The Bankruptcy Code of 1978 and Its Effect Upon Tenancies by the Entireties

I. INTRODUCTION

The form of co-ownership known as tenancy by the entireties historically has created a number of problems in the area of bankruptcy, in large part due to conflicting underlying policies. A significant policy underlying the entireties estate is protection of the marital unit; to some extent, the estate enables a husband and wife to immunize their jointly held property from seizure by creditors. Bankruptcy, in contrast, "is a system of trade-offs seeking to draw a balance among conflicting interests. In exchange for a discharge of debts, the bankrupt surrenders his assets. . . . Inherent in the exchange is the attempt to maximize both equity to the creditors and rehabilitation of the debtor."[1] The policies underlying tenancy by the entireties and bankruptcy are in strongest conflict when the debtor's ability to immunize his property from seizure becomes unjust. Legislative and judicial measures designed to balance the competing interests have achieved varied results.

The Bankruptcy Reform Act of 1978,[2] which will hereinafter be referred to as the Code, became effective October 1, 1979. This Note will explore the effect of that statute upon the balancing of interests when tenancy by the entireties property is at issue. Because of the volume of material, the discussion will focus only upon the situation in which one spouse is in bankruptcy. Section 522(b)[3] serves as the point of departure. Careful analysis of this section raises questions on two levels. First, underlying theoretical problems will be considered. For example, one must determine, under section 541,[4] what items of property are included in the bankruptcy estate. Resolution of this problem requires an examination of the new Code's interest test to discover whether entireties property becomes a part of that estate. Another theoretical question is whether entireties property, if it does become a part of the bankruptcy estate, may be exempted under section 522. Second, the statutory language of section 522(b) will be considered. Thereafter, this Note will examine the interrelationship of these theoretical and interpretive issues. Finally, the

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[1]Comment, *Bankruptcy Exemptions: State Law or Federal Policy?* 35 U. PITT. L. REV. 630 (1974) [hereinafter cited as Comment].

[2]Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (Supp. II 1978)).

[3]11 U.S.C. § 522(b) (Supp. II 1978).

[4]*Id.* § 541.

foregoing analysis will be applied to the bankruptcy process in Indiana, both prior to and following enactment by the Indiana General Assembly of House Bill 1359.

II. BACKGROUND

An analysis of the effects of the Code upon entireties property must begin with section 522 of the Bankruptcy Reform Act of 1978.[5] This section deals with the exemptions which a debtor may claim upon bankruptcy and combines aspects of the Bankruptcy Act of 1898,[6] hereinafter referred to as the Act, with new ideas instituted by Congress and the authors of the new Code. The purpose of exemptions is rehabilitation—to enable the debtor to "make a fresh start in life and bear the burden of future responsibility."[7]

Section 522(b), the provision relevant to the subject matter of this Note, provides:

> (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) [the federal schedule of exemptions] 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 by the entirety or joint tenant to the extent that such interest as a tenant is exempt from process under applicable nonbankruptcy law.[8]

The section, as it relates to entireties property, creates both theoretical problems and questions of statutory interpretation.

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[5]*Id.* § 522.

[6]Bankruptcy Act of 1898, 11 U.S.C. §§ 1-1103 (1976) (repealed Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549).

[7]Comment, *supra* note 1, at 630.

[8]11 U.S.C. § 522(b) (Supp. II 1978).

III. Legal Theory

In order to evaluate the theoretical problems presented by section 522(b), an understanding of that section's role in the bankruptcy process is necessary. In general, when a debtor takes bankruptcy, an estate is created into which pass the debtor's interests and property.[9] At a later point in the proceeding, the debtor, under section 522, may exempt limited amounts of property with which he may make a fresh start.[10] The assets and interests in the property remaining compose the net bankruptcy estate in which the creditors share. The debtor is eventually adjudicated bankrupt and discharged by the bankruptcy court from debts arising prior to the order for relief.[11]

A. Inclusion of Entireties Property Within the Bankruptcy Estate

Before an item of property or an interest therein can be exempted from the bankruptcy estate under section 522, it must be included within that estate. Therefore, consideration of section 541 is necessary to determine what property comes into the bankruptcy estate. Some analysts of section 541 argue that because both section 522—dealing with exemptions—and section 363[12]—dealing with the right of the trustee to use, sell, or lease property of the estate—refer expressly to tenancy by the entireties, entireties property is intended to be included within the bankruptcy estate. Others assert that this argument is merely "bootstrapping," insisting that unless entireties property is first determined to be a part of the estate, sections 522 and 363 do not apply.[13] Analysis of section 541 provides support for the latter view.

To understand how section 541 relates to the question of what property is included within the estate, one must recognize that this section of the Code differs conceptually from the corresponding provision of the Act—section 70a.[14] To some extent, the differences are

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[9] *Id.* § 541(a).

[10] *Id.* § 522.

[11] *See generally* 11 U.S.C. §§ 101-151326 (Supp. II 1978); D. Epstein, Debtor—Creditor Law (2d ed. 1980); 1 Bankr. Serv. (L. Ed.) § 1.1.

[12] 11 U.S.C. § 363 (Supp. II 1978).

[13] The latter group also argues that if the Code intended entireties property to be part of the bankruptcy estate it would have specifically included entireties property within § 541. In 20 or more jurisdictions which recognize this estate, entireties real estate will often prove to be the largest single item of property owned by a husband and wife. Therefore, this group argues that the drafters did not intend to include this estate within the bankruptcy estate.

[14] 11 U.S.C. § 110(a) (1976) (repealed Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549).

related to variations in the degree to which these statutes depend upon nonbankruptcy law. Section 70a of the Act relied heavily upon "nonbankruptcy law, usually state law, to determine what property came into the estate."[15] The Act made no provision for determining whether the bankrupt possessed an interest in property or owed a debt; therefore, resolving the issue mandated reliance upon nonbankruptcy law.[16]

A second area requiring reliance upon nonbankruptcy law was a provision of section 70a which vested the trustee with the bankrupt's title to certain kinds of property,[17] "including rights of action, which prior to the filing of the petition he [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."[18] The Act, however, failed to provide a method for determining "whether and how, prior to the petition, the debtor could have transferred his property or his creditor could have reached it."[19]

Although the Act thus prompted resort to nonbankruptcy law at two distinct levels, the cases under that statute dealt primarily with the second issue. Courts often assumed that an interest existed and proceeded to question whether the interest was transferable or leviable.[20] This assumption is understandable because the latter inquiry assumes the former; it is impossible to transfer or levy upon an interest if no interest exists. In any event, the central question under the Act was whether an interest was transferable or leviable.[21]

Section 541(a)(1) of the Code now creates an estate composed of "all legal and equitable interests of the debtor at the time of the commencement of the case."[22] Thus, although resort to nonbankruptcy

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[15]4 COLLIER ON BANKRUPTCY ¶ 541.02[1] (15th ed. L. King 1979) [hereinafter cited as COLLIER].

[16]*See* Wetteroff v. Grand, 453 F.2d 544, 546 (8th Cir. 1972); Dioguardi v. Curran, 35 F.2d 431, 432 (4th Cir. 1929); *In re* Boudreau, 350 F. Supp. 644, 645 (D. Conn. 1972). *Cf. In re* United Milk Prod. Co., 261 F. Supp. 766, 768 (N.D. Ill. 1966); *In re* Berry, 247 F. 700, 705 (E.D. Mich. 1917). In these cases, the courts stated that it was necessary to refer to state law to decide if an interest was transferable or leviable.

[17]4 COLLIER, *supra* note 15, ¶ 541.02[1].

[18]11 U.S.C. § 110(a)(5) (1976) (repealed Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549).

[19]4 COLLIER, *supra* note 15, ¶ 541.02[1].

[20]*See* Textile Banking Co. v. Widener, 265 F.2d 446, 452-53 (4th Cir. 1959); *In re* Wallace, 22 F.2d 171, 171-72 (E.D. Wash. 1927); *In re* Berry, 247 F. 700, 705 (E.D. Mich. 1917); Foland v. Hoffman, 186 Md. 423, 427, 47 A.2d 62, 65 (1946); 4A COLLIER ON BANKRUPTCY ¶¶ 70.15[1], 70.17[7] (14th ed. J. Moore 1971) [hereinafter cited as COLLIER].

[21]4A COLLIER, *supra* note 20, ¶ 70.17[7].

[22]11 U.S.C. § 541(a)(1) (Supp. II 1978).

law to determine whether the debtor has an interest in property is still necessary, the second step under the Act, involving the determination whether that interest was transferable or leviable, has been omitted. Because all "legal and equitable" interests in property come into the bankruptcy estate, there is no longer a need for a test to determine which interests will be included within the estate and which will not. The test under the Code is simply whether an interest exists.[23]

The question then arises whether individual spouses own any interest in entireties property during their joint lives. Again, as was the case with the question whether entireties property is part of the bankruptcy estate, there is a difference of opinion. Some analysts argue that other sections of the Code and legislative history support the conclusion that all spouses own interests in entireties estates during their joint lives. They point to section 541(c)(1)(A),[24] which states that "an interest of the debtor in property becomes property of the estate under subsection (a)(1) [concerning legal and equitable interests], (a)(2) [concerning interests in community property], or (a)(5) [concerning interests which the debtor acquires within 180 days after filing a petition for bankruptcy] of this section notwithstanding *any provision* . . . that restricts or conditions transfer of such interest by the debtor."[25] Arguing that the legal theory underlying the entireties estate—that neither spouse may individually sever the estate or transfer its property[26]—constitutes a "provision that restricts or conditions transfer of such interest,"[27] these analysts contend that under section 541(c)(1)(A) restrictions on entireties property will not be given effect.[28]

This group of analysts also looks to the legislative history of the Code for support. The following statement appears in the Report of the Committee on the Judiciary on Bankruptcy Law Revision:[29]

> With respect to other co-ownership interests, such as tenancies by the entirety, joint tenancies, and tenancies in common, the bill does not invalidate the rights, but provides a method by which the estate may realize on the value of the

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[23]4 COLLIER, *supra* note 15, ¶ 541.02[1] at 541-12.

[24]11 U.S.C. § 541(c)(1)(A) (Supp. II 1978).

[25]*Id.* (emphasis added).

[26]*See* notes 43-44 *infra*, and accompanying text.

[27]11 U.S.C. § 541(c)(1)(A) (Supp. II 1978).

[28]The drafters' primary interest in removing the restrictions of forfeiture clauses in contracts contradicts the argument that § 541(c)(1)(A) prohibits a spouse from severing entireties property. 1 BANKR. SERV. (L. Ed.) § 1:21 at 29 (citing Trost & King, *Congress and Bankruptcy Reform Circa 1977*, 33 BUS. LAW. 489, 508-10 (1978)).

[29]H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 1-549, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963-6435.

> debtor's interest in the property while protecting the other rights. The trustee is permitted to realize on the value of the propery 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. The other interest is protected under H.R. 8200 by giving the spouse a right of first refusal at a sale of the property, 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.[30]

The argument is that because this statement refers to the "debtor's interest" and the "other interest," that is, the spouse's interest, the drafters obviously believed that the individual spouses had interests.

Closer scrutiny reveals that these analysts are once again "bootstrapping";[31] they seem to indicate that because the Code in section 541(c)(1)(A) and its drafters in the legislative history refer to individual spousal interests, those interests must in fact exist. As will be discussed in more detail later, this proposition is not entirely true. Not all states which recognize the entireties estate accept the concept of present interests in individual spouses.[32] Before assessing the effects of section 541(c)(1)(A) and the legislative history on entireties property, one must determine whether the spouses have individual interests.

The ultimate question is, what constitutes an interest in property. Neither the Code nor the Act provides an answer. Therefore, as stated earlier,[33] resort must be had to nonbankruptcy law—state law—to discover whether the debtor has an interest in property.[34]

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[30]*Id.* at 177, [1978] U.S. CODE CONG. & AD. NEWS at 6137-38 (footnotes omitted).

[31]These arguments resemble those involving the question whether entireties property is part of the bankruptcy estate. *See* text accompanying notes 12-13 *supra*. The determination whether entireties property is part of the bankruptcy estate depends upon whether individual spouses have interests in the entireties estate. If spouses have individual interests in entireties property, then those interests become part of the bankruptcy estate.

[32]*See* notes 57-66 *infra*, and accompanying text.

[33]*See* text accompanying note 15 *supra*.

[34]In jurisdictions recognizing the entireties estate, other arguments support the view that individual spouses do not *necessarily* have an interest in entireties property. For example, a frequently stated rule under the Code is that the bankruptcy estate will have the same but no greater rights in property than the debtor had. 124 CONG. REC. H11,096 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 4 COLLIER, *supra* note 15, ¶ 541.24; 1 BANKR. SERV. (L. Ed.) § 1:21 at 29 (1979); 2 BANKR. L. REP. (CCH) ¶ 9501 (1979). *See* 11 U.S.C. § 541(d) (Supp. II 1978). Applying this rule to the entireties estate, if a particular jurisdiction finds an interest in the debtor which he or she could

Additional problems surface with respect to the terminology of the Code's interest test. The nomenclature used by the courts in the past often proved to be contradictory. For example, even in a jurisdiction which did not find a transferable or leviable interest under the Act, a court in its opinion might indicate first in one sentence that an individual spouse had no interest in an entireties estate and later that "the debtor's interest" would be dealt with in a certain way.[35] A possible explanation for this conflict in terms may be found in the Act's emphasis upon whether the interest of the individual spouse was transferable or leviable rather than whether an interest existed. Nevertheless, this imprecision is a major source of confusion under the Code. Because these statements are mutually exclusive, one of them must either be false or capable of explanation in some other way; either the debtor has an interest in property or he does not.

The assertion that a single spouse has no interest in entireties property leaves little room for explanation. It is an affirmative declaration and must be either true or false as it stands. The statement that the debtor's interest may be dealt with in a certain way may, however, give rise to a logical explanation that can resolve the apparent conflicts. Certain concepts do not readily lend themselves to expression through the use of words, as is illustrated by the difficulty of trying to translate words or ideas from one language into another. With reference to entireties property, difficulty is encountered in describing exactly what property rights spouses possess in the entireties estate. It is submitted that as a result of this linguistic problem, courts have often used the term "interest" to represent two completely different ideas: (1) the concept of interest under the Code, meaning the separate individual interest of

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have claimed, then the trustee will have the same right. If, however, the debtor under the law of his or her state has no interest in the entireties property, the trustee also cannot acquire any interest. This situation indicates that the Code did not assume *necessarily* that a debtor in every jurisdiction had an interest in entireties property because this rule can be logically applied whether a particular jurisdiction finds an individual interest or not.

Another argument for the view that the Code did not assume that spouses in all jurisdictions owned interests in entireties property is that § 541 fails to specifically deal with the interests in entireties property, although the section refers to a broad variety of interests which are included in the bankruptcy estate. *See* 11 U.S.C. § 541 (Supp. II 1978). Although this argument obviously does not provide conclusive proof that entireties property was not intended to be part of the estate (in fact the possibility exists that § 541(c)(1)(A) was intended to cover entireties property), it may indicate an absence of any intent to include all entireties property within the bankruptcy estate.

[35]Chandler v. Cheney, 37 Ind. 391, 397 (1871); Sharpe v. Baker, 51 Ind. App. 547, 553-55, 96 N.E. 627, 629 (1911).

one spouse; and (2) the concept of a spouse's right to possess and enjoy entireties property.

The latter idea might be expressed more accurately as follows: the husband and wife own the entireties property as the marital unity and as individual spouses representing that unity, they are permitted to use and enjoy the property for their joint lives.[36] This explanation squares with the fact that individually the spouses have no interest, yet explains linguistically why they may separately use and enjoy the estate, its proceeds, rents, and profits.

B. Application of the Interest Test

Having considered the changes wrought by the Code, this Note will next assess the effect of those changes upon the estate of tenancy by the entireties. To evaluate the impact one must first understand the history and theory of the entireties estate.

1. History and Theory of Entireties.—Tenancy by the entireties is a peculiar and anomalous estate, sui generis.[37] In jurisdictions acknowledging the estate today as well as at common law, two essential characteristics distinguish it from other forms of coownership. First, entireties property is held or owned jointly by the husband and wife as the marital unity. This characteristic is based upon the fiction that the husband and wife in the marital unity constitute one legal person.[38] They are said to be seized of the estate *per my et non per tout.*[39] Many commentators have stated that this fictional attribute constitutes a fifth unity, in addition to those of time, interest, title and possession.[40] This characteristic, at least in part, distinguishes tenancy by the entireties from joint tenancy. The second distinguishing incident of the entireties estate is that of survivorship. Upon the death of either spouse, the survivor takes the whole by virtue of the original title; no new interest is created.[41]

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[36]*See* Huber, *Creditor's Rights in Tenancies by the Entireties*, 1 B.C. INDUS. & COM. L. REV. 197, 202 (1960).

[37]Koehring v. Bowman, 194 Ind. 433, 436, 142 N.E. 117, 118 (1924); 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1784, at 63 (repl. ed. 1979).

[38]2 AMERICAN LAW OF PROPERTY § 6.6, at 23 (A. J. Casner ed. 1952) [hereinafter cited as A.L.P.]; 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 620, at 683 (1979); 4 G. THOMPSON, *supra* note 37, § 1784, at 58; 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 430, at 217 (3d ed. 1939).

[39]Sharpe v. Baker, 51 Ind. App. 547, 552, 96 N.E. 627, 628 (1911); 4 G. THOMPSON, *supra* note 37, § 1784, at 58-59.

[40]2 A.L.P., *supra* note 38, § 6.6, at 23-25; 4A R. POWELL, *supra* note 38, ¶ 620 at 683. Note, however, that "there is a modern tendency to disregard the necessity of existence of the four unities in creating a tenancy by the entireties." 4 G. THOMPSON, *supra* note 37, § 1785, at 73.

[41]Sharpe v. Baker, 51 Ind. App. at 553, 96 N.E. at 629; 4 G. THOMPSON, *supra* note 37, § 1784, at 70. A difference exists between the right of survivorship incident to

Other incidents of tenancy by the entireties which existed at common law remain today. For instance, the parties must be husband and wife when the estate is formed.[42] One tenant cannot unilaterally sever or partition the estate;[43] the entire estate may be transferred only by the joint action of both husband and wife.[44] Furthermore, in many jurisdictions a grant of realty to a husband and wife without further specification is presumed to create an estate by the entireties.[45]

Although a number of characteristics of the estate have not changed, many common law rules regarding tenancy by the entireties are no longer followed. For example, it is no longer true that the estate can be created by "purchase" only.[46] Moreover, in a majority of jurisdictions one spouse need no longer convey a separately owned piece of property to a "strawman" who then reconveys to the husband and wife as a unit; statutes in most states now allow "the estate to be created by one spouse conveying to both."[47]

It is important to remember that "[t]he right of husband and wife to acquire and hold property by the entireties is not an inherent right, but is a privilege which is subject to repeal, modification or limitation except as to rights already acquired."[48] Statutory changes have had a great impact upon the entireties estate, especially the married women's property acts, which enabled married women

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tenancy by the entireties and that incident to joint tenancy. In *Sharpe*, the court stated:

> The right of the survivor to take the whole estate is common, both to estates in joint tenancy and estates by entireties; but the right by which the survivor holds in each is not the same. If a joint tenant dies during the existence of the joint tenancy, his moiety goes to the survivor by *jus accrescendi*, or right of survivorship; but when a tenant by the entirety dies, the survivor holds the entire estate, not by virtue of any right which he acquires as survivor, but by virtue of the original grant or devise.

51 Ind. App. at 553, 96 N.E. at 629.

[42] 2 A.L.P., *supra* note 38, § 6.6, at 23; 4A R. POWELL, *supra* note 38, ¶ 622, at 690; 4 G. THOMPSON, *supra* note 37, § 1784, at 66; 2 H. TIFFANY, *supra* note 38, § 436.

[43] 4A R. POWELL, *supra* note 38, ¶ 623, at 700; 4 G. THOMPSON, *supra* note 37, § 1784, at 64; 2 H. TIFFANY, *supra* note 38, § 436.

[44] 4A R. POWELL, *supra* note 38, ¶ 623, at 700; 2 H. TIFFANY, *supra* note 38, § 436. These first two characteristics are based upon the fictional unity of husband and wife.

[45] 2 A.L.P., *supra* note 38, § 6.6, at 25; 4A R. POWELL, *supra* note 38, ¶ 622, at 686; 4 G. THOMPSON, *supra* note 37, § 1784, at 59-62. This last characteristic is not based upon the fictional unity of husband and wife.

[46] Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 257 (1974). *See* 4 G. THOMPSON, *supra* note 37, § 1784, at 66-67; 2 H. TIFFANY, *supra* note 38, § 431.

[47] Craig, *supra* note 46, at 257. *See* 4A R. POWELL, *supra* note 38, ¶ 622; 4 G. THOMPSON, *supra* note 37, § 1785, at 77-78. Indiana has enacted its own "strawman" statute. IND. CODE § 32-1-9-1 (1976).

[48] 2 H. TIFFANY, *supra* note 38, § 433, at 225-26.

to hold separate property.[49] Because of these statutes a number of jurisdictions by construction have abolished tenancy by the entireties. Other jurisdictions by judicial decision have abolished the estate for policy reasons.[50]

The rule at common law was that the husband and wife were one person, and that person was the husband.[51] The wife's disability created by coverture enabled the husband to use, possess, take the income from, and control all of the property of the marital unity during the joint lives of the spouses.[52] This right of enjoyment has often been referred to as the usufruct.[53] The right to the usufruct gave the husband the power to "convey or lease the land so as to give his conveyee an exclusive right to possession, subject only to such restrictions as are necessary to assure the wife full possession and enjoyment if she is the survivor of the couple."[54] If the husband survived his wife, his grantee acquired an absolute estate.[55]

The states have interpreted differently the effects of the married women's property acts upon the usufruct and the survivorship rights of tenancy by the entireties.[56] Massachusetts has adopted the

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[49]2 A.L.P., *supra* note 38, § 6.6d, at 31; 4A R. POWELL, *supra* note 38, ¶ 621; 2 H. TIFFANY, *supra* note 38, § 433, at 226-28. *See, e.g.*, Poulson v. Poulson, 145 Me. 15, 70 A.2d 868 (1950); Wilson v. Wilson, 43 Minn. 398, 45 N.W. 710 (1890); Clark v. Clark, 143 Mont. 183, 387 P.2d 907 (1963); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953).

[50]4A R. POWELL, *supra* note 38, ¶ 621; 2 H. TIFFANY, *supra* note 38, § 433, at 228. *See* Kerner v. McDonald, 60 Neb. 663, 84 N.W. 92 (1900).

[51]2 A.L.P., *supra* note 38, § 6.6, at 28.

[52]*Id.*; 4A R. POWELL, *supra* note 38, ¶ 623; 4 G. THOMPSON, *supra* note 37, § 1789, at 96.

A difference of opinion exists regarding the exact nature of the husband's interest in entireties property at common law. The Indiana Court of Appeals, in reviewing the development of the entireties estate, stated that at common law the husband had an "estate" in the usufruct during the joint lives of the spouses. Sharpe v. Baker, 51 Ind. App. at 553, 96 N.E. at 629. The court's analysis indicates that until the enactment of the married women's property statutes, courts held that there was no individual interest in either spouse. *See id.*

However, Professor Huber has argued that no individual interests existed at common law: "When this estate existed at common law, the husband exercised complete control not because he had an individual interest but because he represented the marital unity." Huber, *supra* note 36, at 202.

The right to the usufruct pertained to all jointly owned property as well as to that owned individually by either spouse. 4 G. THOMPSON, *supra* note 37, § 1789; 2 H. TIFFANY, *supra* note 38, § 435.

[53]*See* Sharpe v. Baker, 51 Ind. App. 547, 558, 96 N.E. 627, 630 (1911); Craig, *supra* note 46, at 257.

[54]4A R. POWELL, *supra* note 38, ¶ 623 (footnotes omitted); 2 A.L.P., *supra* note 38, § 6.6, at 28; 4 G. THOMPSON, *supra* note 37, § 1789, at 97-98; 2 H. TIFFANY, *supra* note 38, § 435.

[55]2 A.L.P., *supra* note 38, § 6.6, at 28; 2 H. TIFFANY, *supra* note 38, § 435.

[56]*See, e.g.*, Pray v. Stebbins, 141 Mass. 219, 4 N.E. 824 (1886); Kahn v. Kahn, 43 N.Y.2d 203, 371 N.E.2d 809, 401 N.Y.S.2d 47 (1977); Robinson v. Trousdale County, 516 S.W.2d. 626 (Tenn. 1974); Wambeke v. Hopkin, 372 P.2d 470 (Wyo. 1962).

position that these statutes have altered nothing.[57] Thus, as was the case at common law, the husband still holds the right to the usufruct, which he may transfer and upon which his creditors can levy.[58] He may also convey his contingent interest.[59] The wife, however, has no separate interest which she may transfer or upon which her creditors can levy.[60] Two jurisidictions have ruled that the usufruct is common to both spouses; neither has any interest which may be levied upon or transferred. Nevertheless, these jurisdictions hold that the husband and wife have individual interests in the right of survivorship, interests upon which creditors of the individual spouses can levy.[61] Other states have declared that the individual spouses have interests in the usufruct and right of survivorship which may be alienated or reached by creditors.[62] The majority position is that neither spouse has any interest which may be individually transferred or levied upon by creditors.[63] Finally, some jurisdictions fit into none of these categories.[64]

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[57]Krokyn v. Krokyn, 390 N.E.2d 733, 736 (Mass. 1979); Pray v. Stebbins, 141 Mass. 219, 221-23, 4 N.E. 824, 825-26 (1886); Huber, *supra* note 36, at 200; Plumb, *The Recommendations of the Commission on Bankruptcy Law—Exempt and Immune Property*, 61 VA. L. REV. 1, 115 (1975).

[58]Raptes v. Pappas, 259 Mass. 37, 38, 155 N.E. 787, 787 (1927). *See* Huber, *supra* note 36, at 200; Plumb, *supra* note 57, at 115.

[59]Raptes v. Pappas, 259 Mass. 37, 38, 155 N.E. 787, 787 (1927). *See* Huber, *supra* note 36, at 200; Plumb, *supra* note 57, at 115.

[60]Licker v. Gluskin, 265 Mass. 403, 406, 164 N.E. 613, 615 (1929); Huber, *supra* note 36, at 200; Plumb, *supra* note 57, at 115.

[61]These jurisdictions are Kentucky and Tennessee. *See, e.g.*, Campbell County Bd. of Educ. v. Boulevard Enterprises, Inc., 360 S.W.2d 744 (Ky. 1962); Robinson v. Trousdale County, 516 S.W.2d 626 (Tenn. 1974); Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S.W. 1000 (1895). *See also* 4A R. POWELL, *supra* note 38, ¶ 623, at 702; Craig, *supra* note 46, at 302; Plumb, *supra* note 57, at 116.

[62]The states in this group are Alaska, Arkansas, New Jersey, New York, and Oregon. *See, e.g.*, Ellis v. Ashby, 227 Ark. 479, 299 S.W.2d 206 (1957); Moore v. Denson, 167 Ark. 134, 268 S.W. 609 (1924); Kahn v. Kahn, 43 N.Y.2d 203, 371 N.E.2d 809, 401 N.Y.S.2d 47 (1977); Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895). *See* 4A R. POWELL, *supra* note 38, ¶ 623, at 703; Craig, *supra* note 46, at 295-301; Plumb, *supra* note 57, at 117-18.

[63]The jurisdictions in this group include Delaware, the District of Columbia, Florida, Indiana, Missouri, Pennylvania, Rhode Island, Vermont, the Virgin Islands, Virginia, and Wyoming. *See, e.g.*, Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960); Allen v. Parkey, 154 Va. 739, 149 S.E. 615 (1929); Wambeke v. Hopkin, 372 P.2d 470 (Wyo. 1962); Peters v. Dona, 49 Wyo. 306, 54 P.2d 817 (1936). *See* 4A R. POWELL, *supra* note 38, ¶ 623, at 627 n.12; Craig, *supra* note 46, at 295-301.

[64]Oklahoma recognizes a form of tenancy by the entireties by statute rather than court decision. In Oklahoma, entireties property may be sold in order to pay the debts of either spouse. Such a sale destroys the right of survivorship, as in the case of a sale of jointly owned property. OKLA. STAT. tit. 60, § 74 (1971). *See* 4A R. POWELL, *supra* note 38, ¶ 623, at 705; Plumb, *supra* note 57, at 118.

Michigan recognizes that the husband has a transferable interest in the usufruct and the right of survivorship which creditors, however, can not attach. American State

2. Tenancy by the Entireties Property as Property of the Bankruptcy Estate.—Under the Code, the test for determining whether property will pass into the bankruptcy estate is whether the debtor has an interest in the property. Ultimately, this determination implicates state law. To the extent that such an interest is found to exist, the property will become part of the estate.

Theoretically, three possible results emanate from the juxtaposition of the Code and the Act:[65] (1) If there was a transferable or leviable interest under the Act, ipso facto the debtor had an interest. This interest, therefore, will pass into the bankruptcy estate under the Code. (2) If there was no transferable or leviable interest under the Act, either the debtor had no interest, in which case nothing will pass into the bankruptcy estate under the Code, or (3) the debtor had an interest which he could not transfer for some reason, in which case that interest will pass into the bankruptcy estate under the Code. An examination of the new interest test in the context of the three hypothetical situations may provide some insight into the impact of that standard upon the entireties estate.

In the first category, in which a transferable or leviable interest was identified under the Act, an interest arguably will be found under the Code. Therefore, in Massachusetts, the husband's interest in the usufruct and survivorship interest will pass into his bankruptcy estate. Those jurisdictions which identified a present transferable or leviable interest in the right of survivorship under the Act should allow that interest, be it husband's or wife's, to pass. In states identifying a present interest in both the usufruct and survivorship, either spouse's interest in such property presumably will pass into the estate. No change has occurred regarding the interests which pass in the first category. Because such interests were transferable and leviable under the Act, title to them passed to the trustee. Under the Code, both the usufruct and survivorship rights are interests and will therefore pass into the bankruptcy estate.

Similarly, there will be no change with respect to the interests which pass in the second category, that is, when no alienable or leviable interest was found under the Act because the debtor had no

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Trust Co. v. Rosenthal, 255 Mich. 157, 237 N.W. 534 (1931); Dickey v. Converse, 117 Mich. 449, 76 N.W. 80 (1898). *See* Plumb, *supra* note 57, at 117. *Cf.* Glazer v. Beer, 343 Mich. 495, 72 N.W.2d 141 (1955) (under special facts the court allowed creditors to reach the husband's interest).

North Carolina grants the husband a total interest in the income, but not the corpus, from property held with his wife as tenants by the entireties. Creditors can, however, attach this interest to satisfy the husband's debts. Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937); Johnson Produce v. Massengill, 23 N.C. App. 368, 208 S.E.2d 709 (1974). *See* Plumb, *supra* note 57, at 117.

[65]*See* text accompanying notes 12-36 *supra*.

interest. If no individual interest existed which could be tranferred or levied upon under the Act, none will be present under the Code.

Only in the final category will the Code produce a different result. When the debtor had an interest which was neither transferable nor leviable under the Act, the interest will pass into the bankruptcy estate under the Code's test. Michigan serves as an example.[66] There, the husband holds the usufruct during the joint lives of the spouses. He can also convey both the usufruct and his contingent remainder. Under the Act, however, creditors could not reach either of these interests to satisfy individual debts of the husband.[67] According to one author, the reason for this rule was that access by creditors would encroach upon the wife's and family's possibility of benefiting from these interests.[68] This result will change under the Code's interest test. It is apparent that the husband has an interest since he could transfer that interest under the Act. Because the state's determination whether an interest is transferable or leviable is no longer relevant under the Code, the interest of the husband will pass into his bankruptcy estate.

Thus, the new test utilized by the Code will not in most instances result in the inclusion of different interests and property within the bankruptcy estate. Changes will occur only in those jurisdictions in which an interest existed which was not transferable or leviable under the Act.

C. Exemption of Entireties Property

Another theoretical question which arises under the Code is whether tenancy by the entireties property qualifies as an exemption under section 522. The statute neither defines the term "exemption" nor indicates a legislative intent to exempt all entireties property. Similarly, the Act made no attempt either to define the word "exemption" or to limit the range of exempt property.

Commentators and courts generally agreed that entireties property was not exempt under the Act.[69] One court has stated that the protection which the Act afforded tenancy by the entireties property was not based upon its status as exempt property, but instead

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[66]*See* American State Trust Co. v. Rosenthal, 255 Mich. 157, 237 N.W. 534 (1931); Dickey v. Converse, 117 Mich. 449, 76 N.W. 80 (1898).

[67]American State Trust Co. v. Rosenthal, 255 Mich. 157, 237 N.W. 534 (1931); Dickey v. Converse, 117 Mich. 449, 76 N.W. 80 (1898). *See* Plumb, *supra* note 57, at 117. *Cf.* Glazer v. Beer, 343 Mich. 495, 72 N.W.2d 141 (1955) (under special facts the court allowed creditors to reach the husband's interest).

[68]Plumb, *supra* note 57, at 117.

[69]*See, e.g.*, Shaw v. United States, 94 F. Supp. 245 (W.D. Mich. 1939); Comment, *supra* note 1; Plumb, *supra* note 57.

arose "from the peculiar nature of the estate."[70] In addition, authors often referred to entireties property as being "functionally exempt"[71] or "immune"[72] from seizure, thereby distinguishing it from exempt property.

Further proof that entireties property was not exempt under the Act lies in the different treatment given to exempt and entireties property by the rules dealing with conversion of nonexempt property. The general rule was, and still is, that a debtor may convert his nonexempt property into exempt property without committing a fraud upon his creditors,[73] thereby availing himself of any and all protections which the exemption statutes provide.[74] For example, under the Code, if a debtor does not own an automobile, he may sell his nonexempt assets and use the proceeds from those sales to purchase a car. He may then exempt the value of the car to the extent of $1200 under section 522(d)(2).[75]

The rule does not apply to entireties property. Thus, a debtor could not avoid the claims of his creditors by converting nonexempt assets into entireties property.[76] The courts generally have held that such an action constitutes a fraud upon the creditors and have set aside the conversion.[77] For a particular kind of property to qualify as exempt under the Act, it apparently had to be included within a specific schedule of property not subject to the trustee's claim. Because the schedules did not include entireties property, it was not

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[70]Shaw v. United States, 94 F. Supp. 245, 246 (W.D. Mich. 1939).

[71]Comment, *supra* note 1, at 631.

[72]Plumb, *supra* note 57, at 114.

[73]Bank of Pa. v. Adlman (*In re* Adlman), 541 F.2d 999, 1004 (2d Cir. 1976); Grover v. Jackson (*In re* Jackson), 472 F.2d 589 (9th Cir. 1973). *See* S. REP. No. 95-989, 95th Cong., 2d Sess. 76 (1978).

[74]Although the general rule still governs, the views upon this issue diverge. It is stated in *Collier* that under the Act, "the mere conversion of non-exempt property into exempt property on the eve of bankruptcy was not in itself such fraud as will deprive the bankrupt of his right to exemptions." 3 COLLIER, *supra* note 15, ¶ 522.08(4). Nevertheless, some authorities have adopted the view that if a fraudulent intent can be shown, then the exemption may be denied. *See id.* Determination of fraudulent intent depends upon the facts in each case. *Id. Collier* concluded that the new Code has adopted the view that "conversion of property into exempt property without more, will not be treated as fraudulent." *Id.*

[75]11 U.S.C. § 522(d)(2) (Supp. II 1978). The Indiana exemption statute does not have a specific exemption for an automobile; however, it does allow an exemption of $2000 worth of real or tangible personal property in addition to the personal or family residence. IND. CODE § 34-2-28-1(b) (Supp. 1979). House Bill 1359 has increased the limit on this exemption to $4000. *See* H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1).

[76]Craig, *supra* note 46, at 273-74, Annot., 7 A.L.R.2d 1104 (1949).

[77]*See, e.g., In re* Moore, 11 F.2d 62 (4th Cir. 1926); Cross v. Wagenmaker, 329 Mich. 100, 44 N.W.2d 888 (1950).

exempt.[78] Nevertheless, because it was "immune" or "functionally exempt" from creditor's claims, entireties property comprised a separate and distinct category.[79]

The intent of the drafters of the Code respecting exemption of entireties property is not clear. Although the Code does not expressly change the policy of the Act with respect to tenancy by the entireties property, section 522(b) may be interpreted so as to render entireties property exempt. The Act and state exemption provisions failed to deal with this estate,[80] but the Code's exemption provisions, in section 522, specifically refer to tenancies by the entireties.[81] Section 522(b)(2)(B) creates further confusion by providing that entireties is exempt "to the extent that such interest as a tenant by the entirety . . . is *exempt* from process under applicable nonbankruptcy law."[82] The rule in all jurisdictions prior to the enactment of the Code was that entireties property was not exempt, but fell within a category of its own. Thus, unless the states now make entireties property exempt, it seems this provision will be one of form without substance.[83]

IV. Statutory Interpretation

Another problem created by section 522(b) arises in connection with statutory interpretation. Section 522(b) of the Code appears unambiguous. Theoretically the Code establishes an exemption system which allows the debtor to choose either federal exemptions[84] or state

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[78]*See, e.g.*, Ind. Code § 34-2-28-1 (Supp. 1979); *see* Comment, *supra* note 1, at 631.

[79]*See, e.g.*, Ind. Code § 34-2-28-1 (Supp. 1979); *see* Comment, *supra* note 1, at 631.

[80]*See* 11 U.S.C. § 24 (1976) (repealed Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549); Ind. Code § 34-2-28-1 (Supp. 1979). *But see* H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at Ind. Code §§ 34-2-28-0.5, -1).

[81]11 U.S.C. § 522(b)(2)(B) (Supp. II 1978).

[82]*Id.*

[83]If Indiana has made tenancy by the entireties property both a part of the bankruptcy estate and an exemption, it may have accomplished what the Code refers to in § 522(b)(2)(B).

[84]11 U.S.C. § 522(d) (Supp. II 1978). This is a new provision. The Act had no federal exemptions; only state exemptions existed. An earlier bankruptcy statute, the Bankruptcy Act of 1867, however, did include specific exemptions. Bankruptcy Act of 1867, ch. 176, §§ 1-50, 14 Stat. 517 (1867) (current version codified at 11 U.S.C. §§ 101-151326 (Supp. II 1978)). The 1867 Act and the new Code also possess the similarity of permitting the debtor to opt for more advantageous state exemptions. *See* 3 Collier, *supra* note 15, ¶ 522.02.

Note, § 522(b)(1) allows the individual states to "opt out" by requiring debtors to use the state schedule of exemptions. Although the language of this section is somewhat vague, the legislative history indicates that the choice of "opting out" can only be exercised by a specific prohibition of the option by the state. 3 Collier, *supra*

exemptions,[85] including the state's treatment of tenancy by the entireties property.[86] The general interpretation of section 522 is that the debtor's election to use either state or federal exemptions is exclusive. In other words, if the debtor chooses the federal exemptions, he is precluded from using the state schedule of exemptions and the state treatment of entireties property. Such an interpretation, however, is not the only possibility. One may argue that the state's treatment of tenancy by the entireties property does not apply solely under the state exemption option, but also may be used with the federal exemptions. This interpretation is nonexclusive. Support exists for both arguments.[87]

Those who maintain that an exclusive construction should control assert that gramatically the phrase, "either— . . . ; or, in the alternative . . . ," is disjunctive and the choices therefore are mutually exclusive.[88] Code commentators generally agree with this analysis.[89] One commentator has stated that "section 522(b)(2)(B) allows an exemption in the debtor's interest in property as a tenant by the entirety or joint tenant *if* the debtor chooses the state exemptions."[90] Another author, Professor Kennedy, who helped draft the Code,

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note 15, ¶ 522.02 (referring to 124 CONG. REC. H11,115 (daily ed. Sept. 28, 1978); S17, 412 (daily ed. Oct. 6, 1978)). The Indiana Legislature has recently chosen to exercise the option of disallowing the use of the federal exemptions. *See* H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE § 34-2-28-0.5).

[85]*See, e.g.*, IND. CODE § 34-2-28-1 (Supp. 1979) (Indiana exemption statute).

[86]11 U.S.C. § 522(b)(2)(B) (Supp. II 1978). This Code section also deals with property held in joint tenancy by the debtor and another.

[87]The resolution of this problem will be significant in a number of bankruptcy filings. For example, if an exclusive interpretation is adopted and the debtor has a large amount of entireties property, he may have a difficult choice of determining whether to use the federal exemptions—which in general tend to be more lenient than their state counterparts—and give up his or her entireties protection or to protect the entireties property and lose the advantages of the federal exemptions under § 522(d). Kennedy, *New Bankruptcy Act Impact on Consumer Credit*, 33 BUSINESS LAWYER 1059, 1064 (1978).

[88]As a general rule of construction, "[g]uidance may be drawn from consideration of principles of composition which may be supposed to apply to legislative drafting as well as other forms of writing." 2A A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 47.01 (4th ed. C. Sands 1978). *See* Allstate Mortgage Corp. v. Strasser, 277 So.2d 843 (Fla. 1973); Skinner v. State, 16 Md. App. 116, 293 A.2d 828 (1972).

After gramatically analyzing § 522, an English professor also concluded that the language was disjunctive. She maintained that this analysis was correct, regardless of the construction given the word "or." She based her conclusion on the definition of the word "alternative," as used in the statute, as "mutually exclusive." She said the punctuation indicated no other construction. Interview with Phyllis Scherle, Assistant Professor of English, Indiana University—Purdue University—Indianapolis, in Indianapolis (Jan. 7, 1980).

[89]*See, e.g.*, 3 COLLIER, *supra* note 15, ¶ 522.10; Kennedy, *supra* note 83, at 1064.

[90]3 COLLIER, *supra* note 15, ¶ 522.10 (emphasis added).

commented that "if one opts for the federal exemption, he will give up any advantage under state law that protects an estate by the entirety from invasion by creditors of either spouse. If you take the federal exemption, you submit to a termination of the estate by entirety."[91]

Those who argue for a nonexclusive interpretation assert that the language of section 522(b) should not be construed in a preclusive manner. The word "or" which is used in the clause creating the option is, according to section 102(5), not exclusive.[92] Thus, they submit that the options are not absolutely alternative.[93] The response to this argument is that the phrase "in the alternative,"[94] which follows the "or," is sufficient to negate the general rule of construction found in section 102(5). Further support for a nonexclusive interpretation is found in the analyses of section 522 by other commentators. One author has interpreted this section to allow the debtor to exempt his entireties or joint tenancy property regardless of his choice of the state or federal exemption schedules.[95]

Although little legislative history exists on this construction problem, some legislative reports and proposals support the nonexclusive construction.[96] The Senate version of this legislation employed a nonexclusive interpretation of section 522(b).[97] However,

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[91]Kennedy, *supra* note 87, at 1064. Kennedy made this statement in reference to the House version of the Code. His remarks are particularly pertinent because Congress adopted the House version of § 522.

[92]11 U.S.C. § 102(5) (Supp. II 1978).

[93]This argument is weakened because no one has argued yet that a debtor may use both the state and federal exemptions and choose between their specific provisions. If § 522(b)(1) and § 522(b)(2) are not exclusive on the entireties issue, then neither should be exclusive on the choice of specific exemptions.

[94]The Code does not define this phrase. The *American Heritage Dictionary* defines the word "alternative" as "[t]he choice between two mutually exclusive possibilities." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 39 (1969).

[95]R. Roseburg, *The Bankruptcy Reform Act of 1978: An Overview*, in THE BANKRUPTCY REFORM ACT FOR BANK COUNSEL 9, 29-31 (1979).

[96]One must be aware that

> [t]he extent to which legislative history should be consulted is unclear. There are canons of statutory construction that the legislative history is never consulted when the statute is clear and unambiguous. On the other hand, some cases hold that it is always appropriate to consult legislative history to interpret a statute however clear the words of the statute may appear.

2 App. COLLIER, *supra* note 15, XXV n.129 (citing Train v. Colorado P.I.R.G., 426 U.S. 1, 10 (1976)).

[97]That section provides:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate:
>
> (1) any property that is exempt under Federal, 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 House provision,[98] with some modifications of the amount of the exemptions, was eventually adopted. Legislative history, nevertheless, offers no clue about whether the adopted version of section 522 was based upon, or even took into consideration, the problem of statutory interpretation. The use of a conference committee to resolve the conflicts between these two statutes was impractical in this case because of the brief period of time before the end of the legislative session; thus, the differences in the House and Senate versions were reconciled without a public conference. The managers of the legislation worked out the differences.[99] The only published comment on the resolution of the conflicts is a statement by the House version sponsor, Congressman Edwards, and he did not discuss the problem of interpretation.[100]

Based upon the limited discussion of this issue in the legislative history, particularly with respect to the resolution of the conflicts between the House and Senate versions, it is possible that this interpretive question was not debated in Congress. The possibility exists that the members of Congress, at least the senators, not only had no intent to establish an exclusive provision but also had no knowledge of the effects of their actions.

V. Impact of Legal Theory upon Statutory Interpretation

Having examined both the theoretical and interpretive problems created by section 522, the effect of those two issues upon each other must be considered. In the final analysis, the theoretical issues

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the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(2) 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 would have been exempt from process under applicable nonbankruptcy law.

S. 2266, 95th Cong., 2d Sess. § 522(b) (1978).

[98]H.R. 8200, 95th Cong., 1st Sess. § 522(b) (1978).

[99]2 App. Collier, *supra* note 15, at xxi (citing 124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978 (remarks of Rep. Edwards)).

[100]Congressman Edwards commented on this section:

> Section 522 of the House amendment represents a compromise on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment. Dollar amounts specified in section 522(d) of the House bill have been reduced from amounts as contained in H.R. 8200 as passed by the House. The States may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases.

124 Cong. Rec. H11,095 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

have an important impact upon the interpretive issues; the latter being relevant only to the extent that an interest in entireties property exists within the bankruptcy estate.

An illustration at this point may be of some value. Assume that a husband and wife have assets consisting of real estate, which they use as their residence and own as tenants by the entireties, and a large amount of personal property. Assume also that the husband is now taking bankruptcy. Under the interpretive analysis of section 522(b), the question arises whether the husband should claim the federal or state exemptions. An exclusive interpretation of section 522(b) indicates that if he takes the federal exemptions he is precluded from using the state's exemptions and treatment of entireties property. A nonexclusive construction allows him to use the federal schedule and the state's treatment of entireties. In most cases, the latter choice would prove to be the most beneficial option for the debtor,[101] at least with respect to the value of the property exemptible. Nevertheless, the majority apparently accepts the exclusive interpretation of the election under the statute.[102] Therefore, the debtor ostensibly must choose whether to protect more of his personalty by electing the federal exemptions, thereby giving up the state protection of entireties property, or protect his realty by taking the exemptions provided by the state.

This analysis may be misleading, however, because it fails to consider that only the debtor's individual interest in the entireties property can be included within his bankrupt estate. In fact, depending upon the jurisdiction in which the debtor lives, the possibility exists that no part of the entireties estate may be subject to process. If the debtor lives in a jurisdiction which recognizes no present interest in an individual spouse who owns property by the entireties, the value of that entireties property should be zero.[103] In a jurisdiction following this rule, entireties property is owned by the marital unit and the debtor has no individual interest which can pass into the bankruptcy estate. The debtor under these facts may use the more advantageous federal schedule of exemptions and yet suffer no loss of the entireties property.[104]

Even in a jurisdiction which recognizes an interest in the individual spouse, the effect may be slight if the estate is not too

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[101]In jurisdictions permitting exemptions more lenient than those provided by the federal schedule, the debtor should elect to use the state schedule. *See* 11 U.S.C. § 522(b)(2) (Supp. II 1978).

[102]*See* text accompanying notes 84-100 *supra*.

[103]The debtor, however, should report the property in his list of assets to avoid any claim of concealment.

[104]This conclusion depends upon the assumption that the state in which the debtor lives has not chosen to preclude the use of the federal exemptions.

large. The contingent remainder and usufruct are often of uncertain value; thus, those interests may be of little value to the trustee. One commentator has stated:

> The value to the bankrupt estate of the interest which the trustee receives will depend on whether it is the usufruct or the contingent right of survivorship, or both; if the usufruct, whether it is one-half or the whole; and what the life expectancies of the spouses are. The marketability of the interest may be so limited that it must be abandoned by the trustee.[105]

If in fact the value of such an interest is minimal, the debtor, should he elect the federal exemption, can also exempt the value of that interest, up to the amount of $7,500, as provided by the personal residence exemption of section 522(d)(1).[106] Therefore, unless the value of the debtor's interest in the entireties property is fairly large, the estate will acquire nothing from its inclusion.

Ultimately these questions will be decided by the courts. Nevertheless, it seems that even though the Code seeks to bring more property or interests of the debtor into the estate than the Act, it has done little in fact to subject entireties property to the claims of creditors.

VI. Tenancy by the Entireties in Indiana

The state of bankruptcy law in Indiana as it relates to tenancy by the entireties property is uncertain with the passage of House Bill 1359[107] in early 1980. This bill represents a choice by the state to "opt out" of the federal exemptions of section 522(d) and thus allows a debtor in this state to use only the exemptions provided by the state schedule.[108] House Bill 1359 also makes a number of very

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[105]Craig, *supra* note 46, at 263.

[106]11 U.S.C. § 522(d)(1) (Supp. II 1978). This section provides:

> (d) The following property may be exempted under subsection (b)(1) of this section:
>
> (1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtoror a dependent of the debtor.

Id. A debtor can exempt his personal residence to the extent of $5,000 under the old Indiana exemption statute. Ind. Code § 34-2-28-1(a) (Supp. 1979). Note, the amount of this exemption has now been increased to $7,500. H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at Ind. Code §§ 34-2-28-0.5, -1).

[107]H.B. 1359, 101st Ind. Gen. Ass., 2nd Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at Ind. Code §§ 34-2-28-0.5, -1).

[108]*See id.*

significant changes with regard to the exemptions provided by the current Indiana exemption statute.[109] These changes have created a number of problems which will be dealt with later. At this point, however, an analysis of the probable effects of the Code upon Indiana's treatment of entireties prior to the enactment of House Bill 1359 will serve as an example of the general impact of the statute upon the bankruptcy process.

A. Impact of the Code Prior to House Bill 1359

The bankruptcy courts' treatment of entireties property, applying Indiana law under the Act, provides no guidance in determining whether an interest in entireties will be found under the Code.[110] The rule those courts applied under the Act was that neither spouse had any interest in the usufruct or right of suriviorship that was transferable or leviable.[111] The result under the Code's interest test cannot be ascertained because the prior rule does not explain whether the lack of any transferable or leviable interest can be justified on the grounds that no interests existed or that, assuming the existence of interests, they were not leviable or transferable. Therefore, one must refer to the common law under the Act.

1. Interests in Entireties Property.—Spouses can hold only certain present individual interests in entireties property; this Note has already considered the usufruct and right of survivorship.[112] Yet, one might also argue that a creditor of one spouse owns or holds an interest in entireties property based upon an estoppel theory. Finally, arguments for the presence of individual interests might be based upon consideration of such areas as divorce, murder of one spouse by the other, or insanity of a spouse. In these three situations, bankruptcy courts applying Indiana law have held that the spouses own one-half interests in the entireties property.

Indiana law recognizes no present individual interest in tenancy by the entireties property in either spouse.[113] The Indiana Supreme Court, in an 1871 decision[114] dealing with the issue whether a husband had any mortgageable interest in entireties property, ruled that

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[109]*See* IND. CODE § 34-2-28-1 (Supp. 1979).

[110]*See also* section III. B. 2. of this Note.

[111]*See* Pension Fund v. Gulley, 226 Ind. 415, 81 N.E.2d 676 (1948); Baker v. Cailor, 206 Ind. 440, 196 N.E. 769 (1933); Chandler v. Cheney, 37 Ind. 391 (1871); Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911).

[112]*See* text accompanying notes 51-55 *supra*.

[113]*See, e.g.*, Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893); Chandler v. Cheney, 37 Ind. 391 (1871); Davis v. Clark, 26 Ind. 424 (1866).

[114]Chandler v. Cheney, 37 Ind. 391 (1871).

> at common law, . . . if a conveyance of land be made to a man and woman, who are then husband and wife, they take as joint tenants by entireties, not by moieties; they are seized *per tout*, and not *per my*. Each, as well as both, is entitled to the use of the whole. Neither can sever the joint estate by his own act. . . . Nor, it would seem, could the separate interest of either be sold on execution. *Indeed, there is no separate interest.*[115]

Moreoever, the court in *Thornburg v. Wiggins*,[116] stated: "The statutes extending the rights of married women have no effect whatever upon estates by entirety. Such estate is, in no sense, either the husband's or the wife's separate property."[117] A recent court of appeals case, *Yarde v. Yarde*,[118] reiterated the rule, observing that "the rule in Indiana is well established that neither the husband nor wife have a separate interest in real estate held by the entirety.[119]

Some cases make specific references to elements of the usufruct or right of survivorship.[120] The Indiana Court of Appeals in *Sharpe v. Baker*[121] considered the usufruct and held that "the possession and proceeds of such estates cannot be sold on execution for the individual debt of either the husband or wife; not because they are exempt by statute, but because neither has any separate interest therein."[122] In *Davis v. Clark*[123] the court dealt with the right of survivorship. In that case, the appellant argued that the husband had a contingent remainder in the land which was subject to execution because of the right of survivorship. The court stated that "[t]he right of survivorship, we think, did not constitute a remainder, either contingent or vested, in the legal sense of that term. . . . [T]he right of survivorship is simply an incident of an estate granted to husband and wife and does not constitute a remainder."[124]

The question then arises whether a present interest can be created by estoppel. The courts of Indiana have held that if a single spouse secures a loan with a warranty mortgage on entireties prop-

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[115]*Id.* at 397 (quoting Bevins v. Cline's Adm'r, 21 Ind. 37 (1863) (citations omitted)) (emphasis added).

[116]135 Ind. 178, 34 N.E. 999 (1893).

[117]*Id.* at 183, 34 N.E. at 1000.

[118]117 Ind. App. 277, 71 N.E.2d 625 (1946).

[119]*Id.* at 278, 71 N.E.2d at 625. *Accord*, Pension Fund of Disciples of Christ v. Gulley, 226 Ind. 415, 81 N.E.2d 676 (1948).

[120]*See, e.g.*, Davis v. Clark, 26 Ind. 424 (1866); Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911).

[121]51 Ind. App. 547, 96 N.E. 627 (1911).

[122]*Id.* at 558, 96 N.E. at 630.

[123]26 Ind. 424 (1866).

[124]*Id.* at 430.

erty and later acquires the full title to that property, the title will inure "to the benefit of the mortgagee."[125] The mortgagor is estopped from contesting a foreclosure.[126] Estoppel, however, is merely an equitable device whereby the transferor is estopped to deny the validity of the mortgage after he has benefitted from the consideration conferred by the mortgagee; it does not create an interest.[127]

Indiana courts may also find an individual interest in entireties property in situations such as divorce, murder of one spouse by the other, and insanity of a spouse. In such situations, Indiana courts have ruled that spouses holding property by the entireties shall divide the estate, each taking a one-half share.[128] These circumstances may provide evidence that individual spouses own interests in entireties property; however, closer scrutiny reveals that this is not the case.

Cases involving divorce clarify the nature of interests in entireties property. The court of appeals in *Gibble v. Gibble* [129] ruled that "an absolute divorce terminates an estate by entireties and converts it into an estate as tenants in common."[130] Only after the entireties estate has terminated do the spouses become tenants in common, and until the termination of marriage has occurred, courts make no reference to individual interests.[131] The fact that individual interests are created upon the destruction of the entireties estate provides no indication that interests existed prior to the dissolution of the marriage. Thus, divorce cases offer no evidence of an interest in tenancy by the entireties property in the individual spouses.

Courts have applied similar arguments to situations involving murder of one spouse by the other and insanity of a spouse. Arguing by analogy, they have reached the same result as with divorce—destruction of the entireties estate and creation of one-half interests in each spouse.[132] A specific Indiana statute deals with the murder of

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[125]*E.g.*, Thalls v. Smith, 139 Ind. 496, 39 N.E. 154 (1894); Boone v. Armstrong, 87 Ind. 168 (1882).

[126]Thalls v. Smith, 139 Ind. 496, 39 N.E. 154 (1894).

[127]*See id.*; Boone v. Armstrong, 87 Ind. 168 (1882); Pancoast v. Travelers Ins. Co., 79 Ind. 172 (1881). *But see* Pension Fund of Disciples of Christ v. Gulley, 226 Ind. 415, 81 N.E.2d 676 (1948).

[128]*See, e.g.*, National City Bank of Evansville v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957); Gibble v. Gibble, 111 Ind. App. 60, 40 N.E.2d 347 (1942). *See* IND. CODE § 32-4-4-1 (1976).

[129]111 Ind. App. 60, 40 N.E.2d 347 (1942).

[130]*Id.* at 61, 40 N.E.2d at 347. *Accord*, Maitlen v. Barley, 174 Ind. 620, 621, 92 N.E. 738, 738 (1910); Blake v. Hosford, 387 N.E.2d 1335, 1341-42 (Ind. Ct. App. 1979); Smith v. Smith, 131 Ind. App. 38, 52, 169 N.E.2d 130, 137 (1960). *See also* IND. CODE § 32-4-2-2 (1976).

[131]*See* Gibble v. Gibble, 111 Ind. App. 60, 40 N.E.2d 347 (1942).

[132]*See* National City Bank of Evansville v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957); IND. CODE § 32-4-4-1 (1976).

an intestate, including a spouse.[133] Under this statute the rule requires that the murderer become a constructive trustee for those, other than himself who are entitled to a share under the law of intestate succession or a will.[134] In *National City Bank of Evansville v. Bledsoe*,[135] however, the court applied common law principles because the statute was inapplicable. The statute requires that the murdering spouse be convicted of homicide. In *Bledsoe*, the husband killed his wife and then committed suicide, thereby preventing his conviction. After recognizing that no Indiana cases treated the issue, the court adopted the view that a constructive trust should be imposed upon any share of the entireties estate passing to the husband.

The court also discussed the extent to which the constructive trust should be imposed. The court declared:

> [W]here the operation of a tenancy by entireties has been thwarted by a divorce or otherwise, the common law of the state divides the property equally between the original owners. There is no reason why the same division should not be made where a tenancy by entireties is dissolved by murder.[136]

The estate was thus destroyed and the wife's personal representative acquired a one-half interest in the entireties property. The one-half interest of the husband passed to his personal representative who then held it in constructive trust for the wife's heirs at law and legatees under her will.[137]

In reference to the insanity of a spouse, the rule is that the entireties estate is dissolved and a tenancy in common is produced, thereby creating one-half interests in the individual spouses. An Indiana statute provides:

> Whenever a husband and wife shall own and hold any real estate as joint tenants or tenants by entireties, and one of

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[133]IND. CODE § 29-1-2-12 (Supp. 1979).

[134]The statute provides:

A person who is convicted of murder, . . . shall, in accordance with the rules of equity, become a constructive trustee of any property acquired by him from the decendent or his estate because of the offense, for the sole use and benefit of those persons legally entitled thereto other than such guilty person, saving to all innocent purchasers for value of interests therein acquired in good faith. Such conviction shall be conclusive in any subsequent suit to charge him as such constructive trustee.

Id.

[135]237 Ind. 130, 144 N.E.2d 710 (1957).

[136]*Id.* at 140, 144 N.E.2d at 714-15 (citation omitted).

[137]*Id.*, 144 N.E.2d at 715.

> them shall have been adjudged a person of unsound mind, by a court of competent jurisdiction, and when said insanity is probably permanent, they shall cease to hold and own said real estate as joint tenants or tenants by entireties, as the case may be, but the title to said real estate shall be owned and held by them as tenants in common.[138]

In all three of the above situations—divorce, murder of one spouse by the other, and insanity of a spouse—Indiana courts have held that the entireties estate is destroyed and the individual spouses each take one-half interests in the property. Although the underlying reasons for the result in each case may differ,[139] the key fact is that only after the entireties estate has been destroyed do the spouses acquire separate interests.

2. Result of a Finding of No Interest in the Entireties Property.—The preceding discussion reveals that an individual spouse has no present interest in entireties property under Indiana law. Thus, had the state not precluded the option, a debtor in Indiana generally would have taken the federal schedule of exemptions. Because the debtor has no interest in entireties property, that property would not have been affected by his bankruptcy. Consequently, his major concern would have been with choosing a schedule of exemptions. The federal schedule[140] sets higher limits and includes more exemptible items of property than the current Indiana schedule.[141] From the debtor's point of view, the federal schedule would have been more advantageous.[142]

The Code's interest test apparently favored the debtor in Indiana, in that he or she might, in most cases, have chosen the federal exemption schedule under section 522(d) and yet subjected none of his or her entireties property to the trustee's claim. Nevertheless, a somewhat ironic situation could have been created. The actual result occasioned by this situation may have been to subject more of the debtor's assets to the claims of creditors than if no interest had been found. To comprehend how finding no interest in entireties property could have been detrimental to a debtor, one must

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[138]IND. CODE § 32-4-4-1 (1976).

[139]With respect to divorce and murder of one spouse by the other, the underlying policy is to achieve equity by dividing the entireties estate. In connection with insanity of one spouse, a more likely justification for dividing the estate is the policy of keeping land alienable.

[140]11 U.S.C. § 522(d) (Supp. II 1978).

[141]IND. CODE § 34-2-28-1 (Supp. 1979).

[142]The exemptions provided by § 522(d) are in general more advantageous to the debtor than those provided by Indiana's House Bill 1359. *See* H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1).

examine the interrelation of the liability of individual spouses for their joint debts, the theory of entireties, and the effect of a discharge in bankruptcy.

Under the Act, views differed about the claims of joint creditors where only one spouse had taken bankruptcy. As a general rule, when a debtor was discharged, his joint and several liability was extinguished.[143] Thus, if a creditor possessed only a promise of the individual debtor to pay, that obligation would be extinguished by the discharge. When only one spouse was in bankruptcy, and entireties property was involved, application of the rule became somewhat more complex. Craig, in his analysis, said that the general rule could be explained as follows:

> A. The individual and joint liability of the bankrupt spouse has been discharged by the bankruptcy proceeding (leaving the other spouse individually liable).
> B. In order for a creditor to reach entirety property (which of course is still held by the bankrupt and his spouse, not having passed to the bankrupt trustee), he must be a 'joint' judgment creditor.
> C. One may become a joint judgment creditor only by obtaining a judgment against both spouses *at the same time.*
> D. If a creditor sues both spouses at the same time and one spouse has been discharged from his joint and several liability in bankruptcy, the suit as to that spouse must be dismissed.
> THEREFORE: The joint creditor cannot become a joint judgment creditor and may not levy on entirety property after bankruptcy.[144]

The result, that a joint judgment creditor could not reach entireties property in bankruptcy, without exception, would have worked an injustice upon joint creditors. Therefore, all jurisdictions recognizing entireties provided some means whereby a joint creditor could protect his interest by "obtaining a joint judgment and lien on the entirety property before the bankruptcy of the individual spouse,"[145] or "by requesting a stay of the bankruptcy

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[143]*See* 11 U.S.C. § 32(f) (1976) (repealed Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549); 1A COLLIER, *supra* note 20, ¶ 14.69 at 1454. The new Code retains this rule. *See* 11 U.S.C. § 524(a) (Supp. II 1978); 3 COLLIER, *supra* note 15, ¶ 524.01[3].

[144]Craig, *supra* note 46, at 284.

[145]Craig, *supra* note 46, at 285. *See, e.g.*, Citizens Sav. Bank v. Astrin, 44 Del. 451, 61 A.2d 419 (1948); Kolakowski v. Cyman, 285 Mich. 585, 281 N.W. 332 (1938).

discharge until a joint judgment and lien can be obtained."[146] The majority of these jurisdictions concluded, however, that unless a judgment and lien were obtained prior to discharge, the joint creditor's claims were barred.[147]

Indiana extended the ability of a joint creditor to protect himself even after the discharge of one joint debtor.[148] The courts ostensibly reasoned that an injustice would result if a joint creditor was precluded from recovering against entireties property merely because he failed to secure a timely judgment and lien.[149]

The theoretical justification for this result in Indiana is unique.[150] In *First National Bank of Goodland v. Pothuisje*,[151] the Indiana Supreme Court held that a joint creditor could obtain a judgment and lien even after discharge because a third form of liability existed in spouses who owned entireties property.[152] The court stated the husband and wife were not only jointly and severally liable, but also liable in their capacity as a marital unit. Thus, although the husband's joint and several liability was extinguished by a discharge in bankruptcy, the entireties liability survived.[153] The court also decided that no part of the entireties estate passed to the trustee in bankruptcy. Therefore, it concluded, "[a]s to property it cannot reach and debts it cannot adjudicate, the judgments and decrees of a court of bankruptcy are inoperative."[154] This decision has been widely accepted in Indiana.[155]

The question then arises whether prior to enactment of House Bill 1359, *Pothuisje* still would have been the law in Indiana. Because an individual spouse does not own an interest in entireties property in Indiana, *Pothuisje* apparently would have controlled. Spouses own no interests in entireties property under Indiana law; thus the bankruptcy estate of an individual debtor could acquire no

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[146]Craig, *supra* note 46, at 285. *See* Phillips v. Krakower, 46 F.2d 764 (4th Cir. 1931); Comment, *supra* note 1, at 64.

[147]Craig, *supra* note 46, at 284; Comment, *supra* note 1, at 645. *E.g.*, Reid v. Richardson, 304 F.2d 351 (4th Cir. 1962); Shipman v. Fitzpatrick, 350 Mo. 118, 164 S.W.2d 912 (1942).

[148]First Nat'l Bank of Goodland v. Pothuisje, 217 Ind. 1, 25 N.E.2d 436 (1940); Craig, *supra* note 46, at 286; Comment, *supra* note 1, at 645.

[149]*See, e.g.*, First Nat'l Bank of Goodland v. Pothuisje, 217 Ind. at 7, 25 N.E.2d at 438 (the court implied this in its discussion).

[150]*See* Craig, *supra* note 46, at 286-87; Comment, *supra* note 1, at 645-46.

[151]217 Ind. 1, 25 N.E.2d 436 (1940).

[152]*Id.* at 11, 25 N.E.2d at 439.

[153]*Id.* at 11-12, 25 N.E.2d at 439-40.

[154]*Id.* at 12, 25 N.E.2d at 440.

[155]*See* Smith v. Beneficial Finance Co., Inc., 139 Ind. App. 653, 218 N.E.2d 921 (1966); Williams v. Lyddick, 116 Ind. App. 206, 61 N.E.2d 186 (1945); Shabaz v. Lazar, 115 Ind. App. 691, 60 N.E.2d 748 (1945).

part of the entireties property. Seemingly, the statement of the court in *Pothuisje* would have remained correct: "As to property it cannot reach and debts it cannot adjudicate, the judgments and decrees of a court of bankruptcy are inoperative."[156] If the discharge in bankruptcy of one spouse had no effect upon the entireties estate under *Pothuisje*, the entireties property could have been reached by joint creditors of the husband and wife.[157]

This Note made the assertion that if an individual debtor had an interest in entireties property, that interest would be included within the bankruptcy estate.[158] In many cases, however, the value of that interest is either zero or insignificant. In addition, in those instances in which a valuable interest is found, the possibility exists that it may be exempted under the household exemption provisions of either the state or federal exemption schedules.[159] The advantage to the debtor of finding some value in the entireties estate would have been that because the entireties interest was included within the estate, any further liability with regard to the property would have been extinguished upon discharge. Finding an interest in every jurisdiction would have destroyed the divergence in views that existed under the Act in connection with the ability of joint creditors to protect themselves, thereby immunizing the entireties property from all creditors in a number of cases.

B. Impact of Indiana's House Bill 1359 upon Tenancies by the Entireties in Bankruptcy

House Bill 1359 provides:

> In accordance with section 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. 522(b)), in any bankruptcy proceeding, an individual debtor domiciled in Indiana:
>
> (1) is not entitled to the federal exemptions as provided by section 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. 522(d)); and
>
> (2) may exempt from the property of the estate only that property specified by Indiana law. . . .
>
> The following property of a debtor domiciled in the state of Indiana shall not be liable for levy of sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract express or implied:

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[156]217 Ind. 1, 12, 25 N.E.2d at 440.

[157]Because entireties property was not affected by a discharge in Indiana, the debtor could have used either the federal or state exemptions prior to the effective date, April 1, 1980, of House Bill 1359. H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1).

[158]*See* text preceding text accompanying note 65 *supra*.

[159]*See* text accompanying notes 103-06 *supra*.

(a) Real estate or personal property constituting the personal or family residence of the debtor or a dependent of the debtor, or estates or rights therein or thereto of the value of not more than seven thousand five hundred dollars ($7,500). The exemption under this subsection shall be individually available to joint debtors concerning property held by them as tenants by the entireties.

(b) Other real estate or tangible personal property of the value of four thousand dollars ($4,000).

(c) Intangible personal property, including choses in action (but excluding debts owing and income owing, of the value of one hundred dollars ($100)).

(d) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(e) Any interest the debtor has in real estate held as a tenant by the entireties on the date of the filing of the petition for relief under the the bankruptcy code, unless a joint petition for relief is filed by the debtor and spouse, or individual petitions of the debtor and spouse are subsequently consolidated.

None of the foregoing provisions of this chapter shall apply to any judgment obtained prior to October 1, 1977.

In no event shall the total of all exempted property under subsections (a), (b) and (c) exceed in value ten thousand dollars ($10,000).[160]

This bill creates a number of problems, concerning entireties property with which the courts and possibly the legislature will have to deal.

1. Section 2(e).[161]—An initial problem created by House Bill 1359 involves the constitutionality of section 2(e). Section 2(e) exempts

> [a]ny interest the debtor has in real estate held as a tenant by the entireties *on the date of the filing of the petition for relief under the bankruptcy code, unless a joint petition for relief is filed by the debtor and spouse, or individual petitions of the debtor and spouse are subsequently consolidated.*[162]

Although this subsection is included within a general exemption statute, its applicability is limited to bankruptcy proceedings. By

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[160]H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1).

[161]*Id.* § 2(e).

[162]*Id.*

creating an exemption applicable only in bankruptcy, this subsection may violate the supremacy clause[163] of the United States Constitution.

The Supreme Court in *International Shoe Co. v. Pinkus*[164] held that "[t]he power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount."[165] The Court also maintained that "[s]tates may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."[166] Section 522(b) of the Bankruptcy Reform Act of 1978 provides a debtor with a choice between two sets of exemptions—those established by section 522(d) or those existing under applicable nonbankruptcy law. Thus, states are permitted to enact nonbankruptcy exemption statutes which apply generally to all debtor-creditor relationships. Nevertheless, under the language of *International Shoe*, provisions for exemptions applicable solely in bankruptcy would appear to be improper because they "complement the Bankruptcy Act or . . . provide additional or auxiliary regulations."[167] For this reason, a constitutional attack upon House Bill 1359 on grounds that it violates the supremacy clause may be justified.

Further support for the view that section 2(e) is unconstitutional is found in the 1974 Ninth Circuit Court of Appeals case of *Kanter v. Moneymaker*.[168] *Kanter* involved a claim by the trustee in bankruptcy to a personal injury claim that arose from an automobile accident involving the bankrupt. The accident occurred just prior to the filing of his petition in bankruptcy.[169] The trustee claimed the cause of action as an asset of the estate and sought to have this claim established by the bankruptcy court.[170] The judge ruled in favor of the trustee and the district court affirmed.[171] On appeal, the bankrupt argued that a California statute[172] made a personal injury action exempt from claims of the trustee.[173] The district court had held this statute invalid under the supremacy clause and the court of appeals concurred.[174]

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[163]U.S. CONST. art. VI, cl. 2.
[164]278 U.S. 261 (1929).
[165]*Id.* at 265.
[166]*Id.*
[167]*Id.*
[168]505 F.2d 228 (9th Cir. 1974).
[169]*Id.* at 229.
[170]*Id.*
[171]*Id.*
[172]CAL. CIV. PROC. CODE § 688.1(b) (West Supp. 1980).
[173]505 F.2d at 230.
[174]*Id.*

The Ninth Circuit explained that this statute was defective because it limited only the bankruptcy trustee's ability to reach the personal injury claim and not the ability of other creditors to reach it.[175] Although the state could properly broaden the classes of property which were exempt from claims of all creditors, it could not constitutionally make an interest in property exempt from the claims of the trustee alone.[176] Section 2(e) of House Bill 1359 possesses a limitation similar to that which existed in the California statute. In attempting to make tenancies by the entireties exempt only in bankruptcy, section 2(e) arguably violates the supremacy clause.

Moreover, making entireties property absolutely exempt, as section 2(e) purports to do, is unreasonable because of the possibility for abuse. An absolute exemption, in connection with conversion of nonexempt assets to exempt assets, might allow a debtor to avoid the claims of all creditors. The old rule, that conversion of nonexempt property into *entireties* property constituted a fraud upon creditors,[177] will be changed if House Bill 1359 makes entireties property absolutely exempt. The general rule provides that a debtor may convert *nonexempt* property into *exempt* property without working a fraud upon his creditors.[178] If entireties is now absolutely exempt under section 2(a), such a conversion of nonexempt property to entireties property should be permitted. Because of this change, a debtor anticipating bankruptcy could sell all of his or her nonexempt assets and use the proceeds to purchase real property which the debtor and his or her spouse take as tenants by the entireties. This conversion would not be fraudulent under the law and yet would allow the debtor to receive all the benefits of a discharge in bankruptcy while subjecting none of his or her property to the claims of creditors in bankruptcy.

2. Section 2(a).[179]—If one assumes that section 2(e) is invalid under the supremacy clause, the only provision of House Bill 1359 applicable to entireties would be section 2(a). A number of problems and questions also arise with regard to section 2(a).

a. If entireties is part of the bankruptcy estate.—If entireties property is part of the bankruptcy estate, the first problem involves reconciling the Indiana common law theory, that because an individual spouse has no interest in entireties property no interest will pass to his or her bankruptcy estate, with the necessity that property to be

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[175]*Id.* at 230-31.

[176]*Id.*

[177]*See* notes 76-77 *supra* and accompanying text.

[178]*See* note 73 *supra* and accompanying text.

[179]H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., § 2(a), 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1).

exempted must first have passed into the bankruptcy estate. To decide whether entireties property becomes a part of the bankruptcy estate under the Code, one must determine whether an individual spouse has an interest in such property. One must generally resort to state law to make this determination. Indiana common law provides that individual spouses have no interest in entireties property;[180] therefore, under Indiana common law no entireties property will pass into the bankruptcy estate. Section 2(a) of House Bill 1359, however, states that a personal or family residence held as tenants by the entireties is exempt to the extent of $7,500 to each spouse.[181] For property to be exempt, it must first be part of the bankruptcy estate, and for property to be part of the estate, the debtor must have an interest in it. Section 2(a) of House Bill 1359 and Indiana common law are clearly inconsistent.

The possibility exists that the legislature made entireties exempt to insure its protection, regardless of the construction given the Code regarding that statute. Yet, this action creates an interpretive impasse. Either the common law controls, providing that individual spouses own no interest in entireties property, or the legislature has overruled—but only by implication—the common law, thereby allowing individual spouses to own interests in entireties property.

If one assumes that the legislature has overruled the common law to recognize an interest in entireties property in the individual spouses, a question exists about the extent of that interest. Ostensibly, there are at least three possible answers: the spouses may each hold undivided one-half interests in the entireties estate; the spouses may each hold an interest in the whole estate according to the proportion of the consideration they individually contributed toward acquisition of the property; or the spouses may each hold an interest based upon their proportionate share in the usufruct, plus the value to the spouse of his or her future survivorship interest.[182]

In addition, if entireties property does become a part of the bankruptcy estate under section 2(a), the rights of creditors will be altered. Section 2(a) expressly gives both a husband and wife with

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[180]*See* note 113 *supra* and accompanying text.

[181]H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., § 2(a), 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1).

[182]The value to the individual spouse of this interest could vary depending upon such factors as his or her age and health which are taken into consideration in computing the value of the survivorship. In addition, under common law analysis it is conceivable, although improbable, that the courts could find that the spouse's share in the usufruct but not the future survivorship would pass into the bankruptcy estate. Conversely, the courts could find that the survivorship interest but the usufruct would pass into the bankruptcy estate.

entireties property an exemption in their personal or family residence against creditors holding their joint obligation. This provision thus overrules prior Indiana law holding that the marital entity has no claim to an exemption for entireties property.[183] Section 2(a) is also sufficiently broad to provide each spouse with the same $7,500 exemption against creditors with individual claims against one spouse or the other. The $7,500 household exemption, therefore, applies against both individual creditors and creditors with joint claims.

(i) Examples.—By assuming that each spouse holds a one-half interest in the entireties estate that passes to the trustee in bankruptcy, one can examine the effect of section 2(a) upon the entireties estate. If the spouses are jointly liable on a debt, and only one of them, for example the husband, goes into bankruptcy, the one-half interest of the husband will become part of his bankruptcy estate. He will, however, be entitled to a $7,500 exemption under section 2(a). The husband's interest, therefore, will be subject to the claims of both his joint and individual creditors. Upon discharge, all liability of the husband will be extinguished. If the entireties property is sold or partitioned in bankruptcy, the wife's one-half interest in the division or proceeds probably will be subject to the claims of individual and joint creditors against whom she can claim her $7,500 exemption. This in effect assumes that bankruptcy makes the spouses tenants in common.

If the spouses are not jointly liable on a debt and only the husband goes into bankruptcy the result will be the same as above. However, no interest of the wife, either in entireties or other property, will be subject to the claims of her husband's individual creditors. If the spouses are not jointly liable on a debt and both are in bankruptcy, then the individual one-half interest of each will pass into his or her bankruptcy estate. Each spouse will be entitled to a $7,500 exemption with the balance of the value of the entireties property remaining in the bankruptcy estate to satisfy the claims of individual creditors. If the spouses are jointly liable on a debt and each files a petition in bankruptcy, the result will again be essentially the same. Yet, in this situation the balance of the value of entireties property in excess of the exemption remaining in the bankruptcy estate of each spouse may be used by the trustee to satisfy claims of joint as well as individual creditors.

(ii) Summary.—The results under section 2(a) of House Bill 1359 will differ from those that existed under the old Act. If the spouses do have interests in entireties property under section 2(a), those interests become a part of the bankruptcy estate. Once the in-

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[183]Sharpe v. Baker, 51 Ind. App. 547, 571, 99 N.E. 44, 46-47 (1911).

terest becomes part of the estate, all creditors, whether joint or individual, will share equally in the property. This follows because distributions in bankruptcy make no differentiation between joint and individual creditors. For example, in the first situation discussed above—in which the spouses are jointly liable but only one spouse is in bankruptcy—none of the entireties property would have been subject to the trustee's claims under the Act.[184] Individual creditors received no benefit from the entireties property, and joint creditors outside of bankruptcy were entitled to all the entireties property. Under House Bill 1359, the husband's interest will become part of

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[184]The trustee may, however, have some control over entireties property for marshaling purposes. Marshaling has been defined as the "principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." Sowell v. Federal Reserve Bank, 268 U.S. 449, 456-57 (1925).

An interesting problem of marshaling arises in bankruptcy when a creditor holding the joint obligation of husband and wife with a right to reach entireties property files a claim against the estate of one of the spouses in bankruptcy. Under principles of marshaling will the creditor be required to exhaust his claim against the entireties property before he can share in any distribution from the estate? Or must the joint creditor show that he has exhausted his claim against the bankrupt before he proceeds against entireties property? If the bankrupt is primarily liable upon the obligation, it seems that his individual property or the bankrupt estate should first be exhausted. *See* First Nat'l City Bank v. Phoenix Mut. Life Ins. Co., 364 F. Supp. 390 (S.D.N.Y. 1973) (mortgagee with lien on husband's entireties property and life insurance policies could not be compelled to satisfy claim from the entireties property first, with respect to creditor with lien only on the insurance policies, where the effect was to defeat the wife's right of survivorship to the entireties property); *In re* Estate of Smith, 388 N.E.2d 287 (Ind. Ct. App. 1979) (creditor of husband with lien on individual and entireties property required to exhaust individual collateral first); Miller Lumber & Coal Co. v. Berkheimer, 342 Pa. 329, 20 A.2d 772, 135 A.L.R. 736 (1941) (husband's creditor with lien on individual and entireties property may satisfy claim from the individual property first). *Contra*, Berman v. Green (*In re* Jack Green's Fashions for Men—Big and Tall, Inc.) 597 F.2d 130 (8th Cir. 1979) (lienholder with lien on entireties and individual property of husband requried to exhaust entireties property first where resort to individual property would leave nothing for general creditors).

If the bankrupt spouse is secondarily liable on the joint obligation of husband and wife, the creditors holding a joint claim should be required to exhaust entireties property before participating in the bankrupt estate under general principles of marshaling. *Cf.* Consumers Time Credit, Inc. v. Remark Corp., 248 F. Supp. 158 (E.D. Pa. 1965) (lienholder with lien on both entireties property and life insurance policy required to assert lien on the entireties property first thereby preserving the interest of a lienholder with a junior lien on the life insurance policy). IND. CODE §§ 34-1-55-1 to 4 (1976) (allowing surety to require creditor to exhaust remedies against principal first).

But if the bankrupt and his spouse are equally and jointly liable to a creditor, it is logical that his individual property or the bankrupt estate should be primarily liable to the extent of one half of the obligation—*i.e.*, the extent to which the individual in bankruptcy is liable for contribution. *See, e.g.*, McLochlin v. Miller, 139 Ind. App. 443, 217 N.E.2d 50 (1966) (estate of deceased spouse required to pay one half of mortgage indebtedness on entiretes property upon which both equally liable).

the estate and the joint creditors will have to share that interest with other creditors.

b. If entireties is not part of the bankruptcy estate.—Heretofore, it has been assumed that individual spouses do have interests in entireties property under section 2(a) of House Bill 1359. If, however, the common law is sustained by courts ruling that individual spouses do not have interests in entireties property, very little will change as a result of House Bill 1359. If neither spouse has an interest in entireties property, no interest in that property can pass into the bankruptcy estate of an individual spouse. The trustee will acquire no power over the property and individual creditors will not share in it. *Pothuisje* will continue to control.[185] Thus, the discharge of one spouse in bankruptcy will not affect the entireties estate in Indiana. Joint creditors will be able to reach entireties property prior to and following discharge. Significantly, however, section 2(a) will enable the debtor and his or her spouse together to exempt up to $15,000 worth of individual or family residential property from the claims of joint creditors. Moreover, the husband and wife may convert up to $15,000 in nonexempt assets to individual or family residential entireties property on the eve of bankruptcy and claim it exempt. In this sense, the new Indiana exemption law has not interfered with rights of creditors to the extent which might have occurred under section 2(e).[186]

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[185]*See* text accompanying notes 151-56 *supra.*

[186]For a discussion of conversion under section 2(e) *see* section IV B. 1 of this Note. Beyond questions involving entireties, however, House Bill 1359 does create other problems. The Indiana General Assembly obviously was aware of the federal exemption provisions since it specifically referred to § 522 in its bill. *See* H.B. 1359, 101st Ind. Gen. Ass., 2d Sess., 1B Adv. Legis. Serv. 1660 (1980) (to be codified at IND. CODE §§ 34-2-28-0.5, -1). Yet, it declined to include a number of provisions that were included within the federal schedule of exemptions. These omissions might be interpreted to indicate a legislative intent that these excluded items of and interests in property be included within the bankruptcy estate.

Section 522(d)(10)(D) of the federal exemption schedule, for example, provides that a "debtor's right to receive alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor" is exempt. 11 U.S.C. § 522(d)(10)(D) (Supp. II 1978). House Bill 1359 provides no exemption for these items. Because no state or federal statute exists to exempt such interests, they will become a part of the bankruptcy estate. Therefore, if a wife receives support or separate maintenance payments and declares bankruptcy, it appears that the payments by the husband will pass to the wife's trustee in bankruptcy and the wife will receive no part of them with which to support herself or her children.

Another provision omitted in House Bill 1359 concerns wrongful death recoveries. Section 522(d)(11)(B) provides that "[t]he debtor's right to receive, or property that is traceable to a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor" is exempt. 11 U.S.C. § 522(d)(11)(B) (Supp. II

CONCLUSION

If a particular state has determined that each spouse holds a separable interest in the entireties estate, whatever its quality, that interest will pass to the trustee in bankruptcy. The most difficult problem, however, lies in assigning a value to the interest which passes to the trustee. Once a value has been assigned, the interest may be claimed by the debtor under the bankruptcy exemptions or, if the debtor elects the state exemptions, the interest may be claimed by the debtor to the extent permitted under state law.

Before enactment of the Code, some states had recognized that an individual spouse held some interest in entireties property. In these jurisdictions, the problem of valuing that interest remains. If an individual spouse in bankruptcy takes the exemptions of section 522(d), the value of his interest in the entireties property most likely will remain exempt. If he claims the state exemptions under section 522(b), the pre-Code law of the state will determine which interest creditors may reach.

In some states, such as Indiana, the individual spouse has no interest in entireties property. If section 541 does not include entireties property within the bankruptcy estate of a spouse because the spouse has no interest in the property which may pass to the trustee, the law with respect to entireties property in bankruptcy basically remains unchanged by the new Code.

The individual spouse-debtor may take either the federal bankruptcy exemptions under section 522 or claim the state exemptions and still hold entireties property free from the claims of his individual creditors. Joint creditors, however, may reach entireties property through in rem claims outside of bankruptcy, subject to the applicable rules of marshaling.

Indiana has introduced an important modification to the pre-Code law by allowing each spouse to claim as exempt against joint creditors home property to the extent of $7,500. When reduced to

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1978). House Bill 1359 fails to mention wrongful death recoveries. Wrongful death recoveries apparently become part of the bankruptcy estate.

A final example of an item omitted from the Indiana statute is tort claims. Section 522(d)(11)(D) provides that "[t]he debtor's right to receive, or property that is traceable to a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent" is exempt. 11 U.S.C. § 522(d)(11)(D) (Supp. II 1978). Because House Bill 1359 fails to mention tort claims and no other state or federal statute expressly makes such claims exempt, the proceeds of a tort recovery will pass to the trustee in bankruptcy. House Bill 1359, however, does provide an intangibles exemption of $100. Thus, to that extent the debtor may claim an exemption for his tort claim; however, he will receive no benefit from the tort recovery in excess of the $100 exemption.

its fundamental terms, however, the new Indiana law with respect to entireties property passing to the bankruptcy estate under section 541 leaves unanswered the question whether an individual spouse has an interest in entireties property which will pass to the estate.

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