



THE RACK LAW FIRM, P.C.

A PROFESSIONAL LAW CORPORATION

Preserving Creditor Protection for Marital Real Estate in Living Trusts

In the context of good estate planning, it is not uncommon to transfer real property owned by a husband and wife as tenants by the entirety into one (or both) of their separate revocable trusts as an element of their tax planning strategies. Some clients have contacted us later with concerns (invariably raised by a third party) that the transfer of those properties into trust may have terminated the creditor protection they enjoyed when they owned the property outright as tenants by the entirety. We respond with assurances that the property continues to enjoy the same creditor protection as before, by virtue of Virginia Code § 55-20.2, enacted in 2001. In case this question is on the minds of other clients and advisors, we wanted to share this analysis by way of *e-Legal*.

The form of title known as “tenants by the entirety” is a special joint tenancy created between a husband and wife by which together they hold title to the whole with right of survivorship. Nearly all deeds by which married couples purchase property are held this way.

The Virginia statute provides that if property owned as tenants by the entirety is transferred by husband and wife to their joint trust, or to separate trusts, whether revocable or irrevocable, such property “shall have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety,” so long as the following conditions are met:

- they remain husband and wife;
- the property continues to be held in the trust or trusts; and
- it continues to be their property.

The deed should reference the intent to preserve the creditor protection by citing the statute in the terms of the deed itself.

Prior to 2006, these transfers into separate trusts were required to be made in equal shares to each spouse. However, in response to concerns expressed by attorneys advising clients on estate tax planning strategies, the law was modified to allow the transfer in unequal shares to their separate trusts and still retain protection from the individual creditors of either spouse.

We trust the foregoing puts the rumors to rest by confirming that real properties held as tenants by the entirety and transferred by deed of gift into one or both of the spouse's trusts continue to enjoy protection from individual creditors.