

MAKING A KILLING IN REAL ESTATE: SOLVING THE MYSTERY OF MURDER'S EFFECT ON TENANCY BY THE ENTIRETY IN NEW YORK—A LEGISLATIVE SOLUTION

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INTRODUCTION

In 1889, sixteen-year-old Elmer E. Palmer murdered his grandfather to secure his inheritance. Fearing that his grandfather's lavish bequest to him would be revoked, Elmer killed his grandfather with poison.¹ Elmer never received his inheritance, however, because the New York Court of Appeals held that by reason of his crime, he had surrendered any interest he may have had in his grandfather's estate.²

Since *Riggs v. Palmer*, New York courts have insisted that “[n]o one shall be permitted to . . . take advantage of his own wrong, or to . . . acquire property by his own crime.”³ In spite of its precedential value and stature as a founding case in the effect of murder on property, however, *Riggs* was simple on its facts. It was a case of pure murder for profit that implicated only the victim's property.⁴ In contrast, most killings today are not motivated by greed,⁵ complicating the application of the *Riggs* principle to these cases. The issues become even more complex when the killer is insane or acquitted,⁶ or when the slayer and

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¹ *Riggs v. Palmer*, 115 N.Y. 506, 508–09, 22 N.E. 188, 188–89 (1889).

² *Id.* at 514–15, 22 N.E. at 191.

³ *Id.* at 511, 22 N.E. at 190; *In re Estate of Pikul*, 192 A.D.2d 259, 260–61, 601 N.Y.S.2d 113, 114 (1st Dep't 1993) (internal quotation marks omitted).

⁴ See *Riggs*, 115 N.Y. at 508–09, 22 N.E. at 189.

⁵ See ENCYCLOPEDIA OF MURDER & VIOLENT CRIME 231 (Eric W. Hickey ed., 2003) [hereinafter ENCYCLOPEDIA] (“[T]he most common motivation for murder is the offender's need to resolve feelings of inferiority by exercising control and exerting power over their victim[.]”).

⁶ See *In re Estate of Alexis*, 14 Misc. 3d 379, 381–82, 823 N.Y.S.2d 886, 888–89 (Sur. Ct. Nassau County 2006) (noting that the *Riggs* principle does not apply when

the victim share concurrent ownership of the property. As a result, New York courts have reached different conclusions on how *Riggs* applies in these situations.

This Note focuses on issues that arise when the slayer and the victim have concurrent ownership of property as tenants by the entirety. Tenancy by the entirety is a unique form of concurrent ownership because it can only be formed in real property⁷ by husband and wife⁸ and cannot be unilaterally severed or partitioned.⁹ In addition, each tenant has a right of survivorship—meaning that, during their lifetimes, each tenant has a one-half undivided interest in the property,¹⁰ but upon the natural death of one tenant, title to the entire property vests in the survivor.¹¹ When the death is the result of murder committed by the co-tenant, however, the survivor's interest is uncertain. In these cases, depriving the slayer of his interest under *Riggs* would not just prevent him from acquiring the victim's property, but may also result in a forfeiture of his own property interest.¹²

Many states have legislatively addressed the implications of murder for tenancy by the entirety, but New York law is remarkably unsettled on the subject. Without legislative

the killer is insane or acquitted because he has not committed a "legal[] wrong").

⁷ Since January 1, 1996, a husband and wife may hold "shares of stock of a cooperative apartment corporation" as tenants by the entirety. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(c) (McKinney 2008).

⁸ See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 10.02, at 121 (2000). Thirty states continue to recognize tenancy by the entirety in some form. See Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 445–46 (2001).

⁹ See SPRANKLING, *supra* note 8, at 121. A tenancy by the entirety can only be severed with the consent of both tenants, through, for example, the joint conveyance of the property to a third party or through divorce. See *id.* The effective severance of the tenancy creates a tenancy in common, a property interest in which both co-tenants have undivided ownership of the property without the right of survivorship, but with the individual right to transfer and partition. See JESSE DUKEMINIER ET AL., PROPERTY 275–77 (6th ed. 2006). Tenancy in common allows a co-tenant to "sell, mortgage, lease, or otherwise transfer" his property interest, including distributing through his will. See SPRANKLING, *supra* note 8, § 10.02, at 118. Each tenant in common has the right to compel partition of the property, which can be achieved through either physical division or apportionment of proceeds from the sale of the property. DUKEMINIER ET AL., *supra*, at 291.

¹⁰ See DUKEMINIER ET AL., *supra* note 9, at 276–77.

¹¹ See *id.*

¹² But see N.Y. CIV. RIGHTS LAW § 79-b (McKinney 2008) ("A conviction of a person for any crime, does not work a forfeiture of any property, real or personal, or any right or interest therein.").

guidance, the courts have muddled the law by offering conflicting outcomes. Following *Riggs*, some courts have held that a killer forfeits all property rights he would have succeeded to as a result of his victim's death.¹³ To accomplish this result, these courts employed the legal fiction that the killer predeceased his victim.¹⁴ By applying this legal fiction, the courts deemed the entire property to have vested in the victim. Other courts, however, have modified the *Riggs* holding and instead allowed the killer to maintain his pre-existing interest in the property, which had vested as a result of his crime.¹⁵ These holdings were based on the rationale that forcing the killer to surrender his pre-existing interest in property would constitute punishment exceeding that specified by law.¹⁶ This principle, coupled with New York Civil Rights Law section 79-b, which codifies the law against forfeiture, provides the basis for courts that swear allegiance to *Riggs*' ruling, but still grant the killer some interest in the property.¹⁷

These opposing standards create uncertainty and inequity within the courts. A husband convicted of killing his wife may be forced to forfeit the marital home under the holding of one court, while in another court the same killer would have maintained his property interest. Similar confusion among the courts prompted the New York legislature to enact Estates, Powers, and Trusts Law ("EPTL") section 4-1.6 to harmonize the law regarding the

¹³ See *In re Estate of Pikul*, 192 A.D.2d 259, 264, 601 N.Y.S.2d 113, 116 (1st Dep't 1993); *Bierbrauer v. Moran*, 244 A.D. 87, 90, 279 N.Y.S. 176, 179 (4th Dep't 1935); *In re Estates of Pinnock*, 83 Misc. 2d 233, 240, 371 N.Y.S.2d 797, 804 (Sur. Ct. Bronx County 1975); *In re Estate of Sparks*, 172 Misc. 642, 646, 15 N.Y.S.2d 926, 931 (Sur. Ct. N.Y. County 1939); *Van Alstyne v. Tuffy*, 103 Misc. 455, 456, 459, 169 N.Y.S. 173, 173, 175 (Sup. Ct. Monroe County 1918).

¹⁴ See *Pinnock*, 83 Misc. 2d at 238, 371 N.Y.S.2d at 801-02; *Sparks*, 172 Misc. at 646, 15 N.Y.S.2d at 931.

¹⁵ See *In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep't 2000); *In re Estate of Nicpon*, 102 Misc. 2d 619, 621, 424 N.Y.S.2d 100, 101-02 (Sur. Ct. Erie County 1980); *In re Estate of Busacca*, 102 Misc. 2d 567, 568-69, 423 N.Y.S.2d 622, 623-24 (Sur. Ct. Nassau County 1980); *In re Hawkins' Estate*, 213 N.Y.S.2d 188, 191 (Sur. Ct. Queens County 1961).

¹⁶ See, e.g., *Mathew*, 270 A.D.2d at 417, 706 N.Y.S.2d at 433. *But see Riggs v. Palmer*, 115 N.Y. 506, 513-14, 22 N.E. 188, 190 (1889) (arguing that there is no greater punishment because the rule simply prevents acquisition of property as a result of the crime); *Sparks*, 172 Misc. at 646, 15 N.Y.S.2d at 931 (noting that the court is not taking property from the killer because it was not his to begin with).

¹⁷ See *Mathew*, 270 A.D.2d at 417, 706 N.Y.S.2d at 433.

distribution of joint bank accounts when one spouse killed the other.¹⁸ It is again time for the legislature to take action.

In enacting legislation, the New York legislature has five options. First, the legislature can heed the advice of the Surrogate's Court Advisory Committee and adopt proposed statute EPTL section 4-1.7, which was modeled after EPTL section 4-1.6 and would allow the killer to receive up to one-half of the value of a life estate in property held in tenancy by the entirety.¹⁹ Second, the legislature can model the law on the Uniform Probate Code ("UPC"), which provides that when one tenant by the entirety is killed by the other, the estate is severed, and each party is vested with an interest as tenant in common.²⁰ Finally, the legislature can codify any of the three different approaches found within New York case law.²¹

¹⁸ N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2008). Joint bank accounts are a type of joint tenancy, which is a common form of concurrent ownership. Like tenants by the entirety, joint tenants enjoy a right of survivorship. See *DUKEMINIER ET AL.*, *supra* note 9, at 276–77. The two forms of ownership, however, are distinctly different because a joint tenancy can be unilaterally severed through the independent action of one co-tenant. See *SPRANKLING*, *supra* note 8, § 10.02, at 119–21. When a joint tenancy is validly severed, a tenancy in common is formed. *DUKEMINIER ET AL.*, *supra* note 9, at 276. As a result, the law is well settled on the effect of murder on joint tenancy: The murder of one joint tenant by the other is a unilateral action resulting in the valid severance of the property and the creation of a tenancy in common. See *SPRANKLING*, *supra* note 8, § 10.02, at 118. EPTL section 4-1.6 alters this general rule with respect to bank accounts by limiting the killer's property rights to his monetary contributions into the account, instead of dividing the funds into equal tenancies in common.

¹⁹ REPORT OF THE SURROGATE'S COURT ADVISORY COMMITTEE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 31–33 (2007), [hereinafter *SURROGATE'S COURT ADVISORY COMMITTEE REPORT*], http://www.nycourts.gov/ip/judiciaryslegislative/SurrogatesCourtAd_07.pdf. Under EPTL section 4-1.6, the killer is limited to one-half of the total funds in the account even if he contributed all of the funds because, when a joint account is created, there is a presumption that a gift of one-half of the money contributed is given to the co-tenant. *DUKEMINIER ET AL.*, *supra* note 9, at 289. EPTL section 4-1.6 is inapplicable to tenancy by the entirety, because by its terms, the statute applies to joint tenancies, and not to tenancies by the entirety. Moreover, because tenancy by the entirety vastly differs from joint tenancy, the statute's provisions do not provide the best means for determining the effect murder has on tenancy by the entirety. See *infra* Part IV.A.2.

²⁰ UNIF. PROBATE CODE § 2-803(c)(2) (1990) (amended 1997).

²¹ See *Mathew*, 270 A.D.2d at 417, 706 N.Y.S.2d at 433 (holding that the killer be given the commuted value of a one-half life estate); *In re Estate of Nicpon*, 102 Misc. 2d 619, 621, 424 N.Y.S.2d 100, 102 (Sur. Ct. Erie County 1980) (holding that the killer was to receive a life estate in the property); *In re Estates of Pinnock*, 83 Misc. 2d 233, 238, 371 N.Y.S.2d 797, 802 (Sur. Ct. Bronx County 1975) (holding that the killer was denied all rights in the property).

This Note argues that despite the claims of the courts, New York case law is not settled on the disposition of property held as tenancy by the entirety when one spouse murders the other. Because of the uncertainty that results from such variations, the legislature must take action. This Note will urge the legislature to find a balance between the ruling in *Riggs* and the principle that a killer cannot forfeit his rights. Part I of this Note will survey and present the five available options to determine a killer's interest in property once held in tenancy by the entirety with his victim. Part II will discuss the need for clarification by the legislature, while Part III will first consider the advantages and disadvantages of the four rejected options and then evaluate the benefits and weaknesses of the most viable approach. Finally, Part IV advocates for codification of the line of New York cases that grants the killer the commuted value of a one-half life estate in the property and demonstrates this option's superiority.

I. THE FIVE DIFFERENT VIEWS ON THE KILLER'S PROPERTY INTEREST

Martin Foster married Margaret Jones, and together they purchased a home in Rochester, New York as tenants by the entirety. After ten years of marriage, Martin, thirty-five, murdered his bride and immediately committed suicide. Litigation to determine the rightful owner of the home was brought by the heirs of both the victim and killer.²² Martin Foster's property rights in the Rochester home depend on which one of the five options is applied by the courts.

The divergence in New York case law regarding the effect of murder on tenancy by the entirety is a result of the tension between the 1889 New York Court of Appeals' holding in *Riggs*, announcing that a killer may not profit from his wrongdoing,²³ and New York Civil Rights Law section 79-b, which prevents the forfeiture of property following a conviction.²⁴ As a result, there are three outcomes embraced by New York courts when determining the rights of a killer in property held by the killer and his victim in tenancy by the entirety: (1) the killer is denied

²² This hypothetical is based on the facts set forth in *Van Alstyne v. Tuffy*, 103 Misc. 455, 456, 169 N.Y.S. 173, 173 (Sup. Ct. Monroe County 1918), and will be used to illustrate the different results throughout the Note.

²³ See *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889).

²⁴ See N.Y. CIV. RIGHTS LAW § 79-b (McKinney 2008).

all interest in the property and it passes through the victim's estate;²⁵ (2) the killer retains a life estate in the entire property;²⁶ and (3) the killer is denied his right of survivorship, but is entitled to the commuted value of a one-half life estate in the property or the proceeds from its sale.²⁷ Alternative resolutions to the issue have been offered by the Surrogate's Court Advisory Committee and the Uniform Probate Code. The Surrogate's Court Advisory Committee suggests a law that would compensate the killer for his contribution to the value of the property up to one-half.²⁸ The Uniform Probate Code, on the other hand, severs the tenancy by the entirety and creates a tenancy in common with each party maintaining an undivided one-half interest in the property.²⁹ Therefore, Martin Foster's property interest, if any, varies based on which scheme is applied.

A. *New York Case Law Approaches—Three Distinct Outcomes*

1. The Killer Is Denied All Property Rights

The first approach used by New York courts is to preclude the killer from taking any interest in the tenancy and vest the property as a whole with the victim's estate.³⁰ These courts strictly adhere to the principle expressed in *Riggs* that a killer may not benefit from his crime,³¹ and assert that as a matter of equity, the killer should be denied all interest in the property.³²

²⁵ See, e.g., *In re Estate of Pikul*, 192 A.D.2d 259, 260–61, 601 N.Y.S.2d 113, 114 (1st Dep't 1993); *Bierbrauer v. Moran*, 244 A.D. 87, 90, 279 N.Y.S. 176, 179 (4th Dep't 1935); *Pinnock*, 83 Misc. 2d at 238, 371 N.Y.S.2d at 802; *In re Estate of Sparks*, 172 Misc. 642, 643, 15 N.Y.S.2d 926, 928 (Sur. Ct. N.Y. County 1939).

²⁶ See *Nicpon*, 102 Misc. 2d at 621, 424 N.Y.S.2d at 102.

²⁷ See *In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep't 2000); *In re Estate of Busacca*, 102 Misc. 2d 567, 569, 423 N.Y.S.2d 622, 624 (Sur. Ct. Nassau County 1980).

²⁸ See SURROGATE'S COURT ADVISORY COMMITTEE REPORT, *supra* note 19, at 32–33.

²⁹ UNIF. PROBATE CODE § 2-803(c)(2) (1990) (amended 1997).

³⁰ See *Pinnock*, 83 Misc. 2d at 238, 371 N.Y.S.2d at 802; *Van Alstyne v. Tuffy*, 103 Misc. 455, 457, 169 N.Y.S. 173, 173–74 (Sup. Ct. Monroe County 1918).

³¹ See *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889).

³² See *In re Estate of Pikul*, 192 A.D.2d 259, 260–61, 601 N.Y.S.2d 113, 114 (1st Dep't 1993); *Bierbrauer v. Moran*, 244 A.D. 87, 90, 279 N.Y.S. 176, 179 (4th Dep't 1935); *Pinnock*, 83 Misc. 2d at 238, 371 N.Y.S.2d at 802; *In re Estate of Sparks*, 172 Misc. 642, 643, 15 N.Y.S.2d 926, 928 (Sur. Ct. N.Y. County 1939).

Therefore, Martin Foster would have no interest in the couple's Rochester home.

These courts acknowledge the distinct nature of a tenancy by the entirety and apply equitable principles to prevent the killer from benefiting. Prior to the crime, each tenant owned a one-half undivided interest in the property with a right of survivorship.³³ The killer, therefore, enjoyed only the possibility of absolute ownership, provided he outlived his spouse, but had no right to unilaterally destroy his wife's right of survivorship.³⁴ The victim's death at her husband's hand eliminates any chance for her to survive him, terminating her right of survivorship. Granting the killer an undivided interest in the whole would "elevate the nature of his ownership" interest,³⁵ allowing him to benefit as a result of his crime.³⁶ Even when the killer subsequently commits suicide, he would still benefit from his crime because, despite his inability to physically enjoy the property, he would have the right to determine how the property was disposed, a right considered to be one of the most fundamental rights in the American system of private ownership.³⁷ Therefore, when a killer murders his co-tenant by the entirety, he is wrongfully terminating his victim's right to convey her property and usurping that right for himself, again profiting from his crime. The *Riggs* principle, then, intercedes regardless of whether the killer is dead or alive, to deny the killer of his right of survivorship and all interest in the property.³⁸ This is achieved by engaging in the legal fiction that the victim outlived her killer.³⁹ As a result, the property as a whole is vested in the victim and passes into her estate to be distributed according to her will or the laws of intestacy.

When this analysis is applied to the Fosters, the couple's home in Rochester becomes a part of Margaret's estate.

³³ See *DUKEMINIER ET AL.*, *supra* note 9, at 276–77.

³⁴ See *Pinnock*, 83 Misc. 2d at 237–38, 371 N.Y.S.2d at 801–02.

³⁵ *Id.* at 237, 371 N.Y.S.2d at 801.

³⁶ See *Bierbrauer*, 244 A.D. at 90, 279 N.Y.S. at 179.

³⁷ See *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (“[T]he right to pass on property—to one’s [heirs]—has been part of the Anglo-American legal system since feudal times.”).

³⁸ See *Pinnock*, 83 Misc. 2d at 237–38, 371 N.Y.S.2d at 801–02; *In re Estate of Sparks*, 172 Misc. 642, 646, 15 N.Y.S.2d 926, 931 (Sur. Ct. N.Y. County 1939).

³⁹ See *Bierbrauer*, 244 A.D. at 89–90, 279 N.Y.S. at 179; *Pinnock*, 83 Misc. 2d at 237–38, 371 N.Y.S.2d at 801–02.

Traditionally, when one spouse dies before the other, the surviving spouse would be vested with an interest in the property as a whole based on the rules governing tenancy by the entirety.⁴⁰ In this case, however, because of his wrongdoing, Martin is prevented from benefiting from his crime and is deemed to have predeceased Margaret. Therefore, he is stripped of his right of survivorship and denied all of his ownership rights in accordance with the *Riggs* principle.⁴¹

This outcome is supported by the decisions in *Van Alstyne v. Tuffy*⁴² and *In re Estates of Pinnock*,⁴³ in which the real estate was vested in the victim's estate, and the killer was barred from taking any interest in the property.⁴⁴ In *Van Alstyne*, the court stressed that equity will intervene "where the natural and direct consequence of a criminal act is to vest property in the criminal."⁴⁵ Generally, the death of one tenant by the entirety results in the transfer of the tenancy as a whole to the surviving spouse, but when the death occurs as a result of murder, the *Riggs* principle prevents the killer from inheriting the property; a judgment otherwise would be contrary to New York case law and public policy.⁴⁶ Similarly, in *In re Estates of Pinnock*, the court entertained the legal fiction that the killer predeceased the victim in order to prevent the killer from gaining title to the tenancy.⁴⁷ Granville and Enid Pinnock, husband and wife,

⁴⁰ See SPRANKLING, *supra* note 8, § 10.02, at 121–22.

⁴¹ Note that this was the court's holding in *Van Alstyne v. Tuffy*, the case upon which these facts are based. 103 Misc. 455, 457, 169 N.Y.S. 173, 173–74 (Sur. Ct. Monroe County 1918).

⁴² 103 Misc. 455, 169 N.Y.S. 173.

⁴³ 83 Misc. 2d 233, 371 N.Y.S.2d 797.

⁴⁴ See *id.* at 237–38, 371 N.Y.S.2d at 801–02; *Van Alstyne*, 103 Misc. at 457, 459, 169 N.Y.S. at 173, 175; see also *In re Estate of Pikul*, 192 A.D.2d 259, 260–261, 264, 601 N.Y.S.2d 113, 114, 116 (1st Dep't 1993); *Bierbrauer*, 244 A.D. at 90, 279 N.Y.S. at 179; *In re Estate of Sparks*, 172 Misc. 642, 646, 15 N.Y.S.2d 926, 931 (Sur. Ct. N.Y. County 1939). *Bierbrauer* is particularly reinforcing because the court invoked equitable principles to prevent a killer from benefiting from his crime and precluded the killer from taking any interest in jointly held real estate. See 244 A.D. at 90, 279 N.Y.S. at 179. This is significant because the nature of the joint tenancy allows one tenant to unilaterally sever the interest, and even murder is considered a feasible means of severance. See SPRANKLING, *supra* note 8, § 10.02, at 118. Because severance creates a tenancy in common, the killer would traditionally be vested with an absolute one-half interest. The *Bierbrauer* court, however, employed the *Riggs* principle to reach an equitable result. 244 A.D. at 89–90, 279 N.Y.S. at 179.

⁴⁵ *Van Alstyne*, 103 Misc. at 459, 169 N.Y.S. at 175.

⁴⁶ See *id.* at 459, 169 N.Y.S. at 175.

⁴⁷ *In re Estates of Pinnock*, 83 Misc. 2d 233, 238, 371 N.Y.S.2d 797, 801–02 (Sur.

owned a home on Lowerre Place in Bronx, New York, as tenants by the entirety.⁴⁸ In late January 1975, Granville strangled his wife to death as she slept. He died twenty minutes later by hanging himself, leaving behind a suicide note admitting to the murder of his thirty-five year old wife.⁴⁹ The rope he used to kill Enid rested lightly in his pocket.⁵⁰ To prevent Granville from profiting from his crime, the court applied the *Riggs* doctrine destroying Granville's right of survivorship and concluded that the Bronx home vested in Enid's estate.⁵¹

In order to satisfy rules of equity, the courts have adopted the legal fiction that the victim outlived her killer. This analytical approach has its foundation in the New York Court of Appeals' decision in *Riggs*, which set forth the principle that no killer should benefit from his wrongdoing.⁵² The result denies the killer all property rights and endows the victim with the entire estate.

2. The Killer Is Entitled to a Life Estate

The second approach used by the courts is to grant the killer a life estate, but terminate his right of survivorship.⁵³ These courts significantly rely on New York Civil Rights Law section 79-b, which prevents forfeiture of property as a result of criminal acts.⁵⁴ Under this analysis, Martin Foster would retain an interest in the Rochester home for the remainder of his life; upon his death, the estate would be distributed according to Margaret's will.

The focus of this rationale is on the killer's rights in the property prior to the crime. Through the creation of a tenancy by the entirety, the killer owned an undivided one-half life interest in the property; he simultaneously possessed the whole with his victim.⁵⁵ While the killer's title cannot be improved, it also may

Ct. Bronx County 1975).

⁴⁸ *Id.* at 235, 371 N.Y.S.2d at 799.

⁴⁹ *Id.* at 235-36, 371 N.Y.S.2d at 800-01.

⁵⁰ *Id.*

⁵¹ *Id.* at 237-38, 371 N.Y.S.2d at 801-02.

⁵² *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889).

⁵³ *See generally In re Estate of Nicpon*, 102 Misc. 2d 619, 424 N.Y.S.2d 100 (Sur. Ct. Erie County 1980) (holding that a husband convicted of killing his wife does not forfeit the property, but instead receives only a life estate in the property).

⁵⁴ *See* N.Y. CIV. RIGHTS LAW § 79-b (McKinney 2008).

⁵⁵ *See* *DUKEMINIER ET AL.*, *supra* note 9, at 277.

not be reduced, because the killer will be forced to sacrifice his property rights in violation of Civil Rights Law section 79-b.⁵⁶ Since Martin Foster was entitled to use and enjoy the entire property that he held with Margaret as tenants by the entirety, after he killed her, he could not be divested of these rights. Upon Margaret's death, Martin would be vested with a life estate in the whole but denied survivorship rights to prevent him from increasing his property interest. He would not profit from his crime because he would be precluded from determining how the property would be distributed upon his death—a life estate terminates upon the death of the life tenant. The right to determine distribution would pass to Margaret, whose estate would take title to the property upon Martin's death. Unfortunately for Martin, his life estate terminated the moment he committed suicide.

This conclusion was espoused in *In re Estate of Nicpon*, when the court held that absolute title in the tenancy passed through the victim's estate, but the killer continued to maintain a life estate.⁵⁷ Adam Nicpon killed his wife, pled guilty to manslaughter in the First Degree, and was sentenced to jail. The court stated that Adam "may not inherit or succeed to property as a result of his own wrongful act," and therefore, was denied his right of survivorship in the home held in tenancy by the entirety.⁵⁸ Emphasizing that Adam was still alive, unlike the killer in *In re Estates of Pinnock*, the court held that Adam was entitled to a life estate in the property.⁵⁹ The court reasoned that denying Adam an interest in the property would amount to forfeiture in violation of the Civil Rights Law.⁶⁰ Adam, therefore, maintained a life estate until his death, at which time, the property would be distributed according to his wife's will.

3. The Killer Retains the Value of a One-Half Life Estate

The third approach used by New York courts is to grant the killer the commuted value of a one-half life estate in the property, and deny him his right of survivorship.⁶¹ This analysis

⁵⁶ See *Nicpon*, 102 Misc. 2d at 621, 424 N.Y.S.2d at 101-02.

⁵⁷ *Id.* at 621, 424 N.Y.S.2d at 102.

⁵⁸ *Id.* at 620-21, 424 N.Y.S.2d at 101-02.

⁵⁹ *Id.*

⁶⁰ *Id.* at 621, 424 N.Y.S.2d at 101-02.

⁶¹ See generally *In re Estate of Mathew*, 270 A.D.2d 416, 706 N.Y.S.2d 432 (2d

balances the *Riggs* principle with the killer's right against forfeiture. As a result, Martin Foster would receive a lump-sum payment equal to the value of a one-half life estate in the Rochester home, factoring in his life expectancy. Title in the property would pass to Margaret's heirs.

The basis of this approach is an equilibrium between the rule set out in *Riggs* and the law against forfeiture. The courts recognize that each tenant by the entirety "is entitled to one-half of the rents and profits" earned by the property during their lifetime.⁶² To prevent the killer from benefiting, he is denied his right of survivorship, but to avoid forfeiture, the court holds that the killer is entitled to proceeds equivalent to the revenue created by one-half of the property.⁶³ Therefore, Martin Foster is entitled to the commuted value of one-half of the Rochester property limited by his life expectancy, and the remainder is distributed to his victim's heirs. Since Martin died immediately after Margaret, however, the value of his award is determined by his actual life span and his interest is essentially zero.⁶⁴

This approach was applied in *In re Estate of Busacca*, when the court granted the killer the "commuted value of a life estate in one-half" of the property for his life expectancy.⁶⁵ In *In re Estate of Busacca*, Thomas Busacca killed his wife Florence. The couple's home was sold, and the court was determining the extent of Thomas' rights in the proceeds from the sale.⁶⁶ After reciting the rule set out in *Riggs*, the court held that Thomas was entitled to the value of a one-half life estate in the tenancy so that New

Dep't 2000); *In re Estate of Busacca*, 102 Misc. 2d 567, 423 N.Y.S.2d 622 (Sur. Ct. Nassau County 1980).

⁶² *Busacca*, 102 Misc. 2d at 568, 423 N.Y.S.2d at 623.

⁶³ *Id.* at 569, 423 N.Y.S.2d at 624. It is interesting that the victim may be deemed to have survived her killer with respect to the right of survivorship, vesting her estate with fee simple absolute, but, in order to prevent forfeiture, the killer may not be considered to have predeceased his victim. Although, in cases of murder-suicide, engaging in the legal fiction that the killer predeceased would create a rational result, the rule cannot be applied uniformly to all factual situations, particularly when the killer lives. To deem the killer predeceased directly contradicts the very fact that he is alive.

⁶⁴ See *Estate of Veronica Barraza*, N.Y. L.J., June 14, 2002, at 26, col. 6 (Sur. Ct. Nassau County) (noting that when the killer is already deceased his life expectancy is certain, and therefore, computations should be based on his actual life span).

⁶⁵ 102 Misc. 2d at 569, 423 N.Y.S.2d at 624.

⁶⁶ *Id.* at 568, 423 N.Y.S.2d at 623.

York Civil Rights Law section 79-b would not be violated.⁶⁷ By upholding the killer's right not to forfeit and simultaneously implementing the principle that the wrongdoer may not profit from his crime, the *Busacca* court created a very equitable remedy.

This compromise between *Riggs* and the Civil Rights Law was reiterated in *In re Estate of Mathew* when the killer—who held property with his victim as tenants by the entirety—was awarded the “value of a life estate in one-half of the property or the proceeds from its sale.”⁶⁸ In *In re Estate of Mathew*, Thomas Mathew killed his wife Mary and was subsequently convicted for the crime.⁶⁹ The Mathew's Rockland County home was sold and Thomas claimed a share in the proceeds.⁷⁰ Noting that “an individual who kills his . . . spouse is not entitled to succeed to sole ownership of real property as a surviving tenant by the entirety,” but neither may “the slayer . . . forfeit his . . . own undivided interest in [the] property,” the court held that Thomas was “entitled to the commuted value of a life estate in one-half of the property or the proceeds from its sale.”⁷¹ This value is calculated based on his life expectancy and he forfeits the remainder.

The killer's life interest is a valuation computed based on actuarial tables. Factoring in life expectancy and interest rates, the actuarial table derives a percentage factor used to determine the remainder interest.⁷² The percentage factor for the life estate is determined by subtracting the remainder interest factor from the number one.⁷³ The killer's interest—the commuted value of a one-half life estate—is equal to this life estate factor multiplied by the property value and divided in half,⁷⁴ where the property value is determined by an appraisal or the amount of proceeds from its sale. For example, in *In re Estate of Mathew*, the Mathew's Rockland County home was sold with proceeds totaling

⁶⁷ *Id.* at 569, 423 N.Y.S.2d at 624.

⁶⁸ 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep't 2000).

⁶⁹ *Id.* at 416, 706 N.Y.S.2d at 433.

⁷⁰ *Id.*

⁷¹ *Id.* at 417, 706 N.Y.S.2d at 433.

⁷² See 26 C.F.R. § 25.2512-5(d)(2)(iii) (2008) (Treasury regulation regarding estate tax computation).

⁷³ *Id.*

⁷⁴ See Margaret Valentine Turano, *Supplementary Practice Commentaries*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney Supp. 2007).

approximately \$64,000.⁷⁵ Assuming a five percent interest rate and that Thomas Mathew was sixty years old at the time of the crime, the remainder interest factor is 0.40624.⁷⁶ By subtracting this number from the number one, the life estate factor is 0.59376.⁷⁷ This factor is multiplied by the sale proceeds—\$64,000—resulting in the value of \$38,000.64.⁷⁸ Because Thomas is only entitled to a one-half life estate, this amount is divided in half and the value of Thomas' one-half life estate equals \$19,000.32.⁷⁹

B. The Surrogate's Court Advisory Committee Approach

The fourth approach, announced by the Surrogate's Court Advisory Committee's Report, entitles the killer to the value of his contribution toward the property, limited to one-half the value of a life estate in the tenancy.⁸⁰ This provision mirrors the recently adopted EPTL section 4-1.6, which streamlined the New York courts' approach to the effect of murder on joint bank accounts.⁸¹ According to the proposed law, Martin Foster would

⁷⁵ See *In re Estate of Mathew*, 270 A.D.2d 416, 416, 706 N.Y.S.2d 432, 433 (2d Dep't 2000).

⁷⁶ 26 C.F.R. § 20.2031-7(d)(7) tbl.S (2008).

⁷⁷ $1.00000 - 0.40624 = 0.59376$.

⁷⁸ $0.59376 \times \$64,000 = \$38,000.64$.

⁷⁹ $\$38,000.64 \div 2 = \$19,000.32$.

⁸⁰ See SURROGATE'S COURT ADVISORY COMMITTEE REPORT, *supra* note 19, at 32–33. The proposed amendment reads:

§ 4-1.7. Disqualification of tenant by the entirety in certain instances. Notwithstanding any other provision of law to the contrary, a tenant by the entirety in real property . . . who is convicted of murder in the second degree as defined in section 125.25 of the penal law, or murder in the first degree as defined in section 125.27 of the penal law, or manslaughter in the first degree as defined in subdivision one or two of section 125.20 of the penal law or manslaughter in the second degree as defined in subdivision one of section 125.15 of the penal law of the other spouse, shall not be entitled to any share in such real property or monies derived therefrom, except for any fractional portion thereof contributed by the convicted spouse from his or her separate property as defined by paragraph d of subdivision one of part B of section two hundred thirty-six of the domestic relations law, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety or monies derived therefrom.

Id. Note that this language is very similar to the recently adopted EPTL section 4-1.6.

⁸¹ N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2008). The statute states in part that:

[A] joint tenant convicted of murder in the second degree as defined in

be able to recover the value of his endowment to the tenancy, provided it did not exceed the value of one-half the life estate.

The joint bank account statute was interpreted in *In re Kiejliches*, when the court limited the access of the killer to the funds held in a joint bank account.⁸² In *In re Kiejliches*, Elena Kiejliches was responsible for the death of her husband, Boris, who was found in a barrel on the shores of Queens, New York.⁸³ During their marriage, Elena and Boris created a joint bank account. At the time of Boris' death, the account contained approximately one million dollars.⁸⁴ The court held that Elena was entitled only to those funds that "she actually contributed to the account."⁸⁵ Similar to the purpose of the Surrogate's Court Advisory Committee's proposed statute, the rational basis for this outcome is rooted in the principle that a killer may not profit from his crime, but neither may he forfeit as a result.⁸⁶ The goal is to ensure that the killer is reimbursed for his contribution to prevent forfeiture, but at the same time, limited to no more than one-half—his interest prior to the crime.

The Advisory Committee's proposal would have a similar effect as the joint bank account statute. If the Foster's Rochester home was appraised at \$100,000 and Martin paid one-half of the purchase price, he would be entitled to one-half of the property's value in return.⁸⁷ If Martin had paid the entire purchase price, he would not be fully compensated, but instead limited to one-half of its value. If, however, Martin did not contribute anything to the value of the tenancy, he would be entitled to nothing. The Committee views this as an equitable result because the killer is not profiting from his crime, but only recovering his initial

section 125.25 of the penal law or murder in the first degree as defined in section 125.27 of the penal law of another joint tenant shall not be entitled to the distribution of any monies in a joint bank account created or contributed to by the deceased joint tenant, except for those monies contributed by the convicted joint tenant.

Id.

⁸² 292 A.D.2d 530, 531–32, 740 N.Y.S.2d 85, 86–87 (2d Dep't 2002).

⁸³ *Id.* at 530–31, 740 N.Y.S.2d at 86.

⁸⁴ *Id.* at 530, 740 N.Y.S.2d at 86.

⁸⁵ *Id.* at 531, 740 N.Y.S.2d at 86. Unfortunately, the courts have not addressed whether the killer is also entitled to the interest that has accumulated on those individually deposited funds.

⁸⁶ See *In re Estates of Pinnock*, 83 Misc. 2d 233, 237, 371 N.Y.S.2d 797, 801 (Sur. Ct. Bronx County 1975).

⁸⁷ Note that because Martin committed suicide, his \$50,000 would be deposited with his estate and distributed according to his will.

investment. The killer is not forfeiting either because, during the tenancy, he was only entitled to an undivided one-half in the property.

C. The Uniform Probate Code Model

The fifth approach, outlined in the Uniform Probate Code's slayer statute, section 2-803, severs the tenancy by the entirety and the killer and his victim become tenants in common.⁸⁸ Under this approach, the right of survivorship is destroyed and both Martin and Margaret Foster are entitled to an undivided one-half interest in the Rochester property. As a result of her death, Margaret's half of the property will be distributed according to her will or the laws of intestacy, but Martin is free to possess, enjoy, and exercise his rights as a tenant in common.

The underlying purpose of the Code provision is to prevent the killer from profiting from his crime, but also to prevent him from forfeiting his property.⁸⁹ This rationale was adopted by the Florida legislature and infused into the state's slayer statute, section 732.802, which was modeled after the Uniform Probate Code.⁹⁰ Like the UPC, the Florida statute provides that the killing of one tenant by the entirety by the other severs the tenancy, creating a tenancy in common.⁹¹ This interpretation was supported in *Capoccia v. Capoccia*,⁹² where the Florida District Court of Appeals held that, under the statute, a killer is precluded from obtaining any interest as a surviving spouse, and instead, is vested with a one-half interest as a tenant in common.⁹³ In *Capoccia*, Bobbie Jean Capoccia murdered her husband, Santo, and litigation arose to determine the rights of

⁸⁸ See UNIF. PROBATE CODE § 2-803(c)(2) (1990) (amended 1997).

⁸⁹ See *id.* § 2-803 cmt. (Supp. 2007).

⁹⁰ See FLA. STAT. ANN. § 732.802 note (West 2008) (Uniform Law).

⁹¹ See *id.* § 732.802(2). The statute provides that:

Any joint tenant who unlawfully and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship. This provision applies to joint tenancies with right of survivorship and tenancies by the entirety in real and personal property; joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions; and any other form of coownership with survivorship incidents.

Id.

⁹² 505 So. 2d 624 (Fla. Dist. Ct. App. 1987).

⁹³ *Id.* at 625

the killer in the estate held by her and her husband as tenants by the entirety.⁹⁴ Noting that the statute sought to prevent the murderer from taking the whole of the property by operation of the tenancy by the entirety, the court terminated Bobbie Jean's right of survivorship.⁹⁵ The court held that under the statute, the tenancy by the entirety is severed and transformed into a tenancy in common with the killer and victim each taking a one-half interest.⁹⁶ The language used in the UPC would lead to the same result—severance of the tenancy by the entirety forming a tenancy in common. Therefore, under the UPC or the Florida statute, Martin and Margaret Foster's tenancy by the entirety would be severed and the killer and victim would each be given equal shares as tenants in common.

II. THE NEED FOR AND PURPOSES OF REFORM

The division within New York case law continues despite the New York Court of Appeals' recent decision in *In re Estates of Covert*,⁹⁷ and because the legislature has failed to enact any legislation clarifying the law. The Court did not resolve the controversy in *In re Estates of Covert* because the holding was limited to the facts of the case—which involved a joint will—and the particular issue—which addressed whether the killer's family was precluded from taking under the victim's will.⁹⁸ There remain, then, three different common law approaches and two statutory suggestions on how to resolve the effect of murder on tenancy by the entirety.⁹⁹ This wide variety of results creates inconsistency within property law,¹⁰⁰ unreliability in the transfer of property, and it wastes judicial resources.¹⁰¹ As a traditionally common law state, New York's rule has developed through case law¹⁰² with seemingly little need for legislation, because the

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 97 N.Y.2d 68, 761 N.E.2d 571, 735 N.Y.S.2d 879 (2001).

⁹⁸ *Id.* at 72, 761 N.E.2d at 573–74, 735 N.Y.S.2d at 881–82.

⁹⁹ *See supra* Part I.

¹⁰⁰ *See Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) (noting that the transfer of property should be “orderly, peaceable, and just”).

¹⁰¹ *See, e.g., Covert*, 97 N.Y.2d at 73, 761 N.E.2d at 574, 735 N.Y.S.2d at 882 (noting the procedural history of the case, which spanned three courts).

¹⁰² *See* Julie J. Olenn, Comment, *'Til Death Do Us Part: New York's Slayer Rule and In re Estates of Covert*, 49 BUFF. L. REV. 1341, 1347 (2001). One of the limited exceptions in this area was the amendment to the Estates, Powers, and Trusts Law

Riggs principle was considered to comprehensively address all of the issues.¹⁰³ Since, however, application of the rule has led to significant inconsistencies causing the courts themselves to call for legislative action,¹⁰⁴ the New York legislature must act to address the confusion, uncertainty, and inefficiency that the conflict creates.¹⁰⁵ The legislature should enact a statutory provision clarifying this area of law because a statute will (1) create reliability; (2) promote economy and judicial efficiency; and (3) relieve the judiciary of the task of legislating from the bench.

A. *The Impact of In re Estates of Covert*

The division among New York courts' approaches to succession of rights to property held in tenancy by the entirety when one spouse kills the other was specifically noted by the Appellate Division in *In re Estates of Covert*.¹⁰⁶ Unfortunately, the split remains unresolved because the Court of Appeals chose not to comprehensively address the issue in its opinion.

In re Estates of Covert was unique on its facts because it involved the distribution of joint property under a joint will that had been executed by the killer and his victim prior to the crime.¹⁰⁷ In addition, the court had to decide whether the killer's family, not whether the killer himself, was precluded from taking property from the victim's estate.¹⁰⁸ As husband and wife,

to include a statute dictating the rights of a killer in assets held in a joint bank account with his victim. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2008).

¹⁰³ See Olenn, *supra* note 102, at 1347 n.28 ("New York has failed to enact a comprehensive slayer statute . . . because *Riggs* found such legislation unnecessary . . .").

¹⁰⁴ See *In re Estate of Dorsey*, 161 Misc. 2d 258, 262–63, 613 N.Y.S.2d 335, 338 (Sur. Ct. Dutchess County 1994) ("[I]t seems quite apparent that a comprehensive statute on the subject would provide the best guidance to a court . . .").

¹⁰⁵ See John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 721 (1936) ("[T]he most satisfactory solution of the problem of preventing a slayer from profiting by his unlawful act is statutory . . .").

¹⁰⁶ 279 A.D.2d 48, 51 n.1, 717 N.Y.S.2d 392, 395 n.1 (3d Dep't 2000) ("We note a divergence of appellate authority on this point, with the First and the Fourth Departments holding that the wrongdoer forfeits all rights and the Second Department holding that the wrongdoer does not forfeit his or her own undivided interest." (citations omitted)), *aff'd*, 97 N.Y.2d 68, 761 N.E.2d 571, 735 N.Y.S.2d 879 (2001).

¹⁰⁷ See *Covert*, 97 N.Y.2d at 72–73, 761 N.E.2d at 574, 735 N.Y.S.2d at 882.

¹⁰⁸ *Id.* at 72, 761 N.E.2d at 573–74, 735 N.Y.S.2d at 881–82.

Edward and Kathleen Covert executed a joint will disposing of their property in equal parts to Edward's family, Kathleen's family, and Kathleen's siblings. Three years later, Edward shot and killed Kathleen, and then committed suicide.¹⁰⁹ Kathleen's family sought to prevent Edward's family, the Coverts, from receiving Kathleen's personal property and the couple's joint property under the joint will.¹¹⁰

The court recognized the tension between the principles set out in *Riggs* and the public policy codified in the Civil Rights Law section 79-b,¹¹¹ but still held that *Riggs* disqualified Edward from taking under Kathleen's will as a result of his crime.¹¹² However, the Coverts were still entitled to their share of the property, because under the joint will, they were designated beneficiaries of Kathleen's estate.¹¹³ Edward's crime did not preclude his innocent family members from benefiting under the will. With respect to the couple's joint property, the court held that Edward was entitled to a one-half interest in the property because prior to the killing, he had a vested interest with the right to take one-half of the joint property. Denying him his interest would amount to forfeiture.¹¹⁴ By applying *Riggs*, however, the court denied Edward the right of survivorship because of his crime and the joint property passed in equal halves to the two estates.¹¹⁵

Unfortunately, the court's ruling does not address property held in tenancy by the entirety.¹¹⁶ The holding fails to resolve

¹⁰⁹ *Id.* at 72–73, 761 N.E.2d at 574, 735 N.Y.S.2d at 882. The property at issue included Kathleen's personal estate estimated to be worth \$225,000, Edward's assets worth \$71,000, and property held in joint tenancy with right of survivorship valued at \$121,000. *Id.* at 73, 75, 761 N.E.2d at 574, 576, 735 N.Y.S.2d at 882, 884.

¹¹⁰ *Id.* at 73, 761 N.E.2d at 574, 735 N.Y.S.2d at 882.

¹¹¹ *Id.* at 74, 761 N.E.2d at 575, 735 N.Y.S.2d at 883 (“Indeed, public policy, as embodied in Civil Rights Law § 79-b, militates against application of *Riggs* as a means of effecting a proprietary forfeiture.”).

¹¹² *Id.*

¹¹³ *Id.* at 74–75, 761 N.E.2d at 575–76, 735 N.Y.S.2d at 883–84.

¹¹⁴ *Id.* at 75–76, 761 N.E.2d at 576, 735 N.Y.S.2d at 884. Note that this is consistent with the property principle that murder severs the joint tenancy and creates a tenancy in common. See SPRANKLING, *supra* note 8, § 10.02, at 118.

¹¹⁵ *Covert*, 97 N.Y.2d at 76, 761 N.E.2d at 576, 735 N.Y.S.2d at 884.

¹¹⁶ *Id.* at 75, 761 N.E.2d at 576, 735 N.Y.S.2d at 884 (“This appeal centers on three main types of property to be distributed—individual property owned outright and independently by Edward and Kathleen respectively, joint property with a right of survivorship and individual assets with named beneficiaries.”). Although a joint tenancy and tenancy by the entirety have similar characteristics, tenancy by the entirety is unique in that it can only be created in a married couple and there is no unilateral right of partition. *DUKEMINIER ET AL.*, *supra* note 9, at 276–77.

the tenancy by the entirety issue because the court's focus was on the application of the *Riggs* principle to will bequests and joint tenancies,¹¹⁷ and whether *Riggs* prevented a killer's family, who were also distributees of the victim's will, from accepting their testamentary gifts.¹¹⁸ As recognized by the Appellate Division in *In re Estates of Covert*, New York case law is divided on the status of a killer's interest in property once held by the killer and his victim as tenants by the entirety.¹¹⁹ Because the law continues to be divided, it is the role of the legislature to pass statutory provisions to create harmony.

B. Functions of Reform

1. Reliability

The divergence in case law has created uncertainty in the devolution of real property. The state of New York has become geographically divided, and a killer's rights now depend on the county in which he committed his crime;¹²⁰ his property interest varies with his location.¹²¹ It is inherently unfair for a killer in one county to maintain greater property rights after killing his spouse strictly because of where he committed the killing. This creates an irrational result in an area of law that should be

¹¹⁷ See *Covert*, 97 N.Y.2d at 73–74, 761 N.E.2d at 575, 735 N.Y.S.2d at 883.

¹¹⁸ *Id.* at 72, 761 N.E.2d at 573–74, 735 N.Y.S.2d at 881–82.

¹¹⁹ See *In re Estates of Covert*, 279 A.D.2d 48, 51 n.1, 717 N.Y.S.2d 392, 395 n.1 (3d Dep't 2000), *aff'd*, 97 N.Y.2d 68, 761 N.E.2d 571, 735 N.Y.S.2d 879 (2001).

¹²⁰ See *id.* (noting a split in authority with the First and Fourth Departments limiting all rights of the killer and the Second Department granting the killer a life estate).

¹²¹ The Appellate Division is divided into four departments largely based on region. The First Department includes Manhattan and the Bronx. The second Department includes the remaining three boroughs, Nassau and Suffolk Counties, and includes Dutchess, Orange, Putnam, and Westchester Counties. The Third Department encompasses the area from Albany to Binghamton and just east of Syracuse. The Fourth Department consists of the area west of the Third Department, beginning with Syracuse and including Rochester and Buffalo. See New York State Unified Court System, Appellate Divisions, <http://www.courts.state.ny.us/courts/appellatedivisions.shtml> (last visited Mar. 22, 2008). Note that *Citibank v. Goldberg*, 178 Misc. 2d 287, 291, 679 N.Y.S.2d 237, 240 (Sup. Ct. Nassau County 1998), was decided by a court sitting in Nassau County, within the jurisdiction of the Second Department, and held that the killer had no interest in the proceeds from the sale of property held as tenancy by the entirety. Two years later, however, in *In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep't 2000), the Appellate Division, Second Department, found the decision in *Citibank* “inconsistent with the decision of this court.”

uniform and precise.¹²² In fact, the very purpose of probate law is to provide for an efficient and orderly devolution of property upon death.¹²³ It is important, then, to have a clear and well-settled law that can be relied upon to eliminate this disturbance and restore certainty and uniformity in this complex area of law.

2. Efficiency

Currently, the legal issues that arise as a result of one tenant by the entirety killing the other can only be resolved by the courts. The victim's estate is forced to petition the courts for direction to resolve these issues.¹²⁴ This often requires an appeal that could reach the Court of Appeals, even further consuming judicial resources.¹²⁵ In addition, excessive litigation forces a grieving family to incur great monetary expenses to fight for a judicial declaration that could easily be determined by the legislature. Having a single authority that announces the rule of law would free the courts from incessant petitions for direction and guidance, reduce costs for the victim's estate, and allow the property at issue to pass naturally; a clearly written law fulfills all of these purposes by enforcing efficient and "predictable" property transfer.¹²⁶ Legislative action, then, would limit wasteful litigation and reduce economic waste.

3. Eliminating Judicial Legislation

The lack of direction from the legislature has caused the courts to use their discretion to provide equitable results. As

¹²² See Olenn, *supra* note 102, at 1374 (noting that murder creates disorder in the systematic operation of property law).

¹²³ See Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31, 46 (2000) (noting that the "main purpose" of statutes governing wills is to "provide an efficient means of property transfer at death").

¹²⁴ See, e.g., *In re Estates of Covert*, 97 N.Y.2d 68, 73, 761 N.E.2d 571, 574, 735 N.Y.S.2d 879, 882 (2001) (noting that executor of decedent's estate petitioned the court for "direction in distribution of the estate[]"); *In re Estate of Busacca*, 102 Misc. 2d, 567, 568, 423 N.Y.S.2d, 622, 623 (Sur. Ct. Nassau County 1980) (discussing an action to determine a killer's interest in his victim's estate).

¹²⁵ See, e.g., *Covert*, 97 N.Y.2d at 73, 761 N.E.2d at 574-75, 735 N.Y.S.2d at 882-83 (resolving a case that began in the Surrogate's Court, was appealed to the Appellate Division, and then heard by the New York Court of Appeals).

¹²⁶ See Gregory C. Blackwell, *Property: Creating a Slayer Statute Oklahomans Can Live with*, 57 OKLA. L. REV. 143, 143 (2004) ("It is almost as important that property law be predictable as that it be right." (quoting *In re Estate of Propst*, 788 P.2d 628, 639 (Cal. 1990) (Broussard, J., concurring and dissenting))).

more cases have come before the courts to request direction on how to cope with murder's effect on tenancy by the entirety, this use of discretion has resulted in differing and inconsistent decisions.¹²⁷ But even if a single rule was adopted by the courts, it is unlikely that the rule would sufficiently anticipate all factual situations because it would have developed from one specific set of facts.¹²⁸ This problem could easily be preempted by a comprehensive statute that would serve as the ultimate authority, guiding the courts in their interpretation of the law¹²⁹ and minimizing the need for judicial legislation.¹³⁰

The role of the legislature is to impart a standardized rule of law for the benefit of both the courts and the citizens of the state. Uniform law provides courts with the ability to efficiently and effectively interpret and apply the law, but also informs the people of the consequences of certain actions.¹³¹ The legislature must take "affirmative steps" to synchronize the law in this area.¹³²

III. THE ADVANTAGES AND DISADVANTAGES OF THE FIVE PROPOSED OPTIONS

Faced with reform, the legislature has five options to rectify the current chaos existing in the law regarding transfer of property held in tenancy by the entirety including: (1) a statute modeled after the Uniform Probate Code section 2-803; (2) a statute adopting the Surrogate's Court Advisory Committee's proposed legislation; and (3) a statute codifying one of the three approaches used by New York courts. The new statute should

¹²⁷ See *supra* Part I.

¹²⁸ See Wade, *supra* note 105, at 718 (questioning whether the courts "would be able adequately to meet all of the situations which could be disposed of in a carefully drafted statute"); see also Tara L. Pehush, Comment, *Maryland Is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. BALT. L. REV. 271, 290 (2005) (noting that a court's analysis of one case often leaves "unanswered questions that courts are likely to encounter in the future").

¹²⁹ See Wade, *supra* note 105, at 718 (reasoning that by applying a statutory provision, the courts would "reach that same result [but] by a more customary and authoritative method").

¹³⁰ See Pehush, *supra* note 128, at 291 (recognizing that courts are often "forced to play a quasi-legislative role" when there is no law to address the issues before them).

¹³¹ See *id.* at 290 (noting that legislative action makes both the courts and the state's citizens "aware" of the laws).

¹³² *Id.* at 291.

prevent the killer from benefiting from his crime,¹³³ but it should also incorporate the certainty that is inherent in property law.¹³⁴ Additionally, it should provide uniformity, reliability, and efficiency, while sufficiently reducing the need for judicial lawmaking.¹³⁵ Although each option has its own advantages and disadvantages, ultimately, the legislature should enact a law codifying the outcome adopted by the New York courts that grants the killer the commuted value of a one-half life estate in the property. This Part first considers the four options that fail to implement reform and then analyzes the superiority of the approach that grants the killer the value of a one-half life estate.

A. *The Four Options That Insufficiently Address the Needs for Reform*

1. The Uniform Probate Code Model

The Uniform Probate Code's slayer statute severs the tenancy by the entirety and grants the killer and victim equal shares as tenants in common.¹³⁶ Although numerous states have adopted this approach,¹³⁷ it has a limited foundation in New York case law because it is more forgiving of the killer than the New York courts.¹³⁸ The Uniform Probate Code should not be adopted

¹³³ See *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889).

¹³⁴ See Callie Kramer, Note, *Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute*, 19 N.Y.L. SCH. J. HUM. RTS. 697, 701-02 (2003) (noting that "the regular disposition of property" is disrupted by unlawful killings).

¹³⁵ See *supra* Part II.B.

¹³⁶ UNIF. PROBATE CODE § 2-803(c)(2) (1990) (amended 1997). Section 2-803(c)(2) uses the phrase "joint tenants with the right of survivorship," which includes tenancies by the entireties under the Uniform Probate Code. See *id.* § 1-201(26). The pertinent text reads:

"Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

Id.

¹³⁷ See, e.g., ARIZ. REV. STAT. ANN. § 14-2803(B)(2) (2008) (adopting the UPC statute in full).

¹³⁸ See, for example, *In re Estate of Nicpon*, 102 Misc. 2d 619, 621, 424 N.Y.S.2d 100, 102 (Sur Ct. Erie County 1980), which is the most generous of the New York court rulings, granting the killer a life estate in the property as a whole. In contrast, see *In re Estates of Pinnock*, 83 Misc. 2d 233, 238, 371 N.Y.S.2d 797, 802 (Sur. Ct. Bronx County 1975), which denied the killer all rights to the property and deemed

because it violates the *Riggs* principles by allowing the slayer to benefit from his killing, neglects the distinct characteristics of the tenancy by the entirety, and contradicts current New York case law.

The Uniform Probate Code's slayer statute violates the *Riggs* principle by transforming the tenancy by the entirety into a tenancy in common, vesting the killer with a right greater than his interest prior to the killing. As a tenant by the entirety, the killer only held an undivided, one-half life interest in the property with the possibility of outright ownership, but only if his fellow tenant, who has a reciprocal right, predeceased him.¹³⁹ This ownership right is distinctly different from a tenancy in common, which is characterized by fee ownership in one-half of the property.¹⁴⁰ This unfettered vesting of one-half of the property in the murderer would amount to him "profit[ing] by his own wrong."¹⁴¹ Therefore, application of the Uniform Probate Code results in the "elevat[ion]" of the killer's interest, contrary to the *Riggs* principle.¹⁴²

The UPC is also inadequate because it does not differentiate between a tenancy by the entirety and a joint tenancy. During the existence of a tenancy by the entirety, a co-tenant cannot unilaterally sever the tenancy and form a tenancy in common.¹⁴³ This aspect distinguishes the tenancy by the entirety from the joint tenancy,¹⁴⁴ but the Uniform Probate Code equates the two distinct tenancies and allows the killer to transform a tenancy by the entirety into a tenancy in common.¹⁴⁵ In essence, the

the victim to have outlived the killer.

¹³⁹ See *Pinnock*, 83 Misc. 2d at 237, 371 N.Y.S.2d at 801.

¹⁴⁰ *Id.* (noting that ownership rights as tenant by the entirety, prior to the co-tenant's death, "in no respect had the attributes of absolute one-half ownership of an undivided one-half which flows from a tenancy in common").

¹⁴¹ *Bierbrauer v. Moran*, 244 A.D. 87, 89, 279 N.Y.S. 176, 179 (4th Dep't 1935).

¹⁴² *Pinnock*, 83 Misc. 2d at 237, 371 N.Y.S.2d at 801.

¹⁴³ See *DUKEMINIER ET AL.*, *supra* note 9, at 276-77.

¹⁴⁴ See *id.*

¹⁴⁵ See UNIF. PROBATE CODE § 2-803(c)(2) (1990) (amended 1997). *But see* Olenn, *supra* note 102, at 1373 n.215 (arguing that a tenancy by the entirety must be treated differently than a joint tenancy). Murder of a joint tenant severs the joint tenancy and creates a tenancy in common. See *SPRANKLING*, *supra* note 8, § 10.02, at 118. While this might seem to provide support for the rule, it neglects the unique quality of the tenancy by the entirety. Instead of distinguishing the tenancy by the entirety for its unique nature, the UPC inappropriately treats it as the functional equivalent of a joint tenancy when murder is involved.

Uniform Probate Code allows the killer to do through his victim's murder what he could not do during her lifetime.¹⁴⁶

Finally, the approach used by the UPC, converting the tenancy by the entirety into a tenancy in common, was rejected by a New York court in *Bierbrauer v. Moran*.¹⁴⁷ In *Bierbrauer*, John Moran brutally beat his wife, Nettie, and left her to die on the bathroom floor.¹⁴⁸ As Nettie struggled to survive, John sat in the couple's basement and killed himself by inhaling toxic fumes.¹⁴⁹ The court found that there was insufficient evidence to prove that one had survived the other, but refused to apply the simultaneous death statute to determine the appropriate distribution of the couple's property.¹⁵⁰ New York's simultaneous death statute provides that when the order of death is indeterminable, one-half of the property is distributed as if one spouse survived and the other half is distributed as if the other spouse had survived.¹⁵¹ Essentially, the property would be divided into a tenancy in common, and both John and Nettie's estates would be entitled to one-half of the property. The court, however, rejected this result, and instead, applied equitable principles to deny John any right to the estate.¹⁵² The *Bierbrauer* court's outright rejection of the application of the simultaneous death statute undermines the suitability of the Uniform Probate Code to New York law.

Since application of the Uniform Probate Code creates results that are contrary to New York case law and that ignore the unique characteristics of a tenancy by the entirety, the New

¹⁴⁶ See § 2-803(c)(2).

¹⁴⁷ 244 A.D. 87, 279 N.Y.S. 176 (4th Dep't 1935).

¹⁴⁸ *Id.* at 88–89, 279 N.Y.S. at 177–78.

¹⁴⁹ *Id.* at 88–89, 279 N.Y.S. at 178.

¹⁵⁰ *Id.* at 89–90, 279 N.Y.S. at 178–79. It should be noted that the property at issue was real estate held in joint tenancy. *Id.* at 89, 279 N.Y.S. at 179. The simultaneous death statute, however, applies uniformly to joint tenancies and tenancies by the entirety. See N.Y. EST. POWERS & TRUSTS LAW § 2-1.6(c) (McKinney 2008).

¹⁵¹ See § 2-1.6(c). The pertinent section provides, “[w]here there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived.” *Id.* The simultaneous death severs the tenancy by the entirety into a tenancy in common and the estate of each tenant is entitled to one-half of the property. See *Bierbrauer*, 244 A.D. at 90, 279 N.Y.S. at 180–81.

¹⁵² *Bierbrauer*, 244 A.D. at 89–90, 279 N.Y.S. at 178–79.

York legislature should not adopt a statutory provision modeled on the Uniform Probate Code section 2-803.

2. The Surrogate's Court Advisory Committee Approach

The Advisory Committee's proposed legislation would compensate the killer for any contribution to the value of the property, not to exceed one-half of the value of a life estate in the whole property.¹⁵³ The obvious advantages of the statute are its significant resemblance to the recently adopted EPTL section 4-1.6 and its noble attempt to balance *Riggs* with the rule against forfeiture. Unfortunately, by limiting the killer's interest only to what he "contributed" to the tenancy,¹⁵⁴ the statute disregards the unique nature of the tenancy by the entirety and creates the potential for forfeiture and uncertainty with respect to the killer's ultimate interest. In addition, by failing to address cases in which a killing has occurred but a conviction has not, the proposed law does not eliminate the need for judicial legislation.

The emphasis of the statute is on preventing the wrongdoer from succeeding to property as a result of his crime, but its application creates the potential for forfeiture. Upon creation of a tenancy by the entirety, each tenant has a one-half undivided interest in the property as a whole.¹⁵⁵ If the killer gains more than this one-half interest, he will benefit from his crime; if he becomes entitled to less than one-half, his interest will be forfeited. The statute attempts to prevent the killer from profiting by limiting his recovery to no more than one-half the value of a life estate in the property.¹⁵⁶ When the killer's contribution was less than one-half, however, his interest is diminished because he becomes entitled to a fractional

¹⁵³ SURROGATE'S COURT ADVISORY COMMITTEE REPORT, *supra* note 19, at 33.

¹⁵⁴ *Id.* The contribution must have come from the killer's "separate property."
Id. According to the Domestic Relations Law, separate property is defined as:

(1) [P]roperty acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

N.Y. DOM. REL. LAW § 236 (B)(1)(d) (McKinney 2008).

¹⁵⁵ See *DUKEMINIER ET AL.*, *supra* note 9, at 277.

¹⁵⁶ See SURROGATE'S COURT ADVISORY COMMITTEE REPORT, *supra* note 19, at 33.

percentage, even though prior to the crime he was entitled to a one-half interest.¹⁵⁷ In this sense, the statute fails to protect against forfeiture.

The determination of the killer's interest creates confusion, because unlike a joint bank account, contributions to the value of a home can be more than just monetary. The value of a joint bank account is equal to the funds deposited plus any interest that has accumulated. The contributions of each tenant can be easily determined by referencing bank deposit records and computing the interest.¹⁵⁸ Contributions to a home, on the other hand, cannot be calculated by simply establishing who made the down payment; many additional factors contribute to the value of a home. For example, improvements and routine maintenance contribute to a home's worth, but there is little or no way to verify which tenant made such contributions and exactly how much value was added. Since non-monetary contributions cannot be disregarded because they enhance the value of the home, there is no way to accurately determine the killer's interest. Therefore, this proposal not only fails to resolve the issues of uncertainty, but also creates additional ambiguity.

This statute also fails to eliminate the need for judicial legislation because it only applies to killers who have been convicted of murder or manslaughter.¹⁵⁹ It disregards the effect of murder-suicide, acquittal, or abatement on the tenancy by the entirety—issues that the New York courts have already confronted.¹⁶⁰ In such cases, the courts have held that it is appropriate for the Surrogate's Court to determine that the killer was criminally liable before applying equitable principles.¹⁶¹ To find liability, the Surrogate's Court must hold that the slayer was culpable for his victim's death by a fair preponderance of the

¹⁵⁷ *See id.*

¹⁵⁸ *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2008).

¹⁵⁹ *See* SURROGATE'S COURT ADVISORY COMMITTEE REPORT, *supra* note 19, at 32–33.

¹⁶⁰ *See, e.g., In re Estate of Pikul*, 192 A.D.2d 259, 262–63, 601 N.Y.S.2d 113, 115 (1st Dep't 1993) (deciding the effect of the abatement of a killer's conviction on the victim's property).

¹⁶¹ *See In re Estate of Bobula*, 19 N.Y.2d 818, 819, 227 N.E.2d 49, 50, 280 N.Y.S.2d 152, 153 (1967) (remanding to the Surrogate's Court for a determination of killer's criminal liability). *But see id.* at 820–21, 227 N.E.2d at 51, 280 N.Y.S.2d at 155 (Burke, J., dissenting) (arguing that the Surrogate's Court is not the appropriate forum to determine criminal liability).

evidence.¹⁶² This is the burden of proof regardless of whether the killer died before trial,¹⁶³ was acquitted,¹⁶⁴ or his conviction was abated through operation of law.¹⁶⁵ In the case of abatement, a jury's verdict is sufficient to create a presumption of the killer's guilt; the burden then shifts to the killer's estate to challenge that conviction on the basis of fundamental unfairness.¹⁶⁶ Under these circumstances, litigable issues unresolved by the statute would still exist requiring judicial resolution and further burdening the courts. Because the Advisory Committee's proposal does not meet the goals of the necessary legislative reform, it should not be adopted by the New York legislature.

3. New York Case Law Denying the Killer All Property Rights

A law strictly codifying the *Riggs* principle would adopt the legal fiction that the killer predeceased his victim in order to prevent the killer from profiting from his crime. Accordingly, the tenancy would transfer to the victim's estate,¹⁶⁷ regardless of whether the killer was dead or alive. The use of this legal fiction, however, has been declined by two New York courts, including the Court of Appeals.¹⁶⁸ Although this rule may best satisfy our equitable and moral principles by denying the killer all rights in his victim's property,¹⁶⁹ it also forces the killer to forfeit an

¹⁶² See *Pikul*, 192 A.D.2d at 262, 601 N.Y.S.2d at 115; *In re Estate of Bach*, 53 A.D.2d 612, 612, 383 N.Y.S.2d 653, 654 (2d Dep't 1976). A finding that the killing was an accident, committed in self-defense, or was an act of insanity would entitle the killer to acquire property from his victim in the Surrogate's Court. See *In re Estate of Wells*, 76 Misc. 2d 458, 462, 350 N.Y.S.2d 114, 119 (Sur. Ct. Nassau County 1973).

¹⁶³ *Pikul*, 192 A.D.2d at 262–63, 601 N.Y.S.2d at 115 (holding that when the killer died prior to sentencing resulting in the abatement of his conviction, proof of his crime by a preponderance of the evidence was enough to invoke equitable principles).

¹⁶⁴ See *Cnty. Nat'l Bank & Trust Co. of N.Y. v. Wisan*, 185 A.D.2d 870, 871, 586 N.Y.S.2d 1000, 1001 (2d Dep't 1992); *Kalra v. Kalra*, 149 A.D.2d 409, 410–11, 539 N.Y.S.2d 761, 763 (2d Dep't 1989).

¹⁶⁵ See *Pikul*, 192 A.D.2d at 263, 601 N.Y.S.2d at 115.

¹⁶⁶ *Id.*

¹⁶⁷ Note that the property devolves to the victim's estate because the victim is dead, and all of her property then falls into the estate to be further distributed according to the Estates, Powers, and Trusts Law.

¹⁶⁸ See *In re Estates of Covert*, 97 N.Y.2d 68, 74, 761 N.E.2d 571, 575, 735 N.Y.S.2d 879, 883 (2001); *Citibank v. Goldberg*, 178 Misc. 2d 287, 289–90, 679 N.Y.S.2d 237, 239 (Sup. Ct. Nassau County 1998), criticized by *In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep't 2000).

¹⁶⁹ See *Wade*, *supra* note 105, at 715 (noting that allowing the killer to gain a

interest he held prior to the crime.¹⁷⁰ In addition, the law is inadequate because it was originally adopted to combat the impact of murder motivated by greed,¹⁷¹ neglecting to account for murders committed for other purposes.

Forfeiture results when the killer is denied even his one-half undivided life estate. As a tenant by the entirety, the killer has a "right to a share in the possession and the rents and profits" generated by the property,¹⁷² but he is stripped of that right through the application of the legal fiction that he predeceased his victim.¹⁷³ As a matter of equity, the killer is disqualified from his right of survivorship because of his crime,¹⁷⁴ but the legal fiction strips him of his life interest as well, enforcing a double punishment in violation of Civil Rights Law section 79-b.¹⁷⁵ Application of this legal fiction was repudiated, first in *Citibank v. Goldberg*,¹⁷⁶ and then again by the Court of Appeals in *In re Estates of Covert*.¹⁷⁷ In *Citibank*, the Surrogate's Court "decline[d] to employ" the "legal fiction" because it was "too

property interest from his wrongdoing is "repugnant to all sense of justice").

¹⁷⁰ See *In re Estate of Nicpon*, 102 Misc. 2d 619, 621, 424 N.Y.S.2d 100, 102 (Sur. Ct. Erie County 1980) (recognizing that prior to his crime, the husband, as a tenant by the entirety "possessed an undivided one half life interest [that] cannot be extinguished").

¹⁷¹ *Riggs v. Palmer*, 115 N.Y. 506, 512–13, 22 N.E. 188, 190 (1889).

¹⁷² *In re Estate of Busacca*, 102 Misc. 2d 567, 568, 423 N.Y.S.2d 622, 623 (Sur. Ct. Nassau County 1980).

¹⁷³ See *In re Estates of Pinnock*, 83 Misc. 2d 233, 237–38, 371 N.Y.S.2d 797, 801 (Sur. Ct. Bronx County 1975) ("[I]t must be concluded that a woman [thirty-five] years of age . . . peacefully sleeping in her bed, would have survived the approximately [twenty] minutes that her husband lived, were it not for his wrongful act."); *In re Estate of Sparks*, 172 Misc. 642, 646, 15 N.Y.S.2d 926, 931 (Sur. Ct. N.Y. County 1939) ("But for his criminal act the deceased might have outlived petitioner [husband and killer]. It will be presumed by the court that she did so."); *Bierbrauer v. Moran*, 244 A.D. 87, 91, 279 N.Y.S. 176, 180 (4th Dep't 1935) ("Except for that act his wife would presumably have still been living when he died.").

¹⁷⁴ See *Busacca*, 102 Misc. 2d at 568, 423 N.Y.S.2d at 623 ("[T]he wrongdoer is precluded from taking as survivor by her wrongful act."); *Pinnock*, 83 Misc. 2d at 237, 371 N.Y.S.2d at 801 (noting that the killer loses his right of survivorship "when he became the survivor solely by dint of his wrongfully extinguishing the life of his wife").

¹⁷⁵ See N.Y. CIV. RIGHTS LAW § 79-b (McKinney 2008); *In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep't 2000) (noting that forfeiture in violation of Civil Rights Law section 79-b would result if the killer was "completely deprived of all interest in property which the couple held as tenants by the entirety").

¹⁷⁶ 178 Misc. 2d 287, 289–90, 679 N.Y.S.2d 237, 239 (Sup. Ct. Nassau County 1998), criticized by *Mathew*, 270 A.D.2d at 417, 706 N.Y.S.2d at 433.

¹⁷⁷ 97 N.Y.2d 68, 74, 761 N.E.2d 571, 575, 735 N.Y.S.2d 879, 883 (2001).

narrow[]” an application of the principle that the killer may not profit from his crime.¹⁷⁸ Instead, the court applied principles of equity to balance *Riggs* with the rule against forfeiture.¹⁷⁹ In *In re Estates of Covert*, the Court of Appeals rejected the use of the legal fiction that the killer predeceased his victim¹⁸⁰ because the *Riggs* doctrine cannot be used to cause forfeiture, only to prevent profit.¹⁸¹ Therefore, *Riggs* only denies the killer his right of survivorship.¹⁸²

The *Riggs* principle was originally adopted to prevent a killer motivated by greed from achieving his goal and profiting through his crime.¹⁸³ The killer was denied all interest in the property for reasons of deterrence.¹⁸⁴ This deterrence, however, is only effective on those “contemplating homicide for the purpose of inheriting from the victim.”¹⁸⁵ For the most part, killings today are not motivated by the desire to accelerate interest in property.¹⁸⁶ The requirement, therefore, that the killer be motivated by greed and a desire to gain title to property as a result of his crime has long been disposed of in New York case law.¹⁸⁷ Since the fear of deprivation of property no longer serves its initial deterrent purpose, the strict application of *Riggs* becomes excessive and reaches the point of forfeiture.

Although strict application of the *Riggs* doctrine vindicates our moral and equitable principles, the legislature should not adopt this approach because its underlying analysis has been rejected by the courts in New York, and it does not properly balance these equitable principles with laws against forfeiture.

¹⁷⁸ *Citibank*, 178 Misc. 2d at 289–90, 679 N.Y.S.2d at 239.

¹⁷⁹ *See id.* at 290–91, 679 N.Y.S.2d at 239–40.

¹⁸⁰ *Covert*, 97 N.Y.2d at 74, 761 N.E.2d at 575, 735 N.Y.S.2d at 883 (“There is no need to employ the . . . fiction that Edward ‘predeceased’ Kathleen.”).

¹⁸¹ *Id.* at 75–76, 761 N.E.2d at 576, 735 N.Y.S.2d at 884.

¹⁸² *Id.* at 76, 761 N.E.2d at 576, 735 N.Y.S.2d at 884.

¹⁸³ *See Riggs v. Palmer*, 115 N.Y. 506, 508–09, 22 N.E. 188, 189 (1889) (precluding Elmer Palmer from inheriting under his grandfather’s will because he killed the testator to prevent revocation of a bequest and to “obtain the speedy enjoyment and immediate possession of his property”).

¹⁸⁴ *See Olenn, supra* note 102, at 1350 & n.45.

¹⁸⁵ Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 873 (1993).

¹⁸⁶ *See* ENCYCLOPEDIA, *supra* note 5.

¹⁸⁷ *See In re Estate of Sparks*, 172 Misc. 642, 645, 15 N.Y.S.2d 926, 930 (Sur. Ct. N.Y. County 1939); *Van Alstyne v. Tuffy*, 103 Misc. 455, 459, 169 N.Y.S. 173, 175 (Sup. Ct. Monroe County 1918).

4. New York Case Law Granting the Killer a Life Estate

A law granting the killer a life estate in the tenancy by the entirety should not be adopted because it contradicts the public policy supporting the free transferability of land and creates inconsistency—sometimes allowing the killer to benefit as a result of his crime, and sometimes imposing forfeiture. Although this rule appropriately denies the killer his survivorship rights,¹⁸⁸ it does not satisfy *Riggs* because it allows the killer to increase his interest as a result of his crime,¹⁸⁹ and it violates Civil Rights Law section 79-b when the killer commits suicide.

Granting the killer a life estate in the property is contrary to public policy and common law tradition, which favors the free transfer of property and promotion of title marketability.¹⁹⁰ The killer, as a life tenant, is restricted in his ability to sell, lease, or mortgage the property because his interest only lasts for his lifetime.¹⁹¹ In addition, because of his limited interest, the life tenant is discouraged from improving the property to make it more valuable.¹⁹² Meanwhile, the victim's estate is denied possession of the property until the life estate is terminated, during which time the estate's rights to transfer and improve the property are limited. The new statute should incorporate these important policy issues and promote, not restrict, the transfer of property.

Whether the killer benefits or forfeits under the application of this rule depends on whether he remains alive after the killing. Prior to murdering his spouse, the killer retained "no more than a life interest in an undivided one-half of the

¹⁸⁸ See *Covert*, 97 N.Y.2d 68, 76, 761 N.E.2d 571, 576, 735 N.Y.S.2d 879, 884 (2001).

¹⁸⁹ *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) ("No one shall be permitted to profit by . . . his own wrong . . .").

¹⁹⁰ See *In re Trust of Kellogg*, 35 A.D.2d 145, 148, 316 N.Y.S.2d 293, 296 (4th Dep't 1970) (noting that the purpose of the Rule Against Perpetuities is to prevent restrictions on property that limit its marketability); *In re Estate of Shaul*, 58 Misc. 2d 967, 969, 297 N.Y.S.2d 209, 212 (Sur. Ct. Otsego County 1969) ("Public policy of this state . . . favors the free alienability of property . . ."); *DUKEMINIER ET AL.*, *supra* note 9, at 183 (noting the presumption in favor of the transfer of fee simple absolute estates); Adam J. Katz, Comment, *Heinzman v. Mason: A Decision Based in Equity but Not an Equitable Decision*, 13 QUINNIPIAC PROB. L.J. 441, 454 (1999) ("[P]ublic policy call[s] for the free and unencumbered transfer of one's property.").

¹⁹¹ See *DUKEMINIER ET AL.*, *supra* note 9, at 203.

¹⁹² See *id.*

property.”¹⁹³ When the slayer kills himself immediately after the crime, he forfeits his one-half interest because the rule only provides for a life estate.¹⁹⁴ Since the killer is not alive, there can be no life estate. When the killer remains alive, though, he benefits because the courts must elevate the one-half interest into a life estate in the entire property.¹⁹⁵ The purpose of a statutory provision is to create uniformity,¹⁹⁶ but this disparity in outcome creates more uncertainty and inequality in the law.

B. The Option That Best Implements Reform: New York Case Law—The Killer Is Entitled to the Commuted Value of One-Half the Life Estate

A statute codifying the case law that grants the killer a commuted one-half life estate in the property or proceeds from sale of the property best manifests equitable principles in order to prevent the killer from profiting, but also to avoid forfeiture.¹⁹⁷ In addition, the outcome is consistent regardless of whether the killer commits suicide or not. Although this approach requires judicial determinations of the value of the killer’s interest, the resulting level of litigation will be minimal compared to the current inundation. The rule’s adoption of public policy demonstrates its superiority as a proposed statutory provision.

Unlike the approach granting the killer a life estate, this rule promotes the transfer of property because it gives the killer a monetary interest. The land is not restricted by a life estate, but is wholly vested in the victim’s estate because the killer is denied his rights of survivorship.¹⁹⁸ Instead, the killer is entitled

¹⁹³ *In re Estates of Pinnock*, 83 Misc. 2d 233, 237, 371 N.Y.S.2d 797, 801 (Sur. Ct. Bronx County 1975) (“When both tenants by the entirety were alive, each had no more than a life interest in an undivided one-half of the property with the possibility that if one survived the other tenant, upon such survival, the survivor would own the entire property outright in fee simple absolute.”).

¹⁹⁴ *See In re Estate of Nicpon*, 102 Misc. 2d 619, 620–21, 424 N.Y.S.2d 100, 101–02. (Sur. Ct. Erie County 1980).

¹⁹⁵ *Id.* at 621, 424 N.Y.S.2d at 101–02.

¹⁹⁶ *See Wade*, *supra* note 105, at 719 n.19 (stating that a statute will eliminate inconsistencies in court decisions).

¹⁹⁷ *See In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep’t 2000); *In re Estate of Busacca*, 102 Misc. 2d 567, 569, 423 N.Y.S.2d 622, 624 (Sur. Ct. Nassau County 1980).

¹⁹⁸ *See Busacca*, 102 Misc. 2d at 568, 423 N.Y.S.2d at 623. This, of course, assumes that the killer’s one-half interest is satisfied when (1) the property is sold; (2) the estate pays it; or (3) the estate mortgages the property to borrow the money.

to the value of one-half of a life estate in the property, but is strictly limited to that one-half to prevent both forfeiture and profit.¹⁹⁹ This results in freely transferable property for both the victim's estate and the killer.

The resulting outcome is consistent with both the *Riggs* principles and Civil Rights Law section 79-b. During the tenancy by the entirety, the killer is entitled to one-half of the "rents and profits" generated by the estate; after his crime, he is still entitled to one-half of the "rents and profits."²⁰⁰ The killer does not profit, and he does not forfeit. This is consistent regardless of whether the killer dies immediately after his crime or not. Because the killer is only entitled to the "rents and profits" during his life as a tenant by the entirety,²⁰¹ the commuted value is projected using actuarial tables based on the killer's life expectancy at the time that the crime was committed.²⁰² Therefore, when the killer dies prior to a calculation, his actual life span from the commission of the crime to his death is used, and the proceeds are distributed to his estate.²⁰³ Although the courts must make these calculations to determine the killer's interest, the computation is a minimal burden on the judiciary.

This option is the "most satisfactory" approach to resolving the issue,²⁰⁴ because it provides a reliable and consistent result and relieves the courts of excessive litigation.²⁰⁵

IV. STATUTORY LANGUAGE AND APPLICATION OF A LAW ADOPTING THE COMMUTED ONE-HALF LIFE ESTATE MODEL

A law that grants the killer the commuted value of one-half a life estate effectively balances the contrasting principles found in

¹⁹⁹ See *Mathew*, 270 A.D.2d at 417, 706 N.Y.S.2d at 433.

²⁰⁰ *Busacca*, 102 Misc. 2d at 568, 423 N.Y.S.2d at 623.

²⁰¹ See *id.* (illustrating that the right to "rents and profits" lasts during the existence of the tenancy by the entirety, which terminates upon the death of one spouse or divorce).

²⁰² See *Estate of Veronica Barraza*, N.Y. L.J., June 14, 2002, at 26, col. 6 (Sur. Ct. Nassau County).

²⁰³ See *id.* In the case of murder-suicides, however, the killer's life span is usually only minutes long, so the courts give no value to the killer's life estate. See Margaret Valentine Turano, *Supplementary Practice Commentaries*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney Supp. 2002).

²⁰⁴ See *Wade*, *supra* note 105, at 729.

²⁰⁵ This assertion was bolstered when a law adopting the one-half life estate rule was proposed in the New York State Senate. See N.Y.S. 2419, 230th Sess. (2007).

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both *Riggs* and Civil Rights Law section 79-b. In addition, this approach successfully implements the necessary reforms because it applies universally to the complex factual situations confronting the courts. This section, therefore, proposes statutory language that adopts this outcome and comprehensively addresses its application to these circumstances.

The statute should read:

“Disqualification of tenant by the entirety in certain instances.”²⁰⁶

“Notwithstanding any other provision of law to the contrary, a tenant by the entirety in real property . . . who is convicted of murder in the second degree as defined in section 125.25 of the penal law, or murder in the first degree as defined in section 125.27 of the penal law, or manslaughter in the first degree as defined in subdivision one or two of section 125.20 of the penal law or manslaughter in the second degree as defined in subdivision one of section 125.15 of the penal law of the other spouse, shall not be entitled to any share in such real property or monies derived therefrom, except for”²⁰⁷ “the commuted value of a life estate in one-half of the property or the proceeds from its sale.”²⁰⁸

“After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the . . . killing of the decedent conclusively establishes the convicted individual as the decedent’s killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the . . . killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the . . . killing of the decedent, the

²⁰⁶ SURROGATE’S COURT ADVISORY COMMITTEE REPORT, *supra* note 19, at 32.

²⁰⁷ *Id.*

²⁰⁸ *In re Estate of Mathew*, 270 A.D.2d 416, 417, 706 N.Y.S.2d 432, 433 (2d Dep’t 2000).

determination conclusively establishes that individual as the decedent's killer for purposes of this section."²⁰⁹ In the event of an abatement of the conviction as a result of the killer's death, the conviction creates a presumption of guilt and "the burden of demonstrating the verdict to have been defective lies with the party challenging it."²¹⁰ If the challenging party does not meet that burden, then the conviction "conclusively establishes th[e] individual as the decedent's killer for purposes of this section."²¹¹

Under this statute, a killer who commits murder in the first or second degree or manslaughter in the first or second degree will be entitled to the commuted value of a one-half life estate in the property. The statute specifically provides that a criminal conviction is not necessary. When the killer dies prior to conviction from suicide or otherwise, or in the event of an acquittal, the Surrogate's Court may determine by a preponderance of the evidence whether the statute will apply. Furthermore, if a conviction is abated through operation of law because of the killer's death, this conviction may be used to demonstrate that the statute should apply.²¹²

The commuted value of a one-half life estate is a lump sum distribution based on actuarial tables incorporating life expectancy and interest rates.²¹³ The value of the life estate is determined, divided in half, and disbursed to the killer. When the killer dies prior to this computation, the money is distributed to his estate, while the victim's estate takes title to the real property.

In the case of Martin Foster, there was no conviction because he committed suicide after he killed his wife Margaret. Under the statute, Martin will still be prevented from benefiting from his crime if the Surrogate's Court determines by a preponderance of the evidence that he was criminally liable for his wife's death. In finding Martin liable, the court would implement the statute and terminate Martin's right of survivorship, and title to the

²⁰⁹ UNIF. PROBATE CODE § 2-803(g) (1990).

²¹⁰ *In re Estate of Pikul*, 192 A.D.2d 259, 263, 601 N.Y.S.2d 113, 115 (1st Dep't 1993).

²¹¹ § 2-803(g).

²¹² *Pikul*, 192 A.D.2d at 263, 601 N.Y.S.2d at 115.

²¹³ *See* *DUKEMINIER ET AL.*, *supra* note 9, at 197.

property will pass to Margaret's estate to be distributed accordingly. Martin is entitled to the commuted value of a one-half life estate in the Rochester property. Since Martin was thirty-five years old when he committed the crime, applying a five percent interest rate, the life estate factor is 0.83989.²¹⁴ Estimating the appraisal of the property at \$100,000, Martin is entitled to a one-half life estate worth \$41,994.50.²¹⁵ However, because Martin killed himself immediately after he killed his wife, his actual life span, only seconds long, is used, and his interest is valued at zero.²¹⁶

This statute adopts the principles of equity and morality endorsed by *Riggs*, while enforcing the rights of the killer under Civil Rights Law section 79-b. The statute provides a uniform outcome, regardless of where the crime is committed or when the killer dies. To eliminate the need for judicial lawmaking and reduce the potential for litigation, it addresses numerous situations that the courts have been confronted with in the past, including murder-suicide and the abatement of a conviction. Ultimately, this statute achieves all of the goals of reform: reliability, efficiency and economy, and the elimination of judicial legislation.

CONCLUSION

As a result of Elmer E. Palmer's poisoning of his grandfather, New York case law was infused with the maxim that "[n]o one shall be permitted to . . . take advantage of his own wrong, or to . . . acquire property by his own crime."²¹⁷ In an attempt to honor this noble public policy, the New York courts produced conflicting decisions when determining the property interests of a slayer who kills his fellow tenant by the entirety. To prevent further inconsistencies, the New York legislature must enact legislation. A law like the one proposed in this Note,

²¹⁴ See 26 C.F.R. § 20.2031-7(d)(7) tbl.S (2008). The remainder interest factor is 0.16011. By subtracting this factor from the number one, the life estate factor is 0.83989. See *id.* § 25.2512-5(d)(2)(iii).

²¹⁵ $0.83989 \times \$100,000 = \$83,989$.
 $\$83,989 \div 2 = \$41,994.50$.

²¹⁶ See Margaret Valentine Turano, Supplementary Practice Commentaries, N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney Supp. 2002).

²¹⁷ *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889).

that grants a killer the commuted value of a one-half life estate in the property, exemplifies the equitable principle adopted in *Riggs v. Palmer*, preserves the killer's rights under Civil Rights Law, and effectively embodies the necessary reform.