Maryland State Bar Association's Section on Estate & Trust Law Annual Spring Dinner May 13, 2009

A Match Made In Heaven: Using Tenancy by the Entirety for Creditor Protection Without Sacrificing Estate Planning.

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Mr. Franke received his A.B. from Kenyon College in 1969; his J.D. from Washington and Lee University in 1973; his L.L.M. (Taxation) from George Washington University in 1983. He was admitted to the Maryland Bar in 1974 and has practiced in Annapolis since 1976.

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He has published articles on tax and other topics related to his professional interests, including: *"Asset Protection and Tenancy by the Entirety,"* ACTEC Journal, Spring 2009; *"Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships,"* Maryland Journal of Contemporary Legal Issues, 1996; *"The End of Debate: The Final Regulations of Partnership Allocation Under Section 704(b),"* The Review of Taxation of Individuals, Autumn, 1986; *"Staying Within the Corporate Solution: The Separation of Professionals From the Professional Corporation Under Section 355,"* Taxes - The Tax Magazine, September 1983.

Mr. Franke also has participated, as a lecturer, in various continuing education programs for lawyers, including: *"Asset Protection – A Guide for Maryland Estate and Trust Lawyers,"* (MICPEL Advance Estate Planning Institute 2006); *"Revocable Inter Vivos Trusts,"* (MICPEL 2004 and 2006); *"Valuation Discounting,"* (MICPEL 2003; MSBA 2002 and 2003); *"Business Valuation,"* (MICPEL 1998); *"Family Partnerships,"* (MICPEL 1996); *"Avoiding Probate - Will Substitutes,"* 1996; *"Basic Estate Planning,"* (MICPEL 1993); *"Organizational and Tax Issues of Professional Practices,"* (MSBA 1992); *"Basic Partnerships"* (MICPEL 1991); *"Partnerships,"* (MICPEL 1987); *"What the Real Estate Practitioner Must Know About Taxes - 1986 and Beyond,"* (MICPEL 1986); *"The Impact of Maryland Taxes on Commercial Transactions and Business Operations,"* (MICPEL 1985).

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Maryland Entireties

The asset protection afforded married couples in Maryland with tenancy by the entirety is strong.[1] Generally, a creditor of one spouse cannot attach tenancy by the entirety property unless the debt is an obligation of both.[2]

A dramatic illustration of this concept is offered in Watterson v. Edgerly, 40 Md. App. 230, 388 A.2d 934 (Md. App.1978). In Watterson, the husband was subject to a judgment debt. Thereafter, he transferred all of his interest in the tenancy by the entirety real estate to his wife. She thereupon created a will leaving her assets in trust for the benefit of her husband with a spendthrift clause. The wife died 61 days after the transfer of real estate to her. The Court of Special Appeals said that the husband's creditor "has no standing to complain" because it never had an attachable interest in the property.[3]

Maryland recognizes tenancy by the entirety ownership in real and personal property.

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1 See generally: Franke, "Asset Protection and Tenants by the Entirety," 34 ACTEC J. 210 (2009), attached to this paper. Because the article is attached, the treatment here will be abbreviated. This paper will focus on Maryland law. The various states that recognize tenancy by the entirety ownership treat that form of ownership differently.

2 Also, of course, unless the creation of the tenancy by the entirety was pursuant to a fraudulent conveyance.

3 The U.S. Supreme Court in U.S. v. Craft, 535 U.S. 274 (2002) held that a federal tax lien breaches tenancy by the entirety protection. This has been limited to tax liens or certain forfeitures treated as tax liens. See pages 215-219 of the attached article.

Diamond v. Diamond, 298 Md. 24, 467 A.2d 510 (Md. 1983) ("It is well established that this Court recognizes that a tenancy by the entirety may be created in personal property").

The fact that an account is joint but subject to the order of either should not alter the presumption it is held tenancy by the entirety. Thus, in In re Breslin, 283 B.R. 834 (Bankr. D. Md. 2002), the federal court referred to Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (Md. 1901) for the proposition that when an account is held disjunctively but payable only to the two spouses subject to the order of either, entireties is created.[4] Obviously, if one's intention is to create a tenancy by the entirety account, especially if it will be subject to the order of either, the account contract should designate it as an entireties account. The theory for the proposition that a disjunctive account may still be an entireties account is that each spouse is deemed an agent authorized to act for the other. See e.g., Beal Bank, SSB v. Almond & Assoc., 780 So. 2d 45, 62 (Fla. 2001)("[T]he ability of one spouse to make an individual withdrawal from the account does not defeat the unity of possession so long as the account agreement contains a statement giving each spouse permission to act for the other.")

Maryland Disclaimers

Effective October 1, 2004, Maryland adopted the Uniform Disclaimer of Property Interests Act ("MUDOPIA"). It largely tracks the uniform act promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999 as amended in 2002. The uniform act "was drafted to allow the full range of disclaimers recognized under the Internal Revenue Service Code ("IRC)" Section 2518." LaPiana, "Some Property Law Issues in the Land of Disclaimers," 38 Real Prop., Prob. & Trust J., 207, 209 (Summer 2002) (hereinafter "LaPiana").

Although designed to take advantage of all of the possibilities under IRC § 2518, it

[4] See, however, In re Pernice, 165 B.R. 581 (Bankr. D. Md. 1994) which was distinguished by Breslin for a cautionary tale.

purposefully "decoupled" the statute from the nine-month required of IRC § 2518 and, or course, prior Maryland law. See Est. & Trusts § 9-202 of the pre-October 1, 2004 statute. The decoupling was "designed to reduce confusion" by signaling that a tax qualified disclaimer had to qualify under the § 2518 rules which, in the case of disclaimers of future interests, had to be made within nine months of the creation of the interest. The earlier versions of the uniform acts (including Est. & Trusts § 9-202) authorized disclaimers within nine months of when the contingent interest was finally ascertained and the disclaimant's right to possession or enjoyment became indefeasibly vested. "The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law." Comment, Prefatory Note, UDOPIA (2002).

Other than for federal tax liens[5], a disclaimer is not a transfer for fraudulent conveyance purposes in most jurisdictions. Essen v. Gilmore, 607 N.W.2d 829, 835 (Neb. 2000) ("A review of the jurisprudence of other states shows that it is the majority view that a renunciation under the applicable state probate code is not treated as a fraudulent transfer of assets under the Uniform Fraudulent Transfer Act ("UFTA"), and creditors of the person making the renunciation cannot claim any rights to the renounced property in the absence of an express statutory provision to the contrary."). Also see, Pauw v. Agee, 2000 U.S. Dist. LEXIS 22323 (U.S. Dist. Ct. for S.C. 2000), which permitted a debtor to disclaim his inheritance then rent the property back from his brother who received the property due to the operation of the disclaimer: "This view (that a disclaimer will defeat the judgment against the debtor/disclaimant) corresponds with the majority view that a creditor cannot prevent a debtor from disclaiming an inheritance." [at 19].

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[5] The U.S. Supreme Court has held that a disclaimer is not effective to effectuate a transfer of property free of a federal tax lien in place against the disclaimant. Drye v. United States., 528 U.S. 49 (1999). Drye should only apply to federal tax liens. See pages 215-216 of the attached article.

One court used the "encumbers"[6] provision, however, to trump the "relation back" provision to permit a creditor's lien to operate to bar the disclaimer. That decision, Pennington v. Bigham, 512 So. 2d 1344 (Ala. 1987), turned on the direct interest an heir has in estate property. As in Maryland for decedents dying before January 1, 1970, real estate in Alabama directly passes to intestate heirs: "When John Thomas Bigham died intestate on June 25, 1986, the legal title to a one-half interest in his real property vested eo instanti in Bobby Bigham (the disclaimant); however, it vested subject to the statutory power of the administratrix to take possession of it and obtain an order to have it sold for payment of the debts of his father's estate." Pennington at 1345-46. In Pennington, a judgment creditor had perfected her lien against all of the disclaimant's property before the disclaimant's father died. Thus, the lien acted as an encumbrance of the disclaimant's share. The Supreme Court of Alabama held that a disclaimer after the lien attached under the circumstances of that case constituted a fraudulent conveyance.

There is no decision in Maryland (other than for Medicaid purposes, discussed below) that addresses the operation of the "relation back" provision under prior law, or the "not a transfer, assignment, or release" provisions under the current act. MUDOPIA § 9-203(f)(1); prior act § 9-205; Comment, Section 5, UDOPIA: "Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional 'relation back' doctrine of prior Acts."

Like in Pennington, Maryland has a provision barring disclaimers if the property to be disclaimed is encumbered.[7] Unlike Pennington, Maryland Est. & Trusts § 1-301(a) reversed the common law rule passing real property directly to the heirs by providing that: "All property of a

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[6] This was based on a prior version of the uniform act before the "voluntary" element was added to the uniform act.

[7] As noted, however, the newer uniform act added voluntarily to the bar.

decedent shall be subject to the estates of decedent's law, and upon the person's death shall pass directly to the personal representative, who shall hold legal title for administration and distribution, without any distinction, preference, or priority between real and personal property." This is the Maryland rule for all decedents dying on or after January 1, 1970. An existing lien operating against the disclaimant of a Maryland estate would therefore not attach to the disclaimed property unless the property was actually distributed to him/her.

Perhaps more telling, however, is the language of the Maryland statute under the current act and its predecessor. Section 9-202(f)(2) of the MUDOPIA states: "Creditors of the disclaimant have no interest in the property disclaimed." This comports with the prior statute: "Creditors of the disclaimant have no interest in the property or interest disclaimed, whether their claims are based on contract, tort, tax obligations, or otherwise."

In a pre-2004 case, the Court of Special Appeals looked at the propriety of a Medicaid recipient disclaiming an intestate share of an estate. In Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), cert. denied, 347 Md. 255, 700 A.2d 1215 (1997), the Court first looked at whether excepting benefits after receiving Medicaid benefits constituted "an assignment, conveyance, voluntary encumbrance ... " under the statute. The Court held that a disclaimer was not barred by that Section due to the disclaimant receiving Medicaid payments. The Court held that the disclaimer of benefits, however, would disqualify the disclaimant for Medicaid payments because those assets, in effect, constituted an available resource:

> "What this Court is more broadly faced with is the propriety of the disclaimer in light of societal interest and overall policy considerations. What is ludicrous, if not repugnant, to public policy is that one who is able to regain the ability to be financially self-sufficient, albeit for a temporary or even brief period of time, may voluntarily relinquish his windfall.
>
> While we are mindful that social agencies are 'skewered through and through with office pens, and bound hand and foot with red tape,' this acknowledgment does

> not vitiate legal obligation to report a recipient's change in financial status. Lettich had a legal obligation to 'pay his own way' (by means of the inheritance) until such time as his resources were exhausted. Had the disclaimed funds actually been acquired and exhausted, Lettich most certainly would have been eligible to resume his receipt of Medicaid benefits.
>
> In Molloy v. Bank, 214 A.D.2d 171, 631 N.Y.S.2d 910 (1995), the Supreme Court of New York, Appellate Division, confronted the same issue now before this Court. Molloy, a resident of a nursing home, was a recipient of medical assistance. Upon the death of her daughter, Molloy, pursuant to intestacy law, was entitled to her statutory share of the estate. Prior to disposition of the estate, Molloy renounced her interest in it. Acknowledging that the right to renounce a intestate is irreconcilable with the principle that public aid is of a limited nature and should only be afforded to those who demonstrate legitimate need, 631 N.Y.S.2d at 911, the court found that '[Molloy]'s renunciation of a potentially available asset was the functional equivalent of a transfer of an asset since by refusing to accept it herself, she effectively funneled it to other familial distributes.' Id. At 913.
>
> Applying this analysis to the case sub judice, we adopt the reasoning of the New York court. The result of such a transfer prior to application for benefits is that the transferee enjoys a 'windfall' for which the applicant/transferor is penalized against the inception of his eligibility. So too should this penalty result in a circumstance in which a Medicaid recipient disclaims or otherwise transfers an inheritance that if accepted would result in a loss of eligibility."

Unfortunately, the Court then went on to "suggest" that the State had a potential cause of action for a constructive trust to seek reimbursement for the payments it made to the disclaimant improperly. [This was a "suggestion" because, as the case stated, the personal representative of the estate had acquiesced to reimbursing the State for any Medicaid benefits erroneously paid for the benefit of the disclaimant.]

Presumably, to the extent it is still good law under the new statute, Troy v. Hart carves out a narrow exception to the provision that creditors have no interest in the property disclaimed. Generally, the Medicaid override is a policy trumping of the statute. Comment to UDPIA (at Section 13):

> "A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on

the definition of 'transfer' in the federal Medical Assistance Handbook which includes a 'waiver' of the right to receive an inheritance (see 42 U.S.C.A. § 1396p(e)(1)). See Hinschberger v. Griggs County Social Services, 499 N.W.2d 876 (N.D. 1993); Department of Income Maintenance v. Watts, 211 Conn. 323 (1989), Matter of Keuning, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and Matter of Molloy, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Tannler v. Wisconsin Dept. of Health & Social Services, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); but see, Estate of Kirk, 591 N.W.2d 630 (Iowa, 1999) (valid disclaimer by executor of surviving spouse who as Medicaid beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the States. On the federal level, the United States Supreme Court has held that a valid disclaimer does not defeat a federal tax lien levied under IRC § 6321, Drye, Jr. v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999)."

Federal Tax Laws and the 1997 Regulations

Treasury issued final regulations under § 2518 in 1997 addressing the meaning of "transfer creating the interest" – the event triggering the nine-month period:

"For purposes of the time limitation described in paragraph (c)(1)(i) of this section, the 9-month period for making a disclaimer generally is to be determined with reference to the transfer creating the interest in the disclaimant. With respect to inter vivos transfers, a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as transfers creating an interest for this purpose. With respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer. For example, a bequest of foreign-situs property by a nonresident alien decedent is regarded as a transfer creating an interest in property even if the transfer would not be subject to estate tax. If there is a transfer creating an interest in property during the transferor's lifetime and such interest is later included in the transferor's gross estate for estate tax purposes (or would have been included if such interest were subject to estate tax), the 9-month period for making the qualified disclaimer is determined with reference to the earlier transfer creating the interest. In the case of a general power of appointment, the holder of the power has a 9-month period after the transfer creating the power in which to disclaim. If a person to whom the

> exercise, release, or lapse of a general power desires to make a qualified disclaimer, the disclaimer must be made within a 9-month period after the exercise, release, or lapse regardless of whether the exercise, release, or lapse is subject to estate or gift tax. In the case of a nongeneral power of appointment, the holder of the power, permissible appointees, or takers in default of appointment must disclaim within a 9-month period after the original transfer that created or authorized the creation of the power. If the transfer is for the life of an income beneficiary with succeeding interests to other persons, both the life tenant and the other remaindermen, whether their interests are vested or contingent, must disclaim no later than 9 months after the original transfer creating an interest. In the case of a remainder interest in property which an executor elects to treat as qualified terminable interest property under section 2056(b)(7), the remainderman must disclaim within 9 months of the transfer creating the interest, rather than 9 months from the date such interest is subject to tax under section 2044 or 2519. A person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the previously disclaimed interest no later than 9 months after the date of the transfer creating the interest in the preceding disclaimant. Thus, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as part of the residue, the beneficiary of the residue could make a qualified disclaimer no later than 9 months after the date of the testator's death. See paragraph (d)(3) of this section for the time limitation rule with reference to recipients who are under 21 years of age."

Regs. § 25.2518-2(c)(3)(i). These rules, however, are made applicable for transfers creating the interest sought to be disclaimed occurring on or after December 31, 1997. This means that one must wade through prior law although the new final regulations are supposedly "reflective of prior law." See Llewellyn, Levin & Lewis, "Disclaimers by a Surviving Spouse: The Trend of Increased Opportunities for Post Mortem Tax Planning Continues," 35 Real Prop. Prob. & Trust J. 1, 10 (Spring 2000) (hereinafter "Llewellyn").

The final regulations explicitly permit the disclaimer of the survivorship interest in the entirety interest within nine months of death. In states that permit entireties in personal property, this rule means that the survivorship interest in such property (generally 1/2) is also subject to a disclaimer. Thus, stock held by the entireties will be subject to the survivorship rule.

The final regulations limit the amount that can be disclaimed with respect to bank accounts,

brokerage accounts and mutual funds to the portion attributable to the deceased spouse:

> "Special rule for joint bank, brokerage, and other investment accounts (e.g., accounts held at mutual funds) established between spouses or between persons other than husband and wife ... [I]f a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift ... the surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant."

Thus, if stock acquired from funds solely provided by the surviving spouse is held by the entireties, a one-half interest may be disclaimed. If a brokerage account, on the other hand, is acquired solely from funds attributable to the surviving spouse, such a fund cannot be disclaimed. This result is different, of course, if the fund is held by the entireties and not severable. This raises issues as to whether titling trumps the account agreement language of such account when such language permits unilateral severance. In Maryland, the entirety tenancy exists if the parties intended the joint account to be so held. Whether such an intention would trump the terms applicable to the account is uncertain. But see Llewellyn, supra, footnote 71, taking the position that the intent to hold a brokerage account by the entireties may trump the account terms providing for unilateral severance.[8]

The regulations continued the QTIP rule of counting from creation not death for inter vivos QTIP trusts.

As noted, MUDOPIA permits the full range of disclaimers recognized by IRC § 2518. It also goes further. Under Est. & Trusts § 9-204, the surviving spouse (or other surviving joint tenant) may disclaim the greater of the survivorship share or that portion attributable to the contribution by the deceased holder. "Therefore, under UDOPIA, a surviving citizen spouse could disclaim all of the family home if he or she did not contribute to its purchase, but could make a

[8] See Llewellyn also for a discussion of the opportunities (but complexities) for qualified disclaimers in the marital planning environment. Particularly noteworthy is the discussion of income tax planning through basis adjustments. See Llewellyn at 30-36.

qualified disclaimer under Code § 2518 of only one-half of the property." LaPiana at 213.

The 75% Basis Step-Up Rule[9]

The disclaimed property becomes part of the probate estate. Example 12 of Reg. 25.2518-2(c)(5) makes this point clear:

> *Example (12).* On July 1, 1990, A opens a bank account that is held jointly with B, A's spouse, and transfers $50,000 of A's money to the account. A and B are United States citizens. A can regain the entire account without B's consent, such that the transfer is not a completed gift under § 25.2511-1(h)(4). A dies on August 15, 1998, and B disclaims the entire amount in the bank account on October 15, 1998. Assuming that the remaining requirements of section 2518(b) are satisfied, B made a qualified disclaimer under section 2518(a) because the disclaimer was made within 9 months after A's death at which time B had succeeded to full dominion and control over the account. Under state law, B is treated as predeceasing A with respect to the disclaimed interest. The disclaimed account balance passes through A's probate estate and is no longer joint property includible in A's gross estate under section 2040. The entire account is, instead, includible in A's gross estate under section 2033. The result would be the same if A and B were not married.[10]

Note that B is able to effectuate a qualified disclaimer over the entire joint account because (i) A provided all of the consideration and (ii) until A's death A could, unilaterally, withdraw all of the funds in the joint account.

Because the account becomes part of the probate estate includable under IRC § 2033, it received a full step-up. IRC § 1014(b)(1).

The estate tax inclusion of joint property depends, of course, on whether the joint owners are married. Generally, IRC § 2040(a) provides the rule that for unmarried joint owners all of the value of the joint account is includable in the estate of the decedent except to the extent the surviving joint owner can establish that he or she furnished all or part of the consideration for the account. IRC §

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[9] See Don W. Llewellyn, Kenneth J. Levin, and Barbara B. Lewis, "Disclaimers by a Surviving Spouse: The Trend of Increased Opportunities for Post-Mortem Tax Planning," 35 R.P., Prob. & Trust J. 1, 30-36 (2006).

[10] The last sentence means only that the disclaimant property goes into the probate estate. Only a spouse can then receive the property after he or she has disclaimed the joint interest, not unmarried individuals. IRC § 2518(?).

2040(a). For married individuals, generally it is deemed to be 50% includable. IRC § 240(b).[11] This, of course, tracks the treatment on IRS form 706, Schedule E. [One exception to this treatment flows from the Gallenstein case which is followed in Maryland.[12]]

Under Reg. § 2518-2(c)(5), Example 14, the part not subject to a qualified disclaimer continues to retain its character as joint property under IRC § 2040(b):

> *Example (14).* The facts are the same as Example (12), except that B disclaims 40 percent of the funds in the account. Since, under state law, B is treated as predeceasing A with respect to the disclaimed interest, the 40 percent portion of the account balance that was disclaimed passes through A's probate estate, and is no longer characterized as joint property. This 40 percent portion of the account balance is, therefore, includible in A's gross estate under section 2033. The remaining 60 percent of the account balance that was not disclaimed retains its character as joint property and, therefore, is includible in A's gross estate as provided in section 2040(b). Therefore, 30 percent (1/2 x 60 percent) of the account balance is includible in A's gross estate under section 2040(b), and a total of 70 percent of the aggregate account balance is includible in A's gross estate. If A and B were not married, then the 40 percent portion of the account subject to the disclaimer would be includible in A's gross estate as provided in section 2033 and the 60 percent portion of the account not subject to the disclaimer would be includible in A's gross estate as provided in section 2040(a), because A furnished all of the funds with respect to the account

Note that a disclaimer can increase the basis of jointly held married property. Under example 14, the basis increases from a 50% step-up to a 70% step-up:

- The 40% disclaimed is wholly stepped up due to inclusion under IRC § 2033.
- The 60% not disclaimed continues to be joint property under IRC § 2040(b) and this is includable to the extent of ½ of the 60% or an additional 30%.

In a more common situation, a disclaimer of the survivorship interest in a tenants by the entirety property increases the basis step-up from 50% (with no disclaimer due to the operation of

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[11] IRC § 2040(b) states that joint holdings that are not tenancy by the entirety are only treated this way if held by the spouses as the only joint tenants.

[12] Gallenstein v. United States, 975 F.2d 286 (6 Cir. 1992); Anderson v. United States, 96-2 USTC § 60.235 (D. Md. 1996). Gallenstein permits a full step-up of basis if the deceased spouse furnished all of the consideration for joint spousal interests credited prior to 1976.

IRC § 2040(b)) to 75% due to the operation of an inclusion under IRC § 2033 of the disclaimed 50% interest and a 50% inclusion under § 2040(b) of the remaining 50% "joint interest."[13]

The Planning Opportunity

No size fits all in estate and asset protection planning. Nevertheless, for married couples where one spouse is exposed to potential risk, using entireties property or an asset protection hedge is worth serious consideration. The traditional estate planning objective of funding a credit shelter trust at the first death can be accomplished by the survivor disclaiming coupled with a testamentary trust to catch the disclaimed property.[14]

Due to the requirements of the IRC § 2518, of course, a power of appointment should not be included in the disclaimer trust. Also to hedge against the possibility that the survivor could be incompetent, a power of attorney with the ability to disclaim should be provided.

This approach protects clients from creditors of only one of the spouses. If, at death, there is no such creditor, the credit shelter trust is "triggered" by the survivor disclaiming all or part of the survivorship interest in the entireties property. If, on the other hand, the debtor spouse dies first, no disclaimer is made and the property passes debt-free to the survivor. If the non-debtor spouse dies first, a disclaimer should permit the survivorship interest to pass to a spendthrift trust for the benefit of the debtor spouse. In that event, it is important that the debtor spouse is not his or her own trustee.

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[13] Only in Gallenstein situation or when the joint account is not tenancy by the entirety and the deceased spouse provided all of the consideration will the step-up hit 100%. In Maryland it is highly unlikely a married couple's joint account is not tenancy by the entirety. See the attached article.

[14] So that a disclaimer can be fully used, the credit shelter – or at least part of it – should be QTIPable.

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Asset Protection and Tenancy by the Entirety

by Fred Franke
*Annapolis, Maryland**

Editors' Synopsis: This article first discusses the history and development of tenancy by the entirety, a form of concurrent ownership of property by spouses. The article then considers state variations of that form of ownership and treatment with respect to bankruptcy law and federal tax liens. The article concludes with recommendations for planning with tenancies by the entirety. The appendix to the article provides a useful state by state summary of asset protection aspects of the form of ownership.

I. The Historic Roots and Development of Tenancy by the Entirety

> And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife are considered one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout et non per my; the consequences of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.[1]

Under Blackstone's classic formulation, tenancy by the entirety ownership did not track other forms of concurrent ownership like joint tenancies or tenancies in common. Rather, entirety property was ownership without equal parts or shares ("moieties"). One might assume that the absence of divisible shares meant that neither husband nor wife had a separate, alienable share. One might also assume that if "the whole must remain to the survivor," then the alienation of a separate interest would defeat the right of each spouse to the survivorship of the whole.

The classic formulation of the tenancy is rooted in the theory that husband and wife constitute an indivisible unit: "An estate by the entireties is an almost metaphysical concept which developed at the common law from the Biblical declaration that a man and his wife are one."[2] In practice, however, this metaphysical oneness collided with the restrictions placed on women, particularly married women, by the common law:

> A species of common-law concurrent ownership, tenancy by the entireties developed as part of the English feudal system of land tenures. The exigencies of feudalism demanded that the functions of ownership be vested in males presumably capable of bearing arms in war. Women were lightly regarded legally, especially married women—whose very identifies, in most respects, were considered merged and lost in the personalities of their husbands. For purposes of property and contract, the married woman was under a complete legal blackout termed coverture. *Man and wife were one and the one was male*.[3]

The husband's dominance at common law was extensive. He, and he alone, had sweeping powers over the entireties property. He exclusively:

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[1] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (9th ed. 1783), quoted in Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 437 (Winter 2001). The 9th edition, published posthumously, contained the first discussion of a husband and wife owning an estate by its entirety by Blackstone. Its editor justified the addition: "The editor judges it indispensible to preserve the author's text intire. The alterations which will be found therein, since the publication of the last edition, were made by the author himself, as may appear from a corrected copy in his own handwriting." *Id*. at 437 n.154. In his article, Mr. Carrozzo traces the tenancy by the entirety to as early as the thirteenth century and characterizes Blackstone's description of entities as "the first modern pronouncement." *Id.* at 435-37. For another description of the evolution of the tenancy by the entirety, see also John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 B.Y.U. L. REV. 35 (1997).

[2] United States v. Gurley, 415 F.2d 144, 149 (5th Cir. 1969) (interpreting Florida law).

[3] Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L. Q. 24, 24 (1951) (emphasis added).

> (1) had the privilege and power to occupy the principal and to consume the income of the entire asset; (2) had power to manage, control, and externally dispose of possession and of income during the marriage; (3) had the benefit alone of all the assets for the use as a basis of credit, his possessory and his contingent survivorship interests being subject to attachment for his debts while not for those of the wife; (4) was alone entitled to represent the asset or any part thereof in litigation.[4]

The husband's control over the property was a control over its economic value during his lifetime. This power did not extend, however, to alienating the survivorship interest. The tenancy by the entireties was inseparable from the married unit even though it was dominated by the husband during his lifetime. This situation generally continued until the middle of the nineteenth century when the women's rights movement gained hold.[5] As a consequence, Married Women's Property Acts were enacted by the various States.

Married Women's Property Acts abrogated the dominance of a husband over his wife's property, thus reversing the common law and bringing parity of property rights to both spouses. These statutes forced entireties tenancy to be re-examined: "The question then necessarily arose whether the husband's powers and the wife's disabilities, now abrogated, had been incidents of the co-tenancy status or merely attributes of the marital status."[6]

If the dominance/disability matrix was an essential element of the tenancy, then the various Married Women's Property Acts may be seen as being incompatible with, and therefore sweeping away, the tenancy itself. "This view of the effect of the Married Women's Property Act—as abrogating entireties altogether—has been expressly followed in at least nine states: Alabama, Colorado, Illinois, Iowa, Maine, Minnesota, New Hampshire, South Carolina, and Wisconsin."[7]

Aside from the position that these acts effectively abolished tenancy by the entirety, two other general responses to the Married Women's Property Acts arose: (1) to reinterpret the tenancy without the husband's dominance and the wife's disability; or (2) to deny that the new acts had any impact on the old form of the tenancy. Most states reinterpreted the tenancy by either prohibiting control or alienation of the property by one spouse through unilateral action or by giving each spouse separate rights to control or alienate specific attributes of the property. The few jurisdictions that initially took the position that the Married Women's Property Acts did not impact the ancient attributes of tenancy by the entirety have now fallen into line with those states adopting the tenancy to reflect the equal rights of married women to exercise property rights.[8]

It remains to be seen how entireties will develop in response to domestic partnership legislation and/or developing case law recognizing same-sex civil unions. Entireties requires, of course, marriage as the "fifth unity" of the tenancy:

> [C]ommon law requires five 'unities' to be present: marriage—the joint owners must be married to each other; title—the owners must both have title to the property; time—they both must have received title from the same conveyance; interest—they must have an equal interest in the whole property; and control or possession—they both must have the right to use the entire property.[9]

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[4] *Id.* at 25. Although this male control was sweeping, "English equity courts early developed an institution of separate property for married women, which somewhat alleviated in specific instances the harsh results of the common law dominance by the husband—'admitting the doctrine that a married woman is capable of taking real and personally estate to her own separate and exclusive use, and that she has also an incidental power to dispose of it.'" *Id*. at 26 *quoting* JOSEPH STORY, EQUITY JURISPRUDENCE §§ 1378, 1402 (3d. ed. 1843).

[5] *See* Carrozzo, *supra* note 2, at 439-40. The Seneca Falls Declaration, for example, was published in 1848.

[6] Phipps, *supra* note 4, at 28.

[7] *Id.* at 29. Interestingly, England abolished tenancy by the entirety in 1925 by the Laws of Property Act in 1925. RICHARD R. POWELL, POWELL ON REAL PROPERTY, 52-54 (Michael A. Wolf, ed. 2008). A limited form of entireties tenancy was re-established for "homestead property" by statute in Illinois after the initial abolition. *See* Appendix.

[8] Massachusetts, for example, followed the rule that the "husband was the one" for lifetime control of the entireties property until reversed by statute in 1980. *See* D'Ercole v. D'Ercole, 407 F.Supp. 1377, 1382 (D. Mass. 1976). ("As was conceded [in an earlier case], the common law concept of tenancy by the entirety is male oriented. It is true that the only Massachusetts tenancy tailored exclusively for married persons appears to be balanced in favor of males."). See also Janet D. Ritsko, *Lien Times in Massachusetts: Tenancy by the Entirety after* Coraccio v. Lowell Five Cents Savings Bank, 30 NEW ENG. L. REV. 85 (1995) for a historical prospective on the late-developing acknowledgement of equal property rights for women in Massachusetts. Compare the Comment in the Appendix regarding a similar late statutory reversal of the male domination of entireties in Michigan.

[9] United States v. One Single Family Residence With Out Buildings Located at 15621 S.W. 209th Ave., Miami, Fla., 894 F.2d 1511, 1514 (11th Cir. 1990) (interpreting Florida law).

Under Vermont's civil union statute, parties to a civil union are able "to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for the purposes of a tenancy by the entirety)."[10] The New Jersey Tax Court recently held, however, that a valid Vermont civil union did not qualify a New Jersey same-sex couple to hold New Jersey property by the entireties.[11] How, or whether, the various states will accommodate entireties to the changing concepts of domestic relationships is uncertain. The early response appears to have similarities with the accommodation of the Married Woman's Property Acts and entireties a century and one-half ago.[12]

II. State Variations[13]

Those states reinterpreting tenancy by the entirety to accommodate the Married Women's Property Acts follow one of two basic patterns: (1) re-establishing the "oneness" of the tenancy so that neither spouse can act unilaterally; or (2) giving parity to the wife so that she also can alienate part of the tenancy during her lifetime. The survivorship element is generally maintained, even in the latter model. From an asset protection viewpoint, these states may be characterized as either "full bar" jurisdictions or "modified bar" jurisdictions. In full bar jurisdictions, a creditor of one spouse does not acquire an attachable interest in the entireties property. Conversely, in a modified bar jurisdiction, a creditor of one spouse enjoys some rights in the entireties property, but those rights must accommodate the non-debtor spouse's interest.

Most states retaining the tenancy are full bar jurisdictions, holding that both spouses must act together to alienate the property.[14] Hawaii was the last jurisdiction to examine the nature of the tenancy after the Married Women's Property Act, and it adopted a full bar approach in *Sawada v. Endo*:

> The effect of the Married Women's Property Acts was to abrogate the husband's common law dominance over the marital estate and to place the wife on a level of equality with him as regards the exercise of ownership over the whole estate. The tenancy was and still is predicated upon the legal unity of husband and wife, but the Acts converted it into a unity of equals and not of unequals as at common law. No longer could the husband convey, lease, mortgage or otherwise encumber the property without her consent. The Acts confirmed her right to the use and enjoyment of the whole estate, and all the privileges that ownership of property confers, including the right to convey the property in its entirety, jointly with her husband, during the marriage relation. They also had the effect of insulating the wife's interest in the estate from the separate debts of her husband.... Neither husband nor wife has a separate divisible interest in the property held by the entirety that can be conveyed or reached by execution.[15]

The *Sawada* court held that the husband and wife could convey their residence to their child free from the husband's judgment creditor. After enactment of the Hawaii Married Women's Property Act of 1888, therefore, the husband no longer had separate rights that could be subject to his sole debts.

Modified bar jurisdictions, on the other hand, permit a degree of creditor attachment of a debtor spouse's interest. In Oregon, for example, the tenancy is viewed as a tenancy in common with an indestructible right of survivorship. Thus, a creditor will have an interest in the rents and profits attributable to the debtor spouse but no right of partition. If the non-debtor spouse is the survivor, the lien is extinguished. If the debtor spouse is the survivor, the property can be sold to satisfy the lien.[16]

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[10] 15 VT. STAT. ANN. § 1204(e)(1) (West 2008).

[11] Hennefeld v. Township of Montclair, 22 N.J. Tax 166, 188-90 (2005). This decision was based, in part, on the more restrictive New Jersey Domestic Partnership Act.

[12] For example, Carrozzo, *supra* note 2, sets out various possible responses (abolition of the tenancy, altering the fifth unity to encompass civil unions, modification of the tenancy) which bear a striking resemblance to the responses of the various states to the Married Woman's Property Acts of the late 1800's. *Id.* at 455-65.

[13] This article's Appendix includes a comparative chart of those states that recognize tenancy by the entirety.

[14] *See* Appendix.

[15] Sawada v. Endo, 561 P.2d 1291, 1295 (Haw. 1977) (citations omitted).

[16] Brownley v. Lincoln County, 343 P.2d 529, 531 (Or. 1959); *see also* Hoyt v. American Traders, Inc., 725 P.2d 336, 337 n. 1 (Or. 1986).

In addition to the full bar/modified bar distinction, those jurisdictions recognizing tenancy by the entirety differ as to whether the tenancy may be established for holding personal property. Most jurisdictions permit personal property to be held tenants by the entirety:

> There has always been a controversy as to whether entireties doctrines had any proper application to mere personal property, which always could be disposed of absolutely by the husband [under common law]; but there can be no doubt that in a majority of the United States [entireties doctrines] were early and consistently applied in appropriate cases to marital co-ownership of any types of assets.[17]

Interestingly, even in full bar jurisdictions where the entireties doctrine applies to personal property, the entireties nature of a joint account is not necessarily destroyed if one spouse may draw unilaterally from that account.[18]

Although the various entireties jurisdictions follow two clear patterns, the variations jurisdiction by jurisdiction are pronounced enough to require that estate and/or asset protection planning involving entireties property be rooted in the law of the appropriate jurisdiction.[19] Given that many clients may own properties in multiple jurisdictions, the practitioner's task can be complicated. In sum, estate and asset protection planning involving entireties property must be jurisdiction specific.

III. Tenants by the Entirety and Bankruptcy

Generally, a debtor in bankruptcy can use state law creditor protection exemptions. As explained by the Third Circuit Court of Appeals:

> The Bankruptcy Code provides two alternative plans of exemption. Under § 522(b)(2), a debtor may elect the specific federal exemption listed in § 522(d) ("federal exemptions") or, under § 522(b)(3), may choose the exemptions permitted, inter alia, under state law and general (non-bankruptcy) federal law ("general exemptions").... Debtors may select either alternative, unless a state has "opted out" of the federal exemptions category.[20]

If the debtor uses the general exemptions, the entirety property is exempt to the extent permitted by the non-bankruptcy law; the entireties shield is respected "to the extent that such [entireties] interest… is exempt from process under applicable non-bankruptcy law."[21] The applicable non-bankruptcy law appears to be determined by the situs of real estate, not the domicile of the debtor. In *In re Holland*,[22] for example, the bankruptcy court used Florida law to fully exempt non-residential property located in Florida when the debtor's home state of Illinois would have denied exemption because the property was not a homestead.

In full bar states, of course, the property held by the entireties is immune from process and fully exempt if only one spouse is the debtor. Where, under applicable state law, the creditors of one spouse can reach the property, it is not exempt. The nature of applicable state law restrictions thus determines the degree of protection offered in bankruptcy:

> "[In Massachusetts] [t]he debtor's interest in her [statutory] tenancy-by-the-entirety is subject to attachment but not subject to levy or execution at this time and, so, the debtor's right to possession cannot be interfered with unless and until the property is sold, or debtor and her present spouse are divorced, or she survives her spouse, in which event the trustee will be free to enforce his interest in the debtor's real estate. The trustee has a real albeit contingent interest in the real estate, while the debtor has an exemption limited by the trustee's expectancy."[23]

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[17] Phipps, *supra* note 4, at 25; see also Appendix.

[18] *See, e.g.*, Beal Bank, SSB v. Almond & Associates, 780 So.2d 45, 62 (Fla. 2001) ("[T]he ability of one spouse to make an individual withdrawal from the account does not defeat the unity of possession so long as the account agreement contains a statement giving each spouse permission to act for the other.").

[19] Some even argue that the dissimilarities between those states that continue to recognize entireties are so pronounced that generalization is impossible. *See* POWELL, *supra* note 8, at 52-54.

[20] *In re* Brannon, 476 F.3d 170, 174 (3d Cir. 2007). If a state has opted out, the debtor must use the state exemptions.

[21] Bankruptcy Code, 11 U.S.C. § 522(3)(B) (West 2008).

[22] 366 B.R. 825 (Bankr. N.D. Ill. 2007).

[23] The Honorable Alan M. Ahart, *The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support Obligations After BAPCPA: Debtors Beware*, 81 AM. BANKR. L. J. 233, 243-244 (2007), *quoting In re* McConchie, 94 B.R. 245, 247 (Bankr. D. Mass. 1988). The discussion of Massachusetts law involves law as applied to a principal residence.

> Similarly, in Rhode Island a tenancy by the entirety is subject to attachment but not to levy and sale, which means that a debtor who chooses state exemptions can exempt entireties property to the extent that the debtor remains married or survives the non-debtor spouse. In Illinois, to the extent that a judgment creditor has a judicial lien against a debtor's contingent interests in tenancy by entirety property arising out of a judgment against the debtor, these interests may not be immune from process and therefore may not be exempt under § 522(b)(3)(b). Similarly, in Tennessee because a debtor's survivorship interest is not immune to execution, it remains in the bankruptcy estate even though the debtor's interest in tenancy by entirety property is otherwise exempt under Code § 522(b)(2)(3).[24]

Any exemption removes property from the bankruptcy estate: "An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor."[25] First, however, all property interests of the debtor come into such an estate, including a debtor's interest in property held as a tenant by the entirety.[26] Accordingly, a pre-petition transfer can cause financial disaster. The bankruptcy courts in a majority of jurisdictions have held that the trustee can avoid any pre-petition transfer of otherwise exempt property.[27] The fraudulent conveyance provision of the Bankruptcy Code[28] permits the debtor's interest in otherwise exempt entireties property that was transferred within two years of a bankruptcy petition to be returned to the bankruptcy estate. If returned, the property is likely no longer considered entireties property.[29]

If the debtor is not filing for bankruptcy voluntarily, the debtor is at risk of the creditor forcing involuntary bankruptcy within the avoidance period. Involuntary bankruptcy unravels an intra-spousal or third party transfer of entireties property. Involuntary petitioners, however, are not common:

> Congress has made it quite difficult for creditors to bring a successful involuntary bankruptcy petition.... Courts have been quite reluctant to grant involuntary bankruptcy petitions, interpreting the already strict statutory requirements of involuntary bankruptcy "in a manner which vastly complicates creditors' difficulties of proof and, therefore, increases the costs and risks associated with seeking bankruptcy relief...." Such decisions have made involuntary bankruptcy virtually useless to creditors seeking to collect from opportunistic debtors.[30]

Assuming a pre-petition transfer was not made, entireties property in a full bar jurisdiction will be exempted if none of the debts are joint debts: "A debtor's individual creditors [can] neither levy nor sell a debtor's undivided interest in the entireties property to satisfy debts owed solely by the debtor, because a

[24] *Id.* (citations omitted).

[25] Owen v. Owen, 500 U.S. 305, 308 (1991).

[26] Brannon, 476 F.3d at 174 (quoting Napotnik v. Equibank & Parkvale Savings Assoc., 679 F.2d 316, 318 (3d Cir.1982)); *In re* Ford, 3 B.R. 559, 568 (Bankr. D. Md. 1980) *aff'd*, 638 F.2d 14 (4th Cir. 1981) ("[E]ven property held to be exempt will initially become property of the estate and will remain in the estate until such time as the exemption is taken.").

[27] "The majority includes the Fourth, Sixth, Ninth, Tenth Circuits, lower courts in the Seventh and Eighth Circuits, and some lower courts in the First, Second, and Eleventh Circuits … The minority includes some lower courts in the First, Second and Eleventh Circuits." Dana Yankowitz, *"I Could Have Exempted It Anyway": Can a Trustee Avoid a Debtor's Prepetition Transfer of Exemptible Property?*, 23 EMORY BANKR. DEV. J. 217, 227 n.54, 55 (2006); *see also* Thomas E. Ray, *Avoidance of Transfers of Entireties Property—No Harm No Foul?*, 25 ABI J., Sept. 2006, at 12.

[28] 11 U.S.C. § 548. There are also additional provisions permitting avoidance by the trustee.

[29] *See* 11 U.S.C. § 522(g)(1)(A) (only involuntary transfers can be exempted); *In re* Swiontek, 376 B.R. 851, 865 (Bankr. N.D. Ill. 2007) ("A small number of courts that have analyzed this issue within the context of property transferred pre-petition out of a tenancy by the entirety estate, have permitted the trustee to avoid the transfer and have held that the property does not revert back into a tenancy by the entirety estate."); *In re* Paulding, 370 B.R. 11, 17-20 (Bankr. D. Mass. 2007) (holding that Chapter 7 discharge can be denied when the debtor spouse transfers entireties property to the non-debtor spouse and then reverses transfer before filing the petition); *In re* Goldman, 111 B.R. 230, 233 (Bankr. E.D. Mo. 1990) ("The parties are mistaken when they assume that the property is conveyed back to the Debtor and his wife as tenants by the entireties."); *In re* Rotunda, 55 B.R. 386, 388 (Bankr. W.D.Pa. 1985).

[30] Elijah M. Alper, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1932 (2007), *quoting* Lawrence Ponoroff, *Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute*, 65 IND. L.J. 315, 351 (1990) (other citations omitted).

debtor's interest in tenancy by the entireties property is exempt from process under [the applicable state law]."[31] Exemption may be available even if both spouses file a petition jointly; the determinative factor is the nature of the debts.[32]

However, if the individual debtor-spouse files for bankruptcy and he or she has a joint debt with the non-filing spouse, the rule is markedly different. Remember: entireties property is exempt to the extent that "such interest … is exempt from process under applicable non-bankruptcy law."[33] If one spouse files for bankruptcy and there are joint debts, the entireties property is not exempt to the extent of those joint debts.

The existence of joint debt permits the trustee to sell the entireties property under the Bankruptcy Code, section 363(h).[34] The power of sale permits the trustee to use the entireties property's equity to satisfy the joint creditors.[35] To the extent that entireties property exceeds the joint debt in value, however, such equity continues to be exempt.[36]

In modified bar jurisdictions that permit creditor attachment of one debtor-spouse's interest, the property may be in jeopardy of sale. The Code's power-of-sale provision gives the co-tenant who has not filed for bankruptcy procedural rights to object.[37] Typically, if the creditor would not be prejudiced, courts will not permit sale of entireties property.[38]

IV. *Drye and Craft*: Federal Tax Liens Trump State-law Rights

A. A Close Look at *Drye* and *Craft*

In *Drye v. United States*,[39] a unanimous U.S. Supreme Court held that federal tax liens against an heir attached to the inheritance regardless of any disclaimer filed by the heir. *Drye* later became the basis for *United States v. Craft*,[40] where the Court breached an entireties interest to satisfy a federal tax lien levied against one of the spouses.

Drye resolved the question of whether disclaiming an inheritance under state law prevents federal tax liens from attaching to that interest. In *Drye*, an insolvent heir validly disclaimed his inheritance under Arkansas state law.[41] The Government argued that, because a lien is imposed on any and all "property" or "rights to property" belonging to the taxpayer to satisfy tax debts owed, it was entitled to a lien on the heir's inheritance, disclaimer notwithstanding.[42]

In deciding the controversy, the Court looked "initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as "property" or "rights to property" within the compass of the federal tax lien legislation."[43] Justice Ginsburg expounded upon this "division of competence" between state and federal law: state law determines whether the taxpayer has a legally protected property right; federal law determines whether a lien can attach.[44] She used two telling examples, both dealing with insurance, to make her point. In the first situation, the taxpayer's right to the cash surrender value was exposed to the federal tax lien because the taxpayer (but not his ordinary creditors) could compel payment of the cash surrender value.[45] That right to the cash surrender value was "property" or a "right to property" created under state law. For federal tax lien purposes, the taxpayer's right to receive that value meant that the tax lien attached regardless of the state law that shielded the cash surrender value from creditors' liens. In the other

[31] *In re* Greathouse, 295 B.R. 562, 564 (Bankr. D. Md. 2003) (quoting *In re* Bell-Breslin, 283 B.R. 834, 837 (Bankr. D. Md. 2002)).

[32] Bunker v. Peyton, 312 F.3d 145, 152 (4th Cir. 2002).

[33] 11 U.S.C. § 522(3)(B).

[34] *See* 11 U.S.C. § 363(h).

[35] Greathouse, 295 B.R. at 565.

[36] *In re* Maloney, 146 B.R. 168, 171-72 (Bankr. W.D. Pa. 1992). Allowing the debtor-spouse's share of the entireties property to be available to joint creditors only once that interest becomes subject to § 363(h) has been criticized. *See, e.g.*, Lawrence Kalevich, *Some Thoughts on Entireties in Bankruptcy*, 60 AM. BANKR. L. J. 141 (1986) (arguing that the debtor-spouses' entire interest in the entireties property should be generally available for creditors). Some courts have applied the excess funds to individual creditors. Steven Chaneles, *Tenancy by the Entireties: Has the Bankruptcy Court Found a Chink in the Armor?*, 71 FLA. B. J., Feb. 1997, at 22, 24 & n.16.

[37] *See In re* Wickham, 127 B.R. 9, 10-11 (Bankr. E.D. Va. 1990).

[38] *See In re* Monzon, 214 B.R. 38, 48 (Bankr. S.D. Fla. 1997) ("[A] single oversecured joint debt will not trigger administration of [the entireties property]. However, the presence of an unsecured or undersecured joint debt will subject entireties property to administration by a Trustee…"); Gary Norton, *Sales and Co-owners: Cautionary Tales from the Cases*, 24 ABI J., Nov. 2005, at 22 (discussing the balancing test employed by the courts in determining whether to permit a sale under § 363(h)). In one case highlighted in Norton's article, *In re* Marks, the court found that § 363(h) could not apply without eviscerating the entire notion of a tenancy by the entirety. No. Civ. A. 00-524, 2001 WL 868667, at *3 (E.D. Pa. June 14, 2001). Other cases have been less protective of the notion of entireties or of the non-filing spouse.

[39] 528 U.S. 49 (1999).

[40] 535 U.S. 274 (2002).

[41] *See* 528 U.S. at 52.

[42] Internal Revenue Code ("I.R.C."), 26 U.S.C. § 6321(West 2008); *see also id.* at 54.

[43] *Id.* at 58.

[44] *Id.* at 58-59.

[45] *Id.*, discussing United States v. Bess, 357 U.S. 51, 56-57 (1958).

situation (the death benefit), the tax lien did not attach because the taxpayer did not have access to those funds: "By contrast, we also concluded, again as a matter of federal law, that no federal tax lien could attached to policy proceeds unavailable to the insured in his lifetime."[46]

In *Drye*, the heir had a "valuable, transferable, legally protected" property right to the inheritance at the time of his mother's death.[47] Rather than personally take this interest, the heir chose to channel his interest to close family members through the act of disclaiming. The state law "relation back" which produces the creditor protection does not inhibit the federal taxing authority:

> In sum, in determining whether a federal taxpayer's state-law rights constitute "property" or "rights to property," "the important consideration is the breadth of the control the taxpayer could exercise over the property." Drye had the unqualified right to receive the entire value of his mother's estate (less administrative expenses)... or to channel that value to his daughter. The control rein he held under state law, we hold, rendered the inheritance "property" or "rights to property" belonging to him within the meaning of [the IRC], and hence subject to the federal tax liens that sparked this controversy.[48]

The pivotal factor was the heir's control over effective enjoyment of the inheritance:

> The disclaiming heir or devisee, in contrast [to someone merely declining an offered inter vivos gift], does not restore the status quo, for the decedent cannot be revived. Thus the heir inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does. This power to channel the estate's assets warrants the conclusion that Drye held "property" or a "right to property" subject to the Government's liens.[49]

Craft held that property held as tenants by the entirety is subject to a federal tax lien against one spouse. *Craft* may be seen as an extension of *Drye* but, unlike *Drye*, it was a split decision with Justices Stevens, Scalia and Thomas dissenting. According to Justice O'Connor's opinion for the Court, whether the lien attaches to one spouse's interest in an entireties tenancy is ultimately a question of federal law. In analyzing this question, the Court followed the *Drye* approach: it looked first to state law to determine what rights a taxpayer had in the specific property the government sought; then it decided whether the taxpayer's rights qualified as property or rights to property under federal law.[50] Justice O'Connor concluded that the debtor-taxpayer had a sufficient number of presently-existing "sticks" in the "bundle" comprising the tenants by the entirety property right to give rise to an attachable interest.[51] Among others, these rights included rights of possession, of income, and of sale proceeds if the non-debtor spouse agreed to the sale.[52] Blackstone's legal fiction, ingrained by state law, that neither tenant had an interest separable from the other did not control the scope of the federal tax lien: "[I]f neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system."[53]

Justices Stevens, Scalia and Thomas dissented. Justice Thomas objected to what he saw as a federalization of the law governing rights to property:

> Before today, no one disputed that the IRS, by operation of § 6321, steps into the taxpayer's shoes, and has the same rights as the taxpayer in property or rights to property subject to the

[46] *Id.*

[47] *Id.* at 60.

[48] *Id.* at 61, *quoting* Morgan v. Commissioner, 309 U.S. 78, 83 (1940) (other citations omitted).

[49] *Id.* at 61, *citing* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 607-608 (1989). Two ACTEC Academic Fellows are cited in Drye: Adam Hirsch and Jeffrey Pennell. Adam Hirsch is cited generally to support the Court's holding (as seen above). Jeffrey Pennell is quoted for the basic proposition that a "qualified" disclaimer under I.R.C. § 2518 does not preclude the federal tax lien from attaching because the statute only applies for gift or estate transfer tax purposes. *See id.* at 57 n.3.

[50] 535 U.S. at 278.

[51] *Id.* at 285.

[52] *Id.* at 282, 283.

[53] *Id.* at 286.

> lien. I would not expand the nature of the legal interest the taxpayer has in the property beyond those interests recognized under state law.[54]

Justice Scalia added:

> [A] State's decision to treat the marital partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members, is no more novel and no more "artificial" than a State's decision to treat the commercial partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members.[55]

Drye turned on a determination of whether Mr. Drye could unilaterally elect to receive what would otherwise be a property right. A single co-tenant by the entireties, of course, is not in an analogous position because one co-tenant does not unilaterally control the enjoyment of that property right. Justice Thomas argued that federal tax liens should only be attachable to rights that a taxpayer actually personally possesses:

> That the Grand Rapids property does not belong to Mr. Craft under Michigan law does not end the inquiry, however, since the federal tax lien attaches not only to "property" but also to any "rights to property" belonging to the taxpayer. While the Court concludes that a laundry list of "rights to property" belonged to Mr. Craft as a tenant by the entirety, it does not suggest that the tax lien attached to any of these particular rights. Instead, the Court gathers these rights together and opines that there were sufficient sticks to form a bundle, so that "respondent's husband's interest in the entireties property constituted 'property' or 'rights to property' for the purposes of the federal tax lien statute.
>
> But the Court's "sticks in a bundle" metaphor collapses precisely because of the distinction expressly drawn by the statute, which distinguishes between "property" and "rights to property." The Court refrains from ever stating whether this case involves "property" or "rights to property" even though § 6321 specifically provides that the federal tax lien attaches to "property" and "rights to property" "belonging to" the delinquent taxpayer, and not to an imprecise construct of individual rights in the estate sufficient to constitute "property" or "rights to property" for the purposes of the lien.
>
> Rather than adopt the majority's approach, I would ask specifically, as the statute does, whether Mr. Craft had any particular "rights to property" to which the federal tax lien could attach. He did not. Such "rights to property" that have been subject to the § 6321 lien are valuable and "pecuniary," i.e., they can be attached, and levied upon or sold by the Government. With such rights subject to lien, the taxpayer's interest has ripen into a present estate of some form and is more than a mere expectancy, and thus the taxpayer has an apparent right to channel that value to another. In contrast, a tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other's indestructible right of survivorship. This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse.[56]

B. The *Craft* Aftermath

That the tax lien attaches to the debtor-tax payer's entireties interest does not sever the tenancy

[54] *Id.* at 291-92 (quotations and citations omitted).
[55] *Id.* at 289.
[56] *Id.* at 294-98 (quotations and citations omitted).

automatically. It permits the Internal Revenue Service ("IRS") to either (i) administratively seize and sell the taxpayer's interest or (ii) foreclose the federal tax lien against the entireties property. The administrative option is problematic for the IRS:

> Because of the nature of the entireties property, it would be difficult to gauge what market there would be for the taxpayer's interest in the property. The amount of any bid would in all likelihood be depressed to the extent that the prospective purchaser, given the rights of survivorship, would take the risk that the taxpayer may not outlive his or her spouse. In addition, a prospective purchaser would not know with any certainty if, how, and to the extent to which the rights acquired in an administrative sale could be enforced … Levying on cash and cash equivalents held as entireties property does not present the same impediments as seizing and selling entireties property.[57]

The most likely lien enforcement procedure is foreclosure.[58] Foreclosure is supervised by a court under Internal Revenue Code ("IRC") section 7403 and any individual with an interest in the property must be joined and given an opportunity to be heard. The court may order sale of the whole property and then distribute the sale's proceeds as it sees fit, considering the parties' interests and that of the Government.[59] The value of each spouse's interest is an issue of fact. This exchange from *Craft*'s oral argument is illustrative:

> Question (by the Court): "But in your review, you always value the taxpayer's interest at 50 percent?"
>
> Answer (by Mr. Jones): "No, I think in the Rodgers—well, if the property's been sold, yes. If the property hasn't been sold, and we're talking about in a foreclosure context, I believe the Rodgers court goes through the example of the varying life expectancies of the two tenants, and which one—and I believe what the Court in Rodgers said was that each of them should be treated as if they have a life estate plus a right of survivorship, and the Court explains how that could well—I think in the facts of Rodgers resulted in only 10 percent of the proceeds being applied to the husband's interest and 90 percent being retained on behalf of the spouse, but—"[60]

Craft did not address specifically how the debtor spouse's interest should be valued. *Rodgers*, the case referenced above, involved the judicial sale to enforce federal tax liens against a homestead property where a non-debtor spouse also held an interest.[61] In that case, the court ran calculations "only for the sake of illustration" that assumed the protected interest was the same as a life estate interest. Based upon calculations of the terminated interest (the life interest) amount, a substantial part of the sales proceeds should be allocated to the non-debtor spouse (89% for a 50 year old). This "illustration," of course, focused on fully compensating the non-delinquent spouse for his or her potential loss without regard to a full valuation of the delinquent spouse's property interest.

Courts have not followed the *Rodgers* approach when applying *Craft*. A few courts have endorsed the use of comparable life expectancies.[62] Most courts, however, simply split the proceeds in half. In *Popky v. United States*,[63] the Third Circuit Court of Appeals relied upon the equal rights each spouse has to the "bundle of sticks" that constitutes entireties property to support a fifty percent-fifty percent split. It also relied upon "sound policy" for such an approach to valuation, finding that "an equal valuation is far simpler and less speculative" than the valuation based on life expectancies.[64]

By its terms, *Craft* is limited to federal tax cases. To quote one case, "*Craft* gives no indication

[57] I.R.S. Notice 2003-60, 2003-39 I.R.B. (Sept. 29, 2003), *available at* http://www.irs.gov/irb/2003-39_IRB/ar13.html.

[58] *See* Steve R. Johnson, *Why Craft Isn't Scary*, 37 REAL PROP. PROB. & TR. J. 439, 473-77 (2002).

[59] I.R.C. § 7403(c).

[60] Transcript of Craft Oral Argument 15. "Rodgers" refers to United States v. Rodgers, 649 F.2d 1117 (5th Cir. 1981), *rev'd*, 461 U.S. 677 (1983) and Ingram v. Dallas Dep't of Hous. & Urban Rehab, 649 F.2d 1128 (5th Cir. 1981), *vacated*, 461 U.S. 677 (1983).

[61] 461 U.S. at 698-99.

[62] *See In re* Murray, 318 B.R. 211, 214 (Bankr. M.D. Fla. 2004).

[63] 419 F.3d 242, 245 (3d. Cir. 2005).

[64] *See also In re* Estate of Johnson, 355 F. Supp.2d 866, 870 (E.D. Mich. 2004); *In re* Gallivan, 312 B.R. 662, 666 (Bankr. W.D. Mo. 2004).

that the reasoning therein should be extended beyond federal tax law."[65] Although section 544 of the Bankruptcy Code accords a trustee the rights and powers of a hypothetical "creditor that extends credit to the debtor at the time of the commencement of the case,"[66] courts have declined to extend such rights and powers to a trustee based on the Government being such a hypothetical creditor.[67] In refusing to extend *Craft*, courts reject empowering bankruptcy trustees to use the Bankruptcy Code's "strong arm clause" to get at entireties property in non-tax cases. *Craft* has been extended, however, to fines and forfeitures arising from federal criminal cases: "Although *Craft* only dealt with tax liens, Congress has unequivocally stated that criminal fines are to be treated in the same fashion as federal tax liabilities."[68]

If the federal tax lien is not acted upon, and one spouse dies, the property goes to the survivor either free of the lien or not, depending on who is the survivor:

> When a taxpayer dies, the surviving non-liable spouse takes the property unencumbered by the federal tax lien. When a non-liable spouse predeceases the taxpayer, the property ceases to be held in a tenancy by the entirety, the taxpayer takes the entire property in fee simple, and the federal tax lien attaches to the entire property.[69]

In *Craft*, the property was quitclaimed to the non-debtor spouse after the debtor spouse incurred the tax lien. The lower courts held that no fraudulent conveyance was involved because no lien could attach. This point was not preserved on appeal. Justice O'Connor makes clear, however, that this issue will be present in future entireties tenancy cases involving federal tax liens: "Since the District Court's judgment was based on the notion that, because the federal tax lien could not attach to the property, transferring it could not constitute an attempt to evade the Government creditor, in future cases the fraudulent conveyance question will no doubt be answered differently."[70]

V. Planning in Full Bar Jurisdictions: Post Judgment Transfers and/or Disclaimers in Full Bar Jurisdictions

Generally, except in *Craft* situations, the full bar jurisdictions permit a debtor spouse to convey the entirety property to the non-debtor spouse or for both spouses to transfer the property to third persons without running afoul of the fraudulent conveyance statute.[71] The planning implication is obvious: Married individuals with exposure to liability should hold as much of their property as possible by the entireties.[72] Once liability against one spouse is triggered, the at-risk spouse may transfer the property to the non-debtor spouse.[73] In *Watterson v. Edgerly*,[74] for example, a husband had a judgment lien filed against him but not against his wife. The husband transferred his interest in their entirety property to his wife for no consideration.[75] The wife thereupon signed a will containing a testamentary spendthrift trust for the benefit of her husband, and died shortly thereafter.[76] The Maryland Court of Special Appeals upheld the conveyance of the real estate despite the judgment lien against the husband:

> When, as here, a husband and wife hold title as tenants by the entireties, the judgment creditor of the husband or of the wife has no lien against the property held as entireties, and no standing to complain of a conveyance which prevents the property from falling into his grasp.[77]

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[65] *In re* Ryan, 282 B.R. 742, 750 (Bankr. D.R.I. 2002); *see also* Musolina v. Sinnreich, 391 F.3d 1295, 1298 (11th Cir. 2004); *In re* Kelly, 289 B.R. 38, 43-44 (Bankr. D. Del. 2003).

[66] 11 U.S.C. § 544(a)(1).

[67] Schlossberg v. Barney, 380 F.3d 174, 180-82 (4th Cir. 2004); *In re* Greathouse, 295 B.R. 562, 565-67 (Bankr. D. Md. 2003).

[68] *In re* Hutchins, 306 B.R. 82, 91 (Bankr. D. Vt. 2004) (drug trafficking); *see also* United States v. Fleet, 498 F.3d 1225 (11th Cir. Fla. 2007) (wire fraud, money laundering, etc.); United States v. Godwin, 446 F. Supp. 2d 425 (E.D.N.C. 2006) (embezzlement from federally insured bank). In Maryland, by contrast, the court has refused to permit the sale of a truck used in drug trafficking when the vehicle was held tenants by the entirety. This was under the state forfeiture statute and it was pre-Craft. Maryland v. One 1984 Toyota Truck, 533 A.2d 659 (Md. 1987).

[69] I.R.S. Notice 2003-60.

[70] Craft, 535 U.S. at 289 (citations omitted).

[71] *See* Martin J. McMahon, Annotation, *Validity and Effect of One Spouse's Conveyance to Other Spouse of Interest in Property Held as Estate by the Entireties*, 18 A.L.R. 23, § 8 (5th ed. 1994).

[72] Individuals who typically have liability exposure include physicians, lawyers, public accountants, and business executives with Sarbanes-Oxley exposure.

[73] See above, however, for the danger of making such a conveyance before the filing of a voluntary or involuntary petition in bankruptcy.

[74] 388 A.2d 934 (Md. 1978).

[75] *Id.* at 937.

[76] *Id.*

[77] *Id.* at 939 (citation omitted); *see also* Donvito v. Criswell, 439 N.E.2d 467, 473-74 (Ohio 1982); L&M Gas Co. v. Leggett, 161 S.E.2d 23, 27-28 (N.C. 1968).

This technique is not restricted to intra-spousal transfers. In *Sawada v. Endo*,[78] a judgment was rendered against a husband for an automobile tort. He and his wife conveyed their entireties property to their children. The Supreme Court of Hawaii found that the conveyance could not be a fraudulent one because the creditors had no attachable interest.[79]

Thus, as illustrated above, as long as bankruptcy can be postponed or avoided, transferring an entireties tenancy with only a single debtor-spouse can move the property free of the debt. This is clearly an important benefit of the entireties form of ownership. From an asset protection point of view, entireties ownership is a valuable tool that ought to be preserved.

Using the flexibility afforded by the Internal Revenue Code section 2518, an estate plan can be crafted anticipating that a qualified disclaimer will be used by a surviving spouse to fund a credit shelter or qualified terminable interest property ("QTIP") trust.[80] Under the Internal Revenue Service's 1997 regulations, disclaimer of the "survivorship interest" in entirety property is permitted within nine months of death (not the creation of the interest).[81] This provides an opportunity to preserve the asset protection qualities of entireties without unduly compromising estate planning.[82]

A creditor problem may exist at the first spouse's death. If the debtor spouse predeceases the non-debtor spouse, no action is necessary to have the property pass to the survivor lien free if the property is held as entireties. If the debtor spouse survives, however, a disclaimer may be useful to avoid the lien on that spouse's portion of the entirety property.

Other than for federal tax liens, a disclaimer is typically not a transfer for fraudulent conveyance purposes in most jurisdictions.[83] As explained by one state's highest court:

> A review of the jurisprudence of other states shows that it is the majority view that a renunciation under the applicable state probate code is not treated as a fraudulent transfer of assets under the UFTA [Uniform Fraudulent Transfers Act], and creditors of the person making a renunciation cannot claim any rights to the renounced property in the absence of an express statutory provision to the contrary.[84]

In *Pauw v. Agee*,[85] a federal district court permitted a debtor to disclaim his inheritance but then rent the property back from his brother who received the property through operation of the disclaimer: "This view [that a disclaimer will defeat the judgment against the debtor-disclaimant] corresponds with the majority view that a creditor cannot prevent a debtor from disclaiming an inheritance."[86] New York also follows the majority rule. In *Estate of Oot*,[87] the court upheld the

[78] 561 P.2d 1291 (Haw. 1977). This case is quoted at length above in section II on state variations.

[79] *Id.* at 1295-97.

[80] I.R.C. § 2518(b)(4).

[81] I.R.S. Treas. Reg. § 25.2518-2(c)(4)(i) (West 2008). A special rule, however, applies to joint bank accounts between spouses "if a transferor may unilaterally regain the transferor's own contributions without the consent of the other cotenant…". *Id.* at (c)(4)(iii). For such joint tenancies, the surviving joint tenant may not disclaim any portion of the account attributable to consideration furnished by that surviving joint tenant. As noted in Section II on state variations, above, a joint account subject to the order of either spouse may nevertheless be an entireties account. Presumably such an account would fail the definition of "joint account" contained in these regulations.

[82] To backstop the plan, each spouse should create a durable power of attorney authorizing another person to disclaim on his or her behalf in the case that he or she is incompetent at the time of their spouse's death. Also, of course, the trust receiving the disclaimed property cannot permit a power of appointment to the disclaiming spouse. The retention of entireties property until the death of one spouse necessarily involves a high degree of trust between spouses; each spouse must be certain that the survivor will trigger the creditor shelter or QTIP trust if appropriate. Increasingly estate plans are being designed to give the surviving spouse such control over his or her destiny. *See* Jeffrey N. Pennell, *Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick, Anymore*, 34 ACTEC J., SUMMER 2008, at 2; *see also* Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313 (1996).

[83] Neither the 2002 Uniform Disclaimer Property Interest Act ("UDPIA") nor the earlier uniform acts directly address the issue of a disclaimer by an insolvent disclaimant. All of the uniform acts relied on the law of each jurisdiction to sort out the issue. *See* Adam J. Hirsch, *Revisions In Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U.L. REV. 109 (2001). Separate considerations are also involved in Medicaid planning. *See* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 13 cmt (amended 2006). Nothing in the general discussion herein on disclaimers is meant to address Medicaid planning issues.

[84] Essen v. Gilmore, 607 N.W.2d 829, 835 (Neb. 2000). For a summary of the treatment of disclaimers in other states, *see also In re Bright*, 241 B.R. 664, 671-72 (B.A.P. 9th Cir. 1999) (upholding a pre-petition disclaimer). In contrast, post-petition disclaimers will not work. *In re* Schmidt, 362 B.R. 318 (Bankr. W.D. Tex. 2007).

[85] No. 2:98-2318-23, 2000 U.S. Dist. LEXIS 22323 (D.S.C. 2000).

[86] *Id.* at *19.

[87] 408 N.Y.S.2d 303 (1978).

renunciation of a legacy regardless of the disclaimant's creditors' claims: "It is with no small degree of reluctance that the court arrives at this decision. However, until the legislature in its wisdom provides some statutory vehicle for protecting creditors against frustration of their claims, unfortunate results may again occur."[88]

A minority of states hold that a disclaimer is a fraudulent transfer. Pennsylvania courts, for example, have held a disclaimer to be a fraudulent transfer. "While a solvent legatee may freely renounce and refuse a gift or legacy, an insolvent legatee may not do so since his renunciation would constitute a fraudulent conveyance, void as to creditors under section 4 of the Uniform Fraudulent Conveyance Act of May 21, 1921."[89] Several states have statutes that prohibit disclaimers by insolvent heirs. Disclaimers are prohibited in Florida, for example, when "the disclaimant is insolvent when the disclaimer becomes irrevocable."[90]

The 2002 rendition of the Uniform Disclaimer of Property Interests Act ("UDPIA") bars disclaimers if, before the disclaimer becomes effective, the disclaimant "voluntarily assigns, conveys, encumbers, pledges or transfers the interest sought to be disclaimed."[91] Earlier versions of the uniform acts had similar language barring disclaimers after an encumbrance but without the "voluntary" element. Interpreting a disclaimer act without the "voluntarily" aspect, one state court barred a disclaimer when the disclaimant was subject to a prior lien. After deciding that the act's encumbrance provision trumped its "relation back"[92] provision, the Alabama Supreme Court held that a creditor's lien against the disclaimant rendered the disclaimer ineffective.[93] The court focused on the heir's direct interest in estate property:

> When John Thomas Bigham died intestate on June 25, 1984, the legal title to a one-half interest in his real property vested eo instante in Bobby Bigham; however, it vested subject to the statutory power of the administratrix to take possession of it and obtain an order to have it sold for payment of the debts of his father's estate.[94]

In *Pennington*, a judgment creditor had perfected her lien against all of the disclaimant's property before the disclaimant's father died; therefore, the lien acted as an encumbrance of the disclaimant's share. Under the circumstances of that case, a disclaimer after the attachment of the lien constituted a fraudulent conveyance.[95]

Similarly, *In re Kalt's Estate*,[96] the California Supreme Court found a disclaimer to violate the fraudulent conveyance act. *Kalt's Estate* is important because it served as the basis of many other decisions constituting the minority view. California, however, subsequently legislatively reversed *Kalt's Estate*:

> The few states which appear to follow the minority view that a disclaimer can constitute a fraudulent conveyance base their holdings on the California case of *In re Kalt's Estate*…The holding of *In re Kalt's Estate*, however, was overruled by the California legislature when it enacted a statute providing specifically that a disclaimer is not a fraudulent transfer. See Cal. Prob. Code § 283 (West 1991).[97]

In sum, given the variations among the states, no universal default planning rule can be applied. Nevertheless, in full bar states that do not treat a disclaimer as a fraudulent conveyance, preserving, or indeed creating, entireties ownership coupled with estate planning to be triggered by a disclaimer at the first death, should become a default recommendation.

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[88] *Id.* at 306.

[89] Est. of Centrella, 20 Pa. D.&C.2d 486, 490 (1960) (citations omitted).

[90] FLA. STAT. ANN. 739.402(2)(d) (West 2008); *see also* MINN. STAT. ANN. § 525.532(6) (West 2008).

[91] UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 13(b)(2).

[92] The "relation back" doctrine of earlier versions of the UDPIA has been replaced in the new Act. "The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death." UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 6(b)(1). The Comment to that section states: "This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean." The term "relation back" is used in the Article as short-hand for the revised section.

[93] Pennington v. Bigham, 512 So.2d 1344 (Ala. 1987).

[94] *Id.* at 1345-46.

[95] *Id.* at 1347. The 2002 amendments to the UDPIA, of course, adds "voluntary" to the list of actions barring a disclaimer. This addition "reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar." UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 13 cmt. Maryland, for example, adopted this provision of the UDPIA and added that "Creditors of the disclaimant have no interest in the property disclaimed." MD. CODE ANN., EST. & TRUSTS § 9-202(f)(2) (West 2008).

[96] 108 P.2d 401 (Cal. 1940).

[97] Pauw, 2000 U.S. Dist. LEXIS 22323 at *20.

APPENDIX

Asset Protection Variations Among Jurisdictions Recognizing Tenancy by the Entirety

Alaska	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Levy and sale permitted. Partition may be forced.
	Type of Property: Real and personal property. Alaska Stat. § 34.15.140 recognizes tenants by the entirety in real property. See *Faulk v. Est. of Haskins*, 714 P.2d 354 (Alaska 1986), recognizing tenants in the entirety in personal property.
	Comment: Alaska Stat. § 09.38.100(a) provides that a creditor of one spouse "may obtain a levy on and sale of the interest" of the debtor spouse. The creditor may force partition or severance of the non-debtor spouse's interest. This is subject, however, to other exemptions such as the homestead exemption. Alaska Sta. §§ 09.38.100(a)-(b).
Arkansas	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Creditor may execute but may not defeat non-debtor spouse's right of survivorship interest. Creditor gets one-half of rents and profits but cannot displace non-debtor spouse.
	Type of Property: Real and personal property. "[O]nce property, whether personal or real is placed in the names of persons who are husband and wife, without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entireties …" *Sieb's Hatcheries, Inc. v. Lindley*, 111 F.Supp. 705, 716 (W.D. Ark. 1953). Ark. Code § 23-47-204 lists entireties as one of the accounts banks shall offer under the multiple party account rules.
	Comment: "Execution against a spouse's interest in a tenancy by the entirety has long been permitted even though partition has not. [Earlier cases have] affirmed the principle that property owned as husband and wife as tenants by the entirety may be sold under execution to satisfy a judgment against the husband, subject to the wife's right of survivorship … [A] purchaser of the interest of one tenant by the entirety cannot oust the other tenant from possession, and can only claim one-half of the rents and profits. The remaining tenant is not only entitled to possession plus one-half of the rents and profits, but the right of survivorship is not destroyed or in anywise affected." *Morris v. Solesbee*, 892 S.W.2d 281, 282 (Ark. Ct. App. 1995) (citations omitted).
Delaware	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: Not subject to attachment.
	Type of Property: Real and personal property. See *Rigby v. Rigby*, 88 A.2d 126 (Del. Ch. 1952), on cattle, and *Widder v. Leeds*, 317 A.2d 32 (Del. Ch. 1974), on partnership interest. "It has likewise been held that, in the absence of proof to the contrary, a joint bank account opened in the conjunctive form in the name of a husband and wife may create a tenancy by the entireties, and this status is not altered by the fact that either may withdraw the funds therefrom." *Widder*, 317 A.2d at 35 (citations omitted).
	Comment: Delaware courts have stated, at various times, that a judgment against one spouse does not create a lien on entireties property under Delaware law: "It is settled in

Delaware continued	Delaware that a creditor of one spouse, such as Ms. Johnson, may not place a lien on real property held as tenants by the entireties. *See Steigler v. Insurance Co. of North America*, 384 A.2d 398 (1978) ("interest of neither [husband nor wife] can be sold, attached or liened 'except by [their] joint act'"); *Citizens Savings Bank, Inc. for the Use of Govatos v. Astrin*, 61 A.2d 419 (1948)… so the creditors of one spouse cannot reach the interest the debtor holds in the estate." *Johnson v. Smith*, No. Civ. A. 13585, 1994 WL 643131, *2 (Del. Ch. Oct. 31, 1994). In *Mitchell v. Wilmington Trust Co*., 449 A.2d 1055 (Del. Ch. 1982), aff'd 461 A.2d 696 (Del. 1983), a husband obtained a mortgage from a bank by fraudulently bringing a woman to execute loan settlement documents that, in fact, was not his wife. The court held that the forgery failed to operate to bind the tenant by entirety property. Before the wife received notice of the forgery, the husband transferred the title to the wife as a marital settlement. The transfer was not held a fraudulent transfer because the wife lacked knowledge of the fraudulent transfer (being then unaware of the purported lien) and paid valid consideration (the release of her husband's marital obligations). The court held that the bank acquired an inchoate lien in the property which became extinguished upon the husband's transfer of the property to his wife without knowledge and for valid consideration. Given that no lien attaches in any event, there should have been no reason for the court to reach the fraudulent conveyance aspect of the case. In *Wilmington Savings Fund Society v. Kaczmarczyk*, No. Civ. A. 1769-N, 2007 WL 704937 (Del. Ch. March 1, 2007), the Chancery Court found that a post-judgment transfer by the debtor husband to his non-debtor wife violated the fraudulent conveyance act. As opposed to *Mitchell*, the Kaczmarczyk court held that the transfer, while purportedly made pursuant to the divorce discussions, did not include fair consideration because the parties reconciled. Arguably, neither case should have involved an examination of the fraudulent conveyance statute. These cases necessarily raise a cautionary note as to whether a lien attaches.
District of Columbia	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: Not subject to attachment.
	Type of Property: Real and personal property. See *Morrison v. Potter*, 764 A.2d 234 (D.C. 2000), where a joint checking account was presumed to be held by tenants by the entirety despite the right, under the account agreement, of either spouse to withdraw: "[C]ourts have not interpreted the unilateral right of a spouse to withdraw funds as an alienation of the marital property. Instead, '[w]here a deposit is made payable to either spouse, agency or authority exists by implication … Indeed, with respect to a joint bank account held by a husband and wife, each spouse acts as the other spouse's agent, and both have properly consented to the other spouse's withdrawals in advance, thus satisfying the non-alienation requirement of a tenancy by the entireties" (citations omitted).
	Comment: In *Est. of Wall*, 440 F.2d 215 (D.C. 1971), the husband died holding a tenant by the entirety interest in a fund. The husband's creditors unsuccessfully sought the estate's "interest" in the fund: "[T]he full complement of common law characteristics of co-tenancy by the entireties is preserved. A unilaterally indestructible right of survivorship, an inability of one spouse to alienate his interest, and, importantly for this case, a broad immunity from claims of separate creditors remain among its vital incidents." *Id*. at 219. In *American Wholesale Corp. v. Aronstein*, 10 F.2d 991 (1926), the husband's transfer of his interest in entireties property to his wife was held not to be a fraudulent conveyance because the entireties property was not subject to a lien by his judgment creditors.
Florida	Type of Bar: Full.

Florida continued	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. See *Beal Bank, SSB v. Almand & Assoc.*, 780 So.2d 45 (Fla. 2001), announcing a presumption in favor of entireties of joint bank account unless the signature card specifically disclaims a tenancy by the entireties: "[A]s we have explained, the ability of one spouse to make an individual withdrawal from the account does not defeat the unity of possession so long as the account agreement contains a statement giving each spouse permission to act for the other." This presumption, that jointly owned property held by a married couple is entireties, is rebuttable. *In re Hinton*, 378 B.R. 371 (Bankr. M.D. Fla. 2007).
	Comment: In *Passalino v. Protective Group Securities*, 886 So.2d 295 (Fla. 2004), husband and wife owned rental property as tenants by the entirety. They sold the property and the proceeds were held by their attorney intended as a deposit on another tenants by the entirety property. The fund retained its tenant by the entirety characteristics and was not subject to the judgment solely against the husband. In *Hunt v. Covington*, 200 So. 76 (Fla. 1941), the Florida Supreme Court described the attributes of tenant by the entirety: "It is not subject to execution for the debt of the husband. It is not subject to partition; it is not subject to devise by will; neither is it subject to the laws of descent and distribution."
Hawaii	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. Haw. Rev. Stat. § 509-2 provides that land "or any other type of property" may be held tenants by the entirety. See *Traders Travel International, Inc. v. Howser*, 753 P.2d 244 (Haw. 1988), holding that the clear and unambiguous language of the signature card of "joint account" did not suggest entireties. That children were additional joint owners further rebutted any indication of entireties ownership.
	Comment: In *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), the husband was a judgment debtor due to a motor tort award against him. He and his wife subsequently transferred tenant by the entirety property to their sons. The Hawaii Supreme Court found that no lien attached to husband's interest because he had no separate property interest in the property. Thus, the estate was not subject to the husband's sole debt.
Illinois	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: No attachment to "homestead" entireties property.
	Type of Property: Homestead real property only; see comment below for further explanation.
	Comment: The tenancy was re-established in Illinois by statute and limited to homestead property. 765 ILCS § 1005/1c. By statute, 735 Ill. Comp. Stat. § 5/12-112, the debtor of one spouse cannot act against homestead entireties property. "Illinois stopped recognizing common law tenancy by the entirety in 1861 when married women's law were first adopted. These laws recognized that women enjoyed rights independent of their husbands. In 1989, the Illinois General Assembly enacted a statute creating a tenancy by the entirety applicable only to 'homestead property' held by husbands and wives 'during coverture.'" *E.J. McKernan co. v. Gregory*, 643 N.E.2d 1370, 1373 (Ill. App. 1994).
Indiana	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.

Indiana continued	Type of Property: Real property and personal property "directly derived from real estate held by [tenants by the entirety], as crops produced by cultivation of lands owned by entireties or proceeds arising from sale of property (i.e., real estate) so held." *Rhodes v. Indiana Nat'l Bank*, 544 N.E.2d 179, 180 (Ind. 1989) (holding that the personal property exception is very narrow so that rents are not subject to tenants by the entireties protection). The limitation to real property or to personal property directly derived from it produces fine distinctions. In *Diss v. Agri Business Int'l*, 670 N.E.2d 97 (Ind. 1996), the debtor husband transferred rental property to the wife and the transfer was set aside as a fraudulent conveyance because the rental income was not "personal property directly derived" from the realty. By statute, Ind. Code § 34-55-10-2(c)(5), entireties real estate is exempt from sale for the debt of one spouse.
	Comment: In *Myler v. Myler,* 210 N.E.2d 446 (Ind. App. 1965), the husband owed child support arrearage from his first marriage. The husband's mother subsequently transferred real estate to the husband and his second wife. The court held that the husband's interest was not subject to his individual debts. There was no showing that he transferred his sole funds to acquire the property so no fraudulent conveyance was involved.
Kentucky	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Attachment only on the contingent survivorship interest.
	Type of Property: Real and personal property. "It is recognized in this state that a person may by depositing his own money in the names of himself and another create the equivalent of a tenancy in common or a tenancy by the entirety, depending upon his intent." *Saylor v. Saylor*, 389 S.W.2d 904, 905 (Ky. 1965). *Saylor* held that the conjunctive "and" is presumed to create tenancy in common while the disjunctive "or" created a presumption of entireties.
	Comment: In *Hoffmann v. Newell*, 60 S.W.2d 607, 613 (Ky. 1932) the court permitted the sale of the husband's contingent survivorship interest subject, however, to the wife's right of life time enjoyment and her survivorship right: "We are of the opinion that, as the statute declares this contingent interest of the husband to be subject to sale for the judgment creditor's debt, he takes the interest acquired upon its sale, subject only to the defeasance its very contingent nature demands, or its destruction through the wife's survivorship of his judgment debtor." In *Peyton v. Young*, 659 S.W.2d 205 (Ky. 1983), a husband, but not the wife, mortgaged the entirety property. He subsequently transferred his interest to his wife. The court held that one-half interest carried with it the mortgage. He subsequently murdered his wife then committed suicide. The court treated the deaths as simultaneous and permitted the mortgage to be satisfied out of his one-half interest. If she had indeed survived him, however, the debt would have effectively extinguished because the right of the survivorship is seen as a core element of tenants by the entirety.
Maryland	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. *Bruce v. Dyer*, 524 A.2d 777 (Md. 1987), evidences that entireties are favored by the law. *See also Diamond v. Diamond*, 467 A.2d 510 (Md. 1983) ("It is well established that this Court recognizes that a tenancy by the entireties may be created in personal property.")

Maryland continued	Comment: *Watterson v. Edgerly*, 388 A.2d 934 (Md. App. 1978) held that a creditor "has no standing to complain" when the debtor husband transferred all of his interest in a residence to his wife because it was held tenants by the entirety. In that case, the wife then provided that the residence go by Will to a spendthrift trust for husband's benefit. The wife died 61 days after the transfer of the real estate to her. The intent to create entireties property, coupled with the four unities, causes the tenancy to be created. *Cruickshank-Wallace v. Co. Banking & Trust Co*., 885 A.2d 403 (Md. App. 2005). See, however, *In re Pernia*, 165 B.R. 581 (Bankr. D. Md. 1994), where the Bankruptcy Court held that the account designation trumped intent. In that case, proceeds from the sale of entireties property was used to acquire U.S. Treasury EE Bonds. The bonds were titled as held husband "or" wife. Treasury regulations stated that holding the bonds as such made them subject to the order of either spouse. The court found that the EE Bonds were not entirety property under Maryland law: "Both husband and wife are essential parties to an effective transfer of property held as tenants by the entirety." *Id*. at 582. The federal regulations governing the account holdings were found to preempt "all laws and court decisions" because of federal preemption. *Pernia* was wrongly decided to the extent it claims to make a general pronouncement of Maryland law. Indeed, in *In re Breslin*, 283 B.R. 834 (Bankr. D. Md. 2002), the court stated that the *Pernia* result was "only because" the federal regulations determined ownership and referred to *Brewer v. Bowersox*, 48 A. 1060 (Md. 1901), for the proposition that when an account is held disjunctively but only payable to the two spouses, but subject to the order of either, an entireties account is created. Entireties exists if the couple so intends and the unities coincide, regardless of the nature of the account. See *Cruickshank-Wallace*, 885 A.2d at 413, *Diamond*, 467 A.2d 510; *M. Lit, Inc. v. Berger*, 170 A.2d 303 (Md. 1961). There is also a presumption that property purchased from the proceeds of entireties property retains its character. *Tait v. Safe Deposit & Trust Co. of Baltimore*, 70 F.2d 79 (4th Cir. 1934) (interpreting Maryland law).
Massachusetts	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Lien attaches but no execution if principal residence, otherwise may sell debtor's share.
	Type of Property: Real and personal property. After entireties property was condemned in *Ronan v. Ronan*, 159 N.E.2d 653 (Mass. 1959), the court held that the proceeds belonged to both the husband and wife. Under pre-1980 law, the husband was entitled to the income during their joint lives, and upon the death of either, the survivor was entitled to all of it.
	Comment: Before a statutory fix, Massachusetts held to the "husband was the one" rule under common law. Therefore, the husband's creditors could take possession of the property as long as the husband debtor lived, subject to the wife's right of survivorship. *Pray v. Stebbins*, 4 N.E. 824 (Mass. 1886); *Raptes v. Pappas*, 155 N.E. 787 (1927). The state reversed this rule by statute, Mass. Gen. Laws ch. 209, § 1, providing that both "shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety." The statute also provided that a debtor spouse's interest was not subject to seizure or execution "so long as such property is the principal residence of the nondebtor spouse." Other than property serving as the principal residence of the non-debtor spouse, creditors may execute and sell entireties property after adjusting for the non-debtor spouse's interest. *Coraccio v. Lowell Five Cents Savings Bank*, 612 N.E.2d 650 (Mass. 1993); *In re Snyder*, 249 B.R. 40 (B.A.P. 1st Cir. 2000).
Michigan	Type of Bar: Full
	Effect of Judgment Creditor of One Spouse: No Attachment

Michigan continued	Type of Property: Real property and its proceeds as well as certain enumerated personal property.
	Comment: As with Massachusetts, Michigan was late in enacting a statute holding that both spouses "shall be equally entitled to the rents, products, income or profits, and to the control and management of real or personal property held by them as tenants by the entirety." Mich. Comp. Laws § 557.71 (adopted in 1975). In *SNB Bank & Trust v. Kensey*, 378 N.W.2d 594 (Mich. 1985), the court held that rents from entirety property cannot be attached to satisfy the debts of one spouse's creditors. In that case, the court held that the statute simply equalized the rights of both spouses to control the property and that the entireties property and its rents continued to be the property of the marital unit. Also by statute, certain jointly held debt instruments and stock certificates are exempt from attachment by one spouse's creditors. Mich. Comp. Laws §§ 557.151, 600.6023a. These statutes, in effect, recognized entireties in those enumerated debt and stock accounts. *Zavradinos v. JTRB, Inc.*, 753 N.W.2d 60 (Mich. 2008); *DeYoung v. Mesler*, 130 N.W.2d 38 (Mich. 1964).
Mississippi	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real property.
	Comment: Mississippi recognizes entireties in real property: "An estate by entirety may exist only in a husband and wife and may not be terminated by the unilateral action of one of them because they take by the entireties and not by moieties. While the marriage exists, neither husband nor wife can sever this title so as to defeat or prejudice the right of survivorship in the other, and a conveyance executed by only one of them does not pass title." *Ayers v. Petro*, 417 So.2d 912, 914 (Miss. 1982). Thus, in *Cuevas v. McCallum*, 191 So.2d 843 (Miss. 1966), a husband purportedly conveyed his interest in tenant by the entirety property to his girlfriend in an attempt to lower his asset profile anticipating a divorce. The Mississippi Supreme Court held the transaction void because neither spouse could unilaterally alienate tenant by the entirety property. There are no cases, however, that discuss the rights of creditors of one of the spouse and whether the lack of moieties precludes attachment or merely means that a creditor takes subject to the survivorship interest of the non-debtor spouse. *See* Note, Rodger A. Heaton, *Administration of Entireties Property in Bankruptcy*, 60 Ind. L.J. 305, 309 n.24 (1985). Given the descriptions of entireties in the Mississippi cases, however, there is no reason to doubt that it is a full bar jurisdiction.
Missouri	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. "It has been held in Missouri for some time that where a husband and wife hold personal property as joint owners they are presumed to be tenants by the entirety. Each is presumed to have an undivided interest in the whole of the property." *Hanebrink v. Tower Grove Bank & Trust Co*., 321 S.W.2d 524, 527 (Mo. Ct. App. 1959); *see also Hallmark v. Stallings*, 648 S.W.2d 230 (Mo. Ct. App. 1983) (recognizing entireties ownership in livestock).
	Comment: In *Hanebrink v. Tower Grove Bank & Trust Co*., 321 S.W.2d 524 (Mo. Ct. App. 1959), a bank paid a garnishment against the husband alone from a tenant by the entirety account. The court held the bank liable to wife for the amount paid: "It is also the

Missouri continued	law in this state that where a judgment and execution are against the husband alone such judgment cannot in any way affect property held by the husband and wife in the entirety." Id. at 527. That either spouse can draw on an account does not defeat the entireties: "Neither does the fact that either Dr. Coleman or his wife could draw checks on the account destroy their relationship as tenants by the entirety in the balance left in the bank. The drawing of the checks was by mutual consent." *State Bank of Poplar Bluff v. Coleman*, 240 S.W.2d 188, 191 (Mo. Ct. App. 1951).
New Jersey	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Execution on judgment permitted subject to equity determination.
	Type of Property: Real and personal property by statute, N.J. Stat. Ann. § 46:3-17.2. This statute, however, is found under the "Property" title (title 46), and "Real Property Only" subtitle (subtitle 2). Furthermore, state courts have questioned the existence of entireties ownership in personal property. For example, *Fort Lee Savings & Loan Association v. LiButti*, 254 A.2d 804, 807 (N.J. Super. App. Div. 1969), suggests that entireties ownership only exists in real property: "The estate by the entirety has been described as a 'remnant of other times' which rests upon 'fiction of oneness of husband and wife'… But whatever social purpose this tenancy was designed to serve in the interest of married parties and whatever the reasons for its continued existence in this State, there is no justifiable basis for extending it to the personal property which replaces it. To indulge in the further fiction necessary to achieve such a result serves no useful purpose and acts to frustrate justice. Furthermore, it runs counter to the policy of this State against recognizing the existence of tenancies by the entirety in personalty." (dissent by Judge Carton, adopted by the New Jersey Supreme Court on reversal, 264 A.2d 33 (N.J. 1970)). The *Fort Lee* holding was reaffirmed in *High v. Balun*, 943 F.2d 323, 325 (3d. Cir. 1991), when the court recognized that New Jersey law does not permit married couples to own personal property by the entireties.
	Comment: The execution by the judgment creditor of one spouse acquires the survivorship interest of the debtor spouse and a tenant in common life interest without the automatic right of partition. *Newman v. Chase*, 359 A.2d 474 (N.J. 1976). In *Newman*, the court weighed the creditor's interest against the "cost of dispossessing the family of its home." *Id*. at 480. The court granted the creditor one-half the imputed net rental value of the house. Ultimately, the issue of partition is one within the equity court's determination. "In the usual case involving residential property, the purchaser at the sale may cause neither a physical partition of the property nor a partition by sale of the life estate. The creditor may, however, collect from the non-debtor spouse one-half of the imputed rental value of the property, but must give credit to the non-debtor spouse for his share of certain charges against the property such as mortgage payments, taxes, insurance and repairs." *In re Jordan*, 5 B.R. 59, 62 (Bankr. D.N.J. 1980).
New York	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Attachment permitted and sale allowed subject to equity determination.
	Type of Property: Real property or co-op apartments only under statute, N.Y. Est. Powers & Trusts Law §§ 6-2.1, 6-2.2. In *Hawthorne v. Hawthorne*, 192 N.E.2d 20 (N.Y. 1963), the New York Court of Appeals held that fire insurance proceeds from entireties property was personal property not held by the entireties. The court in *Nat'l Bank & Trust Co. of Norwich v. Rickard*, 393 N.Y.S.2d 801 (N.Y. App. Div. 1977), reached a similar result, finding that excess foreclosure proceeds were personalty held as tenants in common rather than as entireties.

New York continued	Comment: A creditor may reach the debtor spouse's interest and, under certain circumstances, may sell the interest: "[U]nder the authorities, the sale of the husband's interest in the real property would convey a hybrid tenancy in common, with survivorship but no partition rights, to a third party stranger who then could have some conceivable right to use immediately an undivided one-half share of the property … It is, of course, unquestioned that the creditor has legitimate considerations in its favor … However, as a practical matter, its real interest is in asserting its lien in the event of a voluntary sale of the property, or in the husband's possibility of surviving the wife. The creditor's legitimate security interest is really protected by its judgment lien. This Court cannot visualize in this case any substantive value in immediate occupancy rights to anyone outside the close family." *Hammond v. Econo-Car of North Shore*, 336 N.Y.S.2d 493, 494-95 (N.Y. Sup. Ct. 1972) (citations omitted). "As a practical matter, if this were the marital residence, petitioner-wife's right to exclusively occupy the whole of the property unaffected by any attempted sale of her debtor-spouse's interest therein goes without questions." *BNY Financial Corp. v. Moran*, 584 N.Y.S.2d 261, 262 (N.Y. Sup. Ct. 1992) (staying collection activity on Hamptons vacation home to permit non-debtor spouse time to attempt private sale). In *In re Levehar*, 30 B.R. 976 (Bankr. E.D.N.Y. 1983), the Bankruptcy Court reviewed a proposed sale under Bankruptcy Code § 363 which permits such a sale if the Court finds the benefit to the estate outweighs the detriment of such sale to the co-owner. Levehar assumed that the co-owner non-debtor would be entitled to a share greater than 50% of the net proceeds based on her greater life expectancy, suggesting that such a sale would not be appropriate. *Id*. at 981. Implicit in *Levehar*, of course, is that the balancing test of § 363 might yield a different result under other fact situations. *In re Persky*, 134 B.R. 81 (Bankr. E.D.N.Y. 1991), after deciding that under no circumstance can the undivided right to survivorship be severed by such a sale, held the power to sell free of the non-debtor spouse's survivorship interest unenforceable. This case is not followed generally. *See Sapir v. Sartorius*, 230 B.R. 650 (Bankr. S.D.N.Y. 1999).
North Carolina	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real estate only. "Although North Carolina recognizes the right of husband and wife to hold real property as tenants by the entirety, it does not in general recognize the tenancy by the entirety in personal property. When husband and wife voluntarily sell and convey real property owned by them as tenants by the entirety, the proceeds of such are considered personal property … held by husband and wife as tenants in common." *In re Foreclosure of Deed of Trust Recorded at Book 911, at Page 512, Catawba Co. Registry*, 272 S.E.2d 893, 896 (N.C. Ct. App. 1980) (citations omitted).
	Comment: *Dealer Supply Co. v. Greene*, 422 S.E. 2d 350 (N.C. Ct. App. 1992), review denied 426 S.E.2d 704 (1993), involved a pre-divorce transfer by husband and wife to husband's parents in exchange for a cash-out of the wife. "In North Carolina, it is well established that an individual creditor of either husband or wife has no right to levy upon property held by the couple as tenants by the entirety. It follows therefore that a '[h]usband and wife [can] by joint voluntary conveyance transfer the [entirety held] property to anyone of their choice, free of lien or claims of [one spouse's] individual creditors.' Further, as a debtor can only commit a fraudulent conveyance by disposing of property to which the creditor has a legal right to take in satisfaction of his claim, a husband's conveyance of his interest in entirety held property cannot come within the prohibition against fraudulent conveyances." *Id*. at 352 (citations omitted, alterations in original); *see also L&M Gas Co. v. Leggett*, 161 S.E.2d 23 (N.C. 1968). In *Martin v. Roberts*, 628 S.E.2d 812 (N.C. Ct. App. 2006), on the other hand, a transfer incident to divorce but made after the date of the divorce decree was held attachable because the entireties was

North Carolina continued	severed by the time of the conveyance. N.C. Gen. Stat. § 39-13.6, enacted in the early 1980s, reversed the husband's right to control the property during coverture.
Ohio	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: No attachment provided that the deed was created during a certain period.
	Type of Property: Real property only under deeds created after February 9, 1972 and before April 4, 1985 pursuant to the former Ohio Rev. Stat. § 5302.17.
	Comment: Prior to 1972, Ohio did not recognize entireties. By statute in 1972 it permitted husbands and wives to hold real estate as tenants by the entirety. Cases held that such tenancy precluded attachment by the creditor of one spouse: "[W]e unequivocally follow the majority of jurisdictions and hold that a judgment creditor of a married individual is precluded from enforcing that judgment by an action in foreclosure against real property that an individual debtor holds with his/her spouse in an estate by the entireties…" *Koster v. Boucheaux*, 463 N.E.2d 39, 47 (Ohio Ct. App. 1982). Likewise, in *Donvitov v. Criswell*, 439 N.E.2d 467 (Ohio Ct. App. 1982), a post-judgment transfer to the non-debtor spouse was not a fraudulent conveyance because the creditor had no attachable interest. As of 1984, a "survivorship tenancy" replaced tenants by the entirety which does not enjoy the entireties protection. *Central Benefits Mutual Insurance Co. v. Ris Administrators Agency*, 637 N.E.2d 291 (Ohio 1994). Although a co-tenant of a survivorship tenancy may not unilaterally defeat another's right to the survivorship share, a judgment lien against one tenant converts the tenancy to tenancy in common. Ohio Rev. Stat. § 5302.20(c)(4). Tenancies by the entirety created while the 1972 statute was effective, however, shall be respected. Ohio Rev. Stat. § 5302.21.
Oklahoma	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Attachment permitted.
	Type of Property: Real and personal property. Okla. Stat. Ann. tit. 60, § 74.
	Comment: By statute, Oklahoma recognizes entireties. Okla. Stat. Ann. tit. 60, § 74. However, the statute provides: "Nothing herein contained shall prevent execution, levy and sale of the interest of the judgment debtor in such entireties and such sale shall constitute a severance." A sale, not the attachment of a lien, severs the tenancy. Thus, if the debtor spouse dies prior to sale, the property passes to the survivor free of the debt. *Toma v. Toma*, 163 P.3d 540 (Okla. 2007). It appears that the Oklahoma version of entireties precludes voluntary transfer of an interest during coverture. *See* Note, *Tom R. Russell, Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy by the Entirety*, 58 Okla. L. Rev. 317 (2005).
Oregon	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Attachment subject to non-debtor's right to possession and survivorship.
	Type of Property: Real property only. Panushka v. Panushka, 349 P.2d 450 (Or. 1960), involved an executory contract on real property executed by husband and wife. The husband died before settlement and his interest went to his probate estate because the contract converted the holding to a right to the purchase price. The court refused to recognize entireties in personal property. But see *Bedortha v. Sunridge Land Co*., 822 P.2d 694 (Or.

Oregon continued	1991), for a cautionary note on the conversion of real estate to personal property upon an executing contract of sale.
	Comment: Tenancy by the entirety is seen as a tenancy in common with an indestructible right of survivorship. Therefore the interest that a judgment creditor takes is an interest that may be defeated if the non-debtor spouse survivors the debtor. If the tenancy is terminated by divorce, however, the lien remains attached and the creditor may enforce its lien regardless of a divorce decree awarding the property to the non-debtor spouse. *Brownley v. Lincoln Co*., 343 P.2d 529 (Or. 1959). A creditor of one has an interest in the rents and profits and partition is not permitted. *Stanley v. Mueller*, 350 P.2d 880 (Or. 1960). In *Wilde v. Mounts*, 769 P.2d 802 (Or. Ct. App. 1989), the couple deeded the property to a family member after a judgment lien attached due to the debt of the husband alone. The court held that this out conveyance terminated the wife's right of survivorship. Because the judgment lien attached to the husband's interest, and because the interest was an interest in the whole (subject to the wife's interest), the judgment lien thereupon attached to the whole. A later case, involving the allocation of a property damage award to the two cotenants, held that each owns one-half of such proceeds in keeping with the view that entireties is a form of in common ownership. This ruling calls into questions the earlier holding in *Wilde. McCormick v. City of Portland*, 82 P.3d 1043 (Or. Ct. App. 2004).
Pennsylvania	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. "The authorities thus cited would seem to show that either spouse presumptively has the power to act for both, as long as the marriage subsists, in matters of entireties, without specific authorization, provided that fruits or proceeds of such action inures to the benefit of both and the estate is not terminated. But neither may be such action destroy the true purpose of the estate by attempting to convert it or a part of it, in bad faith, into one in severalty." *Madden v. Gosztonyi Savings & Trust Co*., 200 A. 624, 630-631 (Pa. 1938) (discussing a joint bank account).
	Comment: In *Sterrett v. Sterrett*, 166 A.2d 1, 2 (Pa. 1960), the Supreme Court likened tenancy by the entirety property to a living tree "whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade and fruit as much as the other." It is not subject to the creditors of one spouse. There is some question as to whether an unenforceable lien attaches to the debtor spouse's interest, subject to divestment. *See In re Hope*, 77 B.R. 470 (Bankr. E.D.Pa. 1987). In *C.I.T. Corp. v. Flint*, 5 A.2d 126 (Pa. 1939) a transfer by the debtor husband and non-debtor wife to a spendthrift trust for their benefit was found not to be a fraudulent conveyance because the creditor had no attachable interest in the property. The court's holding was narrow however; it only decided the issue of the fraudulent conveyance and not whether, or to what extent, a creditor could reach the debtor's interests in the self-settled spendthrift trust. *Id*. at 129.
Rhode Island	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Attachment permitted but not sale.
	Type of Property: Real property. Applicability to personal property is uncertain, as there are no cases regarding personalty and entireties ownership.
	Comment: In *Broomfield v. Brown*, 25 A.2d 354 (R.I. 1942), the Rhode Island Supreme Court held that the state's married woman's act merely permitted women to own proper-

Rhode Island continued	ty in any manner permitted by law, including as tenants by the entirety. Therefore, the judgment creditor of husband could not force the sale of the property. The courts, however, made a distinction between attachment and sale. It permitted the attachment to be recorded. *Knobb v. Security Ins. Co*., 399 A.2d 1214 (R.I. 1979). In *Cull v. Vadnais*, 406 A.2d 1241 (R.I. 1979), the court held that the lien attaches but no levy and sale permitted. *In re Gibbons*, 459 A.2d 938 (R.I. 1983), the court held that once the lien attaches, a third party will not be free of the debt. The death of the debtor spouse before the non-debtor spouse, however, permits survivorship free of the lien. The Bankruptcy Court in *In re Furkes*, 65 B.R. 232, 236 (Bankr. D.R.I. 1986), explained that the lien attaches "to a contingent future expectancy interest, and that said interest may be sold by the attaching creditor, if anyone can be persuaded to buy it."
Tennessee	Type of Bar: Modified.
	Effect of Judgment Creditor of One Spouse: Lien attaches to debtor spouse's survivorship interest.
	Type of Property: Real and personal property. Joint bank accounts subject to the order of either spouse may be entireties property. *Grahl v. Davis*, 971 S.W.2d 373 (Tenn. 1998); *Sloan v. Jones*, 241 S.W.2d 506 (Tenn. 1951) (relying on the reasoning in *Madden v. Gosztonyi Savings & Trust Co*., 200 A. 624 (Pa. 1938)).
	Comment: The lien attaches to the survivorship interest only and it does not affect the present possessory interest. *In re Arango*, 992 F.2d 611 (6th Cir. 1993) (applying Tennessee law). In *Citizens v. Southern Nat'l Bank*, 640 F.2d 837 (6th Cir. 1981), the court found that the transfer of the tenants by the entirety property from the debtor spouse to the non-debtor spouse involved the transfer of the debtor spouse's survivorship interest. This interest, explained the court, has "substantial value to the recipient spouse" so prejudice to the creditor is inferred. *Id*. at 839. The court therefore remanded the fraudulent conveyance issue.
U.S. Virgin Islands	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No levy and execution.
	Type of Property: Real property only. V.I. Code Ann. tit. 28 § 7.
	Comment: In *Masonry Products, Inc. v. Tees*, 280 F.Supp. 654 (D.V.I. 1968), the court applied the majority rule that a creditor of one spouse may not "reach" that spouse's interest in property held by the entireties during the joint lives of the spouses. Therefore, it passes free from the debt if the non-debtor spouse survives. The estate by the entireties was introduced by statute in 1957 with few interpretative cases so it cannot be determined if a lien attaches.
Vermont	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. See *Beacon Milling Co. v. Larose*, 418 A.2d 32 (Vt. 1990), finding that a joint bank account could be held as entireties, notwithstanding the ability of either to unilaterally withdraw from the account.
	Comment: Entireties property is not subject to the debts of one spouse. *In re Pauquette*, 38 B.R. 170 (Bankr. Vt. 1984). In *Lowell v. Lowell*, 419 A.2d 321 (Vt. 1980), an ex-wife

Vermont continued	could not use part of the value of the husband's tenant by the entirety interest with his current wife to support an alimony claim because such property could not be available to cover his sole debts. *See also Rose v. Morrell*, 259 A.2d 8 (Vt. 1969). Under Vermont's civil union statute, entireties ownership is extended to parties of a civil union. Vt. Stat. Ann. tit. 15 § 1204(e).
Virginia	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. In *Oliver v. Givens*, 129 S.E.2d 661 (Va. 1963), the court found that the sale proceeds of entirety property continue to be held by the entireties and therefore the debtor spouse transferring his interest in the proceeds to his spouse was not a fraudulent transfer. "This is so for the obvious reason that creditors are not prejudiced by a gift of property which is exempt from their claims." *Id*. at 664.
	Comment: In *Rogers v. Rogers*, 512 S.E.2d 821 (Va. 1999), the Virginia Supreme Court held that tenancy by the entirety property could not be sold by a creditor who had two separate judgments (one against husband and one against wife). In that case, the judgments were separate but related. Judgment against the wife was entered because she participated with her husband in a scheme to hinder and delay the collection of the judgment against her husband. *See also Bunker v. Peyton*, 312 F.3d 145 (4th Cir. 2002), where the Court of Appeals in a consolidated bankruptcy case held that the separate creditors of husband and wife were not entitled to satisfy debts against the tenancy by the entirety property regardless of the generally commingling of their finances. Virginia has a statute that extends entirety protection to spouses holding property in revocable trusts under certain circumstances. Such property held in trust "shall have the same immunity from the claims of their separate creditors as it would had it remained a tenancy by the entirety, so long as (i) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their property." Va. Code Ann. § 55-20.2. The property had to be held, before the transfer into trust, as tenants by the entirety.
Wyoming	Type of Bar: Full.
	Effect of Judgment Creditor of One Spouse: No attachment.
	Type of Property: Real and personal property. Wyo. Stat. Ann. § 34-1-140. However, the "existence of a tenancy by the entirety will not be presumed by this court in the absence of an express intent to create the right of survivorship." *In re Anselmi*, 52 B.R. 479, 487 (Bankr. D. Wyo. 1985).
	Comment: In *Colorado Nat'l Bank v. Miles*, 711 P.2d 390 (Wyo. 1985), the court held that one spouse alone cannot subject tenant by the entirety property to a mortgage. "Entirety in this connection means indivisibility. The estate is owned not by one but by both as an indivisible entity …" *Ward Terry & Co. v. Hensen*, 297 P.2d 213, 215 (Wyo. 1956).