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Creditor Protection for the Marital Residence in Living Trusts

In the context of good estate planning, it is not uncommon to transfer real property formerly owned by husband and wife as tenants by the entirety into their separate revocable trusts as an element of their tax planning strategies. Some spouses become concerned that the transfer of their residential real estate into trust may have terminated the creditor protection they enjoyed when they owned the property outright as tenants by the entirety. Fortunately, the issue is governed by statute in Virginia, providing assurances that the property continues to enjoy the same creditor protection as before, by virtue of Virginia Code § 55- 20.2, enacted in 2001.

The form of title known as “tenants by the entirety” means a tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon the death of either, the other takes the whole. The new statute provides that if the principal marital residence is owned as tenants by the entirety and is transferred by the 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.

Prior to 2006, these transfers into separate trusts were required to be made in equal shares; however, the law was modified to allow the transfer in unequal shares to the separate trusts of the spouses and still retain protection from the individual creditors of either spouse.

Accordingly, the estate planning technique calling for the transfer of the marital residence into separate trusts by a husband and wife who hold the property as tenants by the entirety does not destroy the creditor protection afforded by Virginia law.

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