

Transfer of the Marital Residence: The War of the Roses?

Some years ago, a black comedy hit the silver screen in which the divorcing Mr. and Mrs. Rose (Michael Douglas and Kathleen Turner) battled for ownership of the marital residence in their property settlement negotiations. They resolved, over the objections of counsel (the lovely Danny DeVito), to draw a “dotted line” down the middle of the house to share, rather than surrender, the property. After making themselves mutually miserable in their attempts to force the other to relinquish control, they crashed to their deaths in the heat of battle, clutching to the prized chandelier in their magnificent home. Unfortunately, the epilogue failed to explore the estate tax implications of their dark demise. What was the misguided director thinking?

In less dramatic fashion, let us explore one possible scenario. Good estate planning often calls for the marital residence to be transferred (voluntarily) into the living trust of one spouse in an effort to “equalize” estates. Spouses typically hold real property as “tenants by the entireties with right of survivorship,” which could subject the residence to unnecessary estate tax if owned by the surviving spouse. In order to avoid this result, one spouse transfers the home by deed of gift into the living trust of the other, while maintaining other assets of roughly equal value in their own trust. The next question to arise (often unspoken) is: What if we get a divorce? Did I just give him/her the title to the house?

Fortunately, Virginia law is well-settled on this issue, making it a non-issue in most cases. In the matter of *Kelln v. Kelln*, the Court of Appeals of Virginia held that, in the absence of clear and unambiguous evidence of intent to create a separate estate in the other party, a gift between spouses as an element of an estate plan is ineffective to transform an asset into the separate property of the donee spouse. Citing as precedent the notorious divorce case of *Theismann v. Theismann*, the Court determined that, while the separate property of husband (NFL quarterback, Joe Theismann) could easily become marital property by gift to the wife during the marriage, transforming marital property (the residence) into separate property requires evidence of intent to relinquish all present and future dominion over the property so as to remove it from the marital estate.

Following a discussion of the estate tax principles summarized above, the *Kelln* Court found that both spouses intended to retain their interest in the trust assets, each being named as the beneficiary of the trust share held by the other, with the remainder passing to their children upon the death of both parties. Accordingly, there is a presumption in Virginia that the transfer of a marital residence to one spouse’s revocable trust for estate tax planning

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purposes does not create separate property without clear and convincing evidence to the contrary.

The marital residence is often l'objet de la guerre in other, real-life "Wars of the Roses," but where one spouse's trust owns it only because the other spouse signed a deed of gift as a part of their estate plan, the battle is decided. Before the first shot is fired, for better or worse, they still have equal marital property rights to the home, chandeliers and all.

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