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LAW AND THE FAMILY

**"DIVISION OF REAL PROPERTY IN DIVORCE PROCEEDINGS"**

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**THE SLOGAN "share and share alike" is part of the national heritage. But when it comes to spouses who are divorcing, nothing could be further from their thoughts.**

**When a husband and wife take title to real property as tenants by the entirety, interesting incidents of ownership arise from the legal relationship. As a tenant by the entirety, each spouse acquires an undivided half interest in the property with the right of survivorship, a right that cannot be destroyed without the consent of both spouses. While either spouse may mortgage or convey his/her interest in the property it will not impair the non-consenting spouse's survivorship interest. [FN1]**

**Tenants by the entirety do not hold partial interests. Each owns the whole, subject to the parallel right of his or her spouse. On the death of either spouse the fee vests in the other, because the survivor is the repository of the single ownership. [FN2] Neither spouse can dispose of any part of the property so as to affect the other's right of survivorship, nor can one spouse make contracts that bind the other, incur expenses for work not essential to preserve the property, lease the property so as to affect the other's right of possession or subject the property to right-of-way easements. [FN3]**

**Grant v. Grant [FN4] is an example of the effect of divorce and matrimonial agreements on real property ownership. In Grant the parties' divorce judgment, which incorporated their settlement agreement, called for the marital residence to be sold upon the wife's remarriage but gave her its exclusive occupancy until sale. In**

exchange, she was required to bear the upkeep of the house. The wife remarried in November 1992.

As the house lingered on the market, the husband, increasingly irritated with the situation, initiated a proceeding for a judgment for half of its fair market rental value. He asserted that the wife's failure to cooperate in the sale for 14 months effectively ousted him from the property that he co-owned with her now as a tenant in common. The Appellate Division found that the wife cooperated with respect to the sale. Therefore, the husband was not ousted and was properly denied relief.

#### **Not Subject to Partition**

Consistent with its character, property held as tenants by the entirety is not subject to partition, except by mutual consent. Even then it becomes effective only upon dissolution of the marriage. Compulsory partition is not available to a tenant by the entirety. [FN5] This is in contrast to jointly owned property or property held as tenants in common. [FN6]

In *Adams v. Holt*, [FN7] the plaintiff, who purchased the former husband's interest at a sheriff's sale, at a time when he and his wife were tenants by the entirety of the marital residence, had no greater rights than the husband and could not obtain partition.

After the sale, the wife was granted a divorce and "exclusive occupancy of the marital residence for an indefinite period of time." Since the wife was awarded exclusive occupancy, the former husband had no standing to commence a partition action unless and until the exclusive occupancy was extinguished. Likewise for the purchaser of his interest.

A divorce or dissolution of a marriage converts a tenancy by the entirety into a tenancy in common. This is not, however, the case where an ex parte divorce is obtained without service of process or appearance by a spouse. [FN8] Nevertheless, the subsequent marriages of both parties destroys "the spousal unity concept upon which a tenancy by the entirety is based and [transforms] their ownership into a tenancy in common." [FN9] This renders the property subject to partition.

In *Peterson v. Goldberg*, an ex-parte Florida divorce transformed the tenancy by the entirety to a tenancy in common where the husband remarried after he obtained the Florida judgment. The court held that he was estopped from denying the effect of the divorce upon his

right to the estate by the entirety, subject to the right of the plaintiff wife to claim a continuance of the tenancy by the entirety. [FN10]

The outcome hardly differs when the marriage is not dissolved but the parties are granted a separation judgment. The Court of Appeals explained the reasoning in *Kahn v. Kahn* [FN11] when it suggested that "although a separation decree does not dissolve the marriage, it can be argued that such a decree does legally alter the marital relationship and thus, terminates a tenancy by the entirety, enabling a court to order the sale of a home owned by the parties as tenants in common." In *Petrucci v. Petrucci*, [FN12] the Fourth Department held that a separation judgment terminated the tenancy by the entirety.

Domestic Relations Law (DRL) s234 authorizes the court in any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage to award either spouse exclusive possession of the marital home during the action, or in the final judgment, regardless of who holds title to the premises. Exclusive occupancy may even be awarded when a dissolution is denied. [FN13]

#### **Action for Partition**

The conversion of a tenancy by the entirety to a tenancy in common upon the dissolution of the marriage, authorizes an action for partition, in most instances, be brought by either party under Real Property Actions and Proceedings Law s901(1). [FN14] It provides that "[a] person holding and in possession of real property as joint tenant or tenant in common \*\*\* may maintain an action for the partition of the property."

To seek partition, a tenant in common must be in actual or constructive possession of the premises with a current right of possession. Therefore, where one spouse is awarded exclusive occupancy of the marital residence, the other spouse loses more than possession of the property; he or she is precluded from seeking partition, since that spouse is in neither actual nor constructive possession of the property. [FN15]

Partition is unavailable to a spouse who has agreed not to partition the property. [FN16] Partition will not be compelled in violation of an agreement or restriction, provided that the agreement or restriction is for a reasonable duration. [FN17] An agreement or judgment that awards a party an unlimited and unqualified right to the exclusive possession of real property must contain a limitation of time.

Otherwise the power to alienate would be suspended for an unreasonable time. Absent an express or implied agreement to the contrary, the right to exclusive occupancy will be deemed limited to a reasonable duration. [FN18]

In *Sklarin v. Sklarin*, [FN19] the parties' 1975 judgment of divorce and agreement gave the wife exclusive occupancy until she either remarried or vacated the premises. Although neither event transpired, the former husband asserted that, because neither event may ever come to pass, the law implies that the former wife's exclusive occupancy must be limited to a reasonable period.

The Appellate Division rejected his argument, holding that an exclusive occupancy provision of a separation agreement will not be deemed limited to a court-determined reasonable period where the parties have expressly and unambiguously stipulated otherwise.

In *Hiles v. Fisher*, [FN20] the Court of Appeals established that the rights of husband and wife as between themselves are those of tenants in common, and each is entitled to half the rents and profits so long as the question of survivorship is in abeyance. [FN21] During the tenancy, a tenant by the entirety may recover from his co-tenant his just proportion of the rents and profits of the property. [FN22] In determining the amount due, the court may take into account, and charge against receipts, the carrying charges of the property.

The court may take into account money received and expended by any of the co-tenants during the ownership of the property; and any expenditure made by one of the tenants in excess of his share of the obligations is a charge against the interest of his co-tenants.

Where a tenant has been ousted, a court may offset, as against the co-tenant's credit for expenses incurred in maintaining the property, the reasonable value of the co-tenant's exclusive use and occupancy. In *Miraldi v. Miraldi*, [FN23] the court held that as defendant was wrongfully ousted by plaintiff from the marital home owned by them as tenants by the entirety, she was entitled to half the rental value from that date to the date of sale pursuant to the partition decree, after due credit to plaintiff for the expenditures made by him in connection with maintenance, mortgage, taxes and insurance.

### **Rental Value**

Absent an agreement to the contrary, rental value cannot be recovered from a tenant in common who occupies the premises with

**the acquiescence of the co-tenant, unless she has interfered with the right of the co-tenant to also occupy the premises. [FN24] A spouse who leaves the marital home, divorces and remarries cannot expect to reoccupy the premises where it is a one-family home and, thus, cannot be "excluded" [FN25]**

**Where a husband voluntarily leaves the premises, obtains an ex parte divorce and the wife remarries and lives in the former marital residence with her new husband, the former husband is effectively ousted from the premises upon the remarriage and the former wife alone becomes responsible for any charges assessed against the property. [FN26]**

**The courts have put out a welcome sign to the new lives and thus new wives (and husbands) of divorced spouses. Remarried people are not required to collect "rent" from their new spouses. In *Soyer v. Perricone* [FN27] the former husband brought an action against his former wife's new husband to recover damages for his occupancy of the former marital residence. The former wife had been awarded its exclusive occupancy pursuant to a divorce judgment, until the children "reach their majority."**

**The Supreme Court dismissed the complaint, holding that as the husband of a co-tenant, the defendant was entitled to live on the premises rent free. The Appellate Division affirmed, but added that if the plaintiff was ousted unlawfully from the premises by his former wife upon the expiration of her right to the premises under the divorce judgment, his action for fair value of the use and occupancy of the premises would be against his former wife.**

**In *Mancini v. Mancini*, [FN28] where the parties' separation agreement required them to pay equally the house-related expenses until it was sold, the Appellate Division agreed with the Supreme Court that the former wife's remarriage did not relieve the former husband of his obligation to pay his share of the expenses related to the marital residence. The former husband was not entitled to half the rental value of the marital residence because the former wife's new husband as a guest or invitee of the former wife was entitled to live at the premises rent free.**

**FN1. *Schwab v. Krauss* (1991, 3d Dept.) 165 App. Div. 2d 214, 566 NYS2d 974**

**FN2. *Kozyra v. Goldstein* (1989) 146 Misc2d 25, 550 NYS2d 229**

**FN3. *Baker v. Westfall* (1961) 30 Misc2d 946.**

- FN4. (1996, 2d Dept) 651 NYS2d 199.**
- FN5. Stewart v. Stewart (1955) 208 Misc 795, 144 NYS 637.**
- FN6. Wurz v. Wurz (1891, Sup) 15 NYS 720; Saxon v. Saxon (1905) 46 Misc 191, 93 NYS 191.**
- FN7. (1988, 2d Dept.) 141 AD2d 481.**
- FN8. Vanderbilt v. Vanderbilt, 1 NY2d 342, affd 354 US 416; Anello v. Anello, 22 AD2d 694.**
- FN9. Topilow v. Peltz, 25 AD2d 874.**
- FN10. 146 Misc2d 474 (1989).**
- FN11. (1977) 43 NY2d 203.**
- FN12. (1984) 123 Misc2d 925, affd (4th Dept) 119 AD2d 984.**
- FN13. Forbush v. Forbush (1985, 4th Dept) 115 AD2d 335.**
- FN14. Stelz v. Shreck, 128 NY 263, 269; Yax v. Yax, 240 NY 590.**
- FN15. Luvera v. Luvera, supra.**
- FN16. McNally v. McNally, 129 AD2d 686.**
- FN17. Luvera v. Luvera, supra.**
- FN18. Sherman v. Sherman, 168 AD2d 550 (2d Dept. 1990) [unlimited and unqualified right to possession - 11 years]; Surlak v. Fulfree, 145 AD2d 79 [no conditions or limitations in agreement - 15 years]; Luvera v. Luvera, supra ["until such time as same shall be sold" - 15 years].**
- FN19. (1994, 2d Dept.) 204 AD2d 428.**
- FN20. 144 N.Y. 306.**
- FN21. See Goodrich v. Village v. Otego, 216 N.Y. 112.**
- FN22. Niehaus v. Niehaus, 141 App. Div. 251.**
- FN23. (1976, 2d Dept) 51 AD2d 538.**

**FN24. LeBarron v. Babcock, 122 NY 153; Oliva v. Oliva, 136 AD2d 611.**

**FN25. (1995, 2d Dept.) Haberman v. Haberman 216 AD2d 525.**

**FN26. Topilow v. Peltz, supra.**

**FN27. (1993, 2d Dept.) 193 App. Div. 2d 665.**

**FN28. (1995, 2d Dept.) 628 NYS2d 803.**

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