrepresentation, fraud, duress or undue influence exists. And, similarly, where the courts in jurisdictions termed by *McCally* as "minority" contend observance of another rule, one of the five fraudulent elements is always present.

The District of Columbia has been the most liberal in applying purely equitable principles to the facts. And it is not the District of Columbia's statutory law that is unique, but rather the application and interpretation of that statutory law by its courts.

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