



The 2009 Economy, No. 2: Tenancy by the Entirety Property - As An Asset Protection Device

Anna K. Gibson

Foster Swift Estate & Business Planning Alert

May 2009

In these trying economic times, clients from all income backgrounds are interested in learning about legal structures that may protect their assets. The number of creditor lawsuits, foreclosures, and bankruptcies are exponentially increasing. Clients are concerned with the liability of themselves, their spouses, and their future heirs. Those who have accumulated substantial wealth over the years are seeking to ensure that the maximum amount is preserved for future generations. Others are simply trying to hang on to everything they still have.

This issue discusses the protections available to a husband and wife by owning property as tenants by the entirety. We hope that this background information will be helpful to you.

QUESTION:

What is Tenancy by the Entirety?

ANSWER:

Tenancy by the entirety is a type of joint ownership for property that is held by a husband and wife. Tenancy by the entirety stems from the theory that a husband and wife represent an indivisible unit. Each spouse owns an undivided interest in the property. At the death of either spouse, the property passes to the surviving spouse.

QUESTION:

Do all states allow married couples to hold property as tenants by the entirety?

ANSWER:

No. Laws regarding property rights vary by state. Some states do not treat married joint owners differently than unmarried joint owners. The applicable law is where the property is located.

AUTHORS/ CONTRIBUTORS

Anna K. Gibson

PRACTICE AREAS

Estate Planning



Michigan and Florida both allow for ownership as tenants by the entirety.

QUESTION:

What happens to the tenancy by the entirety property on the death of the first spouse to die?

ANSWER:

The property passes to the surviving spouse by law without any further action. A devise in a will (or bequest in a trust) is ineffective to transfer the property.

QUESTION:

Is all property held jointly by husband and wife always tenancy by the entirety property in states that allow such ownership?

ANSWER:

No. A husband and wife can also own joint property as (1) tenants in common, or (2) joint tenants with rights of survivorship.

Tenants in common each own half (or some other fraction) of the property, but the co-tenants have equal right to possess the entire property. Co-tenants may unilaterally partition the property, sell the property, or mortgage the property. Co-tenants also transfer the property at their death to whoever they designate in a will or trust, or by intestacy law.

Joint tenants with rights of survivorship own an undivided interest in the whole property, and the property passes by law to the surviving co-tenant at the death of the first co-tenant. Co-tenants with rights of survivorship can unilaterally seek to partition the property, sell the property, or mortgage the property.

QUESTION:

How would we know whether our joint property is held as tenants by the entirety?

ANSWER:

Michigan and Florida law presume that real estate held jointly by a husband and wife is held as tenants by the entirety. A deed or other certificate of title must indicate another form of ownership (i.e., state "as tenants in common") in order to overcome this presumption.

The law is less clear on whether the presumption applies to personal property. In any event, it is prudent to expressly state on a deed, certificate of title, or other legal document that the couple intends to hold the property (real or personal) as tenants by the entirety. You should consider having an attorney review all documents evidencing joint ownership of property to determine if it is held as tenants by the entirety.



QUESTION:

Can non-married persons own property as tenants by the entirety (i.e., two brothers, a mother and daughter, two unrelated individuals)?

ANSWER:

No. This type of ownership is reserved for married individuals in Michigan and Florida. Non-married persons can hold property jointly as either tenants in common or as joint tenants with rights of survivorship.

QUESTION:

Do creditors of the first spouse to die have any rights to property held as tenants by the entirety?

ANSWER:

No. Tenancy by the entirety property is not included in the probate process. Creditors of the first spouse to die have no rights to the property and need not be given notice when the property passes to the surviving spouse.

QUESTION:

Will creditors of the surviving spouse be able to attach a lien on the property after the death of the first spouse?

ANSWER:

Yes. After the death of the first spouse, full ownership of tenancy by the entirety property transfers to the surviving spouse. Accordingly, creditors of the surviving spouse can attach a lien on the property.

QUESTION:

Is it possible for a surviving spouse with creditor issues to refuse to accept full ownership of the property but still live on the property?

ANSWER:

Yes. The surviving spouse may disclaim the survivorship interest in tenancy by the entirety property within nine months of the death of the first spouse. A properly drafted estate plan could avoid a lien on the property if the debtor-spouse survives by anticipating the use of a qualified disclaimer to fund a credit shelter or qualified terminable interest property trust. Courts have treated the right to live in the property as income interest.

However, a few states hold that such use of a disclaimer constitutes a fraudulent transfer. For example, Florida prohibits disclaimers when the disclaimant is insolvent at the time that the disclaimer becomes irrevocable.



QUESTION:

Does a creditor of one spouse have rights against tenancy by the entirety property?

ANSWER:

It depends on the laws of the state.

In the majority of states that allow tenancy by the entirety property, including both Michigan and Florida, a husband and wife must act together to transfer, partition, encumber, etc. any property held as tenants by the entirety. A creditor of one spouse does not have an attachable interest in the tenancy by the entirety property.

Conversely, in the minority of states, either spouse may act alone to affect the tenancy by the entirety property (mortgage, partition, sell, etc.). Tenancy by the entirety is treated the same as the other forms of joint ownership, and a creditor of one spouse may attach to the extent of the debtor-spouse's interest in the property. This would allow a creditor to force a sale or partition of the property.

QUESTION:

Are there special creditors that could still have an attachable interest in tenancy by the entirety property, even in states where the spouses must act together?

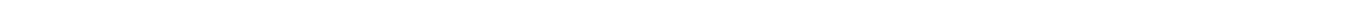
ANSWER:

Yes. The U.S. Supreme Court has decided that property held as tenants by the entirety is always subject to a federal tax lien against one spouse, regardless of the underlying state law. The rule has been extended to criminal fines and forfeitures from federal criminal cases. This rule permits the Internal Revenue Service or the federal government to either: (1) administratively seize and sell the taxpayer's interest in tenancy by entirety property, or (2) foreclose the federal tax lien against the tenancy by entirety property. Because of the difficulty of selling the taxpayer's interest, the most likely procedure is foreclosure.

Following a hearing on a foreclosure petition, a court may order the sale of the whole property and distribute the proceeds equitably between the non-debtor-spouse and the debtor-spouse (which then includes payment to the Internal Revenue Service). Some courts value the husband and wife's respective interests according to applicable life expectancies; others presume each spouse's interest is 50%.

QUESTION:

In Michigan and Florida, can a husband and wife freely transfer tenancy by the entirety property if one spouse has creditor problems?





ANSWER:

Yes, generally. In states where the husband and wife must act together, they may convey tenancy by the entirety property to one of them alone or to a third party (such as their children or to a trust), free from the debtor-spouse's creditors. Because the creditors do not have an attachable interest in the property, this transfer is not considered to be made with the intent to defraud a creditor.

However, if there is a risk that the debtor-spouse may be subject to bankruptcy proceedings within two years of the transfer, then the transfer could be avoided by the bankruptcy trustee. This may result in serious financial consequences because the property will no longer be considered to be held as tenants by the entirety.

QUESTION:

In Michigan and Florida, is tenancy by the entirety property subject to bankruptcy of one or both of the spouses?

ANSWER:

Generally, no. In states where the spouses must act together, tenancy by the entirety property is usually exempted from the bankruptcy proceedings if only one spouse is the debtor of a creditor. This is true even if both spouses simultaneously file for bankruptcy.

However, if there are joint creditors of both spouses, jointly held property may be liquidated to pay joint debt.

QUESTION:

In Michigan and Florida, when is tenancy by the entirety property not exempted from bankruptcy proceedings?

ANSWER:

When the spouses transfer property into tenancy by the entirety status within two years before the debtor-spouse files for bankruptcy (or is forced into involuntary bankruptcy by a creditor), the property could be returned to the bankruptcy estate as a fraudulent conveyance. If returned, the property will not be considered held as tenants by the entirety and therefore will not be exempt from the bankruptcy proceedings.

Also, a husband and wife should be cautious in transferring property out of its tenancy by the entirety status if there is any chance that either spouse could be subject to bankruptcy proceedings.

QUESTION:

Does tenancy by the entirety property afford protection against creditors if the husband and wife have joint debts?



ANSWER:

No. For example, if a husband and wife both personally guarantee a loan, or are both mortgagees on a piece of real property, those joint creditors can attach an interest in tenancy by the entirety property in any state. Tenancy by the entirety property is also not exempt from bankruptcy to the extent of any joint debts of the spouses, even if only one spouse is subject to the bankruptcy proceeding.

A joint debt would allow the creditor to force a partition or sale of the property and recover the proceeds to the extent of the joint debt.

QUESTION:

Can personal property be held as tenants by the entirety?

ANSWER:

State courts vary on whether tenancy by entirety law applies to personal property as well as real property.

Michigan law allows for tenancy by the entirety ownership of real property, along with proceeds from real property (e.g., rents, sale proceeds). Michigan limits ownership of personal property as tenancy by the entirety to only enumerated types, specifically: bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness provided that the ownership includes the wording "as tenancy by the entireties." Non-binding case law has indicated that this might be extended to include brokerage accounts. Although certain tangible personal property cannot be held as tenancy by the entireties, holding those assets in an LLC which is titled as tenancy by the entireties may provide protection. See question 17.

Florida law on tenancy by the entirety applies to all types of both real and personal property. Florida courts have allowed bank accounts to be held as tenants by the entirety and receive full creditor protection, even if one spouse may unilaterally draw from the joint account where the account agreement grants each spouse permission to act for the other.

QUESTION:

Can we hold membership interests in a Michigan or Florida limited liability company as tenants by the entirety?

ANSWER:

Yes. Michigan specifically allows for membership interests in limited liability companies to be held as tenants by the entirety to the same extent as real property. This provision affords asset protection for LLC membership interests held as tenants by the entirety. Thus, it appears feasible for an LLC to hold personal property, including bank accounts, and protect those assets with tenancy by the entireties ownership of the LLC.



Florida statutes provide that an interest in an LLC is personal property and generally allows all real and personal property to be held as tenancy by the entirety.

QUESTION:

So should a husband and wife transfer all property allowable to ownership as tenants by the entirety?

ANSWER:

No, it depends on the facts and circumstances of each client. An attorney should review your estate plan and various assets and liabilities to determine what type of ownership is best for you.

For example, if one spouse already has significant creditors, transferring property into a tenancy by the entirety for the purpose of avoiding creditors could be considered a fraudulent conveyance.

Also, it may be better to hold certain assets in the name of only one spouse to limit joint liability. For example, it may be better to hold a car driven by the couple's child in only one spouse's name (or even the child once he or she turns 18) in case of an accident that results in death or serious disfigurement.
