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# Did the United States Supreme Court Make a Bonfire with the Bundle of Sticks? The Tenancy by the Entireties Before and After *United States v. Craft*, with an Emphasis on Pennsylvania Law

## INTRODUCTION

Pennsylvania Supreme Court Justice Musmanno once remarked that:

[A] [h]usband and wife own an estate in entireties as if it were a living tree, whose fruits they share together. To split the tree in two would be to kill it and then it would not be what it was before when either could enjoy its shelter, shade, and fruit as much as the other.<sup>1</sup>

Until recently, this view of tenancy by the entireties as an indivisible unit, untouchable by the creditors of only one spouse, has remained in some states that recognize this form of property ownership.<sup>2</sup> On April 17th, 2002, the Supreme Court of the United States, in *United States v. Craft*,<sup>3</sup> drastically altered this concept.

Once upon a time, the Supreme Court of the United States allowed states to determine their own rules of property and these rules were binding upon the federal courts.<sup>4</sup> This hands-off approach was first changed in 1958 in *United States v. Bess*.<sup>5</sup> In *Bess*, the Supreme Court of the United States held that state law only determines what interests a person has in property.<sup>6</sup> This concept was further clarified in *United States v. National Bank of Commerce*,<sup>7</sup> in which the majority stated, “state law defined the

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1. Sterrett v. Sterrett, 166 A.2d 1, 2 (Pa. 1960).

2. See Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-By-The-Entireties Interests*, 75 Ind. L. J. 1163, 1170 n.42 (2000). Fifteen of the twenty-four states that recognize a tenancy by the entireties hold this view. Those fifteen states are: Delaware, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Rhode Island, Virginia, Vermont, and Wyoming. In addition, the District of Columbia and the Virgin Islands, also adhere to the view that a creditor of only one spouse cannot attach entireties property. *Id.*

3. 122 S. Ct. 1414 (2002).

4. Tyler v. United States, 281 U.S. 497, 501 (1930).

5. 357 U.S. 51 (1958).

6. *Id.* at 56-57.

7. 472 U.S. 713 (1985).

nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law."<sup>8</sup>

The Supreme Court's present view of state property law was enunciated in *Drye v. United States*.<sup>9</sup> In *Drye*, the majority held that state law is only initially examined to find any rights the taxpayer has in the property and then federal law is used to determine if the taxpayer's rights are "property" or "rights to property"<sup>10</sup> within the meaning of 26 U.S.C. §6321.<sup>11</sup> *Drye* set the stage for *United States v. Craft*<sup>12</sup> and its recent attack on the tenancy by the entirety. Part I of this comment explores the history of the federal case law that has led to *Craft*. Part II discusses the history of *Craft*. Finally, Part III will examine the history of tenancy by the entireties in Pennsylvania case law and will address the impact *Craft* may have on Pennsylvania property law cases and bankruptcy cases.

### I. THE HISTORY OF THE TREATMENT OF THE TENANCY BY THE ENTIRETIES IN FEDERAL CASE LAW

In 1930, the Supreme Court of the United States decided *Tyler v. United States*.<sup>13</sup> This case was a consolidation of three separate cases.<sup>14</sup> The first case, No. 428, involved stock held as a tenancy by the entireties.<sup>15</sup> The husband had died and the stock was included in his gross estate, upon which tax was paid.<sup>16</sup> The district court found that the stock should not have been included and the court of appeals reversed.<sup>17</sup> The second case, No. 546, involved the same concepts but the properties held as a tenancy by the entireties were real estate and ground rents.<sup>18</sup> The Commissioner of In-

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8. *Id.* at 723.

9. 528 U.S. 49 (1999).

10. *Id.* at 58 (quoting *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985)).

11. 26 U.S.C. § 6321 (2003) provides in pertinent part, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal belonging to such person." *Id.*

12. 122 S. Ct. 1414 (2002).

13. 281 U.S. 497 (1930).

14. *Id.* at 499-500.

15. *Id.* at 499.

16. *Id.*

17. *Id.* The courts involved were the United States District Court of Maryland and the United States Court of Appeals for the Fourth Circuit. *Id.*

18. *Tyler*, 281 U.S. at 499.

ternal Revenue wanted the property to be included in the husband's estate following his death, but the Board of Tax Appeals found that there was no deficiency and the property did not have to be included.<sup>19</sup> The district court agreed with the Board of Tax Appeals and the court of appeals affirmed.<sup>20</sup> The third case, No. 547, involved the same concepts, and the property held as a tenancy by the entireties was also real estate.<sup>21</sup> The Commissioner of Internal Revenue included the real estate in the wife's estate after her death.<sup>22</sup> The Board of Tax Appeals disagreed with the Commissioner and the court of appeals affirmed the Board's decision.<sup>23</sup> The United States Supreme Court granted certiorari in each case and consolidated the cases.

The issue presented before the justices was whether it was constitutional, under the Fifth Amendment,<sup>24</sup> for property held as a tenancy by the entireties to be included in the estate of the deceased spouse in order to determine the appropriate tax.<sup>25</sup> The Court found that property held by the entireties could be included in the estate of the deceased spouse in order to determine the appropriate tax.<sup>26</sup> The majority reasoned that including a tenancy by the entireties in the gross estate of a deceased spouse in order to measure the appropriate tax was "neither arbitrary nor capricious"<sup>27</sup> so as not to violate the Fifth Amendment rights of the surviving spouse.<sup>28</sup> This early case also stated that federal courts were bound by state rules of property,<sup>29</sup> however, this would soon change.<sup>30</sup>

In the years following *Tyler*, several of the United States Courts of Appeals decided cases that gave property law power to the

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19. *Id.*

20. *Id.* at 499-500. The courts involved in this case were the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit. *Id.*

21. *Id.* at 500.

22. *Id.*

23. *Tyler*, 281 U.S. at 500. The court involved in this case was the United States Court of Appeals for the Third Circuit. *Id.*

24. The due process clause of the Fifth Amendment provides in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

25. *Tyler*, 281 U.S. at 498-99, 505.

26. *Id.* at 505.

27. *Id.*

28. *Id.*

29. *Id.* at 501.

30. *See Drye*, 528 U.S. at 49.

states. In *Jones v. Kemp*<sup>31</sup> and in *United States v. Hutcherson*<sup>32</sup> the United States Courts of Appeals for the 10th and 8th Circuits, respectively, found that the United States cannot take property held in a tenancy by the entireties from one spouse to satisfy the sole debt of the other spouse, even if the claim is being brought to collect federal taxes.<sup>33</sup>

One year following *Hutcherson*, the United States Court of Appeals for the Third Circuit decided *Raffaele v. Granger*.<sup>34</sup> Antonio Raffaele owed the IRS certain sums of money from back taxes.<sup>35</sup> The Collector of Internal Revenue levied upon the bank account of Antonio and his wife.<sup>36</sup> The couple then brought a complaint to the United States District Court for the Western District of Pennsylvania to terminate the levy, which was granted by the district court.<sup>37</sup> The Collector then appealed to the United States Court of Appeals for the Third Circuit.<sup>38</sup> The issue was whether the Internal Revenue Service (IRS) could levy upon a bank account owned by husband and wife as a tenancy by the entireties in order to collect taxes owed solely by the husband.<sup>39</sup> The court of appeals, relying primarily on *Jones* and *Hutcherson*, decided that the IRS could not levy on a bank account that was owned as a tenancy by the entireties.<sup>40</sup>

Without any United States Supreme Court decision on the subject, the United States Courts of Appeals continued to decide cases involving a tenancy by the entireties in favor of rejecting the claims of a creditor of one spouse on the entireties property. In 1971, the United States Court of Appeals for the Sixth Circuit was faced with an issue similar to that in *Raffaele*. In *Cole v. Cardoza*,<sup>41</sup> the issue was whether a federal tax lien owed only by the husband could attach to a tenancy by the entireties.<sup>42</sup> The case involved the gambling activities of Eugene Cole.<sup>43</sup> Mr. Cole owed the IRS tax on his winnings, so the IRS placed a tax lien upon Mr.

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31. 144 F.2d 478 (10th Cir. 1944).

32. 188 F.2d 326 (8th Cir. 1951).

33. See *Jones*, 144 F.2d at 478; *Hutcherson*, 188 F.2d at 326.

34. 196 F.2d 620 (3d Cir. 1952).

35. *Id.* at 622.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Raffaele*, 196 F.2d at 622.

40. *Id.* at 623.

41. 441 F.2d 1337 (6th Cir. 1971).

42. *Id.* at 1343.

43. *Id.* at 1338.

and Mrs. Cole's home, which was held as a tenancy by the entireties.<sup>44</sup> The court found that the federal tax lien was a cloud on the tenancy by the entireties, and that the husband and wife could have the lien declared a nullity.<sup>45</sup>

The Supreme Court of the United States, in 1985, finally decided a case that would clarify some of the law related to state property rules, federal property rules, and which interests creditors could attach. In *United States v. National Bank of Commerce*,<sup>46</sup> the Supreme Court of the United States decided the issue of whether the IRS could levy a jointly held bank account when only one of the joint owners owed federal income tax.<sup>47</sup> The Court first had to determine if state or federal law was controlling to decide if the joint owners individually had rights to the bank account that could be levied upon the IRS.<sup>48</sup> The majority relied upon *United States v. Bess*<sup>49</sup> to determine that since the joint owners could withdraw from the joint account without telling the other joint owners under state law, there existed a sufficient interest in the property to which the IRS could levy to collect unpaid taxes.<sup>50</sup> The Court clarified *Bess* by stating that "state law defined the nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law."<sup>51</sup> The majority concluded by holding that the IRS could levy on the joint account of the taxpayer.<sup>52</sup> Even though *National Bank of Commerce* specifically stated that if money is kept in a joint bank account as a tenancy by the entireties, the Government cannot levy on the joint account to satisfy the debts of one spouse,<sup>53</sup> it marked the beginning of the end of the tenancy by the entireties as a protection against creditors of only one spouse.

Following *National Bank of Commerce*, the United States Court of Appeals for the Third Circuit made one last attempt to prevent a tenancy by the entireties from being levied or attached by the

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44. *Id.* at 1343.

45. *Id.* at 1344.

46. 472 U.S. 713 (1984).

47. *Id.* at 716. Roy Reeves, his wife, and his mother in this case held the bank account as a joint account. *Id.* Roy Reeves owed the delinquent taxes. *Id.*

48. *Id.* at 722.

49. 357 U.S. 51 (1958).

50. *Nat'l Bank of Commerce*, 472 U.S. at 722-25.

51. *Id.* at 723.

52. *Id.* at 731.

53. *Id.* at 729.

creditors of only one spouse in *Internal Revenue Service v. Gaster*.<sup>54</sup> In this case, Donald Gaster and his wife held a bank account as a tenancy by the entireties.<sup>55</sup> Donald owed back taxes to the IRS from 1977, and, in 1990 the IRS levied on the bank account.<sup>56</sup> The bank filed a complaint against the IRS and the Gasters, which was removed by the IRS to the United States District Court for the District of Delaware.<sup>57</sup> The district court found that the IRS had a right to levy on the account.<sup>58</sup> The Gasters appealed to the United States Court of Appeals for the Third Circuit.<sup>59</sup> The issue was whether the IRS could levy on a bank account, owned jointly by a husband and wife, in order to collect on the husband's unpaid taxes.<sup>60</sup> The court relied on Pennsylvania law to determine the taxpayer's interest in the property. Citing *National Bank of Commerce*,<sup>61</sup> the court found that under Pennsylvania law the husband had no interest in the tenancy by the entireties to which the IRS levy could attach.<sup>62</sup> The court concluded by stating that the IRS levy was incorrect because the creditor of one spouse could not attach entireties property.<sup>63</sup>

The most recent United States Supreme Court case to address this issue, before *United States v. Craft*, was *Drye v. United States*.<sup>64</sup> Even though *Drye* did not involve entireties property, the opinion laid the foundation upon which *Craft* was later decided. In *Drye*, Rohn Drye's mother had died, leaving her estate to him.<sup>65</sup> Rohn Drye had owed the IRS back taxes, so he disclaimed his interest in his mother's estate and the estate passed to his daughter.<sup>66</sup> Arkansas law would not permit Rohn Drye's creditors to attach the disclaimed estate.<sup>67</sup> Rohn's daughter placed the funds

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54. 42 F.3d 787 (3d Cir. 1994).

55. *Id.* at 789.

56. *Id.* at 790.

57. *Id.*

58. *Id.*

59. *Gaster*, 42 F.3d at 790.

60. *Id.* at 789.

61. *Id.* at 791. The *Gaster* court quotes from *National Bank of Commerce*, 472 U.S. at 729 n.11 (citing *Raffaele*, 196 F.2d at 622, which states, if an account is held as tenants by the entireties under Pennsylvania law the IRS's "attempt to deal separately with or dispose of the interest of one is in derogation of the other spouse's ownership of the entire property and, therefore, legally ineffective.") *Id.*

62. *Gaster*, 42 F.3d at 791.

63. *Id.* at 795.

64. 528 U.S. 49 (1999).

65. *Id.* at 52-53.

66. *Id.* at 53.

67. *Id.*

from the estate into a spendthrift trust, which she and her parents used.<sup>68</sup> The IRS then tried to levy on the trust.<sup>69</sup> The trust filed a wrongful levy action in the United States District Court for the Eastern District of Arkansas, which ruled in favor of the IRS.<sup>70</sup> The trust appealed and the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision.<sup>71</sup> The United States Supreme Court granted certiorari to resolve the conflict amongst the circuit courts.<sup>72</sup>

The Court relied on *National Bank of Commerce* to determine whether federal or state law should govern what right or interests a taxpayer has in property.<sup>73</sup> The majority stated, “[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation.”<sup>74</sup> The Court reasoned that under Arkansas law, Rohn Drye had a power to direct the estate’s assets and this power was a form of “property” or a “right to property” upon which the IRS could levy.<sup>75</sup> The majority concluded that Rohn Drye had a sufficient property interest upon which the IRS could levy and therefore the decision of the court of appeals was affirmed.<sup>76</sup> As previously stated, *Drye* did not involve entireties property but it in essence broadened the definition of “property” or “rights to property” for federal tax lien purposes, which opened the door for *United States v. Craft*.

## II. *UNITED STATES V. CRAFT* - THE WOOD IS GATHERED FOR THE BONFIRE

The beginning of the long road to *Craft* occurred in 1972, when Don and Sandra Craft purchased a piece of real estate as tenants

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68. *Id.* at 53-54.

69. *Drye*, 528 U.S. at 54.

70. *Id.*

71. *Id.* The court of appeals opinion can be found at *Drye Family 1995 Trust v. U.S.*, 152 F. 3d 892 (1998).

72. *Id.* at 55. Certiorari was granted at *Drye v. United States*, 526 U.S. 1063 (1999).

73. *Drye*, 528 U.S. at 58.

74. *Id.*

75. *Id.* at 61.

76. *Id.*

by the entireties.<sup>77</sup> Don Craft did not pay federal income tax from 1979 until 1987.<sup>78</sup> In 1989, the IRS filed a federal tax lien on the real estate.<sup>79</sup> Subsequently, Don and Sandra Craft quitclaimed the property to Sandra only.<sup>80</sup> Don Craft then filed for bankruptcy and was discharged in Chapter 7 in 1992.<sup>81</sup> Sandra Craft attempted to sell the property, but the IRS refused to discharge the tax lien unless they received one-half of the proceeds.<sup>82</sup> The proceeds were placed in an escrow account and Sandra Craft sought to quiet title in those funds in a proceeding in the United States District Court of the Western District of Michigan.<sup>83</sup> The district court, relying on a variety of decisions from the United States Courts of Appeals<sup>84</sup> and from the United States Supreme Court,<sup>85</sup> determined that the tenancy by the entireties was terminated by the joint conveyance to Sandra Craft which allowed the IRS's lien to attach to Don Craft's half of the property.<sup>86</sup>

Sandra Craft appealed and the IRS cross-appealed to the United States Court of Appeals for the Sixth Circuit.<sup>87</sup> The court of appeals cited *Cole v. Cardoza*<sup>88</sup> as the authority to prevent the IRS from attaching the entireties property.<sup>89</sup> The court quoted from *Cole* stating, "[T]he lien is without legal effect as it pertains to [the husband's and wife's] house."<sup>90</sup> The court of appeals, like the district court, discussed *Leroy Lane I*<sup>91</sup> and *Leroy Lane II*,<sup>92</sup> as authority to conclude that the federal tax lien did not attach to the en-

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77. *Craft v. United States*, No. 1:93-CV-306, 1994 WL 669680, at \*1 (W.D. Mich. Sept. 12, 1994), *rev'd* 140 F.3d 638 (6th Cir. 1998), *aff'd* 233 F.3d 358 (6th Cir. 2000), *rev'd* 535 U.S. 274 (2002).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Craft*, 1994 WL 669680, at \*1.

83. *Id.*

84. See *Cole*, 441 F.2d at 1337; *United States v. Certain Real Property at 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990) *cert. denied sub nom*; *Marks v. United States*, 499 United States 947 (1991); *United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136 (6th Cir. 1992); *Craft*, 1994 WL 669680, at \*2-3.

85. See *Nat. Bank of Commerce*, 472 U.S. 713; *United States v. Rodgers*, 461 U.S. 677 (1983); *Aquilino v. United States*, 363 U.S. 509 (1960), *rehearing denied* 216 N.Y.S.2d 1025 (1961); *Bess*, 357 U.S. 51. *Craft*, 1994 WL 669680, at \*2.

86. *Craft*, 1994 WL 669680, at \*3.

87. *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998), *rev'd* 535 U.S. 274 (2002).

88. 441 F.2d 1337 (6th Cir. 1791).

89. *Craft*, 140 F.3d at 642.

90. *Id.* (quoting *Cole*, 441 F. 2d at 1344).

91. 910 F.2d 343 (6th Cir. 1990).

92. 972 F.2d 136 (6th Cir. 1992).

tireties property.<sup>93</sup> The court of appeals, however, remanded the case to the district court to determine if Don Craft's conveyance of the property to his wife was a fraudulent conveyance.<sup>94</sup>

In 1999, the United States District Court for the Western District of Michigan revisited *Craft* on remand from the court of appeals.<sup>95</sup> The issue presented before the district court was whether the conveyance of the entireties property from Don Craft to his wife for one dollar was a fraudulent conveyance, such that the IRS could recover, although it was entireties property to which the federal tax lien would not normally attach.<sup>96</sup> The district court looked to Michigan's Uniform Fraudulent Conveyance Act<sup>97</sup> to determine that the conveyance from Don to his wife was not solely a fraudulent conveyance.<sup>98</sup> The court found, however, that even though the actual conveyance was not fraudulent, whatever money was spent by Don Craft to improve the entireties property while he was insolvent was a harm to his creditors.<sup>99</sup> The court concluded that the IRS was entitled to whatever Don Craft paid in principal from 1980 to 1985, a sum of \$6,693; however the remainder of the escrowed proceeds were to go to Mrs. Craft.<sup>100</sup>

*Craft* was again headed for the court of appeals.<sup>101</sup> The IRS appealed, believing that they should be awarded the entire escrowed amount.<sup>102</sup> Sandra Craft cross-appealed, arguing that she should not have to pay the IRS any money.<sup>103</sup> The court of appeals first reasoned that the IRS could not re-argue their case due to the law of the case doctrine.<sup>104</sup> The IRS asserted that *Drye*, decided after

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93. *Craft*, 140 F.3d at 642.

94. *Id.* at 644.

95. *United States v. Craft*, 65 F. Supp. 2d 651 (W.D. Mich. 1999), *appeal dismissed* 233 F.3d 358 (6th Cir. 2000), *rev'd* 535 U.S. 274 (2002).

96. *Id.* at 654.

97. MICH. COMP. LAWS § 566.14, *repealed by* P.A. 1998, No. 434 §13 provided in pertinent part, "Every conveyance made and every obligation incurred by a person who is or will thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." *Id.* In addition, MICH. COMP. LAWS § 566.17, *repealed by* P.A. 1998, No. 434 §13 provided in pertinent part, "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." *Id.*

98. *Craft*, 65 F. Supp 2d at 658.

99. *Id.* at 658-59.

100. *Id.* at 661-62.

101. *Craft v. United States*, 233 F.3d 358 (6th Cir. 2000), *rev'd* 535 U.S. 274 (2002).

102. *Id.* at 363.

103. *Id.*

104. The law of the case doctrine is simply that "issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law

*Craft I*, changed the state of the law such that federal law determines whether a federal tax lien can attach to property and state legal fictions, such as the tenancy by the entireties, do not control federal law when a federal tax lien is involved.<sup>105</sup> The court of appeals found that their first ruling in *Craft I* was consistent with *Drye* and that the IRS's claims were lacking in merit; thus the law of the case doctrine did in fact apply.<sup>106</sup> Consequently, the court of appeals affirmed the district court's ruling and awarded the IRS \$6,693.<sup>107</sup>

Following the decision by the court of appeals, the IRS petitioned the United States Supreme Court, which granted certiorari.<sup>108</sup> *Craft* was argued on January 14th, 2002, and finally decided on April 17th, 2002, thirty years after Don and Sandra had purchased their entireties property and fourteen years after the IRS first assessed a tax deficiency against the now deceased Don Craft. Justice O'Connor authored the opinion of the Court, which was joined by five justices, with three justices dissenting.<sup>109</sup> The issue the Supreme Court addressed was "whether a tenant by the entireties possesses 'property' or 'rights to property' to which a federal tax lien may attach."<sup>110</sup> The majority used the common "bundle of sticks" analogy to explain what rights a person can have in property.<sup>111</sup> The Court stated, "state law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for the purposes of the federal tax lien statute is a question of federal law."<sup>112</sup>

The majority then determined what rights Don Craft had in his entireties property in Michigan.<sup>113</sup> The Court stated that these rights include:

The right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the

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of the case." *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997).

105. *Craft*, 233 F.3d at 366.

106. *Id.* at 367-68.

107. *Id.* at 375.

108. *United States v. Craft*, 533 U.S. 976 (2001).

109. *Id.* at 1419.

110. *Id.*

111. *Id.* at 1420.

112. *Id.*

113. *Craft*, 122 S. Ct. at 1422.

property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.<sup>114</sup>

The majority next addressed the question of whether these rights were sufficient to qualify as 'property' or 'rights to property' under the federal tax code.<sup>115</sup> The Court reasoned that since Don Craft had a significant number of sticks in the bundle, he therefore had 'property' or 'rights to property' to which a federal tax lien could attach.<sup>116</sup> The majority concluded by finding that Don Craft did indeed have 'property' or 'rights to property' to which the federal tax lien could attach, meaning that the IRS was entitled to Don Craft's half of the proceeds from the sale of the property.<sup>117</sup> This decision has directly led to an upheaval of the current understanding of the law of entireties property in regards to creditors. The next section will demonstrate how this decision will affect Pennsylvania, a tenancy by the entireties state.

### III. PENNSYLVANIA HISTORY OF THE TENANCY BY THE ENTIRETIES AND FUTURE CONSEQUENCES

The tenancy by the entireties has always existed in Pennsylvania. Following the passage of the Married Woman's Act on April 11th, 1848,<sup>118</sup> the Supreme Court of Pennsylvania authored *Diver v. Diver*,<sup>119</sup> which expressly retained a tenancy by the entireties as a form of property ownership in Pennsylvania.<sup>120</sup> With the

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114. *Id.*

115. *Id.*

116. *Id.* at 1424. The Court also made a very compelling argument by stating, "that the rights of respondent's husband in the entireties property constitute "property" or "rights to property" "belonging to" him is further underscored by the fact that, if the conclusion were otherwise, the entireties property would belong to no one for the purposes of [26 U.S.C.] §6321." *Id.*

117. *Id.* at 1425.

118. There were three Acts involved – The Acts of April 11th, 1848, P.L. 536, 48 P.S. §64, June 3rd, 1887, P.L. 332, and June 8th, 1893, P.L. 344, 48 P.S. §32. These Acts gave married women the property rights of single women. *Id.*

119. 56 Pa. 106 (1867).

120. *Id.* at 108. The tenancy by the entireties remained the same as before the Acts were passed. See *McCardy v. Canning*, 64 Pa. 39 (1870) (if someone purchased one spouse's share the purchaser had no right of possession during the other spouse's life); *Beihl v. Martin*, 84 A. 953 (Pa. 1912) (one spouse cannot sell the expectancy of survivorship without the joinder of the other, nor could title to the expectancy be gotten through bankruptcy or sheriff's sale).

retention of this form of property ownership, Pennsylvania has adhered to the principle that entireties property cannot be reached by the creditors of one spouse.<sup>121</sup>

In 1946, the Supreme Court of Pennsylvania addressed the issue of whether a "judgment creditor of a husband [may] attach, in execution, the joint bank account of a husband and wife held as tenants by the entireties," in *United States National Bank in Johnstown v. Penrod*.<sup>122</sup> In *Penrod*, a husband and wife owned an account as tenants by the entireties.<sup>123</sup> The court found that the husband's creditors could not attach the account, and if the wife survived the husband, the creditors of the husband could never attach the account.<sup>124</sup> However, if the husband survived the wife, his creditors could then attach the account.<sup>125</sup>

The law as stated in *Penrod* has remained in Pennsylvania without any change<sup>126</sup> on the horizon until *United States v. Craft*. *Craft* has altered the way a tenancy by the entireties will be viewed throughout the future. Before *Craft*, entireties property was not reachable by the creditors of only one spouse. Only joint creditors could attach or levy on entireties property. Now, the Supreme Court of the United States has allowed the IRS to levy on entireties property, even though only one spouse owes the debt.<sup>127</sup> The Court made this determination by finding that each spouse has a sufficient number of sticks from the bundle of property rights to which a creditor may attach.<sup>128</sup> This decision leaves open the issue of whether all creditors may now attach entireties property in a manner similar to the IRS. If this is true, Pennsylvania law will be completely changed.

Not only has *Craft* possibly changed this aspect of Pennsylvania law, but the opinion has also raised the question of how bankrupt-

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121. See *In re Meyer's Estate*, 81 A. 145 (Pa. 1911); *Beihl*, 84 A. at 953; *Bostrom v. Nat. Bank of McKeesport*, 198 A. 644 (Pa. 1938); *Madden v. Gosztonyi Savings & Trust Co.*, 200 A. 624 (Pa. 1938).

122. 47 A.2d 249 (Pa. 1946).

123. *Id.* at 250.

124. *Id.*

125. *Id.*

126. See *Amadon v. Amadon*, 59 A.2d 135 (Pa. 1948); *Sterrett*, 166 A.2d at 1; *McGary v. Lewis*, 119 A.2d 497 (Pa. 1956); *Stinner v. Stinner*, 446 A.2d 651 (Pa. Super. Ct. 1982), *rev'd* 554 A.2d 45 (Pa. 1989), *cert. denied* 492 U.S. 919 (1989); *Patwardham v. Brabant*, 439 A.2d 784 (Pa. Super. Ct. 1982); *Garden State Standardbred Sales Co. v. Seese*, 611 A.2d 1239 (Pa. Super. Ct. 1992); *Constitution Bank v. Olson*, 620 A.2d 1146 (Pa. Super. Ct. 1993); *Koffman v. Smith*, 682 A.2d 1282 (Pa. Super. Ct. 1996).

127. *Craft*, 122 S. Ct. at 1424.

128. *Id.* at 1425.

cies will be handled in Pennsylvania or any state recognizing a tenancy by the entireties. In *In re Barsotti*,<sup>129</sup> Joseph V. Barsotti filed for bankruptcy under Chapter 7.<sup>130</sup> His wife, however, did not join in the bankruptcy.<sup>131</sup> The debtor claimed that any property he held with his wife as a tenancy by the entireties was exempt from the bankruptcy estate.<sup>132</sup> The trustee challenged the exemptions.<sup>133</sup> The Bankruptcy Court for the Western District of Pennsylvania found that "the law in Pennsylvania is clear and without dispute that entireties property is immune from process, including: partition, levy, execution, and sale, or in bankruptcy, where only one spouse is a debtor."<sup>134</sup> The bankruptcy court held that the debtor could exempt all of his property that he held as a tenancy by the entireties from the bankruptcy estate.<sup>135</sup> If only one spouse is in bankruptcy, creditors for joint debts may attach the entireties property.<sup>136</sup> Following the reasoning of *Craft*, it would seem that all property, whether held as a tenancy by the entireties or not, could possibly be subject to the bankruptcy estate even if only one spouse files for bankruptcy. This would eliminate the entireties exemption and afford no protection to the non-debtor spouse.

As of August 2003, no Pennsylvania state court has cited *United States v. Craft*; however bankruptcy courts in the state have addressed the case once. In *In re Basher*,<sup>137</sup> the United States Bankruptcy Court for the Eastern District of Pennsylvania was faced with the same issue that occurred in *Craft*, namely whether a lien of the Internal Revenue Service ("IRS") that is only owed by one spouse can attach to a tenancy by the entireties and what is the value of such an attachment.<sup>138</sup> Mark Basher and Marcella Basher owned a residence as a tenancy by the entireties.<sup>139</sup> The IRS had a tax claim against Mark Basher who had filed for bankruptcy under Chapter 13.<sup>140</sup> The court determined that the IRS lien did in fact attach to the property that was held as a tenancy by the en-

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129. 7 B.R. 205 (Bankr. W.D. Pa. 1980).

130. *Id.* at 207.

131. *Id.*

132. *Id.*

133. *Id.*

134. *In re Barsotti*, 7 B.R. at 209.

135. *Id.* at 213.

136. See *In re Cipa*, 11 B.R. 968 (Bankr. W.D. Pa. 1981).

137. Bankr. No. 02-12328DWS, Adversary No. 02-0346, 2002 Bankr. LEXIS 1467 (Bankr. E.D. Pa. Dec. 3, 2002).

138. *Id.* at \*1.

139. *Id.* at \*5.

140. *Id.* at \*2.

tireties based upon the reasoning of the United States Supreme Court in *United States v. Craft*.<sup>141</sup>

The court was next faced with how to determine the value of such an attachment.<sup>142</sup> The court found that the United States Supreme Court in *United States v. Craft* "not only failed to provide any guidance on how the property rights would be valued but expressly refused to decide whether the survivorship interest in and of itself was a present interest."<sup>143</sup> In the present case, the IRS argued that the attachment lien should be worth 50% of the fair market value of the property and the debtor argued that the attachment lien should not have any value due to his wife's survivorship interest in the property.<sup>144</sup> Unfortunately, the court did not agree with either party as of the date of this opinion and merely requested that both sides file briefs in support of their opposing valuations.<sup>145</sup>

Based on this recent case interpreting *United States v. Craft*, it is still unclear as to what import *Craft* will have in bankruptcy law. Clearly, after *Craft*, a tax lien may attach to a tenancy by the entireties, even when only owed by one spouse, but if the value of such a lien is nothing until the tenancy by the entireties is terminated then *Craft* may have not really changed anything at all. If however, the valuation is 50% then the import of *Craft* will become clear.

## CONCLUSION

The aforementioned issues are only the beginning of what could be the elimination of the tenancy by the entireties. Some may interpret *Craft* more narrowly and find that only IRS liens may attach to entireties property,<sup>146</sup> but if one reads the majority's opin-

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141. *In re Basher*, 2002 Bankr. LEXIS 1467 at \*13.

142. *Id.*

143. *Id.* at \*14.

144. *Id.* at \*16-\*17.

145. *Id.* at \*18.

146. See Daniel C. Bruton, *Pavlov's Dog, the Chicken and the Egg: Decision in United States v. Craft Should Have Minimal Impact*, 2002 ABI JNL. LEXIS 170, \*1 (2002). The author of this article takes the position that *United States v. Craft* will only ever reach federal tax liens and never be extended by the courts to apply to general creditors. *Id.* at \*4. However, this author also states that "it is conceivable that the Supreme Court's determination that a federal tax lien attaches to entireties property will not even apply in the bankruptcy context." *Id.* at \*6. This comment has not received validation, particularly in light of the recent decision by the United States Bankruptcy Court for the Eastern District of Pennsylvania, *In re Basher*, in which the court specifically allowed a federal tax lien to

ion carefully there is a lot more stated than just that. If each spouse is now said to have a sufficient interest in entireties property to which a tax lien may attach, what is to prevent any creditor of only one spouse from making the same argument? If this happens then the tenancy by the entireties will no longer be a needed form of property ownership. Holding property as a tenancy by the entireties will no longer afford any more protection than holding property as tenants in common.

It is unknown how far *Craft* will be taken until it is tested. One thing that is certain is that the United States Supreme Court will have to revisit this issue in the near future in order to clarify if the privilege they have extended to the IRS tax lien will indeed be extended to other creditors. If at that time the privilege is extended, then the tenancy by the entireties will not have any reason to exist as a form of property ownership. Then, *United States v. Craft* will truly have marked the beginning of the end for the tenancy by the entireties and the Supreme Court of the United States will have burnt the bundle of sticks of entireties property and scattered the ashes.

*Angela Sheffler*

