

## **United States v. Craft Marriage is No Longer a Safe Haven**

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Just when we think we have everything figured out and we believe there is some predictability to our professional decisions and provide advice with which we feel comfortable, new court decisions come along that turn our world upside down. United States v. Craft, 535 U.S. (2002) is one of those cases that "rocked" the real property bar, upsetting decades of teachings and understandings of the real property practitioner.

In this case, Don Craft had tax liabilities of \$482,446.00 for failure to file federal income tax returns for the years 1979 through 1986. In 1988 the IRS assessed Don Craft for the unpaid taxes, which became a lien on "all property and rights to property, whether real or personal belonging to" him. 260.U.S.C. § 6321. Sandra L. Craft and Don Craft owned real property in Michigan that is titled as tenants by the entirety. The couple then executed a quitclaim deed to Sandra Craft for one dollar and a title search revealed the lien when she attempted to sell the property a few years later. The IRS agreed to release the lien on the condition that half of the net proceeds be held in escrow pending determination of the Government's interest in the property. The action was brought to quiet title to the escrowed proceeds. The Sixth Circuit Court of Appeals upheld the longstanding principle that property held as tenants by the entireties was not subject to an individual spouse's tax lien. United States v Craft; 140 F. 3d 638 (W.D. Mich. 1998); 65 F. Supp. 2d 651 (W.D. Mich. 1999)

Writing for a divided court (6-3), Justice O'Conner begins her majority opinion by defining the issue as, "Whether the interest of respondent's husband in property he held as tenant by the entirety constitutes 'property and rights to property' for the purposes of the federal tax lien statute." She acknowledges that the federal tax lien attaches federally defined consequences to rights to property created under state law. Therefore, the key question becomes, what rights does the taxpayer have according to state law in real property titled in the tenancy by the entirety.

Following a diatribe on the means by which real property may be jointly held, the opinion acknowledges that Michigan law "characterizes its tenancy by the entirety as creating no individual rights whatsoever." Each spouse is vested with an entire title.

Yet, to reach the desired result, the court puts the individual rights in the real property under a microscope, and lists a number of rights one spouse has in real property held by tenants by the entirety. These are as follows:

1. The right to use the property;
2. The right to exclude third parties;
3. The right to share in income produced;
4. The right of survivorship;

5. The right to become a tenant in common upon divorce;
6. The right to sell the property with spousal consent; and
7. The right to encumber the property with spousal consent.

It was the opinion of the court that these rights are sufficient enough for the Federal tax lien to attach to the property. The court commented that if the conclusion were otherwise, then the entirety's property would belong to no one for the purposes of § 6321. Therefore the Federal Tax Lien does attach to the taxpayers interest in entireties property.

The court, however, expressed no view as to the proper valuation of the taxpayer's interest in the property and remanded the case to the court of appeals for that decision.

The dissent focuses on the fact that entireties property creates no individual rights whatsoever. The rights created are that of the marriage unity. It shows a complete lack of understanding as to the concept of tenancy by the entirety for the majority to hold that one spouse would not have individual rights in the property would mean that the entireties property would belong to "no one" for the purposes of § 6321. Justice Thomas in his dissent points out that even the Internal Revenue Manual states that the federal tax lien does not attach to real property held as tenancy by the entirety.

The members of the real property bar can gnash their teeth and agonize over the ineptness of the Supreme Court over real property matters all we want. However, none of that will now change the law of the land. Only a legislative change in the United States code will reinstate the law it was generally understood to be prior to the decision in Craft. Going forward, we all need to recognize this new interpretation of the property rights of an individual that holds property as tenancy by the entirety is subject to a Federal tax lien. As such, any time we have a Federal tax lien on an individual and the entireties is selling the property, the lien needs to be released at the time of the conveyance.