

Contribution: A New Remedy for Entireties Property?

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Tkachik v Mandeville,¹ decided by the Michigan Supreme Court in July, 2010, appears to be yet another example of “bad facts making bad law”.² In *Tkachik*, the parties held interests in two separate unrelated properties as tenants by the entireties. The properties statutorily passed to the husband upon the wife’s death, outside of probate (and by operation of law), as the surviving owner of the properties, subject only to the joint obligations secured against such properties.

Michigan’s Estates and Protected Individuals Code (“EPIC”)³ generally provides a surviving spouse with a myriad of benefits, including, but not limited to, the right to claim: (1) a forced share;⁴ (2) a homestead allowance;⁵ (3) a family allowance;⁶ and, (4) an exempt property allowance.⁷ However, where a spouse has, for a period of more than one year before the date of decedent’s death: (1) been willfully absent from the decedent; (2) deserted decedent; and/or (3) willfully neglected or refused to provide for decedent’s support (if required to do so by law), MCL 700.2801(2)(e)(i) may eliminate a widow or widower’s ability to receive the benefits otherwise statutorily afforded to a surviving spouse.

In *Tkachik*, the husband had been absent and had failed to contact his wife for a period in excess of 18 months immediately preceding the wife’s death (and had had knowledge that she had been battling cancer). Under such circumstances, the husband was precluded from receiving the “surviving spouse” benefits by application of MCL

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¹ 487 Mich 38 (2010).

² The opinions expressed in this article are those of the author and do not necessarily reflect the opinion of all members of her firm. In fact, the attorney (Steve Malach) who originally proposed the position in the underlying probate court proceedings ultimately adopted by the majority in *Tkachik* is also a member of the same firm.

³ MCL 700.1101, *et seq.*

⁴ MCL 700.2202.

⁵ MCL 700.2402.

⁶ MCL 700.2403.

⁷ MCL 700.2404.

700.2801(2)(e)(i). However, the Michigan Supreme Court felt that the loss of surviving spouse benefits was an insufficient remedy to address what it perceived as bad or wrongful conduct by husband. The Court's perception of the inequities occasioned by the decedent-wife's payment of the mortgage, taxes and insurance relating to their entireties properties during the 18-month period preceding her death (and despite the apparent history that the husband had often been out of the country for extended periods during the last 10 years of the parties' marriage) led the Court to conclude "that the equitable doctrine of contribution can be appropriately applied in this context."⁸ As a result, the Court tried to fashion a very narrow set of circumstances under which the equitable doctrine of "contribution" would be applicable to the parties' entireties property. However, the Court's decision may have eroded the foundation and basic tenets of entireties property which may lead to unintended consequences.

Historically, the interests of a husband and wife holding interests by the entireties was viewed as being an indivisible *single interest*, as opposed to the interest of two individuals that was divisible. Unlike joint tenancy or tenancy in common, tenancy by the entireties is a form of property ownership that may only be held by persons who are married to each other. Furthermore, a conveyance to a married couple creates a presumption that their interest in the property is held as tenants by the entireties, unless otherwise specified.⁹ More importantly, under Michigan law, one tenant by the entireties holds no legal interest in the realty separate from that of the other tenant.¹⁰

Justice Young's dissent in *Tkachik* analyzes the three types of concurrent ownership recognized in Michigan:¹¹ (1) tenancy in common; (2) joint tenancy; and (3) tenancy by the entireties. MCL 554.43 provides, in pertinent part, that these forms of ownership "shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter." Therefore, nothing in the statute recognizes the ability of a court to modify the obligations and/or concurrent ownership interests except as specified by statute.

The default manner in which concurrent ownership is held is tenancy in common, because that is the form of ownership created by a grant or devise of property to two or more people unless the property is expressly declared to be otherwise held.¹² Under tenancy in common, each party's interest can represent a different share or interest in the property, and such shares or interests may be equal or unequal in nature.¹³

⁸ *Id.*, at 41.

⁹ See *Kemp v Sutton*, 233 Mich 249, 258; 206 NW 366 (1925).

¹⁰ See *Long v Earle*, 277 Mich 505, 517; 269 NW 577 (1936).

¹¹ These forms of ownership are specifically provided for under MCL 554.43 *et seq.*

¹² See MCL 554.44.

¹³ See *Fenton v Miller*, 94 Mich 204, 214; 53 NW 957 (1892).

Tenancy in common does not provide for an automatic right of a surviving tenant to acquire the interest of a deceased co-tenant. However, when parties hold property as joint tenants, a special right of survivorship may be created when expressly stated.¹⁴

When parties hold property as tenants in common or as joint tenants, the manner in which title is held will dictate the percentage of their ownership interest and thereby direct their respective percentage or contributory share. But when parties own property indivisibly, as tenants by the entireties, they are but a single tenant, which means there is only one owner (the couple as a singular unit).

Barring a contract varying the obligation of contribution, joint tenants and tenants in common bear an obligation of contribution proportionate to the share of the interest in the property that they hold. Where parties hold an interest as tenants by the entireties, the interest is a singular and whole interest, which historically had been indivisible in nature. The singular nature of the interest therefore negates the possibility of allocating a contributory share, as no second owner exists under this ownership concept.

It should, therefore, follow that the parties in *Tkachik* did not have a common law obligation to contribute equal amounts to the costs of acquisition and maintenance of the property during the term of their tenancy by the entireties. Nonetheless, the *Tkachik* majority felt that the following “special circumstances” merited the application of a “contribution” theory as between these tenants by the entireties:

- (a) where the decedent spouse has taken sole responsibility for the property maintenance payments while the other spouse had absolutely no personal contact with her for at least the last 18 months of her life;
- (b) where the other spouse did not attempt once to communicate with the decedent spouse during this time, even though he acknowledged that he was aware that she was battling cancer;
- (c) where the other spouse was disinherited in the decedent spouse’s will;
- (d) where the decedent spouse sought diligently, albeit unsuccessfully, to divest the other spouse of his interest in the real properties before she died; and
- (e) where the other spouse was deemed a non-surviving spouse under MCL 700.2801(2)(e)(i).¹⁵

In its analysis, the Court noted that:

¹⁴ See *Albro v Allen*, 434 Mich 271, 274-76; 454 NW 2d 85 (1990); *In re Renz Estate*, 338 Mich 347, 56-357; 61 NW2d 148 (1953).

¹⁵ *Tkachik*, *supra* at 57.

The general rule of contribution is that one who is compelled to pay or satisfy the whole *or to bear more than his aliquot share of the common burden or obligation*, upon which several persons are equally liable for which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.¹⁶

However, herein lays the rub. Because entirety property represents an interest held by the married couple as a singular unit or owner, the unit (as opposed to the individuals) bears the sole responsibility with regard to the acquisition and maintenance costs of the property, and no real property statutes previously set forth the percentage contribution that either person was individually required to make. So, while the *Tkachik* majority cites to numerous occasions where the doctrine of contribution has been found applicable in a divorce, separate maintenance and/or action as between joint tenants and/or tenants by the entirety, none of the cited situations related to entirety property interests where no action for divorce or separate maintenance existed. Consequently, while it is well established that contribution claims may be brought during a joint tenancy (as between tenants in common or joint tenants) to compel contribution consistent with the tenant's pro-rata interest in the property, no such provision appears to have ever existed with regard to tenants by the entirety prior to the issuance of *Tkachik*. Historically it was only by virtue of the divorce or separate maintenance statutes that contribution could be sought. This was because following entry of a judgment of divorce or separate maintenance, the entirety interest is automatically terminated and the tenancy by the entirety is severed into a tenancy in common.¹⁷ Because the judgment of divorce and/or separate maintenance automatically ends the tenancy by the entirety, the court can in such a proceeding require contribution toward the ongoing costs of the property or award the property, an interest in other property, or require a contribution toward a party's support, based upon the facts and circumstances presented, within certain statutory confines.

While the *Tkachik* majority recognized that “[a] tenancy by the entirety is a type of concurrent ownership in real property that is unique to married persons,”¹⁸ it failed to recognize that ownership by the entirety creates a singular form of ownership where

¹⁶ *Id.* at 47, citing *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975).

¹⁷ See MCL 552.102:

Every husband and wife owning real estate as joint tenants or as tenants by entirety shall, upon being divorced, become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce.

¹⁸ *Id.* at 46, citing *Field v Steiner*, 250 Mich 469, 477; 231 NW 109 (1930).

the share of the couple is treated as one, as opposed to two. As a direct consequence of the singular nature of the ownership interest, the concept of contribution would appear to be inapplicable, as the marital unit (as a whole) as opposed to one or the other of the couple (as individual owners) is entitled to control and/or is obligated to maintain the property. Therefore, the *Tkachik* Court essentially fashioned a posthumous remedy that otherwise could only have been statutorily granted if the parties had been granted a divorce or judgment of separate maintenance during the parties' respective lifetimes. Interestingly, even a pending action for divorce or separate maintenance will not otherwise survive the death of one of the parties. Therefore, following one party's death, the family court loses jurisdiction to fashion a remedy and/or otherwise make an award of property as between the parties (and/or their representative estates).¹⁹

Therefore, before *Tkachik*, it was only through an action for divorce or separate maintenance that a court was empowered to (equally or disproportionately) divide or otherwise allocate the value of the parties' entireties interests and then only during the owners' joint lifetimes. Moreover, it was only in an action for divorce or separate maintenance that the court could, in consideration of the party's respective contributions toward the acquisition and maintenance of the property, allocate property between them and/or assign responsibility for obligations relating thereto.²⁰

In applying and interpreting such statutes, the courts have determined that there is no strict mathematical formula that exists for the division of such property. *Sparks v*

¹⁹ See *Tiedman v Tiedman*, 400 Mich 571, 573; 255 NW2d 632 (1977); *Zoellner v Zoellner*, 46 Mich 511, 513-14 (1881).

²⁰ MCL 552.103 provides that:

The bill of complaint or amendment thereto, or the answer or cross bill or amendment thereto, filed in any divorce proceeding may ask that the ownership of the lands described therein and owned by the parties to such suit as joint tenants or as tenants by entireties shall be determined by the decree of divorce, if granted, and in such case the court granting the divorce may award such lands to 1 or the other of said parties, or any part of it to either of them, or may order such lands to be sold under the direction of a circuit court commissioner, and the proceeds thereof divided between the parties in such proportion as the court shall order; or may appoint commissioners to partition such lands between said parties in the proportion fixed by the decree. The proceedings following the appointment of such commissioner shall conform to the law governing the partition of lands between tenants in common.

*Sparks*²¹ summarized the factors which a court may consider in distributing the parties' marital estate. The factors to be considered, where applicable, include the: (1) duration of the marriage; (2) contribution of the parties to the marital estate; (3) age of the parties; (4) health of the parties; (5) life status of the parties; (6) necessities and circumstances of the parties; (7) earning ability of the parties; (8) past relations and conduct of the parties; and (9) general principles of equity.²² Additional factors may be relevant depending on the facts and circumstances of a given case.²³

The *Tkachik* majority nonetheless held that:

equity, and the principles of natural justice embodied therein, call on defendant Frank Mandeville to contribute his share of the property maintenance costs incurred by his wife Janet Mandeville, who bore these obligations alone in the 18 months before her death. While defendant was willfully absent from the marriage, and from the marital properties, Janet maintained the properties and incurred all the necessary expenses.²⁴

Justice Young noted in his dissent that the majority's opinion in *Tkachik* results in a sweeping modification of the common law relating to ownership interests of tenancy by the entirety, which heretofore represented the most settled and uncontroversial tenets of property law contained within our body of jurisprudence. He indicated that, with a single blow, "the majority now permits posthumous collateral attacks"²⁵ on the manner in which parties handled their financial affairs during their marriage, by allowing a claim of contribution between tenants by the entirety outside the context of a divorce or separate maintenance action and following the death of one of the parties who had theretofore held an interest in the property as a tenant by the entirety.

Posthumous actions are governed by MCL 600.2921 *et seq.* MCL 600.2921 relating to the survival of actions provides that:

All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

MCL 600.2922(1) goes on to provide, in pertinent part, that:

²¹ 440 Mich 141, 158-59; 485 NW2d 893 (1992).

²² *Id.* at 159-60.

²³ *Id.* at 160.

²⁴ *Tkachik, supra*, at 49.

²⁵ *Id.* at 69.

Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

Consequently, other than injuries that cause or otherwise result in the death of the decedent, there are no other known causes of action that arise solely by virtue of the person's death that do not otherwise represent a survival of an action (or right to bring an action) that existed pre-death. It appears that, under *Tkachik*, we now add to these previously statutorily-limited rights of action an equitable cause of action for contribution toward pre-death maintenance obligations relating to entireties property interests.

Again, contrary to established probate jurisprudence, the Court now authorizes a post-death claim for contribution by the other tenant to an interest in entireties property, which the tenant during lifetime could not otherwise have brought except in an action for divorce or separate maintenance. Rightfully, Justice Young (in his dissent) harkens to a concern that "the majority's new rule may have a disproportionate adverse effect on women in the future."²⁶ To now impose *an equal* obligation of contribution could have unintended and inequitable results. Circumstances where this might arise, include, but are not limited to, situations where: (1) one party might earn more than the other; (2) property is purchased based upon the earning capacity of one of the parties (while the other has little or no ability to make financial contributions); or (3) despite a lack of financial equality the parties decide to take title as tenants by the entireties. Under such circumstances, the financial arrangements engaged in by the parties during the course of their marriage might be questioned and/or undermined following death.

For better or for worse, divorce has become commonplace in our society and blended family situations abound. As a result, it is not uncommon: (1) for a spouse not to make provisions in his/her will for the benefit of a second spouse and instead favor children from a prior relationship; (2) for a spouse to provide that property accumulated by him or her is to be conveyed, devised or otherwise bequeathed to children as opposed to a second spouse who survives him or her; and/or (3) in order to protect the separate property and/or pre-marital nature of property that a spouse might choose to be the sole contributor toward the maintenance of pre-marital and/or separate property

²⁶ *Id.* at 69.

so as to reduce the possibility of a claim of entitlement by a second spouse based upon MCL 552.401. Nonetheless, for the protection of a spouse (and/or as a dispositive direction) a party might still chose to hold the property with a second spouse as tenants by the entireties, either for purposes of the creditor protections provided by this form of ownership or to provide for an automatic transfer of ownership to the surviving spouse upon the first spouse's demise.

The *Tkachik* Court placed a sword in the decedent's sister's hands by which she was able to exact retribution for the perceived wrongs caused by the husband's absence during the wife's illness. By extension, the Court may now have placed a sword in the hands of a decedent's children to take action against a step-parent (post-death) where such children may seek to claw back part of the value of property left to a decedent's surviving spouse. Will disgruntled heirs now be permitted to undermine intentional decisions by a decedent to provide for his or her surviving spouse under the guise of a posthumous claim for contribution? Only time will tell.

One thing is clear: the advice we render our clients relative to the import and implications of tenancy -by the entireties must now be couched and qualified in light of *Tkachik*. So, while the Court attempted to limit the implications of its opinion to a narrow set of circumstances, only time will tell where such a sweeping erosion of a basic real property principle will lead. Statements of intent in a party's estate planning documents, where parties have separated but do not intend to have claims of contribution levied against their spouse, might now be considered if one wishes to attempt to fend off the potential of a posthumous claim for contribution.