

A married couple purchased a residence. They took title to the property as tenants by the entirety. Subsequently, they separated, with the husband moving out and the wife remaining in the residence with their minor child. The husband has filed an action to partition the residence, which the wife opposes.

How should the court rule on the husband's partition action?

- A. For the husband, because the couple is no longer living together in the residence.
- B. For the husband, because the court can order the sale of the residence rather than its physical division.
- C. For the wife, because she is living in the residence with their minor child.
- D. For the wife, because the couple is married.

Explanation:

A **tenancy by the entirety** (TBE) is a type of cotenancy that is available only to **married couples**. As a result, the TBE terminates upon divorce and becomes a tenancy in common. While tenants in common can unilaterally request a **partition** (which the court must grant), a TBE can only be **partitioned if both spouses consent**. That is because tenants by the entirety are viewed as a single marital unit.

Here, the married couple took title to the residence as tenants by the entirety. Although the couple separated and no longer live together in the residence, they are still married (**Choice A**). This means that the TBE remains intact, and the husband cannot partition the residence without the wife's consent. Therefore, the court should rule for the wife.

(**Choice B**) Although courts prefer a partition in kind (ie, physical division of property), a court may order a partition by sale if physically dividing the property is not feasible or fair. But here, the court should not partition the residence by either method because the couple is still married and the wife opposes the partition action.

(**Choice C**) In many states, after a divorce, a former spouse residing in the family residence with a minor child may have the right to remain there for a statutory period. This would be relevant in a divorce action, but not this partition action.

Educational objective:

A tenancy by the entirety is only available to married couples and can only be partitioned if both spouses consent.

References

41 Am. Jur. 2d Husband and Wife § 32 (2020) (no right to partition tenancy by the entirety without consent).

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Cotenants' right to partition

Type of tenancy	Voluntary partition (by agreement of all cotenants)	Involuntary partition (by request of one cotenant)
Tenancy in common	✓	✓
Joint tenancy	✓	✓
Tenancy by the entirety	✓	

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