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## Losing Sticks from the Bundle: Incompatibility of Tenancy by the Entireties and Drug Forfeiture Laws

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# Losing Sticks from the Bundle: Incompatibility of Tenancy by the Entireties and Drug Forfeiture Laws

## I. INTRODUCTION

In *United States v. 1500 Lincoln Avenue*,<sup>1</sup> the United States Court of Appeals for the Third Circuit enforced property forfeiture laws in accordance with the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>2</sup> The court's decision, while ostensibly protecting the innocent spouse's property interest, failed to reconcile competing concerns of drug forfeiture legislation and the restrictions in tenancy by the entireties.

*1500 Lincoln Avenue* involved forfeited real property which was held in tenancy by the entireties, a marital concurrent ownership that is indivisible except by death or joint agreement between spouses. Under the Comprehensive Drug Abuse Prevention and Control Act, an owner of property subject to forfeiture may assert an innocent owner defense if the wrongdoer utilized joint property without the innocent owner's knowledge or consent.<sup>3</sup> In *1500 Lincoln Avenue*, the Third Circuit, by claiming a convicted drug dealer's interest, failed to protect his innocent spouse's full interest their entireties estate.

Part II of this note examines tenancy by the entireties, forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act, and the Third Circuit's attempt to reconcile the competing interests of both laws. Part III examines the Third Circuit's reasoning and compares its findings to existing case law and applicable state law.

## II. UNITED STATES V. 1500 LINCOLN AVENUE<sup>4</sup>

### A. Background

#### 1. History of tenancy by the entireties

Tenancy by the entireties originated in the feudal system's

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1 949 F.2d 73 (3d Cir. 1991).

2 21 U.S.C. § 881(a)(7) (1988).

3 *Id.*

4 949 F.2d 73 (3d Cir. 1991).

regime of land tenures and created concurrent marital property ownership with an indestructible right of survivorship.<sup>5</sup>

The concept became part of English common law and was recognized as the only tenancy by which a husband and wife could concurrently hold land.<sup>6</sup> The husband and wife were considered as one entity.<sup>7</sup> Thus, a single marital identity held the property in its entirety, without divisible shares.<sup>8</sup> The tenancy could be created only by a husband and wife with unity of an ongoing marital relationship, time, title, interest and possession.<sup>9</sup> It could be terminated only by death or divorce, with sole ownership vesting in the surviving spouse.<sup>10</sup> Until the late Nineteenth Century, a husband had exclusive control over property held in tenancy by the entireties. He could convey or encumber it without his wife's consent, subject only to such wife's right of survivorship.<sup>11</sup>

5 ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.5 (5th ed. 1984); Oval A. Phipps, *Tenancy by Entireties*, 25 *TEMP. L.Q.* 24, 24 (1951). Feudal land ownership and control was vested only in men, who were "presumably capable of bearing arms in war" to fight their lords' battles in exchange for their land. Women were considered as chattel and thus lacked legal capacity to assert ownership. Their identities upon marriage were merged and lost in their husbands' dominant identities. *Id.* at 24. In ironic contrast, community property's separate equal share principles have been traced to the Visigoths and other barbaric tribes that recognized the wife as an equal partner who shared everyday life and labor with her husband. 1 WILLIAM Q. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* § 11 (1943).

6 4A RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 620 (1991). Sir William Blackstone defined the tenancy by the entireties as it was described by Sir Thomas Littleton's land law treatise in the mid-Fifteenth Century:

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

2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 181 (Edward Christian ed., Thomas B. Wait & Co. 1965) (1765).

7 J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 550-51 (3d ed. 1990). "[I]n the eyes of the law husband and wife were but one person: they were two souls in one flesh." *Id.* "[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . ." 2 BLACKSTONE, *supra* note 6, at 442; see also Phipps, *supra* note 5, at 24.

8 CUNNINGHAM ET AL., *supra* note 5, § 5.5. Any conveyance to a husband and wife was presumed to create a tenancy by the entireties, even if the conveyance stated a contrary intent. POWELL, *supra* note 6, ¶ 620.

9 CUNNINGHAM ET AL., *supra* note 5, § 5.5; POWELL, *supra* note 6, ¶ 620.

10 CUNNINGHAM ET AL., *supra* note 5, § 5.5; POWELL, *supra* note 6, ¶ 620.

11 CUNNINGHAM ET AL., *supra* note 5, § 5.5; POWELL, *supra* note 6, ¶ 620.

Tenancy by the entireties ownership was imported to the North American English colonies as part of the English common law. Nineteenth Century social attitudes, however, brought radical reformation to the legal status of women.<sup>12</sup> These changes and the subsequent passage of women's property acts prompted many jurisdictions to abolish tenancy by the entireties or modify it to allow mutual control by both spouses.<sup>13</sup> England abolished it entirely in 1925 by passing its Law of Property Act which declared that husbands and wives were to be treated as two distinct persons when acquiring property.<sup>14</sup>

While some United States jurisdictions have taken steps to reform their tenancy by the entireties schemes, their treatment of the subject remains a patchwork of inconsistency. Twenty-three states, including Pennsylvania,<sup>15</sup> still allow creation of a tenancy by the entireties. Remaining states have specifically rejected the concept or simply do not recognize it as a valid title for concurrent estates in land.<sup>16</sup>

As our society grows more complex, tenancy by the entireties holdings create new dilemmas to be resolved by the courts. Drug enforcement forfeiture laws present are an example of such a dilemma.

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According to Blackstone, restricting a woman's right to control property was for her protection. 2 BLACKSTONE, *supra* note 7, at 442; Ruth B. Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 3 (1975). These notions were refuted by Nineteenth Century philosopher John Stuart Mill, who found such inequality of power to be "one of the chief hindrances to human improvement." *Id.* at 2.

12 CUNNINGHAM ET AL., *supra* note 5, § 5.5; POWELL, *supra* note 6, ¶ 620.

13 CUNNINGHAM ET AL., *supra* note 5, § 5.5; POWELL, *supra* note 6, ¶ 622.

14 POWELL, *supra* note 6, ¶ 620 n.7.

15 *In re Moorehead's Estate*, 137 A. 802, 806 (Pa. 1927). *See infra* text accompanying notes 60 and 61.

16 CUNNINGHAM ET AL., *supra* note 5, § 5.5 n.3; *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1519 n.9 (11th Cir. 1990). The following jurisdictions still recognize tenancy by the entireties: Alaska, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. *Id.*; *see also* Eric G. Zajac, *Tenancy by the Entireties and Federal Civil Forfeiture Under the Crime Abuse and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 578 n.166 (1993). It is interesting to note the pattern of English common law influence. All but three states are east of the Mississippi and 10 states were part of the original Thirteen Colonies. Paradoxically, Alaska and Hawaii both achieved statehood only within the last 40 years and established their statutory codes in a cultural and social environment far removed from English common law.

## 2. *The forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act*<sup>17</sup>

The indivisible nature of property title held in tenancy by the entireties has created difficulties in applying property forfeiture laws used to punish persons convicted of drug-related crimes.

In 1984, Congress attempted to strengthen sanctions in existing drug traffic legislation by adding property forfeiture provisions. The new amendment allows the federal government to claim the property interest of any person convicted of a drug-related crime who used the property while committing the underlying crime.<sup>18</sup> Legislative history of that legislation confirms clear congressional intent to attack illegal drug trade through strong economic sanctions that would have an immediate and onerous effect on the convicted party.<sup>19</sup>

At the same time, Congress also provided an innocent owner defense to protect property owners who did not know their property was being used in the commission of drug-related crimes.<sup>20</sup> In *United States v. 1500 Lincoln Avenue*,<sup>21</sup> the Third Circuit applied the innocent owner defense and attempted to reconcile the Act with tenancy by the entireties.

### *B. Facts of 1500 Lincoln Avenue*

A. Leonard Bernstein, who owned and operated a pharmacy in Pittsburgh, Pennsylvania, pled guilty to nine drug-related charges stemming from the illegal sale of pharmaceutical drugs at his pharmacy.<sup>22</sup> Pursuant to § 881(a)(7), the federal government filed a forfeiture complaint for his interest in the real

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17 21 U.S.C. § 881(a)(7) (1988).

18 Section 881(a) states, in part: "The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . (7) All real property, including any right, title, and interest . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . ."

19 S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374 ("Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows.")

20 *Id.* "[No] property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7) (1988).

21 949 F.2d 73 (3d Cir. 1991).

22 949 F.2d at 75.

property at 1500 Lincoln Avenue containing the pharmacy. The government noted that the property was jointly owned by Mr. Bernstein and his wife, Linda Bernstein, in tenancy by the entireties.<sup>23</sup> The government's action sought to convert the interest to a tenancy in common.

To preserve her interest in the property, Mrs. Bernstein claimed the innocent owner defense available under § 881(a)(7). Accordingly, she sought to have the complaint dismissed based on the indivisible nature of her interest.<sup>24</sup> The district court agreed, finding that under Pennsylvania common law, a tenant by the entireties had undivided title to the property that could not be severed by illegal activities on the land.<sup>25</sup>

On appeal, the United States Court of Appeals for the Third Circuit reversed. The case was remanded to the district court to determine if Mr. Bernstein's interest was subject to forfeiture.<sup>26</sup> Subject to this determination, the Third Circuit concluded that Mrs. Bernstein would be entitled to a life estate in the property with the right to fee simple title only if her husband predeceased her.<sup>27</sup>

### *C. The Third Circuit's Reasoning*

The Third Circuit reasoned that the life estate interpretation satisfied both the forfeiture purpose of § 881 and its provision to protect the innocent owner's interest in the property.<sup>28</sup> In contrast, the trial court's decision to deny forfeiture frustrated enforcement of the statute's economic sanctions.<sup>29</sup>

The Third Circuit looked to the legislative history of § 881 and found a compelling public policy in enforcing economic sanctions to fight a drug trade fueled by massive assets.<sup>30</sup> Such intent is reflected in the following language of the Senate: "[T]he traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable

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23 *Id.* at 74.

24 *Id.* at 75.

25 *Id.* The district court maintained that a spouse's innocent owner defense bars civil forfeiture actions against property held in tenancy by the entirety.

26 *Id.* at 78.

27 *Id.*

28 *Id.* at 77-78.

29 *Id.* at 78.

30 *Id.* at 76-77; *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631 (1989); S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country."<sup>31</sup>

In deciding as it did, the Third Circuit rejected alternatives offered by other courts. For example, the United States Court of Appeals for the Eleventh Circuit determined that no portion of a tenancy by the entireties estate may be forfeited if there was an innocent concurrent owner.<sup>32</sup> The Third Circuit considered the Eleventh Circuit's remedy of a *lis pendens* on the guilty spouse's interest to be difficult to enforce at some future time.<sup>33</sup> The Third Circuit reasoned: "[W]e do not see what purpose would be served by postponing adjudication of the government's right to forfeiture . . . rather than adjudicating that issue when the evidence is still fresh."<sup>34</sup>

Furthermore, the court reasoned that an exclusive life estate, with the right to fee simple if she survived her husband, gave the innocent spouse the same rights she enjoyed as a tenant by the entireties.<sup>35</sup> Accordingly, the court adopted the federal government's position that while Mr. Bernstein's property interest was subject to forfeiture, Mrs. Bernstein should still be entitled to exclusive use of the property during her lifetime, with right to fee simple absolute if she survived her husband.<sup>36</sup>

### III. ANALYSIS

While the Third Circuit's reasoning appears to be facially equitable, there are flaws in its treatment of an innocent spouse's property interest. First, the decision is at odds with other judicial decisions involving similar facts.<sup>37</sup> Second, it is

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31 S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374. See also *Caplin & Drysdale*, 491 U.S. at 630, in which the Court refused to exempt assets from forfeiture to be used to pay attorneys fees, and noted that Congress has already underscored the compelling public interest in stripping criminals of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent.

32 15621 S.W. 209th Ave., 894 F.2d at 1514 (quoting Joint Explanatory Statement of Titles I & II, 124 CONG. REC. S17647, *reprinted in* 1978 U.S.C.C.A.N. 9518, 9522).

33 1500 Lincoln Ave., 949 F.2d at 78.

34 *Id.* at 78.

35 *Id.*

36 *Id.*

37 See, e.g., *United States v. 2525 Leroy Lane*, 910 F.2d 343, 352 (6th Cir. 1990); *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1512 (11th Cir. 1990); *United States v. Property Entitled in the Names of Alexander M. Toki and Elizabeth M. Toki*, 779 F. Supp. 1272, 1281-82 (D. Hawaii 1991); *United States v.*

inconsistent with Pennsylvania common law decisions that address the indivisible unity inherent in a tenancy by the entirety estate.

#### A. *Decisions in Conflict with the Third Circuit*

The district court in *1500 Lincoln Avenue* dismissed the forfeiture action, based on another appellate decision in *United States v. 15621 S.W. 209th Avenue*.<sup>38</sup> In *15621 S.W. 209th Avenue*, the United States Court of Appeals for the Eleventh Circuit found it impossible to effectuate forfeiture of the guilty spouse's interest in a tenancy by the entirety estate without interfering with the innocent spouse's interest.<sup>39</sup> The facts of the *15621 S.W. 209th Avenue* case were substantially similar to those present in *1500 Lincoln Avenue*. The wife was an innocent owner by tenancy in the entirety of a family residence used by her husband to conduct illicit drug sales.<sup>40</sup>

The Eleventh Circuit, in analyzing § 881, found "the government obtains through forfeiture whatever interest remains in the property after the innocent owner's interest has been excepted."<sup>41</sup> Since a tenant by the entirety owns an indivisible "right, title and interest" with his or her spouse, there is no measurable interest left solely to a tenant that could be forfeited under § 881.<sup>42</sup> The court declared that the government could prevent alienation of the guilty husband's interest in the estate by filing a *lis pendens* against the property.<sup>43</sup> Should both husband and wife terminate the estate by agreement or divorce, or if the guilty husband survives his wife, the government is able to recover its interest in the guilty husband's share.<sup>44</sup>

The Third Circuit, however, rejected this solution as unwieldy and possibly unenforceable. It maintained that under a *lis pendens* the government would have to "prove the underlying criminal conduct long after its occurred."<sup>45</sup> This concern is tenuous, since Mr. Bernstein was indicted, pled guilty, and is

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11885 S.W. 46 St., 751 F. Supp. 1538 (S.D. Fla. 1990).

38 894 F.2d 1511 (11th Cir. 1990).

39 *Id.* at 1512.

40 *Id.* at 1513.

41 *Id.* at 1516.

42 *Id.*

43 *Id.* at 1516 n.6.

44 *Id.*

45 *1500 Lincoln Ave.*, 949 F.2d at 78.

now serving a ten-year prison term.<sup>46</sup> Consequently, the required criminal conduct is a matter of record, and no further proof is necessary to enforce the *lis pendens*.

While the Third Circuit showed concern for enforcement of a forfeiture statute, its own life estate solution does not prevent Mr. Bernstein from receiving benefits from the property. Mr. Bernstein will still indirectly benefit, through his marital relationship, from profits flowing from his wife's life estate. Assuming the marriage continues after Mr. Bernstein is released from prison, he will be able to share financial support that Mrs. Bernstein is able to provide through her interest in the land. The property may even provide living quarters for the Bernsteins.

In addition, the *1500 Lincoln Avenue* court and the government erroneously relied upon a Sixth Circuit decision.<sup>47</sup> That decision actually supported the position taken by the Eleventh Circuit in *15621 S.W. 209th Avenue*.<sup>48</sup> In *United States v. 2525 Leroy Lane*, the property at issue had been sold, and the court determined that the government was entitled to forfeit the guilty spouse's interest in the proceeds.<sup>49</sup> Nevertheless, the Sixth Circuit noted:

[T]he Government may properly acquire only the interest which Mr. Marks [the guilty spouse] held as cotenant by the entireties. However, the Government cannot occupy the position of Mr. Marks . . . since the estate is founded on marital union, and the Government obviously cannot assume the role of spouse to Mrs. Marks. By acquiring Mr. Marks's interest in the entireties estate, the Government is precluded from obtaining Mr. Marks's interest in the property unless and until Mrs. Marks predeceases her husband or the entireties estate is otherwise terminated by dissolution of the marriage or joint conveyance.<sup>50</sup>

Furthermore, the Sixth Circuit found the Eleventh Circuit's *lis pendens* solution to be appropriate protection of the government's right to acquire an interest in real property held

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46 *Id.* at 75.

47 *Id.* at 75; *see also* *United States v. 2525 Leroy Lane*, 910 F.2d 343, 351 (6th Cir. 1990).

48 *2525 Leroy Lane*, 910 F.2d at 351-52.

49 *Id.* at 352.

50 *Id.*

as an estate by the entireties.<sup>51</sup>

Similarly, federal district courts have relied on the Sixth Circuit and Eleventh Circuit decisions in preventing termination by forfeiture of tenancy by the entireties estates.<sup>52</sup> The district court in *11885 S.W. 46 Street* declared that in an entireties estate, no unilateral act of a spouse could alienate, encumber, or forfeit the property.<sup>53</sup> Accordingly, it found the government could not forfeit any interest in the family home used by the husband in a cocaine transaction without his wife's knowledge.<sup>54</sup> The unities of time, title, interest and possession could not be destroyed by the husband's crime to create a tenancy in common.<sup>55</sup>

In a comparable case, the district court in *United States v. Toki* precluded government forfeiture of any property held as tenancy by the entireties where there was an innocent co-owner.<sup>56</sup> The *Toki* court closely followed both the Eleventh Circuit's decision in *15621 S.W. 209 Avenue* and the Sixth Circuit's decision in *2525 Leroy Lane*.<sup>57</sup> It concluded that the federal government only acquires the right to file a *lis pendens* against a property held in tenancy by the entireties, which ripens upon lawful termination of the estate by the parties' mutual agreement, divorce or death.<sup>58</sup>

### B. Applicability of Pennsylvania State Law

Not only did the Third Circuit reject other courts' decisions, it failed to interpret correctly Pennsylvania's common law principles. It is well settled law that in determining property rights a federal court must look to appropriate state law, even if federal statutes or the federal government are substantially involved in the cause of action.<sup>59</sup>

51 *Id.*

52 *See, e.g., United States v. Property Entitled in the Names of Alexander M. Toki and Elizabeth M. Toki*, 779 F. Supp. 1272 (D. Hawaii 1991); *United States v. 11885 S.W. 46 St.*, 751 F. Supp. 1538 (S.D. Fla. 1990).

53 *11885 S.W. 46 St.*, 751 F. Supp. at 1539.

54 *Id.* at 1539-40.

55 *Id.*

56 779 F. Supp. at 1281-82. This decision did not determine whether or not Mrs. Toki was an innocent owner with regard to her husband's convicted drug activity. *Id.*

57 *Id.*

58 *Id.*

59 *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) ("[P]roperty ownership is not governed by a general federal law,

Pennsylvania common law continues to embrace the legal fiction created by a tenancy by the entireties, notwithstanding the realities of modern-day independent spousal rights.<sup>60</sup> “[T]he legal unity of husband and wife . . . is a unity which must continue to be recognized, however . . . modern laws enlarge the separate rights and privileges of each.”<sup>61</sup> Husband and wife are treated as one person, with each spouse able to enjoy the property in its entirety and have the right of survivorship, but “neither one has any individual portion which can be alienated or separated, or which can be reached by the creditors of either spouse.”<sup>62</sup>

Under Pennsylvania common law, neither spouse may compel partition or sever a tenancy by the entireties through a unilateral conveyance or act by one party. The law also emphasizes that the sole right of a spouse’s creditor is a “presently unenforceable lien upon that spouse’s expectancy of survivorship—a lien that becomes enforceable only when the other spouse dies.”<sup>63</sup>

Pennsylvania courts, however, have recognized an implied mutual agreement to terminate the tenancy under certain circumstances.<sup>64</sup> According to the court in *Clingerman v. Sadowski*, a spouse’s misappropriation of an entireties estate which excludes the other spouse from its use and enjoyment is an offer to terminate the estate.<sup>65</sup> If the other spouse initiates suit to reclaim his or her rightful interest, this response is con-

but rather by the laws of the several States.”); 15621 S.W. 209 Ave., 894 F.2d at 1517-18.

60 *United States v. 717 Woodward St.*, 804 F. Supp. 716, 723 (E.D. Pa. 1992); *Clingerman v. Sadowski*, 519 A.2d 378, 380-81 (Pa. 1986) (paraphrasing LADNER ON CONVEYANCING IN PENNSYLVANIA, § 1.08 (4th ed. 1979).

61 *In re Moorehead’s Estate*, 137 A. 802, 806 (Pa. 1927). Pennsylvania’s devotion to women’s equality in law is exemplified by the following statute passed in 1872 as part of the state’s Married Women’s Property Acts: “From and after passage of this act, all contracts made by married women, in the purchase of sewing machines for their own use, shall be valid and binding, without the necessity of the husband joining in the same.” PA. STAT. ANN. tit. 48, § 33 (1964) *repealed* by Act of February 11, 1982, P.L. 31, No. 19, §1.

62 *Madden v. Gossztonyi Savings & Trust Co.*, 200 A. 624, 627-28 (Pa. 1938); *see also* *Beihl v. Martin*, 84 A. 953, 957 (Pa. 1912) (property held as an estate by the entireties was exempt from husband’s bankruptcy).

63 *Napotnik v. Equibank & Parkvale Savings Ass’n*, 679 F.2d 316, 319 (3d Cir. 1982). Joint debts, however, may be reached by a creditor filing a lien on the jointly owned property. *Id.*

64 *Clingerman*, 519 A.2d at 381.

65 *Id.*

sidered acceptance of the offer to terminate.<sup>66</sup>

In addition, property held by tenancy in the entireties is exempt from execution and sale pursuant to bankruptcy by one spouse. To allow enforcement of such an action would be "the taking of the property of one to pay the debts of another."<sup>67</sup> While the "unity" concept of tenancy by the entireties often results in unfair treatment of creditors,<sup>68</sup> courts try to protect against unfairness by scrutinizing such transfers for evidence of fraudulent conveyance by debtors to exempt valuable property assets.<sup>69</sup>

Accordingly, the district court's decision in *1500 Lincoln Avenue* that precluded destruction of the unity of a tenancy by the entireties through forfeiture is consistent with state common law principles that forbid similar interference by a creditor or bankruptcy proceeding against one spouse. Moreover, Mr. Bernstein's unlawful use of his pharmacy for unauthorized pharmaceutical sales does not constitute a misappropriation or an exclusion of his wife's interest consistent with the *Clingerman* implied agreement rule.<sup>70</sup>

In contrast, the Third Circuit's holding which allowed Mrs. Bernstein a life estate in the subject property interfered with her interest in a manner inconsistent with Pennsylvania common law. While the Third Circuit rejected the government's argument that the tenancy be changed to a tenancy in common,<sup>71</sup> its decision had the actual effect of severing the entireties estate by reducing Mrs. Bernstein's property interest. She retained her right to survivorship, but she had fewer rights to

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66 *Id.*

67 *Bethl*, 84 A. at 953.

68 See generally James J. Vlasic, *Tenancy by the Entireties: A Debtor's Haven*, 65 MICH. B.J. 162-64 (1986).

69 See *2525 Leroy Lane*, 910 F.2d at 349 ("Creation of an entireties estate just prior to commission of a crime could, as in a bankruptcy context, be challenged in certain instances as a fraudulent conveyance.").

70 *Clingerman* and related cases involve highly mobile personal property held as tenancy by the entireties, such as the bank accounts, art collections, and similar assets. *Clingerman*, 519 A.2d at 380. It is far more difficult to misappropriate real property.

71 But compare an alternate solution proposed to amend § 881(a)(7) to change a title held as tenancy in the entireties to tenancy in common if there is an innocent owner-spouse. Eric G. Zajac, *Tenancy by the Entireties and Federal Civil Forfeiture Under the Crime Abuse and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553 (1993). While this alternative solves the problem presented by the drug crime forfeiture laws, it does not solve similar conflicts with bankruptcy and creditors' rights.

the property than she did previously as a tenant by the entireties. The court's solution did not provide for any possible agreement between the government and Mrs. Bernstein to sell the property and divide the proceeds. Rather if she attempted to sell or lease her life estate interest, she would receive substantially less than she would in a lease or sale of a fee simple interest. This conclusion is rooted in the fact that any buyer or lessee would face the uncertain problem of possible reversion to the government if Mrs. Bernstein predeceased her husband. Thus, the Third Circuit solution compromises the property's value and Mrs. Bernstein's fundamental right of alienability.

#### IV. CONCLUSION

Tenancy by the entireties is based on a fictional unity that is inconsistent with the complexities of modern law, particularly the property forfeiture laws discussed herein. As a result, courts are unable to reach equitable results in cases involving tenancy by the entireties. Consequently, this vestige from the feudal system cannot always function effectively as a means of modern concurrent ownership.

The Third Circuit misapplied common law tenancy by the entireties rules in actually terminating an estate—an act that can only be done by the husband and wife who created the estate. While the court had a compelling interest in controlling drug traffic through enforcement of § 881, the fact remains that its holding ignored applicable state law that governs real property ownership. Such a holding demonstrates how tenancy by the entireties creates a dilemma. This dilemma is nonexistent with other forms of concurrent ownership that are more consistent with current social and legal realities.

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