

The Aftermath of Obergefell: Unsettled Times for Tenancy by the Entirety

March 31, 2016



Regardless of your politics, your religious beliefs, which side of the social divide you're on, or how you feel about it, one thing is now certain: same-sex marriages are now legal in this and every other state. Last June, the Supreme Court of the United States determined in *Obergefell v. Hodges* that "same-sex couples may exercise the fundamental right to marry in all States" and "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in *another* State on the ground of its same-sex character."

The Supreme Court having spoken, that is now the law of the land, overriding Section 6 of Article XIV of the North Carolina Constitution, which provides: "Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State," and G.S. 51-1.2, which provides: "Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same sex are not valid in North Carolina."

So, all issues arising from a same-sex marriage are resolved, right? "Not hardly," as John Wayne so succinctly put it in *Big Jake*. There remain many, many details that must be considered. For example:

- G.S. 50-6 permits "a husband and wife" who have lived separate and apart for one year to obtain a divorce. Do individuals in a same-sex marriage who have lived separate and apart for a year have the same right?
- G.S. 52-5 says that "husband and wife" have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried. Is this true of a same-sex married couple?
- The Workers' Compensation Act provides certain benefits to the widow or widower of an employee who dies due to a compensable injury. However, G.S. 97-2 defines "widow" in terms of the wife of a man and "widower" in terms of the husband of a woman. Is the surviving spouse in a same-sex marriage entitled to the same benefits?
- G.S. 105-158.3 describes the rules that require (or permit) a "husband and wife" to file a joint state income tax return in North Carolina. Do the same rules apply to a same-sex married couple?
- Finally, and most importantly for this discussion, may a same-sex married couple acquire/own real property as tenants by the entirety?

This paper focuses on the last issue because how it is resolved may have a dramatic and lasting impact on land titles in North Carolina.

Background and Context

But first, a little background and context.

North Carolina law recognizes three forms of concurrent ownership in real property: tenancy in common, joint tenancy, and tenancy by the entirety.

The Common Attributes of Tenancy in Common and Joint Tenancy

No effort will be made here to delve into the technical and historical differences between a tenancy in common and a joint tenancy. From a practical standpoint in today's world, both have these common attributes:

- Each tenant in common or joint tenant can convey, lease, or encumber that tenant's interest in the property without the consent or joinder of any other co-tenant, but when a tenant does so, the tenant's actions affect only that tenant's interest in the property – not the interest of any other co-tenant unless the tenant who is acting has been authorized to act as the agent for a co-tenant and, in fact, acts as that co-tenant's agent.
- Each tenant in common and joint tenant may compel a "partition" of the property – i.e., the division of the property "in kind" into separate parcels so that each co-tenant receives sole ownership of a parcel, or, if partition in kind cannot be done equitably, the sale of the property and a division of the sale proceeds among the co-tenants.
- A creditor who obtains a judgment against a tenant in common or a joint tenant can obtain a judgment lien on, and can levy against, the interest owned by that tenant, but only that tenant's interest.

Survivorship - Where Tenancy in Common and Joint Tenancy Can Differ

Where a tenancy in common and a joint tenancy can sometimes differ is in the "right of survivorship" to a tenant's interest. When a right of survivorship exists, the surviving co-tenant or co-tenants automatically own the interest of a tenant who dies. The heirs or spouse of the deceased tenant receive no interest in the property and the tenant's will (if any) is ineffective to convey any interest in the property.

There is no right of survivorship in a tenancy in common. When a tenant in common dies, that tenant's undivided share descends to the tenant's heirs (if the tenant dies without a will) or passes according to the tenant's will (if the tenant dies with a will).

It is different in a joint tenancy. At common law, the most important characteristic of a joint tenancy was the right of survivorship. While joint tenancy has not been formally abolished in North Carolina, the automatic right of survivorship (which was the bedrock element of a joint tenancy) has been abolished since 1784 by what is now G.S. 41-2, although G.S. 41-2 expressly permits the creation of a joint tenancy with a right of survivorship in real or personal property "if the instrument creating the joint tenancy expressly provides for a right of survivorship." Thus, depending on the specific language in the deed or other instrument of conveyance, a joint tenancy may (or may not) have a right of survivorship in today's world. However, if the joint tenancy is terminated or "severed" by a joint tenant, the right of survivorship disappears as to that co-tenant's interest, and that co-tenant's interest in the property is thereafter owned by that co-tenant as a tenant in common with the other co-tenant or co-tenants.

Tenancy by the Entirety

Now let's turn to the third form of concurrent ownership, tenancy by the entirety. Tenancy by the entirety in

North Carolina is a hybrid of common law and statutory law. The basic elements of a tenancy by the entirety in North Carolina are:

- It can exist only between a husband and wife. Two people who are not husband and wife cannot own real property together as tenants by the entirety.
- Any conveyance of real property to a husband and wife automatically vests title in them as tenants by the entirety unless the instrument of conveyance indicates some other form of co-ownership is intended. It doesn't matter whether the instrument of conveyance identifies them as married to each other – a tenancy by the entirety is automatic if, at the time of the conveyance, the husband and wife are in fact married to each other.
- Neither the husband nor the wife can effectively convey, lease, or encumber the property or any interest in the property without the consent and joinder of the other unless he or she has been authorized to act as the agent of the other.
- Neither the husband nor the wife may compel a partition of the property.
- With one exception (that being a federal tax lien), a creditor who obtains a judgment against one tenant by the entirety (i.e., the husband or the wife) cannot obtain a judgment lien on, and cannot levy against, real property held by the judgment debtor with his or her spouse as tenants by the entirety. Only judgment creditors that have a judgment against both the husband and wife as joint debtors can levy on property held by them as tenants by the entirety.
- There is right of survivorship in a tenancy by the entirety. If the husband dies survived by his wife, she automatically becomes the sole owner of the property; conversely, if the wife dies survived by her husband, he automatically becomes the sole owner of the property – there is no "transfer" or conveyance of title by intestate succession or by will – title vests automatically in the survivor because of survivorship.
- If the husband and wife divorce, the tenancy by the entirety is automatically terminated and the property is thereafter owned by them as tenants in common.

Tenancy by the entirety has long been the preferred form of concurrent ownership for married couples in North Carolina because:

- It permits the property to be held by the married couple as a family unit;
- The property cannot be transferred or encumbered by either spouse without the consent and joinder of the other;
- The creditors of only one spouse cannot reach the property; and
- The right of survivorship guarantees that title to the property will vest automatically in the surviving spouse following the death of the first spouse to die without passing through the estate of the deceased spouse and becoming liable for the debts of the estate.

The Dilemma of Same-Sex Marriage and Tenancy by the Entirety

So how does all of this relate to same-sex marriage? The issue should be obvious – a tenancy by the entirety is, by common law and statute, reserved to two persons who are "husband and wife," a term historically interpreted to mean a man and a woman married to each other. The critical question is therefore a simple

one: Can two individuals lawfully married to each other acquire or own real property as tenants by the entirety if they are of the same sex? Nobody knows the definitive answer to this question and, unfortunately, the answer is not obvious.

Perhaps we can all agree that a court will likely conclude that denial of the right of a same-sex married couple to hold real property as tenants by the entirety violates their right to equal protection, just as the bar against their marrying did. However, the remedy is less certain. A court may hold that a same-sex married couple should be extended the same right to own property as tenants by the entirety that a "husband and wife" have, or a court might strike down tenancy by the entirety as a form of concurrent ownership for everyone until such time (if ever) it is made available to all legally married couples. Were a court to take the second approach and strike down tenancy by the entirety, it would be moving North Carolina in the direction South Carolina and several other jurisdictions took when they abolished tenancy by the entirety altogether following the enactment of Married Women's Property Acts.

Until the mid-to-late 1800's, married women possessed almost no viable rights in property held by the entirety. In marriage, the husband and wife became one, and that "one" was the husband. The husband had the exclusive right to the possession, control, and use of land owned by him and his wife as tenants by the entirety. Then along came the "Married Women's Property Acts" - laws that recognized a married woman's right to own and control property. The courts of some states concluded that tenancy by the entirety was incompatible with the new property rights of married women and, rather than modifying the "institution" of tenancy by the entirety, simply abolished it. It is interesting to note that North Carolina dodged that bullet in 1982 by enacting G.S. 39-13.6, which gave a husband and wife "equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety." In short, legislation in North Carolina preserved tenancy by the entirety by eliminating the risks inherent in litigation.

Were a court to abolish tenancy by the entirety in North Carolina, the clear benefits of tenancy by the entirety would be lost to all married couples, both "traditional" (i.e., a man and a woman) and same-sex. What would become of the title to real property then held by a traditional married couple as tenants by the entirety? Would it become a tenancy in common? A joint tenancy? If it becomes a joint tenancy, would it be with or without a right of survivorship? Would the property be exposed to the claims of the creditor of only one spouse? Could either spouse convey his or her interest in the property without the consent or joinder of the other? What would become of the interest in the property of the first spouse to die?

Assuming North Carolina doesn't want to lose tenancy by the entirety as a form of concurrent ownership, it should open tenancy by the entirety up to all married couples, regardless of sex. This can be done through litigation or by legislation. Surely the issue will be raised in litigation if it is not promptly addressed by legislation. However, litigation involves high costs, may take several years, and (as noted above) may result in an unacceptable outcome - i.e., the abolition of tenancy by the entirety as a form of concurrent ownership in North Carolina for all married couples.

That leaves the legislative route, always tricky when a volatile social issue such as same-sex marriage is concerned, and particularly so in an election year. However, until the issue is resolved, there will continue to be uncertainty regarding land titles in North Carolina, clearly an unnecessary destabilizing factor.

So What's Being Done About It?

The General Statutes Commission (the "GSC") is a highly respected commission created by the North Carolina General Assembly tasked with, among other things, recommending both substantive and technical statutory changes to the General Assembly. The Commission is composed of 14 members, many of whom are law professors or legal scholars. Dean Judith Wegner is the former Dean of the University of North Carolina Law

School and a member of the GSC. At the request of Dean Wegner at its meeting in October 2015, the GSC opened a docket to consider proposing legislation to revise G.S. 39-13.6, one of several key statutes dealing with tenancy by the entirety, to accommodate same-sex married couples.

In December 2015, an ad hoc group of lawyers from the Real Property, Family Law, and Estate Planning and Fiduciary Law Sections of the North Carolina Bar Association met with Dean Wegner to explore in greater depth the technical changes to the North Carolina General Statutes needed to accommodate same-sex marriages and to avoid the unnecessary costs, delay, and uncertainty associated with litigating the rights of same-sex married couples in North Carolina.

The working group decided on a two-phased approach. In Phase One, the GSC is being asked to consider recommending to the General Assembly certain technical changes to G.S. 39-13.6 and several other statutes that deal specifically with tenancy by the entirety for enactment during its 2016 short session. This is the most pressing issue.

In Phase Two, the working group will identify other statutes that should be "tweaked" to afford all married couples in North Carolina the same rights and benefits, regardless of the sex of the spouses, thereby protecting the existing rights of traditional married couples from potential challenges based on equal protection grounds. In addition to the statutes dealing specifically with tenancy by the entirety already under consideration, over 75 statutes have been identified to date that may need to be slightly amended. Once that review has been completed by the working group, a new request will likely be submitted through Dean Wegner to the GSC for its consideration. Depending on the nature and extent of the proposed statutory changes, the GSC may consider submitting a recommendation to the General Assembly this year or in some later legislative session.

The General Assembly convenes this year on April 25. Stay tuned – it will soon get interesting!

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