

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 25

(Senators Forehand and Frosh)

Judicial Proceedings

Judiciary

Estates and Trusts - Property Held as Tenants by the Entireties - Transfer to
Trust

This bill specifies that, subject to certain conditions, any property of a husband and wife held by them as tenants by the entirety and subsequently conveyed to a trustee, and specified proceeds of that property, have the same immunity from the claims of the husband and wife's separate creditors as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the entirety. Such property, with respect to claims by a separate creditor of a husband or wife, and a debtor's beneficial interest in such property, is also exempt from execution on a judgment. After conveyance to a trustee, the property transferred is no longer held by the husband and wife as tenants by the entirety. The bill may not be construed to affect existing State law with respect to tenancies by the entirety.

Fiscal Summary

State Effect: The bill is not expected to directly impact State finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: Any property of a husband and wife held by them as tenants by the entirety and subsequently conveyed to a trustee, and the proceeds of that property, have the same immunity from the claims of their separate creditors as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the

entirety, as long as: (1) the husband and wife remain married; (2) the property or its proceeds continues to be held in trust by the trustee or trustees or their successors in trust; and (3) both the husband and wife are beneficiaries of the trust.

After the death of one spouse, all property held in trust that was immune from the claims of the husband and wife's separate creditors immediately prior to the individual's death as a result of the property previously having been held by the husband and wife as tenants by the entirety prior to conveyance to a trustee continues to have the same immunity from the claims of the deceased spouse's separate creditors as would have existed if the husband and wife had continued to hold the property conveyed in trust, or its proceeds, as tenants by the entirety. To the extent that the surviving spouse remains a beneficiary of the trust, the property is subject to the claims of the separate creditors of the surviving spouse.

In any dispute relating to the immunity of trust property from the claims of a separate creditor of a husband or wife, the trustee has the burden of proving the immunity of the trust property from the creditor's claims.

The immunity from the claims of the husband and wife's separate creditors established by the bill may be waived as to any specific creditor or any specifically described trust property by the express provisions of a trust instrument or the written consent of both the husband and the wife. The immunity is waived if a trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property immune from the claims of separate creditors and the identity of the immune property is not otherwise reasonably disclosed by other specified means. Such a waiver is effective only as to: (1) the person to whom the financial statement is delivered by the trustee; (2) the particular trust property for which the immunity is insufficiently disclosed on the financial statement; and (3) the transaction for which the disclosure was sought.

Current Law: There does not appear to be Maryland statutory or case law that explicitly addresses the effect that a transfer of property to a trust has on the claims of the separate creditors of a husband and wife if the property is jointly held by the husband and wife as tenants by the entirety prior to the transfer.

The Court of Appeals has indicated that Maryland "retains the tenancy by the entireties in its traditional form," *Columbian Carbon Company v. Kight*, 207 Md. 203, 208 (1955), and that when property is conveyed to a husband and wife they are considered to be one person and take the property "not [as parts], but by the entirety." *Marburg v. Cole*, 49 Md. 402, 411 (1878). As indicated by the *Marburg* court, neither spouse can dispose of the property without the consent of the other and, upon the death of one spouse, the survivor takes the whole of the property. The court has also stated that "it is well settled

in this State that property held in a tenancy by the entireties cannot be taken to satisfy the individual debts of a husband and wife.” *Diamond v. Diamond*, 298 Md. 24, 29 (1983).

The court has recognized that a tenancy by the entireties may be created in personal property as well as real property. *Diamond* at 29. The court has also indicated that the proceeds of the sale of real property held as tenants by the entireties also belong to the husband and wife as tenants by the entirety, *Brell v. Brell*, 143 Md. 443, 450 (1923).

The court has indicated an absolute divorce will sever a tenancy by the entireties and that otherwise some form of joint action is necessary to end a tenancy by the entireties. *Bruce v. Dyer*, 309 Md. 421, 428 (1987). Regarding the conveyance of real property, the court has stated, for example, that “the joint action of both [spouses] and a conveyance by both to a third person does terminate a tenancy by the entireties in the land, but the proceeds ordinarily continue to be held by the entireties.” *Eastern Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 532 (1969).

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Register of Wills; Estate and Trust Law Section, Maryland State Bar Association; Department of Legislative Services

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