

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 799
Judiciary

(Delegate Carter, *et al.*)

Judicial Proceedings

Estates and Trusts - Tenancy by the Entirety Property - Transfer to Trustee or Trustees

This bill alters the applicability of provisions enacted under Chapter 202 of 2010 and the extent to which the immunity established under Chapter 202 of specified property held in trust from the claims of creditors may be waived.

Fiscal Summary

State Effect: The bill is not expected to materially affect State finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: Chapter 202 of 2010 specifies, in part, that the property of a husband and wife that is 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 the separate creditors of the husband and wife as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the entirety, subject to certain conditions. Chapter 202 also specifies that after the death of the first spouse to die, the property continues to be immune from the claims of the decedent's separate creditors, but to the extent the surviving spouse remains a beneficiary of the trust, the property is subject to the claims of the surviving spouse's separate creditors.

The bill specifies that the immunity of property held in trust, under Chapter 202, applies to property conveyed to *the trustee or trustees of one or more trusts* and also adds a condition to the immunity: that the trust instrument, deed, or other instrument of conveyance provides that the provisions enacted under Chapter 202 apply to the property or its proceeds. The bill also specifies that the provisions enacted under Chapter 202, and the alterations made by the bill, only apply to tenancy by the entirety property conveyed to a trustee or trustees on or after October 1, 2010.

The bill lastly expands the authority to waive the immunity established under Chapter 202. Chapter 202 allows for the immunity to be waived as to any specific creditor or any specifically described trust property. The bill specifies that this authority includes the authority to waive the immunity as to all separate creditors of a husband and wife or all former tenancy by the entirety property conveyed to the trustee or trustees.

Current Law: 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's 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 also 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.

After conveyance of property to a trustee pursuant to Chapter 202, the property transferred is no longer held by the husband and wife as tenants by the entirety. Chapter 202 may not be construed to affect existing State law with respect to tenancies by the entirety.

Background: According to the Court of Appeals, 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. In the case, *Brell v. Brell*, 143 Md. 443, 450 (1923), the Court 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.

The Estate and Trust Law Section of the Maryland State Bar Association indicates that questions have arisen as to whether Chapter 202 of 2010 applies to transfers of tenancy by the entirety property to trusts with more than one trustee or trustees of multiple trusts and concerns have also been raised that Chapter 202 may have unintended estate tax consequences in relation to certain trusts used for estate planning purposes to obtain the benefit of both spouses’ estate tax exemptions. The bill specifies that the provisions enacted under Chapter 202 apply to transfers to the trustee or trustees of one or more trusts and, to avoid unintended consequences, makes the provisions applicable to such transfers only where the trust instrument, deed, or other instrument of conveyance provides that the provisions apply to the property or its proceeds and also allows for a broad waiver of the immunity established under Chapter 202.

State Fiscal Effect: The bill may result in an undetermined amount of estate tax revenue not being collected in future years to the extent it avoids unintended estate tax consequences of Chapter 202 of 2010 related to certain trusts. The bill, however, is intended to correct the potential unintended consequences of Chapter 202 of 2010 and is not expected to otherwise affect ongoing estate tax revenue. The extent to which

increased revenues may be collected in the absence of this bill is also uncertain and may be negligible at most.

Additional Information

Prior Introductions: None.

Cross File: SB 696 (Senator Forehand) - Judicial Proceedings.

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

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