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MEMORANDUM

To: House Judiciary I
From: General Statutes Commission
Re: HB 227 (Preserve Tenancy by the Entirety)
Date: April 18, 2017

General Comments

Part I of the proposed committee substitute for this bill, if enacted, will preserve the centuries-old traditional form of property-holding for married couples in this State by adjusting the wording of our statutes on that subject in light of the definitional changes by *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). It will provide stability and certainty to the thousands of married couples in North Carolina who currently own their homes as tenants by the entirety.

Tenancy by the entirety is a traditional form of owning real property, derived from common law, that is available only to married couples. Unless another form of tenancy is specified, a tenancy by the entirety is created when real property is deeded in one deed to two people who are husband and wife at the time they take the property. Both spouses own the entire property rather than a fractional interest in it, and when one spouse dies, the survivor continues to own the entire property. Neither spouse can unilaterally defeat or in any way affect the other spouse's right of survivorship.[1] For example, one spouse cannot validly sell a share of the property without the consent of the other spouse during the other spouse's lifetime, and property held in a tenancy by the entirety is not subject to a partition proceeding. Although a creditor can levy on the property for debts owed jointly by the couple (a typical example being a mortgage the couple takes out to buy the property), the creditors of only one spouse cannot do so.[2] The result is that each spouse, and therefore the family unit as a whole, is protected against the individual liabilities of the other spouse.[3]

For many married couples, their home is their major asset. According to figures from the 2010 United States Census, North Carolina had 3,745,155 households, of which 48.4% were husband-wife households. These households resided in 3,745,155 housing units, of which 66.7% were owner-occupied. Although the General Statutes Commission does not have any figures on the number of properties held in tenancies by the entirety, it is clear from the census figures that they number in the thousands.

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[1] A divorce converts a tenancy by the entirety to a tenancy in common, with no survivorship rights or protection against the ex-spouse's creditors.

[2] The federal government with respect to a federal tax lien is an exception. *U.S. v. Craft*, 535 U.S. 274, 122 S.Ct. 1414 (2002).

[3] *See* 1 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA §§ 7.04 and 7.15-7.19 (6th ed. 2011 & Supp. 2015).

The problem that has arisen, and the reason for this bill, is that the wording of this State's statutes on tenancy by the entirety may no longer pass muster against an equal protection challenge in light of the United States Supreme Court's decision in *Obergefell*. For example, G.S. 39-13.6, the primary statute on the subject, refers to "spouses" but also begins "[a] husband and wife …." This wording raises the question whether a same-sex couple in a valid marriage can take real property in this State in a tenancy by the entirety. Given that *Obergefell* effectively mandated recognition of marriages between persons of the same sex, it is foreseeable that the question will eventually be raised in a court unless the General Assembly acts first.

Courts that have found gender-specific provisions in the law to be unconstitutional have taken a variety of approaches in dealing with the result. For example, the growth of married women's property protections in state laws and state constitutions during the 1800s resulted in challenges to the existence of tenancies by the entirety. Because the married women's property protections granted married women the right to have and control their own property, just as though they were single, while the common law vested control over property held in a tenancy by the entirety in the husband, some courts saw the two as incompatible and judicially abolished tenancy by the entirety as a result. South Carolina is one example, and in the process it decided to recognize a survivorship right created by deed in a tenancy in common.[4] North Carolina in contrast dealt with the issue legislatively, by enacting G.S. 39-13.6.[5] More recently, equal protection challenges to the common law doctrine of necessaries became popular in the 1980s. That common-law doctrine made a husband liable for debts incurred by his wife or minor children for "necessaries," that is, things like food, medicine, etc. North Carolina's Supreme Court dealt with the issue by extending the doctrine to apply to wives as well as husbands;[6] Alabama's Supreme Court, on the other hand, abolished the doctrine.[7]

Due to the uncertainty caused by *Obergefell* in this area of the law, an ad hoc group, consisting of members of different sections of the North Carolina Bar Association, some title attorneys, and others who practice in property and related fields, identified five sections of the North Carolina General Statutes dealing with tenancy by the entirety that the group felt needed to be amended. The General Statutes Commission reviewed the proposed amendments and agreed that they should be made, with a few stylistic changes.

Accordingly, given the foreseeability of a constitutional challenge to our tenancy by the entirety statutes absent action by the General Assembly, and given the possibility that a court may respond by abolishing this form of property holding, and given that thousands of existing married North Carolinians who currently own their homes as tenants by the entirety would be negatively affected by such a result, the General Statutes Commission decided to recommend this bill to give the General Assembly the opportunity to settle the issue rather than the courts.

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[4] *E.g., Davis v. Davis*, 75 S.E.2d 46 (S.C. 1953).

[5] *See* Chapter 1245 of the 1981 Session Laws (Reg. Sess. 1982) ("An Act To Equalize Between Married Persons the Right to Income, Possession, and Control in Property Owned Concurrently in Tenancy by the Entirety").

[6] *North Carolina Baptist Hospitals, Inc. v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987).

[7] *Emanuel v. McGriff*, 596 So.2d 578 (Ala. 1992).

Specific Comments

Part I contains amendments recommended by the General Statutes Commission. The North Carolina Bar Association also supports these amendments.

Section 1.1 amends G.S. 39-13.3 (Conveyances between husband and wife) to replace references to a husband and a wife with references to a "married" grantor or grantee or individual and that person's spouse.

Section 1.2 amends G.S. 39-13.6 (Control of real property held in tenancy by the entirety) to replace some references to a husband and wife with a reference to two individuals married to each other and to update the format of subsection (b). References to a husband or wife in subdivisions (b)(1), (2), and (3) are not changed because these are historic. Subdivision (b)(2a) is included and subdivision (b)(3) is amended to specifically allow a reference to a "spouse" in a deed.

Section 1.3 amends G.S. 39-13.7 (Tenancy by the entireties trusts in real property) to make the terminology gender neutral.

Section 1.4 amends G.S. 41-2 (Survivorship in joint tenancy defined; proviso as to partnership; unequal ownership interests) to replace the reference in subsection (b) to a husband and wife with a reference to two individuals married to each other.

Section 1.5 amends G.S. 41-2.5 (Tenancy by the entirety in mobile homes) to make in subsection (b) the same changes as described in Section 4 and to correct an obvious error in subsection (c), where the reference to "Article" should be to "section."

Part II contains related amendments recommended by the North Carolina Bar Association.

Part III contains the effective date and applicability provisions for the bill.

Section 3.1 explains that the effective date is derived from the final order in the first case that applied to this State the holding in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (the Fourth Circuit predecessor to *Obergefell*).

Section 3.2 sets an effective date of October 10, 2014, applicable to conveyances on or after that date.