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Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy by the Entirety

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Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy by the Entirety*

I. Introduction

Husband and Wife buy Blackacre with the intent to live on the property until death, with the title passing solely to the surviving spouse when the first spouse dies. Husband wants a tractor to farm Blackacre and uses the property, unbeknownst to Wife, as collateral to secure a loan to purchase the tractor. Husband and Wife file separate tax returns, and Husband fails to report the income produced from the farming of Blackacre. Husband decides to spend his income at the local gaming facility and consequently defaults on his tractor loan. After the government successfully sues him for the taxes owed, the question becomes whether the creditor or the government can satisfy the obligation owed to it by taking either Husband's interest or both spouses' interests in Blackacre.

The manner in which two or more individuals own a piece of property determines the rights the individuals have in that property.¹ Although the question of whether a tenancy by the entirety, which is how the hypothetical Husband and Wife own Blackacre, remains a valid form of co-ownership may seem like old, dusty, disinteresting property law to some, the U.S. Supreme Court recently addressed the issue in *United States v. Craft*.² The validity of tenancy by the entirety remains relevant not only to those who co-own property with a spouse, but also to creditors who make secured loans or who seek satisfaction of an obligation through courtroom procedures.

Tenancy by the entirety is a form of concurrent ownership, traditionally in real property, between a husband and wife.³ At common law, a tenancy by the entirety could be created only if the traditional four unities of time, title, interest, and possession existed, as well as a fifth unity requiring a valid marriage.⁴ Modern approaches to tenancy by the entirety among states are too

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1. See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.1 (2d ed. 1993).

2. 535 U.S. 274 (2002) (deciding that, regarding Michigan property law, a federal tax lien could attach to a husband's interest in property held as a tenancy by the entirety).

3. 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 52.01[1] (Michael Allan Wolf ed., 2005).

4. *Id.* Sir William Blackstone best summarized the four unities when he said:

The *properties* of a joint estate are derived from [its] unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*: or, in other words, joint-tenants have one and the same interest, accruing by one

numerous to provide any generalization.⁵ Some states have abolished tenancy by the entirety completely, either statutorily⁶ or by court decision.⁷ Other states have statutorily created tenancy by the entirety,⁸ while others recognize the entireties ownership through case law.⁹ Because of the diverse treatment of tenancy by the entirety in the various states, it is difficult to determine how many states actually recognize the tenancy.¹⁰ What is clear, however, is that tenancies by the entirety exist in some jurisdictions in the United States.¹¹

Although some states do not recognize tenancies by the entirety, the Oklahoma legislature statutorily confirmed that tenancies by the entirety exist in the state by passing title 60, section 74 of the Oklahoma Statutes in 1945 as an emergency measure to “[provide] for the existence and creation of such estates.”¹² The statute establishes the methods by which individuals can own estates in joint tenancy and tenancy by the entirety in the state of Oklahoma.¹³

Although the Oklahoma statute clearly establishes tenancies by the entirety as a valid form of concurrent ownership, Oklahoma courts have had very little to say about the statute regarding tenancies by the entirety.¹⁴ Legislative history concerning the statute is sparse, but the legislature appears to have adopted a version of the entireties estate that significantly differs from the form that existed at common law.¹⁵ Specifically, the statute includes a provision that allows some, but not all, creditors to pursue the obligations of individual spouses in the entireties property,¹⁶ whereas common law tenancies

and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

4 GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 31.06(b) (David A. Thomas ed., 1994) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *180).

5. 7 POWELL, *supra* note 3, § 52.01[3].

6. *Id.* Connecticut, Minnesota, Montana, and Nevada are a few states that, by statute, do not recognize tenancies by the entirety.

7. *Id.* California, Kansas, Washington, and Wisconsin are some examples.

8. *Id.* Examples include Missouri, Oregon, and Wyoming.

9. *Id.* Mississippi and Virginia are examples.

10. Compare 7 POWELL, *supra* note 3, § 52.01[3] (stating that “tenancy by the entirety remains a legitimate form of ownership in . . . 30 states and the District of Columbia”), with 4 THOMPSON, *supra* note 4, § 33.06(e) n.110 (stating that “[i]t is believed that 25 American jurisdictions still recognize tenancies by the entirety”).

11. 7 POWELL, *supra* note 3, § 52.01[3]; 4 THOMPSON, *supra* note 4, § 33.06(e).

12. Act of May 7, 1945, ch. 2, 1945 Okla. Sess. Laws 213 (defining the joint interests of joint tenancy and tenancy by entirety) (codified at 60 OKLA. STAT. § 74 (2001)).

13. 60 OKLA. STAT. § 74 (2001) (unamended since 1945).

14. *See, e.g.*, Barton v. Hooker, 1955 OK 78, ¶ 10, 283 P.2d 514, 517 (discussing the statute as only regarding joint tenancies).

15. *See* 60 OKLA. STAT. § 74.

16. *Id.* (“Nothing herein contained shall prevent execution, levy and sale of the interest of the judgment debtor in such estates and such sale shall constitute a severance.”).

by the entirety are protected from all creditors who pursue debts of individual spouses.¹⁷ In examining the status of tenancies by the entirety in Oklahoma, the statute seemingly conflates the tenancy by the entirety with the joint tenancy, leaving both in existence while failing to differentiate the two.¹⁸ The Oklahoma statute and the few cases interpreting it, however, recognize that tenancies by the entirety not only exist separately from joint tenancies, but also strike a unique balance between family-friendly policy and creditor rights.

To better communicate the current status of tenancies by the entirety in Oklahoma, Part II of this note briefly compares the entirety's estate to two other concurrent interests in property: tenancies in common and joint tenancies. Part III explores the development of the tenancy by the entirety as a form of concurrent ownership in Oklahoma, and Part IV analyzes the consequences of Oklahoma's tenancy by the entirety statute on concurrent owners and creditors. Part IV also explores *United States v. Craft*,¹⁹ a recent U.S. Supreme Court case, and its impact on the status of the entirety's estate in Oklahoma.

II. Historical Comparison of Concurrent Estates

“Whenever two or more persons own the same thing at the same time, a form of concurrent ownership exists.”²⁰ Although co-ownership allows each of the owners to use the property, individual ownership in severalty permits only the single owner to use the property.²¹ Common law recognized three types of concurrent estates: joint tenancies, tenancies in common, and tenancies by the entirety.²²

Concurrent estates can be distinguished from one another by two characteristics: (1) the ability to voluntarily or involuntarily alienate the property *inter vivos*, and (2) the ability to transfer the property at death through testate or intestate succession.²³ The treatment of these characteristics determines what type of concurrent ownership exists in the estate.²⁴ Thus, the basic common law characteristics of concurrent interests, as well as how

17. 4 THOMPSON, *supra* note 4, § 33.07(e).

18. This view is shared by a former professor at the University of Oklahoma College of Law. See generally Osborne M. Reynolds, Jr., *Co-ownership of Property in Oklahoma*, 27 OKLA. L. REV. 585 (1974).

19. 535 U.S. 274 (2002).

20. 4 THOMPSON, *supra* note 4, § 31.01.

21. See CUNNINGHAM, *supra* note 1, § 5.1.

22. 4 THOMPSON, *supra* note 4, § 31.01.

23. *Id.* § 31.02.

24. See *id.* §§ 31.02, 32.02, 33.02.

Oklahoma law treats these interests, is essential to understanding the present state of tenancies by the entirety.²⁵

A. Tenancy in Common: Common Law Versus Current Oklahoma Law

At common law, a tenant in common possessed an interest that could be transferred inter vivos and passed at death through testate or intestate succession.²⁶ In relation to the traditional four unities, a tenancy in common could be created and maintained with only the unity of possession.²⁷ In short, the unity of possession was what made the tenancy in common a form of concurrent ownership.²⁸ Without the unity of possession, a single individual would have owned the property in severalty.²⁹ Tenancies in common were disfavored at common law compared to joint tenancies and tenancies by the entirety because the right of survivorship was a favored principle; thus, to effectively create a tenancy in common, the conveyance creating the estate required express words of limitation.³⁰

In Oklahoma, as at common law, tenants in common have a joint interest in the estate but hold separate and distinct titles, which allows the tenants in common to alienate their interests inter vivos and devise the interests at death through testate or intestate succession.³¹ Further, when co-ownership of undivided shares of property exists because of “conveyances by different instruments, or at different times, or under any circumstances not giving rise to the four unities required for joint tenancy,” the estate is held as a tenancy in common.³² Oklahoma statutory law, however, rejects the common law preference for joint tenancies and instead favors the modern preference of tenancies in common for conveyances to two or more individuals.³³ Oklahoma

25. A more thorough discussion of the concurrent ownership interests in Oklahoma can be found in Professor Reynolds’s 1974 article. *See generally* Reynolds, *supra* note 18, at 585.

26. 4 THOMPSON, *supra* note 4, § 32.02.

27. *Id.* § 32.06(a).

28. *Id.*

29. *Id.*

30. *Id.* § 32.06(b)(1) (asserting that the best way to assure a tenancy in common and not the creation of a joint tenancy with the requisite right of survivorship was to expressly limit the estate “to A and B, to hold *as tenants in common, and not as joint tenants*”).

31. *See* Matthews v. Matthews, 1998 OK 66, ¶ 11, 961 P.2d 831, 834-35.

32. Reynolds, *supra* note 18, at 594 (citing Ball v. Autry, 1966 OK 199, 427 P.2d 424).

33. The modern preference for tenancies in common grew out of the preference for free alienability of property that the right of survivorship hinders. 4 THOMPSON, *supra* note 4, § 32.06(b)(2). *See* 84 OKLA. STAT. § 184 (2001) (stating that a devise to two or more persons creates a tenancy in common); *see also* 60 OKLA. STAT. § 74 (2001) (codifying that express words are necessary to create a joint tenancy or tenancy by the entirety).

courts,³⁴ as well as those from a majority of other states,³⁵ also operate with a presumption toward tenancies in common.

B. Joint Tenancy: Common Law Versus Current Oklahoma Law

Although joint tenancies are no longer preferred, they are still a form of concurrent ownership that some co-owners use.³⁶ Historically, a joint tenant possessed an undivided interest that could be transferred *inter vivos*, thus severing the joint tenancy.³⁷ The interest, however, could not be passed at death through testate or intestate succession.³⁸ When a type of concurrent ownership did not possess the characteristics of devisability and inheritability, each co-owner had a “right of survivorship,” meaning that on the death of one of the co-owners, his interest transferred to the surviving co-owners.³⁹ To establish a joint tenancy at common law, all four unities were necessary.⁴⁰ In short, joint tenants at common law had one and the same interest, ensuing from the same conveyance, beginning at the same time, and held by the same undivided possession.⁴¹

Oklahoma joint tenancies mirror common law joint tenancies in several key aspects. First, Oklahoma requires the four unities of time, title, interest, and possession to create a joint tenancy.⁴² Second, the principal characteristic of the estate is the right of survivorship resulting from the lack of devisability or inheritability.⁴³ Third, either joint tenant can destroy the right of survivorship by voluntarily severing the joint tenancy through an *inter vivos* gift or sale of the joint tenant’s undivided share.⁴⁴ Lastly, an “involuntary conveyance,” which occurs when a creditor levies on a joint tenant’s share during his lifetime, will sever the joint tenancy.⁴⁵ This severance, like any other act by

34. *Gazalski v. Goss (In re Estate of Ingram)*, 1994 OK 51, ¶¶ 24, 874 P.2d 1282, 1288; see *Alexander v. Alexander*, 1975 OK 101, ¶ 12, 538 P.2d 200, 203.

35. See 4 THOMPSON, *supra* note 4, § 32.06(b)(2) (listing forty-six states, as well as the District of Columbia, where the presumption favoring tenancies in common is codified by statute).

36. 60 OKLA. STAT. § 74 (2001); *Barton v. Hooker*, 1955 OK 78, ¶¶ 10-11, 283 P.2d 514, 517.

37. 4 THOMPSON, *supra* note 4, § 31.02.

38. *Id.*

39. *Id.*

40. *Id.* § 31.06(b).

41. *Id.*

42. *Clovis v. Clovis*, 1969 OK 170, ¶ 16, 460 P.2d 878, 881.

43. *Id.*

44. *Shackleton v. Sherrard*, 1963 OK 193, ¶¶ 12-15, 385 P.2d 898, 901-02.

45. *Reynolds*, *supra* note 18, at 592.

a joint tenant that is inconsistent with the maintenance of the joint tenancy, will result in a tenancy in common.⁴⁶

Oklahoma law differs from the common law regarding joint tenancies in two respects.⁴⁷ First, to create a joint tenancy in Oklahoma, the grantor must expressly declare his intent that the estate be held in a joint tenancy and not as a tenancy in common.⁴⁸ Second, an owner of property in severalty may grant to himself and another an estate in joint tenancy in that same property, even though such a conveyance would lack the unities of time and title.⁴⁹ This second difference results in a category of joint tenancies created not by a conveyance encompassing the four common law unities, but instead by the statutory language of title 60, section 74 of the Oklahoma Statutes.⁵⁰ Creation of a joint tenancy pursuant to the statutory language allows the creation of a joint tenancy by methods not existing at common law.⁵¹

C. Common Law Tenancy by the Entirety

At common law, a tenant by the entirety possessed an interest that could not be devised or passed through intestate succession.⁵² When an estate lacked either of these two characteristics, a right of survivorship existed.⁵³ As noted, this right was characteristic of both a tenancy by the entirety and a joint tenancy.⁵⁴ A distinguishing factor between tenancies by the entirety and joint tenancies was that a joint tenant, by an inter vivos alienation of his undivided share in the estate, could destroy the other joint tenant's right of survivorship.⁵⁵ This right of alienability did not exist in an estate held by tenants by the entirety because holders of such estates each owned the whole of the estate and not an undivided share.⁵⁶ Therefore, only divorce or mutual agreement of the husband and wife could destroy a right of survivorship for a tenancy by the entirety estate.⁵⁷

All four traditional unities were essential, as well as a fifth unity of marriage, to create a tenancy by the entirety at common law.⁵⁸ Because all of

46. *Shackleton*, ¶¶ 12-15, 385 P.2d at 901-02.

47. 60 OKLA. STAT. § 74 (2001).

48. *Barton v. Hooker*, 1955 OK 78, ¶ 10, 283 P.2d 514, 517.

49. *Id.* ¶¶ 10-11, 283 P.2d at 517.

50. *Raney v. Diehl*, 1971 OK 28, ¶¶ 17-18, 482 P.2d 585, 590.

51. *Id.*

52. 4 THOMPSON, *supra* note 4, § 33.02.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* § 33.06(b).

the unities had to be present at the time the estate was created, a subsequent marriage after two individuals already possessed concurrent interests in an estate did not transform the estate into a tenancy by the entirety.⁵⁹ Moreover, the creation of a tenancy by the entirety was presumed, regardless of the intent of the parties, when a conveyance of property to a husband and wife met the five unity requirements.⁶⁰ This presumption was founded on the legal fiction that the husband and wife were considered one person, and consequently, the husband and wife could not truly own the estate concurrently because they only possessed a single interest.⁶¹ Under this presumption, the marital unit held the estate in its entirety and not in undivided shares per a joint tenancy.⁶²

As women attained increased property rights, tenancy by the entirety became an unacceptable form of ownership in some states because the common law preference for the estate was founded on the unity of the spouses "personified in the husband."⁶³ Increased property rights for women were usually established through passage of various Married Women's Property Acts, which in some states have been interpreted to impliedly abolish tenancies by the entirety.⁶⁴ As the legal status of women began to increase, some states determined that tenancies by the entirety were the product of a suppressive era for women, and thus, many states abolished the ownership form.⁶⁵

III. Tracing Tenancy by the Entirety in Oklahoma

A. Kansas Addressed the Status of Tenancy by the Entirety in 1888

Before statehood, the area now known as Oklahoma was divided on whether to recognize the common law presumption favoring tenancies by the entirety for the husband and wife. At that time, Indian Territory⁶⁶ followed the common law and Oklahoma Territory preferred tenancies in common.⁶⁷ The current status of tenancies by the entirety in Oklahoma traces its roots to the

59. *Id.*

60. 7 POWELL, *supra* note 3, § 52.01[2].

61. *Id.*

62. *Id.*

63. At early common law, husbands were thought to be in sole control of the marital property. *Id.*

64. 4 THOMPSON, *supra* note 4, § 33.06(e).

65. *See* 7 POWELL, *supra* note 3, § 52.03[3].

66. Before statehood, Oklahoma was divided into the Indian and Oklahoma Territories. *Oklahoma History*, at <http://www.state.ok.us/osfdocs/history.html> (last visited Apr. 5, 2005).

67. Thomas G. Johnson, Jr., *Real Property: Joint Tenancies: Delivery of Deeds*, 1 OKLA. L. REV. 90, 92 (1948) (describing extensively the state of tenancies in the entirety in Oklahoma as they existed in 1948 and posturing that it was unclear what the passage of title 60, section 74 of the Oklahoma Statutes would do to the status of such estates).

concepts expressed in *Baker v. Stewart*,⁶⁸ an 1888 Kansas Supreme Court decision.⁶⁹ In *Baker*, a husband and wife received a conveyance of land.⁷⁰ When the wife died, the couple had surviving children, so the issue was whether the husband and wife had initially taken the property as tenants by the entirety, thereby creating a right of survivorship.⁷¹ If the couple had taken the property in this form of co-ownership, the husband would be entitled to the whole property as a result of survivorship.⁷² But if the husband and wife took the property as tenants in common, the wife's interest in the property would pass through intestate succession to her husband and their children as her survivors.⁷³

The majority held that because Kansas had not passed a statute governing conveyances of property to a husband and wife, the conveyance in the case must follow the common law presumption that the estate was a tenancy by the entirety.⁷⁴ The majority also refuted the argument that Kansas's Married Women's Property Act indirectly or impliedly modified the common law.⁷⁵ The court reasoned that the legislature passed the act to grant married women expanded property rights and not to take rights away from them.⁷⁶ The court determined that women tended to outlive men, and removing the presumption of a tenancy by the entirety and favoring a tenancy in common would essentially eviscerate rights of survivorship for many women.⁷⁷ Thus, in the *Baker* majority's opinion, the passage of the Act had no impact on the tenancy by the entirety and its validity as a form of concurrent ownership.⁷⁸

In contrast, the dissent noted that tenancies by the entirety grew from the common law fiction that the husband and wife, as one legal entity, were incapable of holding property as joint tenants or tenants in common.⁷⁹ The dissenting justice claimed that the Kansas statutes did not favor this common law fiction and that it was "not applicable to [the] society and institutions" of

68. 19 P. 904 (Kan. 1888).

69. *Helvie v. Hoover*, 1902 OK 36, ¶ 14, 69 P. 958, 960-61 (deciding that Oklahoma Territory would follow the more modern law rejecting the presumption favoring tenancies by the entirety); see *Clay v. Robertson*, 1912 OK 94, ¶¶ 3-5, 120 P. 1102, 1103 (holding that Indian Territory would follow the common law presumption favoring tenancies by the entirety).

70. *Baker*, 19 P. at 904.

71. *Id.* at 904-05.

72. *Id.*

73. *Id.*

74. *Id.* at 907.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 911 (Horton, C.J., dissenting).

this country.⁸⁰ The dissent also disputed the majority's argument that women benefitted from the existence of the tenancy by the entirety because they tended to outlive men.⁸¹ The dissent pointed out that mortality rates were higher for women than men in certain age groups, and accordingly, no clear conclusion could be drawn regarding which gender benefitted more from the right of survivorship.⁸² Clearly, the dissent did not believe tenancies by the entirety should exist in Kansas because the ownership interest employed a fiction no longer accepted by society.⁸³

B. Oklahoma Territory Followed Emerging Law

Fourteen years after *Baker*, Oklahoma Territory considered the same issue in the 1902 case of *Helvie v. Hoover*.⁸⁴ In *Helvie*, the wife paid for land in Oklahoma Territory that was conveyed to her and her husband via a warranty deed.⁸⁵ The question presented to the Supreme Court of Oklahoma concerned the type of concurrent estate the husband and wife had in the property.⁸⁶ The court stated that the common law clearly favored tenancies by the entirety in transfers to married couples, but that problems arose when statutes overruled the common law expressly or by implication, or when the common law advanced a principle that was inconsistent with modern beliefs concerning marital relations.⁸⁷

The *Helvie* court noted the correct description of the common law rule that was adopted in *Baker*, as well as the accurate depiction of the more modern rule by the *Baker* dissent.⁸⁸ Ultimately, the court held that because Oklahoma Territory had afforded women rights typically granted under Married Women's Property Acts, the co-ownership of tenancy by the entirety was "repugnant" to the rights of women in the Territory.⁸⁹ Of particular importance is the fact that although *Helvie* does not expressly state the position, the court seemed to hold that tenancies by the entirety did not exist

80. *Id.* at 910 (Horton, C.J., dissenting).

81. *Id.* at 912 (Horton, C.J., dissenting).

82. *Id.*

83. *Id.* at 916 (Horton, C.J., dissenting).

84. 1902 OK 36, 69 P. 958.

85. *Id.* ¶ 0, 69 P. at 958.

86. *Id.* ¶ 1, 69 P. at 959.

87. *Id.* ¶ 3, 69 P. at 959.

88. *Id.* ¶ 14, 69 P. at 960-61 (noting that Kansas legislature repudiated the doctrine adopted by the majority in the first session convened after the decision was rendered).

89. *Id.* ¶ 15, 69 P. at 961. Oklahoma Territory passed its version of the Married Women's Property Act in 1893. *Id.* ¶ 16, 69 P. at 961.

at all in Oklahoma Territory because that form of co-ownership was founded on a repudiated legal fiction.⁹⁰

C. Indian Territory Followed Common Law Favoring Tenancies by the Entirety

Twenty-four years after the *Baker* decision in Kansas, the Oklahoma Supreme Court decided *Clay v. Robertson*,⁹¹ a case in which the husband and wife received a patent from the Muskogee Nation granting them property in Tulsa.⁹² The issue before the Supreme Court of Oklahoma was whether the estate created was a tenancy by the entirety or some other concurrent estate.⁹³ The court noted that Arkansas statutes and case law governed Indian Territory and that the issue had been well settled by the Arkansas Supreme Court.⁹⁴ The established rule in Arkansas was that conveyances to husbands and wives created tenancies by the entirety because the trend in the United States to grant married women more rights through Married Women's Property Acts did not impliedly impact such conveyances.⁹⁵ The Arkansas court reasoned that the "marriage relation is a peculiar one," and that laws severing property ties between the husband and wife weakened such relationships.⁹⁶ Arkansas followed a rule its court believed was "sanctioned by divine wisdom."⁹⁷ That rule ultimately favored the husband and wife holding property as a single entity in a tenancy by the entirety.⁹⁸

By following Arkansas law, Indian Territory continued to recognize tenancies by the entirety.⁹⁹ Notably, this perspective, while shared by the Kansas Supreme Court majority in *Baker*,¹⁰⁰ conflicted with the position taken by Oklahoma Territory in *Helvie*.¹⁰¹ The central issue in both cases was whether a tenancy by the entirety was an outdated method of owning property because of women's increasing property rights.¹⁰²

90. *See id.* ¶ 15, 69 P. at 961.

91. 1912 OK 94, 120 P. 1102.

92. *Id.* ¶ 2, 120 P. at 1102.

93. *Id.* ¶¶ 2-3, 120 P. at 1102-03.

94. *Id.* ¶ 3, 120 P. at 1103 (citing *Robinson v. Eagle*, 29 Ark. 202 (1874)).

95. *Id.* ¶ 4, 120 P. at 1103.

96. *Id.* (quoting *Robinson*, 29 Ark. at 207).

97. *Id.* (quoting *Robinson*, 29 Ark. at 208).

98. *Id.*

99. *Id.* ¶ 7, 120 P. at 1104.

100. *Baker v. Stewart*, 19 P. 904, 907 (Kan. 1888).

101. *Helvie v. Hoover*, 1902 OK 36, ¶ 15, 69 P. 958, 961.

102. *See Clay*, ¶¶ 2-3, 120 P. at 1102-03; *Helvie*, ¶ 1, 69 P. at 959; *Baker*, 19 P. at 904-05.

D. After Statehood, Oklahoma Reaffirmed Acceptance of the Emerging View

By 1916 when the Supreme Court of Oklahoma decided *Hamra v. Fitzpatrick*,¹⁰³ Oklahoma Territory had rejected tenancies by the entirety¹⁰⁴ while Indian Territory had accepted them.¹⁰⁵ In *Hamra*, the court was not presented directly with the issue of whether tenancies by the entirety existed in the newly formed state of Oklahoma, but rather whether land being held as homestead property was exempt from levy and execution.¹⁰⁶ The couple claimed that the property had been conveyed to both of them as husband and wife, and therefore, the property could not be sold to satisfy a judgment against the husband only.¹⁰⁷ The court determined that the property could be held between husband and wife as tenants in common and remain homestead property.¹⁰⁸ Citing *Helvie*, the court stated in dicta that a “tenancy by the entirety [was] not applicable to the conditions in Oklahoma.”¹⁰⁹ This language suggests that the *Hamra* court did not consider tenancies by the entirety to be an existing form of concurrent ownership in Oklahoma in 1916.

After *Hamra*, the Court provided no direction regarding the status of tenancy by the entirety in Oklahoma until the 1945 case of *Mathis v. Oklahoma Tax Commission*.¹¹⁰ In *Mathis*, the court quoted title 68, section 989 of the Oklahoma Statutes¹¹¹ as stating that the value of any interest in property owned by a decedent “and any other person as joint tenants, tenants in common or tenants by the entirety” was to be used in the calculation of the decedent’s gross estate.¹¹² The court’s reference to a statute that mentioned tenancies by the entirety, combined with the simple existence of such a statute, gave some credence to the argument that tenancies by the entirety existed in Oklahoma in 1945, despite the decisions in *Hamra* and *Helvie*. The reference, however, was far from conclusive.

By 1945, the Oklahoma Supreme Court’s dearth of decisions on the status of tenancies by the entirety left the issue open for debate.¹¹³ It appeared that joint tenancy was the preferred method of concurrent ownership at the time,

103. 1916 OK 67, 154 P. 665.

104. *Helvie*, ¶ 15, 69 P. at 961.

105. *Clay*, ¶ 7, 120 P. at 1104.

106. *Hamra*, ¶ 1, 154 P. at 665.

107. *Id.* ¶ 4, 154 P. at 666.

108. *Id.* ¶ 9, 154 P. at 667.

109. *Id.*

110. 1945 OK 78, 157 P.2d 156.

111. 68 OKLA. STAT. § 989 (1941) (current version as amended at 68 OKLA. STAT. § 807 (2001)).

112. *Mathis*, ¶ 9, 157 P.2d at 157.

113. Raymond Everest, *Joint Tenancy*, 16 OKLA. B.J. 90, 90 (1945).

but without direction from the court, others outside the judiciary attempted to clarify the status of tenancies in Oklahoma.¹¹⁴ One attempt at clarification was by Raymond Everest, an Oklahoma practitioner who, although not directly examining the issue regarding tenancies by the entirety, commented on the status of the estates when he wrote that “there can be no question under [*Helvie*] but that the common law doctrine of . . . tenancy by entirety does not [exist] in Oklahoma.”¹¹⁵ Although far from irrefutable, the practitioner’s opinion clarifies the belief that tenancies by the entirety did not exist in Oklahoma in 1945. Further clarification occurred just months after the practitioner stated his opinion when the Oklahoma Legislature passed title 60, section 74 of the Oklahoma Statutes addressing tenancies by the entirety.¹¹⁶

E. Statutory and Case Law Since 1945 Proves Tenancies by the Entirety Exist

Title 60, section 74 explicitly states that tenancies by the entirety statutorily exist.¹¹⁷ Because the Supreme Court of Oklahoma has not directly addressed the statute’s legitimacy, a future case centering on this issue would undoubtedly hinge on principles of statutory construction.¹¹⁸ Many rules of statutory construction exist, but it is well-settled that “[t]he determination of legislative intent controls statutory interpretation,” and it is “presume[d] that the Legislature intends what it expresses.”¹¹⁹ If the legislature clearly expresses itself in the statute, construing its intent through statutory construction is not necessary because no ambiguity exists.¹²⁰ In either the case of clear expression or ambiguity in a statute, the Oklahoma Supreme Court will presume an existing statute was passed for a reason.¹²¹ Because the court has not ruled on the issue, it is undetermined whether title 60, section 74 is

114. *Id.*

115. *Id.* at 92.

116. Act of May 7, 1945, ch. 2, 1945 Okla. Sess. Laws 213 (defining the joint interests of joint tenancy and tenancy by entirety) (codified at 60 OKLA. STAT. § 74 (2001)).

117. 60 OKLA. STAT. § 74 (2001) (“Such . . . tenancy by entirety may be created by transfer [to husbands and wives].”).

118. *See, e.g.*, *Fulsom v. Fulsom*, 2003 OK 96, ¶¶ 6-7, 81 P.3d 652, 655 (determining proper construction in a case of first impression regarding statutory attorney’s fees); *Blitz U.S.A., Inc. v. Okla. Tax Comm’n*, 2003 OK 50, ¶ 14, 75 P.3d, 883, 887-88 (analyzing income tax question of first impression using statutory construction if a statute is ambiguous).

119. *See, e.g.*, *Okla. Ass’n for Equitable Taxation v. Oklahoma City*, 1995 OK 62, ¶ 5, 901 P.2d 800, 803.

120. *Id.* ¶ 10, 901 P.2d at 804.

121. *Id.* (stating that the Oklahoma Supreme Court “will not presume that the Legislature acted in vain in promulgating a statute”).

clear or ambiguous.¹²² It is certain, however, that the statute exists, and consequently the court would presume that tenancies by the entirety statutorily exist in Oklahoma.¹²³

Some Oklahoma case law regarding the status of tenancies by the entirety exists, but the cases are sparse and not directly on point.¹²⁴ The closest the court came to actually recognizing the statutorily created tenancy by the entirety was in 1953 in *Flesher v. Flesher*.¹²⁵ The court addressed whether title 60, section 74 contemplated rights of survivorship for joint tenants.¹²⁶ Although the court did not directly address the existence of tenancies by the entirety in Oklahoma, it stated that “a joint tenancy and tenancy by entirety is expressly recognized by our statute.”¹²⁷ The majority opinion in *Flesher*, however, is not the first Oklahoma Supreme Court opinion to recognize that tenancies by the entirety statutorily exist. In *Draughon v. Wright*,¹²⁸ a 1948 case addressing co-ownership of property and the right of survivorship applicable to title 60, section 74, the dissenting opinion stated that “[p]rovisions of statute creating joint tenancy . . . contemplate a tenancy by entirety”¹²⁹ These express statements by the court, although not controlling on the issue, support the proposition that the ability to create tenancies by the entirety is a statutory right in Oklahoma.

Most recently, the Supreme Court of Oklahoma, in 1994, decided *Gazalski v. Goss (In re Estate of Ingram)*¹³⁰ and quoted title 60, section 74.¹³¹ The statute contains provisions for both the creation of joint tenancies and tenancies by the entirety.¹³² The issue in *Gazalski* was once again whether property described as “joint,” but lacking any language of “survivorship,”

122. See *Arrow Tool & Gauge v. Mead*, 2000 OK 86, ¶ 6, 16 P.3d 1120, 1123 (resolving a case of first impression concerning statutory construction calls for *de novo* review).

123. *Okla. Ass'n for Equitable Taxation*, ¶ 5, 901 P.2d at 803.

124. The court has never actually addressed tenancies by the entirety directly. Reference to the form of co-ownership has been in regard to other issues. The court has quoted title 60, section 74 because the statute also established the creation of joint tenancies, which is a more common form of co-ownership than tenancies by the entirety. For examples of cases citing the statute for issues involving joint tenancy, see *Gazalski v. Goss (In re Estate of Ingram)*, 1994 OK 51, 874 P.2d 1282; *Raney v. Diehl*, 1971 OK 28, 482 P.2d 585; *Barton v. Hooker*, 1955 OK 78, 283 P.2d 514.

125. 1953 OK 392, 258 P.2d 899.

126. *Id.* ¶¶ 10-11, 258 P.2d at 902.

127. *Id.*

128. 1948 OK 81, 191 P.2d 921.

129. *Id.* ¶ 1, 191 P.2d at 925 (Riley, J., dissenting).

130. 1994 OK 51, 874 P.2d 1282.

131. *Id.* ¶ 9, 874 P.2d at 1285 n.1.

132. 60 OKLA. STAT. § 74 (2001).

created a valid joint tenancy.¹³³ The court had no reason to determine the existence of tenancies by the entirety and did not decide the issue.¹³⁴ The court's mentioning of the statute and the statute's existence once again reaffirmed that tenancies by the entirety are a legitimate form of co-ownership in Oklahoma. Because this form of cotenancy exists, it is necessary to perform statutory construction to determine the actual effect of tenancies by the entirety in Oklahoma. Further, an examination of other states' applications of their statutes proves helpful in the interpretation of the Oklahoma statute.¹³⁵

IV. Actual Effect of Title 60, Section 74 on Tenancies by the Entirety

As mentioned previously in this note,¹³⁶ the right of survivorship distinguishes joint tenancies and tenancies by the entirety from tenancies in common.¹³⁷ Limitations on the individual spouses' abilities to transfer their interests distinguish tenancies by the entirety from joint tenancies.¹³⁸ These limitations are: (1) the spouses' inability to voluntarily or involuntarily alienate their interests inter vivos without the consent of the other spouse; and (2) the inability to transfer the interest at death via testate or intestate succession.¹³⁹ Whether the right of survivorship and these limitations specifically apply to tenancies by the entirety in Oklahoma in light of the existing statute remains an unsettled question.

A. The Statute Contemplates an Implied Right of Survivorship

Title 60, section 74 does not expressly mention that a joint tenancy or a tenancy by the entirety created in accordance with the statute contains a right of survivorship between the cotenants.¹⁴⁰ Although the issue of survivorship has not been directly addressed by the Oklahoma Supreme Court regarding tenancies by the entirety, the court has held that the statute does not indicate an intention contrary to common law.¹⁴¹ Therefore, the term "joint tenancy"

133. *Gazalski*, ¶ 1, 874 P.2d at 1284.

134. *See id.* ¶ 29, 874 P.2d at 1289.

135. *Dolese Bros. Co. v. State*, 2003 OK 4, ¶ 16, 64 P.3d 1093, 1099 (citing *Cain's Coffee Co. v. City of Muskogee*, 1935 OK 450, ¶ 12, 44 P.2d 50, 52, for its use of an Illinois Supreme Court definition of "manufacturing" to aid in statutory construction of an Oklahoma statute).

136. *See supra* text accompanying notes 23-28.

137. 4 THOMPSON, *supra* note 4, § 33.02.

138. *Id.*

139. *Id.*

140. 60 OKLA. STAT. § 74 (2001); *see, e.g.*, *Flesher v. Flesher*, 1953 OK 392, ¶ 11, 258 P.2d 899, 902 (holding title 60, section 74 does not contemplate a joint tenancy without a right of survivorship even though the statute does not expressly mention the right).

141. *Flesher*, ¶ 11, 258 P.2d at 902 (citing construction in *Draughon v. Wright*, 1948 OK 81, ¶ 9, 191 P.2d 921, 923, that a statutory right of survivorship existed because the right existed

should be given its common law understanding, which includes a right of survivorship.¹⁴² Similar to joint tenancy, the legislature did not define tenancy by the entirety.¹⁴³ As a result, the term should be given its common law understanding,¹⁴⁴ which also includes a right of survivorship.¹⁴⁵

Not only does Oklahoma's statute contemplate a right of survivorship, but other jurisdictions that recognize tenancies by the entirety also recognize that the right of survivorship is integral to the form of cotenancy. Some states expressly recognize the survivorship interest in their statutes, thereby allowing creation of tenancies by the entirety.¹⁴⁶ Other states accept a right of survivorship in accordance with common law when a statute is silent on the issue.¹⁴⁷

As for jurisdictions within the U.S. Court of Appeals for the Tenth Circuit, Utah refers to tenancies by the entirety in several statutes in the Utah Code. Most notably, Utah's Probate Code expressly recognizes a right of survivorship for tenants by the entirety, obviating the need for inference.¹⁴⁸ Going beyond the current Utah Code, the Utah Supreme Court has also recognized that tenancy by the entirety possesses a right of survivorship even though decisions regarding the issue are limited.¹⁴⁹ Accordingly, either by statute or by court decision, Utah recognizes a right of survivorship for tenancies by the entirety.

Wyoming, another state within the Tenth Circuit, statutorily recognizes tenancies by the entirety,¹⁵⁰ but the statute does not control the creation of the estates or any rights of survivorship.¹⁵¹ The statute instead codifies the

at common law, and the Legislature did not clearly abrogate that right).

142. *Id.*

143. 60 OKLA. STAT. § 74 (2001).

144. *See Flesher*, ¶ 11, 258 P.2d at 902.

145. 4 THOMPSON, *supra* note 4, § 33.02.

146. *See, e.g.*, N.J. STAT. ANN. § 37:2-18 (West 2002) ("Any such conveyance heretofore or hereafter made shall convey the entire estate and interest of a married man or married woman in lands held by such husband and wife as tenants by the entirety, including the right of survivorship . . .").

147. *See, e.g.*, N.Y. REAL PROP. LAW § 240-b (McKinney 1989). An identical statute, section 442.025 of the Missouri Statutes, was interpreted to allow a right of survivorship. *Kluck v. Metsger*, 349 S.W.2d 919, 921 (Mo. 1961).

148. UTAH CODE ANN. § 75-2-702 (2004) ("For the purposes of this subsection, 'co-owners with right of survivorship' includes joint tenants, tenants by the entireties, and other co-owners of property . . .").

149. *See, e.g.*, *In re Cowan's Estate*, 99 P.2d 605, 606 (Utah 1940) (citing a now-repealed statute that when property is held in a joint tenancy or as a tenancy by the entireties a right of survivorship exists).

150. WYO. STAT. ANN. § 34-1-140 (Michie 2004).

151. *In re Anselmi*, 52 B.R. 479, 486 (Bankr. D. Wyo. 1985) (citing *Wambeke v. Hopkin*,

principle that if a spouse owns a piece of property in severalty, the person can create a tenancy by the entirety with the other spouse without the use of a strawman.¹⁵² Because Wyoming's statute does not control the creation of tenancies by the entirety, the creation of the estate is ostensibly a product of common law, which includes a right of survivorship.¹⁵³

As for other states within the Tenth Circuit, Kansas, both by statute¹⁵⁴ and case law,¹⁵⁵ no longer recognizes tenancies by the entirety. Moreover, the New Mexico Supreme Court has held that its state legislature abrogated tenancies by the entirety within the state by adopting a community property system.¹⁵⁶ It is unclear whether Colorado even recognizes the form of co-ownership at all.¹⁵⁷

In Oklahoma, the common law right of survivorship should be accepted for tenancies by the entirety. Recognizing the right would keep the form of co-ownership consistent with the court's decision in *Flesher*, holding that joint tenancies created via title 60, section 74 receive the right of survivorship even though the statute is silent. Also, Oklahoma's recognition of the right would correspond with other states, like Utah and Wyoming, that recognize that tenancies by the entirety include a right of survivorship. This right of survivorship distinguishes tenancies by the entirety from tenancies in common, but if the Oklahoma statute does not follow the common law limitations on individual ownership transfers, this crucial difference will continue to be ignored in Oklahoma.¹⁵⁸

372 P.2d 470 (Wyo. 1962) to explain that tenancies by the entirety are not statutorily created but are a product of common law requiring a right of survivorship).

152. *Id.* A strawman at common law was a third party who would take title to property from one or more co-owner(s) and transfer the title back to the co-owner(s) to sever or create some of the four unities and change the type of ownership interest in the property. *See* 7 POWELL, *supra* note 3, § 1.07.

153. *In re Anselmi*, 52 B.R. at 486.

154. KAN. STAT. ANN. § 58-501 (1994) (explaining that a conveyance to a husband and wife creates a tenancy in common unless the conveyance clearly establishes a joint tenancy).

155. *Walnut Valley State Bank v. Stovall*, 566 P.2d 33, 37 (Kan. Ct. App. 1977), *rev'd on other grounds*, 574 P.2d 1382 (Kan. 1978).

156. *Swink v. Fingado*, 850 P.2d 978, 982 n.9 (N.M. 1993); *see also* N.M. STAT. ANN. § 40-3-8 (Michie 2004).

157. *Thompson G. Marsh, Tenancy by the Entirety in Colorado*, 13 COLO. LAW. 230, 230 (1984) (citing *Whyman v. Johnson*, 163 P. 76 (Colo. 1917) for its dicta that tenancies by the entirety may not be a valid form of cotenancy in Colorado).

158. *See* 60 OKLA. STAT. § 74 (2001) (stating "[n]othing herein contained shall prevent execution, levy and sale of the interest of the judgment debtor in such estates and such sale shall constitute a severance").

B. Individual Voluntary or Involuntary Transfers of Property Interests

Inherent in the common law understanding of tenancies by the entirety is the inability of an individual spouse to transfer, voluntarily or involuntarily, his interest in the entirety property without the consent of the other spouse.¹⁵⁹ The limitation exists to avoid any destruction of the right of survivorship that this type of co-ownership embraces.¹⁶⁰ Without this limitation, the estate would be held simply in a joint tenancy.¹⁶¹ The older theoretical basis for limiting individual transferability was that the husband and wife were considered one entity, so there was no individual interest that could be transferred.¹⁶² A more modern policy argument for limiting individual transferability is one focused on protection of the family unit. Specifically, it would be unfair to allow one spouse to destroy the other spouse's right of survivorship.¹⁶³

Because the Oklahoma legislature did not clearly define tenancies by the entirety, its common law understanding should be given effect.¹⁶⁴ Accepting the common law meaning would result in the spouses' inability to individually transfer their interest in the estate in *any* manner.¹⁶⁵ If Oklahoma followed the common law, voluntary conveyances, such as an inter vivos sale, the granting of a lien, or a devise at death by individual spouses would not be allowed.¹⁶⁶ Further adherence to the common law would prevent creditors from pursuing an involuntary conveyance of the property, such as a judgment lien or levy, to satisfy one spouse's debt.¹⁶⁷ The legislature, however, qualified the common law tenancy by the entirety when it inserted the provision "[n]othing herein contained shall prevent execution, levy and sale of the interest of the *judgment debtor* in such estates and such sale shall constitute a severance."¹⁶⁸

The legislature's intent behind this clause limiting the protection of a spouse's survivorship interest in the tenancy by the entirety is not clear. Because the qualification only applies in situations involving judgment debtors, and thus *involuntary* conveyances only, Oklahoma should still apply the common law tenancy by the entirety in matters not involving judgment

159. 4 THOMPSON, *supra* note 4, § 33.02.

160. *Id.*

161. *Id.*

162. *Id.* § 33.07(e).

163. *Id.*

164. *Flesher v. Flesher*, 1953 OK 392, ¶ 11, 258 P.2d 899, 902 (giving common law understanding to joint tenancy).

165. 7 POWELL, *supra* note 3, § 52.03[1].

166. *Id.*

167. *Id.* § 52.03[3].

168. 60 OKLA. STAT. § 74 (2001) (emphasis added).

debtors.¹⁶⁹ Thus, Oklahoma should disallow any *voluntary* conveyances not approved by the non-conveying spouse. In turn, an individual spouse in Oklahoma, as at common law, should not be able to sever the right of survivorship by voluntarily transferring or encumbering the property either during his or her life or upon his death.¹⁷⁰ Because the legislature chose to address the involuntary conveyance to a judgment creditor,¹⁷¹ the more difficult question is how to treat these involuntary conveyances, such as a judgment lien, by an individual debtor spouse. To understand how the Oklahoma statute should be interpreted, it is helpful to consider the law in other jurisdictions.¹⁷²

As stated previously, Utah and Wyoming are the only two states in the Tenth Circuit, other than Oklahoma, that explicitly recognize tenancies by the entirety in a statutory scheme.¹⁷³ Utah, as determined by the Utah Supreme Court, allows spouses holding property as tenants by the entirety to alienate their individual interests and destroy the other spouse's right of survivorship.¹⁷⁴ Accordingly, any purchaser or attaching creditor then becomes a tenant in common with the remaining spouse.¹⁷⁵ Wyoming does not allow individual spousal alienability in *any* way, voluntarily or involuntarily.¹⁷⁶ The Supreme Court of Wyoming has gone so far as to state, "[i]f this [common law doctrine] interferes too much with the rights of creditors as held in some of the cases, the remedy should be provided by the legislature."¹⁷⁷ To date, the law in Wyoming is unchanged, and creditors of an individual spouse cannot reach property held in tenancy by the entirety.¹⁷⁸

169. See *Flesher v. Flesher*, 1953 OK 392, ¶ 11, 258 P.2d 899, 902 (stating that "[t]he term 'joint tenancy' had a well defined meaning at common law, and, since the Legislature did not define the term or use language indicating a contrary intention, we must presume that it used the term in its technical common law sense").

170. See 7 POWELL, *supra* note 3, § 52.03[1].

171. 60 OKLA. STAT. § 74.

172. *Dolese Bros. Co. v. State*, 2003 OK 4, ¶ 16, 64 P.3d 1093, 1100 (citing *Cain's Coffee Co. v. City of Muskogee*, 1935 OK 450, ¶ 12, 44 P.2d 50, 52, for the court's use of an Illinois Supreme Court definition of "manufacturing" to aid in statutory construction of an Oklahoma statute).

173. See UTAH CODE ANN. § 75-2-702 (2004); *In re Anselmi*, 52 B.R. 479, 486 (Bankr. D. Wyo. 1985).

174. *Clearfield State Bank v. Contos*, 562 P.2d 622, 624-25 (Utah 1977).

175. *Id.*

176. *Lurie v. Blackwell*, 51 P.3d 846, 851 (Wyo. 2002) ("Neither Wyoming nor Missouri law allows a judgment creditor to seize property held by a husband and wife as tenants by the entirety to satisfy the individual debts of one of the spouses."); *Ward Terry & Co. v. Hensen*, 297 P.2d 213, 219-20 (Wyo. 1956).

177. *Ward Terry & Co.*, 297 P.2d at 220.

178. See *Lurie*, 51 P.3d at 851.

As far as involuntary conveyances to creditors are concerned, Wyoming law follows the majority view that creditors of individual spouses cannot reach the spouse's interest in an entirety estate.¹⁷⁹ *Sawada v. Endo*,¹⁸⁰ a leading Hawaii case that explores the majority rule, held that "under the Married Women's Property Acts the interest of a husband or a wife in an estate by the entireties is not subject to the claims of his or her individual creditors"¹⁸¹ *Sawada* cited a number of jurisdictions for the proposition that the very nature of a tenancy by the entirety forbids a unilateral conveyance that destroys the right of survivorship.¹⁸² Consequently, the Hawaii Supreme Court was not faced with a policy decision between creditors or the familial unit.¹⁸³ Although Hawaii and other jurisdictions follow the majority rule that tenancies by the entirety do not allow either voluntary or involuntary unilateral conveyances, many of these jurisdictions rely on interpretation of Married Women's Property Acts and court-created law.¹⁸⁴ Oklahoma is different from these jurisdictions because its existing statute expressly states that judgment creditors can levy the entireties estate to satisfy the debts of an individual spouse.¹⁸⁵ In further contrast to the majority rule against any type of unilateral conveyance of the entireties property is *United States v. Craft*,¹⁸⁶ a recent U.S. Supreme Court decision that held that federal tax creditors could reach entireties property to satisfy the individual tax debt of one of the spouses.¹⁸⁷

C. Craft: Entireties Property Is Not Safe from Certain Creditors

The issue in *Craft* was whether an individual spouse as a tenant by the entirety possessed "property" or "rights in property" that could be pursued by the federal government to satisfy the individual spouse's federal tax lien.¹⁸⁸ The U.S. Supreme Court held that the spouses possessed individual property rights in the entireties estate, as defined by Michigan law, which could be the subject of a lien.¹⁸⁹ Thus, if one of the spouses has a separate, unpaid tax

179. 4 THOMPSON, *supra* note 4, § 33.07(e) (citing *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), as an example of support for the majority rule). See generally CUNNINGHAM, *supra* note 1, § 5.5; J.H. Cooper, Annotation, *Interest of Spouse in Estate by the Entireties as Subject to Satisfaction of His or Her Individual Debt*, 75 A.L.R.2d 1172 (1961) (updated Dec. 2004).

180. 561 P.2d 1291.

181. *Id.* at 1295.

182. *Id.*

183. *Id.* at 1297.

184. *Id.* at 1295; see also 4 THOMPSON, *supra* note 4, § 33.07(e).

185. 60 OKLA. STAT. § 74 (2001).

186. 535 U.S. 274 (2002).

187. *Id.* at 276.

188. *Id.*

189. *Id.*

burden, the federal government could pursue the entireties property to satisfy that tax burden.¹⁹⁰ The opinion stated that the Court must look to state law to determine what property rights exist, but the question of whether those property rights can be reached by a federal tax lien is a federal question that does not rely on state law.¹⁹¹

The *Craft* decision supports the position that at least some creditors should be able to reach entireties property,¹⁹² and the decision undoubtedly affects tenancies by the entirety in Oklahoma. The only issue that *Craft* seems to address relevant to Oklahoma is that federal creditors can pursue entireties property to satisfy an individual spouse's federal tax debt.¹⁹³ The decision leaves in place any existing state law regarding the ability of state creditors to reach the entireties property.¹⁹⁴ The question of the ability of state creditors to reach entireties property remains unanswered — except for the provision in title 60, section 74 that seemingly allows *all* judgment creditors, federal and state, to pursue entireties property to satisfy the debts of individual spouses.¹⁹⁵

D. A Judgment Creditor Forcing an Involuntary Conveyance Becomes a Tenant in Common

At a minimum, federal tax creditors can force an involuntary conveyance of an individual spouse's interest in entireties property.¹⁹⁶ Thus, two questions remain: (1) what ownership interest do these, and possibly other judgment creditors receive; and (2) at what point does the right of survivorship terminate, if at all? In answering the first question, of the three forms of concurrent ownership discussed in this note, only a tenancy in common or joint tenancy are possible choices because a tenancy by the entirety requires the co-owners to be husband and wife.¹⁹⁷ The answer to the second question depends greatly on the answer to the first.

Judgment creditors will not receive a joint tenancy ownership interest with the remaining spouse. In Oklahoma, the four unities of time, title, interest, and

190. *See id.*

191. *Id.* at 278. “We recognize that Michigan makes a different choice with respect to state law creditors: ‘[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone.’” *Id.* at 288 (quoting *Sanford v. Bertrau*, 169 N.W. 880, 881 (Mich. 1918)).

192. *Id.*

193. *Id.*

194. *Id.*

195. 60 OKLA. STAT. § 74 (2001) (stating “[n]othing herein contained shall prevent execution, levy and sale of the interest of the judgment debtor in such estates and such sale shall constitute a severance”).

196. *Craft*, 535 U.S. at 288.

197. 4 THOMPSON, *supra* note 4, § 33.08.

possession must be present to create a joint tenancy.¹⁹⁸ Because the judgment creditor obtained its interest at a different time and by a different method than the remaining spouse, the unities of time and title would be lacking, so no joint tenancy could be created.¹⁹⁹ A joint tenancy in Oklahoma can be created pursuant to title 60, section 74 without the four unities if the conveying instrument expressly declared that a joint tenancy was to be created.²⁰⁰ It is unlikely, however, that an involuntary transfer to a judgment creditor will contain an express provision to create a joint tenancy between the creditor and the remaining spouse.

Tenancy in common is the favored form of co-ownership in Oklahoma and would most likely be the form of concurrent ownership between a remaining spouse and a judgment creditor.²⁰¹ In Oklahoma, tenants in common have a joint interest in the estate, but hold separate and distinct titles that allow the tenants in common to transfer their interests voluntarily or involuntarily.²⁰² Tenants in common do not enjoy a right of survivorship,²⁰³ so the question remains whether the judgment creditor becomes a tenant in common on the filing of the judgment lien or on the actual execution sale of the property.

Because case law in Oklahoma regarding the existence of tenancies by the entirety does not exist, there is consequently no case law concerning the severance of tenancies by the entirety and its right of survivorship by conveyances to judgment creditors. To determine how a court might rule on the issue, it is helpful to look at case law concerning the severance of joint tenancies and the effect on its right of survivorship. In Oklahoma, the attachment of a lien by levy or by filing a judgment lien suffices to destroy the joint tenancy and the right of survivorship.²⁰⁴ If the joint tenancy were not severed by the attachment of the lien, the joint tenancy would be severed by

198. *Clovis v. Clovis*, 1969 OK 170, ¶ 11, 460 P.2d 878, 881-82.

199. *Id.*

200. 60 OKLA. STAT. § 74; *Raney v. Diehl*, 1971 OK 28, ¶¶ 17-18, 482 P.2d 585, 590.

201. *Gazalski v. Goss (In re Estate of Ingram)*, 1994 OK 51, ¶ 24, 874 P.2d 1282, 1288; *see also* 84 OKLA. STAT. § 184 (2001) (stating that a devise to two or more persons creates a tenancy in common); 60 OKLA. STAT. § 74 (codifying that express words are necessary to create a joint tenancy or tenancy by the entirety).

202. *See, e.g., Matthews v. Matthews*, 1998 OK 66, ¶ 11, 961 P.2d 831, 834 (holding that joint tenants in a tenancy in common have distinct title despite their joint interest in the property).

203. 4 THOMPSON, *supra* note 4, § 33.02.

204. *See* 7 POWELL, *supra* note 3, § 51.04(1)(c) (citing *Ladd v. State ex rel. Okla. Tax Comm'n*, 1984 OK 60, ¶ 4, 688 P.2d 59, 61).

the execution sale of the property.²⁰⁵ To keep the severance survivorship rights consistent, Oklahoma should apply its joint tenancy precedent to tenancies by the entirety and establish the rule that tenancies by the entirety are severed on the attachment of the lien and not on execution sale.

E. Summary of the Current Status of Tenancies by the Entirety in Oklahoma

A tenancy by the entirety is a valid form of concurrent ownership in Oklahoma because explicit statutory language allows such creation.²⁰⁶ The effects of allowing tenancies by the entirety in Oklahoma are: (1) the husband and wife creating the estate enjoy the right of survivorship that existed at common law²⁰⁷ and that many other jurisdictions recognize;²⁰⁸ (2) individual spouses are not allowed to voluntarily transfer their ownership interests without the consent of the other spouse;²⁰⁹ and (3) individual spouses are required to involuntarily transfer their interests to judgment creditors.²¹⁰ *Craft* supports the position allowing involuntary transfers to at least some judgment creditors.²¹¹

By disallowing individual voluntary conveyances but allowing individual involuntary conveyances, Oklahoma has a unique form of tenancy by the entirety.²¹² The Oklahoma tenancy by the entirety, however, is practical and strikes a desirable balance between a policy favoring creditors and a policy favoring the family. It is true that a spouse who wishes to unilaterally sever the right of survivorship may manipulate Oklahoma's form of tenancy by the entirety. The spouse may take an unsecured loan from the potential purchaser instead of voluntarily transferring his interest; he could then default on that

205. See 7 POWELL, *supra* note 3, § 51.04. Requiring a creditor to actually sell the property to sever the joint tenancy means that the creditor must sell the property before the debtor joint tenant dies, or the creditor's interest would be extinguished. *Id.*

206. 60 OKLA. STAT. § 74.

207. *Flesher v. Flesher*, 1953 OK 392, ¶ 11, 258 P.2d 899, 902; 4 THOMPSON, *supra* note 4, § 33.02.

208. See, e.g., UTAH CODE ANN. § 75-2-702 (2004) ("For the purposes of this subsection, 'co-owners with right of survivorship' includes joint tenants, tenants by the entireties, and other co-owners of property.").

209. *Flesher*, ¶ 11, 258 P.2d at 902 (citing construction in *Draughon v. Wright*, 1948 OK 81, ¶ 9, 191 P.2d 921, 923, for the proposition that if the legislature did not indicate a contrary intention then a term with a well-defined common law meaning should continue having that meaning in the statute).

210. 60 OKLA. STAT. § 74 (stating "[n]othing herein contained shall prevent execution, levy and sale of the interest of the judgment debtor in such estates and such sale shall constitute a severance").

211. *United States v. Craft*, 535 U.S. 274, 288 (2002).

212. See *Sawada v. Endo*, 561 P.2d 1291, 1295 (Haw. 1977); see also 4 THOMPSON, *supra* note 4, 33.07(e) (stating that the majority of states do not allow either type of transfer).

loan and the “creditor” could then pursue judicial measures to reach the property being held in a tenancy by the entirety. It is questionable whether this type of transaction could produce a unilateral transfer of a spouse’s interest, but requiring the “creditor” to pursue court action would be a deterrent to such dealings. For those judgment creditors who successfully pursue entireties estates, they would become tenants in common with the remaining spouse and sever the right of survivorship.²¹³

V. Conclusion

Despite the limiting language of the statute, Oklahoma’s form of tenancy by the entirety gives husbands and wives a co-ownership option that differs from a joint tenancy. Two features of the tenancy give security to the marital relationship concerning the property owned by the spouses: (1) spouses enjoy the survivorship right that exists for joint tenancies and allows them to protect the estate from any testacy or intestacy conveyances; and (2) an estate held as tenancy by the entirety protects one spouse from the other spouse’s voluntary conveyance of the property. Oklahoma, however, does not provide the highest level of security for spouses because it allows judgment creditors freedom to satisfy debts owed by an individual spouse by pursuing the tenancy by the entirety property. This unique variation from traditional tenancies by the entirety recognizes the importance of credit in today’s society. Striking the balance between a policy protecting marital property and a policy protecting creditor’s rights makes the tenancy by the entirety a form of concurrent ownership that should be used more often in Oklahoma.

Tom R. Russell

213. *See* Gazalski v. Goss (*In re* Estate of Ingram), 1994 OK 51, ¶ 24, 874 P.2d 1282, 1288 (discussing presumption of a tenancy in common); *see also* Matthews v. Matthews, 1998 OK 66, ¶ 11, 961 P.2d 831, 834-35 (discussing cotenancy relationship).