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THE TENANCY BY THE ENTIRETIES IN FLORIDA*

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The estate by the entireties, deeply rooted in feudal concepts of the marital relationship, continues to thrive in the State of Florida. Drawing its substance from notions of community property, the tenancy has proved a trap for the unwary, a blessing for surviving spouses, a curse to heirs and creditors, and a source of endless litigation.

Briefly stated, an estate by the entireties is created when property is taken in the names of husband and wife.[1] Sometimes the intent to create such a tenancy must be shown.[2] Property so held cannot be encumbered, leased, or conveyed without the joint consent of husband and wife.[3] The surviving tenant becomes the sole owner of entireties property; hence the property is not administered as a part of the estate of the deceased tenant.[4] Individual creditors of husband or wife cannot levy on the property, although execution is allowed for the joint debts of the couple.[5]

This article is concerned with problems arising from the incidents of the estate, with the rights of third parties in transactions in connection with such property, and with the creation and termination of the estate. The federal tax impacts of the tenancy, the effect of Florida's homestead provisions, utilization of the tenancy in estate planning, and title opinion problems will receive brief consideration.

* A table of headings and subheadings is appended at the end of this article.

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1. *E.g.*, Knapp v. Fredricksen, 148 Fla. 311, 4 So. 2d 251 (1941); Dixon v. Becker, 134 Fla. 547, 184 So. 114 (1938); English v. English, 66 Fla. 427, 63 So. 822 (1913).

2. *E.g.*, Winters v. Parks, 91 So. 2d 649 (Fla. 1956); *In re* Lyons' Estate, 90 So. 2d 39 (Fla. 1956); Tingle v. Hornsby, 111 So. 2d 274 (1st D.C.A. Fla. 1959).

3. *E.g.*, Richart v. Roper, 156 Fla. 822, 25 So. 2d 80 (1946); Richardson v. Grill, 138 Fla. 787, 190 So. 255 (1939); Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936). But spouses have been allowed to exercise unilateral control over tenancies composed of personal property. See notes 202-203 *infra*.

4. *E.g.*, Wilson v. Florida Nat'l Bank & Trust Co., 64 So. 2d 309 (Fla. 1953); Norman v. Kannon, 133 Fla. 710, 182 So. 903 (1938); Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

5. *E.g.*, Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936); Hart v. Atwood, 96 Fla. 667, 119 So. 116 (1928); Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920).

HISTORICAL DEVELOPMENT OF THE TENANCY

The English Origin

Estates by the entireties, predicated upon now quaint ideas of the status of married women, originated in the English common law as early as the fourteenth century.[6] The tenancy was based upon a legal fiction that husband and wife are one and that therefore there is but one estate, with the husband-wife entity owning the whole.[7] At common law a wife could not own personal property and was not entitled to her earnings from her personal labor.[8] The husband was entitled to a freehold estate in all of the property owned by the wife at marriage and also in that later conveyed or devised to her.[9] Because of these disabilities, it has been said that the early English judges could not bring themselves to give the wife the status of a joint tenant or a tenant in common; as a result there evolved the doctrine of the tenancy by the entireties, with its concept of "oneness."[10] The estate as it existed at common law lacked many of the incidents that accompany the tenancy today. For example, the husband alone could convey the property, subject to the wife's indestructible right of survivorship, his individual creditors could levy upon the estate; and the tenancy could not exist in personal property.[11]

Absorption into the Law of Florida

Surprisingly, until 1913 the Supreme Court of Florida did not have occasion to decide whether an estate by the entireties could be created in this state. The Court first recognized the tenancy in *English v. English*[12] by holding that a conveyance to a third party by a husband, with a reconveyance to husband and wife, creates an estate by the entireties. The Court did not dwell at length upon the wisdom of recognizing the estate in Florida. In a mechanical manner it pointed out that the common law recognized such an estate, that Florida had adopted the common law except as modified by statute,[13]

6. See 4 THOMPSON, REAL PROPERTY §1803 (1940); Ritter, *A Criticism of the Estate by the Entirety*, 5 U. FLA. L. REV. 153, 154 (1952).

7. Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936); Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

8. See Omwake v. Omwake, 70 So. 2d 565 (Fla. 1954); Farrington v. Richardson, 153 Fla. 907, 16 So. 2d 158 (1944); Blood v. Hunt, 97 Fla. 551, 121 So. 886 (1929); 41 C.J.S., *Husband and Wife* §21 (1944).

9. See note 8 *supra*.

10. See Ritter, *supra* note 6, at 155.

11. *Id.* at 154-55. *But see* Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925) (citing cases for the proposition that a tenancy by the entireties existed in personal property at common law).

12. 66 Fla. 427, 63 So. 822 (1913).

13. FLA. STAT. §2.01 (1959).

that in its opinion the statutes abrogating the right of survivorship in joint tenancy[14] and creating separate property rights of married women[15] had not changed the common law, and that hence the estate still existed in Florida.

Recognition of the tenancy in Florida has drawn severe criticism, primarily on the bases that there was no reason to embrace the estate, since married women can now hold property, and that the doctrine is archaic and repugnant to modern ideas of the status of married women.[16] It has also been pointed out that the majority of the states have refused to recognize the tenancy.[17]

In the *English* case the Florida Court enunciated the following incidents of the tenancy: Upon the death of one spouse the survivor takes all of the estate, though not as a new estate; both spouses must assent to alienation of the estate; and there can be no partition of the lands during the joint lives of the spouses.

Later decisions established that judgment creditors of one of the spouses cannot levy upon property held by the entireties.[18] Recognition that the estate can also exist in personal property followed a short time later.[19]

In the past forty-seven years many cases involving the tenancy have been considered by Florida courts. The result has been the formulation of a body of law sui generis to the tenancy by the entireties. It behooves the Florida practitioner to grasp the import of these decisions, since they have and will continue to upset the planning of an estate and to frustrate or delight spouses, heirs, vendees, and creditors.

CREATION OF THE ESTATE IN FLORIDA

The Common Law Unities

An analysis of the so-called unities necessary to the existence of jointly-held estates clarifies the differences between the estate by the

14. FLA. STAT. §689.15 (1959). The statute was enacted originally on Nov. 17, 1829. COMP. GEN. LAWS ANN. §5482 (1927). The statute was amended in 1941 to expressly exempt estates by the entireties from its operation. Fla. Laws 1941, ch. 20954, §3.

15. See FLA. CONST. art. XI, §1; FLA. STAT. §708.02 (1959) (enacted originally in 1845). Both provide that the property of a married woman shall be her separate property.

16. See Ritter, *supra* note 6, at 158-59.

17. See 4 THOMPSON, REAL PROPERTY §1806 (1940); Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951).

18. *E.g.*, State *ex rel.* Molter v. Johnson, 107 Fla. 47, 144 So. 299 (1932); Hart v. Atwood, 96 Fla. 667, 119 So. 116 (1928); Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920).

19. *E.g.*, Rader v. First Nat'l Bank, 42 So. 2d 1 (Fla. 1949); Lindsley v. Phare, 115 Fla. 454, 155 So. 812 (1934); Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

entireties and other jointly-held estates. The one distinguishing feature of an estate in common is unity of possession by the co-tenants.[20] Joint tenancy contemplates three additional unities: The interests of the co-tenants in the property must be the same; their interests must originate in the same conveyance or by the same instrument; and their interests must commence simultaneously.[21] A tenancy by the entireties contemplates the four unities of joint tenancy and the additional unity of person springing from the relationship of husband and wife.[22] The singleness of person is traceable to the common law conception of man and wife as one person. The Florida Court has thus described the estate:[23]

> "It is a peculiar and anomalous estate. It is a *sui generis* species of tenancy. The essential characteristic of an estate by the entirety is that each spouse is seized of the whole or the entirety, and not of a share, moiety, or divisible part. . . . There is but one estate, and, in contemplation of law, it is held by but one person."

Since the marital relationship is essential to the creation of a tenancy by the entireties, a deed to husband and wife fails to create such a tenancy when the marriage is bigamous.[24] When an instrument purports to create an estate by the entireties between mother and daughter, the conveyance results only in a tenancy in common, with a right of survivorship and an agreement not to partition.[25]

Rule of Construction or Rule of Law?

Many Florida cases hold in effect that when land is conveyed to husband and wife an estate by the entireties is created unless the conveyance reveals a contrary intent.[26] The Florida Court has said that a limitation of property conveyed to husband and wife without specifying their property interests is construed to limit it to them by the entireties, and that in order to create the tenancy it is not necessary that the grantees be referred to as husband and wife or that their matrimonial relationship be mentioned in the deed.[27]

20. Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (1945).

21. *Ibid.;* Johnson v. Landefeld, 138 Fla. 511, 514, 189 So. 666, 668 (1939) (dissenting opinion).

22. Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (1945).

23. Bailey v. Smith, 89 Fla. 303, 305, 103 So. 833, 834 (1925).

24. Nottingham v. Denison, 63 So. 2d 269 (Fla. 1953); Kerivan v. Fogal, 156 Fla. 92, 22 So. 2d 584 (1945).

25. Forehand v. Peacock, 77 So. 2d 625 (Fla. 1955).

26. *E.g.,* Knapp v. Fredericksen, 148 Fla. 311, 4 So. 2d 251 (1941); Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376 (1920); English v. English, 66 Fla. 427, 63 So. 822 (1913).

27. American Central Ins. Co. v. Whitlock, 122 Fla. 363, 165 So. 380 (1936)

But the Court has also recognized the application of a rule of construction, as exemplified by this statement in *Bailey v. Smith*:[28]

> "[W]hether such an estate [by the entireties] exists as a result of the acquisition of property by and in the names of both husband and wife must be determined by a consideration of the nature and terms of the transaction as portraying the intent of the parties and of the rules of law applicable thereto."

There are numerous Florida cases that deal with the question whether an estate by the entireties has been created. The total impression of these cases is a welter of conflicting rulings. One case announces the creation of a tenancy by the entireties as a rule of law, and the next is decided upon the presumption that the spouses intended to create the tenancy. The results are more consistent if viewed in the light of three overlapping factual situations:

> (1) Does the question of the existence of an estate by the entireties arise upon the death of one of the spouses or in a "living" setting, such as divorce?
>
> (2) Is the purported estate by the entireties composed of real or personal property?
>
> (3) Did the husband or the wife furnish the consideration for the purchase of the property?

Real Property. Initially, it may be said that if husband and wife acquire non-homestead real estate in their joint names the survivor will become the sole owner of the property in the absence of a fraudulent conveyance.[29] In this situation the Florida Court follows a rule of law in determining that a tenancy by the entireties exists. No concern is expressed over whether one of the spouses contributed more to the estate than the other. Existence of an intent to create the tenancy in real estate can, however, become an issue in a living termination of the estate.[30]

Personal Property. Florida recognizes a tenancy by the entireties in promissory notes,[31] mortgages,[32] partnerships,[33] bonds,[34] bank ac-

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(personalty, dictum as to realty).

28. 89 Fla. 303, 308, 103 So. 833, 835 (1925) (rule of law applied, however).

29. *E.g.,* cases cited note 26 *supra.*

30. Hargett v. Hargett, 156 Fla. 730, 24 So. 2d 305 (1946).

31. Merrill v. Adkins, 131 Fla. 478, 180 So. 41 (1938); American Central Ins. Co. v. Whitlock, 122 Fla. 363, 165 So. 380 (1936); Lindsley v. Phare, 115 Fla. 454, 155 So. 812 (1934).

32. Powell v. Metz, 55 So. 2d 915 (Fla. 1952); Lindsley v. Phare, *supra* note 31; Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

33. Lacker v. Zuern, 109 So. 2d 180 (2d D.C.A. Fla. 1959).

34. See *In re* Lyons' Estate, 90 So. 2d 39 (Fla. 1956).

counts and savings deposits,[35] corporate stock,[36] and other intangible rights, such as beverage licenses.[37] The Florida judiciary has vacillated in formulating the requirements for creation of the tenancy in personalty. When the Supreme Court first recognized creation of the tenancy in personal property, the only requisite was that the property be in the names of husband and wife, although at the same time it intimated that the intent of the parties should be considered.[38] Florida courts have subsequently demanded evidence of intent to create the estate beyond the mere execution of an instrument in the names of the spouses.[39]

The greatest area of difficulty has been in determining whether the estate was created in bank accounts. Confusion with cases involving joint bank accounts, together with the Court's concern over evasion of testamentary requirements, tracing of proceeds, and lack of unity of control by the spouses, has clouded the requirements for establishing a tenancy by the entireties in bank accounts.

In the first Florida case involving bank accounts of spouses the Court sustained a tenancy by the entireties by looking solely at the deposit agreement authorizing payment to husband *and* wife.[40] Later cases followed a rule of law in upholding the tenancy upon a mere showing of a joint deposit agreement,[41] even when the deposit contract made the account payable to either of the spouses or to the survivor.[42] In *Hagerty v. Hagerty*[43] the Court said that the fact that either spouse could unilaterally sever the estate was not significant, that the deposit slip merely made each spouse the agent of the other, and that upon an agency theory each spouse still had control of the account. The Court stated that there was no need to concern itself with the requirements of an inter vivos gift, such as surrender of dominion over the gift to the donee-spouse. It reasoned that no

35. Rader v. First Nat'l Bank, 42 So. 2d 1 (Fla. 1949); Bailey v. Smith, *supra* note 32; Lerner v. Lerner, 113 So. 2d 212 (2d D.C.A. Fla. 1959).

36. See Lamoureux v. Lamoureux, 157 Fla. 300, 25 So. 2d 859 (1946); Lerner v. Lerner, *supra* note 35.

37. Hutchins v. Hutchins, 113 So. 2d 412 (2d D.C.A. Fla. 1959).

38. Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

39. Winters v. Parks, 91 So. 2d 649 (Fla. 1956); *In re* Lyons' Estate, 90 So. 2d 39 (Fla. 1956); Lerner v. Lerner, *supra* note 35; Tingle v. Hornsby, 111 So. 2d 274 (1st D.C.A. Fla. 1959). See Doing v. Riley, 176 F.2d 449 (5th Cir. 1949), in which the court said that although tenancy by the entireties can exist in personal property, no court decision or Florida statute prescribes the procedure by which such an estate can be created.

40. Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925).

41. Colclazier v. Colclazier, 89 So. 2d 261 (Fla. 1956); Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951); Rader v. First Nat'l Bank, 42 So. 2d 1 (Fla. 1949).

42. Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951).

43. *Ibid.*

estate by the entireties would be possible in bank accounts if complete control over the account were given the donee, because the donor-spouse also has to retain dominion over entireties property. The Court stated further that bank deposits are particularly suitable for a tenancy by the entireties because of the unities of possession, interest, and person peculiar to a joint bank deposit.

A new doctrine was enunciated in 1955 in the case of *In re Lyons' Estate.*[44] There were two bank accounts, both payable to husband *or* wife, but only one of them contained words of survivorship. The wife had never withdrawn funds from or deposited money in either account. The Court at first held that the bank account with words of survivorship qualified as an estate by the entireties but that the one lacking a survivorship provision did not. On rehearing,[45] the Court held that neither deposit created an estate by the entireties. The Court said that there must be a clear showing of an intent to create the estate in bank deposits and condoned the use of extrinsic evidence to establish the intent of the donor. The husband-donor had struck the name of the wife from one of the deposit agreements before his death; the other account had been terminated by the husband, who had placed the proceeds in another account in his sole name. The Court could have predicated its decision upon the theory that the tenancy had been terminated by the husband acting within his agency. But under its prior rulings the Court would have had to allow the wife to trace the proceeds of the unilateral severance without her consent; as a result it was held that no tenancy by the entireties was ever created.

Winters v. Parks[46] also involved the tracing of proceeds of a bank account. The Court said that the wording of the deposit agreement — "Mr. or Mrs. . . . Joint Account with Right of Survivorship" — was sufficient to establish an intent to give the survivor the funds remaining in the account upon the death of the donor-spouse, but that an estate by the entireties was not created. Extrinsic evidence of intent was again allowed. The donor had consistently dealt with the bank account as his own; the donee-spouse had written only a few checks on the account over a period of twelve years; and the donee-spouse was listed on the account only as a matter of convenience. The Court said that when the deposit agreement does not clearly indicate that the spouses intend to hold by the entireties, all of the facts leading up to and subsequent to creation of the account become relevant. A later case[47] upheld a tenancy by the entireties in a bank account, distinguishing *In re Lyons' Estate* and *Winters v. Parks* on the basis

44. 90 So. 2d 39 (Fla. 1956).
45. *Id.* at 43.
46. 91 So. 2d 649 (Fla. 1956).
47. Lerner v. Lerner, 113 So. 2d 212 (2d D.C.A. Fla. 1959).

that the wife was shown to have contributed some of her own funds to the account.

The foregoing cases have been criticized as being inconsistent with the earlier Florida rulings.[48] It should be noted, however, that the cases are consistent if the ultimate question is whether the donee-spouse shall be allowed to trace the money transferred from the account by the donor-spouse during his life. The earlier cases involved the issue of who was to take the funds remaining in the account upon the death of the donor;[49] in *Winters v. Parks* and *In re Lyons' Estate* the wife attempted to trace the proceeds following a unilateral severance of the account by the husband.

If the Court rules that a tenancy by the entireties has been created in a joint bank account, each spouse lacks the power to make gratuitous inter vivos transfers from the account. Apparently this would give the surviving spouse a golden opportunity to attack such transfers by the deceased, no matter how long a period of time had elapsed since the transfer. The courts have both allowed[50] and denied[51] the surviving spouse the right to trace such inter vivos transfers from personal property held by the entireties. The easy way out of this dilemma is for the court to hold that although the bank account creates a joint estate with rights of survivorship, no tenancy by the entireties arises. This gives the surviving tenant the right to claim funds remaining in the account but avoids the inevitable tracing problems that accompany a holding that an estate by the entireties was created. Of course, as the Supreme Court said in *Winters v. Parks*, a clear showing of an intent to create the tenancy will be recognized; but rubber stamp impressions on bank deposit agreements will not be sufficient.

Since tenancies by the entireties in bank accounts are similar to bank accounts held as joint tenancies, the Court may apply to husband-wife deposits the recent stringent requirements enunciated for joint tenancies. In *Chase Federal Savings & Loan Ass'n v. Sullivan*[52]

48. Brooker, *Survivorship in Joint Bank Accounts*, 31 FLA. B.J. 183 (1957).

49. Cases cited note 41 *supra*.

50. Lerner v. Lerner, 113 So. 2d 212 (2d D.C.A. Fla. 1959).

51. Winters v. Parks, 91 So. 2d 649 (Fla. 1956); *In re* Lyons' Estate, 90 So. 2d 39 (Fla. 1956).

52. 127 So. 2d 112 (Fla. 1960). The requirements of FLA. STAT. §689.15 (1959) must be met to establish survivorship in joint bank accounts except in estates by the entireties. It provides that there will be no survivorship rights unless the instrument creating the estate expressly so provides. *Id.* §659.29 frees the bank from liability if it pays the survivor of an account that is payable to either depositor or payable to either or the survivor. This statute establishes survivorship as between the bank and the surviving tenant but does not establish ownership of the account. Spark v. Canny, 88 So. 2d 307 (Fla. 1956). Brooker, *supra* note 48, points out that the statute allows the surviving tenant to take the account when

the Florida Court announced that an inter vivos gift or trust[53] is a condition precedent to recognition of a joint bank account. Hence, the elements of an inter vivos gift — donative intent, delivery of a present interest in the res, and acceptance by the donee — must be present to some extent in order to sustain a joint bank account. The deposit agreement in *Sullivan* clearly showed that the depositor intended for the other party to receive the proceeds upon her death. This agreement, said the Court, gave rise to a presumption that she intended that the donee should have a present, equal right to withdraw the money. But extrinsic evidence clearly rebutted this presumption. Since the evidence revealed that the depositor intended the donee to have an interest in the account only upon her death, the Court held that the gift was void for failure to comply with the Statute of Wills.

It is uncertain whether the Court will extend the requirements of the *Sullivan* case to estates by the entireties in bank accounts. The Court cited *Hagerty v. Hagerty* for the proposition that each of the parties must have an equal right to withdraw the funds. But in the *Hagerty* case the Court did not require any showing of an inter vivos gift. It can be reasoned that in *Hagerty* the presumption of a present gift stood unrebutted because of lack of evidence showing testamentary intent.

As policy reasons for the *Sullivan* decision, the Court said that a contrary holding would defeat the claims of those entitled to priority over testamentary beneficiaries, including the rights of creditors and those of widows to dower. These reasons are not persuasive when applied to a husband-wife bank account, since a widow's interest would be best protected by a finding that the account was held by the entireties, and creditors' interests can be amply protected under the law of fraudulent conveyances. From a policy standpoint, therefore, the *Sullivan* case should not be applied to husband-wife

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he may not be entitled to it and that if the tenant squanders the money, the heirs or others entitled to the account will have a naked remedy.

53. Florida recognized the "Totten Trust" in Seymour v. Seymour, 85 So. 2d 726 (Fla. 1956), in which an account was established by a depositor in trust for her son. The depositor subsequently added to and withdrew from the savings account. The Court described the trust as tentative, revocable at will by the depositor until he dies or completes the gift by delivery of the passbook or notice to the beneficiary. FLA. STAT. §659.30 (1959) frees the bank from liability for paying the stated beneficiary after the death of the "trustee," but it is not determinative of ownership of the property. Seymour v. Seymour, *id.* See Webster v. St. Petersburg Fed. Sav. & Loan Ass'n, 155 Fla. 412, 20 So. 2d 400 (1945), in which the Court discusses four theories upon which a joint tenancy with right of survivorship can be sustained: (1) trust, (2) joint tenancy under FLA. STAT. §689.15, (3) completed gift, and (4) contract between depositor and bank, with the donee as a third party beneficiary.

bank accounts when the issue is ownership of the funds remaining in the account after one spouse dies.[54]

Other reasons why the Court differentiates between real and personal property are apparent. A person purchasing real estate or receiving it as a gift from one of the spouses is charged with notice of the interest of the other spouse, since the interest is expressly set out in the chain of title. This is not true in regard to personal property.

Further, the placing of real property in the names of the spouses is a living act. Their interests are fixed at that time. But bank deposits vary; each depositor has the power to deplenish the account. Thus the allowing of estates by the entireties in bank accounts results in one more inroad upon the Statute of Wills. If the tenancy is recognized, tracing problems will occur, and the entire estate of a deceased may be disposed of without compliance with testamentary requirements.

Husband as Donor. A distinction between whether the claimant is husband or wife becomes exceedingly important in a living termination of the estate, as by divorce. In situations of this nature the Florida Supreme Court follows a rule of construction, even as to the existence of a tenancy by the entireties in real property.[55] The Court uses traditional gift doctrine in the event of a living termination of the estate. One theory is that when a husband places property in the names of his wife and himself he intends to make a gift to his wife.[56] This presumption can be rebutted only by a showing of conclusive evidence to the contrary.[57]

When property held by the entireties is sold and the husband is allowed to take the proceeds without protest from the wife, she cannot trace the proceeds upon divorce, since her acquiescence rebuts the presumption of an intent to create an estate by the entireties.[58] In *Strauss v. Strauss*[59] the Florida Supreme Court reversed a chancellor's order that the wife convey to the husband her interest in property held in their joint names, saying that even if the presump-

54. Nor should the bank account be denied the status of an estate by the entireties through evidence aliunde of a lack of donative intent. Intent to create a joint tenancy was allowed to be rebutted in Spark v. Canny, 88 So. 2d 307 (Fla. 1956). Unlike other instances of joint tenancies, when the wife is the donee there is a strong presumption of a gift.

55. *E.g.*, Picchi v. Picchi, 100 So. 2d 627 (Fla. 1958); Fuller v. Fuller, 38 So. 2d 51 (Fla. 1948); Hargett v. Hargett, 156 Fla. 730, 24 So. 2d 305 (1946).

56. Hargett v. Hargett, *supra* note 55; Strauss v. Strauss, 148 Fla. 23, 3 So. 2d 727 (1941).

57. Strauss v. Strauss, 148 Fla. 23, 3 So. 2d 727 (1941).

58. Fuller v. Fuller, 38 So. 2d 51 (Fla. 1948).

59. 148 Fla. 23, 3 So. 2d 727 (1941).

tion of a gift to the wife is overcome, the wife can establish a special equity in the property through the contribution of services to the family's welfare and comfort over a period of years. By way of explanation the Court noted the virtues of the doctrine of community property as it exists in the Southwest and stated that it will force an equal division of property accumulated during coverture when the circumstances so warrant. It noted further that the labor, pain, and drudgery required of the wife and mother in sustaining the home and giving birth to and caring for the children often more than offset the contribution of the father to the family budget.

In another instance a husband who had conveyed a one-half undivided interest in his property to his wife shortly after marriage failed to rebut the presumption of a gift by showing that the wife stayed with him only five or six days and that hence the consideration for the transfer failed.[60] When a husband owns property outright but upon selling it has the mortgage made payable to him and his wife, he cannot avoid the presumption of a valid gift by claiming that the wife's name was placed on the mortgage through inadvertence.[61]

A husband's argument in a divorce proceeding, and after his death the argument of the guardian of his minor child, that the placing of the property in the wife's and the husband's names was a gift conditioned upon the marital behavior of the wife was rejected,[62] though the equities were strongly in favor of the husband and the child. The chancellor had refused to award custody of the child to the mother after the death of the father and had held that the gift was on a condition subsequent. In reversing the chancellor the Florida Supreme Court said that the situation was the typical one in which the behavior of one of the spouses deteriorated over a period of time without any preconceived plan to that end, and that the subsequent misconduct could not be visited back upon a transaction growing out of a presumptive voluntary gift motivated by the affection of the husband for his wife. The Court stated that adoption of the condition subsequent rationale would come dangerously close to announcing that an estate by the entireties has no efficacy until death places the entire interest in the estate in the survivor, because until then it would not be definitely known whether the marriage had been successful.

Wife as Donor. When a wife contributes money to the acquisition of property taken in the joint names of husband and wife, a different rule applies. In this situation Florida adopts the traditional view that the wife intended to make a loan, not a gift, and that the hus-

60. Ray v. Ray, 44 So. 2d 286 (Fla. 1950).
61. Powell v. Metz, 55 So. 2d 915 (Fla. 1952).
62. Copeland v. Copeland, 65 So. 2d 853 (Fla. 1953).

band holds the property for her benefit in a resulting trust.[63] The reasons for this view are said to be the confidential relationship involved[64] and the legal doctrine that a wife has no obligation to support her husband.[65] If the husband is the claimant, he has to prove that there was a bona fide gift in order to overcome the presumption of a resulting trust;[66] and evidence of an intention to make a gift must be clear and convincing.[67]

The dichotomy that the creation of a tenancy by the entireties depends upon who paid the purchase price of the property is one of the more illogical doctrines in this area. It seems unfair and unrealistic to tell a husband that when he acquires property in his and his wife's names he has made a gift to his wife and on the other hand to tell the wife that she can put her property in their joint names but that really this act has no legal significance, since the law presumes that she intends her husband to hold the property in trust for her.

From the foregoing it appears that Florida follows a rule of law that allows the surviving spouse to take the entire interest in real property held in their joint names.[68] Extrinsic evidence is not allowed to vary the terms of the deed creating the tenancy. But real property in the names of the spouses may be held not to be an estate by the entireties in divorce proceedings or when a creditor is attempting to levy upon the estate. The Florida Supreme Court generally follows a rule of construction in both "living" and "death" situations when personal property, especially bank accounts, is in-

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63. *E.g.*, Faris v. Williams, 154 Fla. 6, 16 So. 2d 293 (1944); Allen v. Allen, 123 So. 2d 355 (2d D.C.A. Fla. 1960). *But see* Walton v. Walton, 155 Fla. 573, 20 So. 2d 899 (Fla. 1945) (*semble*); Coleman v. Williams, 146 Fla. 45, 200 So. 207 (1941). Before the presumption of a resulting trust arises the fact that the wife's separate funds were used in acquiring the property must be established. In Foster v. Thornton, 131 Fla. 277, 179 So. 882 (1938), the Court fixed the quantum of proof as beyond a reasonable doubt. This case, however, involved a creditor of the husband, who had transferred his property to the wife pending suit.

64. See Allen v. Allen, 123 So. 2d 355 (2d D.C.A. Fla. 1960).

65. See Pyle v. Pyle, 53 So. 2d 312 (Fla. 1951).

66. Forde v. Forde, 152 Fla. 142, 10 So. 2d 919 (1942); Allen v. Allen, *supra* note 64.

67. Forde v. Forde, *supra* note 66.

68. It may be possible, although doubtful, that heirs of the wife could attack the surviving husband's interest if the wife supplied the consideration for the purchase of the land. *Cf.* Pyle v. Pyle, *supra* note 65. The *Pyle* case involved a situation in which the wife, who supplied the consideration, was held to state a cause of action in a suit to impress a resulting trust upon property acquired by the deceased husband in his sole name. The case *did not* involve an estate by the entireties; and it was the surviving spouse, *not* the heirs, who was claiming that the property was held in a resulting trust.

volved. In all cases in which the intent of the parties is allowed to be shown by extrinsic evidence, a presumption of gift to the wife, or of resulting trust in her favor if she supplied the consideration, must be rebutted.

Creation by Implication

Property held in the sole name of one of the spouses has been adjudicated to be a tenancy by the entireties.[69] If the spouses contract in their joint names to acquire property from third parties and the husband takes a conveyance in his name alone, the chancellor can rule that the property is held by the entireties, since there is inferred from the contract of sale an intent that the deed should be executed in the names of husband and wife.[70] Estates by the entireties may arise in property in the names of third persons when the property was purchased with assets obtained from the sale of entireties properties. In *White v. White*,[71] jointly-owned property of husband and wife was used to purchase property in the sole name of a stepson. In a suit by the wife for separate maintenance the stepson was ordered to convey to the husband and wife, on the theory of resulting trust. Similarly, shares of corporate stock taken in exchange by the husband for property held by the entireties and given by him to a third person can be claimed by his wife after his death.[72] An estate by the entireties may be implied if a husband designates himself and his wife as vendors in a contract for sale of his sole property.[73]

The Necessary Words

Traditionally, estates by the entireties in real property are created by deeding the land to husband *and* wife. If the necessary unities are present,[74] including the fact that John and Mary Doe are legally married,[75] an estate by the entireties is created, even if the marital relationship is not mentioned in the deed.[76]

Since an estate by the entireties is predicated upon the theory that each spouse has absolute control over the entire estate, a difficult problem is presented when property is held in the name of husband *or* wife. This gives each spouse the ability to deal with the property without the consent of the other. The husband-*or*-wife situation

69. Picchi v. Picchi, 100 So. 2d 627 (Fla. 1958).
70. *Ibid.*
71. 42 So. 2d 710 (Fla. 1949).
72. Lerner v. Lerner, 113 So. 2d 212 (2d D.C.A. Fla. 1959) (conversion of joint bank account).
73. Tingle v. Hornsby, 111 So. 2d 274 (1st D.C.A. Fla. 1959).
74. See text at notes 20-22 *supra*.
75. See text at notes 24-25 *supra*.
76. See text at note 27 *supra*.

usually arises in connection with bank accounts and savings deposits. A bank has no authority to pay one of the spouses alone if the deposit is in the names of husband *and* wife,[77] but if the deposit slip reads husband *or* wife the bank can pay upon the order of either.[78] Massachusetts refuses to recognize a tenancy by the entireties if the deposit is in the disjunctive, since unilateral control is repugnant to the underlying theory of unity of control of the estate.[79] Pennsylvania[80] and Florida,[81] however, allow a husband-*or*-wife deposit to be held by the entireties, but the Court will resort to extrinsic evidence of the intent of the depositor.[82] The disjunctive deposits are sustained on the theory that each spouse by the terms of the deposit has given the other express authority to represent both in making withdrawals from the account.[83]

Statutory Creation

A problem arises when a husband owning property in severalty desires to convert it into property held by the entireties. Should he convey the fee to the wife, with an express provision that he intends to create an estate by the entireties? Or should he convey an undivided one-half interest to the wife? Or should he convey to a third person and take a conveyance back to himself and his wife as tenants by the entireties?

Section 689.11 of the Florida statutes was amended in 1947 to provide that "an estate by the entirety may be created by the spouse holding fee simple title conveying to the other by a deed in which the purpose to create such estate is stated." The statute was enacted after affirmance in 1939 by an equally divided Supreme Court of a lower court's holding that a conveyance of non-homestead property by a husband to his wife and himself sufficed to create an estate by the entireties and void a subsequent devise of the same property by the husband to his son.[84] The three justices approving the lower court's order said that the deed in legal effect conveyed to the wife and reserved to the husband, even though there was no express mention in the deed of an intent to create an estate by the entireties. These

77. Milano v. Fayette Title & Trust Co., 96 Pa. Super. 310 (1929). *But see* Bello v. Union Trust Co., 267 F.2d 190 (5th Cir. 1959); Gerson v. Broward Co. Title Co., 116 So. 2d 455 (2d D.C.A. Fla. 1959).

78. FLA. STAT. §659.29 (1959).

79. Marble v. Treasurer, 245 Mass. 504, 139 N.E. 442 (1923).

80. Madden v. Gosztonyi Sav. & Trust Co., 331 Pa. 476, 200 Atl. 624 (1938).

81. Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951).

82. *In re* Lyons' Estate, 90 So. 2d 39 (Fla. 1956).

83. Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951).

84. Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939); see Note, 1 U. FLA. L. REV. 433 (1948).

justices thought that the deed afforded the five requisite unities of interest, title, time, possession, and husband and wife. The affirming opinion could have utilized the theory that the conveyance was to the legal unity of the husband and his wife. The other three justices registered a strong dissent,[85] saying that one person could not occupy at one time the position of both grantor and grantee in regard to the same property. The dissenters felt that the legal effect of such a deed should be to convey a tenancy in common to the wife. They argued that the deed failed to create an estate by the entireties because the interests of both husband and wife did not accrue by the same instrument and did not commence at the same time.

The Florida Court had a similar problem before it in the previous year. In *Dixon v. Becker*[86] a brother and sister held land as tenants in common under their father's will. They agreed to partition the land by conveyances of specific parcels executed respectively by each and spouse. The sister died; and her husband, assuming that he owned the parcel by right of survivorship, sold the land deeded to him and his wife. The children of the wife then brought suit to adjudicate their interest in the lands that had been conveyed by the husband. The Florida Court reasoned that since the sister already owned a one-half undivided interest in the property that was deeded to her and her husband, an estate by the entireties was created in only the additional one-half interest that they received jointly. The case is based on the theory that the sister had never joined in a deed to herself and her husband of her undivided portion of that tract.

The Florida Third District Court of Appeal recently held that a conveyance by a husband to his wife of an undivided one-half interest in real property, with the express statement that it was the intent of the grantor to create an estate by the entireties, did not accomplish this result but created a tenancy in common with the right of survivorship.[87] The court said that an estate by the entireties is created only by the husband's conveyance of the fee directly to his wife with the stated purpose of creating a tenancy by the entireties.[88]

A federal court applying Florida law has ruled that the conveyance of property by husband and wife to themselves as grantees has the effect of creating a tenancy by the entireties, and that section 689.11 of the Florida statutes is not the exclusive method of creating the tenancy.[89]

85. 138 Fla. at 514, 189 So. at 668.

86. 134 Fla. 547, 184 So. 114 (1938).

87. Little River Bank & Trust Co. v. Eastman, 105 So. 2d 912 (3d D.C.A. Fla. 1958).

88. *Id.* at 913; see Annot., 1 A.L.R.2d 247 (1948).

89. Schuler v. Claughton, 248 F.2d 528 (5th Cir. 1957).

Under the statute, conveyance of the fee to non-homestead property by husband to wife as sole grantee with the expression of an intent to create an estate by the entireties will create the estate. At common law the usual method of conveying a husband's sole property so as to create a tenancy by the entireties was to use a "straw man" conveyance and a reconveyance to husband and wife. The statute avoids a burdensome circuity of conveyancing, albeit some of the traditional features or unities of the estate are dispensed with, such as unity of time and title.

Under the statute one spouse would be safe in conveying to the other by using the following words of limitation so that the intent to create an estate would be absolutely clear: "to grant, bargain, sell, and transfer such interest in Blackacre as will under the statute create an estate by the entirety."[90] The statute, however, does not cover situations in which the husband does not own the fee or desires to create an estate by the entireties in a lesser estate.

Conveyance of the fee by the husband to his wife and himself as co-grantees does not meet the letter of the statute, although it certainly reflects its spirit by avoiding third-party arrangements. The Supreme Court's divided affirmance of such a conveyance in *Johnson v. Landefeld*[91] is of questionable reliability as precedent. However, the contention of the dissenting justices in that case that a grantor cannot convey to himself seems greatly weakened by the legislation that allows creation of the tenancy without the traditional unities of an estate by the entireties.

In summary, a spouse can safely create an estate by the entireties in severalty land only by using a third party or by following the statute strictly. A direct conveyance by one spouse to both spouses as grantees or a conveyance of an undivided one-half interest by one spouse to the other possibly will not be held to create a tenancy by the entireties.

Termination of the Estate

An estate by the entireties can be terminated only when (1) both spouses join in a conveyance, (2) one spouse dies and the survivor acquires the sole interest, (3) one spouse conveys to the other, or (4) the relationship is dissolved by divorce and the parties become tenants in common.[92] Any discussion of the termination of the estate neces-

90. See Note, 1 U. Fla. L. Rev. 433, 439 (1948).

91. 138 Fla. 511, 189 So. 666 (1939).

92. *In re* Lyons' Estate, 90 So. 2d 39, 40-41 (Fla. 1956) (dictum). Fla. Stat. §689.15 (1959) provides that tenants by the entireties become tenants in common upon divorce. The legislature has provided a procedure whereby the guardian of a person adjudged insane or mentally or physically incompetent can convey or encumber entireties property upon application to the court if the competent

sarily presupposes the requisite intention to create the tenancy. The varying rules controlling creation of the tenancy have been alluded to earlier.[93]

Effect of Divorce

The Florida Supreme Court has thus expressed the effect of divorce upon a tenancy by the entireties:[94]

> "When the marriage relationship is ended there is occasion to take inventory, so to speak, and wind up the interests of the parties in the property acquired through common effort. . . . [T]he law provides that holders of estates by the entireties . . . become tenants in common upon divorce. . . . In such way all the unities present in joint tenancy and the unity of person, characteristic of such estates, are reduced to the lone unity of possession."

Florida courts have repeatedly held that under the statute the parties become tenants in common upon divorce unless one of the spouses has an equitable interest in the property beyond the legal interest.[95] This interest can be established by rebutting the presumption of gift to the wife,[96] or by failure of the husband to rebut the presumption of resulting trust when the wife supplied the consideration for the purchase of the property.[97] Therefore, it is reversible error for the chancellor to award property held by the entireties to one of the spouses without a finding of some special equity in the property beyond the legal interest.[98] And the fact that the purchase money for the tenancy by the entireties is secured by a mortgage on the wife's separate property does not establish a special equity in her favor when the mortgage payments are made from a joint bank account of husband and wife.[99]

Although the general rule is that the chancellor cannot direct disposition of the parties' property merely as an incident of divorce,[100]

spouse agrees to join in the sale or conveyance. One half of the proceeds goes to the guardian and the other half to the competent spouse. The guardian also collects all payments or rentals on realty or personalty held by the entireties and pays one half to the competent spouse. FLA. STAT. §745.15 (3) (1959).

93. See subheading, "Rule of Construction or Rule of Law?," at note 26 *supra*.

94. Clawson v. Clawson, 54 So. 2d 161, 162 (Fla. 1951).

95. *E.g.*, Latta v. Latta, 121 So. 2d 42 (3d D.C.A. Fla. 1960); Jones v. Jones, 121 So. 2d 811 (3d D.C.A. Fla. 1960).

96. Fuller v. Fuller, 38 So. 2d 51 (Fla. 1948).

97. Allen v. Allen, 123 So. 2d 355 (2d D.C.A. Fla. 1960).

98. Holmes v. Holmes, 95 So. 2d 593 (Fla. 1957); Latta v. Latta, *supra* note 95.

99. Jones v. Jones, 121 So. 2d 811 (3d D.C.A. Fla. 1960).

100. Boles v. Boles, 59 So. 2d 871 (Fla. 1952); Bell v. Bell, 112 So. 2d 63

there are exceptions. For example, the court may award the husband's interest to the wife as lump sum alimony.[101] Since the award of the husband's interest is denominated lump sum alimony, an adulterous wife cannot receive more than her legal interest in entireties property in the absence of a showing of a special equity in the property.[102] But the award of specific entireties property to the adulterous wife that is based on a special equity arising from her contribution of funds or services beyond the performance of ordinary marital duties is not alimony that is barred by the Florida statutes.[103] Furthermore, a husband's interest in property held by the entireties cannot be granted to the wife as lump sum alimony when alimony in installments also is awarded.[104] Another exception to the general rule is that the chancellor may charge entireties property with the husband's obligation to support the wife by giving her the use, occupancy, and control of the property; this is true even though the property is homestead.[105] Such a decree does not divest the husband of his interest in the property; it merely makes his interest subject to the use of the wife. Though recognizing the husband as a tenant in common of the property while it is being subjected to the use of his family, the judiciary will refuse to partition the land charged with such a purpose.[106]

When the chancellor denies a divorce he is without power to order an adjudication of the joint property interests.[107] The unity of person continues, at least in contemplation of law. The Florida Court reasons that adjudication of property interests is senseless unless the marriage is terminated, because the parties may become reconciled. Hence appointment of a receiver to manage the couple's property until they are divorced or agree to a division of the property is reversible error.[108] The Court has been criticized for this position. The critics see no reason why a court should not entertain partition suits between parties to a marriage.[109] An adjudication of joint property interests cannot be made even if the wife is granted

(3d D.C.A. Fla. 1959); Banfi v. Banfi, 123 So. 2d 52, 53 (3d D.C.A. Fla. 1960) (dictum).

101. Kilian v. Kilian, 97 So. 2d 201 (Fla. 1957); Reid v. Reid, 68 So. 2d 821 (Fla. 1953); see Benson v. Benson, 102 So. 2d 748 (3d D.C.A. Fla. 1958).

102. Benson v. Benson, 102 So. 2d 748 (3d D.C.A.), *cert. denied*, 105 So. 2d 792 (Fla. 1958).

103. Eakin v. Eakin, 99 So. 2d 854 (Fla. 1958), FLA. STAT. §65.08 (1959).

104. Bailey v. Bailey, 126 So. 2d 165 (3d D.C.A. Fla. 1961).

105. Banks v. Banks, 98 So. 2d 337 (Fla. 1957); Bailey v. Bailey, *supra* note 104.

106. Pollack v. Pollack, 159 Fla. 224, 31 So. 2d 253 (1947); see Fuller v. Fuller, 38 So. 2d 51 (Fla. 1948).

107. Clawson v. Clawson, 54 So. 2d 161 (Fla. 1951).

108. *Ibid.*

109. *Id.* at 164 (dissenting opinion).

separate maintenance.[110] It has been said that there is no reason to refuse severance of the marriage unity in one sense by denying a divorce and to grant it in the property sense by adjudicating separate property interests.[111]

In summary, the parties may pray for partition of the property in the divorce proceeding if they so desire and thus sever the resulting tenancy in common, but in this event the chancellor must follow the statutory requirements[112] in decreeing the partition.[113] The parties can also dispose of property held by the entireties by having a private property settlement incorporated into the divorce decree.[114]

Unilateral Alienation of the Estate

The underlying theory of an estate by the entireties is that neither spouse can alienate the estate without the consent of the other. The Florida Supreme Court has used agency doctrine to permit one spouse alone to sever the estate in joint bank accounts[115] and negotiable instruments.[116] For example, if the spouses individually take funds from a joint bank account and thereafter divide and exercise separate dominion over bonds purchased with the funds, there is no continuation of the estate in the bonds.[117]

Each tenant by the entireties owes the other the highest degree of confidence and trust. Accordingly, the Court once held that one of the spouses alone cannot purchase a tax deed to entireties property and thereafter claim that this divested the other spouse of his interest in the property.[118] This case involved the purchase of tax deeds under the Murphy Act, which provided that any money paid for the tax deed in excess of the tax and liens went to the owners of the property.[119] The Court based its decision on the theory that since the

110. Lamoureux v. Lamoureux, 157 Fla. 300, 25 So. 2d 859 (1946). See Lamoureux v. Lamoureux, 44 So. 2d 810 (Fla. 1950), in which the Court held that a mortgage on the business held by the entireties should be paid out of business income and not out of the husband's separate part of the business income, the parties to share equally in the equity upon termination of the estate.

111. Junk v. Junk, 65 So. 2d 728 (Fla. 1953); *cf.* Field v. Field, 68 So. 2d 376 (Fla. 1953) (wife cannot be ordered to relinquish dower when divorce is denied).

112. FLA. STAT. §§66.01-.09 (1959).

113. Banfi v. Banfi, 123 So. 2d 52 (3d D.C.A. Fla. 1960).

114. Weigel v. Wiener, 149 Fla. 231, 5 So. 2d 447 (1942).

115. See subheading "Personal Property," at note 31 *supra.*

116. See subheading "Agency and Other Relations with Third Parties," at note 200 *infra.*

117. Rader v. First Nat'l Bank, 42 So. 2d 1 (Fla. 1949).

118. Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (1945); *cf.* Spencer v. Spencer, 160 Fla. 749, 36 So. 2d 424 (1948).

119. Fla. Laws 1937, ch. 18296.

spouses are "one" in law, the default of one in not paying taxes is the default of the other and the act of one in purchasing the tax deed is likewise the act of both. The Court has subsequently ruled, however, that a joint tenant who purchases a tax deed other than under the Murphy Act acquires the complete interest in the property by virtue of the original tax deed.[120] Although this case involved joint tenants, the Court clearly implied that a tenant by the entireties can also purchase a tax deed on the estate and cut off the rights of the other spouse.[121] This opens the door for one spouse to defraud the other by not paying the taxes and then terminating the tenancy.[122] But the spouses still owe some fiduciary duty to each other. If they sign a purchase money mortgage on entireties property, the wife cannot purchase the mortgage for a valuable consideration from the mortgagee and enforce it against the property.[123]

Florida courts have had to wrestle with the conflicting theories of partnership law and property law when a partnership interest is held by the entireties. It is well recognized that a partnership can be dissolved at will; it is equally true that ordinarily the sole act of a tenant by the entireties cannot sever the tenancy. The problem is compounded by the fact that if one of the spouses were to drain off the profits and waste the business, the courts would be without power to prevent it if property concepts were blindly followed. The Second District Court of Appeal resolved this apparent conflict and granted dissolution of a partnership held by the entireties.[124] The lower court had refused dissolution on the theory that a tenancy by the entireties cannot be severed by the act of a single spouse. The Court of Appeal said that partnership law and tenancy law are not in conflict and that a partnership can be dissolved without affecting the tenancy, since the proceeds of dissolution will still be impressed with the tenancy. The Court further stated that one tenant may apply for judicial protection of his rights in entireties property and that equity will grant relief if the peculiar circumstances of the case so warrant.

There is also the possibility that the spouses can vary by contract the usual rule against severance without joint consent. The income from, or the proceeds of, the sale of real estate held by the entireties is equally the property of husband and wife. But the spouses can contract for each to receive half of the proceeds from the sale of the

120. Logan v. Ward, 48 So. 2d 525 (Fla. 1950).

121. *Id.* at 527.

122. This might also be a procedure whereby the estate might be terminated without incurring unpleasant tax consequences.

123. Brocato v. Brocato, 74 So. 2d 58 (Fla. 1954).

124. Lacker v. Zuern, 109 So. 2d 180 (2d D.C.A. Fla. 1959). See also Clawson v. Clawson, 54 So. 2d 161, 162 (Fla. 1951) (dictum).

property, and in this event half will go to the estate of the deceased spouse.[125]

The unilateral action of one of the spouses in conveying to the other an undivided one-half interest in property held by the entireties has also been held to destroy the tenancy, leaving the complete fee in the grantee.[126] Although it is well settled that the husband cannot convey his interest in an estate by the entireties to a third party without joinder of his wife, the statute permitting direct conveyances between husband and wife allows him to convey the fee to her without her joinder. It is said that acceptance by the wife of the conveyance manifests her consent to the transfer.[127]

Termination by Death

Although it has been said that the surviving tenant by the entireties takes by survivorship,[128] the accepted theory is that both spouses own the complete fee during their lives; when one dies his or her interest is merely extinguished, and no new estate is taken by survivorship.[129] When real estate is devised or conveyed to husband and wife, the survivor will come into full ownership of the property upon the death of one of the tenants.[130] But personal property in the names of husband and wife may or may not go absolutely to the survivor, depending upon a determination of whether an estate by the entireties was created.[131]

A problem frequently arises as to whether the surviving spouse is entitled to contribution for, or exoneration of, a mortgage debt on entireties property in a suit against the personal representative of the deceased spouse. Florida holds that the surviving spouse is not entitled to contribution or exoneration of even one half of the mortgage debt, even though the deceased spouse signed the mortgage.[132] It is consistent to say that the entire mortgage debt is owed by each of the spouses if it is said that each of the spouses owns all of the estate. But circumstances might arise in which the surviving spouse would be entitled to contribution from the estate. For example, if instead of a purchase money mortgage, the debt represented money ob-

125. Dodson v. National Title Ins. Co., 159 Fla. 371, 31 So. 2d 402 (1947).

126. Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941).

127. *Ibid.*

128. Norman v. Kannon, 133 Fla. 710, 182 So. 903 (1938).

129. Lopez v. Lopez, 90 So. 2d 456 (Fla. 1956); Kinney v. Mosher, 100 So. 2d 644 (1st D.C.A. Fla. 1958).

130. See subheading "Real Property," at note 29 *supra.*

131. See subheading "Personal Property," at note 31 *supra.*

132. Lopez v. Lopez, 90 So. 2d 456 (Fla. 1956); Durlacher v. First Nat'l Bank, 100 So. 2d 73 (3d D.C.A. Fla. 1958).

tained by the deceased for the operation of his business or merely for personal reasons, there might arise a right to equitable contribution from the estate.[133]

As will be brought out in a later section, property that acquired entireties status before it acquired homestead status vests completely in the survivor by operation of law rather than under the constitutional and statutory provisions controlling descent of homestead property.[134]

Another problem is whether the agreement of tenants by the entireties that each will take all joint property and that the survivor will leave it to named beneficiaries is binding. The First District Court of Appeal in *Weiss v. Storm*[135] held that such a will is binding and that the attempt of the survivor to leave the property to someone other than the one designated is of no effect. The court said that the uncertainty as to which tenant would survive the other, coupled with the fact that title so held vests exclusively in the survivor, constitutes adequate consideration to support the mutual promise to make a will.

Suppose that a tenant by the entireties murders his or her spouse and commits suicide. Who takes the property — the heirs of the wife or the heirs of the husband? Section 731.31 of Florida Statutes 1959 provides that any person convicted of murder cannot inherit from the decedent or take any portion of the decedent's estate as a legatee or as a devisee. The Florida Supreme Court reversed a lower court holding that the victim's heirs take all of the property.[136] The Court held the statute inapplicable because one spouse does not "inherit" the interest of the other in an estate by the entireties but merely comes into full beneficial ownership of it. The Court held further that the heirs of the wife were entitled to one half of the property and that the heirs of the husband were entitled to the other half. The decision was based on the equitable principle that no one should be permitted to profit by his own crime and upon the Missouri rule that "where the husband by his willful, felonious act dissolves the marital relationship, and as a consequence there is a severance of the estate by the entirety, such property may well be treated as held by tenants in common."[137]

On occasion a person includes in his will property held by the

133. Lopez v. Lopez, 90 So. 2d 456, 459 (Fla. 1956) (dictum).

134. Harkins v. Holt, 124 Fla. 774, 169 So. 481 (1936); Kinney v. Mosher, 100 So. 2d 644 (1st D.C.A. Fla. 1958).

135. 126 So. 2d 295 (1st D.C.A. Fla. 1961); *accord,* Ugent v. Boehmke, 123 So. 2d 387 (3d D.C.A. Fla. 1960); Fleming v. Fleming, 194 Iowa 104, 180 N.W. 206 (1920). *But see* Hall v. Roberts, 146 Fla. 444, 1 So. 2d 579 (1941).

136. Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951).

137. *Id.* at 850.

entireties. A problem of will construction then confronts the court. Did the husband intend for his wife to share in his testamentary disposition only if she renounces her interests in property held by the entireties? Must the wife elect between taking under the husband's will and taking the entireties property outright? Apparently this point has not been finally determined in Florida.[138] It has been said, however, that the wife should be forced to elect, since by taking under the will and claiming property outside the will she would be asserting inconsistent rights.[139]

In case of the simultaneous death of tenants by the entireties, section 736.05 (3) of Florida Statutes 1959 provides that property held by the entireties shall be distributed equally to the heirs of the wife and the heirs of the husband.

Inter Vivos Disposal — Specific Performance

Under the common law rule the husband's conveyance of an estate by the entireties was subject to the wife's indivisible right to the entire estate in case she should survive him.[140] If the husband survived the wife, her rights were extinguished and his conveyance to a third party estopped him from asserting an interest against his grantee.[141] Estates by the entireties could not be conveyed by livery of seisin by the husband; they as well as dower interests were conveyed in a collusive suit known as fine and common recovery.[142] After Florida abolished this class of suit, it was asserted that it was impossible to convey the wife's interest in property. The Supreme Court pointed out that the statutes then in effect made conveyances by married women valid when they were duly executed by husband and wife, and that the acknowledgment of the wife apart from the husband substituted for the fine and common recovery.[143]

Generally it may be said that, because of the unity of interest of husband and wife in an estate by the entireties, neither can alone sell, lease, or contract for its sale.[144] The Florida Court has indicated that a lease signed only by the wife would be valid if it could be shown that she was acting as agent of her husband.[145] Possession of the

138. See Colclazier v. Colclazier, 89 So. 2d 261 (Fla. 1956) (*semble*).

139. *Id.* at 265 (dissenting opinion).

140. Newman v. Equitable Life Assur. Soc'y, 119 Fla. 641, 160 So. 745 (1935).

141. *Ibid.* It is uncertain whether the husband's deed would today estop him from asserting an interest against the grantee, since Florida cases indicate that such conveyances without joinder of both spouses are void. See Uniform Title Standard 6.3, 20 FLA. STAT. ANN. (Supp. 1960).

142. Newman v. Equitable Life Assur. Soc'y, 119 Fla. 641, 160 So. 745 (1935).

143. *Ibid.*

144. Richart v. Roper, 156 Fla. 822, 25 So. 2d 80 (1946).

145. Cooper v. Maynard, 156 Fla. 534, 23 So. 2d 734 (1945).

premises by the vendee and also part performance would perhaps vitiate the requirement that both spouses must sign the instrument.[146] And a wife possessing a written power of attorney from her husband can enter into an enforceable contract to sell entireties property.[147]

Much of the confusion surrounding the formal requirements for making an enforceable conveyance, lease, or mortgage of entireties property stems from the fact that the property may also constitute a homestead and from the debate as to whether the wife's interest is her separate property within the contemplation of the conveyancing acts and the Constitution.

A contract for the sale of homestead property can be specifically enforced only if executed by husband and wife in the presence of two subscribing witnesses.[148] Likewise, in the absence of estoppel,[149] a mortgage on homestead property must be duly executed by husband and wife in the presence of two subscribing witnesses in order to be enforceable.[150] But the sellers have been held estopped to deny the validity of a contract when they had signed a deed and had surrendered it to their broker for the purpose of obtaining the signature of witnesses before forwarding the instrument to the purchasers, who in the meantime had materially changed their position.[151] In a recent opinion the Florida Supreme Court stated that the present law requires that, in order to be specifically enforceable, agreements to convey homestead property, to convey the separate property of married women, and to release dower must be signed by both husband and wife in the presence of two subscribing witnesses.[152]

A question then arises as to the necessary requirements for a valid contract for sale of entireties property. The most recent expression of a Florida court has been that a contract pertaining to entireties property, signed by both spouses but not executed in the presence of two subscribing witnesses, is not specifically enforceable.[153]

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146. *Ibid.*

147. Knowlton v. Dean, 159 Fla. 98, 31 So. 2d 58 (1947).

148. Abercrombie v. Eidschun, 66 So. 2d 875 (Fla. 1953); Scott v. Hotel Martinique, Inc., 48 So. 2d 160 (Fla. 1950).

149. New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939) (holding that the wife's negligence estopped her from attacking the acknowledgment of the notary).

150. Oates v. New York Life Ins. Co., 113 Fla. 678, 116 Fla. 253, 117 Fla. 892, 152 So. 671 (1934); 122 Fla. 540, 166 So. 269 (1936); 130 Fla. 851, 178 So. 570 (1937); 141 Fla. 614, 192 So. 637 (1939); 144 Fla. 744, 198 So. 681 (1940); *cert. denied,* 314 U.S. 614 (1941).

151. Cox v. La Pota, 76 So. 2d 662 (Fla. 1954).

152. Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957).

153. Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1958); *cf.* Mister v. Thompson, 114 So. 2d 507 (2d D.C.A. Fla. 1959).

CORRELATION WITH HOMESTEAD LAW

Property held by the entireties can also qualify as a homestead for purposes of exemption from forced sale for individual or joint debts of the spouses if one of the spouses is the head of the family living on the premises.[154] Homestead property held by the entireties, however, vests by operation of law in the surviving spouse and nothing remains to be affected by the constitutional and statutory provisions controlling descent of homesteads.[155] After the death of the head of the family the property is no longer a homestead unless a new homestead results through the surviving spouse's living on the property as the head of a family.[156]

The important question that controls the descent of homestead entireties property is whether the property qualified as a homestead of one of the spouses at the time of conveyance into an estate by the entireties. A typical situation occurs when a couple with children decide to convert homestead property in the name of one spouse into an estate by the entireties. Both spouses join in deeding the property to a third person, who conveys it back to the husband and wife. Such attempts to alienate the homestead have invariably been voided by the Florida Court,[157] since a conveyance of homestead property without consideration is a fraud upon the children's remainder interest in the property upon the death of the head of the family.[158] Furthermore, it is possible that section 95.23 of Florida Statutes 1959, which provides that a deed to property of record for over twenty years bars claims of other persons against the land, will not be applied when the head of the family has attempted wrongfully to convert the homestead into an estate by the entireties.[159]

154. Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932). It has been suggested that since neither husband nor wife owns property that is in legal contemplation owned by the unity of husband and wife, homestead status logically cannot attach to entireties property, because headship of the family and ownership of the land are not vested in the same person. Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption: I-III*, 2 U. FLA. L. REV. 12, 34 (1949).

155. Menendez v. Rodriguez, *supra* note 154; Kinney v. Mosher, 100 So. 2d 644 (1st D.C.A. Fla. 1958); see Harkins v. Holt, 124 Fla. 774, 169 So. 481 (1936).

156. Norman v. Kannon, 133 Fla. 710, 182 So. 903 (1938); see Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950) (wife can be head of family so as to constitute a homestead); Passmore v. Morrison, 63 So. 2d 297 (Fla. 1953) (surviving wife could devise homestead property held by the entireties to the exclusion of an adopted son when it was shown that the minor child had not lived with the adoptive mother for two years before or after the death of the husband).

157. *E.g.*, Florida Nat'l Bank v. Winn, 158 Fla. 750, 30 So. 2d 298 (1947); Bess v. Anderson, 102 Fla. 1127, 136 So. 898 (1931); Reed v. Fain, 122 So. 2d 322 (2d D.C.A. Fla. 1960).

158. Reed v. Fain, *supra* note 157; Norman v. Kannon, *supra* note 156.

159. Reed v. Fain, *supra* note 157. *But see* Thompson v. Thompson, 70 So. 2d

Of course, if at the time of the "straw man" conveyances the property was not a homestead, it will go to the surviving spouse instead of descending according to homestead law.[160] And a conveyance of homestead property by tenants by the entireties to a third party and a subsequent reconveyance to only the head of the family may be shown under proper circumstances to have been a mortgage and mortgage satisfaction, with the property retaining its status as an estate by the entireties.[161]

The Florida judiciary has consistently held that a homestead in the sole name of the head of the family cannot be alienated without consideration.[162] The question arises whether this restriction will be imposed upon the owners of homestead property held by the entireties. The Florida Supreme Court has held that the homestead provisions of the Constitution were adopted for the benefit of the heirs of a head of a family and do not apply to entireties property, since the property does not inure to them upon death of the head of the family. The Court said:[163]

> "The fact that exemptions from liens and forced sales may be claimed by the head of a family during his lifetime on a home place owned by the entireties makes no difference in the operation of the law as respects the right of tenants by the entireties to make a conveyance of the property in the same manner as any other property owned by the tenants may be conveyed."

The children theoretically have an expectancy in the homestead held by the entireties, since the head of the family may survive the other spouse. This, however, is not sufficient to prevent a gratuitous conveyance of the property by the husband and wife.

Section 4 of article X of the Constitution provides that a deed alienating the homestead must be executed by husband and wife. Section 689.11 of Florida Statutes 1959 provides that direct conveyances between husband and wife do not require joinder of the grantee-spouse. The Florida Court has held that the direct-conveyance statute is not applicable when homestead property owned solely by the head of the family is conveyed to the other spouse, and that the wife must join in a deed conveying the property to her.[164] Joinder

555 (Fla. 1954).

160. Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

161. Kinney v. Mosher, 100 So. 2d 644 (1st D.C.A. Fla. 1958).

162. *E.g.*, cases cited note 157 *supra*.

163. Denham v. Sexton, 48 So. 2d 416, 418 (Fla. 1950) (alternative holding).

164. Estep v. Herring, 154 Fla. 653, 18 So. 2d 683 (1944); Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); Byrd v. Byrd, 73 Fla. 322, 74 So. 313 (1917); Thomas v. Craft, 55 Fla. 842, 46 So. 594 (1908).

of the wife in the deed may be required even when the wife pays a valuable consideration for the homestead property.[165]

As a part of a separation agreement the head of the family on occasion deeds the homestead to the wife without her joinder. In this situation, the Court can easily find abandonment of the homestead in order to uphold the conveyance made without the joinder of the wife.[166] In *Rawlins v. Dade Lumber Co.*[167] the Court could have found abandonment in a case in which the husband alone conveyed to the wife homestead property prior to divorce. The couple had no children. The Court preferred, however, to base its decision on the theory that when the wife is the only "heir" under the Constitution she is not required to join in the conveyance. In estates by the entireties the children also have no inheritable interest in the property, and logically the wife should not have to join in the conveyance to her of homestead property held by the entireties. This belief is enforced by the Court's holdings that tenants by the entireties may dispose of homestead property in the same manner as other property held by the entireties,[168] and that entireties property may be conveyed to one spouse without the grantee's joining in executing the deed.[169]

165. See Thomas v. Craft, *supra* note 164, in which the Court stated that the constitutional provisions for alienation of the homestead must be followed even when the conveyances are between members of the family. *But see* Church v. Lee, 102 Fla. 478, 489, 136 So. 242, 247 (1931), in which the Court said: "In fact, to require the wife to unite in executing a conveyance to herself would be 'to demand the performance of an absurd and idle act.'" This statement was purely dictum, since in the *Church* case the wife had joined in the conveyance to herself; but the conveyance was held invalid because it would defeat the rights of the children guaranteed by the Constitution. The Court in *Church* intimated that the decision in *Thomas* should be limited to a situation in which the husband conveys to his wife *and children* without the joinder of his wife. The wife was not shown to have paid consideration for the conveyances of the homestead in either case.

166. Moore v. Hunter, 153 Fla. 158, 13 So. 2d 909 (1943); Miller v. West Palm Beach Atl. Nat'l Bank, 142 Fla. 22, 194 So. 230 (1940).

167. 80 Fla. 398, 86 So. 334 (1920).

168. Denham v. Sexton, 48 So. 2d 416 (Fla. 1950).

169. Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941). Knowlton v. Dean, 159 Fla. 98, 31 So. 2d 58 (1947), held that homestead property held by the entireties had been abandoned and that the wife could exercise a special power of attorney granted her by her husband to enter into a contract to sell the property that would be specifically enforceable in a suit by the husband and wife. The decision did not specify whether both spouses would have had to join in the conveyance if the entireties property had retained its homestead character at the time the contract of sale was made. FLA. STAT. §708.09 (1959) provides that husband and wife may convey property held by the entireties by using a power of attorney given by the other spouse. But *id.* §708.10(5) says that this provision shall not be construed as dispensing with the joinder of husband and wife in conveying or mortgaging homestead property. The statute is thus of little aid in determining whether one spouse may convey to the other entireties property

What happens when the wife desires to convey her interest in homestead entireties property to the husband, who is the head of the family? If the provision requiring that both spouses join in the deed is carried to its logical extreme, the conveyance vesting sole title in the head of the family will be void. But certainly this is not an alienation of the homestead; in fact, it vests title in the head of the family so as to give the children an inheritable interest for the first time. In this situation the Constitution should be construed as not requiring joinder of both spouses.

Since the constitutional provision may ultimately be construed as requiring the joinder of both spouses in conveying to one spouse homestead property held by the entireties, it is perhaps advisable to have both spouses join in the deed even though their joinder may seem to be an idle act.

The conversion of homestead property in the sole name of the head of the family into an estate by the entireties may also be accomplished by a sale for a valuable consideration[170] or by prior abandonment.[171] The Court has held that sufficient consideration was present when a wife and husband joined in conveying the husband's homestead property to a third party for a sum of cash and a mortgage, payable to the wife and husband, that was canceled three years later in exchange for a reconveyance to them by the entireties.[172]

A single homestead can include both property held by the entireties and property in the sole name of the head of the family. In this situation, upon death of the head of the family the property held by the entireties vests absolutely in the wife and the descent of the remainder is controlled by the homestead provisions.[173]

The Rights of Creditors and Third Parties

Creditors of husband and wife are often in a quandary as to whether they can levy upon property held by the spouses by the en-

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that is also the homestead without both joining in the deed.

170. See Weigel v. Wiener, 149 Fla. 231, 5 So. 2d 447 (1942). The requirement of consideration is relaxed when the children of the couple are included as grantees, even when some children are excluded. The burden of proof is upon the person asserting lack of consideration. Alienation of the homestead can be accomplished by a deed from husband and wife to husband and wife for life, with remainder to some of the children. See Parrish v. Robbirds, 146 Fla. 324, 200 So. 925 (1941); Jones v. Equitable Life Assur. Soc'y, 126 Fla. 527, 171 So. 317 (1936); Daniels v. Mercer, 105 Fla. 362, 141 So. 189 (1932).

171. See Marsh v. Hartley, 109 So. 2d 34 (2d D.C.A. Fla. 1959) (abandonment not shown before conveyance into entireties, although family was away from homestead for four years and the property was rented during that time).

172. Miller v. Mobley, 136 Fla. 351, 186 So. 797 (1939).

173. Wilson v. Florida Nat'l Bank & Trust Co., 64 So. 2d 309 (Fla. 1953).

tireties. Debtors legitimately wonder if they must pay off obligations to the spouses jointly when the instrument evidencing the indebtedness is made payable to husband and wife. Prospective purchasers of property want to know whether they can rely on a prior conveyance of property held by the entireties. These problems and many others are the heritage of recognition of the tenancy by the entireties.

Individual Debts of the Spouses

The Florida Supreme Court in *Ohio Butterine Co. v. Hargrave*[174] ruled that non-homestead real property held by the entireties cannot be subjected to the individual debts of one of the spouses. The creditor in this case had asked that the chancellor adjudicate the separate interest of the debtor-spouse without damaging or interfering with the lawful rights of the other spouse. In the alternative, the creditor asked that the court decree that a portion of the income from the rental property be applied to the judgment during the life of the debtor-spouse. The Supreme Court recognized that some jurisdictions allow such a levy on entireties property on the theory that at common law a husband was entitled to possession and control and could dispose of the rents and profits during the joint lives of the spouses. In rejecting this approach the Court pointed out that Florida's married women's acts have deprived the husband of possession and control of the property of the wife and stated:[175]

> " 'If the husband can dispose of the estate during their joint lives, the wife is deprived of the enjoyment without her consent. . . . The right of the wife to the joint enjoyment of the estate during the marriage is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of her husband. . . . There is an equity in equality; but there is gross iniquity and injustice in permitting the husband to deprive the wife of the use and enjoyment of an estate that does not belong exclusively to either, but to both, and which belongs as much to the wife as to the husband.' "

The Court rejected the argument that a rule forbidding levy on estates by the entireties by individual creditors would open the door to fraud on creditors with the terse comment that if such a situation presented itself the Court would apply its power to set aside the fraudulent conveyances. This rule has become well established and has been adhered to in subsequent cases involving real estate held by the entire-

174. 79 Fla. 458, 84 So. 376 (1920).

175. *Id.* at 463, 84 So. at 378. Thus the same statutes that were held not applicable in 1913 to abrogate the tenancy became relevant only seven years later to extend its incidents.

ties.[176] It also is apparent that creditors cannot levy upon personal property held by the entireties to satisfy the separate debts of the spouses.[177]

Joint Debts

A creditor of both the husband and the wife can levy upon non-homestead property held by the spouses by the entireties.[178] But if the property is also the homestead of the spouses, even joint creditors cannot levy upon the property.[179] Section 2 of article X of the Constitution provides that the exemption from forced sale shall inure to the widow and heirs of the head of the family. This provision has been interpreted as forbidding levy against the homestead by creditors of the head of the family after his death.[180] Does the exemption from forced sale inure to the widow when the homestead is held by the entireties? The widow acquires the property by virtue of the original title creating the estate and not through operation of the homestead law; hence the exemption does not inure to her. Joint debts, although barred while the head of the family was alive because of the property's homestead character, logically can be the basis of execution against the widow unless the property acquires a new homestead status.[181] The property is exempt from liability for separate debts of the

176. *E.g.*, State *ex rel.* Molter v. Johnson, 107 Fla. 47, 144 So. 299 (1932); Hart v. Atwood, 96 Fla. 667, 119 So. 116 (1928); Yafanaro v. Ninos, 123 So. 2d 286 (2d D.C.A. Fla. 1960).

177. Lindsley v. Phare, 115 Fla. 454, 155 So. 812 (1934); Winters v. Parks, 91 So. 2d 649, 651 (Fla. 1956) (dictum); see Kornberg v. Krupka, 118 So. 2d 790 (3d D.C.A. Fla. 1960); *cf.*, Sheldon v. Waters, 168 F.2d 483 (5th Cir. 1948). See Ritter, *supra* note 6, at 163, for a logical analysis that would subject the tenancy composed of personalty to the separate debts of either spouse.

178. Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936).

179. Coleman v. Williams, 146 Fla. 45, 200 So. 207 (1941).

180. Hillsborough Inv. Co. v. Wilcox, 152 Fla. 837, 13 So. 2d 448 (1943); Cumberland & Liberty Mills v. Keggin, 139 Fla. 133, 190 So. 492 (1939).

181. A liberal construction of the homestead exemption could result in barring the creditor from levying on the property even though a new homestead status is not attained. The Court could say that even though the property does not descend under the homestead law, the surviving spouse in fact is a widow, that the manner in which she acquired her interest was of no importance, and that when a debt of the head of the family is barred at the time of his death the exemption from forced sale as to that debt inures to the surviving spouse. But a joint obligation of the spouses is not extinguished by the death of one of them; even if the exemption from sale for the spouse's debt inures to the survivor, the survivor is still separately liable. And a creditor can levy upon the former homestead to satisfy a separate debt of the beneficiary even if the deceased head of the family was the sole owner of the property and the beneficiary is an heir within the constitutional provisions. *Cf.* Donly v. Metropolitan Realty & Inv. Co., 71 Fla. 644, 72 So. 178 (1916) (assignee of heir entitled to partition former homestead property).

decedent, not because the homestead exemption inures to the widow but because the property of the surviving spouse cannot be sold to pay the decedent's separate debts.[182]

Fraudulent Conveyances

Although the law of fraudulent conveyances is beyond the scope of this article, the Florida cases involving tenancies by the entireties will be briefly summarized. In an early case the Florida Supreme Court held that a gift of property to a wife by a husband in embarrassed circumstances could be reached by the husband's creditors because " 'a man must be just before he can be permitted to be generous . . . .' "[183] The Court at one time took the position that a voluntary conveyance of property to a spouse without consideration, or a conversion of individual property into a tenancy by the entireties, coupled with an existing indebtedness of the husband, presented a prima facie or presumptive case of fraud.[184] Under this line of cases the conveyances were not fraudulent per se, but the burden of proof was on the grantee of the property to show the absence of fraud.[185] Recent cases, however, have indicated that such conveyances will no longer be deemed prima facie fraudulent.[186] This, of course, does not mean that fraudulent conveyances cannot be reached; it merely places a greater burden of proof upon the creditor.

A conveyance by a husband to a third party and a reconveyance to him and his wife during pendency of a suit tend strongly to indicate fraud, and the conveyance will probably be set aside.[187] Also, contingent creditors, such as the surety on the note of the conveying spouse,[188] or a person who has entered into an executory contract with the conveying spouse,[189] can defeat such conveyances. On the other hand, creditors of one of the spouses who become creditors after the conveyance will find it more difficult to set aside the conveyance, especially if at the time of the voluntary transfer into a tenancy by the entireties the debtor-spouse's other obligations are trifling.[190] Thus there is some indication that a creditor attacking a

182. See Crosby & Miller, *supra* note 154, at 35.

183. Craig v. Gamble, 5 Fla. 430, 436 (1854).

184. Richardson v. Grill, 138 Fla. 787, 190 So. 255 (1939); Sample v. Natalby, 120 Fla. 161, 162 So. 493 (1935); Reel v. Livingstone, 34 Fla. 377, 16 So. 284 (1894).

185. Cases cited note 184 *supra*.

186. Meyer v. Faust, 83 So. 2d 847 (Fla. 1955); Vaughn v. Mandis, 53 So. 2d 704 (Fla. 1951); Kornberg v. Krupka, 118 So. 2d 790 (3d D.C.A. Fla. 1960); *cf.* State Bank of Haines City v. Lockhart, 120 Fla. 278, 162 So. 691 (1935).

187. Sample v. Natalby, 120 Fla. 161, 162 So. 493 (1935).

188. Reel v. Livingstone, 34 Fla. 377, 16 So. 284 (1894).

189. Whetstone v. Coslick, 117 Fla. 203, 157 So. 666 (1934).

190. Richardson v. Grill, 138 Fla. 787, 190 So. 255 (1939).

purported fraudulent conveyance must make some showing of reliance upon the fact that the property was in the sole name of the debtor-spouse.

In view of the popularity of installment buying, dictum in one Florida case presents a bright light to creditors.[191] The Court said that even if property purchased by installments is placed in the names of husband and wife a long time before the husband incurs debts, his creditors can reach property held by the entireties if the husband continues to make payments on the property. This theory is based on the contention that injustice to subsequent creditors would result if debtors were permitted to apply periodic payments toward the creation of an estate that would be beyond the reach of their creditors.

If an individual judgment creditor desires to reach jointly-held property of spouses, it is essential that the spouse who was not sued be impleaded in the supplemental execution proceeding.[192] This requirement is an element of constitutional due process of law that affords the affected spouse an opportunity to be heard upon the issue of her or his property rights. Failure to implead the wife will not be excused by the fact that her spouse was fully represented by counsel at the proceeding.[193]

Mechanics' and Materialmen's Liens

Failure to pay for materials or labor used in building or repairing property held by the entireties has been a fertile field of litigation. Seemingly, building contractors invariably obtain the signature of only one of the spouses on a repair or building contract. Under the common law rule neither the husband nor the wife, acting separately, could subject an estate by the entireties to a lien.[194] The Florida legislature has been aware of the undue hardship that this rule works on building contractors and through the years has provided special relief for them. Under early statutes, materialmen and mechanics could recover upon showing an express contract between them and the spouses or upon showing that the work was done and the materials furnished with the knowledge and assent of both husband and wife.[195] However, there was a tendency on the part of the courts to construe strictly the legislative grace granted the contractors, and the contractors were required to follow the statute to

191. Whetstone v. Coslick, 117 Fla. 203, 208, 157 So. 666, 668 (1934).

192. Meyer v. Faust, *supra* note 186; Kornberg v. Krupka, *supra* note 186.

193. Meyer v. Faust, 83 So. 2d 847 (Fla. 1955).

194. Allardice & Allardice, Inc. v. Weatherlow, 98 Fla. 475, 124 So. 38 (1929).

195. *Ibid.*; Logan Moore Lumber Co. v. Legato, 100 Fla. 1451, 131 So. 381 (1930).

the letter as to allegations in the complaint, filing of the notice of lien, and notice to the parties.[196] The coverage of the statute was restricted by the Supreme Court to the construction or repair of buildings or improvements of like character; hence a lien for cultivating, fertilizing, and caring for citrus trees was not allowed on a grove held by the entireties.[197]

The legislature has now adopted section 84.12 of the Florida statutes, under which the contracting spouse is deemed the agent of the other spouse unless the non-contracting spouse files an affirmative objection with the clerk of the court within ten days after receiving notice of the work being done on the property. But under this statute a spouse living apart from the contracting spouse is relieved of the duty of filing an objection. Also, even if the spouse is not living apart from the contracting spouse, there must be knowledge of the commencement of the work before the duty to protest arises.[198] The statute cannot be utilized by a contractor who seeks to hold the non-contracting spouse for the payment of a deficiency decree, since the decree must rest upon a contractual obligation, not upon implications of agency.[199]

Agency and Other Relations with Third Parties

In the area of personal property the Florida courts have shown an inclination to allow one of the spouses to alienate the tenancy by the entireties, and some of the statements by the courts are broad enough to apply the concept of agency to transactions concerning real estate,[200] although it has not been done as yet. It has been held that a note held by the entireties can be discharged by payment to

196. Velazquez v. Suarez, 113 Fla. 856, 152 So. 708 (1934); Mead v. Picotte, 101 Fla. 325, 134 So. 57 (1931); Ferdon v. Hendry Lumber Co., 97 Fla. 283, 120 So. 335 (1929).

197. Goldsmith v. Orange Belt Securities Co., 115 Fla. 683, 156 So. 3 (1934). Since this case was decided the statute has been materially amended. But even if a statutory lien is denied, it may be possible to establish an equitable lien against the property. See Dewing v. Davis, 117 So. 2d 747 (2d D.C.A. Fla. 1960).

198. Penzi v. David, 122 So. 2d 635 (2d D.C.A. Fla. 1960) (mortgagee who obtained signature of only one spouse on mortgage on entireties property given for improvement loan cannot enforce lien against the property if the other spouse lacked notice).

199. Meadows Southern Constr. Co. v. Pezzaniti, 108 So. 2d 499 (2d D.C.A. Fla. 1959). *But see* Anderson v. Carter, 100 So. 2d 831 (2d D.C.A. Fla. 1958). The statutory lien against entireties property can be enforced only by a suit in equity. FLA. STAT. §86.03 (1959). But a suit on the contract at law is not barred. *Id.*, §84.32.

200. See Lerner v. Lerner, 113 So. 2d 212 (2d D.C.A. Fla. 1959) (Court said that either spouse presumptively has the power to act for both during coverture as long as the proceeds from sale of the property inure to the benefit of both).

either spouse or to both of them.[201] Also, one of the spouses can indorse a note held by them by the entireties, and the sole signature will convey the entire estate.[202] The expressed theory of these cases is the old notion that husband and wife are indivisible, that the possession of one is the possession of the other, and that hence one can act for the other. The rationale, however, probably lies in the belief that a contrary rule would subject many innocent third parties to inequities. The fact remains that the holdings in this area are in direct conflict with the great majority of other decisions in the Florida case law of tenancy by the entireties, with no attempt at logical explanation of the results reached.

Purchasers of property held by the entireties usually pay for the property by making out a check payable to both spouses. What happens when the spouse to whom the check was delivered forges the indorsement of the other spouse, cashes the check, and absconds with the proceeds? Apparently the defrauded spouse cannot recover against the drawer-purchaser, the bank that cashed the check, the drawee bank, or an escrow holder.[203]

As to the payment of a note held by the entireties, the maker should check to see if the parties have been divorced. If they have, they are tenants in common and each party is entitled to half of the payments.[204] Payment to one of the spouses is risky, since the agency relationship has ceased by virtue of the divorce decree. Similarly, the clerk of the court may become liable to one of the parties after their divorce if he pays over the surplus from a sale of former entireties properties to only one of the spouses.[205]

A purchaser of a tax deed is well advised to make sure that each spouse has notice of the tax sale of property held by the entireties. An application for a tax deed mailed separately to husband and wife but received only by the husband because of an incorrect address of the wife gives inadequate notice, and a tax deed based thereon is invalid.[206]

Another collateral problem that may arise concerns the status of a tenant by the entireties who joins in a mortgage on joint property as security for a note executed solely by the other spouse. To give the debtor-spouse an extension of time on the note without notice to the spouse signing as surety discharges ordinary sureties from liability

201. Mann v. Etchells, 132 Fla. 409, 182 So. 198 (1938); Merrill v. Adkins, 131 Fla. 478, 180 So. 41 (1938).

202. American Central Ins. Co. v. Whitlock, 122 Fla. 363, 165 So. 380 (1936).

203. Bello v. Union Trust Co., 267 F.2d 190 (5th Cir. 1959); Gerson v. Broward Co. Title Co., 116 So. 2d 455 (2d D.C.A. Fla. 1959).

204. Powell v. Metz, 55 So. 2d 915 (Fla. 1952).

205. Quick v. Leatherman, 96 So. 2d 136 (Fla. 1957).

206. Montgomery v. Gipson, 69 So. 2d 305 (Fla. 1954).

on the note. But the Florida Court has said that entireties property can be levied on by the mortgagee, because the obligation remains a joint debt;[207] the note is construed merely as evidence of the debt secured by the mortgage.

Estoppel and Resulting Trusts

It is difficult to tell when the courts will apply the doctrines of estoppel and resulting trusts. Both are equitable remedies, and ad hoc adjudication seems to be necessary because of the uncertainty that has crept into the law through the weighing of equities in individual cases. A summary of the cases, while providing little in the way of precedent, furnishes some insight into the attitude of the Florida courts.

It has been held that if a husband and wife convey property held by the entireties to the brother of the husband by a deed containing a recital of consideration, the transfer cannot be set aside after the death of the husband upon the ground that the wife received no consideration.[208] A similar ruling prevented a wife, upon securing a divorce, from attacking the conveyance of her interest in entireties property to the mother of her former husband.[209] It has also been said that a payee of a note signed by one of the parties to a marriage may be able to impose an equitable lien upon entireties property if the payee can prove fraud or misrepresentation on the part of the spouse that did not sign the note.[210] In another instance, equitable estoppel principles were applied to shield innocent purchasers from a woman who upon the records had acquired the fee to an estate by the entireties by surviving her husband, although in fact she was not legally married to her co-tenant.[211]

If the property of other persons is used to purchase property placed in a tenancy by the entireties, a resulting trust arises in favor of the persons whose property was so used.[212]

The foregoing cases emphasize the diversity of holdings that inevitably occurs when the rights of innocent third persons collide with the traditional concepts that enshroud the tenancy by the entireties.

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207. Anderson v. Trueman, 100 Fla. 727, 130 So. 12 (1930).

208. Maxwell v. Sullivan, 123 Fla. 263, 166 So. 575 (1936).

209. Dempsey v. Dempsey, 154 Fla. 728, 19 So. 2d 52 (1944).

210. Yafanaro v. Ninos, 123 So. 2d 286, 288 (2d D.C.A. Fla. 1960) (dictum).

211. Kerivan v. Fogal, 156 Fla. 92, 22 So. 2d 584 (1945). See also Nottingham v. Denison, 63 So. 2d 269 (Fla. 1953).

212. Wilkins v. Wilkins, 144 Fla. 590, 198 So. 335 (1940) (fiduciary funds used to purchase entireties property); Brown v. Brown, 123 So. 2d 298 (3d D.C.A. Fla. 1960) (spouse used property of children to purchase entireties property).

These cases cannot even be called typical; similar disputes in cases heretofore discussed were resolved differently.[213]

TITLE OPINION PROBLEMS

An attorney checking an abstract of title as the basis for rendering a title opinion must take into consideration the various pitfalls that may result from Florida's peculiar tenancy by the entireties. The following suggestions are not intended to be all-inclusive but are merely indicative of the problem areas.[214] Many of the defects will not render the property unmarketable but may, in the absence of estoppel, cast a cloud upon title to property.[215]

A deed to persons who are in fact man and wife creates a tenancy by the entireties. A mere recital of marriage is not reliable; there should be affidavits in the record showing that the husband and wife were married at the time of the conveyance to them and that the relationship continued until one of the tenants died.[216] If they were not married at the time of the conveyance to them, a subsequent conveyance or devise by one of the spouses may be effective to convey only a one-half interest in the property. If they were not married at the date of death of one of them, the conveyance or devise of the survivor will be effective only as to half of the property. There also should be proof in the record of the prior death of the non-conveying spouse. If the other spouse is alive at the time of the conveyance by the purported survivor, the conveyance is absolutely void and the grantee acquires no interest in the property.[217]

A deed of the fee interest from one spouse to the other, stating an intent to create a tenancy by the entireties, is sufficient to establish the estate.[218] There is some doubt as to whether a conveyance of an undivided one-half interest by one spouse to the other will create a tenancy by the entireties. There is also doubt as

213. *E.g.*, Richart v. Roper, 156 Fla. 822, 25 So. 2d 80 (1946); Lindsley v. Phare, 115 Fla. 454, 155 So. 812 (1934); Yafanaro v. Ninos, 123 So. 2d 286 (2d D.C.A. Fla. 1960).

214. Case authority for the hypotheticals is omitted, since the statements are supported by cases cited elsewhere. Reference will be made to Uniform Title Standards established by The Florida Bar. A title standard is a voluntary agreement by which members of the bar agree to treat a title problem in a particular manner. A copy of the standards can be found in 20 FLA. STAT. ANN. (Supp. 1960). The various Florida curative acts, of course, operate with equal vigor upon property held by the entireties.

215. Uniform Title Standard 00 provides that in construing title problems the examiner should favor marketability of title whenever possible. 20 FLA. STAT. ANN. (Supp. 1960).

216. Uniform Title Standard 6.1, 20 FLA. STAT. ANN. (Supp. 1960).

217. *Id.*, Standard 6.3.

218. *Id.*, Standard 6.1.

to whether a conveyance of the fee by one spouse to both spouses as grantees will create an estate by the entireties. In the last two situations, it perhaps would be wise to obtain releases from the heirs of the non-conveying or the deceased spouse.

If one of the spouses murders the other, the estate by the entireties is severed and a tenancy in common is created. Hence the murderer or his heirs and the victim's heirs must join to convey the entire fee.

The wife and the husband must join in the conveyance of the property in the presence of two subscribing witnesses. Separate deeds of husband and wife in the presence of the witnesses will not be effective to convey the estate, since the tenancy is considered to be indivisible.[219] Although it is believed that a husband's deed will estop him from asserting any interest against entireties property he alone conveyed, it would not be safe for an attorney to rely upon the fact that the wife predeceased the husband and that the after-acquired property of the husband passed under the earlier deed.[220]

A conveyance of entireties property by one spouse to the other will vest title to the entireties property in the grantee, even if both spouses did not join as grantors in the deed.[221]

If the property was homestead at the time of its conversion into an estate by the entireties, it will pass under the homestead law of descent rather than to the surviving spouse. In every case in which the tenants by the entireties used the property as a homestead the attorney must be particularly careful to check the surrounding facts and circumstances before determining that the property interest upon death of one of the spouses vested completely in the surviving spouse.

All divorce decrees in connection with the property in question should be checked. Failure to mention the property in the decree results in the parties becoming tenants in common without any right of survivorship. A sole conveyance thereafter by one of the parties, even with proof of the death of the co-tenant, raises a red flag.

Although tax deeds are always looked upon with suspicion, a special word of caution is warranted in regard to entireties property. The application for a tax deed must have been mailed to each spouse and in fact received by each spouse.[222]

Conveyances directly to her husband of property owned solely by the wife, with an expression of an intent to create an estate by

219. *Id.*, Standard 6.3.

220. *Ibid. But see* Newman v. Equitable Life Assur. Soc'y, 119 Fla. 641, 160 So. 745 (1935), in which the Court recognized that at common law a husband's sole conveyance of entireties property during his wife's lifetime estopped him from claiming against his grantee after her death.

221. Uniform Title Standard 6.4, 20 FLA. STAT. ANN. (Supp. 1960).

222. Montgomery v. Gipson, 69 So. 2d 305 (Fla. 1954).

the entireties, or through a conveyance with the joinder of her husband to a third party and back to the spouses, should be viewed with caution. Although it is believed that a later conveyance by the surviving husband would pass the entire fee, it is possible that the situation might give rise to a resulting trust in favor of the wife's heirs.

UTILIZATION OF THE TENANCY IN ESTATE PLANNING

The tenancy by the entireties, although it frequently creates tax problems, can serve some useful purposes in the planning of estates.[223] This article does not purport to treat in detail the gift and estate tax consequences and estate planning aspects of the tenancy but only to summarize briefly some of its advantages and disadvantages.

The Federal Gift Tax

Personal Property. When personal property owned by one of the spouses, or purchased by one of them, is placed in their joint names, a taxable gift has been made.[224] The value of the gift to the non-contributing spouse is computed actuarially by the use of life expectancy tables; the tax is imposed upon the amount of the donor's contribution to the tenancy less his retained interest in it.[225] Thus the value of the gift will be more than half of the value of the property if the non-contributing spouse is younger than the donor. But there is no immediate gift tax when the property is composed of bank accounts or United States savings bonds.[226] It is important to remember that termination of the tenancy may result in a gift tax if the distribution of the proceeds is not in accordance with the actuarial interests of the spouses in the tenancy.[227] A taxable gift also occurs in the case of termination of or withdrawal by the non-contributing spouse of savings bonds and bank accounts held by the entireties.[228] One alleviating factor is that a person who makes a gift to his spouse need pay a tax on only half of the gift, and he may even escape this burden if the $3,000 annual gift tax exclusion for each donee and the $30,000 lifetime exclusion have not been exhausted in the year of the gift.[229]

Real Estate. The donor spouse of a gratuitous conveyance of realty occuring since 1954 is deemed not to have made a gift at the

223. See, *e.g.*, Black, *Tenancy by the Entireties as a Tool in Estate Planning in Florida*, 5 U. FLA. L. REV. 378 (1952).

224. Commissioner v. Hart, 106 F.2d 269 (3d Cir. 1939).

225. Treas. Reg. §25.2515-2.

226. Treas. Reg. §25.2511-1 (h) (4).

227. INT. REV. CODE OF 1954, §2515; Treas. Reg. §25.2515-4 (b).

228. Treas. Reg. §25.2511-1 (h) (4).

229. INT. REV. CODE OF 1954, §§2503 (b), 2521, 2523.

time of the transfer.[230] However, the spouse may elect to have the transfer treated as a gift. If no election is made, and if the donee receives any part of the proceeds paid upon termination of the tenancy for reasons other than death, there will be a gift tax on the amount received by the donee that is not attributable to the donee's contribution to the tenancy.[231]

The Estate Tax

All property that was held by the entireties by a decedent at the time of his death is deemed to have been his separate property for estate tax purposes.[232] To prevent the entire value of the property from going into the deceased spouse's gross estate, his personal representative must prove to what extent the property was purchased with the survivor's separate funds. If the tenancy by the entireties was created gratuitously by a third person, only the decedent's one half will be taken into the gross estate; but the personal representative must show that the property was received from a third party. The fact that a gift tax has been paid upon the initial transfer is of importance only in claiming a credit against the estate tax.[233]

The cases are in conflict over the possibility of severance of the tenancy in contemplation of death, but seemingly the harsh effects of the Internal Revenue Code can be avoided by an irrevocable severance of the tenancy before death.[234] The cases are also in conflict as to what will constitute sufficient consideration on the part of the surviving spouse to avoid dragging the entire value of the tenancy into the decedent's gross estate.[235]

One advantage of holding property by the entireties is that the property automatically qualifies for the marital deduction to the extent that its value is included in the gross estate of the deceased spouse.[236] The fifty per cent of the adjusted gross estate limitation on the marital deduction can, however, prevent part of the property passing to the surviving spouse from being tax free to the estate.[237]

Florida recognizes the fact that the marital deduction decreases the tax burden on the estate. Thus, if the value of the wife's dower and the value of the jointly-held property do not exceed the maximum

230. INT. REV. CODE OF 1954, §2515 (a).
231. INT. REV. CODE OF 1954, §2515 (b).
232. INT. REV. CODE OF 1954, §2040.
233. Hornor's Estate v. Commissioner, 130 F.2d 649 (3d Cir. 1942).
234. See Sullivan's Estate v. Commissioner, 175 F.2d 657 (9th Cir. 1949).
235. *Compare* Estate of Loveland, 13 T.C. 5 (1949), *with* Estate of Singer v. Shaughnessy, 198 F.2d 178 (2d Cir. 1952).
236. INT. REV. CODE OF 1954, §2056 (c) (5).
237. INT. REV. CODE OF 1954, §2056 (c).

marital deduction, the executor of the deceased spouse's estate cannot hold the wife liable for a portion of the estate tax.[238] But when a huge artificial estate is taxed in an amount exceeding the testamentary estate and the allowable marital deduction, the estate is entitled to have the surviving spouse pay part of the tax bill.[239]

Advantages and Disadvantages of the Tenancy

Since tenancies by the entireties pass outside the will of the deceased spouse, administration costs upon jointly-held property are avoided in his estate; but the cost of administration will occur in the estate of the surviving spouse. Furthermore, the deceased spouse has lost the control over the ultimate disposition of property that could have been achieved with a trust. It also appears that property held by the entireties is not part of the deceased spouse's estate for either admeasurement or distribution of dower.[240]

If one spouse desires to leave all of his or her property to the other spouse and the adjusted gross estate is under $120,000, the tenancy by the entireties may be the ideal device. In addition, a small bank account held by the entireties will provide the family with cash during the period of administration when funds are otherwise inaccessible. Also, in the absence of a fraudulent intent, a spouse can insulate himself against the claims of his separate creditors by placing the property in the names of both spouses.

The tenancy can be used to avoid the restrictions placed on the descent of homestead realty by purchasing the property in the joint names of the spouses. The life estate in homestead property provided the wife by the statutes of descent can prove unfortunate, because she will be unable to convey the interests of the children, who are remaindermen. Sale of the property is thus very difficult.

Danger areas that spouses should be aware of are the unpleasant tax consequences that may attend the creation of the tenancy, the possibility that a spendthrift spouse may waste the estate without providing properly for minor children, and the always present possibility of severance of the estate by divorce.

CONCLUSION

Any evaluation of the estate by the entireties as it exists in Florida today must take many factors into account. The critics of the estate uniformly assert that it is founded upon an anachronistic doctrine incompatible with modern ideas of American institutions

238. *In re* Fuch's Estate, 60 So. 2d 536 (Fla. 1952).
239. See Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951).
240. See *In re* Brock's Estate, 63 So. 2d 510 (Fla. 1953).

and that the tenancy is repugnant to the American sense of justice and the true theory of the marital relationship.

The skeptics also point to the inconsistent results that have been announced by the Florida Supreme Court. For instance, the Court in one context says that the tenancy by the entireties does not constitute the separate property of a married woman but in another context says that it does. The Court has allowed one spouse to act as agent for the other in transactions concerning personal property but not in dealings concerning real property.

The Florida Court has announced separate rules covering the creation of tenancies by the entireties, depending upon whether the estate is comprised of real or personal property. Divorce and death are apparently governed by different rules. If the non-contributing spouse is the wife, the Court presumes a gift of the interest to the wife; but when the non-contributing spouse is the husband, the Court presumes the creation of a resulting trust.

The Florida Court in extending protection to the estate against individual creditors of one of the tenants follows the general Florida policy of protecting property interests at the expense of creditors. This, coupled with the homestead laws, dower rights, and freedom from garnishment of wages, welds a formidable judgment-proof shield around debtors. It is surprising that there are not more appellate cases in connection with fraudulent transfers, since the estate by the entireties offers an open door to debtors who desire to thwart their creditors.

The estate by the entireties also defeats the operation of Florida's constitutional and statutory provisions for the descent of homestead real estate. In an era in which husbands and wives usually acquire their homes in their joint names, the interests of surviving children guaranteed by the Constitution are eliminated by utilization of the estate. In recognizing that an estate by the entireties can be a homestead for the purpose of exemption from forced sale and yet not descend to the surviving wife as a life estate with a vested remainder in the children, the Court has probably saved the homestead provisions. If homestead property could devolve only in the manner provided by the Constitution, land titles would be tied up during the life of the wife.

These criticisms seemingly compel a recommendation that the Florida legislature eliminate the estate by the entireties. However, there are important considerations that favor retention of the estate in Florida. The Court has rested its decisions upon a rule of construction based upon a presumption of intention. In America one of the most prized rights of the individual is control over the property he owns. If he desires to give his property away he should be able to do so.

The Florida Court has announced that it favors community property concepts. This position is laudable because both the husband and the wife share in the acquisition of property by the family. The wife's contribution may consist only of keeping the house and rearing the children, but who is to say that this contribution is not as important as that of the wage earner? Recognition of the tenancy by the entireties partially gives effect to the theory of community property that husband and wife should share equally in property acquired during coverture.

There are ample legal remedies to prevent fraudulent transfers of property. Creditors and third persons who deal with real estate held by the entireties are on notice that both spouses must consent to alienation of the estate. The Court, because of commercial necessity, has protected third persons in transactions involving personal property held by the entireties and thereby alleviated hardships that otherwise would arise through the lack of notice of the interests of the respective spouses.

One of the frequent criticisms leveled at the tenancy is that it imposes restrictions upon each spouse in severing the estate. Even if Florida were to abolish the estate by the entireties, the spouses would not enjoy complete freedom in disposing of real estate during their joint lives. The husband's joinder would still be required for a valid conveyance of the wife's real property, and the wife would still have to release her inchoate dower rights in order to meet the requirements imposed by cautious vendees. The husband would still lack power to control the distribution of one third of his realty and personalty at his death if the wife chose to elect dower.

If the tenancy were abolished, in many instances spouses would hold property as joint tenants with rights of survivorship unless the present statutes were amended. They would at least be tenants in common without the rights of survivorship. Some of the more important consequences would be that creditors could levy upon the interests of either spouse in non-homestead property, unilateral alienation of personal property would be permitted, and specific performance of the husband's individual contracts pertaining to jointly-held property would be possible.

Regardless of its incongruous features, the fact remains that the tenancy by the entireties is firmly imbedded in the law of Florida. A creature of the common law imported initially through judicial interpretation, the estate has received statutory recognition and has enjoyed continued expansion since 1913. Although stare decisis should not control the question of abolishing the tenancy, many Floridians have relied upon the existence of the tenancy in planning their estates. Lawyers and laymen are familiar with its general principles. The cases are inconsistent if the view is taken that only

one rule must exist for every conceivable situation, but it must be recognized that if rules are to be instruments of justice there must be some degree of flexibility.

For these reasons, and since many of the incidents of the estate would still exist in its absence, abrogation of the estate does not seem to be warranted. Also it would be inadvisable to deprive the Florida courts of a legal tool that enables them to reach an equitable result in divorce cases and in those instances in which the husband has transferred all or most of his assets to defeat the widow's dower rights.

There are several changes that may be suggested. First, the Court should extend the presumption of gift to cover those instances in which a wife has placed property in the names of herself and her husband. Although there are historical reasons, there is no logical reason why the wife should not be allowed to make a gift to her husband as easily as he can to her. Second, the legislature should clarify the method by which a spouse owning property can establish an estate by the entireties. The direct conveyance statute should be amended to provide that any conveyance from one spouse to another that expresses an intent to create an estate by the entireties will be sufficient to create the tenancy. The doubt as to whether the direct conveyance statute can be utilized to convey to one spouse homestead property held by the entireties should also be removed.

Third, the courts should clarify the requirements for creating the estate in personal property. Although it is believed that unambiguous language in an instrument can either create or negate the tenancy, trial judges and attorneys need guidance in those frequent situations in which the parties have failed to express themselves clearly. The wisest choice in regard to bank accounts would be a rule that the tenancy is not created unless it is expressly provided for in the depositor's contract with the bank. The surviving spouse's right to funds remaining in the account could still be protected by a judicial finding of an intent to create a joint tenancy. This would preclude the surviving spouse from attempting to trace the decedent's inter vivos transfers. In cases involving personalty other than bank accounts the intent of the parties should be the touchstone.

Finally, it can safely be predicted that the tenancy by the entireties will remain a pillar of Florida property law. Creditors will continue to eye enviously but vainly the jewels beyond their grasp. Children will feel cheated and continue to sue their parents and stepparents. Husbands will continue to testify that putting property in the names of both spouses was done only through inadvertence. And legal scholars will maintain their assault upon that archaic old English doctrine. But all to no avail!

TABLE OF HEADINGS AND SUBHEADINGS