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TENANCY BY THE ENTIRETIES: A MATRIMONIAL REGIME IGNORED

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Questions of matrimonial property have been discussed at length over the last decade. Inspired by a basic dissatisfaction with the traditional notion of separation of property, the debate has been often ardent and emotional, occasionally highly technical, but never without interest.

In the eye of the controversy is the question of a fundamental reform in the total proprietary relationship between spouses, in their "matrimonial regime". Thus appear and disappear, alternately commended and condemned, proposals for community of property—be it full or partial,¹ immediate or deferred—or for separation of property coupled with wide judicial discretion.²

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¹ Limited or partial community has more traditionally referred to a regime limited to property (excluding inherited property) acquired by a couple after they have married. But this phrase also aptly describes a more recent development in some common law provinces: community of property limited to a defined class of "family assets".

² *Canada*: The Law Reform Commission of Canada, following the then lead of Ontario, initially favoured immediate co-ownership of the matrimonial home and deferred community of all after-acquired property together with an element of judicial discretion: Working Paper No. 8: Family Property (1975). It subsequently opted rather for equality of distribution on marriage breakdown: Report on Family Law (1976).

British Columbia: S. 8 of the Family Relations Act, S.B.C., 1972, c. 20, was the first Canadian legislation providing for judicial discretion (following the example of New Zealand and England). The Royal Commission on Family and Children's Law (Berger Commission), in its Sixth Report (1975), recommended immediate community with joint management of all assets, but the Legislature has opted instead

At the same time, and less contentiously, attention has focussed on the matrimonial home. That it should be co-owned, or at the very least jointly managed, is a proposal that finds favour with most law

for a deferred community of family assets together with a measure of judicial discretion, similar to that of Ontario. See Family Relations Act, R.S.B.C., 1979, c. 121, Part 3 (in force March 31st, 1979).

Alberta: The majority report on Matrimonial Property (1975), of the Institute of Law Research and Reform, University of Alberta, recommended judicial discretion for existing marriages and deferred community with judicial discretion to vary the shares for those married or moving into Alberta after the legislation takes effect. The minority limited reform to the introduction of judicial discretion, and the Legislature accepted the latter's recommendation when it enacted The Matrimonial Property Act, S.A., 1978, c. 22. Under this Act, the effective date of which is January 1st, 1979, property continues to be owned separately but, upon application of one of the spouses at marriage breakdown, the court may order that property acquired during the marriage is to be shared equally, or in some other proportion if such an equal division would be unfair in the circumstances. The Act also includes occupational rights to the matrimonial home. See: Margaret A. Shone, Principles of Matrimonial Property Sharing: Alberta's New Act (1979), 17 Alta L. Rev. 143; Peter J. M. Lown and Frances L. Bendiak, Matrimonial Property—The New Regime (1979), 17 Alta L. Rev. 372.

Saskatchewan: The Law Reform Commission of Saskatchewan recommended that reforms be introduced in three phases: judicial discretion, co-ownership of the matrimonial home and deferred community. The first was achieved in 1975 when a new s. 22 was added to The Married Women's Property Act, R.S.S., 1965, c. 340, by S.S., 1974-75, c. 29 (now The Married Persons' Property Act: R.S.S., 1978, c. M-6). The scheme therein has recently been varied with the adoption of The Matrimonial Property Act, S.S., 1979, c. M-6.1, to provide for an initial presumption of equal distribution with judicial discretion to vary, similar to the Alberta model. The second, that is, co-ownership of the matrimonial home, was detailed in the Commission's Proposals for a Saskatchewan Matrimonial Homes Act (1976). Although it was recommended for immediate adoption, this now seems unlikely, as does introduction of the third proposed reform, deferred community.

Manitoba: The Marital Property Act, S.M., 1977, c. 48, enacted pursuant to the recommendations of the Manitoba Law Reform Commission in its Report on Family Law, Part II: Property Disposition, Report (1976), p. 24, provided for unseverable joint ownership of the marital home and immediate community of all other family assets, as well as for deferred community of commercial assets. This legislation was reviewed by the Family Law Review Committee (Report, March 6th, 1978). It was subsequently repealed and a new Marital Property Act, S.M., 1978, c. 24, (in force October 15th, 1978) has substituted for it a regime of deferred sharing of all after-acquired assets together with a measure of judicial discretion as to ultimate distribution.

Ontario: The Ontario Law Reform Commission, in its Report on Family Law, Part IV: Family Property Law (1974), was the first of the common law provinces to recommend a regime of deferred sharing (on the example of the Scandinavian countries, West Germany, France (where such a regime is optional) and Quebec (an Act Respecting Matrimonial Regimes, S.Q., 1969, c. 77)), as well as immediate co-ownership of the matrimonial home. The legislation finally adopted (The Family Law Reform Act, 1978, S.O., 1978, c. 2), however, is based on the Ministry of the Attorney General's 1977 Report, Family Law Reform. It restricts the ambit of the deferred community to "family assets" and includes a measure of judicial discretion

reform commissions—whether or not they also advocate more sweeping reforms—,³ with a good many spouses⁴ and with the

in regard to their ultimate distribution. No provision is made for co-ownership of the matrimonial home, although it is to be controlled by both spouses. The effective date of this Act is March 31st, 1978. See generally Winifred H. Holland, *Reform of Matrimonial Property Law in Ontario* (1978), 1 *Can. J. Fam. L.* 1, and James C. MacDonald (ed.) and others, *Law and Practice under The Family Law Reform Act, 1978* (1979).

New Brunswick: The Law Reform Division of the Department of Justice proposed for discussion joint ownership of the matrimonial home and household goods and, like the recent Ontario legislation, deferred community for all other "family assets" together with some judicial discretion to vary the shares on distribution. *Matrimonial Property Reform for New Brunswick: Discussion Paper*, (1978). The legislation introduced, however, is modelled to some extent on that of Ontario: *Marital Property Act, Bill 79, 1st Sess., 49th Legis., 1979* (reintroduced with minor changes as *Bill 49, 2nd Sess., 49th Legis., 1980*).

Nova Scotia: Nova Scotia recently adopted a *Matrimonial Property Act, S.N.S., 1980, c. 9* (not yet proclaimed in force) somewhat similar to the Ontario, New Brunswick and Prince Edward Island statutes.

Prince Edward Island: Prince Edward Island has recently adopted legislation resembling closely that of Ontario: *Family Law Reform Act, S.P.E.I., 1978, c. 6* (proclaimed in force December 31st, 1978).

Newfoundland: In 1970 The Newfoundland Family Law Study recommended the adoption of a regime of deferred sharing along the same lines as was proposed in Ontario in 1967 (Ontario Law Reform Commission, *Family Law Project, Study: Family Law Study Project 8—Property Rights in the Family*, published as Chapter VI in *Newfoundland Family Law Study, Family Law in Newfoundland* (1973). The legislation eventually introduced (*The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly, 1979*), however, closely resembles Nova Scotia's Act as to sharing of matrimonial assets while also providing for a joint tenancy of the matrimonial home. This bill has apparently been tabled for further study: *The National, Vol. 6, No. 11, Dec. 11th, 1979*.

Northwest Territories: The *Matrimonial Property Ordinance, R.O.N.W.T., 1974, c. M-7* (being *O.N.W.T., 1974, c. 3*) provides for judicial discretion along the same lines as Saskatchewan's 1975 legislation.

³ Proposals for immediate statutory co-ownership have come from England (*The Law Commission, First Report on Family Property: A New Approach* (1973), (*Law Com. No. 52*) and *Third Report on Family Property: The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods* (1978), (*Law Com. No. 86*), Canada, Manitoba (subsequently repealed), Newfoundland, Saskatchewan and New Brunswick (now apparently rejected in the latter two jurisdictions): *ibid.* In other instances (particularly if the basic regime is either one of deferred community or judicial discretion with a presumption of equal sharing), the reform is a guarantee of certain rights of joint control and possession stopping short of immediate co-ownership. See particularly Part III of both *The Family Law Reform Act, 1978, S.O., 1978, c. 2*, and *the Family Law Reform Act, S.P.E.I., 1978, c. 6*; Part II of the *Marital Property Act, Bill 49, 2nd Sess. 49th Legis. (N.B.), 1980*; *Matrimonial Property Act, S.N.S., 1980, c. 9, ss 6-11*. In those provinces with homestead legislation (B.C., Alberta, Saskatchewan and Manitoba), the accent is upon regulating possession at marriage breakdown, as joint control is ensured by the various homestead acts which still remain in force.

⁴ Who register title to the matrimonial home in both names.

courts.⁵ There is, however, substantially less agreement as to what form this co-ownership should take. It is clear that the vast majority of married persons opt for joint tenancy, presumably because of the attendant incident of survivorship. On the other hand, the courts seem equally clearly to favour tenancy in common.⁶ As for the various law reform commissions, there is surprisingly little articulated consideration of the options available, at least in traditional property terms. What does emerge from the various reports and implementing legislation is, first, that there is a renewed interest in Canada in the forms of co-ownership and the incidents attached thereto: the right of survivorship, severability, alienability and the right to partition; second, that solutions are being framed only in terms of the two major forms of co-ownership, joint tenancy and tenancy in common, with changes in their traditional incidents being tailor-made to meet perceived needs; and that a third form of co-ownership is being largely ignored, that of tenancy by the entireties.

It is the purpose of this article to examine tenancy by the entireties under existing Canadian law and to assess its place in the current wave of reform.

⁵ Where title is registered in the name of one of the spouses, the courts will nevertheless sometimes award a partial beneficial interest to the other spouse. See, for example, *Trueman v. Trueman*, 18 D.L.R. (3d) 109, [1971] 2 W.W.R. 688 (Alta S.C. App. Div.); *Kowalchuk v. Kowalchuk* (1974), 51 D.L.R. (3d) 463 (Man. C.A.); *Madisso v. Madisso* (1975), 11 O.R. (2d) 411, 66 D.L.R. (3d) 385 (C.A.) (leave to appeal to S.C.C. refused); *Rathwell v. Rathwell*, 83 D.L.R. (3d) 289, [1978] 2 W.W.R. 101, 1 R.F.L. (2d) 1 (S.C.C.); *Becker v. Pettkus* (1978), 87 D.L.R. (3d) 101, 20 O.R. (2d) 105, 5 R.F.L. (2d) 344 (Ont. C.A.) (leave to appeal to S.C.C. granted: (1978), 25 N.R. 265; heard 23 June 1980 and judgment reserved).

⁶ The difference between joint tenancy and tenancy in common is most evident when one tenant dies: on the death of a joint tenant, his or her interest in the property passes to the surviving joint tenant (or tenants) by right of survivorship, whereas on the death of a tenant in common, the property devolves to his or her heir.

While most court awards are in fact for an equal sharing, see for example, *Rathwell v. Rathwell*, *ibid.*, at pp. 301-302 (D.L.R.), per Dickson J.: "Although equity is said to favour equality, it is not every contribution which will entitle a spouse to a one-half interest in the matrimonial property. The extent of the interest will be proportionate to the contribution, direct or indirect, of the spouse. Where the contributions are unequal, the shares will be unequal." And in this same case, Mr. Justice Martland, although dissenting in the result, was prepared to allow the wife a share falling short of one-half (at p. 294). See also *Becker v. Pettkus*, *ibid.*, and, more precisely, *Hazell v. Hazell*, [1972] 1 W.L.R. 301, [1972] 1 All E.R. 932 (C.A.) (one-fifth share) and *More v. More* (1975), 17 R.F.L. 5 (B.C.S.C.) (one-quarter share). The significance is, of course, that claims to a beneficial interest may therefore be made not only by the spouses themselves (although most, if not all, claims are in fact *inter vivos*) but also by the heirs of a non-title-holding spouse after his or her death.

I. Tenancy by the Entireties in Canadian Law.

At common law, when property was conveyed to a husband and wife in any estate⁷ in such a way that had they been strangers they would have taken as joint tenants, they took rather as tenants by the entireties. This was so because of the doctrine of unity of legal personality, according to which husband and wife were considered in law as one: to the four unities of time, title, interest and possession was added a fifth unity, unity of the person. This unity was so complete that neither spouse was regarded as having even a potential share in the property; both were seised together as one individual of the whole,⁸ that is, of the entirety. They were, in other words, together tenants of the entirety. From this flows one of the most important features of a tenancy by the entireties: its unseverability.⁹ And it follows from this unseverability that the right of survivorship is indestructible.

In contrast, each joint tenant has a potential share¹⁰ with which he or she is free to deal independently, thereby severing the joint tenancy and converting it into a tenancy in common.¹¹ The result is that the right of survivorship is destroyed, as it is not an incident of a tenancy in common. The courts, with whom the right of survivorship does not find favour, show an increasing willingness to extend the operation of this right to sever. This is accomplished by finding a severance in equity in circumstances where there has not been a

⁷ *Bredon's Case* (1597), 1 Co. Rep. 67b, 76 E.R. 161, at p. 161, n. D1.

⁸ They are said to be seised *per tout et non per my*: *Green d. Crew v. King* (1778), 2 Wm. Bl. 1211, 96 E.R. 713, at p. 714, per Blackstone J.

⁹ *Green d. Crew v. King*, *ibid.*; *Atcheson v. Atcheson* (1849), 11 Beav. 485, 50 E.R. 905; *Thornley v. Thornley*, [1893] 2 Ch. 229, at p. 233, per Romer J. This rule did not apply to a term of years in entireties, which the husband could dispose of freely. Sir R. Megarry, and H. W. R. Wade, *The Law of Real Property* (4th ed., 1975), p. 433, n. 90. The question has also been raised as to whether either tenant might nevertheless separately convey his own interest, subject to the other's survivorship. Hilary P. Bradford, *Tenancies by the Entirety in New York* (1951-52), 1 Buff. L. Rev. 279, at p. 284.

¹⁰ They are said to be seised if not a share at least of a potential share and of the whole: *per my et per tout*. Litt. 288, as cited in Megarry and Wade, *op. cit.*, *ibid.*, p. 392.

¹¹ In Saskatchewan, however, unilateral severance is presently impossible by virtue of s. 240(2) of The Land Titles Act, R.S.S., 1978, c. L-5, which stipulates: "The registrar shall not accept for registration an instrument purporting to transfer the share or interest of any such joint tenant unless it is accompanied by the written consent thereto of the other joint tenants. . . ." On the possible interpretation of this section, and on the existence of comparable practices in Alberta and Manitoba, see A. J. McClean, *Severance of Joint Tenancies* (1979), 57 Can. Bar Rev. 1, at p. 7, n. 22. See also *Re Foort & Chapman*, [1973] 4 W.W.R. 461, 37 D.L.R. (3d) 730 (B.C. S.C. in Chambers), at p. 739, per Wooton J., for the suggestion that joint tenants may contract out of the right to sever.

severance in law, in that the requisite formalities have not been complied with. One series of cases deals with severance by implied mutual agreement, that is, where there is a course of conduct "sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common",¹² one indicating "a mutuality of agreement from which the court will infer a mutual agreement to sever".¹³ Such mutuality has been found in a variety of situations ranging from formal agreements to sell and divide the proceeds¹⁴ through negotiations with a view to reaching such an agreement¹⁵ to joint or mutual wills¹⁶ and deathbed conversations.¹⁷ Another and more divided line of cases deals with severance effected unilaterally.¹⁸ Most courts accept such a severance provided the act is carried through to the point where the joint tenant is no longer master of the proceedings and has effectively precluded himself from claiming a right of survivorship.¹⁹ A transfer, even unregistered, to a third party²⁰ or a specifically enforceable agreement to sell²¹ would

¹² *Williams v. Hensman* (1861), 1 J. & H. 546, 70 E.R. 862, at p. 867, per Page Wood V.-C.

¹³ *Flannigan v. Wotherspoon*, 7 W.W.R. (N.S.) 660, [1953] 1 D.L.R. 768, at p. 769 (B.C. S.C.), per Coady J.

¹⁴ *Schofield v. Graham* (1969), 69 W.W.R. 332, 6 D.L.R. (3d) 88 (Alta S.C.); *Re McKee and National Trust Co.* (1975), 7 O.R. (2d) 614, 56 D.L.R. (3d) 190 (C.A.).

¹⁵ *Ginn v. Armstrong* (1969), 3 D.L.R. (3d) 285 (B.C. S.C.); *Re Walters & Walters* (1977), 79 D.L.R. (3d) 122, 1 R.P.R. 150 (Ont. H.C.), aff'd without reasons (1978), 17 O.R. (2d) 592, 84 D.L.R. (3d) 416 (C.A.).

¹⁶ *Szabo v. Boros* (1967), 60 W.W.R. 745, 64 D.L.R. (2d) 48 (B.C. C.A.); *Re Gillespie* (1969), 3 D.L.R. (3d) 317 (Ont. C.A.).

¹⁷ *Flannigan v. Wotherspoon*, *supra*, footnote 13.

¹⁸ By this we do not have in mind severance brought about by one joint tenant murdering another although, interestingly enough, much of the Commonwealth jurisprudence on this point seems to be Canadian: *Re Pupkowski* (1956), 6 D.L.R. (2d) 427 (B.C. S.C.); *Schobelt v. Barber*, [1967] 1 O.R. 349, 60 D.L.R. (2d) 519 (H.C.); *Re Gore*, [1972] 1 O.R. 550, 23 D.L.R. (3d) 534 (H.C.); *Novak v. Gatién* (1975), 25 R.F.L. 397 (Man. Q.B.); *Re Dreger* (1976), 12 O.R. (2d) 371, 69 D.L.R. (3d) 47 (H.C.). *Semble* the same result would obtain if the tenancy were by the entireties, in spite of its unseverable nature, by virtue of the overriding principle that a person shall not benefit from his own wrong.

¹⁹ *Re Wilks, Child v. Bulmer*, [1891] 3 Ch. 59; *Neilson-Jones v. Fodden*, [1974] 3 All E.R. 38; *Munroe v. Carlson* (1975), 59 D.L.R. (3d) 763 (B.C. S.C.). See particularly A. J. McClean, *op. cit.*, footnote 11, at pp. 25-33. For a more liberal English approach, see *Burgess v. Rownsley*, [1975] Ch. 429, [1975] 3 All E.R. 142 (C.A.).

²⁰ *Stonehouse v. A.-G. B.C.*, [1962] S.C.R. 103, 31 D.L.R. (2d) 118, 37 W.W.R. 62. See also *Perks v. Perks*, [1950] 2 W.W.R. 189 (B.C. S.C.); *Re Cameron*, [1957] O.R. 581, 11 D.L.R. (2d) 201 (H.C.). On the other hand, in a provision which appears to be unique in Canada, Saskatchewan's The Land Titles Act, *supra*, footnote 11, s. 240(1) stipulates that a joint tenancy "shall be deemed

²¹ See next page.

appear to be such an act, as would execution and registration of a deed to oneself, particularly with the avowed purpose of severing the joint tenancy.²² But the commencement of a partition action is not, as the action could be discontinued at any time.²³ On the other hand, and seemingly contrary to this general line of jurisprudence, a recent case has held that a declaration of trust in a trust deed in favour of a third party does effect a severance, even though the declaration of trust could subsequently have been set aside.²⁴

Thus we see that a tenancy by the entireties is *ipso facto* unseverable whereas severance of a joint tenancy, long possible in theory, is increasingly easy in fact. It follows that in the former, the right of survivorship is indestructible whereas in the latter, it is illusory at best.

That neither spouse is regarded as having even a potential share in property held in tenancy by the entireties gives rise to a second major difference between it and the other two forms of co-ownership: that is, its immunity from seizure by the creditors of the individual spouses. Since, in general, creditors can reach only those interests in a debtor's property that the debtor can alienate and since the individual spouses do not have separate interest to alienate, it follows that a creditor cannot reach such a debtor's interest.²⁵ With

not to have been severed" by an instrument executed by one of the joint tenants unless it is registered. The Saskatchewan Law Reform Commission, which favoured tenancy in common over joint tenancy, recommended the adoption of a simple mechanism for unilateral severance. Proposals for a Saskatchewan Matrimonial Homes Act (1976), pp. 29-30.

²² *Re McKee and National Trust Co. Ltd.*, *supra*, footnote 14, at p. 196, distinguishing agreements for sale and options to purchase in this regard. *Contra*, *Re Foort & Chapman*, *supra*, footnote 11, which is perhaps distinguishable on the grounds that the transferee, the son of the transferring joint tenant, was in fact a volunteer, as only \$1.00 of the expressed consideration of \$6,001.00 was actually paid, the yearly installment of \$2,000.00 each being forgiven as they fell due (at p. 732).

²³ *Re Murdoch & Barry* (1975), 64 D.L.R. (3d) 222 (Ont. H.C. in Chambers); *Kraemer v. Kraemer & McGill* (1977), 1 R.F.L. (2d) 322 (B.C. S.C.), at p. 328. For specific legislative provision to this effect see Property Law Act, R.S.B.C., 1979, c. 340, s. 18(3) (formerly Conveyancing and Property Law Act, S.B.C., 1978, c. 16; in force October 31st, 1979).

²⁴ *Munroe v. Carlsson*, *supra*, footnote 19; *Rodrigue v. Dufton* (1976), 13 O.R. (2d) 613, 72 D.L.R. (3d) 16, 30 R.F.L. 216 (H.C.).

²⁵ *Sorensen v. Sorensen*, [1977] 2 W.W.R. 438, 3 A.L.R. 8 (Alta S.C., App. Div.) (leave to appeal to S.C.C. granted: (1977), 18 N.R. 358, 6 A.R. 540; appeal discontinued 7th February 1979). In *Public Trustee v. Mee*, [1972] 2 W.W.R. 424, 23 D.L.R. (3d) 49 (B.C. C.A.) (*sub nom. Re Mee*) a similar declaration of trust was held to constitute a severance since, no power of revocation having been reserved, it could not subsequently have been revoked.

²⁵ John Ritchie, *Tenancy by the Entirety in Real Property with Particular Reference to the Law of Virginia* (1942), 28 Va. L. Rev. 608, at p. 617. The

tenancies in common, on the other hand, seizure by creditors is clearly possible. This is also true of joint tenancies and converts it into a tenancy in common.²⁶ The only real question is the point at which such a severance becomes effective.²⁷

A third difference relates to the right to partition. At common law, it is true, compulsory partition was possible only if the form of co-ownership was coparcenary.²⁸ However, as early as 1539 and 1540 joint tenants and tenants in common were given a statutory

application of these conclusions would not seem to be limited to the law of Virginia. See also Estates & Trusts, Probate & Trust Division, Report of Committee on Death Taxation, Property Owned with Spouse: Joint Tenancy, Tenancy by the Entireties and Community Property (1976), 11 *Real Prop, Probate & Trust J.* 405, at p. 410. Laskin's analysis is more qualified: putting the emphasis on the husband's common law right of control and enjoyment during coverture, he concludes that "a creditor of the wife could not at common law realize his claim against an estate by the entireties during coverture; and while a creditor of the husband could get at the latter's interest existing during the joint lives he could not defeat the wife's right to survivorship." Bora Laskin, *Tenancy by the Entireties Revived* (1959), 37 *Can. Bar Rev.* 370, at p. 372. See also Hilary P. Bradford, *op. cit.*, footnote 9, at p. 284, suggesting that the purchaser at an execution sale merely acquires the interest of the debtor spouse subject to his or her right of survivorship.

²⁶ *Re White*, 33 O.W.N. 255, [1928] 1 D.L.R. 846 (S.C. in Bankruptcy); *Re Chisick* (1967), 62 W.W.R. (N.S.) 586 (Man. C.A.).

²⁷ See for example *Power v. Grace*, [1932] O.R. 357, [1932] 2 D.L.R. 793; *Re Penn* (1951), 4 W.W.R. (N.S.) 452 (B.C. S.C.); *Re Brooklands Lumber & Hardware Ltd & Simcoe* (1956), 18 W.W.R. 328, 3 D.L.R. (2d) 762 (Man. Q.B.); *Re Young* (1968), 66 W.W.R. 193, 70 D.L.R. (2d) 594 (B.C. C.A.); *Re McDonald* (1969), 71 W.W.R. 444, 8 D.L.R. (3d) 666 (B.C. S.C. in Chambers); *Sunglo Lumber Ltd v. McKenna* (1974), 48 D.L.R. (3d) 154 (B.C. S.C.).

²⁸ At common law, when a person died intestate and property devolved on two or more persons who together constituted the heir (as for example when the nearest relatives were two or more females), the heirs took as co-parceners. In Canada co-parcenary is virtually non-existent. Where legislation provides that where property devolves on an intestacy to two or more persons they take as tenants in common (see for example *The Devolution of Estates Act*, R.S.O., 1970, c. 129, s. 19), then co-parcenary can remain only upon the descent of an estate tail to two or more daughters. And estates tail have been abolished in all provinces in Canada except Manitoba and Prince Edward Island, and even there they may easily be converted into fees simple by simple registration of disentailing assurances (The Law of Property Act, R.S.M., 1970, c. L 90, s. 30; Real Property Act, R.S.P.E.I., 1974, c. R-4, ss 17 & 18). This is also true in Ontario for estates tail created before May 27th, 1956 (The Conveyancy and Law of Property Amendment Act, 1956, S.O., 1956, c. 10, s. 3, providing for the continued application of The Estates Tail Act, R.S.O., 1950, c. 117, to all existing estates tail). For legislation abolishing estates tail see: Property Law Act, R.S.B.C., 1979, c. 340, s. 10; The Transfer and Descent of Land Act, R.S.A., 1970, c. 368, s. 10; The Land Titles Act, R.S.S., 1978, c. L-5, ss 243-244; The Conveyancing and Law of Property Act, R.S.O., 1970, c. 85, s. 4 (for documents effective after May 27th, 1956); Property Act, R.S.N.B., 1973, c. P-19, s. 19; Real Property Act, R.S.N.S., 1967, c. 261, s. 5; Wills Ordinance, R.O.Y.T., 1971, s. 19(2); Wills Ordinance, R.O.N.W.T., 1974, c. W-3, s. 20(2).

right to compel partition.²⁹ While the legislation of the various Canadian jurisdictions is generally similar to the English, in some provinces partition is mandatory, that is as of right, while in the majority it is discretionary.³⁰ Yet even in these latter jurisdictions, partition was until very recently regarded as a *prima facie* right which would be denied only in the most limited circumstances—if the applicant was acting vexatiously or oppressively, or did not come to court with clean hands.³¹

Tenancy by the entireties, on the other hand, remains as the one form of co-ownership that is not subject to partition, since it was not—and has not since been—included within the terms of the various Partition Acts. In other words, a tenancy by the entireties is unpartitionable while the other forms of co-ownership have been, except rarely, partitionable *per se*.

Nevertheless, in recent years joint tenancy and tenancy in common have moved towards tenancy by the entireties, at least as far as the right to partition is concerned, since this right has fallen somewhat in disfavour,³² particularly in cases involving the mat-

²⁹ Partition Acts, 31 Hen. 8, c. 1 (estates of inheritance) and 32 Hen. 8, c. 32 (estates for life and years). In 1868 the courts were given a discretion to order a sale in lieu of physical partition: Partition Act, 1868 (U.K.), 31 & 33 Vict., c. 40. These provisions have all been adopted in Canada either through the doctrine of reception (Saskatchewan, Yukon and Northwest Territories) or by virtue of independent Acts: Partition of Property Act, R.S.B.C., 1979, c. 311; The Partition and Sale Act, S.A., 1979, c. 59; The Law of Property Act, R.S.M., 1970, c. L 90, ss 18-26; The Partition Act, R.S.O., 1970, c. 338; Order 56, r. 23, of the Rules of Court of New Brunswick; Partition Act, R.S.N.S., 1967, c. 223; Real Property Act, Part III, R.S.P.E.I., 1974, c. R-4, as am. by S.P.E.I., 1974 (2nd), c. 65, s. 3(d); The Judicature Act, R.S.N., 1970, c. 187, ss 109-121.

³⁰ It is mandatory in those provinces or territories that have received the English Act and discretionary in the others (with the exception of Alberta where it is also mandatory: The Partition and Sale Act, *ibid.*, s. 2(2)); British Columbia (*Evans v. Evans* (No. 2), 1 W.W.R. (N.S.) 280, [1951] 2 D.L.R. 221 (B.C. C.A.)), Manitoba (*Fritz v. Fritz* (No. 2) (1952), 60 Man. R. 28, 4 W.W.R. (N.S.) 650 (C.A.)), Ontario (*Re Hutcheson & Hutcheson*, [1950] O.R. 265, [1950] 2 D.L.R. 751 (C.A.)), New Brunswick, Nova Scotia and *semble* Newfoundland.

³¹ See particularly *Davis v. Davis*, [1954] O.R. 23, [1954] 1 D.L.R. 827 (C.A.), following the lead of Ferguson J. in *Szuba v. Szuba*, [1950] O.W.N. 669, [1951] 1 D.L.R. 387 (H.C.).

³² Some changes have been statutory. For example partition of the common elements of a condominium development is impossible: Condominium Act, R.S.B.C., 1979, c. 61, s. 12; The Condominium Property Act, R.S.A., 1970, c. 62, s. 5(3); The Condominium Property Act, R.S.S., 1978, c. C-26, s. 5(3); The Condominium Act, R.S.M., 1970, c. C170, s. 8(5); The Condominium Act 1978, S.O., 1978, c. 84, s. 7(6); Condominium Property Act, R.S.N.B., 1973, c. C-16, s. 7(6); Condominium Act, S.N.S., 1970-71, c. 12, s. 16(6); Condominium Act, S.P.E.I., 1977, c. 6, s. 7(6); The Condominium Act, R.S.N., 1970, c. 57, s. 11(2) (in force 1st January 1975); Condominium Ordinance, R.O.Y.T., 1974, c. C-12, s.

rimonial home. Courts across Canada have extended their discretion to refuse an order for partition and sale to include the wider ground of the inconvenience or hardship that such an order would entail for the occupying party. Such cases usually deal with the matrimonial home, where the occupier is the spouse or former spouse of the petitioning party and is either disabled or with young children to support.³³

Finally, tenancy by the entireties—neither severable nor partitionable during the continuance of the marital relation—ends

9(5); Condominium Ordinance, R.O.N.W.T., 1974, c. C-10, s. 9(5). And in some jurisdictions partition cannot be granted if it would conflict with the relevant subdivision control legislation: Partition of Property Act, R.S.B.C., 1979, c. 311, s. 17 (first added by S.B.C., 1976, c. 2, s. 25); The Partition and Sale Act, S.A., 1979, c. 59, s. 14, and *Wensel v. Wensel* (1976), 72 D.L.R. (3d) 1, [1977] 1 W.W.R. 32, 5 A.R. 379 (Alta S.C., App. Div.); and *quaere* The Planning Act, S.M., 1975, c. 29, s. 60(1) as am. by S.M., 1978, c. 37, s. 12. While no specific prohibition is found in the Ontario Act, see: *A.-G. Ont. v. Harry* (1979), 93 D.L.R. (3d) 332 (Ont. H.C.); *Barchuk v. Valentini* (1979), 96 D.L.R. (3d) 753, 6 R.P.R. 224 (Ont. H.C.). But see: *Re Lama et al. and Coltsman et al.* (1978), 20 O.R. (2d) 701, 98 (Co. Ct); *Re Hay and Gooderham* (1979), 24 O.R. (2d) 701, 98 D.L.R. (3d) 383 (Div. Ct); *Re Winters et al., and Ho* (1979), 102 D.L.R. (3d) 180, 8 R.P.R. 290 (Ont. H.C.). Note that The Planning Act now requires that where an action is brought under The Partition Act, notice shall be given to the Minister of Housing; S.O., 1978, c. 93, s. 5.

³³ This is particularly so in those provinces in which partition is discretionary. See for example: *Re Yale and MacMaster* (1974), 46 D.L.R. (3d) 167 (Ont. H.C.); *Melvin v. Melvin* (1975), 58 D.L.R. (3d) 98 (N.B.S.C., App. Div.); *Fernandes v. Fernandes* (1975), 65 D.L.R. (3d) 685 (B.C. S.C.); *McLennan v. McLennan* (1975), 29 R.F.L. 117 (B.C. S.C.); *Bossert v. Bossert* (1976), 29 R.F.L. 387 (Ont. H.C.); *Parney v. Parney* (1976), 30 R.F.L. 64 (Ont. Co. Ct); *Harmeling v. Harmeling* (1978), 90 D.L.R. (3d) 208 (B.C.C.A.). And in Alberta, in spite of the mandatory character of the then applicable English legislation, the Appellate Division recently held that the court nevertheless has discretion to refuse partition: *Clarke v. Clarke* (1974), 48 D.L.R. (2d) 707, 15 R.F.L. 115 (where sale in lieu of partition was requested); *Re Kornacki & Kornacki* (1975), 58 D.L.R. (3d) 159 (generally; no authority cited). However, its mandatory character was reaffirmed by the Alberta legislature: The Partition and Sale Act, *supra*, footnote 30.

A cautionary note was sounded in *Re MacDonald and MacDonald* (1976), 73 D.L.R. (3d) 341, 30 R.F.L. 187 (Ont. H.C., Div. Ct) in which the court reaffirmed that the usual modes of co-ownership are, in principle, partitionable. Speaking for the court, Mr. Justice Steele said: "Throughout all of these cases, nothing has detracted from the *prima facie* right of the husband for partition. . . . I believe that this discretion must be exercised on narrow grounds as indicated in the *Davis* decision, with the added ground that if there is a serious hardship in the respondent, then the Court may consider it as a factor in exercising its discretion not to grant the partition" (at p. 346 (D.L.R.)). What is required is "a preponderance of evidence to indicate serious hardship would result", not "a mere balance of probabilities of hardship". *Ibid.*

It should be noted that even within the confines of the *Davis* decision, the courts have sometimes been able to refuse an application for partition because of resulting hardship, by holding that such hardship was intended by the applicant, who was

automatically upon divorce. Divorce destroys the unity of the person upon which tenancy by the entireties is founded and converts it into a joint tenancy.³⁴

Whether or not tenancy by the entireties still exists in Canada is a matter of some debate. Prince Edward Island and Alberta, for example, have recently abolished it—and Newfoundland and British Columbia have also apparently done so.³⁵ In the other provinces, the answer would seem to depend on the effect of the various Married Women's Property legislation,³⁶ that is, on whether or not one

therefore acting maliciously, vexatiously or oppressively. See especially *Rayner v. Rayner* (1956), 3 D.L.R. (2d) 522 (B.C. S.C.); *Steele v. Steele* (1960), 67 Man. R. 270 (Q.B.); *Bergen v. Bergen* (1969), 68 W.W.R. 196 (B.C. S.C.); *Klakow v. Klakow* (1972), 7 R.F.L. 349 (Ont. S.C. in Chambers); *Czarnich v. Zagora* (1972), 8 R.F.L. 259 (Ont. S.C. in Chambers).

³⁴ *Thornley v. Thornley*, *supra*, footnote 9, at p. 233, per Romer J. See however W. R. Pepler, Partition—A Survey of The Law in Alberta (1977), 15 Alta L. Rev. 1. at p. 3, suggesting that the tenancy is converted into tenancy in common. The most exact analysis appears to be that of John Ritchie, *op. cit.*, footnote 25, at p. 611, n. 12a: "After such a divorce, the former tenants by the entirety will hold either as joint tenants or tenants in common, depending upon the type of tenancy which would have been created by the instrument if the transferees had not been married at the time the instrument took effect." It would seem that in the normal course of events this would be a joint tenancy.

³⁵ S. 64(1) of the Family Law Reform Act, S.P.E.I., 1978, c. 6, states simply: "The estate of tenancy by entireties [*sic*] and the common law rules related thereto are abolished." The Alberta provision provides further that existing tenancies by the entireties are converted into joint tenancies and that in future any disposition that would have the effect of creating such a tenancy creates instead a joint tenancy: The Transfer and Descent of Land Act, R.S.A., 1970, c. 368, s. 6 as am. by The Partition and Sale Act, S.A., 1979, c. 59, s. 21.

Both the Newfoundland and British Columbia enactments provide that for all purposes of acquisition of land, a husband and wife shall "be treated as two persons": The Chattels Real Act, R.S.N., 1970, c. 36, s. 4(1), as am. by S.N., 1972, No. 13, s. 2 and the Property Law Act, R.S.B.C., 1979, c. 340, s. 12. That the intention in Newfoundland was to abolish tenancy by the entireties is clear from the fact that the following subsection specifically refers to this form of tenancy in converting existing ones into joint tenancies, and from the fact that the 1972 enactment follows hard on the heels of a recommendation of the Newfoundland Family Law Study that tenancy by the entireties be abolished: Family Law in Newfoundland, *op. cit.*, footnote 2, at pp. 278-279. This also seems to have been the case in British Columbia since according to the Explanatory Notes accompanying the Bill (Bill 31, 3rd Sess., 31st Legis., 1977) this section "removes any remaining doubt (a) that tenancy by entireties is abolished, and (b) that transfer to husband and wife and a third party, in the absence of a contrary intention, passes a third share to each and not a half share to husband and wife and the other half to the third party." (See *infra*, footnote 37). In both provinces, one would have preferred a more direct legislative approach.

³⁶ The Married Persons' Property Act, R.S.S., 1978, c. M-6; The Married Women's Property Act, R.S.M., 1970, c. M70; The Married Women's Property Act, R.S.O., 1970, c. 162 (replaced by The Family Law Reform Act, 1978, S.O., 1978, c. 2); Married Woman's Property Act, R.S.N.B., 1973, c. M-4; Married Women's

regards the husband's traditional unilateral right of control and enjoyment of the property (his marital right or *ius mariti*) as an incident of tenancy by the entirety itself—so that if it is abolished, tenancy by the entirety is also abolished. Or whether, and this is perhaps merely another way of saying the same thing, these Acts destroy the fundamental characteristic of unity of husband and wife.

That the Married Women's Property Act has made impossible tenancies by the entirety is the position adopted in England.³⁷ This was also the position in Ontario for some time, as courts there followed the English precedent in *Re Wilson and Toronto Incandescent Electric Light Co.*³⁸ and later in *Spring v. Kinnie*.³⁹

. . . the effect of the Married Women's Property Act . . . is to enable the wife to take as though she were a *feme sole*, and so the effect of the marital relationship is ended so far as real property is concerned.

However, in 1958, this approach was rejected in *Campbell v. Sovereign Securities and Holdings Co. Ltd.*⁴⁰ In that case, Stewart J., whose reasons and conclusions were specifically adopted by the Court of Appeal, disagreed with the above-quoted remark as being neither necessary to the decision nor of general application.⁴¹ He

Property Act, R.S.N.S., 1967, c. 176; Married Women's Property Ordinance, R.O.Y.T., 1971, c. M-4; Married Women's Property Ordinance, R.O.N.W.T., 1974, c. M-6.

³⁷ *Thornley v. Thornley*, *supra*, footnote 9. The English courts have held, however, that if property is conveyed to husband and wife and third parties (even as tenants in common), the old rule that in the absence of a contrary intention the husband and wife together take one share still applies: *In Re Jupp: Jupp v. Blackwell* (1888), 39 Ch. D. 148. See also *Bedson v. Bedson*, [1965] 2 Q.B. 666, [1965] 3 All E.R. 307 (C.A.) for the suggestion of Lord Denning that when a husband and wife are joint tenants of a matrimonial home, neither can sell or otherwise sever the tenancy while the other is in possession. Lord Russell, dissenting, called this "an attempt to revive to some extent the long defunct tenancy by entirety which, as I have already remarked, was doomed by the Married Women's Property Act, 1882, itself." (at p. 690 (Q.B.)). A few jurisdictions in the United States also take the position that tenancy by the entirety is incompatible with this Act. John Ritchie, *op. cit.*, footnote 25, at p. 612; Effect of the Married Women's Property Acts upon Estates by the Entirety (1923-24), 37 Harv. L. Rev. 616, at p. 618.

³⁸ (1891), 20 O.R. 397 (Q.B.D.).

³⁹ 62 O.L.R. 652, [1928] 4 D.L.R. 723, at p. 723 (S.C., App. Div.), per Middelton J.A.

⁴⁰ [1958] O.W.N. 414, 16 D.L.R. (2d) 606; aff'g [1958] O.R. 441, 13 D.L.R. (2d) 195. See comment (1959), 37 Can. Bar Rev. 370 by B. Laskin.

⁴¹ 13 D.L.R. (2d), at p. 202. A discussion of tenancy by the entirety was *obiter* in this case—and for that matter in *Re Wilson* and even *Campbell v. Sovereign Securities* itself—because the only real issue was whether or not the surviving spouse took the property by survivorship. In other words, in each case, the court had to decide whether or not the spouses held as tenants in common or by a form of co-ownership having as incident the right of survivorship; but in each, it was unnecessary for the court to decide between joint tenancy and tenancy by the

stated: "I do not think that the Married Women's Property Act ousts the doctrine of the unity of the husband and wife (upon which the concept of tenancy by the entireties is really based) . . ." ⁴² This would also seem to be or to have been the position in British Columbia, Alberta, Saskatchewan, Prince Edward Island and Newfoundland which, in addition to the usual Married Women's Property Acts, ^{42a} have had or still have legislation explicitly envisaging the possibility of tenancies by the entireties. ⁴³ In other provinces, however, in the absence of both specific statutory enactments and judicial guidance, the answer is entirely a matter of conjecture. Do they follow the example of England, or rather that of Ontario? Finally, what is the position now in Ontario since the adoption of The Family Law Reform Act, 1975, section 1(1) of which provided: "For all purposes of the law of Ontario, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband." ⁴⁴ On one hand, one could argue that this section destroys the unity of husband and wife in the clearest and most unambiguous

entireties. The only case in which the choice between joint tenancy and tenancy by the entireties affected the outcome was *Re Demaiter and Link*, [1973] 3 O.R. 140, 36 D.L.R. (3d) 164 (S.C.).

⁴² *Ibid.*, at p. 201. The majority of American states also reflect this view. John Ritchie, *op. cit.*, footnote 25, at pp. 612-613; Ont. Law Ref. Comm., Study of the Family Law Project (1967), Vol. I: Property Subjects, p. 148; Report of Committee on Death Taxation, *op. cit.*, footnote 25, at p. 406, n. 11; Hilary P. Bradford, *op. cit.*, footnote 9, at pp. 282-283; Effect of the Married Women's Property Acts upon Estates by Entireties, *op. cit.*, footnote 37, at pp. 616-619. Some states even hold that tenancies by the entireties are entirely unaffected by the Married Women's Property Act and that the husband retains his *ius mariti* as an incident of the estate. John Ritchie, *ibid.*; Effect of the Married Women's Property Act upon Estates by the Entireties, *ibid.*, at pp. 616-617.

^{42a} The Married Women's Property Act, R.S.A., 1970, c. 227; The Married Persons' Property Act, R.S.S., 1978, c. M-6; Married Women's Property Act, R.S.P.E.I., 1974, c. M-6 (replaced by Family Law Reform Act, S.P.E.I., 1978, c. 2); The Married Women's Property Act, R.S.N., 1970, c. 227.

⁴³ Land Registry Act, R.S.B.C., 1960, c. 208, s. 21(1) (now replaced by Land Title Act, R.S.B.C., 1979, c. 219 (in force October 31st, 1979) which has no equivalent section); The Transfer and Descent of Land Act, R.S.A., 1970, c. 368, s. 6 (since am. by The Partition and Sale Act, S.A., 1979, c. 59, s. 21); The Land Titles Act, R.S.S., 1978, c.L-5, s. 245; Dependents of a Deceased Person Relief Act, R.S.P.E.I., 1974, c. D-6, ss 19(1)(d) and 19(2) (since amended by Family Law Reform Act, S.P.E.I., 1978, c. 6, s. 64(2)); The Chattels Real Act, R.S.N., 1970, c. 36, s. 4(2) as am. by S.N., 1972, No. 13, s. 2.

⁴⁴ S.O., 1975, c. 41. See now The Family Law Reform Act, 1978, S.O., 1978, c. 2, s. 65(1). Prince Edward Island has an identical provision in its Act (s. 60(1)); but in spite of this and even though the P.E.I. Act does not have an equivalent to subsection 4, it was thought necessary to abolish tenancy by the entireties explicitly. *Supra*, footnote 35.

terms, thereby bringing down the concept of tenancy by the entirety. On the other hand, one could look rather to subsection 4 of this same section—which explains that the purpose of the provision in question is “to make the same law apply, and to apply equally, to married men and married women and to remove any difference therein resulting from any common law rule or doctrine, and [it] . . . shall be so construed”—and argue that (abstracting the husband’s marital right) the same law *does* apply to husband and wife under tenancy by the entirety, that there is therefore no difference to be removed and that, accordingly, subsection 1 has no purpose, that is no application, in the case of tenancies by the entirety.

This brings us back to the question of the place of the husband’s marital right in tenancy by the entirety—for it is clear that, whatever be the effect of the Married Women’s Property legislation on the unity of husband and wife, it did end the husband’s control over his wife’s property. The more logical position would seem to be that this legislation has merely enabled the wife to participate in its control: in the same way that it has abolished the husband’s estate *jure uxoris* in the property the wife owns alone and has given her full control over it, so it has given her the right to equal participation with her husband in the management and control of property they own together. Under this view, in other words, the husband’s control over estates held by the entirety was not an incident of the tenancy by the entirety but rather an example of his common law right by marriage, of general application to all his wife’s property.

Assuming, then, that tenancies by the entirety continue to be possible in Canada, how may they be created? The first point is that, except in rare instances, such a tenancy must be expressly created. This is so because almost every jurisdiction in Canada has a statutory provision to the effect that if land is granted to two or more persons, they are presumed to take as tenants in common unless a contrary intention appears;⁴⁵ and in Ontario this presumption specifically applies even in the case of husband and wife.⁴⁶ The one exception to

⁴⁵ The exceptions are Prince Edward Island and Newfoundland. For the general run of legislation see: Property Law Act, R.S.B.C., 1979, c. 340, s. 11; The Transfer and Descent of Land Act, R.S.A., 1970, c. 368, s. 9; The Land Titles Act, R.S.S., 1978, c. L-5, s. 242; The Law of Property Act, R.S.M., 1970, c. L90, s. 15; The Conveyancing and Law of Property Act, R.S.O., 1970, c. 85, s. 13; Property Act, R.S.N.B., 1973, c. P-19, s. 20; Real Property Act, R.S.N.S., 1967, c. 261, s. 4; Tenants in Common Ordinance, R.O.Y.T., 1971, c. T-1, s. 2; Tenants in Common Ordinance, R.O.N.W.T., 1974, c. T-3, s. 2.

⁴⁶ This would also seem true of British Columbia by virtue of s. 12 of the new Property Law Act, cited *supra*, footnote 35. Note that in Ontario the original version of The Family Law Reform Act, 1975, suggested that in the case of a husband and wife, the presumption should be that they take as joint tenants, since this is what most couples do in fact choose (Bill 117, 4th Sess., 29th Legis., 1974, ss 1(3)(e) and 5). This proposal was omitted without explanation from the final draft.

date arose in *Campbell v. Sovereign Securities and Holding Co. Ltd.*⁴⁷ In that case, property had been sold to a husband and wife under an agreement for sale which was silent as to the form of tenancy. (It was not until after the husband's death that the vendor delivered a deed to the wife which conveyed the property to her and her husband "as joint tenants and not as tenants in common".) In deciding whether the wife alone could convey good title to a subsequent purchaser, the court held that the section in question did not apply, as an agreement for sale is not a "letters patent, assurance or will" within the terms of the section, which contemplates present or past but not future transfers of land, and that accordingly the husband and wife did not take as tenants in common. This reasoning seems applicable to most, if not all, of the legislation.⁴⁸

Therefore, specific words are required to rebut the presumption of tenancy in common. But what words are sufficient? In Saskatchewan, at least, the answer is clear: it requires express words to create a tenancy by the entireties.

When land is transferred to a man and his wife the transferees take according to the tenor of the transfer, and they shall not take by the entireties unless it is so expressed in the transfer.⁴⁹

And this would also seem to be the case in Ontario, at least if *Re Demaiter and Link*⁵⁰ can be made to stand for anything. In that case the husband and wife had taken title to property specifically as joint tenants and not as tenants in common. The husband later deserted his wife, conveyed his interest in the property to a third party and subsequently died. The third party was seeking an order for partition and sale, and one of the defences raised was that the original conveyance had created a tenancy by the entireties, which was unseverable, and that therefore the property belonged entirely to the wife on the death of the husband by virtue of her indefeasible right of survivorship. Counsel's line of reasoning is not clear from the report but it must have been the following: it was established in *Campbell v. Sovereign Securities and Holding Co. Ltd.*⁵¹ that tenancy by the entireties continues to exist in Ontario; at common law no special words of limitation were required and this estate was created whenever property was conveyed to a husband and wife in such a

⁴⁷ *Supra*, footnote 40.

⁴⁸ The possible exception is the Manitoba Act, *supra*, footnote 45, which speaks of "or any other instrument" as well as of letters patent, conveyances, assurances, and wills.

⁴⁹ The Land Titles Act, R.S.S., 1978, c. L-5, s. 245. This was also the case in Alberta by virtue of The Transfer and Descent of Land Act, R.S.A., 1970, c. 369, s. 6, before it was amended. *Supra*, footnote 35.

⁵⁰ *Supra*, footnote 41.

⁵¹ *Supra*, footnote 40.

way that, had they been strangers, they would have taken as joint tenants; this was so in the conveyance in question as the property was conveyed to the husband and wife specifically as joint tenants, thereby rebutting the presumption of tenancy in common raised by section 13 of The Conveyancing and Law of Property Act;⁵² accordingly, the husband and wife must hold as tenants by the entireties. This ingenious argument would mean that most if not all couples who presently co-own their property hold it as tenants by the entireties. Pushed to the limit, it would entail the rather startling conclusion that not only does tenancy by the entireties exist in Canada, but that in the vast majority of jurisdictions its creation is in fact mandatory if one does not want a tenancy in common, and that all and every severance and partition of matrimonial homes jointly owned have been ineffective. Mr. Justice Fanoj avoided this dilemma by holding that since the basis for the decision in *Campbell v. Sovereign Securities and Holdings Co. Ltd* was that an agreement for purchase was not an "assurance" within the meaning of section 13, it did not apply to the case at bar: "In the instant application there was a conveyance to Mr. and Mrs. Link as joint tenants and not as tenants in common. Clearly the deed would be an 'assurance' within the meaning of s. 13 of the *Conveyancing and Law of Property Act*. It is my considered view that a joint tenancy was thereby created and not a tenancy by the entireties."⁵³ With respect, this reasoning is unconvincing. It is difficult to see why it mattered whether or not the deed was an "assurance" within the meaning of section 13 as this section did not apply. It only applies where the document in question—be it letters patent, conveyance, assurance or will—is silent as to the form of co-ownership, that is, where the parties have not rebutted the presumption in favour of a tenancy in common by indicating a contrary intention. And in the *Link* case the parties had clearly indicated a contrary intention by taking "as joint tenants and not as tenants in common". This leaves unanswered the main question: if the husband and wife did not take as tenants in common, by what tenancy did they take—joint tenancy or tenancy by the entireties?

If, as was suggested in the *Campbell* case, tenancy by the entireties continues to exist in Ontario, then it must be possible to create one. And, in the absence of statutory provision to the contrary,⁵⁴ the method of creation must be the same as that existing

⁵² *Supra*, footnote 45.

⁵³ *Supra*, footnote 50, at p. 166 (D.L.R.).

⁵⁴ The only possible statutory provision to the contrary, albeit an indirect one, which this writer could find is s. 11(1)(a) of The Family Law Reform Act, 1978, *supra*, footnote 3, to the effect that "the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to

in England at common law. In this event, no special words of limitation are required; all that is necessary is that the estate be conveyed to the spouses "in terms which would have made them joint tenants if they had not been married".⁵⁵ In short, it is difficult to see how one can in fact avoid the dilemma posed by counsel's argument in *Re Demaiter and Link*.

Tenancy by the entireties, then, can be described as a variation on joint tenancy. Like joint tenancy, the right of survivorship applies. But unlike joint tenancy, this right is indestructible: a tenancy by the entireties may neither be severed nor partitioned. That such a tenancy may still be created is clearly admitted in Saskatchewan and arguable in the others. What then is the place of such a tenancy in the current wave of reform of the law of matrimonial property?

II. Tenancy by the Entireties and Law Reform.

The first and most obvious point is that any explicit reference to tenancy by the entireties is totally absent from the various law reform commission proposals. Five provinces initially considered co-

have on severance of the joint tenancy, a one-half beneficial interest in the property". From this it could be argued that since property held by husband and wife as joint tenants is severable, it is therefore not a tenancy by the entireties; accordingly specific words other than "as joint tenants" must be necessary to create a tenancy by the entireties. To like effect, see s. 52(2)(g) of the Family Relations Act, R.S.B.C., 1979, c. 121; s. 15(1)(a) of the Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1980; s. 21(1)(a) of Matrimonial Property Act, S.N.S., 1980, c. 9; s. 29(2) of The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly (Nfld), 1979. Saskatchewan's recent legislation has similar sections (The Matrimonial Property Act, S.S., 1979, c. M-6.1, ss 26(1)(b)(vi) and 50(2)(a)) but, as we have seen, this province also has legislation specifically requiring express words to create a tenancy by the entireties. *Supra*, footnote 29. Finally, that P.E.I. also has a similar section (Family Law Reform Act, S.P.E.I., 1978, c. 6, s. 12(1)(a)) would seem irrelevant for the purposes of the present discussion for, as we have also seen, it has clearly abolished tenancy by the entireties. *Supra*, footnote 35.

⁵⁵ *Thornley v. Thornley*, *supra*, footnote 9, at p. 233, per Romer J. See for example: *Green d. Crew v. King*, *supra*, footnote 8, at p. 713 ("to the use of John Fitzwalter and Elizabeth, his wife, and the longer liver of them; and after the death of the longer liver of them, to the right heirs of the said John and Elizabeth for ever"); *Doe d. Freestone v. Parrat* (1794), 5 T.R. 652, 101 E.R. 363, at p. 364 ("to her nephew in law John Freestone and Lucy his wife, and to their heirs and assigns for ever"); *Doe d. Dormer v. Wilson* (1821), 4 B & Ald. 303, 106 E.R. 948, at p. 949 (to the use of husband and wife "for and during the term and terms of their natural lives, and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor of them for ever"); *Ward v. Ward* (1880), 14 Ch. D. 506, at p. 506 ("unto and to use of the said . . . [husband and wife] during their joint lives", and after the death of the husband to the use of the wife absolutely, with trusts for the husband if he survived her, and for the children"). The American position seems to be that the husband and wife are presumed to take as tenants by the entireties unless a contrary intention appears from the instrument. See

ownership of the matrimonial home as a component of a total reform of their matrimonial regime. Of these, two (Ontario and Saskatchewan) preferred tenancy in common while three (Manitoba, New Brunswick and Newfoundland) favoured joint tenancy. And whereas, as we have seen,⁵⁶ four of these jurisdictions eventually decided against a statutory co-ownership in favour of a more general reform,⁵⁷ nevertheless echoes of tenancy by the entireties are heard, as the incidents attached to the various regimes have been altered so as to resemble at times those attached to tenancy by the entireties.

Take, for example, the right of survivorship. Looking first at the proposals for statutory co-ownership, the Saskatchewan Law Reform Commissioners examined this incident and expressly rejected it as being inherently unfair in the circumstances. "Thus, constrained not to impose a joint tenancy, the alternative faced by the Commission was to impose a tenancy in common in equal share."⁵⁸ Tenancy in common, therefore, but tenancy in common with a difference, as the right of survivorship reappeared in two instances: if the property in question was the principal residence, regardless of the name in which it was registered, or if it was registered solely in the name of the survivor even if not the principal residence.⁵⁹ Thus, it was only in the doubly limited situation where the property *was not* the principal residence and *was* registered in the name of the deceased that the full effect of its being held in common would have applied. It was only then that "one-half interest will remain with the survivor and a one-half interest will go by will or upon an intestacy as part of the estate of the deceased".⁶⁰ The Saskatchewan Law Reform Commission, therefore, opted for a

John Ritchie, *op. cit.*, footnote 25, at pp. 610-619; Hilary P. Bradford, *op. cit.*, footnote 9, at pp. 279-280; Report of Committee on Death Taxation, *op. cit.*, footnote 25, at p. 407.

⁵⁶ *Supra*, footnote 2.

⁵⁷ The exception being Newfoundland, which still favours a joint tenancy for the matrimonial home. *Supra*, footnote 12.

⁵⁸ Proposals for a Saskatchewan Matrimonial Home Act (1976), p. 29. See generally pp. 27-29.

⁵⁹ *Ibid.*, pp. 34-36. The rationale for these two variants was, in the first case, to ensure that the survivor would not be forced out of the principal residence and, in the second, to prevent possible resentment and resistance on the part of a survivor who might be asked to transfer a one-half interest to the estate of the deceased spouse. The intent of the legislation was "to create equality between the spouses and not to assist beneficiaries or creditors of a deceased spouse at the expense of the survivor" (p. 35). Of somewhat similar effect was the New Brunswick suggestion that there be no deferred sharing where it was the surviving spouse who held the larger share of the property. Matrimonial Property Reform for New Brunswick: Discussion Paper (1978), pp. 26-27.

⁶⁰ *Op. cit.*, footnote 58, p. 35.

tenancy in common, but one with a partial right of survivorship. Manitoba, on the other hand, preferred joint tenancy in its initial reform specifically because of the right of survivorship, a right which it reinforced by stipulating that such a joint tenancy not be severable:⁶¹ in other words, a tenancy by the entireties unrecognized as such.

Even where the reform is one of sharing of assets (rather than co-ownership), one can perhaps also speak of a right of survivorship. True, some jurisdictions envisage a sharing only on marriage breakdown, and consequently do not admit of new applications by or against deceased spouses' estates.⁶² In Saskatchewan, New Brunswick, Nova Scotia and Newfoundland, however, applications for matrimonial property orders may be commenced not only on marriage breakdown but also on the death of a spouse. For example, in Saskatchewan, one may be "made or continued by a surviving spouse after the death of the other spouse or may be continued by the personal representative of the deceased spouse".⁶³ More interesting, perhaps, for our purposes, is the New Brunswick suggestion, which singles out for special treatment the matrimonial home:

Where a spouse dies, the surviving spouse, upon application of the Court, is entitled as against the estate of the deceased spouse to have the marital property divided into equal shares; and in any division of marital property the Court shall order the deceased spouses' interest in the marital home to vest in the

⁶¹ The Marital Property Act, S.M., 1977, c. 48, s. 6(1). This section spoke of the joint tenancy not being severable "by mere execution by one spouse of an instrument purporting to transfer or otherwise dispose of one-half of the interest in favour of a third person". *Quaere* other methods of severance?

⁶² Family Relations Act, R.S.B.C., 1979, c. 121, s. 43(1); The Marital Property Act, S.M., 1978, c. 24, s. 24(2) (providing that the rights under the Act "of a spouse who has rights under the Dower Act" expire on death. *Quaere* rights of other spouses?). The Family Law Reform Act, 1978, S.O., 1978, c. 2, s. 4 and especially subsection 3 thereof: "The rights under subsection 1 are personal as between the spouses but any application commenced under subsection 2 before the death of a spouse may be continued by or against the estate of the deceased spouse." To like effect, the Family Law Reform Act, S.P.E.I., 1978, c. 6, s. 4(3). The Alberta legislation is somewhat wider in that it does envisage an application being launched by a surviving spouse, but "only if an application for a matrimonial property order could have been commenced immediately before the death of the other spouse." The Matrimonial Property Act, S.A., 1978, c. 22, s. 11(2). See also s. 16.

⁶³ The Matrimonial Property Act, S.S., 1979, c. M-6.1, s. 30(1) (emphasis added). In other words, while an application begun before death may be continued either by the surviving spouse or on behalf of the deceased spouse (as in Ontario and Prince Edward Island), one may be initiated after death only by the surviving spouse and not by the deceased spouse's estate. The rationale for this difference in treatment is presumably the same as that prompting the Saskatchewan Law Reform Commission to import a measure of survivorship into a statutory tenancy in common. See *supra*, footnote 59.

surviving spouse unless . . . the Court considers that another order would be more fair and equitable in the circumstances.⁶⁴

May not one, therefore,—particularly in light of the mandatory nature of this legislation—properly speak of a right of survivorship in the matrimonial home?

Take, as well, the right to alienate one's interest, that is, a right to sever. It would seem that where the suggestion was for statutory co-ownership, neither spouse could deal autonomously with his or her own interest in the property. This is certainly the case in Newfoundland,⁶⁵ but it is not entirely clear in the other jurisdictions. For example, we have seen that the earlier Manitoba legislation, since repealed, specifically provided that the statutory joint tenancy would not be severable "by the mere execution by one spouse of an instrument purporting to transfer or otherwise dispose of one-half of the interest in favour of a third person".⁶⁶ The Saskatchewan proposal was more ambiguous. On one hand, the Commission envisaged the provision of a simple mechanism for unilateral severance of title to a matrimonial home jointly held.⁶⁷ On the other, it was suggested that the status of a matrimonial home would automatically cease upon termination of a marriage (or earlier if certain specified procedures were followed) and that each party would then become a registered owner of an undivided one-half interest in the home, evidenced by certificates of title issued in the name of each. "This means that each former spouse can technically and legally *then* deal with his or her own half interest, free of the other."⁶⁸ The implication is, of course, that parties were not free to so deal with their individual interests prior to this time. Even vaguer

⁶⁴ Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, s. 4(1) (emphasis added). This section is reinforced by provisions giving this right of a surviving spouse to possession of the home priority over "[a]ny bequest or devise contained in the last will and testament of a deceased spouse, including a specific bequest or devise, and any vesting of property provided by law upon an intestacy" (s. 4(4)) and over applications brought under the Testators Family Maintenance Act (s. 4(6)). Finally, s. 5(3) provides for the continuance of such an application on behalf of the estate of the surviving spouse, should the surviving spouse die after the application has been made.

Note that both the Nova Scotia and Newfoundland legislation provide simply that a spouse may make application for division of matrimonial assets where "one of the spouses has died", as well as on marriage breakdown. Matrimonial Property Act, S.N.S., 1980, c. 9, s. 12(1)(d) and The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly (Nfld), 1979, s. 19(1)(d).

⁶⁵ *Ibid.*, s. 8.

⁶⁶ *Supra*, footnote 61.

⁶⁷ *Op. cit.*, footnote 58, pp. 29-30. It would be open to the other spouse to apply to have the application for severance discontinued.

⁶⁸ *Ibid.*, p. 34 (emphasis added).

was the New Brunswick *Discussion Paper*, which suggested merely that the rules with respect to a matrimonial home would apply "even where the property was held by the spouses jointly as tenants in common (which would *otherwise* give to each spouse the right to alienate by deed or will his or her interest)"⁶⁹ apparently overlooking that a joint tenant may also alienate his or her interest by deed albeit not by will.

Where the reform is for a sharing of assets, the situation is even less clear. The various legislative enactments to date are aimed at ensuring an equitable division of property on marriage breakdown,⁷⁰ regardless of which spouse actually owns the property. An integral part of each scheme, giving the non-title holding spouse a measure of security during the currency of the marriage, is a provision whereby the title-holding spouse may not alienate or otherwise deal with the matrimonial home—or his or her interest therein—without the consent of the non-title holding spouse.⁷¹ The Ontario, Prince Edward Island, New Brunswick and Nova Scotia Acts are the most sweeping in this regard:

No spouse shall dispose of or encumber any interest in the matrimonial home unless,

- (a) the other spouse joins in the instrument or consents to the transaction;
- (b) the other spouse has released all rights under this Part by a separation agreement;
- (c) the transaction is authorized by court order or an order has been made releasing the property as a matrimonial home;
- (d) the property is not designated as a matrimonial home under section 41 and an instrument designating another property as a matrimonial home of the spouses is registered under section 41 and not cancelled.⁷²

There are, however, limits on the extent of this protection. A transaction contravening subsection 1 may not be set aside if the

⁶⁹ *Op. cit.*, footnote 59, p. 17.

⁷⁰ Or death. *Supra*, footnotes 63 and 64.

⁷¹ As these provisions derogate from the general philosophy of continued separation of property and hence free alienability, they are restricted in application to the matrimonial home. A good statement of the general rule is found in s. 43 of the Saskatchewan Act (with the marginal notation that "property remains separate"): "No provision of this Act vests any title to or interest in any matrimonial property of one spouse in the other spouse, and the spouse who owns the matrimonial property may . . . sell, lease, mortgage, hypothecate, repair, improve, demolish, spend or otherwise deal with or dispose of the property as if this Act had not been passed." To like effect, see The Marital Property Act, S.M. 1978, c. 24, s. 6(1); Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, s. 47.

⁷² The Family Law Reform Act, 1978, S.O., 1978, c. 2, s. 42(1). A similarly numbered section of the P.E.I. Act (Family Law Reform Act, S.P.E.I., 1978, c. 6) is identical. The New Brunswick (Marital Property Act, Bill 49, 2nd Sess., 49th Legis., 1979, s. 19(1)) and The Nova Scotia sections (Matrimonial Property Act, S.N.S., 1980, c. 9, s. 8(1)), while not completely *verbatim*, are of similar effect.

person acquiring the interest was a *bona fide* purchaser for value without notice, and a mere affidavit by the spouse dealing with the property that the property is not a matrimonial home is sufficient proof, in the absence of actual notice to the contrary.⁷³ As well, the section does not apply to the acquisition of property by operation of law (such as upon bankruptcy), regardless of notice.⁷⁴ Should an interest in the matrimonial home be so acquired by a third party, then other provisions of the Act, such as the right to apply for an order for exclusive possession or to postpone an order for partition and sale, do not apply since they only apply to inter-spousal applications.⁷⁵

While the new legislation in the other provinces is silent as to a general restriction on the right to alienate, a similar protection is provided by the existing mechanism of the homestead legislation, which legislation is specifically retained.⁷⁶ As well, they, like Ontario, have dispositions which restrict a spouse's right to alienate or otherwise dispose of his or her interest in the matrimonial home in more limited circumstances: if a marriage agreement has been registered against property in the appropriate registration office⁷⁷ or where an application is pending either for division of assets or for exclusive possession of the matrimonial home.⁷⁸

⁷³ Ss 42(2) and (3) (Ontario and P.E.I.); ss 19(2) and (3) (N.B.); ss 8(2) and (3) (N.S.); see Holland, *op. cit.*, footnote 2, at p. 34.

⁷⁴ S. 42(4) (Ontario and P.E.I.). The New Brunswick bill and the Nova Scotia Act have no similar proposal.

⁷⁵ Some measure of relief is given to the "wronged" spouse should the third party proceed to realize upon a lien, encumbrance or execution, or exercise a forfeiture. Such a spouse "has the same right of redemption or relief against forfeiture as the other spouse has". S. 43 (Ontario and P.E.I.); s. 21 (N.B.); s. 9 (N.S.).

⁷⁶ The Matrimonial Property Act, S.A., 1978, c. 22, s. 28(1); The Matrimonial Property Act, S.S., 1979, c. M-6.1, s. 16; The Marital Property Act, S.M., 1978, c. 24, s. 24; and, more generally, Family Relations Act, R.S.B.C., 1979, c. 121, s. 55(2).

The legislatures of the older provinces have preferred to abolish dower—an illusory protection at best—and to substitute therefore the above-mentioned statutory scheme: The Family Law Reform Act, 1978, S.O., 1978, c. 2, s. 70; Family Law Reform Act, S.P.E.I., 1978, c. 6, s. 62; Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, s. 49; Matrimonial Property Act, S.N.S., 1980, c. 9, s. 33(3). Newfoundland did not abolish dower since it appears that only dower consumate still exists, under The Dower Act, 1833 (U.K.), 3 & 4 Will. 4, c. 105.

⁷⁷ Family Relations Act, S.B.C., 1978, c. 2, s. 49.

⁷⁸ *Ibid.*, ss 52 and 53; The Matrimonial Property Act, S.A., 1978, c. 22, s. 35; The Family Law Reform Act, 1978, S.O., 1978, c. 2, ss 9 and 47; Family Law Reform Act, S.P.E.I., 1978, c. 6, ss 10 and 47; Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, ss 11 and 25; Matrimonial Property Act, S.N.S., 1980, c. 9, s. 19; The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly (Nfld), 1979, s. 28.

Most important, in our context, are those provisions concerning orders for exclusive possession of the matrimonial home. In all jurisdictions, as well as the basic reform of sharing of assets, each statute has an additional protection whereby one spouse may apply for an order for exclusive possession of the matrimonial home, regardless of whether the home is co-owned or is the exclusive property of one or other of the spouses. When such an order is made, the court may direct, *inter alia*, that rights to sell or otherwise dispose of or encumber the property be postponed or be subject to the right to exclusive possession.⁷⁹ And an order for exclusive possession, when registered, binds successors in title. The non-possessing spouse may subsequently deal with "his estate or interest" in the property only with the consent of the other spouse or under a court order.⁸⁰

What we find, therefore, when we interpret these various provisions in the optic of a co-owned matrimonial home, is a prohibition against each spouse dealing freely with his or her estate or interest in the matrimonial home. Hence, inalienability and, it follows, unseverability: that is to say, tenancy by the entireties, at least as far as this one incident is concerned.

Take, finally, the right to partition. We have seen that the second major incident of tenancy by the entireties is that it cannot be partitioned. We have seen, as well, that while partition of the other forms of co-ownership is possible—indeed, a *prima facie* right—it is recently more difficult to obtain, as the courts, albeit not unanimously, will now weigh the relative hardship resulting from an order for partition and sale. What, then, is the position of the various matrimonial property reforms in this regard?

The answer to this question is easier to find than that concerning severability. It is in favour of limiting the right to partition. True, most statutes admit the possibility of partition or sale as one of the

⁷⁹ Family Relations Act, R.S.B.C., 1978, c. 121, s. 78; The Matrimonial Property Act, S.A., 1978, c. 22, s. 21; The Matrimonial Property Act, S.S., 1979, c. M.-6.1, s. 5(1); The Family Maintenance Act, S.M., 1978, c. 25, s. 9; The Family Law Reform Act, 1978, S.O., 1978, c. 2, s. 45(1); Family Law Reform Act, S.P.E.I., 1978, c. 6, s. 45(1); Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, s. 23(1); Matrimonial Property Act, S.N.S., 1980, c. 9, s. 11(1); The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly (Nfld), 1979, s. 13(1)(a).

⁸⁰ The Matrimonial Property Act, S.A., 1978, c. 22, ss 22 and 27; The Matrimonial Property Act, S.S., 1979, c. M-6.1, ss 9 and 12; The Family Law Reform Act, 1978, S.O., 1978, c. 2, ss 2(10) and 48; Family Law Reform Act, S.P.E.I., 1978, c. 6, ss 2(9) and 48; Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, s. 46; Matrimonial Property Act, S.N.S., 1980, c. 9, s. 20(1); The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly (Nfld), 1979, s. 15.

means whereby the sharing of assets may be effected.⁸¹ Nevertheless, most declare that the right to partition may be postponed and be subject to the right of exclusive possession of the matrimonial home.⁸² In considering whether to grant an application for exclusive possession, thereby postponing partition, the courts are directed to consider such factors as the needs of children, the availability of affordable alternate accommodation, the financial position of each spouse, and the conduct of the spouses towards each other⁸³—all

⁸¹ Family Relations Act, R.S.B.C., 1978, c. 121, s. 52(2)(d); The Matrimonial Property Act, S.S., 1979, c. M-6.1, s. 26(1)(b)(v); The Family Law Reform Act, 1978, S.O., 1978, c. 2, ss 6(b) (family assets) and 7(c) (non-family assets); Family Law Reform Act, S.P.E.I., 1978, c. 6, ss 7(b) and 8(c); Marital Property Act, Bill 49, 2nd Sess., 49th Legis. (N.B.), 1979, s. 10; Matrimonial Property Act, S.N.S., 1980, c. 9, s. 15(b); The Matrimonial Property Act, Bill 1, 1st Sess., 38th General Assembly (Nfld), 1979, s. 24(b).

Most of these provisions, with the exception of Manitoba and those provinces following the Ontario model (Prince Edward Island, New Brunswick, Nova Scotia and Newfoundland) also mention explicitly severance as a possible course of action for the court to order. Severance, is, however, possible in Ontario (and presumably also in these other provinces). See s. 11(1)(a) cited *supra*, footnote 54, and *Re Cipens & Cipens* (1978), 90 D.L.R. (3d) 461 (Ont. U.F.C.), at p. 466.

⁸² Family Relations Act, R.S.B.C., 1978, c. 121, s. 78; The Matrimonial Property Act, S.A., 1978, c. 22, s. 21 and The Partition and Sale Act, S.A., 1979, c. 59, s. 9; The Matrimonial Property Act, S.S., 1979, c. M-6.1, s. 5(1)(e); The Family Maintenance Act, S.M., 1978, c. 25, s. 9(2).

The exceptions are Ontario, Prince Edward Island, New Brunswick, Nova Scotia and Newfoundland, as these Acts are silent as to priorities. However, a recent decision of the Unified Family Court of Ontario has decided that The Partition Act has been superseded by the provisions of this Act, and that the right to partition and sale under s. 6 (division of assets) must be postponed until the question of possession has been decided: *Re Cipens & Cipens*, *ibid*. The court's reasoning would presumably also apply in these other provinces.

Note as well that the B.C. Act provides, more widely, that the Part dealing with division of assets prevails where there is a conflict between it and the Partition Act or the Married Women's Property Act (s. 55(1)). This reflects established jurisprudence under the earlier act: *Dickinson v. Dickinson* (1976), 27 R.F.L. 296 (B.C. S.C.); *Hamilton v. Hamilton* (1976), 28 R.F.L. 54 (B.C. S.C.); *Kraemer v. Kraemer & McGill*, *supra*, footnote 22.

⁸³ The Matrimonial Property Act, S.A., 1978, c. 22, s. 20; The Matrimonial Property Act, S.S., 1979, c. M-6.1, s. 7. The Ontario, Prince Edward Island, New Brunswick and Newfoundland Acts are quite limiting in this regard, singling out for exclusive consideration only the adequacy of other provision for shelter and the best interest of children (s. 45(3) (Ontario and P.E.I.); s. 23(3) (N.B.); s. 11(4) (N.S.); s. 13(3) (Nfld)). However, reasoning that an order for exclusive possession is equivalent to an order for maintenance, the court in *Re Cipens and Cipens*, *supra*, footnote 81, at pp. 466 and 467, imported the very broad criteria set out in s. 18(5) of the Act for the assessment of maintenance. This reasoning would also apply to the other four jurisdictions, but *semble not* to B.C. in view of the fact that exclusive possession is there regarded as a temporary or interim measure pending judicial determination as to final division of assets. However, one suspects that the court would be sympathetic to such an application for occupation and possession in view of its temporary nature.

factors also relevant to a more traditional balancing of relative hardship. In other words, under these statutes, although partition is still possible, there is no longer even a *prima facie* right to it.

What seems to emerge from this analysis is that the legislatures have implicitly recognized the value of the two central characteristics of tenancy by the entireties—that it may be neither severed or partitioned—by importing them, to some extent, into their matrimonial property reforms. However, their importation is implicit at best. It is clear that no conscious, explicit analysis has been made of the advantage of tenancy by the entireties and of its place, if any, in the new legislative schemes.⁸⁴

Conclusion

The attempt to assess the place of tenancy by the entireties in the current reform has proved detailed and difficult, tenuous and at times artificial. Why is this?

The reason would seem to go deeper than the relatively esoteric nature of tenancy by the entireties itself. A close reading of the statutes indicates, to this writer at least, that the current reforms have been formulated and drafted with little precise analysis of their place in, or impact upon, traditional property concepts. In the provisions dealing both with the final division of matrimonial property and with the right to possession of the matrimonial home, the rules have been drafted to provide a solution irrespective of questions of ownership. Since it therefore does not matter at all whether the property is jointly or solely owned, the form of co-ownership and the incidents attached thereto matter even less.

But can one so readily dismiss traditional property notions? It would seem not. They must reappear, inevitably, when the matrimonial property Acts cannot be invoked—if, firstly, the property dispute is between spouses whose rights under the act have not been crystallized by an application (which will be the case if, for example, the marriage has not broken down) or if, secondly, the dispute is not between spouses or former spouses but rather between one spouse and a third party such as a creditor. In other words, it is perhaps not too much of an oversimplification to suggest that in most Canadian provinces, the matrimonial regime is comprised of two separate bodies of law: the statutory reforms which set out the proprietary rules applicable to the spouse themselves upon marriage

⁸⁴ Even in Prince Edward Island, tenancy by the entireties would seem to have been abolished not reflectively, because its incidents were felt undesirable, but rather reflexively, along with dower, curtesy and the presumption of advancement, as part of a general abolition of some of the more historical, hence antiquated, elements of the common law of real property.

breakdown, and the traditional property rules which govern where there is no marriage breakdown or where third parties are involved. This latter is obviously an important area and one to which tenancy by the entirety has a major contribution to make. Even though it is more rigid in application than the reform proposals, it shares their more common characteristics in regard to severance and partition.

It has been the thesis of this article that tenancies by the entirety do still exist in Canada, that they may still be created, that it is possible that in some jurisdictions the only forms of co-ownership open to married couples are tenancies in common or by the entirety, and finally—and here the writer feels considerable hesitation—that in such jurisdictions even if a married couple has taken property specifically as joint tenants, they nevertheless hold as tenants by the entirety.

Whether or not tenancy by the entirety ought to continue to exist is a social rather than a legal question. Law reform commissions and legislatures should address this question and should either recognize this tenancy or abolish it, specifically and directly. The courts should not be left with the task of ascertaining the legislature's intention through the bias of a multitude of other statutes.
