

## MSC Opinion: Tkachik v. Mandeville

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28. July 2010 By Julie Lam

While Fred and Janet were married, they acquired two properties as tenants by the entirety. A tenancy by the entirety is a type of concurrent estate, unique to married couples, that includes the right of survivorship. Although the probate court found that Frank was not a “surviving spouse” under the Estates and Protected Individuals Code (EPIC), MCL 700.2081(2)(e)(i), which states that a surviving spouse will not be treated as surviving the decedent if a breakdown in marriage is shown, the probate court determined that the statute does not destroy a tenancy by the entirety. Thus, upon Janet’s death, the properties passed to Frank in fee simple absolute. The personal representative of Janet’s estate brought this action to seek contribution from Frank for the expenses Janet incurred in maintaining the properties prior to her death. The probate court granted Frank summary distribution on the estate’s contribution claim, and the Court of Appeals affirmed. In a 4-3 [opinion](#), the Michigan Supreme Court reversed.

In an issue of first impression, the Michigan Supreme Court held that the equitable doctrine of contribution can be applied between co-tenants by the entirety outside the context of a divorce or separate maintenance proceeding. In an opinion authored by Justice Markman, and joined by Chief Justice Kelly, and Justices Cavanagh and Corrigan, the majority concluded that Frank had been unjustly enriched because he enjoyed sole ownership of the properties as a result of Janet’s maintenance payments, because they otherwise would have been subject to foreclosure. The majority concluded that the equitable doctrine of contribution could be applied in this context, given Frank’s willful absence in the 18 months prior to Janet’s death, the fact that Janet disinherited Frank and attempted to divest him of his interest in the properties, and the finding that Frank was not deemed a “surviving spouse” under EPIC.

For the 18 months prior to Janet’s death from breast cancer, Frank was absent and did not communicate with Janet despite knowing about her illness. During Frank’s absence, Janet maintained the properties and paid taxes, insurance, and mortgage for the properties. In the months leading up to her death, Janet executed a living trust and final will that disinherited Frank, and named her sister as the personal representative of her estate. Janet also transferred her retirement benefits so that Frank would not receive them. She also unsuccessfully tried to sidestep the right of survivorship in the properties by quitclaim deed.

In a vigorous dissent, Justice Young characterized the majority’s decision as a “sweeping modification of the common law” and one that creates an action that amounts to a “posthumous divorce”. Justice Young argues that “the majority’s opinion is contrary to and undermines settled principles of law and equity[.]” Justice Young criticized the majority’s balancing of equities where there were no divorce or separate maintenance actions.

Justice Weaver, joined by Justice Hathaway, issued a separate dissenting opinion agreeing with Justice Young’s criticism that the new rule will have unforeseen consequences, and stating that “the majority’s unrestrained decision today is a huge mistake.”