



Tenancy by the Entirety, Revisited

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While concurrent ownership is a subject we have all understood since Real Property 1, it can be easy to overlook various attributes and requirements for the three types of concurrent ownership. The most common form of concurrent ownership and the form that is naturally created without intent to do otherwise is a tenancy in common. Each tenant in common has an undivided interest in the whole property so there is a unity of possession (each owner has the same right to possess the property as the other owner). Because there are no other unities, a judgment creditor's lien against one owner attaches to that owner's undivided interest only and each owner's interest is separately inheritable.

A second form of concurrent ownership, joint tenancy with the right of survivorship, is only formed when a specific intent to do so is shown in the vesting document. The survivorship issue is the distinguishing factor from a tenancy in common. Upon the passing of one joint tenant, the title becomes vested in the surviving joint tenant. Like the tenancy in common, a judgment creditor's lien against one joint tenant does attach to that tenant's undivided interest. In addition to the unity of possession, a joint tenancy with the right of survivorship has the unities of time, title and interest. The joint tenancy must be created at the same time, in the same vesting document and the owners must have the same interest. Unlike a tenancy in common, this form of concurrent ownership is not created by operation of law.

A third form of concurrent ownership, tenancy by the entirety, is also not created through operation of law and can only be created in a deed or will. Whereas a tenancy in common has one unity and a joint tenancy contains four unities, a tenancy by the entirety contains five unities; the unity of time, title, interest, possession and person. The unity of person involves the legal fiction that a married couple is one entity. Since unities must be present at the time of the conveyance, a conveyance to a couple prior to marriage does not convey a tenancy by the entirety estate even though they subsequently marry.

Like a joint tenancy with the right of survivorship, a tenancy by the entireties estate has a survivorship feature. The survivorship feature, however, is different from a joint tenancy in that due to the unity of person, the marital estate is the owner separate and apart from each individual spouse. Upon the death of one spouse, the survivor owns the property, not because of the death but because the survivor was seized in the whole estate from the beginning due to the original grant to the married couple. A spouse's interest in entirety property is not inheritable and it does not pass through intestacy or devise. There are, however, two exceptions to this survivorship feature.

NCGS 31A-5 is commonly known as the slayer statute. When one spouse willfully and unlawfully kills the other, one half of the entirety property passes under the deceased's estate and the other half is held by the slayer for their life and then passes to the slain spouse's heirs. The other exception to the survivorship feature is found in NCGS 28A-24-3 which is known as the simultaneous death statute. This statute establishes that should there be no sufficient proof that one spouse died before the other, it will be presumed that they died simultaneously and one half of the property will be distributed as if one spouse survived and the other half will be distributed as if the other spouse survived, in effect giving the heirs of each spouse a one half undivided interest.

Another feature of the tenancy by the entirety estate resulting from the unity of person is the inability of a judgment creditor of one spouse to create a lien on the property. A judgment against only one spouse does not attach to property owned as entirety property. There is no individual interest to be attached as it is owned by the marital entity. There are, however, exceptions to this rule. The most commonly known exception is that a Federal Tax lien against only one spouse attaches as a lien against a half interest in the property. Prior to the US v. Craft decision in 2002, Federal Tax liens against one spouse were not considered to attach to the property due to the estate not being owned by the individual spouse. But in the Craft case out of Michigan, the US Supreme Court interpreted 26 USCA 6321 to include entirety property notwithstanding state law to the contrary. There are also a couple of lesser known exceptions. A Court Order against one spouse to produce income to support the other spouse and minor children can have the effect of attaching the spouse's possessory interest so that their portion of any rent can be used to support the other spouse and their minor children. The other exception involves North Carolina's RICO statute so that a Court can enter an order of forfeiture against only the guilty spouse so that the innocent spouse will retain a one half undivided interest.

A tenancy by the entirety can be terminated three ways: deed, divorce and death. A married couple may voluntarily convey the land by deed to a third party, to just one spouse or to both spouses as tenants in common and the entirety estate will be terminated. Neither spouse, however, has the right to unilaterally convey, encumber or force a partition proceeding against the other. A deed of trust that lists only one spouse as the mortgagor theoretically does not secure a loan on entirety property notwithstanding that both spouses signed the deed of trust.

An absolute divorce has the effect of terminating the entirety estate and, under operation of law, creates a tenancy in common estate between the former spouses. The unity of person is terminated by the divorce, so the tenancy by entirety is terminated as well. Although the other four unities are present, a joint tenancy with a right of survivorship cannot be created by operation of law. A divorce from bed and board is a legal separation, so the marriage remains intact and the entirety estate is not terminated. Likewise, the death of one spouse terminates the entirety estate and the title is vested in the survivor only. Title is vested in the survivor not due to the death, but due to the vesting document; the original interest in the spouse was not a fractional interest but an interest in the whole estate.