NORTH CAROLINA’S TENANCY BY THE ENTIRETY REFORM LEGISLATION OF 1982

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I. Introduction

On June 18, 1982, the North Carolina General Assembly enacted House Bill No. 671 entitled “AN ACT TO EQUALIZE BETWEEN MARRIED PERSONS THE RIGHT TO INCOME, POSSESSION, AND CONTROL IN PROPERTY OWNED CONCURRENTLY IN TENANCY BY THE ENTIRETY.”

This article explores several of the issues raised by the legislation: (1) Does it alter the pre-reform law under which a creditor of neither husband nor wife alone could reach any interest in entirety property? (2) Does it extend that exemption to the rents and profits arising from tenancy by the entirety property? (3) Will the provisions for management of entirety property by husband and wife generate a theory of estoppel by acquiescence? (4) Will the courts utilize the curative principles of the reform act when holding that pre-reform law was unconstitutional because of gender discrimination? (5) Does the act intend to change ownership of rents and profits accruing after the act’s effective date, January 1, 1983, from entirety property where the cotenancy was created before that date? (6) Does the act intend to shift management and control of

pre-enactment entirety property? (7) Does the act enable third-party donors creating a tenancy by the entirety to validly claim two federal gift tax annual exclusions on the theory that the wife’s interest is no longer a future interest? and (8) Does the act cause a shift in the bases of the husband and wife in entirety property that will affect federal income tax liabilities?

II. EFFECT OF THE LEGISLATION ON THE EXEMPT STATUS OF TENANCY BY THE ENTIRETY PROPERTY VIS-A-VIS CREDITORS OF ONE SPOUSE ALONE.

A. Tenancy by the Entirety as a Common Law Form of Co-Ownership

At English common law a grant of land naming husband and wife as grantees created a tenancy by the entirety. Marriage made the spouses “one flesh” and that one flesh appeared in the eyes of the law as the husband. The wife’s legal existence was suspended by the marriage; she was a femme covert, legally “covered up” or hidden.

Naturally, the husband was the exclusive manager of entirety property and the owner of rents and profits derived from it. He could lease the land and even convey a life interest (measured by his own life). This interest in the husband could be seized by his creditors.

But when the marriage status ended by his death (divorce was so rare that termination for this reason was seldom encountered), the co-owner wife as survivor was no longer covert but was now recognized as owner of the property by the law. Thus, the husband’s deed during his lifetime could not convey any interest that lasted beyond his death unless he survived his wife.


B. Effect of the Married Women’s Property Rights Acts

Beginning with Mississippi in 1839, legislatures in the American states with common law marital property systems enacted legislation removing the status of married women as femmes covertes. These statutes called Married Women’s Property Rights Acts, gave women management power, and ownership of rents and profits, of their own property during marriage, abolishing the English common law’s jure uxoris.⁴

The courts in most states held that such legislation applied to the wife’s interest in tenancy by the entirety property. Because of the husband’s dominance in tenancy by the entirety at common law, many courts held that form of concurrent ownership inconsistent with the legislation conferring management powers and ownership rights on married women. They concluded that the legislation had abolished tenancy by the entirety.⁵

In other states the courts held that tenancy by the entirety continued in gender-neutral form.⁶ The wife’s management function was equivalent to the husband’s, and they co-owned the rents and profits of the property as well as the land itself. Rights of creditors were also gender-neutral. Typically, the creditors of neither alone could reach any interest.⁷ In a few states it was held

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5. See, e.g., Walthall v. Goree, 366 Ala. 728 (1960); Clark v. Clark, 56 N.H. 105 (1875). See generally Phipps, supra note 2; Annot., 141 A.L.R. 179 (1942). However, the Married Women’s Property Rights Acts were held not to apply to tenancies by the entirety created before their enactment. E.g., Kron v. Kron, 195 Ill. 181, 62 N.E. 809 (1902); Stilphen v. Stilphen 65 N.H. 126, 23 A. 79 (1889). See generally, 2 J. BISHOP, LAW OF MARRIED WOMEN § 44 (1875) (especially cases collected in n.5); Annot., 27 A.L.R. 2d 868 (1953); cf. Ryder v. Hulser, 24 N.Y. 273 (1862) (Married Women’s Property Act of 1848-49 did not make married woman owner of rents and profits of property acquired by her before enactment; as to it jure uxoris still applied). Accordingly the wave of Married Women’s Property Rights Acts did not present to the courts the constitutional questions concerning retroactivity discussed in this Article.


that the creditor of one spouse alone could reach his or her right of survivorship. And in at least one, New Jersey, it was held that the creditor of one alone could reach not only the right of survivorship of the debtor but his or her present interest, becoming a tenant in common in possession with the nondebtor spouse.

C. The North Carolina Experience

North Carolina became subject to a typical Married Women’s Property Rights regime in 1868 as part of the state constitution. The decision in Long v. Barnes, suggested that the constitutional provision would have no effect at all on tenancy by the entirety as a form of co-ownership.

However, nine years later in Bruce v. Nickolson, the North Carolina Supreme Court apparently was influenced by the constitutional provision in holding that a husband’s creditor could not reach any interest in tenancy by the entirety property. Of course, a wife’s creditor also could not reach any interest.


11. 87 N.C. 329 (1882). In 1869, after the constitutional provision took effect, a deed conveyed realty to husband and wife. In 1879 the husband alone conveyed to the plaintiff. If tenancy by the entirety had been abolished, the plaintiff took an undivided half interest in fee simple; if tenancy by the entirety continued unchanged as an estate, the plaintiff received the husband’s life estate and the husband’s right of survivorship—in effect everything but a contingent remainder (survivorship right) in the wife. The latter solution was adopted by the court.


13. The court also relied on N.C. Code § 1840 (1848), providing that no land belonging to the wife shall be disposed of by the husband without her consent. This 1848 act also provided that no interest of the husband in lands of the wife should be subject to levy and sale to satisfy any execution obtained against the husband.
The holding in Bruce was logically inconsistent with continuation of the common law theory that the husband during the continuance of the marriage was, in the eyes of the law, the primary owner of the property, the wife having what in effect was something like a future interest such as a contingent remainder. Massachusetts, one of the few states to recognize unchanged male dominance in tenancy by the entirety despite enactment of a Married Women's Property Rights Act, continued to permit the husband's creditor to reach all of the husband's interest, a decision fully protecting for the wife all that the common law said she owned.

Nevertheless, North Carolina's Supreme Court continued after Bruce to hold that the husband had exclusive management of the entirety property as well as sole ownership of its rents and profits. As Professor Lee observed, this state of the laws was illogical.

Apparently the Bruce decision and numerous cases following Bruce which bar the creditors of one spouse from any interest in the entirety were judicial attempts to create something like a homestead interest. The exemptions given by statute in North Carolina against executions by creditors have always been puny compared to other states. Criticism has been made that the North Carolina case law treatment of creditors' rights in entirety property is a gross method for protection of poor creditors. Unlimited amounts of land can be shielded by the Bruce line of cases, not just the family residence.

19. Consider General Air Conditioning Co. v. Douglass, 241 N.C. 170, 84
lenders—can protect themselves by conditioning their dealings with one spouse alone on the other spouse joining in an instrument that pledges the entirety property as security for the debt or which enables the third party to get a judgment against both spouses (as when the wife signs on the contract made by her husband as his guarantor). But the type of creditor who may appear most deserving of a recovery against a debtor spouse’s extensive interest in entirety property—the victim on whom a spouse has tortiously inflicted severe injuries—has no relief.

Nevertheless, until the General Assembly enacts a substantial family homestead exemption that satisfies the policy goals now achieved by the court’s Bruce line of cases, the state supreme court is unlikely to back away from the present law on creditor access.

Nothing about the new section 39-13.6 of the General Statutes suggests that the Legislature had in mind any change in the law of creditors’ rights. Incidents involving management and control of tenancy by the entirety are substantially changed by subsection (a) of the Act, providing:

A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse. This section shall not be construed to require the spouse’s joinder.

S.E.2d 828 (1954). The husband was in the business—at a large scale—of buying lots, constructing homes on them, and selling the properties. In just over a year, register of deed records showed 52 acquisitions with title taken in tenancy by the entirety and 72 deeds out of the husband and wife. In the cited case a creditor of the husband’s business, which could not obtain a joint judgment against husband and wife on his contract signed only by husband, was unable to reach any of the co-owned real property. That the entirety property was part of a business was considered irrelevant by the court in applying the law of creditor access. Use of the entirety form of ownership thus gave the spouses far more limited liability protection than would incorporating the enterprise.

20. See In re Banks, 22 Bankr. 891 (Bankr. W.D.N.C. 1982), observing that in enacting section 1C-1601(a) of the general statutes in 1981, to make the federal exemptions under the Bankruptcy Act inapplicable, the General Assembly considered but declined to change the law concerning creditor access to property owned in tenancy by the entirety. The court concluded that the cited statute had no effect on tenancy by the entirety law.

Indirectly the new Act does affect creditors in that the husband himself cannot now deed over any interest in the entirety property to voluntarily pay a debt, as he could before 1983. See N.C. Gen. Stat. § 39-13.6(a) quoted in text at note 21.
where a different provision is made under G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, or G.S. 52-10.\textsuperscript{21}

But the General Assembly still calls the resulting co-ownership tenancy by the entirety. Emphasis is seen to be on upgrading the position of the wife to a status of equality with the husband. Allowing the creditors of either husband or wife to reach some interest in entirety property would not disturb that equality, but such a change from the present law would not advance equality either. Probably the legislature did not think about creditors’ rights in enacting the new law, and hence no change in the law concerning creditor access should be found by implication.

Actually, giving the wife management authority and co-ownership of rents and profits increases her stake in the entirety property that the \textit{Bruce} line of cases intended to protect from husband’s creditors. The gender-neutral approach to the incidents of tenancy by the entirety that the General Assembly desires of course requires the same protection of the husband’s interest when a creditor of the wife alone attempts to levy execution.

In sum, the new Act will not alter the \textit{Bruce} rule; instead it removes the inconsistent incidents of husband dominance that made \textit{Bruce} illogical.

III. \textbf{Effect of the Legislation on the Right of a Creditor of One Spouse to Reach the Rents and Profits of Entirety Property}

Subsection (a) of new section 39-13.6 extends to the wife an equal right in the rents and profits flowing from entirety property. In those states that have broadened the concept of entirety property to encompass rents and profits, creditors of one spouse have been unable to reach that spouse’s interest in the rents and profits.\textsuperscript{22} Despite the new law, this view is not likely to be followed in

\textsuperscript{21} These statutes provide that a spouse need not join in a purchase-money mortgage (N.C. Gen. Stat. § 39-13), a conveyance between husband and wife (N.C. Gen. Stat. § 39-13.3(d)), a conveyance by husband or wife under a deed of separation which authorizes the spouse to convey without the consent and joinder of the other (N.C. Gen. Stat. § 39-13.4), or a contract or release between husband and wife of a duration of three years or less (N.C. Gen. Stat. § 52-10).

\textsuperscript{22} In Ward Terry & Co. v. Hensen, 75 Wyo. 444, 297 P.2d 213 (1956), the court did not allow rents and profits flowing from the entirety property to be subjected to an indebtedness incurred only by the wife. Only a few states are in accord. \textit{See}, e.g., Annapolis Banking & Trust Co. v. Smith, 164 Md. 8, 164 A. 157 (1933) (husband’s interest in rent from estate by entireties not separate estate of
North Carolina since North Carolina generally has not recognized tenancy by the entirety ownership of personalty, although a few exceptions to the basic rule exist. The new Act does not say that the rents and profits are held in tenancy by the entirety (rather than in tenancy in common), and thus departure from the common law rule against entirety ownership of personalty is not likely.

Moreover, from a practical standpoint the Bruce rule regarding creditor access to the real property itself may be felt by the court to supply sufficient protection to the marital unit against creditors of one spouse. If tenancy by the entirety realty is producing rents and profits, it is not likely to be the family home. As indicated above, the Bruce rule denying creditor access may be a functional equivalent of a homestead law. If so, the policy reasons underlying Bruce do not extend to the rents and profits. The creditor of one spouse alone should be able to reach half of such rents and profits from realty owned in tenancy by the entirety.

husband and therefore not attachable for his debts); Cole v. Cardoza, 441 F.2d 1337 (6th Cir. 1971) (applying Michigan law) (neither entirety land nor its rents and profits are subject to execution by creditor of one spouse). But see Berlin v. Herbert, 48 Misc. 2d 33, 265 N.Y.S.2d 25 (Dist. Ct. 1966) (creditor entitled to share in rents and profits as well as occupancy). These minority decisions in effect view the rents and profits as held in tenancy by the entirety just as is the productive realty.

23. In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981) (surplus funds generated by foreclosure sale of entirety property not held constructively as entirety property); Forsyth County v. Plemmons, 2 N.C. App. 373, 163 S.E.2d 97 (1968) (where building on entirety property burned down, fire insurance proceeds not held constructively as entirety property since the proceeds result solely from the terms of an insurance contract and not from an involuntary transfer of title to land). See also Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956) (estate by entirety exists only in realty); Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947) (estate by entirety in personal property not recognized in North Carolina).

24. Personality may be owned in tenancy by the entirety in some instances where there has been an involuntary conversion of the entirety realty into personalty. Highway Commission v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967) (condemnation of entirety property held to involve such an involuntary transfer of title that the character of the entirety estate remained in the funds received). But see Forsyth County v. Plemmons, 2 N.C. App. 373, 163 S.E.2d 97 (1968) (burning of building on entirety property not involuntary transfer). North Carolina has also recognized an estate by the entirety in personalty where one spouse is incompetent and her guardian has consented to a sale. Perry v. Jolly, 259 N.C. 305, 130 S.E.2d 654 (1963) (proceeds from sale of entirety property constructively retained characteristics of entirety property where wife was incompetent, since a sale can no longer be the voluntary act of both spouses).
IV. WILL THE REQUIRED "WRITTEN JOINER" BE DISPENSED WITH WHEN ONE SPOUSE ORALLY ACQUIESCES IN A MANAGEMENT DECISION MADE BY THE OTHER?

As indicated above, the new statute provides that "neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property [owned in tenancy by the entirety] without the written joinder of the other spouse."²⁵ Under prior law, the deed or other instrument executed by the husband alone operated on all interests in the property except the wife's survivorship, and a deed executed by the wife alone would be effective to convey her interest through the doctrine of estoppel by deed in most instances after the entirety was terminated by husband's death or the couple's divorce.²⁶

Whether the new statute makes the deed or other instrument of one spouse alone wholly void so as not to support the passing of an interest via estoppel is unclear. The management system enacted appears to be similar to that in most community property states where a husband and wife co-own community realty in equal shares, each having an equal interest.²⁷ In those states the property

²⁵. 1981 N.C. Sess. Laws ch. 1245 (Reg. Sess. 1982) (codified at N.C. Gen. Stat. § 39-13.6(a)). This author assumes that "written joinder" means that if, for example, the husband wishes to mortgage or lease entirety realty, the statute is not satisfied by his obtaining a written consent signed by the wife on a paper separate from the mortgage or lease, which he alone signs (unless the separate consent form is equivalent to a power of attorney). Nor, apparently, would wife's signature at the bottom of the lease or mortgage stating "I consent" satisfy section 39-13.6. Apparently the wife must assume the status of lessor, grantor, or mortgagor. That means she will be personally liable on warranties contained in the instrument, which she might not be if the statute empowered the husband to convey the full fee upon her written "consent." See the discussion of this problem arising under the Louisiana joinder statute applicable to property co-owned in community by Louisiana spouses in McClendon, Louisiana's New Matrimonial Regime Law: Some Aspects of the Effect on Real Estate Practice, 39 La. L. Rev. 441 (1979), and Tete, A Critique of the Equal Management Act of 1978, 39 La. L. Rev. 491 (1979).


is not subject to partition by court action, and statutes call for joint action by the spouses to alienate or encumber the property.

Some of the states have declared by statute or case law the instrument executed by one spouse alone to be void. Others have held the instrument merely voidable by the non-joining spouse, with the title to the complete interest (i.e., the half interest of the non-signing spouse as well as that of the signing spouse) vested in the grantee (or a security interest in the mortgagee) until such time as the non-signing spouse takes action to void the transaction.

One case holds the instrument executed by one spouse alone valid with respect to his half interest, but voidable as to the half interest of the non-signing spouse. The latter California decision, Mitchell v. American Reserve Ins. Co., in effect empowers one spouse to partition the co-owned property; it is inconsistent with

32. See La. Civ. Code Ann. art. 2353 (West Supp. 1981); Stabbert v. Atlas Imperial Diesel Engine Co., 39 Wash. 2d 789, 238 P.2d 1212 (1951). This was formerly the rule in California. E.g., Mark v. Title Guarantee & Trust Co., 122 Cal. App. 301, 9 P.2d 839 (1932) (to void transaction nonsigning spouse had to make restitution to grantee of consideration paid). During the marriage the California nonsigning spouse could void the transaction in toto, but after dissolution of the marriage by divorce or death, she (or her estate) could void it only as to her half interest. Yearout v. American Pipe & Steel Corp., 74 Cal. App. 2d 139, 168 P.2d 174 (1946).

The notion that the signature of one spouse alone can convey the interest of the non-signing spouse (subject to a right in her to void the deed) seems necessarily to have roots in the older approach to management in community property states, where the husband alone had complete control over all the community property and could convey his wife's interest as agent for her (or as a trustee for her).

the policy reasons underlying the joinder statute (that the sale of
realty owned by the marital unit is such an important event that
both spouses should concur in such a decision); it is furthermore
inconsistent with the “unity of person” concept upon which com-
mon law tenancy by the entirety is founded. North Carolina will
not, then, interpret section 39-13.6 of the general statutes in the
manner that the California case construed a similar act.

Most likely, North Carolina will hold the instrument executed
by only one spouse void for some purposes but viable for others. A
lease or deed executed by one spouse alone should be void ab initio
(with no need for the other spouse to bring an action to void it)
when the issue is whether the instrument itself passed any title,
interest, or right of possession upon delivery to the grantee or
lessee. This voidness should continue so long as the realty is owned
by the marital unit in tenancy by the entirety. If the nonsigning
spouse should die, terminating the tenancy by the entirety, the
courts should hold the instrument executed during the marriage by
the survivor sufficiently nonvoid to support a claim by the grantee,
mortgagee, or lessee on an estoppel by deed theory. Likewise, if the
tenancy by the entirety is terminated by divorce or simply because
the husband and wife through appropriate exchange of instru-
ments change the form of ownership to tenancy in common, the
instrument should support an estoppel by deed claim to the extent
of the interest owned after the termination of the entirety by the
spouse who executed it. In such a case, even though the co-own-
ers are still married they have opted to eliminate the “unity,”
nonpartitionibility feature from their co-ownership of the land,
and the theoretical basis for labeling the instrument executed by
only one of them void is also eliminated.

More questionable is whether an instrument executed by one
spouse alone should be sufficiently nonvoid to support an estoppel
in pais claim against the nonsigning spouse. For example, suppose
Husband has for many years been in the practice of leasing farm-
land owned in tenancy by the entirety to tenant farmers. In 1983
he once again, without Wife’s joinder, makes a lease. In an evic-

34. I.e., the grantee, mortgagee, or lessee will obtain ownership of or rights to
the husband’s undivided half interest in tenancy in common where the spouses
have, after he alone executed the instrument at issue, converted the form of own-
ership of the realty from tenancy by the entirety to a 50-50 tenancy in common.

35. If the lease is for more than three years, there must be a writing accord-
ing to the Statute of Frauds, N.C. GEN. STAT. § 43-38 (1976). In such a case,
absent some estoppel to invoke the statute (see Vierra v. Pereira, 12 Cal. 2d 629,
tion suit against the would-be tenants, can they establish a right of
possession under an instrument executed solely by the husband on
a theory that Husband signed as Wife's agent, or that she ratified
the lease, or that she is estopped to invoke the joinder statute?

A similar problem arose prior to the 1982 Tenancy by the En-
tirety Reform Act when a contractor attempted to assert me-
chanics' and materialmen's liens against tenancy by the entirety realty
based on a work-order contract signed only by the husband.36 The
North Carolina Supreme Court held, in General Air Conditioning
Co. v. Douglass, that marital status alone was insufficient to estab-
lish an agency.37 The fact that the wife obtained the benefits of the
contractor's improvements to the tenancy by the entirety property

86 P.2d 816 (1939) where the California joinder statute was held inapplicable to
an oral lease taken outside the statute of frauds via estoppel), there will always be
a written instrument for the wife to execute. If the lease is for three years or less,
but it is reduced to writing not joined by the wife, argument can be made that
invalidating the writing for lack of Wife's signature should not bar the tenants
from relying on oral discussions leading up to the execution of the lease if the wife
participated in them, since the statute of frauds for leases does not apply (i.e.,
N.C. GEN. STAT. § 43-38). As section 39-13.6 is drafted, the spouse who engages in
the conversation in which an unwritten lease is made need not sign anything; only
the "other spouse" needs to sign a written joinder. It would seem, then, that if
both spouses talk to the lessee about the arrangement, there is no "other spouse"
who must sign a joinder.

Also it can be argued that the tenancy by the entirety reform statute requir-
ing "written joinder of the other spouse" is inapplicable when the lease of three
years or less was wholly oral at all times. I.e., the two year oral lease by the hus-
band alone is valid even if the wife delivered to the tenant her written objection.
No "written joinder" is required because there was nothing to join.

California held its joinder statute inapplicable in a case where the act of the
husband alone in acquiescing in a fence as marking the boundary of land co-
owned by the spouses in effect transferred to a contiguous landowner a substan-
Rptr. 559 (1964) (on the theory there was no instrument for the wife to sign to
express her joinder). Apparently this problem cannot arise in North Carolina, be-
cause this state rejects the "boundary by acquiescence" doctrine. See Wagner v.
36. General Air Conditioning Co. v. Douglass, 241 N.C. 170, 84 S.E.2d 828
37. In the case before the court, the contract did not have to be in writing
and agency could have been established by parol evidence. Since the joinder sig-
nature required by section 39-13.6 must be in writing, it would seem likely that
any agency enabling a husband's signature to bind the wife would also have to be
in writing, to carry out the protective policies of the reform act. I.e., Wife would
have to give husband a formal power of attorney authorizing him to act for her in
dealing with specified parcels of entirety realty.
was not a ratification by her of her husband's act; nor was her mere knowledge of what he was doing sufficient to raise an estoppel in pais. The holding in *Douglass* involving a mechanics' and materialman's lien should still be good law and should be extended to all other types of transactions for which the new act requires joinder, such as leases, mortgages, etc.

Consider the most extreme case: a lessee or mortgagee of *Husband* alone seeks out *Wife*, shows her the instrument executed by *Husband*, assures himself she understands it, and obtains her oral approval (but not her joinder in writing). Subsequently, *Wife* reaps the benefits of the transaction (as by co-owning the rentals paid under a lease of entirety realty). She then repudiates the lease and sues to evict the tenant. If on any theory the *written* joinder requirement is excused in such a case, it would appear some oral consent of the wife would always suffice, contrary to the legislative judgment that transactions involving tenancy by the entirety property were of sufficient importance that she should be fully involved by joining in the written instrument.

Moreover, from a technical standpoint a basic element of estoppel in pais will be lacking in such cases: reasonable reliance by the party asserting estoppel on the oral representation. When section 39-13.6 so plainly states that the wife's joinder should be *written*, how could a third party ever reasonably rely on a co-owner's *oral* approval of a transaction that the statute of frauds requires to be in writing or, even where the statute of frauds is inapplicable (as in the case of a two-year lease), of a transaction for which a writing has been prepared?

Again precedent by analogy can be found from the community property states having joinder statutes similar to section 39-13.6(a) of the North Carolina General Statutes. Some decisions apply ordi-

38. *See* Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 12, 86 S.E.2d 745, 753 (1955) (party claiming estoppel in reliance is viewed as "reasonably prudent person"); Boddie v. Bond, 154 N.C. 359, 365-66, 70 S.E. 824, 826-27 (1911) (party claiming estoppel must have "reasonably relied"); *see also* Webber v. Webber, 32 N.C. App. 572, 232 S.E.2d 865 (1977) (party claiming estoppel must have "rightfully relied"). A good case in point is Hill v. Town of Hillsborough, 48 N.C. App. 553, 269 S.E.2d 303 (1980), where a landowner pointed out to town officials what he (mistakenly) thought was his boundary land and in reliance the town paved a road up to the supposed boundary line. The road in fact encroached. In the landowner's suit for trespass, the town's theory that the landowner was estopped to assert the true boundary was rejected on the ground it was unreasonable of the town to rely on an informal statement of a legally ascertenable fact such as the location of a boundary.
nary estoppel in pais principles to conclude that a wife's failure to object to a transaction made by the husband alone provides no basis for reasonably relying on the validity of the transaction in the face of the joinder statute.39 Many other cases, however, have estopped the wife to object to the deed or mortgage executed by the husband alone simply because of her awareness of the transaction and failure to object or because she benefited from the transaction.40 When the estoppel is based on receipt of benefits by the nonsigning party, technically the estoppel is not in pais (requiring the party claiming it to have reasonably relied to his detriment on the representation or inaction by the party estopped) but rather a "quasi-estoppel" or implied ratification to prevent unjust enrichment.41

It is predicted that any estoppel to assert the joinder statute must be based on unjust enrichment principles rather than on estoppel in pais. Moreover, a strong argument can be made—especially in cases where the nonjoining wife was not even aware of the transaction when her husband entered into it—even though it generated co-owned rents, loan funds, or purchase money so that the nonjoining wife did legally obtain a benefit, that quasi-estoppel should not be recognized because it would wholly defeat the legislative judgment that the wife should be involved as an active partner with the husband in dealings with entirety property.

The North Carolina Supreme Court did not conclude that un-

39. See Waldeck v. Hedden, 89 Cal. App. 485, 265 P. 340 (1928); Treadwell v. Henderson, 58 N.M. 230, 269 P.2d 1108 (1954). A strict approach as to the effect of nonjoinder and estoppel is also taken under some homestead statutes where even though one spouse is the sole owner, because it is declared a homestead, the other spouse must by statute join in a conveyance or mortgage. See, e.g., Dvorak v. Maring, 285 N.W.2d 675 (Minn. 1979) (vendors not estopped from denying validity of sale of homestead not complying with statute which required signatures of both spouses on a contract for sale).


41. The distinction is explained in Redevelopment Comm'n of Greenville v. Hannaford, 29 N.C. App. 1, 222 S.E.2d 752 (1976), rejecting the theory that estoppel was not available because the party claiming it could not have reasonably relied on a defective instrument. The court said that under the quasi-estoppel doctrine, as opposed to estoppel in pais, "[w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligations or effects by taking a position inconsistent with it." 29 N.C. App. at 4, 222 S.E.2d at 754.
just enrichment required a different result in the Douglass case where the tenancy by the entirety property in which the wife had an interest had been improved by the husband’s creditor who, it seems rather apparent, was not going to get paid unless he could establish a lien on the realty.

On the other hand, the new law increases the wife’s interest in such property so that in a case like Douglass the unjust enrichment to her arising from declining to find estoppel is sufficiently greater that Douglass can be distinguished. Moreover, the failure to estop the wife in a case like Douglass could have been a “protective” judicial reaction in sympathy for wives treated rather shabbily by the common law of tenancy by the entirety. (An attitude of protectiveness could also be based on the feeling that since the common law denied the wife any role in day to day management, she lacked the experience to consent informally to the husband’s dealings.) It is possible that the North Carolina Supreme Court, now that the new act makes the wife an equal participant with the husband in tenancies by the entirety, will abandon its approach that assured her protection so that estoppel will freely be found.

V. To What Extent is the Reform Retroactive? Will Application of the Act to Entireties Created Before Enactment Be Unconstitutional?

A. Subsection (c) of New Section 39-13.6

Subsection (c) of the new section 39-13.6 of the General Statutes states:

This section shall apply to all conveyances on and after January 1, 1983. For income tax purposes effective for taxable years beginning on and after January 1, 1983, the income from property held in tenancy by the entirety shall be reportable ½ (one-half) by each spouse regardless of when the conveyance of the property was made.

The section is ambiguous as to ownership of rents and profits from entirety property arising without substantial labor by either

42. For example, if the land at issue were rented out, under present law Wife would own half the rents and profits whereas under the law as it existed at the time of Douglass Husband was the sole owner of them and, of course, his creditor could seize all of them unless otherwise exempt.

43. If a combination of labor by a spouse and capital owned in tenancy by the entirety generated the rents and profits, arguably some apportionment
spouse after January 1, 1983, from tenancy by the entirety property conveyed to the spouses prior to the effective date of the act. The rentals arise from property subject to a pre-1983 conveyance, so the first sentence of subsection (c) might suggest the old law applies to such rents and profits and the wife has no ownership interest. Yet, the second sentence imposes an income tax liability on her.

Since it would almost certainly be unconstitutional for the state to tax the wife with respect to a half interest in rents and profits she did not own, it must be the intention of subsection (c) that the wife actually owns the half interest on which she is taxed. If so, she should have management power over that inter-

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formula is necessary to separate a share of the gain traceable to the labor and owned solely by the laboring spouse from that attributable to the co-owned capital. See In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975), dealing with the analogous situation in a community property state where separate labor (by a separated spouse) is employed to make co-owned (community) capital productive of rents and profits.

44. See Poe v. Seaborn, 282 U.S. 101 (1930), where the I.R.S. asserted that the husband alone was the appropriate party to pay income tax on income earned by him classified by Washington law as community property. The Court held that the husband only owned half the property and under state law Wife owned the other half and hence she was the party taxable on that half.

It is true that a taxing authority can make acquisition of something less than full proprietary rights a taxable event. For a number of years in the 1940’s for federal estate tax purposes a community property state husband was deemed to own the fifty percent of his earnings that were in fact and law (at the state level) owned by his wife. At his death, she still owned that half interest and she acquired no property. However, at that time, all community property was subject to exclusive male management, and management power over the wife’s half interest did pass at husband’s death to the wife. This transfer was in Fernandez v. Wiener, 326 U.S. 340 (1945), held to be subject to taxation as it would be if actual title had passed. See also Commonwealth v. Terjen, 197 Va. 596, 90 S.E.2d 801 (1956).

Fernandez is no help in explaining how North Carolina can tax a wife on half the rents and profits without her owning half of them, since under no property theory could it be said she was acquiring management power when the profits were generated but no ownership interest. If she has any management power over the rents and profits it is because she is, by implication of the taxability provision of subsection (c), the owner of a half interest.

45. Perhaps some legislators who voted for H.B. 67 considered the income taxation provision simply a “tax break” for married persons they could “enjoy” without altering male ownership of rents and profits arising from pre-1983 tenancy by the entirety property. It is true that income splitting can provide a net lower tax if the combined liabilities of husband and wife are examined. Nevertheless, the wife’s tax liability is hers under North Carolina law. The gross unfairness
est in the rents and profits, and her creditors should be able to reach that half interest notwithstanding the fact that the conveyance creating the entirety from which the rents and profits sprang was pre-1983.

Subsection (c) can readily be construed consistently with the concept of the wife owning half of all rents and profits from entirety property no matter when the entirety was created: i.e., the first sentence of subsection (c) concerning the effective date for “all conveyances” refers to the effective date of subsection (b), which addresses the subject of conveyances;46 it does not refer to the effective date of subsection (a) concerning ownership of rents and profits and management power.

Indeed, if the initial reference in subsection (c) to January 1, 1983, were intended to apply to the management and ownership provisions of subsection (a), rather than to the material in subsection (b) concerning what type of deed language created a tenancy by the entirety, the legislature would have referred to “all property held in tenancy by the entirety” or “all estates by the entirety” created on and after January 1, 1983, rather than to “all conveyances,” since the rules concerning management and ownership relate to the property or the estate, not to the conveyance.

Additionally, there is a generally-worded, uncodified effective date clause in section 2 of the bill that enacted the tenancy by the entirety reform, which states: “This Act shall become effective on January 1, 1983.” This provision, not directed at “conveyances,” appears to be the effective date provision governing subsection (a) of section 39-13.6. It is, of course, not limited to tenancies by the entirety created after 1982 but suggests that subsection (a) applies in any dispute concerning entirety property arising after 1982 without regard to when the estate was created.

46. A conveyance of real property, or any interest therein to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:

(1) a named man “and wife,” or
(2) a named women “and husband,” or
(3) two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married;

unless a contrary intention is expressed in the conveyance.
The foregoing analysis establishes rather clearly that so much of subsection (a) of the new law as concerns gender-neutral treatment of the rents and profits from tenancy by the entirety property is intended to apply retroactively in the sense of including rents and profits from such property acquired before 1983. Since reaching that conclusion requires limiting the first sentence of subsection (c) to the conveyancing provisions of subsection (b), it seems that only the non-codified effective date clause literally applies to that part of subsection (a) eliminating sex discrimination with respect to management and control over the land itself (as opposed to rents and profits therefrom).

Thus, North Carolina courts could conclude that all provisions of subsection (a) apply to tenancy by the entirety property acquired before 1983.

B. Construing Subsection (c) to Resolve Constitutional Doubts

At the very least there seems to be uncertainty or ambiguity as to how much of subsection (a) is to apply to pre-enactment tenancies by the entirety: whether all of subsection (a) or just that part of it concerning rents and profits. The former, broader construction of subsection (a) would eliminate all continuing sex discrimination from state law concerning tenancy by the entirety but would not take any more “property” rights of the husband than would the alternative construction. The narrower construction continues sex discrimination after 1982 with respect to management of pre-1983 tenancy by the entirety land. This article urges that such discrimination based on gender must be held to violate the equal protection clause of the fourteenth amendment to the federal Constitution. The present issue under consideration is not, however, the constitutionality vel non of gender discrimination but is rather which of two possible constructions of subsection (c) and (a) concerning retroactivity should be adopted. When the issue is interpretation, the court merely need find "grave doubts" as to the constitutionality of one possible interpretation to reject it in favor.

47. See infra text accompanying notes 55-57 discussing the authorities that establish there is no taking of property when the legislature adjusts management power over co-owned property to remove the husband’s greater power and require him to share his management power with the wife. The proposed broader construction of subsection (a) thus raises no due process problems of a taking of property beyond those already inherent in the narrower construction.

48. See infra text accompanying notes 62-78.
of another interpretation which eliminates such doubts.\textsuperscript{49} Surely such doubts must exist with respect to a system of co-ownership that recognizes a husband and wife as having equal proprietary interests in both the corpus and any rents and profits but which gives the husband, because of his gender, greater management power over the corpus. Therefore, all of the reforms of subsection (a) should apply to all tenancies by the entirety in North Carolina regardless of when created.

C. *Due Process Problems*

The problem of reconciling subsections (a) and (c) and determining the extent of retroactivity of the reform act is moot if the final provision of subsection (c) concerning tax liability of the wife for half of the rents and profits of pre-1983 tenancies by the entirety is unconstitutional. The argument will be made that the final words of subsection (c)—"regardless of when the conveyance of the property was made"—must be striken to avoid violation of the due process clause of the fourteenth amendment to the federal Constitution and the "law of the land" clause of the North Carolina constitution.\textsuperscript{50} Both prohibit a state law that takes a person's "vested" property rights (unless for a public purpose with just compensation paid). In this context the word "vested" is simply a label to describe the fact that the right at issue is protected against a "taking" by the due process clause.\textsuperscript{51}


Additionally, where there is a construction problem, reference may be had to the title of the act. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51 (1947). The title at issue here is: "an Act to Equalize Between Married Persons the Right to Income, Possession, and Control in Property Owned Concurrently in Tenancy by the Entirety." (emphasis added.) The legislature was speaking in 1982 and used the past tense, "owned," rather than referring to property "to be owned" or "to be acquired." The title thus indicates the curative provisions of subsection (a) were to extend to then-existing property, and the construction of subsection (c) effectuating that intention should be adopted.

\textsuperscript{50} N.C. CONST. art. I, § 19.

Quite clearly there is a "taking" of a husband's property when the new law is applied to tenancies by the entirety created before its enactment to make the wife co-owner of rents and profits in accordance with the directive that she be taxed on half such gain. The potential flow of income previously owned solely by the husband is proprietary in nature. Similarity to a life estate is apparent. The husband now must share that proprietary interest with the wife. In effect the statute has taken half of the life estate equivalent from him.

Resolution of a husband's claim that the new law is unconstitutional because it takes vested property rights can begin with two established propositions: first, that taking some of the husband's interest in property and vesting it in the wife for no reason other than to equalize their ownership rights in particular assets would be unconstitutional; second, that a person cannot have a vested property right arising under a state law that denies equal protection. That certainly is the teaching of Shelley v. Kraemer; the Court there invoked the equal protection clause to destroy previously recognized property rights—the benefit or right to enforce certain types of restrictive covenants.

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52. As is demonstrated at text accompanying notes 103-104, the federal government for tax purposes does treat the wife under pre-1983 law as having no more than a future interest of the type that follows a life estate.

53. Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934), held violative of due process an act construed as immediately converting earnings during marriage that were a husband's separate property (in the English common law sense) into co-owned community property when he and his wife changed their domicile from a common law state to California.

The purpose of the statute in Thornton was not to correct a scheme of property ownership that was subject to any constitutional doubts; rather, to Californians accustomed to community property principles, it seemed unfair (not unconstitutional) that the wife would have no ownership interest in the husband's earnings.

An analogous case arising under the North Carolina "law of the land" clause is Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965). The pre-enactment law construed a class gift in wills-such as "to my nephews and nieces"—as excluding persons who were adopted into the family. Because this seemed unfair (and not because of any constitutional problem with the exclusion of adopteds) the General Assembly reversed the presumption in 1963 with enactment of N.C. Gen. Stat. § 48-23. The state supreme court held it would be unconstitutional to apply the new law to determine ownership of a future interest under a will of a testator dying in 1957. There would have been a "taking" in part of the property of the blood relatives if adopteds were added to the class.

54. 334 U.S. 1 (1948). All property law scholars agree that the benefit of a
1. Management Power is Not a Property Right

There should be no denial of due process in applying to pre-enactment tenancies by the entirety the new law giving a wife co-equal management power either over the rents and profits or the pre-1983 land itself. In effect, the power given the wife is like a veto power over the pre-enactment power of the husband unilaterally to control the profits and make leases and contracts affecting use of the land (but not conveying the fee or disturbing the wife's right of survivorship).\footnote{55}

The United States Supreme Court has decided a case involving a state law that increased the wife's management rights with respect to co-owned property by giving her a veto power. That is, the state law, like the North Carolina reform act, created a dual management regime for certain types of transactions involving the co-owned realty.\footnote{56} The decision, Arnett v. Reade, found no taking of property when the new management rule was applied "retroactively" to pre-enactment property. The reason: the husband's property rights—ownership of a half interest in the affected realty—were not abridged when mere management power was altered.\footnote{57}

The change of management and control law in North Carolina is distinguishable from Arnett only in that the North Carolina wife's ownership interest in entirety property was not as extensive as the New Mexico wife's community property interest in Arnett.

\footnotetext{55}{See, e.g., North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965) (husband had exclusive control of entirety property).}

\footnotetext{56}{Arnett v. Reade, 220 U.S. 311 (1911), treating a statute of New Mexico Territory requiring the joinder of the wife along with the husband in the alienation of community realty. Prior to the enactment the husband alone could convey not only his interest but the wife's as well.}

\footnotetext{57}{Accord, Holyoke v. Jackson, 3 Wash. Terr. 235, 3 P. 841 (1882). For some years California seemed to take a different view, treating the husband's management power apparently as a property right. See, e.g., Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22 (1923); but see Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L. Rev. 977, 1059-70 (1975). California now does permit statutory changes in management and control law to apply to property acquired before enactment. Robertson v. Willis, 77 Cal. App. 3d 358, 143 Cal. Rptr. 523 (1978).}
The New Mexico wife was co-owner of the land and its rents and profits from community property even though she had no management power over them and no testamentary power. 58

This difference seems insufficient to render inapplicable in North Carolina the constitutional analysis of Arnett. The North Carolina wife does have a substantial proprietary interest in pre-1983 entirety property (even if she cannot constitutionally be made half-owner of the rents and profits). Insofar as the husband's creditors could not reach the present right of possession of entirety property in order to protect the wife, her interest is more than just a future interest like a contingent remainder. 59 Moreover, even if she is viewed as having just a future interest, the veto power given her in subsection (a) of the new act is reasonably related to the protection of that future interest. Accordingly, if the equal management provisions of subsection (a) are construed to apply to pre-1983 tenancies by the entirety, this will not result in an unconstitutional taking of property of the husband but rather the altering of a nonproprietary right. 60

There clearly is no due process problem in making the wife equal manager of post-1982 rents and profits if she can be made equal owner of them, the subject next discussed.

2. Rents and Profits

Insofar as subsection (a) strips the husband of the right to sole ownership of rents and profits from pre-1983 tenancies by the entirety it results in a taking of property. The question becomes whether such taking is nonetheless valid under the Shelley v. Kraemer principle that an unconstitutional law cannot create "vested" property rights. 61


60. See Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925), where that portion of a statute attempting to make the wife sole owner of certain types of rents and profits previously classified as community property was held unconstitutional under Tex. Const. art. 16, § 15 (1866), but the provision of the statute removing the husband's management power over such co-owned property and giving it exclusively to the wife was upheld.

61. Only where the first amendment is involved is a statute struck down on
Thus, the first step in responding to a husband’s due process argument is to determine whether pre-enactment law violated the equal protection clause of the fourteenth amendment. Gender discrimination is, of course, not tested for constitutionality under the difficult-to-satisfy “strict scrutiny” test applicable to racial discrimination nor under the lax “any rational basis” test applied to legal line-drawing in the commercial sector. Rather, an intermediate or middle tier level of review is employed: the gender discrimination “must serve important governmental objectives and must be substantially related to the achievement of those objectives.”

The pre-reform North Carolina law construed gender-neutral grant language (e.g., “to John and Rose Jacobs”) to give the husband greater rights than the wife to achieve no governmental objective at all. The North Carolina courts were just blindly following a common law history that treated women shabbily and virtually denied their legal identity. If the governmental purpose were to provide a form of ownership many married couples desired, the law could have achieved that goal without discrimination by (1) requiring the instrument to state that unequal ownership was desired and (2) recognizing a form of entirety ownership which spouses could elect, if they chose, wherein the female had the dominant rights.

3. Alternative of Taking Title in Tenancy in Common Will Not Support the Gender Discrimination

In a case concerning the constitutionality of gender-biased tenancy by the entirety law of Massachusetts, a United States district court did find the necessary “state action” to make the equal protection clause of the fourteenth amendment applicable but went on to hold that the Massachusetts law should not be invalidated because tenancy by the entirety was not mandatory; if the spouses did not like a form of ownership giving greater rights to the husband they could hold land as tenants in common or as joint tenants with right of survivorship. The court felt it could avoid

its face; in other situations it may be unconstitutional as applied in certain fact situations but is not totally void. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 215-16 (1974) (statute held invalid on its face on first amendment grounds).
dealing with the constitutionality of a presumption of intent on the part of the grantee spouses to hold land in a discriminatory manner by finding that the wife in the case before the court had, together with her husband, freely selected the entirety form of ownership and had not fallen into a form of ownership giving the male greater rights as a result of "coercion, ignorance, or misrepresentation." 64

At the time of the district court's decision in the Massachusetts case, a husband's creditor could, as at common law, reach all interests in the entirety property except the wife's right of survivorship. 66 Thus, in Massachusetts there was very little or no economic "coercion" to choose the entirety form of ownership. If tenancy in common or joint tenancy was selected, the husband's creditor and the wife's creditor could reach a half interest; if tenancy by the entirety were chosen, the husband's creditor could reach almost all the interests in the land, the wife's creditor none.

In North Carolina, however, there was, before the 1982 reform act, economic coercion to select entirety ownership because under that form of cotenancy the creditor of neither husband nor wife could reach any interest, 68 while, as in Massachusetts, the creditor of either spouse could reach a half interest in tenancy in common property. 67 The slight income tax disadvantage under pre-reform North Carolina law of having husband own all the rents and profits of productive entirety property, 68 was a small economic price to

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64. 407 F. Supp. at 1382.
67. Stubbs v. Hardee, 461 F.2d 480 (4th Cir. 1972). This result follows whether or not there is engrafted onto the tenancy in common a right of survivorship as permitted by N. C. GEN. STAT. § 41-2; see Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).
68. Because almost all married couples file joint federal tax returns, the rental income can readily be split as a matter of federal tax law for federal income tax purposes. North Carolina does not authorize such income splitting. However, in many situations where the couple owns income-producing entirety property (e.g., a rental condominium), both spouses also have good paying jobs and the income of each exceeds the legally exempt amount by $10,000, which puts them in the highest North Carolina income tax bracket. See N.C. GEN. STAT. § 105-136 (1979). In such situations income splitting for additional revenues consisting of
pay for the protection against creditors. (The insult to the wife of pre-reform law was substantial, but probably very few couples rejected a tenancy by the entirety holding and the resulting protection against creditors because of such noneconomic "cost.")

Even if one rejects the notion of economic coercion in North Carolina to use the tenancy by the entirety form of co-ownership, the 1981 Supreme Court case of *Kirchberg v. Feenstra* makes it clear that the existence of optional and nonsexist forms of co-ownership (tenancy in common with or without a survivorship annexed) is no basis for rejecting the constitutional attack on the discriminatory tenancy by the entirety form of co-ownership. *Kirchberg* involved not state law discrimination as per ownership but the traditional community property rule, as codified in Louisiana, giving the husband exclusive management over community property. The wife in *Kirchberg* attacked the validity of her husband's mortgage of community realty, made by him pursuant to the male-management rule without her knowledge. The mortgagor's "defense" was that the wife, by filing a declaration, could have assumed shared management over the community home. But, held the court, focusing on some alternative arrangement that could have been utilized "overlooks the critical question: whether [the male-management statute] furthers an important government interest." Obviously the same response by the Court would have met an argument by the mortgagor similar to that made in the Massachusetts tenancy by the entirety case: the spouses in *Kirchberg* did not have to own real property as community property; they could have owned it in indivision—the civil law equivalent of tenancy in common.


71. 450 U.S. at 461.

72. At the time of the Kirchberg mortgage, Louisiana spouses could not have directly transmutated community property to property owned in indivision. See W. Reppy & W. de Funik, Community Property in the United States 422 (1975); former La. Civ. Code Ann. art. 2446 (West 1952). However, even if community funds were used to buy realty, if the deed recited ownership in indivision and husband executed the deed, he would have been estopped to deny the accuracy of the recital. See Curtis v. Curtis, 403 So. 2d 56 (La. 1981). Because of the form of the title and the estoppel, he could not convey more than a half interest.
I have no doubt, then, but that pre-reform North Carolina law was unconstitutional under Kirchberg. It does not follow, however, that every title acquired under the old law can be overturned. The gender discrimination in prior law will permit an otherwise unconstitutional taking of the husband’s property to equalize the ownership interests only in situations where application of the prior law to specific fact situations results in unfairness. The retroactivity provisions of section 39-13.6(c) do not implicate first amendment freedoms. Thus we are not concerned about the “chilling effect” of the statute; and the fact that the taking of a husband’s ownership of future rents and profits may be unconstitutional in some fact situations does not make subsection (c) unconstitutional on its face. It will be valid in all fact situations where gender discrimination in prior law resulted in unfairness to women and a windfall for men.\textsuperscript{73}

There are several fact situations in which application of pre-reform tenancy by the entirety law of North Carolina was not unconstitutional despite the greater rights conferred on male cotenants. Some examples:

1. *Husband* in 1960 decides to purchase with his earnings (or an inheritance, etc.) land. He wants to have control over the land during his life and to own its rents and profits; he wants *Wife* to own the property after his death and he would like to avoid probate administration with respect to the land. He therefore has the grantor convey the land “to Mr. and Mrs. John Jones, husband and wife,” knowing this verbal formulation presumptively creates a tenancy by the entirety.

2. *Husband* and *Wife* in 1962 wish to invest in rental real property. They desire to have the protection against creditors enjoyed by ownership as tenants by the entirety. Aware of the gender discrimination in North Carolina tenancy by the entirety law (with respect to management and ownership of rents and profits) but fearing any attempt to alter it on the deed would negate the protection against creditors, they calculate the percentage of ownership *Wife* will have if her interest is viewed as a contingent remainder. Assume it is twenty percent. *Wife* then pays twenty

\textsuperscript{73} The situation presented by the racially restricted covenant in Shelley v. Kraemer, 348 U.S. 1 (1948) is readily distinguishable. Enforcement of such a covenant to prevent acquisition by a willing black buyer from a willing seller would always cause unfairness. Especially because *Shelley* dealt with a suspect classification, that decision was constitutionally able to at once destroy all property rights previously created by such covenants.
percent of the purchase price with her earnings; Husband pays eighty percent with his earnings.

3. Wife in 1964 wants to buy Blackacre but does not have enough money. She asks Husband to contribute a matching sum, but he refuses until she agrees that they will take title as tenants by the entirety. She is advised that this will give him management and control as well as sole ownership of rents and profits. Because of such benefits, Husband supplies fifty percent of the purchase price.

In these fact situations the spouses (or the husband alone) relied on pre-reform law and made whatever adjustments they desired to take account of the gender discrimination. Because of such reliance and the lack of a gender discrimination operating unfairly, retrospective reshuffling of ownership of rents and profits appears unwarranted.

Situations where the pre-reform law applied unfairly and unconstitutionally, so that under Shelley no "vested" property right (in excess of an equal interest) could be created in the husband, include the following:

Wife's parents wish to deed Whiteacre to Wife and Husband. They are aware that if they create equal tenancy in common interests in their donees, the creditors of each can seize the debtor's half interest. They are also aware that if they create a tenancy by the entirety, Wife's proprietary interest will be less than Husband's, yet the creditor of neither can reach the property. They want their daughter's interest to be equal to her husband's but conclude that the loss of exemption from creditors resulting if this is done is too great a price to pay, and hence they use a form of deed that creates a tenancy by the entirety.

This tenancy by the entirety was created as a result of economic coercion: failure of North Carolina law to provide the valuable protection against creditors enjoyed by tenancy by the entirety ownership in (1) a gender neutral form of co-ownership, or (2) in addition to the male-dominated tenancy by the entirety, a matching form of co-ownership with equivalent female dominance.\(^4\) Additionally, in this hypothetical the husband has taken no action in reliance on the existence of sex discrimination features found in the state law.

\(^4\) I.e., this second alternative assumes that the "separate but equal" theory rejected in the area of racial discrimination, Brown v. Board of Education, 347 U.S. 483 (1954), remains viable with respect to gender discrimination.
What of the situation that is probably the most common? The realty is purchased with mixed funds, most of which probably were Husband’s earnings which had been placed in a common bank account with Wife’s lesser earnings. The couple had no discussion with their realtor or lawyer who represented them at closing. They took title in the form “to John Jones and wife Sarah Jones” unaware that it created a tenancy by the entirety in which the husband had greater property rights than the wife. Is the pre-reform North Carolina law unconstitutional when applied to a tenancy by the entirety created in ignorance? I believe the answer must be “yes” on this basis: If the couple had been told about the choices North Carolina gave them—tenancy in common with equal ownership but no protection against creditors versus tenancy by the entirety with the male co-owner having greater proprietary rights but with significant protection against creditors—they would have felt the same economic compulsion as did Wife’s donor parents in the immediately preceding hypothetical.

Since a law is presumed to be constitutional until facts are presented showing why due process is violated by its application, the “retroactive” application of the reform act to ownership of post-1982 rents and profits from pre-enactment tenancies by the entirety should be widespread. Seldom will an aggrieved spouse be able to show the tenancy by the entirety was created in awareness of the sexually discriminatory law and with an intention that the law apply in its pre-reform sexually discriminatory manner.

4. Flat Rule for Post-1972 Tenancies by the Entirety

Reed v. Reed, the first Supreme Court case to hold that the fourteenth amendment equal protection clause was violated by gender discrimination, was decided November 22, 1971. For purposes of application of subsection (a) of the reform act to pre-enactment tenancies by the entirety, a reasonable distinction can be made between pre- and post-Reed instruments. Study of the due process clause “retroactivity” cases indicates that a holding that retroactive application is unconstitutional is most often to be expected when an affected party could reasonably rely on rights be-


76. 404 U.S. 71 (1971).
ing created in him under pre-enactment law.\textsuperscript{77}

After \textit{Reed} it is hard to imagine how North Carolina grantees could reasonably rely on state law being permitted to imply into a gender-neutral grant "to Hugh and Bertha Davis, husband and wife," an intention that the husband was to have greater proprietary rights than the wife. \textit{Reed} made the presumption in favor of entirety ownership highly suspect. Parties who in fact wanted the husband to have greater rights than the wife reasonably would, after \textit{Reed}, indicate that intention on the face of the instrument.\textsuperscript{78}

Accordingly, the courts might properly hold that the presumption in favor of constitutional application of the state law is conclusive with respect to post-1972 tenancies by the entirety.

5. \textit{The Contrast Between Court-Enforced Retroactivity and Legislative Discretion}

The foregoing analysis of the due process issue does not address what a court \textit{would} do in this regard if it had to invalidate state law for denial of equal protection but rather what a legislature \textit{can} do if it ascertains state law needs to be altered to avoid a denial of equal protection. I have doubts as to whether the courts would apply a corrective decision to rents and profits accruing after the judgment from tenancies by the entirety created before the judgment. But I have little doubt that in most situations the limited form of retroactivity the North Carolina General Assembly has opted for does not deny due process of law. There has been no attempt to overturn transactions based on pre-reform law (e.g., \textit{husband} alone makes a lease) or titles resting on pre-reform law (e.g., \textit{husband} takes rents and profits from entirety property accruing in 1980-81 and buys a yacht in his own name).

VI. \textbf{Effect of the Reform Legislation on Judicial "Cure" of Any Remaining Unconstitutional Gender Discrimination in North Carolina Entireties Law}

It has been shown that the reform act intends to eliminate


\textsuperscript{78} Example: "To Hugh and Bertha Davis as common law tenants by the entirety with Husband having management and control and ownership of the rents and profits."
gender discrimination with respect to ownership of rents and profits accruing from tenancies by the entirety created before 1983 and that, accordingly, the wife should be viewed as having equal management of such rents and profits under subsection (a) of section 39-13.6. It has also been shown that the General Assembly could constitutionally remove gender discrimination as it affects the law of management and control of the corpus of pre-1983 tenancies by the entirety. What is unclear is whether the General Assembly intended that type of retroactive application of subsection (a). If it is found the General Assembly did not so intend, some sex discrimination remains in North Carolina law. It has been shown that in most cases discrimination (giving the husband greater management power because of his gender) cannot be defended under “middle tier” equal protection scrutiny.

This section of the article predicts that the courts will simply apply subsection (a) retroactively with respect to management of pre-1983 tenancies by the entirety notwithstanding that this was not the intent of the legislature rather than formulate a different type of judicial “cure” for the retained gender discrimination.

This article has already analyzed the significance of *Kirchberg v. Feenstra*, as establishing that the gender discrimination in North Carolina law is unconstitutional; but *Kirchberg* also provides guidance as to how that unconstitutionality would be judicially cured.

Usually, a denial of equal protection can be cured in one of two ways: (1) extend the benefit to the disfavored class or (2) deny the benefit to both classes. In *Kirchberg*, four “cures” for the anti-female discrimination in Louisiana law of management of co-owned property were possible: (1) convert to “equal” management of all the community property including community realty

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81. Equal management was, at the time of the *Kirchberg* decision, the method employed with respect to community personality in most community property states. *E.g.*, ARIZ. REV. STAT. ANN. § 25-214(B) (1976); IDAHO CODE § 32-912 (1947); *see generally* W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES, 205-12 (2d ed. 1982).
so that each spouse acting alone would have the power to grant a mortgage; (2) convert to sex-neutral management of the property based on the source—e.g., if the husband’s earnings were used to acquire the co-owned land, he alone could exercise management power;82 (3) change to a scheme of management by each spouse over a half interest so that the mortgage of the husband alone in Kirchberg encumbered his half interest in the co-owned property but not the wife’s;83 or (4) shift to dual management so that both spouses had to join to make a valid mortgage, the mortgage of one spouse alone being either void in toto or voidable in toto by the spouse not executing it.84

Cure number 1 would overturn no Louisiana transactions (except to the extent deeds executed by a wife alone of community realty had been delivered before the decision); number 2 would affect some transactions but probably leave most unaffected (assuming most community property realty is acquired by a husband’s earnings);85 and number 3 would disappoint mortgagees to some extent (but the mortgagee in Kirchberg would plainly have been paid in full as a half interest in the equity would have left him

82. This is the Texas system for management of community property not evidenced by title documents naming both spouses as co-owners. Compare Tex. Fam. Code Ann. § 5.22(a) with § 5.24. Although the Texas system is facially sex-neutral, so long as husbands are more likely to have earnings than are wives, husbands have more benefits under the Texas approach to management than other approaches. See criticism in Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 946-48 (1971); Comment, Community Property: Male Management and Women’s Rights, 1972 Law & The Social Order (Ariz. St. L.J.) 163, 174-75 (1972).


85. Number 2 would have resulted in a victory for Mrs. Feenstra, however, as the property at issue had been purchased with the community earnings of both husband and wife. Brief Amicus Curiae of N.O.W. Legal Defense and Education Fund, American Civil Liberties Union Women’s Rights Project, American Jewish Committee, American Jewish Congress, Institute for Women Today, National Center on Women and Family Law, National Coalition of American Nuns, Unitarian Univeralist Women’s Federation, Women’s Equity Action League, Women’s Legal Defense Fund, No. 79-1388, October Term 1980, United States Supreme Court, page 16.
fully secured). It is cure number 4—shifting to dual management—which would most disrupt Louisiana law and which would affect the most transactions to the greatest degree.

The cure employed by the Supreme Court was number 4, which appears to be contrary to the guidance of Califano v. Westcott to select the alternative that is least disruptive of the statutory scheme. It seems clear that this “cure” was chosen because that was the statutory cure employed—six years after the Feenstra mortgage was executed—by the Louisiana legislature. Likewise, in discussing “grave reservations” about the constitutionality of the Massachusetts tenancy by the entirety law as it distinguished between the rights of husbands and wives to pledge the credit of the entirety estate, the Court of Appeals for the First Circuit declared that, if it had to reach the issue, it “would in all probability follow the lead” of state legislation enacted after the events at issue in the case before it in order to effectuate a cure.

The denial of equal protection in the pre-reform North Carolina tenancy by the entirety law with respect to management power could be cured by adopting any of the four options available in the Kirchberg case.

Kirchberg strongly suggests that the issue of how to cure the unconstitutional aspects of pre-1983 North Carolina law is foreclosed by the 1982 reform bill: it will be applied retroactively, at least in the first case arising to assert the invalidity of the pre-1983 North Carolina law.

VII. Taxation Effects of the Reform Legislation

A. North Carolina Tax Law

Aside from altering the income tax liability of rents and profits derived from tenancy by the entirety property, the reform legislation, even if fully retroactive to equalize the incidents of ownership of pre-1983 tenancy by the entirety realty, has no other effect

86. 443 U.S. 76, 89 (1979).
88. Friedman v. Harold, 638 F.2d 262, 269 (1st Cir. 1981). A creditor of the wife, lacking standing to demand “middle tier” review, urged the cure was to extend to wives the power to bind entirety property to be liable for her contracts. The quoted passage discussed what the court would have done had the wife been before the court urging a denial of equal protection. The 1979 legislation the court said it would follow insulate the entirety property from a husband’s creditors as well as a wife’s creditors.
on North Carolina income, gift, or inheritance tax law.

With respect to income tax liability on sale by the spouses of tenancy entirety property for a gain, the North Carolina Administrative Code has since 1976 provided:

When property held as a tenancy by the entirety is sold, any gain or loss from the sale is equally divided for income tax purposes between the husband and wife unless there is a valid partnership agreement to the contrary. An allocation of the proceeds from the sale under a valid partnership agreement does not, however, change the husband's or wife's basis in the property used to determine reportable gain or deductible loss.89

Other regulations concerning income tax,90 as well as those dealing with the North Carolina gift and inheritance tax, make it clear that the cost basis, or donor's basis or basis acquired on succession is divided equally between the spouses.

Since 1976, the Department's regulations concerning the state inheritance tax91 have provided: "Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one-half of the value of such property."92 With respect to the North Carolina Gift Tax,93 the regulations have since February 1976 provided:

When a gift of real estate is made and the gift is to a husband and wife, creating an estate by the entirety, the value of the transfer is equally divided between the donees.94

When one spouse furnishes the funds for purchase of real property titled in husband and wife creating an estate by the entirety, one-half of such funds are a gift on the part of the spouse furnishing the funds and a gift tax return is required when the value of the gift exceeds the annual exclusion of three thousand dollars ($3,000).95

89. N.C. ADMIN. CODE tit. 7, § 1304.
90. See id. § 1305 indicating that when one tenant by the entirety dies the basis in the survivor is the combined total of half the original basis (as adjusted) plus half the fair market value at date of death. I.e., there is a step up in value of the decedent's half of the basis but not of the survivor's half. See also 40 N.C. Atty. Gen. Rpts. 838 (1969).
93. See N.C. GEN. STAT. §§ 105-188, 105-190 (1979).
94. N.C. ADMIN. CODE tit. 17, ch. 3, subch. 3C, § .0005.
95. N.C. ADMIN. CODE tit. 17, ch. 3, subch. 3C, § .0006. This regulation is notoriously unenforced. See Comment, The Creation and Termination of Tenan-
The termination by either husband or wife of a tenancy by the entirety in real property is considered a transfer of one-half of the value of said real property to the other spouse. The transfer is reportable for North Carolina gift tax purposes in accordance with the provisions of G.S. § 105-188.96

Since each spouse is, at least under the inheritance tax regulation quoted and the first two of the three gift tax regulations quoted, treated as equal owner of the property97 despite the husband's greater rights, the same treatment should be applied in dividing a cost, donor's or succession basis. (The meaning of the fourth-quoted regulation is unclear;98 perhaps the regulation is

96. N.C. ADMIN. CODE tit. 17, ch. 3, subch. 3C, § .0007.

97. See Letter from George W. Boylan, Assistant Attorney General, dated 31 July 1980, to Mr. Sam Watson, Jr., Assistant Director, Inheritance and Gift Tax Division, N.C. Department of Revenue. Watson had asked whether it was not more correct to characterize the husband as owner of a life estate in the entirety property, the wife having only a contingent remainder. The Revenue Department's advisor at the Department of Justice insisted that the following cases made a husband and wife 50-50 owners: Olive v. Biggs, 276 N.C. 445, 173 S.E.2d 301 (1970); Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967); Davis v. Bass, 188 N.C. 200, 203, 124 S.E. 566 (1924). These views were reiterated by the Justice Department's Mr. Boylan in a letter of 10 February 1981 to the author.

98. Ordinarily, the phrase "termination" of a tenancy by the entirety refers either (1) to the death of one spouse, with the survivor becoming sole owner, or (2) conversion of the tenancy by the entirety into tenancy in common by divorce, a deed or separation, etc. See 7 STRONG'S N.C. INDEX, Husband & Wife § 17 (3d ed. 1977). Type (1) would involve an inheritance tax, not a gift tax, so that cannot be what this regulation has in mind. Type (2) could not involve a gift if the law viewed the spouses as equal owners of the property while it was held in tenancy by the entirety. However, the unequal ownership approach of older federal gift
simply void as contrary to statute.)

B. Federal Tax Liabilities

For several purposes, the Internal Revenue Service and the courts enforcing the federal Internal Revenue Code have taken the position that the interests of a husband and wife in property owned as tenants by the entirety are not equal. In all states where the form of ownership was recognized—and even though the laws thereof were completely gender-neutral—an adjustment was made based on life expectancies, on the assumption that the tenancy by the entirety would terminate only by death of one of the spouses. Since women have longer life expectancies than men

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99. Tax law (see text accompanying notes 103-04) also cannot explain section .0007 of the regulations. Only if the husband were viewed as 100 percent owner of the tenancy by the entirety property could converting ownership to a 50-50 tenancy in common involve a gift "of one half of the value of said real property." But even if the wife were aged 80, the husband aged 20, her future interest under the federal unequal-ownership theory would have some value—say two percent. In that situation, the gift tax liability upon conversion into a 50-50 tenancy in common would always be based on a value less than half. (I.e., the wife had a two percent interest, and now has a fifty percent interest, so the gift is forty-eight percent of the value.) If by chance the spouse converted the entirety into an unequal fraction (e.g., 52-48 in favor of the wife in the hypothetical above) the gift involved might be "one half the value"—but surely section .0007 was not intended to be limited to that type of "termination."

Since the regulation speaks of either husband or wife alone making a termination (rather than both), apparently section .0007 is limited to a termination whereby one spouse deeds his complete interest in the entirety property to the other. That reading of section .0007 makes it consistent with the other quoted regulations in viewing the spouses as equal owners of the property despite age differences and despite the husband's greater property rights under pre-1983 law.

99. The author's guess is that some draftsman copied .0007 from U.S. Treas. Reg. 25.2515 while forgetting that North Carolina law did not give the spouses the option to delay reporting the gift involved when one of them created a tenancy by the entirety out of property owned by him or her. Under the federal regulation, the termination of the tenancy by the entirety upon its being converted into tenancy in common would constitute a gift if the spouses had not elected to treat the creation of the co-ownership as a gift. 26 U.S.C. §§ 2515(a) and (b).


101. The I.R.S. never accepted the notion that a wife's ability to obtain a divorce on no-fault grounds granted her a right of severance by which she could, in effect, appoint to herself whenever she wished, a half interest in the property.
and since it is not uncommon for a wife to be younger than her husband, this calculation resulted in the wife's having a greater percentage of ownership of the property than the husband because of her greater chances of being the surviving owner.

For states like North Carolina which held—prior to the recent reform Act—that the husband was the sole owner of the rents and profits, a second adjustment of ownership interests was demanded by the I.R.S. As the wife had no rights in the rents and profits, she had at most a future interest (like a contingent remainder). The husband had all the rest of the proprietary interests (e.g., a life estate and alternative contingent remainder). These various interests were to be valued according to appropriate actuarial tables.\(^{103}\)

The theory that a North Carolina wife had no present proprietary interest was the foundation for a revenue ruling\(^{104}\) that a third

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Of course, after the enactment of the North Carolina equitable distribution statute in 1981, the argument about absolute right of severance was much weaker, because the divorce would not assure her half the property.

102. There appears to be no indication that federal law or the federal constitution is viewed as barring the I.R.S. from recognizing the greater longevity of women, see Los Angeles Dep't of Water v. Manhart, 435 U.S. 702 (1978), especially in situations where doing so works to the benefit of women, see Kahn v. Shevin, 416 U.S. 351 (1974).

103. Treas. Regs. § 25.2515-2(c) (1982), referring to § 25.2512-9(F) (1982), where some of the pertinent tables are collected and advice is given to apply to the I.R.S. for other necessary "special factor[s]."


Under the pre-1981 law, parents and other donors wishing to give land to married donees were well advised to make out the deed in tenancy in common (adding a survivorship if desired); they could then take two annual $3000 exclusions on their federal gift tax return. Later the couple could, by strawman conveyances, convert the tenancy into a tenancy by the entirety in order to obtain the exemption-from-creditors benefits of that form of co-ownership in North Carolina. This second step in the creation of the tenancy by the entirety obviously would generate no state gift tax under the quoted regulations; nor would it involve a federal gift tax after 1976, since effective in 1977 federal law viewed husband and wife as having equal interests in tenancies by the entirety they created regardless of age differences and state law. 26 U.S.C. § 2515(c)(3), amended 90 Stat. 1855 (repealed as to estates of decedents dying after Dec. 31, 1981, and to gifts made after Dec. 31, 1981, see section 403(e) of Pub. L. 97-34). Prior to 1977, the conversion of the tenancy in common into tenancy by the entirety in North Carolina would usually involve the wife making a gift of a present interest to the husband. The former $3000 exclusion would have applied to cover in many cases
party donor giving land to a husband and wife in tenancy by the entirety could utilize only one annual exclusion per donee couple, since a gift of a future interest did not qualify for the annual exclusion under section 2503(b) of the Internal Revenue Code.

Unquestionably the reform of North Carolina's tenancy by the entirety has eliminated all bases the I.R.S. has for characterizing the wife's interest as something other than a present interest. Because of her post-1982 management power as well as ownership of half the rents and profits, the wife's interest will support a donor's claim for a second annual exclusion—now at the rate of $10,000 per donee—(108) in addition to the annual exclusion based on the husband's interest under prior law. (106)

This obvious change in the application of federal gift tax law to North Carolina tenancies by the entirety should affect federal income tax law as well.

Although income tax law does not necessarily track gift tax law, there appears to be no reason why the I.R.S. would not characterize—prior to the enactment of section 39-13.6—a wife's as a future interest for purposes of dividing the cost or other basis between the spouses for income tax purposes. (107)

The I.R.S. attitude is apparent in *Forbes v. United States*, (108) where it was asserted that a Massachusetts husband received taxable gain when, incident to divorce, he conveyed appreciated tenancy by the entirety property to his wife in exchange for her re-

the difference in value of husband's interest after the conversion. In any event, the marital deduction would frequently have permitted step two to be made free of gift tax prior to 1977, even when the difference in value exceeded $3000.


106. Nevertheless, it will be very rare for a $20,000 gift of real property to be held by the married donees in tenancy by the entirety to generate $20,000 worth of exclusion because of the adjustments in ownership required to be based on life expectancy. Unless the wife is several years older than her husband, her interest will be viewed by the Internal Revenue Service as more than fifty percent in value and the husband will not be viewed as having received an interest worth the full $10,000 exclusion for him.

The above-quoted North Carolina gift tax regulations leave no doubt that at all times a donor could treat each spouse as receiving half the property, notwithstanding that the North Carolina annual exclusion ($3,000 per donee) is, like the federal exclusion, available only for present interests. N.C. Gen. Stat. § 105-188(d) (1979).


lease of property claims against him arising out of her marital status. *(United States v. Davis*\(^{109}\) characterizes such a transfer as a nongift transfer for consideration, valuing what the husband receives through the wife’s release of claims as the fair market value of the property at the time of transfer.) The I.R.S. successfully urged the district court to treat the wife as having no proprietary interest at all in Massachusetts tenancy by the entirety but instead a mere expectancy.\(^{110}\)

Under pre-reform North Carolina law the wife has at least some proprietary interest;\(^ {111}\) hence the courts will divide the ownership for income tax\(^ {112}\) purposes by treating the wife as having a

\(^{109}\) 370 U.S. 65 (1962).

\(^{110}\) At that time a Massachusetts husband, like a North Carolina husband, was the sole owner of rents and profits arising from tenancy by the entirety property and had exclusive management power over the land (except that he could not convey his wife’s right of survivorship). *See supra* note 14. Unlike North Carolina law, Massachusetts allowed the husband’s creditor to seize all of the entirety property except the wife’s future interest. The *Bruce* rule of North Carolina law, see *supra* text accompanying notes 12-15, barring the husband’s creditor, would seem to compel the I.R.S. and federal courts to recognize that the North Carolina wife under pre-reform law had at least some sort of property interest in the tenancy by the entirety land, even if it was analogized to a future (proprietary) interest. Apparently, too, the state tax law of Massachusetts at the time of *Forbes* was unlike North Carolina’s (see *supra* text accompanying notes 89-99) in treating the husband and wife as having equal proprietary interests. In sum, there appears to be no risk of the *Forbes* holding being applied to pre-reform North Carolina tenancies by the entirety and the case is cited merely to demonstrate that the I.R.S. will assert that the husband holds the greatest package of proprietary interests in entirety property consistent with local law treatment of his rights.


\(^{112}\) The assumption here is that for income tax purposes the I.R.S. will indulge in the same (less than rational) conclusion it uses in valuing tenancies by the entirety under the regulations to section 2515 of the gift tax chapter of the Internal Revenue Code: that the tenancy by the entirety will end solely by death and not be divorce, not by conversion, by sale or otherwise, of the real property into personality which must be owned under state law in tenancy in common. A more rational approach would be to conclude that as likely as not some event other than death will terminate the tenancy by the entirety so that it cannot be held that state law is wrong in treating the wife and husband as equal owners of pre-reform tenancy by the entirety notwithstanding the husband’s management power and right to any rents and profits. In the case of a residence not rented out,
contingent remainder or executory interest, the husband all the remaining interests (e.g., a life estate and alternative contingent remainder).

When the acquisition is by gift or devise, the donor's basis or the value at the devisor's death (or alternate valuation date under federal estate tax law) will be divided between the spouses according to the relative values of their interests. When the spouses purchase the tenancy by the entirety property, one of them will be making a gift to the other except in the unusual circumstance where each spouse contributes a portion of the consideration in direct ratio to the ownership interest he or she will have after the cost basis is divided between the hypothetical future and present interests.

Suppose a case where Husband, aged 39, spends $100,000 of his earnings to buy Blackacre, taking title in tenancy by the entirety. Wife is aged 46, which means she and Husband have roughly the same life expectancy. Imputing a life estate to Husband, aged 39, its value is eighty percent of the total value of Blackacre

the husband's greater interests are illusory only, in any event, as there will be no profits and no management transactions (other than the granting of mortgages, which no lender will accept without the wife's signature so that her right of survivorship is subject to the security interest created).

113. If the wife is viewed as having a contingent remainder, then the husband has a life estate and alternative contingent remainder. As a remainderperson, the wife can enjoin commission of waste by the husband. If the wife has an executory interest, the husband has a fee simple defeasible (on his death, her surviving). Generally, the holder of a fee simple defeasible cannot be enjoined from committing waste. Poe v. Hardie, 65 N.C. 447 (1871). At old common law the wife could not sue the husband for waste of property of which they were both seized but over which he had management power. Davis v. Gilliam, 40 N.C. 308 (1848) (property inherited by wife but which husband managed by virtue of his marital right). This suggests that the more appropriate future interest that the I.R.S. should view the wife as owning in entirety property is an executory interest. This is not inconsistent with Bynum v. Wicker, 141 N.C. 95, 53 S.E. 478 (1906), and Jones v. Smith Co. 149 N.C. 317, 63 S.E. 1092 (1908), which indicated the wife might be able to enjoin the husband from cutting timber on entirety property. Since the timber itself is real property, its severance by cutting would be more than waste: a destruction of the entirety in the timber estate.

114. Between 1955 and 1981, under former section 2515 of the Internal Revenue Code of 1954, when the spouses (as opposed to a third party) created a tenancy by the entirety, there would be no gift made for gift tax purposes unless they chose to file a gift tax return opting to have the transaction treated as a gift. There is no reason to believe that this rule would carry over to income tax law. It seems certain, for purposes of allocating basis, income tax law will recognize the gift that was delayed by section 2515 for gift tax purposes.
under the six percent annuity tables utilized by the I.R.S. for this allocation.\textsuperscript{118} Thus, Husband's basis for the life estate imputed to him\textsuperscript{118} is $80,000, and the $20,000 basis for the imputed future interests is shared equally by the spouses because they have at this time roughly the same life expectancy.\textsuperscript{117}

For several reasons, as years go by, the bases will shift. First, since Husband has a cost basis rather than a basis taken from a donor or a basis acquired through succession, he is not barred by section 273 of the Code from amortizing his cost over the life of the asset if the acquisition is a profit-making venture.\textsuperscript{118} If the entirety property is a structure held for renting out or a depletable mineral estate, to the extent the husband is viewed as a life tenant, he can claim all the depreciation or any depletion allowance based on the full $100,000 basis.\textsuperscript{119} All such adjustments to basis utilized by the husband reduce the "uniform basis" which is divided between the spouses.\textsuperscript{120}

\begin{itemize}
\item[115.] Treas. Regs. § 25.2512-9(f) (1982). See Table A(1). An argument can be made that if the tenancy by the entirety were created by the husband during 1977-1981, the bases of the husband and wife should be 50-50 on the theory that former 26 U.S.C. § 2515(c) should be imported into income tax law. That section did treat for gift tax purposes the tenants by the entirety as co-equal owners when one or both spouses created the entirety. But this was an artificial concept created by Congress for gift tax purposes. Since it did not correspond to the proprietary interests in the property as the I.R.S. viewed it in other contexts—including eturities created by gift from third party donors, which remained subject to valuation based on life expectancies and discount for lack of present interest—this article assumes that no special valuation approach applies to tenancies by the entirety created by a spouse or spouses during 1977-1981.
\item[116.] It is assumed that even if (see note 113) the appropriate imputed present-future interest combination is defeasible fee and executory interest, rather than life estate plus alternative contingent remainders, for valuation purposes the husband's defeasible fee can be viewed as including a life estate component and a future interest component analogous to a contingent remainder.
\item[117.] See infra note 122.
\item[118.] He should succeed in amortizing if the I.R.S. and/or the courts will view his ownership as consisting of two parts: a terminable life estate and a contingent remainder. Some of his $90,000 cost basis must be allocated to the contingent remainder and will not be subject to amortization, as that interest is not a wasting asset. If the I.R.S. insists that the husband has a defeasible fee, it is unclear whether the interest is sufficiently terminable to permit amortization. Probably it is not, and only if the owner can show his interest is certain to terminate can he amortize.
\item[120.] See generally 2 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 41.46 (1981).
\end{itemize}
Additionally, the mere passage of time alone will cause the bases to shift as the values of the imputed proprietary interests shift. As the couple age, the value of the wife's contingent remainder or executory interest increases as the date approaches when it will, if ever, become possessory. This gain will be offset to a very small degree by the amount which, during the year in question, the difference in life expectancy between Husband and Wife was diminished. This process of a gradual shift of ownership interest (and hence of basis) from Husband to Wife can be viewed as a series of annual, automatic gifts from him to her. He established the tenancy by the entirety form of title and, in effect, set up something like a trust for her benefit under the terms of which a series of small gifts would be made to her annually.

Shrinkage of the husband's basis because of these annual gifts will never reduce it to zero (although depreciation may). Even if he is aged 99 and his wife aged 60, his remaining “life estate” is worth something and his “contingent remainder” is worth a few cents.

Although the wife has acquired her future interest by gift, the husband's present interest in the same property was not created by gift, and hence it appears that any increase in her basis over the passage of time will result solely from the continuing-gift theory and not from application of the split-interest gift regulations. The latter appear to call for an upwards adjustment in the basis of the donee future-interest owner only when she shares a “uniform basis” with a present interest holder created in a gift transaction.

121. See Treas. Reg. § 25.2515 1(2)(ii) (1982), referring to “any change in the proportionate values resulting from the passing of time.” 122. At age 20, a female's life expectancy is more than 5½ years longer than a male's. This gap diminishes as the pair age (as the husband survives death-causing events, such as war, that occur more frequently to men than to women). At age 94 they have the same life expectancy, which remains the same at older ages. See West's ApPoinTmeNT BoOk fOr juDgEs anD laWyeRs, Annuity Tables, pp. 86-87 (1982). See also Treas. Reg. § 25.2512-9(B) (1982), Tables A(1) and A(2), indicating that at age 95 the life expectancies of men and women become the same.

123. It is again assumed that even if the appropriate property characterization of the husband's interest is defeasible fee, for tax purposes than can be broken down into a life estate with alternative contingent remainder in him (as well as the wife).

124. Treas. Reg. § 1.1015-1(b) (1982) says the uniform basis adjustment rules apply to “property acquired by gift” and goes on to incorporate the annual adjustment rules found in the regulations under section 1014. They state in pertinent part that the uniform basis theory (and consequent adjustments under it) applies “[w]here more than one person has an interest in property acquired from
The inability to adjust upwards, under the split-interest regulations, the wife's carry-over basis as donee in the future interest should increase the attractiveness of achieving a similar result under the "automatic annual gifts" theory proposed above.

If the husband is taking depreciation, the imputed annual gift to the wife should perhaps be limited to a fractional interest corresponding to the value of the nondepreciable component of the property. For example, to so much of the husband's basis as is allocated to the land and, if any, salvage value of a structure.\textsuperscript{125} Similarly, it is arguable that if the husband is amortizing his cost basis on a wasting-asset theory, each year he uses up the full amount of basis that might be transferred to his wife. On that theory, the wife acquires a zero basis in the fractional interest she obtains during the year under the annual gift theory.

On the other hand, a perfectly good argument can be made that the basis remaining at the end of the year after amortization (and annual depreciation or depletion) should be assigned to the entire interest of the husband, including that fractional interest he is viewed as giving to his wife at the end of the year.

The latter approach seems more consistent with adjusted basis theory in general, and it will be assumed that amortization by a husband (or depreciation or depletion) will reduce but not extinguish the basis assigned to the fractional interest he is treated as giving to his wife each year.

More complex calculations and adjustments must be made in another common fact situation under pre-1983 North Carolina law. Suppose both Husband and Wife work and each has substantial savings. Each contributes $50,000 to the acquisition of Blackacre in tenancy by the entirety. If Wife's future interest was then worth, as in the above hypothetical, ten percent of the value, she has made a $40,000 gift to Husband. His $90,000 basis consists of $50,000 cost basis and $40,000 carry-over donor's basis.

As in the first hypothetical, the husband may be able to claim some amortization of his $50,000 contribution or depreciation of some portion of the $90,000 share of value corresponding to his basis. Also, as in the first hypothetical, there will be annual gifts from the husband to wife occurring because the form of title is

\textsuperscript{125} If some of the husband's interest is subject to depletion, on the same theory it is arguable that the automatic gift should be confined to any nondepletible interest the husband owns in the realty.
tenancy by the entirety.\textsuperscript{126}

Let us assume now a cash sale of Blackacre for $200,000. Some seventeen years have elapsed since the acquisition in either the first or second hypothetical situation. For sake of simplicity, let us assume the property was a dwelling and there was no depreciation or amortization. There is still $100,000 worth of basis to allocate. Husband is now 56\frac{1}{2} years old, and according to actuarial tables his imputed life estate is worth sixty percent of the value of the land and the future interest is worth forty percent.\textsuperscript{127} Disregarding the small shift in the relative life expectancies of the husband and wife,\textsuperscript{128} the future interest can still be divided equally between them. Thus Wife owns twenty percent of Blackacre and Husband eighty percent, and the $100,000 of cost basis has been reallocated 80-20 to correspond to the shift in ownership interests, the wife obtaining under section 1015 of the Internal Revenue Code a fraction of her husband's original share of basis because of the imputed annual gifts from him to her.

If the spouses allocate the $200,000 cash proceeds between them $40,000 to her and $160,000 to him this would be viewed under North Carolina tax law as Wife giving to Husband $60,000 but as no gift under federal law.\textsuperscript{129} Since the spouses probably consider themselves equal owners, they are unlikely to make such an allocation of proceeds. North Carolina law makes them co-equal owners as tenants in common. Prior to the 1981 enactment of the unlimited marital deduction, the cash sale often would involve a

\textsuperscript{126} The theory becomes a bit “sticky” with respect to viewing the husband as giving back to the wife any of the $40,000 worth of value she is viewed by the I.R.S. as having given to him. Arguably, the return to her coming back is something in money or money's worth that reduces from the outset her gift to him. Yet, it is not known when the property will be sold or removed from entirety ownership by divorce, etc., so there is no assurance the wife will get anything back in “money’s worth” under the entirety arrangement. The husband did not have to put up $50,000 for the entirety. He knew what would happen: it would be boosted up to a $90,000 interest, which would then as a matter of law decrease annually through the automatic gifts process. It is thus concluded that the husband’s full $90,000 interest should be subjected to automatic annual gift reductions.

\textsuperscript{127} Treas. Reg. § 25.2512-9(B) (1982), Table A(1).

\textsuperscript{128} According to the West Publishing Company actuarial tables, supra note 122, when the couple were 39 and 46, his life expectancy was 32.31 years, hers 31.20. Seventeen years later his is 18.62 and hers is 17.26. His greater life expectancy (because he is six years younger) has increased from 1.11 to 1.36 years, a total of .25 years change, which is the de minimis figure I am disregarding in the calculations.

A gift for federal tax purposes.\textsuperscript{130} As the regulations specifically stated, there would have been a gift for federal purposes even if an election had been made to treat the creation of the tenancy by the entirety as a gift.\textsuperscript{131}

For income tax purposes, however, looking at the sale as preceding the gift,\textsuperscript{132} Wife has sold a future interest with a $20,000 basis for $40,000 and Husband has sold a package of interests with an $80,000 basis for $160,000. Higher tax liability resulting from progressive rates and the imputing of most of the gain to Husband can be avoided by filing a joint income tax return.

The savings to be gained by filing a joint return would be substantially less upon the cash sale of a tenancy by the entirety which had been created in 1983 after the North Carolina reform act became effective. Wife would have owned half the present interest (joint life estate) sold. Because she was, in our hypothetical, six years older than Husband, the value of her future interest was roughly the same as the value of Husband’s future interest (alternative contingent remainder). In the typical situation, however, where Wife is the same age or a bit younger than Husband, under

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{130}.]
\item It is assumed the cash was not promptly reinvested in other tenancy by the entirety property as permitted by the roll-over regulation, § 25.2515-1(d)(2)(ii). It is provided in § 25.2515-1(d)(3)(ii) of the regulations: Where the proceeds of a sale, exchange, or other disposition of the property are not actually divided between the spouses but are held (whether in a bank account or otherwise) in their joint names or in the name of one spouse as a custodian or trustee for their joint interests, each spouse is presumed, in the absence of a showing to the contrary, to have received as of the date of termination, proceeds of termination equal in value to the value of his or her enforceable property rights in respect of the proceeds. (Emphasis added.)
\item It is believed North Carolina law per se provides the showing to the contrary in that the spouses become 50-50 cotenants as a matter of law unless they engage in what the state will view as a gift transaction to prevent that from happening. See supra cases cited note 111.
\item Treas. Reg. § 25.2515-1(d)(1), T.D. 7238, 1973-1 C.B. 544, 570. For example, in our first hypothetical where the husband spent $100,000, federal law viewed him as giving his wife only ten percent of the property. The passage of seventeen years increased that to twenty percent. The cash sale increases her share of ownership in the eyes of the I.R.S. to fifty percent. In most states where Wife was viewed as having a present interest, the husband’s purchase may have given her a fifty-five percent interest, because of her longer life expectancy, and the cash sale was viewed as her giving back to him the extra five percent.
\item If the spouses were not to file a joint return, I suspect an attempt by them to structure the sale as occurring after the gift from Husband and Wife in order to split the gain would be rejected as a tax avoidance sham.
\end{enumerate}
\end{footnotesize}
the new law because of her longer life expectancy, the value of her share of the future interest will be greater than Husband's. It will be common for the I.R.S. to treat Wife as selling, say, fifty-five percent of the property and being able to offset against her gain fifty-five percent of the basis. The filing of a joint return could result in some small tax savings.

The treatment of tenancies by the entirety created after 1983 should also apply to all North Carolina tenancies by the entirety, whenever created, when the sale at issue occurs after the effective date of the reform act. This is so because the new act is at least partly retroactive to pre-1983 tenancies by the entirety.

We have seen that since the reform act makes a wife taxable on half the rents and profits from pre-1983 entirety property, it must follow that she owns half those rents and profits.133 Although she probably has management power over her half of the rents and profits as co-owner, it is unclear whether the new law gives her management power over pre-1983 entirety property.

However, the plain change in the law of ownership of the rents and profits should retroactively wipe out any reason the I.R.S. has for treating a wife as owner solely of a future interest. The I.R.S. has not viewed management power in the husband as a property right that makes him more than fifty percent owner of property which he manages as agent or trustee for the wife.134 Thus, on Jan-

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133. Except in the very few instances where any application of the new law to reduce a husband's property rights acquired in reasonable reliance under the sexist common law would be unconstitutional. See supra text accompanying notes 73-78.

134. See Rev. Rul. 79-105, 1979-1 C.B. 316. Here the husband and wife acquired property held in tenancy by the entirety when the wife was a half owner of the rents and profits but state law also gave Husband exclusive management power. (i.e., it was a hybrid of sexist and non-sexist principles.) Later, a state statute altered management and control law to give Wife equal management power. The I.R.S. said that

[a] management power over property that affects the administration of the property, rather than the ownership or beneficial enjoyment, is not regarded as a vested property interest. . . . Consequently, a statutory alteration of such a management power held by a spouse in a tenancy by the entirety is not an alteration of the property interests of spouses.

Thus, there was no taxable event.

Many decisions in community property states have explained male management of co-owned property in this way as the exercise of a nonproprietary right. E.g., In re Williams' Estate, 40 Nev. 241, 161 P. 741 (1916) (husband acted as agent for wife); Kohny v. Dunbar, 21 Idaho 258, 121 P. 544 (1912) (agent); Murphy v. Metropolitan Life Ins. Co., 498 S.W.2d 278 (Tex. Civ. App. 1973), writ
uary 1, 1983, tax bases of wives throughout North Carolina should shift upwards because of the transfer by operation of law to them (where constitutionally permissible) of a chunk of the husband’s property interest in the realty.

While tax theory usually links a change of basis with a taxable event,135 that is not always the case,136 and, moreover, the transfer could be deemed for federal tax purposes a gift not taxable because of the unlimited marital deduction in effect on January 1, 1983.137

C. Federal Tax Liability Under the Davis Case

Because of the option of filing a joint return, the income tax relief to spouses in instances of cash sales of tenancy by the entirety resulting from the new law is of little significance. On the other hand, the reform law may result in considerable relief at divorce when appreciated tenancy by the entirety property is awarded to the wife under the 1981 equitable distribution statute138 and the I.R.S. asserts that the husband has a gain under the Davis case.139

An initial question arises whether the North Carolina equitable distribution statute has been drafted to eliminate Davis problems by creating a marital property system that is roughly the equivalent of community property. That is, if the wife already owns the property she is awarded at divorce by the court itself (or by contract incorporated into a decree dividing the property), there has been no transfer to her from the husband of any property (and no need to examine whether the fair market value of what was transferred exceeded the husband’s adjusted basis).

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ref’d n.r.e. (husband viewed as trustee for wife).


136. E.g., the case where one builds an improvement and the basis is increased.

137. The absence of donative intent by Husband is no bar to finding a gift. See Commissioner v. Wemyss, 324 U.S. 303 (1944); Treas. Reg. § 25.2511-1(g)(1) (1958). However, one leading treatise flatly asserts that federal gift tax law (the source of a taxable event absent the marital deduction) applies “only to voluntary transfers of property.” D. Kahn & E. Colson, Federal Taxation of Estates, Gifts and Trusts § 2.204 (2d ed. 1975), citing Harris v. Commissioner, 340 U.S. 106 (1950), involving a transfer in contemplation of divorce not treated as a gift. See also E.T. 19, 1946-2 C.B. 166 (no gift where husband pays wife’s divorce attorney’s fees under legal compulsion).


139. See supra text accompanying note 109.
Subsection (k) of the equitable distribution statute provides: "The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action." This is a rather obvious attempt to obtain the benefits of a Tenth Circuit holding that Davis is inapplicable when the wife receives her vested property rights at the time divorce is filed rather than at the time of the rendering of the decree dividing property. Initially, even though Davis is an unpopular decision, there is no reason to be confident that the Fourth Circuit would agree with the Tenth that such a verbal formulation in state law is sufficient to disguise what is really happening to the husband’s property because of the divorce. In substance, in Oklahoma and Colorado, the two states the Tenth Circuit has allowed to escape Davis under the it-vested-at-filing theory, the wife receives all property rights at the time of divorce. Only in form does she receive property rights when the action is filed.

Moreover, the North Carolina formulation in subsection (k) is significantly different from the Colorado-Oklahoma theory of vesting. There, “at the time the divorce action was filed there vested in the wife her interest in the property in the name of the husband.” But under North Carolina’s subsection (k), the filing of the action vests in the wife not an interest in property but “the right to an equitable distribution.” The difference is very significant. If Oklahoma and Colorado are serious about vesting the property interest of the wife at the time of filing of the divorce action, equitable considerations arising after the filing could not be considered. For example, if a week after filing the husband were seriously injured in an automobile accident, that would not alter

140. See McCaffrey & Wolf, Davis Update: A State Survey of Tax Treatment of Property Transfers Upon Divorce, 2 FairShare No. 8 at 11, 14 (1982) (statute “specifically designed” to prevent Davis liability).

141. See Imel v. United States, 523 F.2d 853 (10th Cir. 1975) (Colorado law) and the Collins cases from Oklahoma discussed therein; accord Engle and Engle, 293 Or. 207, 646 P.2d 20 (1982).

142. In re Questions Submitted by United States District Court, 184 Colo. 1, 517 P.2d 1331 (1974) (emphasis added); accord, Collins v. Oklahoma Tax Commission, 446 P.2d 290 (Okla. 1968). The Oregon statutory formulation held sufficient to avoid Davis liability in Engle, supra note 141, was that “the rights of the parties in the marital assets shall be considered a species of co-ownership” once the divorce action was filed. OR. REV. STAT. § 107.105(1)(e) (1982) (emphasis added).
the property distribution. It is clear from the North Carolina statute, however, that the amount of property the wife will receive does turn on events occurring after the filing of the action. There is only a presumption that a 50-50 division of marital property is appropriate, and unequal divisions are contemplated in many circumstances. For example, subsection (c) directs the North Carolina divorce court to take into account, in equitably dividing the property, the economic condition of each party “at the time of the division” of the marital property. It also calls for consideration of which parent-spouse will receive custody of minor children, a matter not usually decided at the time of filing of the divorce action.

In sum, North Carolina law does not vest a property right in the nonowner spouse at the time of filing of the divorce action but rather a right, of unmeasurable value at that time, to an equitable distribution of divisible property. There almost certainly will be Davis problems generated by such division.

The harsh effect of the Davis rule, coupled with the I.R.S. treatment of tenancy by the entirety, can be illustrated by examining the tax effects of an award to the wife of the tenancy by the entirety residence acquired by the spouses in the second hypothetical above, where the spouses each contributed $50,000 to acquire Blackacre. It will be recalled that the wife was treated by the I.R.S. for income tax purposes as making a $40,000 gift to the husband. In the hypothetical, after seventeen years the imputed annual gifts have shifted ten percent of the ownership to the wife, along with a proportionate amount of the husband’s basis. For simplicity, let us assume there has been no adjustment to basis by way of improve-

143. Colorado and Oklahoma may assert that the wife was vested with an interest based on the date of filing only to be later partially divested by Husband’s accident. This simply makes their attempt to skirt Davis all the more obviously a sham. Moreover, if it were the wife who were injured after the filing, no divesting theory could explain how this fact entitles her to a larger share of the property than she would have obtained based on the facts existing at the time of filing.


Not only must the right vested be in property, but, according to the I.R.S., to avoid Davis, it must be “similar to community property law.” Rev. Rul. 74-347, 1974-2 C.B. 26. Obviously, the Tenth Circuit does not consider this ruling valid, but the Fourth Circuit might.
ments, depreciation, etc. The spouses’ combined bases are still $100,000; the property is worth $200,000.

If Blackacre, the tenancy by the entirety property, is awarded to Wife at divorce and no property of hers is awarded to Husband,¹⁴⁵ she has acquired in consideration for her release of marital property claims an eighty percent interest in the realty worth $160,000 in which the husband has an $80,000 basis. It appears Husband has an $80,000 gain. It further appears that after the 1982 reform act takes effect, the gain will be only about $50,000. Wife already will own a half interest in the imputed life estate (an interest worth $60,000). What Husband transfers to her under the new law is his half interest in this joint life estate (worth $60,000 but as to which he has a $30,000 basis—gain of $30,000) and his contingent remainder. Because in the hypothetical situation Husband’s life expectancy was the same as Wife’s, his contingent remainder is valued at twenty percent of the total value of the property as well as hers. Its fair market value is $40,000, and $20,000 of Husband’s basis is allocated to it. Husband’s total gain is then $50,000 rather than $80,000 thanks to the new law.

But it is not that simple. The above analysis fails to take into account the impact of I.R.C. section 1001(e), which provides:

In determining gain or loss from the sale or other disposition of a term interest in property, that portion of the adjusted basis which is determined pursuant to section . . . 1015 . . . to the extent such adjusted basis is a portion of the entire adjusted basis of the property shall be disregarded.

The section defines “term interest” as a life estate or term of years, but the regulations indicate the intent is to reach all interests in “property which will terminate or fail on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur.”¹⁴⁶

If Husband is viewed as owning a defeasible fee in the realty,

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¹⁴⁵. A reshuffling of property interests with each spouse owning as much in value after the division as before is nontaxable, unless a promissory note is used to create property that previously did not exist. See Kaney, Tax Planning for Division of Jointly-held Property in a Divorce Made Easier by Ruling, 174 J. of Tax’n 174 (Spring 1982) (analyzing Rev. Rul. 81-292); see also Carrieres v. Commissioner, 64 T.C. 959 (1975), aff’d, 552 F.2d 1350 (9th Cir. 1977) (unequal division of community property); Bartke, Marital Sharing—Why Not Do It By Contract?, 67 Geo. L.J. 1131, 1158-62 (1979).

his entire interest could be a term interest. More likely, however, since section 1001(e)(2)(A) singles out a life estate as a term interest, Husband will succeed in having his ownership rights broken down into an imputed life estate coupled with an imputed contingent remainder, the latter not being a term interest.

In the hypothetical case, the husband began owning ninety percent of the entirety property (as far as the I.R.S. is concerned) and had a $90,000 basis: $50,000 for his cash contribution and $40,000 under section 1015 of the Code upon gift from his wife when the tenancy by the entirety was created. So much of that $40,000 of basis as the husband still has is tainted by section 1001(e) and cannot be used to reduce his Davis gain.

Husband may contend that all of the interest passing via annual gifts during the seventeen years of ownership to Wife was a return to her of part of the forty percent interest in the realty the I.R.S. views her as having given him when the tenancy by the entirety was created. This constituted ten percent of the total value of Blackacre and could be viewed as shifting back to Wife $10,000 worth of Husband’s (tainted) basis that he acquired under section 1015. The I.R.S. will probably prevail on a counter argument that there is no way to trace the annual interests shifted to Wife for income tax purposes as stemming from her original gift to him but rather these interests should be treated as drawn pro rata from the five-ninths interest Husband owned at the outset that he paid for and the four-ninths interest his wife is viewed as having given to him. On this theory, four-ninths of the $10,000 basis shifted to Wife via annual gifts, or $4,444, is drawn from the tainted basis pool.

Husband will argue that just as Wife’s imputed future interest in Blackacre is growing larger over time as the moment approaches when the “remainder” will become possessory, so does the contingent remainder, non-term interest,147 imputed to him grow. This

147. While it is “an interest, present or future, . . . in the right to use property which will . . . fail . . . on the occurrence of [a] . . . contingency;” Treas. Reg. § 1.1001-1(f)(2), T.D. 7142, 1971-2 C.B. 295, 296. (emphasis added)—that is, the husband’s contingent remainder vanishes on his death prior to his wife—it does not fit into any of the categories specifically mentioned in section 1001(e)(2) as term interests: life estates, a term of years, or interests in trust. The reference to future interests that may fail in the regulations is clearly to a life estate not yet possessory or a term of years to begin in future which can terminate after becoming possessory (and perhaps additionally before becoming possessory due to conditions precedent or divesting conditions) but not to a future interest that can
shift from Husband's term interest subject to section 1001(e) should be drawn pro rata from the portion of his ownership interest he acquired by cash and the portion his wife gave him. This argument should prevail unless the I.R.S. successfully urges Husband's entire interest is a term interest as being in the nature of a defeasible fee determinable by his death before Wife. I have previously assumed that this contention by the I.R.S. will fail. Thus $4,444 of Husband's basis acquired by him under section 1015 is removed from section 1001(e) taint by being allocated to his nonterm contingent remainder interest.

Husband will further urge (successfully) that the one-tenth of Blackacre that was from the creation of the tenancy by the entirety imputed to be a contingent remainder (nonterm) interest owned by him was acquired four-ninths by gift from his wife at the creation of the tenancy by the entirety. Thus, another $4,444 of tainted basis is removed from the operation of section 1001(e). Deducting the $13,332 from the husband's original $40,000 basis under section 1015, we have left $26,668 of basis that must be allocated under pre-1983 state law to the term interest—imputed life estate—that the husband transfers to the wife at divorce. Because of section 1001(e) his gain under pre-reform law is $106,668, not $80,000.

After the 1982 reform law takes effect, section 1001(e) causes virtually no increase in gain. Because the hypothetical we are dealing with posits a husband and wife with similar life expectancies at the time of creation of the tenancy by the entirety, no imputed gift occurred when the tenancy by the entirety was created.148

In the typical situation where the wife's life expectancy is longer than the husband's and they both contribute equal sums to acquire the property, it is she who is the donee having a portion of section 1015 basis, and only if the husband is awarded the tenancy by the entirety property at divorce will section 1001(e) increase Davis gain. Likewise, section 1001(e) will not cause adverse tax effects in the situation where the husband's earnings are the sole source of the acquisition, as only the wife will have at divorce a basis acquired under secton 1015. But if in this case the court con-

148. And because the divorce occurred before the couple reached extreme old age, the narrowing of the life expectancy difference between men and women by the passage of years did not materially increase the husband's quantum of ownership. And any such increase would be in the husband's imputed future interest, not a term interest, so that a transfer would not implicate section 1001(e).
siders it equitable to award the property to the husband, all of the wife's basis is tainted by section 1001(e) and Davis will increase the tax liability.\(^{149}\) Obviously, too, section 1001(e) dramatically increases Davis liability where one spouse is awarded the tenancy by the entirety property at divorce and the tenancy by the entirety had been created by gift by a third party (e.g., the parents of one of the spouses). All of the basis allocated to the imputed life estate of the transferor spouse will have been acquired under section 1015 and cannot be used to reduce gain. Only that amount allocated to the transferor's imputed future interest (not a term interest) will reduce his Davis gain.\(^{150}\)

Although, when literally applied, section 1001(e) can dramatically increase Davis tax liability where there is any inherited or donor-acquired basis, this is not the type of situation Congress had in mind in enacting section 1001(e). It appears the type of situation section 1001(e) is directed to is this: the owner of bonds paying fifteen percent interest with $100,000 principal payable in ten years makes a gift of the interest portion (the coupons) to Son and of the principal to Grandson. Grandson is viewed as having no income when he gets the $100,000 in the future (section 102 of the Code applies). The income should be fully taxable to Son. If he should sell his income interest, he should not be able to escape recognition of gain by deducting some share of the basis. Hence, section 1001(e) does not allow him to utilize so much of the basis that would otherwise be assigned to him in the allocation of basis under the regulations to section 1014.

Usually, tenancy by the entirety property transferred at divorce will not be income producing (e.g., a residence occupied by Husband or Wife). Even if rental property were involved, the husband's "term interest" in pre-1983 North Carolina entirety property is not a carved out income interest, as in the bond hypothetical above. It is an I.R.S. fiction that breaks the tenancy by the

\(^{149}\) This return of the tenancy by the entirety property at divorce to the husband who created the entirety is one of the few transfer situations where the 1982 reform act increases tax liability.

\(^{150}\) Observe that when both the husband's interest and the wife's future interest come to them via devise or gift from a third party, the regulations—note 124—under section 1014 (and 1015, as it incorporates them) mandate the annual adjustment based on changed life expectancies that this article has predicted will occur in the case of cost bases under the automatic gifts theory. See Treas. Reg. § 1.1014-4(b), -5, T.D. 7142, 1971-2 C.B. 295, 296-98. Thus the nonterm interests will be growing in size annually.
entirety ownership into present and future interests. Most importantly, a spouse's imputed life interest (e.g., a husband's life interest under pre-1982 North Carolina law) cannot be transferred to a third party, as can the bond coupon term interest in the above hypothetical. Section 1001(e) does not apply to reduction of gain by use of a basis acquired by gift or devise when all of the interests sharing the uniform basis are conveyed in a single transaction. There is only one person to whom the husband or wife can, acting alone, convey his or her term interest: the other spouse. But that type of transfer can be viewed as unifying the basis at the moment the transferee spouse acquires the full interest in the property. Since the transferee no longer holds a future interest, his or her basis would not increase over the passage of time as it would had the term interest been conveyed to a third party leaving the basis-holder with the future interest originally devised or given to him or her.

Since tax policy does not require applying section 1001(e) to a basically nontransferable term interest such as that which the I.R.S. imputes to the husband under pre-reform law and logically will impute to both spouses after 1982, technical arguments against application of section 1001(e) may be accepted and tax avoidance techniques tolerated. Arguably, the husband under pre-1983 law and both spouses under post-1982 law should be viewed as having not a life estate in the tenancy by the entirety property but a defeasible fee. Since it will not necessarily terminate, perhaps at least in the tenancy by the entirety context, it could escape classification as a secton 1001(e) "term interest."

Tax avoidance steps can be taken to technically eliminate the impact of section 1001(e) on Davis liability. First, the form of ownership could be converted from tenancy by the entirety to tenancy in common before the division at divorce that will make one spouse the sole owner. In no sense does a tenant in common own a term interest, so section 1001(e) should have no application to the ultimate transfer (unless the I.R.S. restructures the series of events as all part of one transaction designed with tax avoidance motives). What are the consequences of the conversion from tenancy by the entirety to tenancy in common? If viewed in isolation it is under federal law a gift—from the husband to wife under pre-reform state law and usually from the wife to husband after 1982—nontaxable since ERTA instituted the unlimited marital deduction.

If the change in form from tenancy by the entirety is treated as a gift, there should be a change in basis that can affect Davis
income tax liability at the second stage of the transaction when one spouse becomes sole owner of the property. Sometimes this change is beneficial to the taxpayer, sometimes detrimental. For example, suppose the couple acquired tenancy by the entirety property by gift from the parents of one of them. It has since doubled in value. The ages of the divorcing spouses are such that Wife is viewed by the I.R.S. as owning fifty-five percent of the property and Husband forty-five percent. If the anticipated ultimate distribution is all of the property to the wife because of her needs, the step one change in form increases Davis liability of the husband. He will end up transferring to Wife fifty percent of the value of appreciated property rather than forty-five percent (although this is partially offset by his receiving under section 1015 some of her basis upon her “gift” to him when property interests were changed from 55-45 to 50-50).\textsuperscript{151}

If the husband and his tax advisor are not seriously worried about the I.R.S. claiming that section 1001(e) applies to Husband’s basis in a direct transfer of his tenancy by the entirety interests to Wife, the tax cost of step one probably is not worth the arguably improved position Husband obtains with respect to whether he has transferred to Wife a term interest.

Suppose it is anticipated that Husband will end up with the property after the divorce (e.g., because his parents were the donors and it is considered equitable to return this family land to him, the wife having property of her own). Step one now reduces Davis liability of the wife because she will end up at step two transferring only a fifty percent rather than a fifty-five percent interest in appreciated property. While I believe the I.R.S. may permit tax avoidance transactions to eliminate applicability of section 1001(e)—because it should have excluded imputed term interests arising in the tenancy by the entirety context—the I.R.S. clearly is not retreating from Davis. I suspect the I.R.S. will not allow the wife to reduce her Davis liability in this manner. To avoid the risk that the I.R.S. will combine the transactions at step one and step two and view the wife as transferring a term interest under section 1001(e), she might be well advised to concede that the separation of the transfer into two stages cannot reduce her Davis liability.

Suppose the property acquired by gift from Husband’s parents

\textsuperscript{151} Since Husband will not be transferring a term interest to Wife at step two, it is not significant that this bit of basis comes to Husband by gift, just as the remainder of his basis was the result of a gift under the hypothetical facts.
was income-producing—*e.g.*, a farm, an apartment house—or held by the spouses for sale for gain. It could be contended that the step one transfer is not a gift by *Wife* to *Husband* (reducing her interest from fifty-five percent to fifty percent) because of complete absence of donative intent, but rather a nontaxable like-kind exchange with the bases of the spouses undisturbed. After all, spouses contemplating divorce know it is almost certain that the tenancy by the entirety will not end by death. To the spouses, the value of each one’s interest in the property is the same. If section 1031 does apply at step one, then at step two *Wife* transfers to *Husband* a fifty percent nonterm interest holding fifty-five percent of the basis. There is too much tax benefit, and the I.R.S. will “telescope” the two stages into one, with the risk that *Wife* will be viewed as conveying a term interest and section 1001(e) will apply to increase her *Davis* gain.

A second approach to avoidance of section 1001(e) is to wait until after divorce to transfer, pursuant to agreement, one ex-spouse’s interest in the property to the other. This approach allows the tenancy by the entirety to be dissolved as a matter of law,¹⁵²

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The North Carolina equitable distribution statute is unclear as to whether, after one spouse has obtained an *ex parte* divorce in another state, an action can be brought to partition the tenancy in common property equitably under section 50-20 of the General Statutes or whether ownership must remain 50-50 between the ex-spouses, with any partition simply being in kind or by sale without disturbing equal ownership. North Carolina General Statute § 50-21 (1981 Supp.)—part of the 1981 legislation creating the scheme of equitable distribution of property incident to termination of marriage by divorce—states in pertinent part (emphasis added):

> Upon application of *a party to an action for divorce*, an equitable distribution of property shall follow a decree of absolute divorce. A party may file a cross action for equitable distribution in a suit for an absolute divorce, or *may file a separate action* instituted for the purpose of securing an order of equitable distribution... The equitable distribution may not precede a decree of absolute divorce.

When the wife who remained in North Carolina received notice of the husband’s *ex parte* divorce action pending in, for example, Nevada, she obviously had standing to bring the “separate action” in North Carolina courts envisioned by section 50-21. The problem is whether such standing is removed by a Nevada judgment that becomes final (but which makes no attempt to divide marital property be-
arguably not a gift. In the subsequent transfer—e.g., from Husband to Wife—a nonterm tenancy in common fifty percent interest would be transferred. Again there are problems that the step one change, occurring as a matter of law, from tenancy by the entirety to tenancy in common could increase Davis liability or apparently decrease it so that the I.R.S. would insist on treating the two steps as one.158

cause the Nevada court lacks in personam jurisdiction over the wife). I.e., if the wife tries to bring her suit after the Nevada judgment is final she arguably is not "a party to an action for divorce" (quoting the first clause of section 50-21).

The construction that rests jurisdiction to make an equitable distribution on the plaintiff's having the status of a party to a pending action for divorce should be rejected; it should be sufficient that she was a party to an action that went to judgment. Otherwise she could be greatly penalized for her inaction (failing to file suit under section 50-21) after learning of the suit initiated in Nevada. See generally, Note, 28 BAYLOR L. REV. 425 (1976); de Carteret v. de Carteret, 26 Wash. App. 907, 615 P.2d 513 (1980); Matthews v. Houtchens, 576 S.W.2d 880 (Tex. Civ. App. 1979). Note that subsection (k) of the equitable division statute (quoted supra in the text accompanying note 140) says the right to an equitable division vests when the divorce suit is filed (without limitation to a filing in North Carolina). Nothing is said there about the termination of the divorce action by final judgment causing the vested right to be divested.

153. One tax problem with the second suggested tax avoidance approach—providing for a transfer after a divorce decree had terminated the tenancy by the entirety—is that mere termination by operation of law at the moment when marital status ended might be treated by the I.R.S. as a Davis transfer. If this upgraded the wife's property interest (as it would under pre-1983 law and could under post-1982 law if she were considerably older than he), the I.R.S. could claim North Carolina caused this result because the divorce terminated a continuing duty of support by the husband. Since the transfer occurring at divorce would be of a term interest in the entirety property, section 1001(e) might increase the Davis liability.

It is believed that the risk is slight, especially if the divorce occurs along with a settlement contract or decree which envisions only the subsequent transfer as the consideration for the relinquishment of the wife's property claims emanating from her marital status. Moreover, post-1982 it can be shown that in the great majority of such severances of an entirety by divorce (to be followed by a later transfer to the wife), the nominal shift in ownership by the change to tenancy in common operates against the property interest of the party (wife) who under the decree or settlement agreement is to receive property to extinguish her marital rights. Thus, it appears the transfer that the I.R.S. imputes as happening when a North Carolina entirety becomes an equal tenancy in common has nothing at all to do with satisfying any marital property rights of either spouse. It just happens as a matter of law, and Davis should not be implicated.

Note that if this prediction is wrong, the Nevada ex parte divorce discussed supra in note 152 would be a taxable event if the couple owned tenancy by the entirety property in North Carolina.
A third scheme for avoidance of section 1001(e) is for the spouses to jointly transfer the tenancy by the entirety property to a straw-person who, pursuant to agreement, later transfers the property to the spouse intended to be the ultimate sole owner. Again it will be wise to concede this maneuver has not eliminated Davis gain to the transferor spouse and has been utilized simply to assure that the term interests were conveyed in a unified transaction along with their corresponding future interests so that section 1001(e) does not apply.154

VIII. Conclusion

The long-overdue reform of North Carolina law concerning tenancy by the entirety should have no effect on creditors' rights and exemptions except to reduce from all to half the amount of rents and profits from entirety property the husband's creditors can reach and to allow the wife's creditors to reach a half interest in such rents and profits. The entirety property itself will remain exempt unless the creditor obtains judgment against both spouses. But this exemption will not be extended to the rents and profits.

The new law calls for the joinder in management transactions by the spouse of the tenant by the entirety who wishes to lease, mortgage, convey, etc., entirety realty. This greatly expands the number of "dual management" transactions in North Carolina and will undoubtedly increase the number of cases where theories of agency, ratification, and estoppel are invoked by lessees, mortgagors, etc., to avoid a conclusion that failure to satisfy the joinder requirement renders a transaction entered into by one spouse alone void or voidable. Such instruments by one spouse alone should be void for all purposes except estoppel by deed after the entirety has terminated. Only a formal power of attorney should be the basis for a finding that a husband signed as agent for his wife. Estoppel in pais cannot be successfully asserted against a wife even though she orally approves of a transaction entered into by the husband and the third party is aware of this, since the third party cannot reasonably believe, given the clear language of the new act, that oral consent suffices. In some instances, to prevent undue influence by the wife, a case for ratification or quasi-estoppel can be

154. Finally, a cash sale of the tenancy by the entirety property with distribution of the cash to the spouse to be benefited by the equitable distribution at divorce avoids section 1001(e). But this causes far more gain than Davis, because the transferee spouse's interest in the property is sold as well as the transferor's.
made out, but acceptance of that theory will seriously undercut the legislative judgment that the wife should participate by joinder in significant management decisions involving tenancy by the entirety property.

Although the General Assembly fixed a January 1, 1983, effective date for the new Act, if unconstitutionality of the pre-reform law is established in litigation concerning a pre-1983 dispute, the principles of the new law will be used to "cure" the unconstitutionality.

The reordering of management and control of entirety property is constitutional in all cases. The General Assembly in declaring the wife subject to income tax liability for half the rents and profits accruing after 1982 on entireties created before the effective date of the Act must intend that the wife own the half interest on which she is taxed. This alteration of the ownership of rents and profits is constitutional except in the few cases where ownership by the husband can be shown to have been intended by the donor or the husband himself who supplied the consideration. However, where a post-1972 instrument does not express that intent on its face, it cannot be established by parol evidence.

The new act will enable third-party donors to take two, not just one, annual exclusions of $10,000 under federal gift tax law in most cases where tenancies by the entirety are created by gift. With respect to federal income tax law, the reform act should alter the bases that a husband and wife have in entirety property to make the bases of each almost equal (unless the age difference between the spouses is substantial) concurrently with a shift of property rights approaching near equality. The latter development usually will have beneficial income tax results for North Carolina husbands seeking divorce.