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Domestic Relations Law—Divisible Divorce—Effect of Sister State Ex Parte Divorce on New York Tenancy by the Entirety

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defense counsel had some training but no experience.[52] Therefore, it would seem that one could be critical of the court's decision. On these facts the court might have found that Kennedy was denied effective counsel, and could have equitably decided the case without ever reaching the constitutional questions involved. But even if the court were not so disposed, it did have ample authority to formulate a more equitable decision. It should have resolved the constitutional question in favor of the right to counsel in Special Court-Martial. As Blackstone has written:

> No man should take up arms, but with a view to defend his country and its laws; he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier.[53]

RICHARD LIPPES

DOMESTIC RELATIONS LAW—DIVISIBLE DIVORCE—EFFECT OF SISTER STATE EX PARTE DIVORCE ON NEW YORK TENANCY BY THE ENTIRETY

Edith Kolb, the plaintiff, married Henry Kolb in 1933. In 1939 they acquired New York real property as tenants by the entirety.[1] The plaintiff was granted an ex parte divorce[2] in Florida in 1960. Mr. Kolb, a resident of New York, was served by substituted service in accordance with Florida law, but neither answered the complaint nor appeared in the divorce proceeding. Eight months after the Florida decree, Mr. Kolb died. Plaintiff brought this action to declare herself, as survivor, sole owner of the real property. Plaintiff's claim was based on the theory that the ex parte Florida divorce did not affect the tenancy by the entirety in New York realty. Opposing her in this action was her infant son, Roger Kolb, who claimed title to part of the real estate as decedent's heir.[3] His claim was based on an argument that the ex parte Florida divorce changed the tenancy by the entirety into a tenancy in common, thereby destroying his mother's right of survivorship. *Held*, a valid sister state ex parte

52. Note, 5 Duquesne U.L. Rev. 431, 435 (1967).
53. Blackstone, Commentaries *408.

1. A tenancy by the entirety is a type of property ownership available only to husband and wife and under which the husband and wife have a right of survivorship. For a general treatment of the subject of tenancies by the entirety, *see* 4 R. Powell, The Law of Real Property ¶¶ 620-24 (1967).

2. An ex parte divorce is one rendered by a court lacking personal jurisdiction over the defendant spouse.

3. Pursuant to N.Y. Deced. Est. Law § 83 which provides:

> The real property of a deceased person . . . shall descend . . . in the manner following:
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> . . .
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> Subd. 5, If there be no surviving spouse, the whole thereof shall descend and be distributed equally to and among the children . . . .

Section 83 was replaced by Section 4-1.1 Estates, Powers and Trusts Laws which became effective September 1, 1967. The new section did not affect the import of subd. 5.

divorce does not affect a tenancy by the entirety in New York realty. *Kolb v. Kolb*,[152] Misc. 2d 313, 276 N.Y.S.2d 317 (Sup. Ct. 1966).

Generally, even though recognition of the divorce offends the public policy of the recognizing state, all states are constitutionally required to give full faith and credit to valid ex parte divorces granted by sister states.[4] This constitutional mandate has been limited by the Supreme Court to the requirement that the "home" state[5] is obligated to recognize the divorce decree only in so far as the foreign decree dissolves the marital status.[6] Under the Supreme Court's "divisible divorce" doctrine,[7] the home state is free to regard certain incidents of marriage, such as the husband's obligation to support his wife and children,[8] prior support agreements[9] and child custody,[10] as surviving the divorce. Whether a tenancy by the entirety and its attendant right of survivorship survive a valid sister state ex parte divorce is a question that is not altogether settled.[11]

A prerequisite to ownership of property as tenants by the entirety is that the owners be married to each other.[12] So long as the marriage endures, the property held by husband and wife as tenants by the entirety cannot be partitioned nor can their rights of survivorship be destroyed by unilateral action.[13] Generally, a divorce obtained by the parties will destroy the tenancy by the entirety and its attendant right of survivorship. A New York divorce decree, for example, has the effect of changing a tenancy by the entirety in New York realty into a tenancy in common.[14] New York courts give the same effect to a

4. U.S. Const. art. IV, § I, *implemented by* 28 U.S.C. § 1738 (1964). [A] valid divorce of a sister state is entitled to full faith and credit. Johnson v. Muelberger, 340 U.S. 581, 584 (1951). The domicile of one party to a divorce action creates an adequate relationship with that state to justify its exercise of power over the marital relationship so that its decrees on status will be entitled to full faith and credit in other states. Williams v. North Carolina, 317 U.S. 287, 298-99 (1942).

5. "Home" state in this context is the state of domicile of the spouse who is absent from the sister state ex parte divorce proceedings.

6. *See, e.g.*, Estin v. Estin, 334 U.S. 541 (1948).

7. For a critical discussion of the emergence of the divisible divorce doctrine *see* Morris, *Divisible Divorce*, 64 Harv. L. Rev. 1287 (1951). For a more recent discussion of the effects of the doctrine *see* Comment, *Divisible Divorce*, 76 Harv. L. Rev. 1233 (1963).

8. *See, e.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

9. *See, e.g.*, Estin v. Estin, 334 U.S. 541 (1948).

10. *See, e.g.*, May v. Anderson, 345 U.S. 528 (1953).

11. The most recent New York cases dealing with the issue have held that a tenancy by the entirety survives a sister state ex parte divorce. *See* Anello v. Anello, 22 A.D.2d 694, 253 N.Y.S.2d 759 (2d Dep't 1964); Kraus v. Huelsman, 52 Misc. 2d 807, 276 N.Y.S.2d 637 (Sup. Ct. 1960). *But see* Ninth Federal Sav. & Loan Ass'n v. Thuna, 36 Misc. 2d 742 (Sup. Ct. 1962); Grigoleit v. Grigoleit, 205 Misc. 2d 904, 133 N.Y.S.2d 442 (Sup. Ct. 1954).

12. *See, e.g.*, Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895).

13. *See, e.g.*, N.Y. Real Property Actions Law § 901; Vollaro v. Vollaro, 144 App. Div. 242, 129 N.Y.S. 43 (2d Dep't 1911).

14. For the leading case see Stelz v. Shreck, 128 N.Y. 263, 28 N.E. 510 (1891). The Court set forth what has become the traditional view of the nature of a tenancy by the entirety:

> At common law husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seized of the whole, . . . because they were legally but one person. Death separated them, and the survivor still held the whole because he or she had

sister state divorce when the court which granted the divorce had jurisdiction over both parties.[15] A problem arises when the sister state divorce decree is obtained in an ex parte proceeding. Should New York courts give the ex parte decree the effect of changing tenancy by the entirety into a tenancy in common, or should the courts apply the "divisible divorce" doctrine and hold that the tenancy by the entirety is an incident of marriage which survives the divorce? The New York courts appear to have adopted the latter course.[16]

The "divisible divorce" doctrine emerged soon after *Williams v. North Carolina* in direct response to that case's broad holding that all states must give "full faith and credit" to sister state ex parte divorce decrees.[17] Mr. Justice Douglas' concerning opinion in *Esenwein v. Commonwealth* ex rel. *Esenwein*[18] was the initial expression of the doctrine by a member of the Supreme Court. He suggested that a foreign ex parte divorce need not terminate a wife's right to support, and reasoned that although the risks of bastardy and bigamy necessitated a rule that an ex parte divorce terminate the marital status, no such

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always been seized of the whole, and the person who died had no estate which was descendible or divisible.

Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by a divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. . . . When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me the much more logical as well as plausible view to say that, as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity; anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage, and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one as in the case of death there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is severed, and, a severance having taken place, each takes his or her proportionate share of the property as a tenant in common, without survivorship. *Id.* at 266-67, 28 N.E. at 511.

15. *See, e.g.*, Albin v. Albin, 26 Misc. 2d 383, 208 N.Y.S.2d 252 (Sup. Ct. 1960); Melchers v. Bertolido, 118 Misc. 196, 192 N.Y.S. 781 (Sup. Ct. 1922).

16. *See, e.g.*, Anello v. Anello, 22 A.D.2d 694, 253 N.Y.S.2d 759 (2d Dep't 1964); Kraus v. Huelsman, 52 Misc. 2d 807, 276 N.Y.S.2d 976 (Sup. Ct. 1967); Huber v. Huber, 26 Misc. 2d 539, 209 N.Y.S.2d 637 (Sup. Ct. 1960); Leis v. Shaughnessy, 26 Misc. 2d 536, 209 N.Y.S.2d 648 (Sup. Ct. 1960).

17. 317 U.S. 287 (1942). The Court in *Williams* held that North Carolina was constitutionally bound to grant "full faith and credit" to a valid Nevada ex parte divorce. The case involved the use of the Nevada divorce decrees as a defense to criminal charges of adultery and co-habitation lodged against two parties who had obtained Nevada divorces from their respective spouses and married each other. Thus the real issue in *Williams* was the effect to be given a sister state ex parte divorce, on the marital status itself. The Court, at that time, did not consider the possibility of a divisible divorce. Later, however, when confronted with the policy and due process problems presented in *Estin* and *Vanderbilt*, the Court retracted from the *Williams* position by recognizing divisible divorce doctrine.

18. 325 U.S. 279 (1945).

considerations compelled terminating the wife's right to support.[19] This concept of divisible divorce, mere dicta in *Esenwein*,[20] provided the basis for the majority opinion in *Estin v. Estin*.[21] There the Supreme Court affirmed a New York Court of Appeals decision[22] which held that a New York support order survived a subsequent Nevada ex parte divorce. The *Estin* Court's rationale was two-fold: first, the Court recognized a need to accommodate New York's interest in keeping its domiciliary wives from becoming public charges;[23] and second, the Court reiterated the basic due process requirement that a state court acquire personal jurisdiction over a party before adjudicating his property rights.[24] The 1957 decision of *Vanderbilt v. Vanderbilt*[25] rounded out the Supreme Court's divisible divorce doctrine. *Vanderbilt* held that an ex parte Nevada divorce obtained by a husband did not terminate the wife's New York support rights even though she instituted the support action after the Nevada decree had become final.[26] Finally, while the Supreme Court has not had occasion to speak on the effect of an ex parte divorce on a tenancy by the entirety, in *Simons v. Miami Beach First Nat'l Bank*[27] the Court affirmed a Florida decision holding that an ex parte divorce obtained by a husband extinguished his ex-wife's dower rights in his property.[28] It would appear, therefore, that the Supreme Court doctrine does not require that *all* incidents of marriage survive the ex parte divorce. Thus the Supreme Court's position is that: (1) all states must recognize sister state ex parte divorces as destroying marital status; (2) states may decide that certain incidents of the marriage survive the ex parte divorce; and (3) not all incidents of marriage must necessarily survive the ex parte divorce.

In accordance with these guidelines set by the Supreme Court, the question of whether the divisible divorce doctrine should be extended to preserve a tenancy by the entirety in New York was first adjudicated in *Grigoleit v. Grigoleit*.[29] In that case, the Suffolk County Supreme Court ordered a partition of property held by the entirety. The Court reasoned that a Florida ex parte divorce had as much effect upon property rights as a New York ex parte divorce, and consequently dissolved the tenancy by the entirety in New York.[30] Notwithstanding the

19. *Id.* at 282.
20. The court's decision in *Esenwein*, which denied the husband relief from a Pennsylvania support order, was not based on the divisible divorce doctrine. Rather, the decision was grounded on an impeachment in Pennsylvania of the Nevada finding of domicile. The Nevada divorce was therefore invalid for all purposes.
21. 334 U.S. 542 (1948). "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." *Id.* at 549.
22. Estin v. Estin, 296 N.Y. 308, 73 N.E.2d 113 (1947).
23. Estin v. Estin, 334 U.S. at 547.
24. *Id.* at 548.
25. 354 U.S. 416 (1957).
26. *Id.* at 419.
27. 381 U.S. 81, *rehearing denied*, 381 U.S. 956 (1965).
28. For an analysis of the *Simons* case *see* Currie, *Suitcase Divorce in the Conflict of Laws*, 34 U. Chi. L. Rev. 26 (1966).
29. 205 Misc. 904, 133 N.Y.S.2d 442 (Sup. Ct. 1954).
30. The Suffolk County Supreme Court said, "I see no distinction between a valid

Grigoleit decision, the court in *Huber v. Huber*[31] chose to extend the divisible divorce doctrine to preserve a tenancy by the entirety. This Nassau County Supreme Court case distinguished *Grigoleit* on the grounds that the court in *Grigoleit* failed to treat the right of survivorship as a property right. The *Huber* court considered the right of survivorship a property right, and because of the due process requirement, necessarily held that such property rights could not be affected unless the court had personal jurisdiction over the absent spouse.[32] It appears that *Huber* marked the point at which a due process argument[33] became the primary consideration in the application of the divisible divorce concept in New York. The *Huber* court refused to distinguish between rights incident to a tenancy by the entirety and a wife's right to support.[34] Implicit in the decision is a diminution of the public policy reasoning which gave rise to the divisible divorce doctrine itself—that is, the state's legitimate desire to keep its domiciliary wives from becoming public charges.[35] The *Huber* decision was not predicated on such interests. Although the holding in *Huber* was expressly rejected in a Queens County Supreme Court case[36] as being inconsistent with the traditional rationale set forth in *Stelz v. Shreck*,[37] it nevertheless was adopted by the New York Appellate Division, Second Department, in *Anello v. Anello*.[38] *Anello* represents the highest New York court decision to date on this issue.

The *Kolb* court, in a brief opinion based primarily on the rule set out in *Huber* and adopted in *Anello*, held that sister state ex parte divorce could not affect rights in New York property held by the entirety.[39] The court implicitly adopted the *Huber* characterization of the right of survivorship as a property right which could not be adjudicated by the divorcing court without jurisdiction over the absent spouse.[40] Since the Florida court did not have personal jurisdiction over the husband, that court could not, by its divorce decree, affect his

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decree obtained in the New York courts and a decree of a sister state, recognized valid in this state." *Id.* at 905, 133 N.Y.S.2d at 443.

31. 26 Misc. 2d 539, 209 N.Y.S.2d 637 (Sup. Ct. 1960).

32. *Id.* at 541, 209 N.Y.S.2d at 641.

33. "It is thus the due process clause as it applies to the husband's property rights, and not the full faith and credit clause as it applies to the marital status of the parties, which governs." *Id.* at 547, 209 N.Y.S.2d at 646-47.

34. After giving a summary of the argument in *Vanderbilt*, the court said: "So also, by parity of reasoning, the marriage remains alive with respect to the rights of the New York spouse in New York property held by the entireties." *Id.* at 547, 209 N.Y.S.2d at 646.

35. "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest." Estin v. Estin, 334 U.S. 541, 547 (1948).

36. Ninth Federal Sav. & Loan Ass'n v. Thura, 36 Misc. 2d 742, 233 N.Y.S.2d 37 (Sup. Ct. 1962).

37. 128 N.Y. 263, 28 N.E. 510 (1891). The rationale of the *Stelz* case was that a tenancy by the entirety being dependent for its existence upon the fictional unity of husband and wife, any severance of the fictional unity must carry with it a termination of the tenancy by the entirety. *Id.* at 266-67, 28 N.E. at 511.

38. 22 A.D.2d 694, 253 N.Y.S.2d 759 (2d Dep't 1964).

39. "A foreign divorce decree, where the court does not have jurisdiction over the person of both parties, does not affect the rights in New York property." Kolb v. Kolb, 52 Misc. 2d at 314, 276 N.Y.S.2d at 318 (Sup. Ct. 1966).

40. Huber v. Huber, 26 Misc. 2d 539, 541, 209 N.Y.S.2d 637, 641 (Sup. Ct. 1960).

survivorship rights. Therefore the Florida decree could not have the effect of extinguishing the tenancy by the entirety. Finally, since the Florida court could not effect the tenancy by the entirety, the wife's right to survivorship was also unaffected by the Florida decree.

Apparently the *Kolb* court, in applying the rule of *Anello* and *Huber*, did not deem significant the fact that the plaintiff in that proceeding for a declaratory judgment had obtained the divorce in the earlier action. The practical effect is that the rule of *Huber* and *Anello* was imposed by the *Kolb* court to protect the right of survivorship of the spouse who was *present* in the divorce proceedings. In contrast, both the *Huber* and the *Anello* courts imposed the rule to protect the survivorship rights of a spouse *absent* from the divorce proceedings.[41] Accordingly, it would seem that the due process argument so basic to the *Huber* and *Anello* decisions loses a great deal of impact when applied to facts such as those in *Kolb*. The due process argument in *Huber* and *Anello* was directed toward protecting the rights of parties not before the court. By not distinguishing these decisions from the instant case, the court placed itself in the curious position of asserting the absent spouse's rights as a basis for a decision which benefits no one but the spouse present in the divorce proceedings.[42] Moreover, even if the husband had been present in the proceedings before the Florida court, the issue of the divorce's effect on the tenancy by the entirety in New York realty would not have been litigated. Rather, the tenancy by the entirety would have been changed by operation of law to a tenancy in common.[43] There seems to be little reason for allowing the wife to place herself in a more advantageous position in a later action than she would have been had she obtained personal jurisdiction over her husband in the prior divorce proceedings. The court's failure to discuss any distinctions between the *Kolb* situation and those in *Huber* and *Anello* leaves unanswered the question of whether a judicial distinction will be made in the future.

The United States Supreme Court has maintained a rather liberal position with regard to divisible divorce questions raised in state courts. State policy decisions to preserve certain incidents of marriage have been held by the Court to be consistent with the "full faith and credit" clause of the Constitution.[44] But the Court has also upheld, as not violative of due process requirements, a state decision holding that the ex-wife's dower rights ended when her husband obtained

41. Anello v. Anello, 22 A.D.2d 694, 253 N.Y.S.2d 759 (2d Dep't 1964). The husband who had obtained the sister state ex parte divorce was barred from maintaining an action for partition of the property held by the entireties. Huber v. Huber, 26 Misc. 2d 539, 209 N.Y.S.2d 637 (Sup. Ct. 1960). The wife who had obtained a Florida ex parte divorce was barred from maintaining an action for partition.

42. If Mr. Kolb were alive and was before the court asking for a partition of the property held by the entireties, the present court presumably would dismiss the action on the basis of the same reasoning implicit in the court's present decision. Under such circumstances the anomaly becomes more graphic. Not only would Mr. Kolb's rights be used to his ex-wife's benefit but simultaneously to his own detriment.

43. Albin v. Albin, 26 Misc. 2d 383, 208 N.Y.S.2d 252 (Sup. Ct. 1960).

44. *See, e.g.*, May v. Anderson, 345 U.S. 528 (1953); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

a sister state ex parte divorce.[45] It would appear that as long as due process requirements are met, the state is free to decide each incident in accord with its own policy. With regard to New York public policy there seems to be little reason for courts favoring a ruling that sister state ex parte divorces will act to change a tenancy by the entirety to a tenancy in common. As the *Huber* case correctly pointed out, such a ruling would raise serious problems of due process since the courts would then be adjudicating property rights of an absent spouse without jurisdiction over that spouse. On the other hand, the *Kolb* decision, in following the rule in *Huber,* reflects a view which is in conflict with the apparent desire of New York State to discourage out of state divorces.[46] The ruling that a sister state ex parte divorce will not affect a tenancy by the entirety while a domestic divorce (either bilateral or ex parte) may create the setting for forum shopping. Notwithstanding new provisions in the New York Domestic Relations Law for assailing domicile in the divorcing state,[47] situations could arise in which a party seeking a divorce would find a sister state ex parte decree more beneficial than a New York decree.[48] Perhaps the solution to the apparent dilemma lies in allowing the sister state ex parte divorce to affect only the rights of the party obtaining the sister state divorce. If it were the rule that such a divorce decree extinguished the divorcing party's right of survivorship, then that party would be in no better position with respect to the property than if the divorce had been sought and obtained in New York. It is suggested that to fulfill basic due process requirements, the sister state ex parte divorce should leave the absent spouse's right of survivorship unaffected.[49] Inherent in

45. *See, e.g.,* Simons v. Miami Beach First Nat'l Bank, 381 U.S. 81 (1964), *rehearing denied,* 381 U.S. 956 (1965).

46. *See* Ploscowe, *A Modern Divorce and Judicial Separation Act for New York,* 30 Albany L. Rev. 1 (1966).

47. N.Y. Dom. Rel. Law § 250. For a comment on the extent to which Sec. 250 changes the New York Law and an appraisal of its potential effect *see* Phillips, *Divorce Law Reform in New York,* 13 Catholic Law. 52 (1967).

48. A right of survivorship may well take an added value when viewed in light of the parties' respective life expectancies. Where there is a disparity of age between the two parties, the younger of the two has a greater statistical probability of living to execute the right of survivorship. If, then, the party valued the rights enjoyed under the tenancy by the entirety—including the right of survivorship—more than the right to partition inherent in ownership in common then a sister state ex parte decree would better serve his aims. On the other hand, if the party desired a partition of the property he could acquire a New York divorce and thereby have the tenancy by the entirety changed to a tenancy in common.

49. Under such a rule each party would have certain rights: The divorcing spouse would possess all the rights of a tenant in common, subject, however, to the absent spouse's right of survivorship. The divorcing spouse's rights would include the right to share in income from the property and any proceeds derived from its sale. But due to the right of survivorship, which the absent spouse would still retain, the divorcing spouse's rights would not include a right to partition.

The absent spouse would possess all rights of a tenant by the entirety with the added benefit of no longer being encumbered by the other party's right of survivorship. This would mean that the absent spouse wait for the right survivorship to become operative and take all the property or waive the right of survivorship and bring an action for partition at any time.

If the divorcing party were to die first, then the absent spouse's right of survivorship would become operative and that spouse would become sole owner of the property. On the other hand, if the absent spouse were to die first, then the property would be divided evenly between the divorcing spouse and the absent spouse's estate.

this suggestion are certain deterrents to New York residents travelling out of New York to acquire a divorce. The primary disadvantages of obtaining a sister state ex parte divorce would be that the divorcing spouse's property interests would then be encumbered by the absent spouse's right of survivorship. However, if the divorcing spouse were to obtain a New York divorce this encumberance would be avoided, since the traditional rule changing the tenancy by the entirety into a tenancy in common would then come into effect.[50] The advantages available to the party who chooses to obtain the divorce in New York State should not be looked upon as discriminating against out of state divorces, but rather would reflect a premium for obtaining personal jurisdiction over the other party. If there are to be any advantages, they are more justifiably attached to *obtaining* personal jurisdiction than to *avoiding* it. While probably not so intended, the *Kolb* court's decision, in effect, rewarded Mrs. Kolb for avoiding personal jurisdiction over her husband in her suit for divorce. Under the aforementioned suggestion, Mrs. Kolb would not be entitled to sole ownership of the real property upon her ex-husband's death since *she* had obtained the sister state ex parte divorce, and consequently would be entitled to only one-half the property. The other one-half would remain in the decedent's estate. Thus, what Mrs. Kolb would receive under this suggestion would be no greater than she would have received had the divorce been obtained in New York.

In view of the archaic divorce law operative in New York in 1961,[51] Mrs. Kolb's choice of forums cannot be said to have been based solely, if at all, on consideration involving the effect of the divorce decree on the tenancy by the entirety. Her choice more likely was motivated by the less restrictive grounds for divorce available in Florida. But that motivation no longer exists for the New York spouse seeking a divorce. Grounds for divorce have been widely extended under New York's new divorce law,[52] and factors such as the effect of the divorce on a tenancy by the entirety may well become determinative in deciding the forum for a divorce proceeding.[53] While New York courts may not always be in a position to discourage forum shopping, yet they certainly ought not *encourage* and *reward* out of state divorces. A perpetuation of the *Kolb* ruling will have this undesirable effect.

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50. Stelz v. Shreck, 128 N.Y. 263, 28 N.E. 510 (1891).

51. N.Y. Dom. Rel. Law § 170 in effect until Sept. 1, 1967 provided for adultery as the sole grounds for divorce in New York.

52. N.Y. Dom. Rel. Law § 170 was repealed and replaced by a new sec. 170 which took effect Sept. 1, 1967. In addition to adultery an action for divorce may now be grounded on cruelty, abandonment of one's spouse for two years, confinement to prison for three years, living apart for two years following a judicial separation, and living apart for two years following the execution of a written separation agreement.

53. The choice for the party seeking a divorce may become whether to go out of state and preserve the tenancy by the entirety or stay in New York and have the tenancy by the entirety changed into a tenancy in common. The *Kolb* decision provides for such a choice.