

The House on Vernon Avenue – (if these walls could talk)

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George had been working in a good job for five years after college and had saved enough money for a down payment on a house. Martha had just moved to town and got a job at the same company that employed George. It was love at first sight and the two decided to set up house and get married. The marriage would be in Martha's home town which was out of state. In the mean time they had found the perfect home on Vernon Avenue and decided to buy it with George's savings before someone else got it. Because they closed on the house only a week before their marriage ceremony, the employee at the settlement company that the bank sent them to prepared the deed to "George Smith and wife, Martha Smith".

To subsequent title searchers it appears that a Tenancy by the Entirety estate has been created. But has it? A grant to a husband and wife automatically creates a Tenancy by the Entirety (TBE) unless the grant expressly says otherwise with words such as to "husband and wife as tenants in common and not as tenants by the entirety" or to "husband and wife, each a one half interest". But here, George and Martha were not yet married. For a TBE to be created, five unities must be present. The unity of time means that the interest of the husband and wife must be created at the same time. The unity of title means that the interest must be created by the same document which would either be a deed or a will. The unity of interest means that the husband and wife each have identical interest. One can not have an easement and the other a fee nor can one have a life estate and the other a remainder. The unity of possession which means that the possession of either spouse is the possession of the other and that the possession of the marital entity is the possession of each individual spouse. Their possession is not just equal but is considered the same and indistinguishable. And finally the unity of person which involves the legal fiction that a husband and wife are one entity. Because George and Martha were not married at the time of the conveyance, the unities of person and possession are missing. No TBE was created. Their marriage the week after closing does not turn it into a TBE as all unities must exist at the time the estate is created. So George and Martha are tenants in common. The public however is unaware that a tenancy in common has been created. What difference does that make?

Back in Martha's hometown, the local department store is looking to collect on a past due account. When the happy couple arrives for their big day, Martha assures her parents that she will take care of the bill but does not mention it to George. After the wedding the couple returns to move into their new home on Vernon Avenue. The department store gets a default judgment and has it transcribed to Martha's new jurisdiction. Unless the IRS is involved, a judgment against only one spouse will not attach to property owned in a TBE estate because of the legal fiction that the marital entity is a separate and distinct entity. So if George and Martha were married when they took title, this judgment would not attach. Because, however, George and Martha are tenants in common, this judgment against only Martha will attach to her ½ undivided interest.

George and Martha are happy together at Vernon Avenue and their careers are going well. Then one day George's old room-mate who is a mortgage broker tells George that he can save money by refinancing. So George and Martha start the refinance transaction and hire a reputable attorney to close the deal. The attorney finds the judgment but because it is only against Martha and title is held by "George Smith and wife, Martha Smith", he relies on the record that they were married at the time they took title and so determines that the judgment does not attach to the property. He mentions the judgment at closing but casually says that they do not need to pay off the judgment because it is not a lien on the property. But this was the first that George had heard of the debt. Marital trouble soon starts.

Other troubles start too. The economy sours and Martha, being a recently hired employee is laid off. Being at home, she decides to redo the yard with new sod and shrubbery. She consults a landscape architect to design a new layout for her yard on Vernon Avenue. Martha gets the new design and decides to do all of the work herself. She works diligently and the yard is transformed into

a showpiece and is the envy of the neighborhood. Meanwhile the landscape company sends Martha its bill for their design. Martha is shocked to get a bill because she had done all of the work and she is shocked at the amount of the bill. She doesn't feel that she owes the money and in her typical fashion ignores the bill and doesn't tell George.

The landscaping company files a claim of lien. George answers the door one Thursday evening and accepts service for Martha from the sheriff's deputy. The landscaping company is certainly entitled to file a claim of lien for landscaping architectural services under Chapter 44A of the North Carolina General Statutes, but because they only dealt with Martha and not George, did they deal with the owner so that they are entitled to a lien on the property? If a contractor only deals with one spouse when the property is owned in a TBE estate, then the contractor is not entitled to a lien on the land (Webster's 20-14). The contractor must deal with both spouses to be entitled to a mechanic's lien on TBE property. But here George and Martha are tenants in common. So the landscaping company is entitled to a lien on Martha's ½ undivided interest. George tells Martha that she better take care of this matter. Martha calls the landscaping company to tell them that she doesn't owe them a dime and to go away. The landscaping company files suit and George is not there to accept service this time so once again, Martha has a default judgment entered against her without George's knowledge.

George is upset that Martha has spent money and jeopardized their credit while their household income has taken a hit. Martha is upset that George is upset and the two are arguing nightly. Finally Martha threatens to move back home to mother's and George agrees. Back home creditors are hounding Martha and her credit history is making it hard to find a job so Martha decides to file for bankruptcy. Martha's bankruptcy petition is granted and she is released from the obligation to repay her debts. But what happens to Martha's two judgment liens on the house on Vernon Avenue which she still owns with George? Even though Martha is relieved of the personal liability of these debts, the discharge does not remove the judgment liens (11USC 524(a)). If real property of the debtor has a possessory lien attached to it at the time of the petition, that possessory lien will still be attached after discharge.

Martha feels great to be out from under her debt and decides that divorcing George will complete her sense of freedom. Martha begins divorce and equitable distribution proceedings. Martha wants George to pay her for half of the equity in the house. George feels that this is unfair because he paid all of the down payment for the house but agrees just so he can get past the divorce. Neither is aware that the two earlier judgments against Martha are liens against the house. George can not pay Martha so they decide to sell the house. Because the buyer's attorney has looked through George and Martha's divorce proceedings, she knows that they took title a week before they actually got married. So she is aware that George and Martha own the house as tenants in common and not as TBE. She reports these liens to the title company who require the cancelation or release of those liens.

When the realtor tells this to George, he decides to hire a lawyer so that he can get more than half of the proceeds since these are Martha's debts and he paid all of the down payment. When Martha finds out she tells the realtor that she was relieved of those debts in bankruptcy and that is not her problem anymore. Meanwhile the sale falls through and the buyers threaten to sue for specific performance.

George's lawyer argues that when title to the house on Vernon Avenue went into George and Martha, George intended that he have the entire fee and that the settlement company made a mistake and that a resulting trust for his benefit occurred. Martha's lawyer argues that when George paid the down payment, he clearly made a gift to his future wife and so half of the down payment is really her separate asset not subject to equitable distribution. As a general rule, when one provides the purchase money but the title goes to another, they hold title in trust for the one who provided the money. This is referred to as a purchase money resulting trust. In 1982, the case of *Mims v. Mims*, 305 NC 41 clearly states the law on resulting trusts in that the trust is created "...to effectuate what the law presumes to have been the intention of the parties...that the person to whom the land was conveyed hold it as trustee for the person who supplied the purchase money." *Mims v. Mims* also states that where there is a special obligation to maintain another person then there is the presumption of a gift to the person holding title and not a trust for the person supplying the purchase price. A husband and wife relationship is such a special relationship. But here, George and Martha were not yet married when they took title. So in this case, even though the presumption would be that Martha holds her undivided interest in a purchase money resulting trust for George, it would probably easily be rebutted by their imminent marriage and be ruled a gift to Martha.

NCGS 50-20 sets out the rules for equitable distribution in North Carolina. In the case of *Martha v. George*, a Judge may, but not necessarily rule as follows. That the house on Vernon Avenue is marital property; that the judgment in favor of the department store is a separate debt of Martha's since it predated the marriage and that the judgment in favor of the landscape architectural company is a marital debt because it arose during the marriage and it benefited the marital property. Unless factors are shown to establish that an equal distribution is not equitable, the Court will cause an equal distribution of the net value of the marital property.

Meanwhile the suit to enforce the earlier contract to sell the house on Vernon Avenue has been filed against George and Martha. Now George and Martha are ready to sell the house on Vernon Avenue and they agree with the buyers that they are now ready, willing and able to convey the property and the buyer dismisses their suit. Martha's proceeds will be less the amount needed to have the department store judgment released and less half the amount needed to release the landscape architectural company's judgment. George's proceeds will be less half the amount needed to release the landscape architectural company's judgment.

The new owners of the house on Vernon Avenue, John and Abigail, have been married for six months. Because they used a lawyer to close their transaction, they can be sure that they will have a great future in the house on Vernon Avenue.