

NOTES

Administration of Entireties Property in Bankruptcy

INTRODUCTION

State law¹ often permits a husband and wife who own property as tenants by the entirety² to immunize the property from seizure by creditors.³ Federal bankruptcy law,⁴ however, seeks to maximize equity to creditors⁵ by requiring a debtor to surrender his assets in exchange for a discharge of his debts. As a result, bankruptcy courts have encountered considerable problems when administering entireties property.

The most notable problems are: (1) whether an interest in entireties property can be reached by joint creditors when a debtor files singly,⁶ and (2) if the debtor can exempt his interest, whether the trustee may sell the entireties property despite the exemption.⁷ This Note resolves these problems. It also explains how to administer entireties property depending upon the jurisdictional form of entireties property ownership, the number of debtors filing, and the type of creditors involved.⁸

1. See *infra* note 24 for a summary of state law creating and interpreting tenancies by the entireties in the 25 jurisdictions which retain this form of ownership.

2. Tenancy by the entirety is a species of common law concurrent ownership which developed as part of the English feudal system of land tenures. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951). Essentially, it is a joint tenancy modified by the common law fiction that husband and wife are one person and by the common law incidents of coverture. 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952); I.H. TIFFANY, THE LAW OF REAL PROPERTY 645 (3d ed. 1920); 2 W. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 121 (1947); Honigman, *Tenancy by Entirety in Michigan*, 5 MICH. ST. B.J. 249, 284 (1926). To remain consistent with the fiction of a third legal entity—the marital unit—the individual spouses are subsumed as one, and each spouse is deemed to be seized of the entire ownership interest, not merely of an undivided fractional interest, as with joint tenancy. Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 256 (1974).

3. Grilliot & Yocum, *Tenancy by the Entirety: An Ancient Fiction Frustrates Modern Creditors*, 17 AM. BUS. L.J. 341 (1979).

4. 11 U.S.C.A. §§ 101-151326 (West Supp. 1983). The Bankruptcy Code was enacted in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Hereinafter, the Bankruptcy Code will be referred to by that title or simply as the Code.

5. Comment, *Bankruptcy Exemptions: State Law or Federal Policy?*, 35 U. PITT. L. REV. 630 (1974).

6. See *infra* notes 47-83 and accompanying text.

7. See *infra* notes 84-113 and accompanying text.

8. See *infra* notes 114-74 and accompanying text. A chart of proper administration results is presented *infra* at Appendix.

I. DEBTOR V. CREDITOR

A. *Entireties Property and the Bankruptcy Estate*

It is first necessary to determine whether a debtor who holds property as a tenant by the entirety has an interest which becomes property of the bankruptcy estate under section 541(a).⁹ Only if he has such an interest will the exemption and sale provisions become applicable.¹⁰

9. 11 U.S.C. § 541(a)(1) (1982) is titled "Property of the Estate" and reads:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

10. The majority of courts which have addressed the issue have concluded, although for different reasons, that the debtor does have an interest which becomes property of the estate. See *In re Ford*, 3 Bankr. 559 (D. Md. 1980); *Michigan Nat'l Bank v. Chrysler (In re Trickett)*, 14 Bankr. 85 (W.D. Mich. 1981); *Loeber v. Loeber (Matter of Loeber)*, 12 Bankr. 669 (D.N.J. 1981); *In re Barsotti*, 7 Bankr. 205 (W.D. Pa. 1980); *Waldschmidt v. Shaw (In re Shaw)*, 5 Bankr. 107 (M.D. Tenn. 1980); *Virginia Nat'l Bank v. Martin (In re Martin)*, 20 Bankr. 374 (E.D. Va. 1982).

In *In re Barsotti*, the court reviewed the House and Senate Judiciary Committee Reports, House and Senate Floor Statements, and the Bankruptcy Commission Report. It concluded that the intent of § 541(a)(1) is to include all property of the debtor in the bankruptcy estate, including an interest in tenancy by the entireties property which is merely equitable, such as an expectancy or right of survivorship. *Barsotti*, 7 Bankr. at 210. Because § 541 includes both the legal interests and the equitable interests of the debtor, the court's special attention paid to the fact that a tenant by the entireties has only an equitable interest was unnecessary.

In *In re Ford* the court thoroughly examined the Maryland law of tenancies by the entirety. The court concluded that a debtor has several distinct legal and equitable interests in entireties property which enter the bankruptcy estate notwithstanding the fact that neither husband nor wife may sell or dispose of all or any part of the property without the other's assent and that the spouses share equally in the income from the property while the estate exists. *Id.* at 562 (citing *Ades v. Caplin*, 132 Md. 66, 69, 103 A. 94, 95 (1918)); *Whitelock v. Whitelock*, 156 Md. 115, 143 A. 712 (1928); *Masterman v. Masterman*, 129 Md. 167, 98 A. 537 (1916). The debtor was found to have an expectancy based upon his right of survivorship and although the event of survivorship may be contingent and uncertain, the *right* to that survivorship interest was found to be a present interest and not a future contingent right. *Ford*, 3 Bankr. at 566. In addition, the court found that the debtor had an indivisible present right to use, possession, and income from his entireties property. *Id.* at 566.

The reasoning in the *Ford* opinion has been adopted by courts in at least three other states to support a finding that an interest in entireties property becomes property of the bankruptcy estate. *Trickett*, 14 Bankr. 85; *Shaw*, 5 Bankr. 107; *Martin*, 20 Bankr. 374. Although the *Trickett* court adopted the reasoning used in *Ford*, it based its conclusion on an additional reason. The court stated that "[i]f there could be any questions on whether a debtor has a legal or equitable interest in an estate by the entirety, this is resolved by the fact that 11 U.S.C. § 363(h), (i), and (j) set forth the procedure for disposal of such property by the trustee." *Trickett*, 14 Bankr. at 88.

However, in at least two states, bankruptcy courts have concluded that the debtor's interest does not enter the estate. See *In re Jeffers*, 3 Bankr. 49 (N.D. Ind. 1980); *Miner v. Anderson (In re Anderson)*, 12 Bankr. 483 (W.D. Mo. 1981). In *Jeffers* the court analyzed the legislative history of the Bankruptcy Code and concluded that while Congress *may* have intended real estate held by the entireties to come into the debtor's estate through § 541(a)(1), the intent of the House Judiciary Committee in its report accompanying H.R. 8200 was clear—tenancies by

The drafters of section 541(a) created a broad general definition of property of the estate. The statute reads:

The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

- (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.¹¹

The language "all legal or equitable interests" does not exclude any of the debtor's interests in property.¹² In addition, subsections (b) and (c)(2) exclude certain powers exercisable solely for the benefit of others and the debtor's interest in a spendthrift trust, but they do not exclude any interest in entireties property.¹³ Thus, the ordinary meaning of the statutory language¹⁴ indicates

the entirety should not be invalidated. *Jeffers*, 3 Bankr. at 56 (emphasis added). The court further concluded that since, under Indiana law, tenants by the entirety do not have a separate or individual interest in real estate, allowing entireties property to become part of the estate and allowing exemptions thereon and sale pursuant to § 363(h) of the Code would, in effect, change Indiana law regarding real estate held as entireties property. *Jeffers*, 3 Bankr. at 56. Because the legislative history was found to be inconclusive about whether entireties property enters the bankruptcy estate but perfectly clear as to invalidation of tenancies by the entirety, the court felt compelled to hold that, in Indiana, entireties property does not become property of the estate pursuant to § 541.

In *Anderson*, as in *Jeffers*, the court concluded that entirety property may not be brought into the bankruptcy estate. *Anderson*, 12 Bankr. at 490. The *Anderson* court reasoned that because under Missouri law a debtor had no right to the use, enjoyment, or income from the property apart from his spouse, he could not be regarded as having any legal or equitable interest in the property as of the commencement of the case. *Id.* (citing *Schwind v. O'Halloran*, 346 Mo. 486, 142 S.W.2d 55 (1940); *Otto F. Stifel's Union Brewing Co. v. Saxy*, 273 Mo. 159, 201 S.W. 67 (1918); *Frost v. Frost*, 200 Mo. 474, 98 S.W. 527 (1906)). The court distinguished cases in Maryland and Florida in which courts had held that entireties property does enter the bankruptcy estate by stating that because state law is determinative of the debtor's interest in entireties property, it was possible for the property to enter the estate under Maryland and Florida law but not under Missouri law. *Anderson*, 12 Bankr. at 488-90. It is interesting to note that the *Anderson* court ignored *Barsotti*, which was decided prior to *Anderson* in a state with identical incidents of entireties property ownership and which reached the opposite result.

These conflicting judicial opinions illustrate the need for a more goal-oriented analytical approach to better serve the contemporary needs of bankruptcy courts and practitioners.

11. 11 U.S.C. § 541(a) (1982) (emphasis added).

12. All interests in property are either legal or equitable. See 1 THOMPSON ON REAL PROPERTY (1980 Replacement) § 5, p. 27. See also *Merchants' Loan and Trust Co. v. Patterson*, 308 Ill. 519, 139 N.E. 912 (1923) (stating entire interest consists of legal and equitable interests); *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 550 P.2d 413 (1976) (stating that after legal interests were terminated, only equitable interest remained); *In re Glosser's Estate*, 355 Pa. 210, 49 A.2d 401 (1946) (stating that a beneficiary without any interest has neither a legal nor an equitable interest).

13. 11 U.S.C. § 541(b) (1982) reads:

Property of the estate does not include—

- (1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or
- (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases

that any interest the debtor has in entireties property becomes property of the bankruptcy estate.¹⁵

This conclusion is confirmed by examination of the legislative history of section 541. Section 541's predecessor, section 70(a) of the repealed Bankruptcy Act,¹⁶ incorporated the "title" theory of property law. Section 70 was a detailed legislative scheme which listed several kinds of property, title to which passed to the trustee upon the filing of the petition.¹⁷ Paragraph (5) of section 70(a)¹⁸ provided, *inter alia*, that the trustee was vested with title to "property, including rights of action, which prior to the filing of the petition [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered." Whether particular property

to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

11 U.S.C. § 541(c)(2) (1982) reads: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

14. It is a fundamental canon of statutory construction that unless otherwise defined, words will be interpreted as taking their ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 49 (1979).

15. There is good reason to question the value of an individual debtor's interest in entireties property. Indeed, the sponsors of the Code legislation in each congressional chamber stated, "*fojnly* the debtor's interest in such property becomes property of the estate." 124 CONG. REC. 32,399 (1978); 124 CONG. REC. 33,999 (1978) (emphasis added). However, that an individual debtor *has* an interest in entireties property cannot be seriously questioned. See *Craig*, *supra* note 2, at 256.

16. 11 U.S.C.A. § 110(a) (West Supp. 1952).

17. See *infra* note 18.

18. Section 70(a)(5) of the repealed Act read:

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . .

(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action *ex delicto* for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And, provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets.

could have been "transferred" or "levied upon" was determined by reference to state law, and when state laws differed, so did bankruptcy administration results.¹⁹ Federal courts were essentially allowed only to place a federal gloss on state property law concepts.²⁰

The Commission on the Bankruptcy Laws of the United States,²¹ in its report issued to Congress in 1973,²² recognized the problem of whether jointly owned property was part of the estate under section 70(a).²³ The Commission recommended simplification of the definition of property of the bankruptcy estate to minimize the necessity of resorting to state law²⁴ for a determination

19. Compare *Carmona v. Robinson*, 336 F.2d 518 (9th Cir. 1964) (finding that based upon California law, a cause of action for personal injuries is an asset of the estate) with *Hayes v. Buda*, 323 F.2d 748 (7th Cir. 1963) (finding that based upon Wisconsin law, a cause of action for personal injuries is not an asset of the estate). See generally Countryman, *The Use of State Law in Bankruptcy Cases (Part 1)*, 47 N.Y.U. L. REV. 407, 466-73 (1972) (providing examples of differing bankruptcy administration results).

20. See the report by the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I at 194 (1973) [hereinafter cited as BKRTCY. COMM. REPORT].

21. Created by Public Law 91-354 on July 24, 1970, the Commission on the Bankruptcy Laws of the United States was established to "study, analyze, evaluate, and recommend changes in the Bankruptcy Act of 1898." BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 1.

22. BKRTCY. COMM. REPORT, *supra* note 20.

23. *Id.*, pt. I at 195.

24. Modern variations of tenancies by the entirety exist in these 25 jurisdictions: Alaska—ALASKA STAT. § 34.15.140 (1975) (recognizing the right to hold an estate in land as tenants by the entirety, with right of survivorship); Arkansas—*Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949); *Union & Mercantile Trust Co. v. Hudson*, 147 Ark. 7, 227 S.W. 1 (1921) (entireties may exist in any type of assets); Delaware—*Hoyle v. Hoyle*, 31 Del. Ch. 64, 66 A.2d 130 (1949); *Ciconte v. Barba*, 19 Del. Ch. 6, 161 A. 925 (1932); *Rauht v. Reinhart*, 180 A. 913 (Del. Orph. 1935) (entireties may exist in any type of assets); District of Columbia—*Flaherty v. Columbus*, 41 App. D.C. 525 (1914) (estates by the entirety exist in both personality and realty); Florida—*Rader v. First Nat'l Bank*, 42 So. 2d 1 (Fla. 1949); *Dodson v. National Title Ins. Co.*, 159 Fla. 371, 31 So. 2d 402 (1947); *American Cent. Ins. Co. v. Whitlock*, 122 Fla. 363, 165 So. 380 (1936); *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925) (entireties may exist in any type of assets); Hawaii—*In re Dean's Trust*, 47 Hawaii 629, 394 P.2d 432 (1964); *Fung v. Chang*, 47 Hawaii 149, 384 P.2d 303 (1963) (indicating that the usufruct is split equally between husband and wife, but other incidents unknown); HAWAII REV. STAT. § 509.2 (Supp. 1982) (entireties may exist in any type of assets); Indiana—*Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924) (entireties may exist in real property only, except that the proceeds derived from sale or conversion of entireties realty may be held by entireties); Kentucky—*Stambaugh v. Stambaugh*, 288 Ky. 491, 156 S.W.2d 827 (1941); *Laun v. DePasqualte*, 254 Ky. 314, 71 S.W.2d 641 (1934); *Hoffman v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932); *Francis v. Vastine*, 220 Ky. 431, 17 S.W.2d 419 (1929) (providing only for entireties ownership of realty); KY. REV. STAT. § 381.050(2) (Supp. 1982); Maryland—*Beard v. Beard*, 185 Md. 178, 44 A.2d 469 (1945); *Young v. Cockman*, 182 Md. 246, 34 A.2d 428 (1943); *Hammond v. Dugan*, 166 Md. 402, 170 A. 757 (1934); *Brell v. Brell*, 143 Md. 443, 122 A. 635 (1923); *Baker v. Baker*, 123 Md. 32, 90 A. 776 (1914); *Brewer v. Bowersox*, 92 Md. 567, 48 A. 1060 (1901); *Pannone v. McLaughlin*, 37 Md. App. 395, 377 A.2d 597 (1977) (entireties may exist in any type of assets); Massachusetts—*Childs v. Childs*, 293 Mass. 67, 199 N.E. 383 (1936); *Splaine v. Morrissey*, 282 Mass. 217, 184 N.E. 670 (1933) (entireties may exist in any type of assets); MASS. GEN. LAWS ANN. ch. 209, § 1 (West 1979) (entireties usufruct is split equally; spouses are entitled to equal control, management, and possession); Michigan—*Moore v. Van Goosen*, 250 Mich. 67, 229 N.W. 451 (1930); *Scholten v. Scholten*, 238 Mich. 679, 214 N.W. 320 (1927); *Wait v. Bovee*, 35 Mich. 425 (1877) (entireties may exist only in realty or, by agreement, in proceeds from

of what constitutes "property."²⁵

After hearings were held in both houses of Congress on the Commission's proposed legislation, the House Committee on the Judiciary reported H.R.

sale of entireties realty (*but see dictum in Frank v. Patton*, 251 Mich. 557, 232 N.W. 211 (1930) (suggesting that personal property may be held by the entireties)); MICH. COMP. LAWS ANN. § 557.71 (West Supp. 1983-84) (usufruct, control, and management are split equally between spouses); Mississippi—*Cuevas v. Cuevas*, 191 So. 2d 843 (Miss. 1966) (incidents of entireties ownership unknown, but the tenancy cannot be destroyed by the act of one tenant); MISS. CODE ANN. § 89-1-7 (Supp. 1983); Missouri—*Schwind v. O'Halloran*, 346 Mo. 486, 142 S.W.2d 55 (1940); *Cullum v. Rice*, 236 Mo. App. 1113, 162 S.W.2d 342 (1942) (entireties may exist in any type of assets); New Jersey—*Franklin Nat'l Bank v. Freile*, 116 N.J. Eq. 278, 173 A. 93 (1934); *Central Trust Co. v. Street*, 95 N.J. Eq. 278, 127 A. 82 (1923); *Aubrey v. Schneider*, 69 N.J. Eq. 629, 60 A. 929 (1905); *Able-Old Hickory Bldg. & Loan Ass'n v. Polansky*, 47 A.2d 730 (N.J. Ch. 1946) (entireties may exist in real property only); N.J. REV. STAT. § 37:2-18 (West Supp. 1983-84); New York—*In re Maguire's Will*, 277 N.Y. 527, 13 N.E.2d 458 (1938); *In re Blumenthal's Estate*, 236 N.Y. 448, 141 N.E. 911 (1923); *In re McKelway's Estate*, 221 N.Y. 15, 116 N.E. 348 (1917); *In re McKinney's Estate*, 175 Misc. 377, 24 N.Y.S.2d 906 (Sup. Ct. 1940) (entireties may exist in real property only, except a chose in action for money still owing on a sale of entireties realty); N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 1983-84); North Carolina—*Wilson v. Ervin*, 227 N.C. 396, 42 S.E.2d 468 (1947); *Dozier v. Leary*, 196 N.C. 12, 144 S.E. 368 (1928); *Winchester Simmons Co. v. Cutler*, 194 N.C. 698, 140 S.E. 622 (1927); *Turlington v. Lucas*, 186 N.C. 282, 119 S.E. 366 (1923) (entireties may exist in real property only; N.C. GEN. STAT. § 39-13.5 (Cum. Supp. 1983); Oklahoma—OKLA. STAT. ANN. tit. 60, § 74 (West 1971) (allowing creation of entireties estates, but expressly providing that levy and sale of a single spouse's interest constitutes a valid severance); Oregon—*Manning v. United States Nat'l Bank*, 174 Or. 118, 148 P.2d 255 (1944); *Halman v. Mays*, 154 Or. 241, 59 P.2d 392 (1936); *Nunner v. Erickson*, 151 Or. 575, 51 P.2d 839 (1935); *Webb v. Woodcock*, 134 Or. 319, 290 P. 751 (1930); *Smith v. Durkee*, 121 Or. 86, 254 P. 207 (1927); *Ganoe v. Ohmart*, 121 Or. 116, 254 P. 203 (1927); *Stout v. Van Zante*, 109 Or. 430, 219 P. 804 (1923) (entireties may exist in real property only); OR. REV. STAT. § 108-090(2) (1981); Pennsylvania—*Blummer v. Metropolitan Life Ins. Co.*, 362 Pa. 7, 66 A.2d 245 (1949); *United States Nat'l Bank v. Penrod*, 354 Pa. 170, 47 A.2d 249 (1946) (entireties may exist in any type of assets); Rhode Island—*Van Ausdall v. Van Ausdall*, 48 R.I. 106, 135 A. 850 (1927); *Quinn v. Drummond*, 47 R.I. 215, 132 A. 439 (1926); *Wilder v. Aldrich*, 2 R.I. 518 (1853) (entireties may exist only in real property); Tennessee—*State v. Progressive Bldg. & Loan Ass'n*, 174 Tenn. 597, 129 S.W.2d 513 (1939); *Campbell v. Campbell*, 167 Tenn. 77, 66 S.W.2d 990 (1934); *Moore v. Chase*, 25 Tenn. App. 239, 156 S.W.2d 84 (1941) (entireties may exist in any type of assets); TENN. CODE ANN. § 36-602 (Supp. 1983); Vermont—*Swanton Sav. Bank & Trust Co. v. Tremblay*, 113 Vt. 530, 37 A.2d 381 (1944); *George v. Dutton's Estate*, 94 Vt. 76, 108 A. 515 (1920); *Citizens' Sav. Bank & Trust Co. v. Jenkins*, 91 Vt. 13, 99 A. 250 (1916) (entireties may exist in any type of assets); Virgin Islands—*Masonry Prods. Inc. v. Tees*, 280 F. Supp. 654 (D. St. Croix 1968); V.I. CODE ANN. tit. 28, § 7 (1975); Virginia—*Allen v. Parkey*, 154 Va. 739, 149 S.E. 615 (1929) (entireties may exist in real property); Wyoming—*Nussbacher v. Manderfield*, 64 Wyo. 55, 186 P.2d 548 (1947); *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936) (entireties may exist in realty); WYO. STAT. § 34-1-140 (1977).

25. Property of the estate was simply defined in the Commission's Report as "all property of the debtor as of the date of the petition" and property inherited within six months after the filing, subject to three minor exceptions. The exceptions were for limitations on community property, property subject to a power of appointment, and contingent future interests. BKRTCY. COMM. REPORT, *supra* note 20, pt. II at 147.

The Commission clearly expressed its intent to include interests in jointly owned property in the bankruptcy estate:

Under the proposed Act, the undivided interest of a spouse who is a debtor in a case under the Act is property of the estate. This is contrary to the present Act which looks to state law to determine what happens with respect to property

8200²⁶ favorably to the full House of Representatives for consideration. The Judiciary Committee report discussed the changes in what was to constitute property of the debtor's estate:²⁷

The bill determines what is property of the estate by a simple reference to what interests in property the debtor has at the commencement of the case.^[28] This includes *all* interests, such as interests in real or personal property, tangible and intangible property, choses in action, causes of action, rights such as copyrights, trade-marks, patents, and processes,^[29] *contingent interests* and future interests, *whether or not transferable by the debtor.*^[30] . . .

These changes will bring *anything of value* that the debtors have into the estate. The exemption section^[31] will permit an individual debtor to take out of the estate that property that is necessary for a fresh start and for the support of himself and his dependents. Certain restrictions on the transferability of property will prevent the trustee from realizing on some items of property of the estate.^[32] But on the whole, the trustee will be able to bring *all* property together for a coherent evaluation of its value and transferability, and then to dispose of it for the benefit of the debtor's creditors.³³

Such broad language clearly indicates that the legislation was intended to incorporate the Commission's suggestion that the bankruptcy estate include all of the debtor's property regardless of how limited his interest in that property. The Committee Report even made specific reference to tenancies by the entirety in the following context:

With respect to . . . co-ownership interest, such as tenancies by the entirety . . . the bill does not invalidate the right but provides a method

jointly owned by a husband and wife.

Id., pt. I at 195 (footnote omitted). The second part of the Commission's Report, in a note accompanying this particular section of the proposed statute, reiterates the clear intent that the estate of the debtor is to include all property owned by the debtor including "undivided interests in property." *Id.*, pt. II at 149 n.2.

26. H.R. 8200, 95th Cong., 1st Sess. (1977).

27. H.R. REP. No. 595, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963 [hereinafter cited as HOUSE REPORT]. In criticizing the existing law the Committee wrote, "[c]urrent law is a complicated melange of references to State law, and does little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts." *Id.* at 175 (citing Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1970); BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 192-95; Countryman, *supra* note 19, at 473-74).

28. HOUSE REPORT, *supra* note 27, at 175 (citing H.R. 8200, § 101 (proposed 11 U.S.C. § 541(a)(1))).

29. HOUSE REPORT, *supra* note 27, at 175 (emphasis added) (citing Bankruptcy Act § 70(a)(2), 11 U.S.C. § 110(a)(2) (1970); Countryman, *supra* note 19, at 473-74).

30. HOUSE REPORT, *supra* note 27, at 175-76 (emphasis added) (citing H.R. 8200, § 101 (proposed 11 U.S.C. § 541(c)(1))).

31. HOUSE REPORT, *supra* note 27, at 176 (emphasis added) (citing H.R. 8200, § 101 (proposed 11 U.S.C. § 522)).

32. HOUSE REPORT, *supra* note 27, at 176 (emphasis added) (comparing proposed 11 U.S.C. § 363 with BKRTCY. COMM. REPORT, *supra* note 20, pt. II at 147-48, and H.R. 31, 94th Cong., 1st Sess., § 4-601(b) (1975)).

33. HOUSE REPORT, *supra* note 27, at 176 (emphasis added).

by which the estate may³⁴ realize on the value of the debtor's interest in the property while protecting the other rights. The trustee is permitted to realize on the value of the property by being permitted to sell it without obtaining the consent or a waiver of rights by the spouse of the debtor or the co-owner, as may be required for a complete sale under applicable State law.³⁵ The other interest is protected under H.R. 8200 by giving the spouse a right of first refusal at a sale of the property,³⁶ and by requiring the trustee to pay over to the spouse the value of the spouse's interest in the property if the trustee sells the property to someone other than the spouse.³⁷

H.R. 8200 was passed and sent to the Senate for consideration, but the Senate Judiciary Committee reported its own bill, S. 2266,³⁸ to the full Senate. Though the provisions discussed here were identical in both bills, the Report of the Senate Judiciary Committee does not specifically discuss tenancy by entirety property.³⁹ However, the Senate Report did emphasize that "[t]he scope of this paragraph is broad" and that section 541(a)(1) "includes as property of the estate *all* property of the debtor, even that

34. The court in *In re Anderson*, 12 Bankr. 483, emphasized this permissive language in the Committee Report and concluded that it must mean that

in states like Missouri, where the entiretyship gives the debtor, standing alone, no legal or equitable right, the entirety property cannot be deemed to have passed into the estate in bankruptcy. To conclude otherwise would be to violate the maxim otherwise plainly and unequivocally expressed in the legislative history to the effect that section 541 cannot be employed to enlarge the rights of the debtor beyond those which existed as of the date of the commencement of the case.

Id. at 490. Such a conclusion is unnecessary, however, because the permissive language could be construed to refer to the contingency inherent in 11 U.S.C. § 363 providing for a sale of certain co-owned property. For example, in *In re Shaw*, 5 Bankr. 107, the court held that a mere survivorship interest owned by a debtor is not sufficient to allow a sale of entireties property by the trustee. The language of the Committee Report could be interpreted to be permissive with respect to cases such as *Shaw*, but to be made mandatory in cases where the trustee is able to sell the property. This is a more consistent interpretation of the Report because in the sentences following the word "may," the Committee proceeds to discuss the advantages of allowing the trustee to sell the property without the non-debtor spouse's consent and the protections provided to the non-debtor spouse when the sale occurs. The *Anderson* court's suggestion that the above interpretation will enlarge the rights of the debtor beyond those which he had at the commencement of the case is also not persuasive. Admittedly, the debtor was unable to terminate or to partition the entiretyship prior to the commencement of the case; but permitting the trustee to sell the property and thereby to terminate the entiretyship does nothing to enlarge the *debtor's* rights.

35. HOUSE REPORT, *supra* note 27, at 177 (citing H.R. 8200, § 101 (proposed 11 U.S.C. § 363(g))).

36. HOUSE REPORT, *supra* note 27, at 177 (citing H.R. 8200, § 101 (proposed 11 U.S.C. § 363(h))).

37. HOUSE REPORT, *supra* note 27, at 177 (citing H.R. 8200, § 101 (proposed 11 U.S.C. § 363(i))). This is the particular language which was found to be persuasive in holding that entireties property becomes property of the estate by the *Trickett* court, 14 Bankr. at 88.

38. S. 2266, 95th Cong., 2d Sess. (1978).

39. The debtor in *Ford*, 3 Bankr. 559, argued that it was significant that a detailed Senate Report, issued subsequent to a House Report, made no mention whatever of the tenancy by the entirety problem. The court dismissed the argument as unpersuasive because the positions taken by Congressman Edwards and Senator DeConcini in their floor statements were consistent with the position expressed in the House Report. *Id.* at 567.

needed for a fresh start."⁴⁰ The Senate later adopted S. 2266 as an amendment to H.R. 8200.

Rather than proceeding to conference, both the House and the Senate made additional amendments to the bill. H.R. 8200, as amended,⁴¹ passed the Senate on October 5, 1978, and the House on October 6, 1978. Prior to passage of the compromise version of the Code, Senator DeConcini and Representative Edwards made the following identical remarks on the floor of their respective chambers:

Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the commencement of the case is property of the estate The addition of this provision by the House amendment merely clarifies that section 541(a) is an *all-embracing* definition⁴²

Representative Edwards added, "[t]hus, as section 541(a)(1) clearly states, the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate."⁴³ And, in discussing both the meaning of "property" and the broad scope of section 541, Representative Edwards remarked that "[a]lthough 'property' is not construed in this section [102], it is used consistently throughout the Code in its broadest sense."⁴⁴

Based upon the statutory language and the legislative history of section 541, it is apparent that Congress intended to include all property in which the debtor has an interest at the time of the commencement of the case in the bankruptcy estate.⁴⁵ More specifically, congressional intent is that a debtor's undivided interest in property which he holds as a tenant by the entirety, such as present interests in the use, possession, income, and right of survivorship, shall become property of the estate.⁴⁶

40. S. REP. No. 989, 95th Cong., 2d Sess., 82-83 (1978) (emphasis added).

41. Section 541(a)(1) and the subsections of § 363 of H.R. 8200 and S. 2266 differ insignificantly from those enacted in the Code.

For a detailed discussion of the legislative history, see generally 2 COLLIER ON BANKRUPTCY app. v-xxix (L. King 15th ed. 1979); Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L.J. 1 (1979); A. RESNICK & E. WYPYSKI, *BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY* (1979).

42. 124 CONG. REC. 32,399 (1978); 124 CONG. REC. 33,999 (1978) (emphasis added). See *supra* note 15 for an additional comment by the sponsors.

43. 124 CONG. REC. 32,399 (1978). Though Representative Edwards' statement indicates that entireties property interests will be limited in the hands of the estate, it clearly indicates an intent that the entireties property, at a minimum, will enter the estate.

44. 124 CONG. REC. 32,393.

45. This conclusion is also supported by the fact that the majority of bankruptcy courts which have decided the issue have reached the same conclusion. See *supra* note 10.

46. This conclusion is further supported by several comparisons made by the court in *Ford*, 3 Bankr. 559, between § 541(a)(1) of the Code and § 70(a) of the Bankruptcy Act and between §§ 541(a)(1) and 522(b)(2)(B) of the Code. See also *Barsotti*, 7 Bankr. at 210-11 (making similar comparisons); *Trickett*, 14 Bankr. at 88-89 (comparing § 541(a)(1) to § 363(h), (i), and (j) of the Code).

B. Exemptions Under Section 522(b)(2)(B)⁴⁷

It is next necessary to determine whether the interest in entireties property may be exempted by the debtor from administration by the trustee pursuant to section 522(b)(2)(B).⁴⁸ At present, the most difficult exemption situation involves a debtor who files singly with joint creditors. The dispute centers on whether section 522(b)(2)(B) should be construed such that, unless both spouses file for bankruptcy, entireties property interests may be exempted from the estate.

1. The Conflict

In *In re Ford*,⁴⁹ joint creditors were not allowed to reach entireties property where only one spouse had filed for bankruptcy. The court explained that Mr. Ford's individual undivided interest as a tenant by the entirety was what became an asset of the estate. This interest alone was not subject to the claim of either individual or joint creditors of Mr. Ford and his wife.⁵⁰

The court reasoned that joint creditors of Mr. and Mrs. Ford could have levied upon or sold only the entireties property consisting of the entire, combined, and unsevered interests, as a unity, of both Mr. and Mrs. Ford, but could not have levied upon or sold either of their individual undivided interests. In order for joint creditors to execute upon entireties property, the debtor's interests must be joined with the interests of the non-debtor spouse. Because such is not the case where a debtor files alone for bankruptcy, joint

47. 11 U.S.C. § 522(b) (1982) reads:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative, (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

48. Exemption in this context is not a reference to particular exemptions allowed debtors by state law. Section 522(b)(2)(A) refers to such exemptions. Rather, the phrase "exempt from process" in § 522(b)(2)(B) must mean "immune from process." That is, the debtor's interests which are exemptible are those which cannot be reached by creditors, not because of legislative directive, but because of the inherent nature of the property interest. For example, an individual spouse's interest in tenancy by the entirety property cannot be reached by creditors; otherwise, the very purpose of entirety ownership—protection of the fictional marital unit—would be defeated. See *infra* notes 71-72 and accompanying text.

49. 3 Bankr. 559 (D. Md. 1980).

50. *Id.*

creditors may not reach the entireties property or the debtor's interest in that property.⁵¹

In contrast, in *Napotnik v. Equibank & Parkvale Savings Association*,⁵² a debtor filing singly was allowed to exempt only his equity in entireties property that was in excess of the liens of joint creditors.⁵³ The Court of Appeals for the Third Circuit held that "a creditor with a joint judgment on a joint debt may levy upon the property itself and thus upon the interests of both spouses."⁵⁴

The *Napotnik* court did not distinguish *Ford*. Instead, it merely summarized the result in *Ford*⁵⁵ and proceeded to reach its own conclusion, apparently persuaded by the fact that no Pennsylvania case could be found in which a creditor on a joint debt had attempted to levy upon the interest of only one spouse.⁵⁶ Presumably, the *Napotnik* court believed that the paucity of such cases indicates that the interests of both spouses are available to joint creditors and are not "exempt from process" for purposes of section 522(b)(2)(B).

2. Resolution

Both courts purported to reach results compelled by section 522(b)(2)(B). Unfortunately, the legislative history of section 522 fails to provide clear guidance as to which result is the correct interpretation of the statute.⁵⁷

51. *Id.* at 576.

52. 679 F.2d 316 (3d Cir. 1982).

53. *Id.* at 318.

54. *Id.* at 321.

55. *Id.* at 320.

56. *Id.* at 321 n.10.

57. In hearings before a House subcommittee, Congressman M. Caldwell Butler, Professor Stefan A. Riesenfeld, and Bernard Shapiro discussed bankruptcy's effect on the nonbankrupt spouse's interest in entireties property. *Hearings on H.R. 31 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess., pt. III (1975-76) [hereinafter cited as *Subcommittee Hearings*]. Specifically they addressed the problems caused by the differing treatment of estates by the entirety by the various states. *Id.* at 1519-24. The bill before the subcommittee was H.R. 31, 94th Cong., 1st Sess. (1975), the Bankruptcy Commission's proposed bill, which provided only for federal exemptions by debtors. The Commission had recommended a flat repeal of the applicability of all state exemption laws in federal bankruptcy proceedings. BKRTCY. COMM. REPORT, *supra* note 20, pt. IV at 503 n.3. In the colloquy, Congressman Butler stated that "[t]he theory of tenancy by the entirety is that the husband and wife are yet a third person and therefore, if that third person is not in bankruptcy, [the trustee] should not have an access to that asset." *Subcommittee Hearings, supra*, at 1521. In order to remain consistent to this theory then, courts must conclude that a debtor may exempt his interest in entireties property from the bankruptcy estate.

The Commission's proposal, however, was severely criticized, and such criticism led to the compromise allowing the option to choose between federal and state exemptions. *See, e.g., Bankruptcy Act Revision: Hearings on H.R. 31 & 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess., pt. II at 937, 1025, 1663-64 (1975). Therefore, discussion of H.R. 31 may not be an accurate indication of legislative interest underlying the legislation as enacted.

H.R. 31 was succeeded by H.R. 6, 95 Cong., 1st Sess. (1977), which listed an exemption

However, the relevant policies underlying the Code and entireties property ownership do provide the necessary guidance.

a. policy considerations

The most significant policy justification for allowing property exemptions is debtor rehabilitation—to re-establish debtors so that they may once again participate in the open credit economy.⁵⁸ This goal is often described as providing the debtor with a “fresh start.”⁵⁹ In order to best serve the “fresh

for “property in which the debtor has an interest as a tenant by the entirety.” *Id.* at 69. Such language is ambiguous because of the various interpretations which may be given to the interest of a single debtor in entireties property. On one hand, one could argue that a debtor who co-owns property as a tenant by the entirety has an undivided interest which allows him to exempt the property. On the other hand, some bankruptcy courts have decided that a single tenant by the entirety has no interest, legal or equitable, in entireties property; rather, the fictional marital unit holds the entire interest. *See Ford*, 3 Bankr. 559; *Trickett*, 14 Bankr. 85. Because of the ambiguity, the language of the exemption in H.R. 6 provides no useful guidance for resolving the issue.

Most important to the analysis should be the legislative discussion which surrounded the final version of the Code's exemption section. In a House Report, H.R. REP. NO. 595, 95th Cong., 1st Sess. 360-61 (1977), § 522(b) is described as a significant departure from the law under the 1898 Act because it permits an individual debtor a choice between state and federal exemptions. There is no discussion, however, of interpretation of the “exempt from process under applicable nonbankruptcy law” language. *See id.*; S. REP. NO. 989, 95th Cong., 2d Sess. 75 (1978); 124 CONG. REC. 32,399 (1978); 123 CONG. REC. 33,999 (1977). Without such discussion, one can only conclude that the legislative history of § 522 provides no definitive basis for resolving whether a debtor who files singly with joint creditors can exempt his interest in entireties property.

Finally, one should note that legislative activity which occurred subsequent to adoption of § 522 is also not sufficiently clear to resolve the issue. In *Napotnik v. Equibank*, 679 F.2d 316, the debtor argued that an amendment to § 522(b), proposed subsequent to the section's adoption, was intended to be a clarification of unarticulated congressional intent. The amendment, if adopted, would have added language to § 522(b)(2) expressly providing that an interest of a debtor in entireties property would be exempt from property of the bankruptcy estate to the extent that such interest is exempt under federal law or is not subject to levy by a creditor of only the debtor under state law. 126 CONG. REC. 31,142 (1980); 126 CONG. REC. 26,488 (1980). In rebuttal, the trustee argued that the Senate had more recently attempted to amend the Code, but had omitted any amendment of § 522(b). *See* 127 CONG. REC. S7897 (daily ed. July 17, 1981). The trustee argued that failure to consider such an amendment indicated that the earlier proposed amendment presented a substantive change in the law. *Napotnik v. Equibank*, 679 F.2d at 321 n.11. However, neither of these arguments is conclusive because the proposed amendment to § 522(b) failed for reasons unrelated to the amendment itself. *Id.* at 321. *See* 126 CONG. REC. 31,917 (1980) (indicating that the failure was related to an additional amendment requiring a debtor's reorganization plan to be confirmed by at least one class of creditors as a means of adequately differentiating between creditors with impaired claims and creditors with unimpaired claims).

58. BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 71.

59. The Supreme Court has long recognized the importance of this policy:

[One of the primary purposes of the bankruptcy act is] to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.

Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915).

This purpose of the [bankruptcy] act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (emphasis deleted).

start" policy, relief for debtors must be flexible, comprehensive, lasting, and timely.⁶⁰ According to the Bankruptcy Commission,⁶¹ there must be an integrated system of relief for persons who must continue as income-producing and consumer spending economic units after bankruptcy.⁶² Based heavily upon the Commission's recommendations, the Bankruptcy Code has adopted the approach that the "fresh start" objective will be most readily achieved by permitting the debtor to retain specified property free from the claims of creditors.⁶³

A direct result of providing the debtor with a "fresh start," however, is that creditors suffer. Certainly the exemption laws contribute significantly to the high percentage of cases in which no assets at all are available for distribution to creditors.⁶⁴ This point raises a second and significant countervailing policy: distribution of the debtor's assets should yield as much as possible to satisfy creditors' claims.⁶⁵ From the creditors' perspective, it is important to have bankruptcy rules that determine rights in the debtor's wealth, wherever situated, and that guide credit in the open-credit economy, such as processes which permit creditors to realize on their claims.⁶⁶ To the extent that debtors' assets are exempt, the assets are not available for liquidation and for the payment of dividends to creditors.⁶⁷

A third policy to consider is that of seeking uniformity of bankruptcy administration results. Congress' adoption of section 522 indicates that uniformity is not a major concern. Section 522 does not treat all debtors uniformly because the amount of assets they may claim as exempt depends upon whether the debtor's state has opted out of the federal exemptions,

60. BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 79.

61. *See supra* note 21.

62. BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 79.

63. *See generally* Countryman, *Consumers in Bankruptcy Cases*, 18 WASHBURN L.J. 1 (1980). This approach is in conjunction with granting a debtor a discharge from indebtedness incurred prior to the filing of the petition.

64. *See generally* D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 20-24 (1971); *Bankruptcy Act Revision: Hearings on H.R. 31 & 32 Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st & 2d Sess., pt. II at 768-69 (1975) (statement of Professor Shuchman) [hereinafter cited as *House Hearings*].

65. BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 70-80.

66. BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 71.

67. In fact, the debtor's estate often includes so few assets that creditors have no significant interest in it. Therefore, denying exemptions to the debtor often benefits the trustee in the sense that it provides him assets which can be distributed to creditors. *See House Hearings, supra* note 64, pt. II at 767, 773, 786-88 (statement of Professor Shuchman). Arguably, Congress' failure to seriously consider a bankruptcy scheme that would guarantee some minimal dividend to creditors as a condition to debtors receiving a "fresh start" evidences the lack of importance of this policy. Previous bankruptcy acts have conditioned allowances of property to the debtor and the discharge of debts upon the debtor's assets being sufficient to pay 50% of debts owed. *See, e.g.,* Bankruptcy Act of 1800, ch. 19, § 34, 2 Stat. 19; Bankruptcy Act of 1867, ch. 176, § 33, 14 Stat. 517, *as amended by* ch. 258, 15 Stat. 227 (1868).

leaving the debtor only the nonuniform exemptions provided by state law.⁶⁸ However, the constitutional language certainly implies that national uniformity is a legitimate goal,⁶⁹ and the fact that the Bankruptcy Commission was created with a view toward eliminating the lack of uniformity in treatment of debtors and creditors⁷⁰ further supports the implication. Therefore, despite Congress' adoption of the alternative exemption scheme, the policy favoring uniformity may provide useful guidance in determining whether a debtor filing singly may exempt entireties property from joint creditors in bankruptcy.

Finally, considering the issue in light of one policy which underlies entireties ownership—protection of the marital unit⁷¹—may also be helpful. One judge colorfully articulated the concept of protecting the marital unit:

Husband and wife own an estate in entireties as if it were a living tree, whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade and fruit as much as the other.⁷²

Arguably, to deny a debtor filing singly an exemption for an interest in entireties property would, in effect, kill the tree resulting in a lack of shelter for either spouse. If section 522 is construed without consideration of this policy, a determination of proper administration of entireties property may well produce results directly contrary to a fundamental purpose of recognizing entireties ownership.

b. policy application

Interpreting the language in section 522(b)(2)(B) to allow a debtor filing singly to exempt his interest in entireties property enhances his opportunity to gain a "fresh start." After discharge, the debtor retains his undivided interest in the entireties property, which may often be the principal residence of the debtor and his or her spouse,⁷³ and is spared the detriment of trying to relocate in a market of higher prices and mortgage rates. Refusing to

68. See Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1515-16 (1959) (providing a detailed chart illustrating the disparities throughout the United States). See also Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 681-84 (1960) (providing specific comparisons of disparate treatment of debtors in various states).

69. U.S. CONST., art. I, § 8, cl. 4 reads: "[The Congress shall have the power] [t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States."

70. BKRTCY. COMM. REPORT, *supra* note 20, pt. I at 4.

71. Note, *The Bankruptcy Code of 1978 and Its Effect Upon Tenancies by the Entireties*, 13 IND. L. REV. 761 (1980).

72. *Sterrett v. Sterrett*, 401 Pa. 583, 585, 166 A.2d 1, 2 (1960).

73. Admittedly, the homestead exemption is specifically designed to protect the family home; however, it is not unreasonable to conclude that legislatures may see the exemption for entireties property as an additional protection for the home. See Lavien & Mencher, *The Eclipse of Massachusetts Tenancy by the Entirety and a Reappraisal of Homestead as They Relate to Bankruptcy*, 67 MASS. L. REV. 170, 171 (1982).

provide the debtor the exemption, however, will likely result in a forced sale of the entireties property,⁷⁴ often at deflated values, and will significantly impair any likelihood of an economic rehabilitation of the debtor. Since the "fresh start" objective of the Code is aimed at increasing the debtor's value as an economic unit in society, this policy strongly supports allowing a debtor filing singly with joint creditors to exempt his interest in entireties property from the bankruptcy estate.⁷⁵

The policy of seeking to maximize the property available to creditors, while antagonistic to the "fresh start" policy,⁷⁶ does not require denying the debtor the exemption. Creditors may argue that denying the debtor the exemption does not necessarily deny him a "fresh start" because state legislatures are sensitive to those needs when setting state exemption levels. However, this argument is, at best, transparent because there are great disparities in state exemption laws,⁷⁷ and because legislatures often fail to modify exemption provisions at reasonable intervals to keep pace with inflation.⁷⁸ Additionally, preventing joint creditors from reaching entireties property when only one spouse files does not prevent all levying upon such property. Joint creditors may still do so prior to the debtor's filing date⁷⁹ in most, if not all, states.⁸⁰ And, creditors are in a better position to pass on the costs of any loss in their course of business in a variety of ways: higher interest rates, tighter controls on the availability of credit, or any number of methods by which such losses are passed on through the political-economic system. Certainly creditors are more likely to have this option than

74. See *infra* note 86 and accompanying text. *But see infra* note 111 (explaining the statutory criteria the trustee must meet before sale of estate property).

75. The argument may not seem as convincing in cases where a married couple holds real estate by the entireties strictly for investment purposes. Whether Congress and state legislatures view the policy of protecting the marital unit as important enough to allow exemption of investment property held by the entireties is beyond the scope of this Note.

76. See Grilliot & Yocum, *supra* note 3, at 348.

77. See *supra* note 68 and accompanying text.

78. For example, in 1855, Massachusetts provided an exemption for tools, implements, and fixtures necessary for carrying on a trade not exceeding one hundred dollars in value. One hundred four years later, the exemption was still intact. And, as recently as 1959, Georgia allowed an exemption of one horse or mule or one yoke of oxen, and one loom and one spinning wheel. See Joslin, *Debtors' Exemption Laws: Time for Modernization*, 34 *IND. L.J.* 355, 356 (1959).

79. Of course, creditors will not be able to levy upon the debtor's property within the 90 days immediately preceding the filing date because the Code prohibits preference of any unsecured creditor over another unsecured creditor. 11 U.S.C. § 547 (1982).

80. See, e.g., *Fairclaw v. Forrest*, 130 F.2d 829 (D.C. Cir. 1942) (dictum); *Stanley v. Powers*, 123 Fla. 359, 166 So. 843 (1936); *Union Nat'l Bank v. Finley*, 180 Ind. 470, 103 N.E. 110 (1913); *Ades v. Caplan*, 132 Md. 66, 103 A. 94 (1918); *Rossmann v. Hutchinson*, 289 Mich. 577, 286 N.W. 835 (1939); *Dickey v. Thompson*, 323 Mo. 107, 18 S.W.2d 388 (1929); *L & M Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968); *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951). *But cf.* *Phillips v. Krakower*, 46 F.2d 764 (4th Cir. 1931) (finding that the interest of the bankrupt in entireties property does not pass to the trustee for the benefit of creditors).

debtors are. For these reasons, providing the debtor an exemption is not precluded by the policy of maximizing assets available to creditors.

The policy of seeking uniform bankruptcy administration results, by itself, is not strong enough to justify allowing a debtor filing individually to exempt his interest in entireties property from joint creditors. However, it does provide some support for that result. The Supreme Court has held that "geographical" rather than "personal" uniformity satisfies the constitutional requirement.⁸¹ Because section 522 does not specify different administration results for some states than it does for other states, geographical uniformity standards are met by an interpretation allowing debtors an exemption. Besides, as noted above,⁸² the uniformity policy may not be significant at all in view of the Code's provision for a choice between state and federal exemptions.

Finally, the issue should be evaluated in light of the policy underlying tenancy by the entireties ownership: protection of the marital unit. Intuitively, it seems that allowing the debtor the exemption would provide maximum protection for the marriage because there would be no danger of forcing a sale of the entireties property. Upon reflection, one must reasonably conclude that in order to be consistent with the policy of protecting the marital unit, the debtor should be allowed the exemption. Creditors may argue that since allowing joint creditors to levy on the property is allowed under nonbankruptcy law,⁸³ denying a debtor who files individually the exemption will only permit creditors to do what the spouses should reasonably have expected to happen when they incurred a joint debt. Significantly, this argument ignores the possibility that creditors could control the extension of credit to spouses who would own property by the entireties. Indeed, creditors may easily do so, thereby more directly protecting themselves in the event that one spouse later files for bankruptcy. Casting this burden upon creditors not only protects the marital unit by allowing individual debtors to claim the exemption, but also provides protection by relieving married couples of the responsibility of familiarizing themselves with the intricacies of modern bankruptcy law should one of the spouses decide to file.

Providing an exemption for entireties property to a debtor filing individually with joint creditors will enhance the debtor's "fresh start" without unduly interfering with creditors' interest in realizing on debts. It is reasonable to conclude that an interpretation of section 522(b)(2)(B) allowing such an exemption is the more desirable interpretation. This is especially true because that conclusion also protects the marital unit which entireties prop-

81. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189 (1902). A federal statute is geographically uniform whenever it does not require that *A* be the law in certain states and *B* be the law in the remaining states. Comment, *Bankruptcy Exemptions: Whether Illinois's Use of the Federal "Opt-Out" Provision is Constitutional*, 1981 S. ILL. L.J. 65, 73.

82. See *supra* text accompanying note 68.

83. See sources cited *supra* note 80.

erty ownership was created to protect and because the constitutional requirement of uniformity will be met by bankruptcy administration results.

II. DEBTOR V. TRUSTEE

Courts also disagree as to the trustee's ability to sell the entireties property pursuant to section 363(h)⁸⁴ despite the debtor's exemption claim.⁸⁵ The disagreement arises over whether section 363(h) is even applicable to cases where the debtor elects to exempt his interest(s) in entireties property.

Several courts have indicated that if an individual files with joint creditors, then the trustee may sell the entireties property.⁸⁶ The view expressed, albeit in dicta, in *In re Cipa*⁸⁷ is representative:

Because the debtor's undivided interest in the whole of the entireties property becomes part of the estate, the entireties property itself becomes subject to administration. Pursuant to [s]ection 363(h), the trustee may sell, subject to certain conditions outlined in 11 U.S.C. § 363(h)(1)-(4), entireties property without the consent of the non-debtor spouse, even though the debtor spouse alone would be precluded under state law.⁸⁸

Several other courts have concluded that the trustee may not sell the property.⁸⁹ They also have not explained their conclusion in any detail. In

84. 11 U.S.C. § 363(h) reads:

Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

85. Bankruptcy Rules 2002(a), (c)(1), and 6004(a) require that notice of a proposed sale of property be given to the debtor not less than 20 days before the sale is scheduled to occur (subject to court approval) and that such notice include the time and place of any public sale, the terms and conditions of any private sale, and the time fixed for filing objections. Rule 6004(b) then provides that any objection to the proposed sale must be filed not less than five days before the sale date. If a proper objection is filed, Rule 6004(d) provides for a hearing. Apparently, it is at this hearing when the bankruptcy court will be required to address the issue.

86. See *In re Phillos*, 14 Bankr. 781 (W.D. Va. 1981); *In re Korff*, 14 Bankr. 189 (E.D. Mich. 1981); *In re Cipa*, 11 Bankr. 968 (W.D. Pa. 1981); *Michigan Nat'l Bank v. Chrystler (In re Trickett)*, 14 Bankr. 85 (W.D. Mich. 1981); *Hadley v. Koehler (In re Koehler)*, 19 Bankr. 308 (M.D. Fla. 1982).

87. 11 Bankr. 968 (W.D. Pa. 1981).

88. *Id.* at 971.

89. *In re Redmond*, 15 Bankr. 437 (E.D. Tenn. 1981); *In re Dawson*, 10 Bankr. 680, *aff'd*, 14 Bankr. 822 (E.D. Tenn. 1981); *In re Ford*, 3 Bankr. 559 (D. Md. 1980); *In re Shaw*, 5 Bankr. 107 (M.D. Tenn. 1980).

In re Shaw,⁹⁰ the trustee for the estate of one spouse sought to sell the property owned by the debtor and her spouse as tenants by the entirety pursuant to section 363(h). The debtor claimed her interest in the entirety property as exempt under section 522(b)(2)(B). Since, under Tennessee law, creditors are able to levy upon the contingent survivorship interest,⁹¹ that interest was not exemptible. The trustee argued that the right of survivorship which remained as property of the estate after the section 522(b)(2)(B) exemption was a sufficient interest in entirety property to entitle sale of the property pursuant to section 363(h).⁹²

The court rejected the argument, noting that one spouse's right of survivorship is not an undivided interest in entirety property as specifically required by section 363(h)(2); rather, it is one which is separate and alienable.⁹³ Although without citing legislative history, the court also stated that "Congress did not intend to give a trustee for the estate of one spouse the rather drastic authority to sell the entire property unless the entire interest of the debtor spouse as tenant by the entirety is included in the estate."⁹⁴

Similarly, in *In re Ford*,⁹⁵ the court concluded that, under Maryland law, section 363(h) does not become applicable where an individual debtor elects to exempt his interest in entirety property pursuant to section 522(b)(2)(B).⁹⁶ The *Ford* court noted that its conclusion did not render the statutory provision meaningless because sale of entirety property would be permissible in different factual situations and in other jurisdictions.⁹⁷

Because the opinions of the courts do not provide a clear explanation of the trustee's right to sell entirety property, a more comprehensive analysis will benefit bankruptcy courts and practitioners.

A. *The Statute's Ambiguity*

In section 363(h), Congress provided that the trustee may sell the interest of both the estate and the non-debtor spouse, provided that:

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; [and]

90. 5 Bankr. 107 (M.D. Tenn. 1980).

91. *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S.W. 1000 (1895).

92. *Shaw*, 5 Bankr. at 110.

93. *Id.*

94. *Id.*

95. 3 Bankr. 559 (D. Md. 1980).

96. *Id.* at 578.

97. *Id.* See *infra* & *supra* text accompanying notes 84-113 for a complete discussion of situations where § 363(h) is applicable.

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners.⁹⁸

There are two reasonable, but contradictory, interpretations of this statutory language.⁹⁹ The language could apply whenever the trustee seeks to sell entireties property. Arguably, if Congress had intended to prevent sales of entireties property where the debtor was able to exempt all or some of his interests in entireties property, then it could have done so expressly. Contrarily, the language could reasonably be interpreted to apply only where the debtor does not exempt his interests in entireties property under section 522(b)(2)(B). This interpretation would not render the statutory language meaningless. As noted above,¹⁰⁰ the *Ford* court recognized several situations in which the trustee may sell entireties property if he can fulfill the statutory criteria.¹⁰¹

Unfortunately, legislative history provides no guidance as to which interpretation better satisfies congressional intent.¹⁰² However, consideration of

98. There is a fourth limitation in § 363(h) on the right to make a sale. That limitation, however, was added in an attempt to protect public utilities from being deprived of power sources because of the bankruptcy of a *joint* owner. See 124 CONG. REC. H11093 (daily ed. Sept. 28, 1978). See *supra* note 84 for full text of the statute.

99. One might seek to resolve this issue by reading § 363(b) in conjunction with § 522(b)(2)(B). Section 363(h) only allows the trustee to sell "the estate's interest" in entireties property. See *supra* note 84. Section 522(b)(2)(B) provides for the debtor to exempt his interest in entireties property "from property of the estate." See *supra* note 47. Thus, one might argue that the trustee cannot sell entireties property interests pursuant to § 363(h) because, after exemption, the trustee has no remaining interest to sell. However, this argument incorrectly assumes that an exemption will be allowed before the trustee proposes to sell the entireties property. See *supra* note 85.

100. See *supra* note 97 and accompanying text.

101. See *infra* note 111.

102. One author has proposed that "[t]he best method of using the legislative history to aid interpretation of a section of the Code is to begin with the most recent statement of authority and delve backward through the legislative process." Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 957 (1979). Following this method reveals no mention of § 363(h) more recent than the one in the Senate Report of the Judiciary Committee to accompany S. 2266 filed by Senator DeConcini on July 14, 1978. S. REP. NO. 989, 95th Cong., 2d Sess. 56 (1978). In that report, subsection (h) is explained in essentially the very language of the statute:

Subsection (h) permits sale of a co-owner's interest in property in which the debtor had an undivided ownership interest such as a joint tenancy, a tenancy in common, or a tenancy by the entirety. Such a sale is permissible only if partition is impracticable, if sale of the estate's interest would realize significantly less for the estate than [sic] sale of the property free of the interests of the co-owners, and if the benefit to the estate of such a sale outweighs any detriment to the co-owners. This subsection does not apply to a co-owner's interest in a public utility when a disruption of the utilities services could result.

Accordingly, it provides virtually no guidance on whether the provision is applicable where an individual debtor exempts his interest in entireties property from the estate under § 522(b)(2)(B). Similar treatment of § 363(h) is found in an earlier floor statement of Congressman Edwards and in the House Report of the Judiciary Committee to accompany H.R. 8200. See 124 CONG. REC. 473 (daily ed. Feb. 1, 1978) (remarks of Rep. Don Edwards); H.R. REP. NO. 595, 95th Cong., 1st Sess. (1977).

the relevant policies underlying the Code and entireties property ownership¹⁰³ establishes that section 363(h) does not apply when an individual debtor exempts his interest in entireties property pursuant to section 522(b)(2)(B).

B. Resolution

First, interpreting section 363(h) to be inapplicable where the trustee seeks to sell exemptible entireties property interests certainly enhances the debtor's opportunity to gain a "fresh start." Upon receiving a discharge from the bankruptcy court, the debtor retains his undivided interest in the entireties property in addition to otherwise exemptible property. Retention produces more options to a discharged debtor who seeks to reestablish himself as an income-producing and consumer-spending unit in society. For example, some debtors are free to borrow money using entireties property interests as collateral for the loan. The loan proceeds can then be invested to produce income. Similarly, some debtors may sell the entireties property interests to attain cash for personal consumption.¹⁰⁴ Even in jurisdictions where sale of the interests is not possible, debtors whose principal residence is owned by the entireties are spared the detriment of trying to relocate.¹⁰⁵ Clearly, discharged debtors have a better opportunity for a "fresh start" with the entireties asset than without it.

Second, the policy of seeking to maximize the property available to creditors would be promoted by applying section 363(h) to all cases in which the trustee seeks to sell entireties property. Although such application would not always allow a sale,¹⁰⁶ it would increase the likelihood of one. However, allowing sale under section 363(h) and thereby defeating the exemption expressly provided by section 522(b)(2)(B) is unreasonable. Under the alternative interpretation, section 363(h) serves the "fresh start" policy and does not render the exemption provision useless.¹⁰⁷ Furthermore, interpreting section 363(h) as inapplicable does not deny creditors all effective relief, because they may still recover prior to bankruptcy in most, if not all, states¹⁰⁸ and because creditors are in a better position to pass on the costs of any loss in their course of business.¹⁰⁹ Therefore, while creditor satisfaction would be enhanced by applying section 363(h) to all cases, this policy is better served by interpreting section 363(h) as inapplicable where an individual debtor seeks to exempt his interest in entireties property.

103. See *supra* notes 58-72 and accompanying text.

104. See *infra* note 114 (indicating that of the five jurisdictional forms of entireties property ownership, four allow debtors to convey at least some of their interests).

105. See *infra* note 141 for a list of these jurisdictions.

106. See *infra* note 111 and accompanying text.

107. A statute should be interpreted so as not to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

108. See *supra* note 80.

109. See *supra* text accompanying note 80.

Third, in view of the Code's provision for a choice between state and federal exemptions,¹¹⁰ the policy of seeking uniform bankruptcy administration results, by itself, is not strong enough to prefer one interpretation over the other. However, interpreting section 363(h) as inapplicable to exemptible entireties property interests is consistent with the constitutional uniformity standard. This interpretation produces differing results only to the extent that certain states allow debtors to exempt their interests in entireties property while others do not. Section 363(h) does not specify that bankruptcy administration results differ in various states; states are free to amend their property law to achieve any beneficial results allowable under the terms of section 363(h).

Moreover, interpreting the statute to allow sale despite the exemption would not necessarily provide more uniformity. The administration results will still depend on whether the trustee can fulfill the three statutory criteria.¹¹¹ The facts of each case could produce differing results within states, whereas the suggested interpretation would only produce different results among states.¹¹²

110. See *supra* note 57.

111. See *supra* note 84. Only one of the three criteria which are relevant to entireties property ownership presents a problem for trustees. The first criterion will almost always be met when the property which the trustee seeks to sell is owned by the entireties. That is, in nearly every jurisdiction recognizing entireties ownership, partition of the property is impracticable because the incidents of entireties ownership do not allow alienation by an individual spouse of all of his or her interests. See *infra* note 114. In those few jurisdictions where partition is practicable (Alaska, Arkansas, New Jersey, New York, and Oregon), sale by the trustee will not be allowed.

The second criterion is also not particularly difficult for a trustee to meet when he seeks to sell entireties property. Sale of the estate's undivided interest in entireties property is likely to be difficult, if not impossible, because of the non-debtor spouse's indestructible right of survivorship. Grilliot & Yocum, *supra* note 3, at 348. Free of the co-owning spouse's interest, however, the property could be sold for its fair market value. Though § 363(j) requires the trustee to distribute to the debtor's spouse the proceeds, less the costs and expenses, of such sale according to the interests of such spouse, the amount of proceeds left to the estate would most likely exceed the amount the trustee could get from a sale of the debtor's undivided interest.

The third criterion is the difficult one for the trustee to meet in order to allow sale of the entireties property. The benefit to the estate of such a sale is illustrated clearly by the discussion of the second criterion above. However, the difficulty will arise when the trustee tries to establish that the benefit outweighs the detriment to the non-debtor spouse. The court, arguably, will be forced to consider factors such as the relative ages of the debtor and the joint owner and, if residential property is involved, the costs of relocation for the non-debtor spouse. Evaluation of these factors involves calculation of various potential risks to be borne by non-debtor spouses. Courts may be unwilling to make such calculations, not only because of the unreliability of risk measurement, but also because the evaluation process could be seen as shifting some of the burden of establishing the statutory criteria from the trustee to the non-debtor spouse.

112. For example, assume two married couples living in the same jurisdiction. Each couple owns a home by the entireties. Each couple has joint creditors. Couple *A* has 10 children; couple *B* has no children. The husband of each couple files for bankruptcy and seeks to exempt his interests in the entireties property. A bankruptcy court could very well decide to allow the trustee to sell couple *B*'s house but not to allow sale of couple *A*'s house. The detriment to wife *A* of relocating with 10 children could be found by a court to outweigh the benefit to the estate of selling the home. While this example oversimplifies the factors the court will consider, it demonstrates that allowing sale despite a debtor's exemption claim will not necessarily produce uniform bankruptcy administration results.

Finally, to protect the marital unit, section 363(h) should not be applied where an individual debtor seeks to exempt his interest(s) in entireties property. This interpretation reduces the circumstances in which the trustee can sell the entireties property. As a result, married couples who own homes by the entireties will not be required to bear the burden of relocating in a market of higher prices and mortgage rates. Furthermore, spouses will not be forced into the bankruptcy process by an involuntary sale of entireties property. Strain on marriages is certainly reduced by an interpretation which does not force the non-debtor spouse to suffer directly from a forced sale of his or her entireties property interests which were not part of the bankruptcy estate.¹¹³

In sum, interpreting section 363(h) as inapplicable where a debtor exempts his interest in entireties property is more likely to ensure the debtor a "fresh start" and to protect the marital unit. Moreover, this interpretation does not allow the trustee to defeat exemption rights which are expressly provided to the debtor in section 522(b)(2)(B). Because this alternative is less offensive to the other provisions of the Code and satisfies the policies underlying the Code and entireties property ownership, it is the correct interpretation of section 363(h).

III. BANKRUPTCY ADMINISTRATION RESULTS

Having resolved the questions above, it is now possible to summarize the results of administering entireties property in each of the five groups of jurisdictions¹¹⁴ as defined by the incidents of the estate and as affected by

113. It has been argued that § 363(i) and § 363(j) provide the necessary protection to a non-debtor spouse by providing a right of first purchase or, alternatively, a right to proceeds from the sale according to the interests held by the non-debtor spouse. See *In re Cipa*, 11 Bankr. 968 (W.D. Pa. 1981); *In re Trickett*, 14 Bankr. 85 (W.D. Mich. 1981). Correspondingly, the benefit of sale will always outweigh the detriment to the non-debtor spouse. However, to accept this argument would be to effectively nullify the third criterion in § 363(h). Such a construction is contrary to general rules of statutory construction and is unnecessary. See *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

114. (1) North Carolina is the only state which has retained the husband's right to exclusive control of the usufruct (the present enjoyment of all of the use, possession, and income from the entireties property). The husband alone is entitled to convey the usufruct during coverture, but he may not convey his contingent right of survivorship. Individual creditors of the husband may levy on the usufruct, but not on the contingent right of survivorship. See sources cited *infra* notes 116-28.

(2) Massachusetts and Michigan are similar to each other in that the usufruct is split between the husband and wife and in that either spouse may convey the usufruct or the contingent right of survivorship. In Michigan, individual creditors may not levy on the usufruct or the contingent right of survivorship; however, in Massachusetts, individual creditors may not levy on those incidents only where the entireties property involved is the principal residence of the debtor. See sources cited *infra* notes 129-40.

(3) The majority of jurisdictions which still recognize tenancies by the entirety split the usufruct equally between husband and wife, prohibit conveyance of any interest in the property by either spouse, and prohibit individual creditors from levying on either the usufruct or the contingent right of survivorship. See sources cited *infra* notes 141-50. See also *infra* note 141

the number of debtors filing and by the type of creditors involved where the petitioner has elected to take state exemptions.¹¹⁵

A. Group 1—North Carolina

1. Incidents of Entireties Ownership

North Carolina is the only state which has retained the husband's exclusive right to control of the usufruct—the present enjoyment of all of the use, possession and income from the entireties property.¹¹⁶ The husband alone is entitled to convey the usufruct during coverture, but he may not convey his contingent right of survivorship.¹¹⁷ Individual creditors of the husband may levy on the usufruct, but not on the contingent right of survivorship.¹¹⁸ The wife may convey nothing and her individual creditors may not levy on her individual interests.¹¹⁹

2. Exemptibility of Interests in Entireties Property

A spouse who files singly for bankruptcy could have either individual or joint creditors (or both). In those cases where the debtor-husband files with individual creditors, his interest in the usufruct is not exempt under section 522(b)(2)(B) because it is not exempt from levy by individual creditors under

(listing the states within this category).

(4) Kentucky and Tennessee also split the usufruct between husband and wife. Neither spouse may convey the usufruct, but either may convey his or her contingent right of survivorship. Likewise, no individual creditors may levy on the usufruct, but they may levy upon the contingent survivorship interest. See sources cited *infra* notes 156-61.

(5) In Alaska, Arkansas, New Jersey, New York, and Oregon, the usufruct is split equally between spouses. Either spouse may convey the usufruct and/or the contingent right of survivorship. Creditors of either spouse may levy on the usufruct and/or the contingent right of survivorship. In these states, tenancy by the entirety is the practical equivalent of a tenancy in common for the joint lives of spouses, with an indestructible remainder interest in the surviving spouse. See sources cited *infra* notes 162-74.

115. See *infra* Appendix for a chart summarizing proper administration results in each of the five groups of jurisdictions.

116. See *Williams v. Williams*, 231 N.C. 33, 56 S.E.2d 20 (1949); *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E.2d 666 (1945); *Lewis v. Pate*, 212 N.C. 253, 193 S.E. 20 (1937); *Moore v. Shore*, 208 N.C. 446, 181 S.E. 275 (1935); *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927); *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Dorsey v. Kirkland*, 177 N.C. 520, 99 S.E. 407 (1919); *Bank of Greenville v. Gornito*, 161 N.C. 341, 77 S.E. 222 (1913); *West v. Railroad*, 140 N.C. 620, 53 S.E. 477 (1906); *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906).

117. Cases cited *supra* note 116.

118. *L & M Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968). Though creditors may levy on the usufruct, *Leggett* also indicates that the husband and wife could convey free of the severed interest. Therefore, the creditor's ability to levy is somewhat illusory. *But cf.* *Stubbs v. Hardee*, 461 F.2d 480 (4th Cir. 1972) (holding that an attempt to retain equitable ownership of the land and of accruing profits, both free of the claims of creditors, was a violation of creditors' rights).

119. See cases cited *supra* note 116.

state law. However, his contingent right of survivorship is exempt, as is a debtor-wife's interest in the contingent right of survivorship. These results are consistent with the Code's provision that one looks to applicable non-bankruptcy law for determining exemptions.¹²⁰

If a spouse files singly with joint creditors, the results are slightly different. Because this Note argues that joint creditors cannot reach the debtor's undivided interest in bankruptcy, it makes no difference that under North Carolina law, joint creditors can execute upon entireties property outside bankruptcy.¹²¹ When a spouse files singly for bankruptcy, the individual's interest in entireties property can be declared exempt, even in the presence of joint creditors. Such creditors will have to seek to recover on the joint debt prior to the bankruptcy filing¹²² or will have to file an involuntary petition to force the other spouse into bankruptcy.¹²³ If the latter alternative is sought, the creditor will then need to seek consolidation of the debtors' bankruptcy cases¹²⁴ in order to reach the entireties property.

In cases where both spouses file for bankruptcy, it is also possible for there to be individual or joint creditors. If the joint debtors have only individual creditors, then the results should be the same for each debtor as if each spouse had filed alone.¹²⁵ Where both spouses file with joint creditors, the entireties property is subject to administration by the trustee and cannot be exempted by either or both of the spouses.

3. Sale of the Entireties Property

The trustee may not sell the entireties property where either (1) the husband or the wife files singly with individual or joint creditors, or (2) both debtors file but with individual creditors. These results are generally compelled by the conclusion that any undivided interest in entireties property which is exemptible prevents the trustee from being able to sell the entireties property.¹²⁶ The exception occurs where the husband files individually with individual creditors. Although his interest in the usufruct is not exemptible

120. 11 U.S.C. § 522(b)(2)(B) (1982). *See supra* note 10.

121. *Martin v. Lewis*, 187 N.C. 473, 122 S.E. 180 (1924).

122. *See supra* note 116 and accompanying text.

123. The provisions regulating the commencement of an involuntary case are set forth in 11 U.S.C. § 303 (1982).

124. 11 U.S.C. § 302(B) (1982) provides for the court to determine which cases shall be consolidated. The factors that will be relevant in the court's determination include the extent of jointly owned property and the amount of jointly owned debts. The section is not license to consolidate cases in order to avoid other provisions of the Code to the detriment of either the debtors or their creditors. It is designed mainly for ease of administration. S. REP. NO. 989, 95th Cong., 2d Sess. (1978). *See also* *D'Avignon v. Palmisano*, 34 Bankr. 796 (D. Vt. 1982) (holding that joint administration of separate petitions could defeat the exemption).

125. *See supra* text accompanying note 120.

126. *See supra* text accompanying notes 84-113.

from the estate, it is not an undivided interest as required by section 363(h)(2);¹²⁷ therefore, the trustee is not entitled to sell the entireties property.

The trustee may sell the entireties property where both spouses file with joint creditors, if he can establish the three statutory criteria. This result is compelled by the debtors' inability to exempt their undivided interests in the entireties property from the estate pursuant to section 522(b)(2)(B).¹²⁸

B. Group 2—Michigan, Massachusetts

1. Incidents of Entireties Ownership

In these states, the usufruct¹²⁹ is split equally between husband and wife.¹³⁰ In addition, either spouse may convey his or her interest in the usufruct and/or his or her contingent right of survivorship.¹³¹ In Michigan, individual creditors of either spouse may not levy on that spouse's interests;¹³² but, in Massachusetts, the protection against levy by individual creditors extends only to entireties property which is the principal residence of the debtor(s).¹³³

2. Exemptibility of Interests in Entireties Property

In Michigan, since individual creditors may not levy on entireties property outside bankruptcy, where one or both spouses file but with only individual creditors, the entireties property is exemptible from administration. The result would be the same in these instances in Massachusetts as long as the property involved is a principal residence of the debtor(s).¹³⁴ Entireties property which is not such a residence is, however, subject to administration and distribution to creditors.

127. That is, the incidents of entireties property ownership in North Carolina are such that the husband has *exclusive* rights to control of the usufruct. It is not an undivided interest. Because § 363(h)(2) provides that the trustee may sell the property only if the sale of the estate's *undivided* interest in entireties property would realize significantly less for the estate than sale of the entireties property free of co-owners' interests, a debtor-husband filing individually in North Carolina cannot subject the entireties property co-owned with his wife to sale by the trustee.

128. One should note two other situations in which the trustee can sell the entireties property, if the statutory criteria are met. These situations are: (1) where a debtor does not elect his state exemptions; rather he elects to take the federal exemptions under § 522(b)(1), and (2) where a debtor does not elect to take any exemptions. *In re Ford*, 3 Bankr. 559, 578 (D. Md. 1980).

129. See *supra* text accompanying note 116.

130. MASS. GEN. LAWS ANN. ch. 209, § 1 (West 1979); MICH. COMP. LAWS § 557.71 (West Supp. 1984-85).

131. Sources cited *infra* note 135.

132. *Banker's Trust Co. v. Humber*, 264 Mich. 71, 249 N.W. 454 (1933); *Moore v. Van Goosen*, 250 Mich. 67, 229 N.W. 451 (1930); *Hoyt v. Winstanley*, 221 Mich. 515, 191 N.W. 213 (1922); *Dickey v. Converse*, 117 Mich. 449, 76 N.W. 80 (1898).

133. MASS. GEN. LAWS ANN. ch. 209, § 1 (West 1979).

134. See *id.*

If both spouses filed with joint creditors, the entireties property remains property of the bankruptcy estate, because under either state's law, entireties property is subject to execution for the joint debts of spouses outside bankruptcy.¹³⁵ However, if only one spouse files with joint creditors,¹³⁶ he or she is entitled to exempt the undivided interest in entireties property in Michigan or in Massachusetts.

3. Sale of the Entireties Property

a. Michigan

The trustee may not sell the entireties property where either (1) the debtor files singly with individual or joint creditors, or (2) both debtors file but with individual creditors. These results are compelled by the conclusion that any undivided interest in entireties property which is exemptible prevents the trustee from being able to sell the entireties property.¹³⁷

The trustee may sell the entireties property where both spouses file with joint creditors, if he can establish the three statutory criteria. This result is compelled by the debtors' inability to exempt their undivided interests in the entireties property from the estate pursuant to section 522(b)(2)(B).¹³⁸

b. Massachusetts

The trustee may sell the entireties property where either (1) the debtor files singly with individual or joint creditors, or (2) both debtors file with individual creditors, but he may do so only if he can establish the three statutory criteria and if the entireties property is not the principal residence of the debtor(s). If the entireties property is the principal residence, then the undivided interest of the debtor(s) in the property is exemptible and will prevent the trustee from selling the property.¹³⁹

The trustee may sell the entireties property where both spouses file with joint creditors, if he can satisfy the three statutory criteria, regardless of whether the property is a principal residence. This result is compelled by the debtors' inability to exempt their undivided interests in the entireties property from the estate pursuant to section 522(b)(2)(B).¹⁴⁰

135. MICH. COMP. LAWS ANN. § 557.53 (West Supp. 1984-85); see Lavien & Mencher, *supra* note 73, at 175.

136. See, e.g., *Total Leonard, Inc. v. Iocco (In re Iocco)*, 1 Bankr. Ct. Dec. (CCR) 943 (E.D. Mich. 1975); *In re Trickett*, 14 Bankr. 85 (W.D. Mich. 1981).

137. See *supra* text accompanying notes 84-113.

138. See *supra* note 128.

139. See *supra* text accompanying notes 84-113.

140. See *supra* note 128.

C. Group 3—The Majority Jurisdictions

1. Incidents of Entireties Ownership

This group includes the majority of states that retain tenancy by the entirety as a form of property ownership.¹⁴¹ These states split the usufruct¹⁴² equally between husband and wife,¹⁴³ prohibit conveyance of any interest in the property by either spouse,¹⁴⁴ and prohibit individual creditors from levying on either the usufruct or the contingent right of survivorship.¹⁴⁵

2. Exemptibility of Interests in Entireties Property

Where one or both spouses file with only individual creditors, it is clear that entireties property will not be subject to administration.¹⁴⁶ This is consistent with the state law incidents prohibiting individual creditors from levying on entireties property. Again, the conflict occurs where a spouse files singly but with joint creditors.¹⁴⁷ Section 522(b)(2)(B) should be interpreted to require both spouses to file for bankruptcy if joint creditors are to be able to reach entireties property, so that all of the undivided interests in the entireties property would be available for administration. Where both

141. Delaware, District of Columbia, Florida, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, Virgin Islands, Virginia, and Wyoming. See *supra* note 114 (summarizing the incidents of entireties ownership in these jurisdictions).

142. See *supra* text accompanying note 116.

143. Hoyle v. Hoyle, 66 A.2d 130 (Del. Ch. 1949); Fairclaw v. Forrest, 130 F.2d 829 (D.C. Cir. 1942); Bailey v. Smith, 89 Fla. 303, 103 So. 833 (1925); Fuqua v. Merchants Loan & Sav. Ass'n, 114 Ind. App. 607, 54 N.E.2d 287 (1944) (by inference); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916); Schwind v. O'Halloran, 346 Mo. 486, 142 S.W.2d 55 (1940); Wickerham v. Vitori, 345 Pa. 111, 25 A.2d 801 (1942); Bloomfield v. Brown, 67 R.I. 452, 25 A.2d 354 (1942) (dictum); Sargent v. Platt, 111 Vt. 185, 13 A.2d 195 (1940); Masonry Prods., Inc. v. Tees, 280 F. Supp. 654 (D. St. Croix 1968); Burroughs v. Gorman, 166 Va. 58, 184 S.E. 174 (1936); Peters v. Dona, 49 Wyo. 306, 54 P.2d 817 (1936) (by inference).

144. Citizens Sav. Bank v. Astrin, 61 A.2d 419 (Del. Super. 1948); Fairclaw, 130 F.2d 829; Bailey, 89 Fla. 303, 103 So. 833; Baker v. Cailor, 206 Ind. 440, 186 N.E. 769 (1933); Keen v. Keen, 60 A.2d 200 (Md. 1948) (dictum); Wilson v. Fower, 236 Mo. App. 532, 155 S.W.2d 502 (1941); Schweitzer v. Evans, 360 Pa. 552, 63 A.2d 39 (1949); Bloomfield, 67 R.I. 452, 25 A.2d 354 (dictum); Kennedy v. Rutter, 110 Vt. 332, 6 A.2d 17 (1939); Masonry Prods., 280 F. Supp. 654; Allen v. Parkey, 154 Va. 739, 149 S.E. 615 (1929); Peters, 49 Wyo. 306, 54 P.2d 817 (by inference).

145. Citizens Sav. Bank, 61 A.2d 419; Fairclaw, 130 F.2d 829; Dodson v. Nat'l Title Ins. Co., 159 Fla. 371, 31 So. 2d 402 (1947); Baker, 206 Ind. 440, 186 N.E. 769; Keen, 60 A.2d 200 (dictum); Baker v. Lamar, 140 S.W.2d 31 (Mo. 1940); Amadon v. Amadon, 359 Pa. 434, 59 A.2d 135 (1948); Bloomfield, 67 R.I. 452, 25 A.2d 354 (dictum); Corey v. McLean, 100 Vt. 90, 135 A. 10 (1926); Masonry Prods., 280 F. Supp. 654; Allen, 154 Va. 739, 149 S.E. 615; Peters, 49 Wyo. 306, 54 P.2d 817 (dictum).

146. For cases where one spouse files, see Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981); Kosto v. Lausch (*In re Lausch*), 16 Bankr. 162 (M.D. Fla. 1981); *In re Lungler*, 14 Bankr. 6 (M.D. Fla. 1981); *In re Sutton*, 10 Bankr. 737 (E.D. Va. 1981); *In re Ford*, 3 Bankr. 559 (D. Md. 1980); Bass v. Thacker (*In re Thacker*), 5 Bankr. 592 (W.D. Va. 1980); and where both spouses file, see *In re Lambert*, 10 Bankr. 11 (N.D. Ind. 1980).

147. See *supra* notes 77-89 and accompanying text.

spouses do file with joint creditors in these states, no interests in entireties property are exemptible.¹⁴⁸

3. Sale of the Entireties Property

The trustee may not sell the entireties property where either (1) the debtor files singly with individual or joint creditors, or (2) both debtors file but with individual creditors. These results are compelled by the conclusion that any undivided interest in entireties property which is exemptible prevents the trustee from being able to sell the entireties property.¹⁴⁹

The trustee may sell the entireties property where both spouses file with joint creditors, if he can establish the three statutory criteria. This result is compelled by the debtors' inability to exempt their undivided interests in the entireties property from the estate pursuant to section 522(b)(2)(B).¹⁵⁰

D. Group 4—Kentucky, Tennessee

1. Incidents of Entireties Ownership

Group four states, Kentucky and Tennessee, split the usufruct¹⁵¹ equally between husband and wife.¹⁵² Neither spouse may convey the usufruct,¹⁵³ but either may convey the contingent right of survivorship.¹⁵⁴ Likewise, no individual creditors may levy on the usufruct,¹⁵⁵ but they may levy upon the contingent survivorship interest.¹⁵⁶ In these states, administration of entireties property in bankruptcy should produce the following results.

148. See *Ragsdale v. Genesco, Inc.*, 674 F.2d 277 (4th Cir. 1982); *In re Ragsdale*, 9 Bankr. 991 (E.D. Va. 1981); *In re Butler*, 5 Bankr. 360 (D. Md. 1980).

149. See *supra* text accompanying notes 84-113.

150. See *supra* note 128.

151. See *supra* text accompanying note 116.

152. *Hoffmann v. Newell*, 249 Ky. 270, 60 S.W.2d 607 (1932); *Williams v. Cravens*, 28 Tenn. App. 541, 191 S.W.2d 942 (1946).

153. *Francis v. Vastine*, 229 Ky. 431, 17 S.W.2d 419 (1929); *Sloan v. Sloan*, 182 Tenn. 162, 184 S.W.2d 391 (1945).

154. Sources cited *supra* note 153.

155. *Hoffmann*, 249 Ky. 270, 60 S.W.2d 607; *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 31 S.W. 1000 (1895). *But see* *Ames v. Norman*, 36 Tenn. 369 (4 Sneed) (1857) (holding that individual creditors may levy upon the estate, but noting that purchasers at sale will hold in subordination to the contingent survivorship interest of the non-debtor spouse).

156. Sources cited *supra* note 155. The significant aspect of the ability of a creditor to levy on the contingent right of survivorship is that an intervening conveyance will not defeat the creditor's right to take the property if the debtor spouse is the survivor, even if the property is in the hands of a third party. At least one case in Kentucky has held that the usufruct interest can be levied upon. *In re Brown*, 60 F.2d 269 (W.D. Ky. 1932). In that case, the trustee was allowed to sell the entire usufruct for the joint lives of the bankrupt and spouse. Half of the proceeds passed to the bankrupt estate and half to the non-debtor spouse. *But cf.* *United States v. Ragsdale*, 206 F. Supp. 613 (W.D. Tenn. 1962). That court acknowledged the rule that only the contingent right of survivorship could be levied upon by the individual creditor. However, because the entirety was in cash proceeds from the sale of an entirety, the court ordered the money invested in United States bonds and one-half of the interest was to be paid to the creditor and one-half to the non-debtor spouse. The principal of the bonds would pass to the creditor or to the non-debtor spouse, depending upon whether the debtor was the survivor.

2. Exemptibility of Interests in Entireties Property

Where a single spouse or both spouses file with only individual creditors, courts should rule that the debtor(s) can exempt all but the survivorship interest(s).¹⁵⁷ Presence of joint creditors when both spouses file will result in the entireties property being subject to administration. Where only one spouse files with joint creditors, the debtor's undivided interest in the usufruct and in the contingent right of survivorship should be allowed as an exemption, since state law requires both of the debtor's interests to be present for joint creditors to levy.¹⁵⁸

3. Sale of the Entireties Property

The trustee may not sell the entireties property where either (1) the debtor files singly with individual or joint creditors, or (2) both debtors file but with individual creditors. Where joint creditors are involved, the result is compelled by the conclusion that any undivided interest in entireties property which is exemptible prevents the trustee from being able to sell the entireties property.¹⁵⁹ Although either spouse's individual contingent survivorship interest is not exemptible from the estate where either spouse files or both spouses file with individual creditors, it is not an undivided interest as required by section 363(h)(2);¹⁶⁰ therefore, the trustee is not entitled to sell the entireties property.

The trustee may sell the entireties property where both spouses file with joint creditors, if he can establish the three statutory criteria. This result is compelled by the debtors' inability to exempt their undivided interests in the entireties property from the estate pursuant to section 522(b)(2)(B).¹⁶¹

E. Group 5—Alaska, Arkansas, New Jersey, New York, Oregon

1. Incidents of Entireties Ownership

The final group of states¹⁶² includes Alaska, Arkansas, New Jersey, New York, and Oregon. In these states, tenancy by the entirety is the practical equivalent of a tenancy in common for the joint lives of the spouses, with

157. See, e.g., *In re Dawson*, 10 Bankr. 680 (E.D. Tenn. 1981); *In re Redmond*, 15 Bankr. 437 (E.D. Tenn. 1981); *In re Shaw*, 5 Bankr. 107 (M.D. Tenn. 1980).

158. *Robinson v. Trousdale County*, 516 S.W.2d 626, 632 (Tenn. 1974).

159. See *supra* text accompanying notes 84-113.

160. See *supra* note 127.

161. See *supra* note 128.

162. One should note that Hawaii, Mississippi, and Oklahoma have not been classified within one of the five groups because of the uncertainty of the incidents of entireties property ownership within these jurisdictions.

an indestructible remainder interest in the surviving spouse.¹⁶³ The usufruct¹⁶⁴ is split equally between husband and wife.¹⁶⁵ Either spouse may convey the usufruct and/or the contingent right of survivorship,¹⁶⁶ and individual creditors may levy on the usufruct and/or the contingent right of survivorship.¹⁶⁷

2. Exemptibility of Interests in Entireties Property

Where a spouse files singly with only individual creditors,¹⁶⁸ entireties property will not be exemptible because it would have been subject to levy outside bankruptcy. State law clearly permits a debtor's interest in a tenancy by the entirety to be sold under execution upon a judgment against that debtor.¹⁶⁹ The purchaser at such sale becomes a tenant in common with the debtor's spouse, subject to the spouse's right of survivorship, and is entitled to share in the rents and profits, but not in the occupancy.¹⁷⁰ If both spouses file with individual creditors, the purchasers at sale apparently become tenants in common with each other.¹⁷¹

Where both spouses file with joint creditors, the entireties property would not be exemptible because, under state law, the property would be subject to execution by joint creditors.¹⁷² A debtor who files individually with joint creditors, however, could exempt his or her undivided interest based upon

163. Phipps, *supra* note 2, at 31.

164. See *supra* text accompanying note 116.

165. *Pilip v. United States*, 186 F. Supp. 397 (D. Alaska 1960) (declaring the incidents to be those found in Oregon); *Davies v. Johnson*, 124 Ark. 390, 187 S.W. 323 (1916); *Schulz v. Ziegler*, 80 N.J. Eq. 199, 83 A. 968 (1912); *In re Jamaica Bay*, 252 A.D. 103, 297 N.Y.S. 415 (1937); *Pfaffinger v. Seely*, 134 Or. 542, 291 P. 1015 (1930). *But cf.* 4 R. POWELL, THE LAW OF REAL PROPERTY § 623 (1982) (concluding that entireties ownership does not exist in Alaska).

166. *Pilip*, 186 F. Supp. 397; *Pope v. McBride*, 207 Ark. 940, 184 S.W.2d 259 (1944); *Zanzonico v. Zanzonico*, 24 N.J. Misc. 15, 46 A.2d 565 (1946); *Kawalis v. Kawalis*, 183 Misc. 896, 53 N.Y.S.2d 162 (Sup. Ct. 1945); *Marshall v. Wilson*, 175 Or. 506, 154 P.2d 547 (1945).

New Jersey differs slightly from the other states in this group in that only the husband may convey his right of survivorship, as well as his joint interest, during marriage. And, he may do so only to his wife. *Schumann v. Curry*, 121 N.J. Eq. 439, 190 A. 628 (1937).

167. *Pilip*, 186 F. Supp. 397; *Moore v. Denson*, 167 Ark. 134, 268 S.W. 609 (1924); *Zanzonico*, 24 N.J. Misc. 15, 46 A.2d 565 (explaining that the debtor's contingent right of survivorship does not pass, and if such debtor survives his or her spouse, he or she will take free of the title of the purchaser at the execution sale); *Infante v. Sperber*, 187 Misc. 9, 61 N.Y.S.2d 76, *rev'd on other grounds*, 271 A.D. 896, 67 N.Y.S.2d 82 (1946); *Bush v. Shepherd*, 186 Or. 105, 205 P.2d 842 (1949).

168. See, e.g., *In re Weiss*, 4 Bankr. 327 (S.D.N.Y. 1980).

169. Sources cited *supra* note 167.

170. *Rothschild v. Lincoln Rochester Trust Co.*, 212 F.2d 584 (2d Cir. 1954); *In re Rowe*, 234 F. Supp. 114 (E.D.N.Y. 1964); *Hiles v. Fisher*, 144 N.Y. 306, 39 N.E. 337 (1895); *Finnegan v. Humes*, 252 A.D. 385, *aff'd*, 277 N.Y. 682, 14 N.E.2d 389 (1938).

Significantly, the purchaser at sale cannot maintain a partition action. *Bartkowiak v. Sampson*, 73 Misc. 446, 133 N.Y.S. 401 (Oneida County Ct. 1911).

171. Rents and profits are, of course, more easily shared than possession would be if the entireties property involves a dwelling. In cases which involve dwellings, the cotenants may be forced to seek partition of the estate. Generally, partition is an inherent right of tenants in common. *Albin v. Albin*, 26 Misc. 2d 383, 208 N.Y.S.2d 252 (Sup. Ct. 1960).

172. *Hiles*, 144 N.Y. at 315, 39 N.E. at 339 (citing *McCurdy v. Cannin*, 64 Pa. 39 (1870)).

the argument that outside bankruptcy a joint creditor could only levy on entireties property when both spouses' interests were available.

3. Sale of the Entireties Property

The trustee may not sell the entireties property where the debtor files singly with joint creditors. This result is compelled by the conclusion that any undivided interest in entireties property which is exemptible prevents the trustee from being able to sell the entireties property.¹⁷³

The trustee may sell the entireties property where either (1) a spouse files singly or both spouses file with individual creditors, or (2) where both spouses file with joint creditors, if he can establish the statutory criteria. In each of these situations, an undivided interest in entireties property was property of the estate which could not be exempted pursuant to section 522(b)(2)(B).¹⁷⁴

CONCLUSION

Administration of entireties property in bankruptcy causes courts considerable difficulty. The legislative history of section 541 of the Bankruptcy Code provides persuasive support for the conclusion that entireties property does become property of the bankruptcy estate. However, the legislative history of section 522(b)(2)(B) of the Code is neither persuasive nor even helpful in determining whether a debtor who files individually with joint creditors and who elects to take state exemptions may exempt his or her interest in entireties property from the bankruptcy estate. Policies underlying the Code and entireties property ownership, however, provide ample support for the conclusion that a debtor should be entitled to exempt entireties property.

Similarly, these policies support interpreting section 363(h) to be inapplicable where a trustee seeks to sell entireties property despite the debtor's ability to exempt his interest(s) in the property under section 522(b)(2)(B). While these results may seem too great a burden to place on creditors and the open-credit economy in modern society, to conclude otherwise would be to unreasonably construe the statutory language and to defeat the purpose of entireties property ownership.

If Congress seeks to deny debtors who file individually the exemption or to allow trustees to sell entireties property despite the exemption, it should expressly do so. Likewise, state legislatures who do not support the underlying policy of tenancies by the entirety should repeal statutes allowing creation of that estate.

RODGER A. HEATON

173. See *supra* text accompanying notes 84-113.

174. See *supra* note 128.

Appendix

Group 1—North Carolina

	Individual Creditors	Joint Creditors
Debtor Files Singly	Husband's interest in the usufruct is not exemptible. Husband's or wife's contingent right of survivorship is exemptible. Trustee may not sell the entireties property.	All of debtor's interests in entireties property are exemptible. Trustee may not sell the entireties property.
Debtors File Jointly or File Separately but are Consolidated	Results are the same for each debtor as if each had filed singly.	No interests in entireties property are exemptible. Trustee may sell the entireties property if he can meet the statutory criteria.

Group 2—Michigan, Massachusetts

	Individual Creditors	Joint Creditors
Debtor Files Singly	<i>Mich.</i> —Entireties interests are exemptible. Trustee may not sell the entireties property. <i>Mass.</i> —Only entireties interests in property which is a principal residence of the debtor is exemptible. Trustee may sell the entireties property if 1) he can meet the statutory criteria, and 2) the entireties property is not the debtor's principal residence.	All of debtor's interests in entireties property are exemptible in either state. In Michigan, trustee may not sell the entireties property. In Massachusetts, trustee may sell the entireties property if 1) he can meet the statutory criteria, and 2) the entireties property is not the debtor's principal residence.

Debtors File Jointly or File Separately but are Consolidated	Results are the same for each debtor as if each had filed singly.	No interests in entireties property are exemptible. Trustee may sell the entireties property if he can meet the statutory criteria.
--	---	---

Group 3—Delaware, District of Columbia, Florida, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, Virgin Islands, Virginia, Wyoming

	Individual Creditors	Joint Creditors
Debtor Files Singly	All of debtor's interests in entireties property are exemptible. Trustee may not sell the entireties property.	All of debtor's interests in entireties property are exemptible. Trustee may not sell the entireties property.
Debtors File Jointly or File Separately but are Consolidated	Results are the same for each debtor as if each had filed singly.	No interests in entireties property are exemptible. Trustee may sell the entireties property if he can meet the statutory criteria.

Group 4—Kentucky, Tennessee

	Individual Creditors	Joint Creditors
Debtor Files Singly	Debtor's interest in usufruct is exemptible. Debtor's interest in contingent right of survivorship is not exemptible. Trustee may not sell the entireties property.	All of debtor's interests in entireties property are exemptible. Trustee may not sell the entireties property.
Debtors File Jointly or File Separately but are Consolidated	Results are the same for each debtor as if each had filed singly.	No interests in entireties property are exemptible. Trustee may sell the entireties property if he can meet the statutory criteria.

Group 5—Alaska, Arkansas, New Jersey, New York, Oregon

	Individual Creditors	Joint Creditors
Debtor Files Singly	No interests in entireties property are exemptible. Purchaser at sale becomes a tenant in common with the non-debtor spouse (purchaser not entitled to occupancy). Trustee may sell the entireties property if he can meet the statutory criteria.	All of debtor's interests in entireties property are exemptible. Trustee may not sell the entireties property.
Debtors File Jointly or File Separately but are Consolidated	No interests in entireties property are exemptible. Purchasers at sale become tenants in common with each other. Trustee may sell the entireties property if he can meet the statutory criteria.	No interests in entireties property are exemptible. Trustee may sell the entireties property if he can meet the statutory criteria.