

# Tenancy by the Entirety Property and Transfers to Trusts

By

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Lawyers practicing in the area of matrimonial law encounter the structuring of property transactions as their clients contemplate marriage, during the marriage, and upon dissolution of the marriage. At all three periods in the life of a marriage, whether for creditor asset protection purposes, estate planning purposes, or dissolution purposes, whether and how to deviate from the state's default property laws is of utmost concern for the matrimonial lawyer. Of special concern is how default laws intended to protect the spouses' marital estate from creditors — including the tenancy by the entirety estate — may be implicated or abrogated by transfers, particularly transfers to a trust.

This article explores the tenancy by the entirety concurrent estate, the concurrent estate enjoyed by married persons that has its origins in the English common law<sup>1</sup> and which continues in one-half of the states,<sup>2</sup> and considers the effect of its marital property protections in light of wider use of trusts by married couples. Specifically, the article explores how transfers of entirety property to a trust can jeopardize the creditor protection of the entirety estate. The article then explores the legislation in each of the roughly one-half of the twenty-five tenancy by the entirety jurisdictions in the United States that authorizes continuing protections for spouses against one spouse's separate creditors even after property held by the entirety is transferred to a trust.

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<sup>1</sup> See *infra* text accompanying notes 4-16.

<sup>2</sup> See Appendix A to this article for a current listing of states recognizing the tenancy by the entireties and the authority — whether statutory or common law — for that recognition.

## I. The Tenancy by the Entirety and Effect of Conveyance of Entirety Property

### A. *A Brief History of Concurrent Estates and the Tenancy by the Entirety*

The tenancy by the entirety is a close historical adjunct to the joint tenancy with right of survivorship, the preferred estate under the English common law.<sup>3</sup> Blackstone, in his *Commentaries on the Laws of England*, described concurrent estates by looking at the “unities” connecting the concurrent owners to the estate in land.<sup>4</sup> The four unities characteristic of the joint tenancy were the unities of time, title, interest, and possession.<sup>5</sup> To establish the joint tenancy with right of survivorship, co-owners of property must acquire title at the same time, by the same instrument of conveyance (by deed or will, and never by operation of law such as descent), and with interests of the same duration or quality (for example, each joint tenant must be seized of a fee simple absolute or a life estate, etc.). Finally, the fourth unity, possession, means that each of the co-tenants has an equal right to possess the whole. Blackstone referred to the unity of possession this way:

Joint-tenants are said to be seized *per my et per tout* [by half and by all], by the half or *moiety*, and by *all*; that is they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.<sup>6</sup>

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<sup>3</sup> Many states have, of course, abrogated this preferential status for the joint tenancy with right of survivorship and have by statute adopted a default preference for the tenancy in common whenever real property is granted or devised to two or more persons. *See, e.g.*, MO. REV. STAT. § 442.450 (“Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy.”).

<sup>4</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*179.

<sup>5</sup> *Id.* at \*180.

<sup>6</sup> *Id.* at \*181.

At common law, the existence of these four unities created a joint tenancy with right of survivorship.<sup>7</sup> While no longer the default estate for concurrent tenants in many states,<sup>8</sup> the joint tenancy remains today a common way for married couples to hold title to both real and personal property in that the survivor of the spouses succeeds to the whole estate at the death of the first spouse.<sup>9</sup>

The tenancy by the entirety arose as essentially a subset of the joint tenancy in that it requires the same four unities of time, title, interest, and possession, while adding an additional, or fifth, unity – the unity of person that is supplied by marriage.<sup>10</sup> Blackstone describes this in his Commentaries, stating,

And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised [sic] of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.<sup>11</sup>

Blackstone prefaced his statement on the estate by noting that a married couple was one person under the common law.<sup>12</sup>

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<sup>7</sup> *Id.* (internal citations omitted).

<sup>8</sup> Most, if not all, states have abrogated the common law's preferential status for the joint tenancy with right of survivorship and have by statute adopted a default preference for the tenancy in common whenever real property is granted or devised to two or more persons. *See, e.g.,* MO. REV. STAT. § 442.450 (“Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy.”); *see also* D. WHITMAN, A. BURKHART, W. FREYERMUTH & T. RULE, *THE LAW OF PROPERTY* 147 (4th ed. 2000) (“[A]ll American jurisdictions today presume that a conveyance to two or more persons, without additional qualifying language, creates a tenancy in common, rather than a joint tenancy.”).

<sup>9</sup> The lawyer is, of course, well aware of the ease with which the survivorship benefit of the joint tenancy may be defeated. One spouse acting alone, and without notice to the other spouse, may transfer his interest in the property held as joint tenants, thus converting the transferee and the original joint tenant/spouse to tenants in common and defeating or terminating the spouse's right of survivorship.

<sup>10</sup> BLACKSTONE, *supra* note 4, at \*182.

<sup>11</sup> *Id.* (italics in original; internal citations omitted).

<sup>12</sup> *Id.*

Thus, unlike unmarried joint tenants, spouses cannot take by half (moieties) and by whole.<sup>13</sup> Instead, Blackstone describes the married couple as being seized of the undivided whole with a right of survivorship, and calls this estate tenancy by the entirety.<sup>14</sup>

The English common law was expressly adopted by nearly every state either by a state constitutional provision or by statute,<sup>15</sup> thus both the joint tenancy and the tenancy by the entirety estates carried over into American law. Some states, however, abrogated the entireties estate with the passage of property reforms that ended dower and curtesy and gave married women property rights.<sup>16</sup>

Still the entirety estate for married couples continues as the default estate in nearly one-half the states<sup>17</sup> and grants married couples, in addition to the survivorship feature, the most important aspect of the entireties estate — its protection against one spouse's separate creditors. Because the estate cannot be severed by the unilateral action of one spouse, creditors are typically barred from forcing partition to execute a lien.<sup>18</sup> This protection makes tenancy by the entirety an attractive choice by which married couples hold title to property in jurisdictions where it is available.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., ARIZ. REV. STAT. § 1-201; CAL. CIV. CODE § 22.2; MO. REV. STAT. § 1.010; VT. STAT. ANN. tit. 1, § 271; WYO. STAT. ANN. § 8-1-101.

<sup>16</sup> For some examples of Married Women's Property Acts (MWPA), see FLA. STAT. § 708.08; IND. CODE ANN. § 31-11-7-2; MO. REV. STAT. § 451.29; N.Y. DOM. REL. LAW § 50.

<sup>17</sup> See Appendix A to this article for a current listing of states recognizing the tenancy by the entireties and the authority — whether statutory or common law — for that recognition.

<sup>18</sup> See *Blount v. Padgett*, 261 A.3d 200, 203 (D.C. 2021), citing *Morrison v. Potter*, 764 A.2d 234 (D.C. 2000); *Arbesman v. Winer*, 468 A.2d 633 (Md. Ct. App. 1983); see also *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650 (Mass. 1993); *Tkachik v. Mandeville*, 790 N.W.2d 260 (Mich. 2010); *Kaufmann v. Krahling*, 519 S.W.2d 29 (Mo. Ct. App. 1975).

## B. *Tenancies by the Entirety and Revocable or Inter Vivos Trusts*

With the advent of the wide use of revocable trusts for persons of all income levels, married couples who had enjoyed the survivorship and creditor protection aspects of the tenancy by the entirety began to consider the creation of a trust for avoidance of probate, for privacy concerns, and for other reasons. For married couples in tenancy by the entirety states with net worths below the federal estate tax exemption, the use of joint revocable trusts and nonprobate transfers gives married couples the ability to avoid probate while enjoying creditor protection.<sup>19</sup>

For married couples with net worths near or above the federal estate tax exemption level, however, . . . in order to avoid or minimize estate tax at the surviving spouse's death, these couples must typically sever joint tenancies and divide their assets between themselves. Proceeding in this estate tax-sensitive manner causes the couple to lose their tenancy by the entirety creditor-protected status.<sup>20</sup>

It is beyond the scope of this article to educate matrimonial lawyers as to the estate-planning techniques for married couples wishing to limit their federal estate tax liability. Instead, this article provides a basic guide to tenancy by the entirety properties and the consequences of conveyancing such property reviewing the statutes that some states have enacted to help married couples retain creditor protection aspects of tenancy by the entirety even upon transfer of the entireties property.

The transfer of entireties property to a trust, however, can be problematic. Indeed, even the transfer of joint tenancy property to a trust continues to cause apparently unintended consequences and litigation. In a recent Iowa case,<sup>21</sup> a woman who owned considerable property purchased a lake lot and titled it to herself and her companion as joint tenants with right of survivorship.<sup>22</sup> Four years later, she created a revocable trust into which she transferred all her real property, including the lake lot.<sup>23</sup> The beneficiaries of the trust included the woman's relatives, other

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<sup>19</sup> See James G. Blasé, *The Missouri Qualified Spousal Trust: A Potential Estate Planning Panacea*, 68 J. Mo. B. 144 (May-June 2012).

<sup>20</sup> *Id.*

<sup>21</sup> *Grout v. Sickels*, 985 N.W.2d 144, 145 (Iowa 2023).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

individuals, and several charities, but not the joint tenant/companion.<sup>24</sup> At the woman's death, her companion claimed 100% interest in the lake lot as the sole survivor of the joint tenancy.<sup>25</sup> The successor trustee claimed that the conveyance of the lake lot to the revocable trust severed the joint tenancy with right of survivorship, rendering the companion and the trust tenants in common, each with a 50% interest.<sup>26</sup> The Iowa Supreme Court ruled in favor of the trustee, holding that a transfer of joint tenancy property into a revocable trust of one of the joint tenants severs the joint tenancy, terminating the right of survivorship, and rendering the surviving tenant and the trust tenants in common.<sup>27</sup> The key takeaway for lawyers is that the revocable trust is a separate legal entity and not the alter ego of the settlor/grantor<sup>28</sup>—they are different parties and the transfer of the joint tenancy property into the trust of one of the joint tenants effects a severance. Lawyers must be aware of the consequences of transfer of joint tenancy property into trusts, even into the revocable trust of one of the joint tenants.<sup>29</sup>

The same consequences of severance and termination of the survivorship right can occur when married couples hold property as tenants by the entirety and then transfer that property to a revocable trust. That transfer can also jeopardize the creditor protection that otherwise would be afforded to the tenancy by the entirety property. Conveyance of entireties property into a trust has been held to have the same effect of destroying the

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<sup>24</sup> *Id.* at 147.

<sup>25</sup> *Id.* at 145.

<sup>26</sup> *Id.* at 145-46.

<sup>27</sup> *Id.* at 149.

<sup>28</sup> *Id.* (“[I]t makes no sense to suggest that the Trust could now hold a property as a joint tenant with right of survivorship. The Trust is not a natural person and doesn't “die.” In fact, it outlived [settlor/grantor].”).

<sup>29</sup> For other cases concluding that a conveyance by an individual to their revocable trust terminates a prior joint tenancy with rights of survivorship, see *Wood v. Pavlin*, 467 S.W.3d 323, 324–26 (Mo. Ct. App. 2015) (finding that one joint tenant's transfer of his undivided interest to his revocable trust five months before his death severed the joint tenancy, recognizing the “national norm” of the ability to unilaterally sever); *Smolen v. Smolen*, 956 P.2d 128, 130 (Nev. 1998) (per curiam) (“[The transferring joint tenant] severed the joint tenancy when he conveyed his interest in the residence to the new trust. This transfer not only severed the joint tenancy but also created a tenancy in common between [the former joint tenant] and the new . . . trust.”).

unity of title and the unity of person/marriage required for the entirety estate.<sup>30</sup>

A bankruptcy case arising from Florida, a tenancy by the entirety state, is illustrative.<sup>31</sup> In *In re Givans*<sup>32</sup> the debtor husband sought to exempt from the bankruptcy estate certain real property that had been held by the spouses as tenants by the entireties, but was later transferred by the spouses to a joint revocable trust for which the spouses were co-trustees.<sup>33</sup> The bankruptcy trustee argued that the real property was not exempt because, by transferring the property to the joint revocable trust, the tenancy by entirety ownership was destroyed by the transfer to the spouses *as trustees*—as opposed to as spouses with the unity of marriage—and therefore the husband could not exempt it from claims of his separate creditors.<sup>34</sup> After reviewing the Florida requirements of tenancy by the entirety, including the unity of marriage, the court agreed with the bankruptcy trustee stating

Tenant[cy] by entirety terminates by divorce, death or *an agreement between the parties*. Here, the express language of the Trustee Deed shows the Debtor and Mrs. Givans' contrary intent to continue ownership of the Property as tenants by the entireties. The Trustee Deed provides the Debtor and Mrs. Givans *as Trustee of the Trust* own the Property, *not* as "husband and wife." Under trust law, a trustee holds only legal title to trust property while equitable title rests with the beneficiary. Once the Debtor and Mrs. Givans transferred the Property to the Trust, they no longer owned the Property in their individual capacity. They held bare legal title as Trustee for the Trust. Because a

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<sup>30</sup> *In re Givans*, 623 B.R. 635, 641 (Bankr. M.D. Fla. 2020), citing *In re Anderson*, 561 B.R. 230, 242 (Bankr. M.D. Fla. 2016) (holding that a trust is not a married person for the purpose of the required unities and therefore a trust cannot hold property as a tenancy by the entirety).

<sup>31</sup> Section 522 (b)(3)(B) of the federal Bankruptcy Code exempts any interest in property the debtor had immediately before the commencement of a case if the property is owned by a debtor and a spouse as tenants by the entirety and is exempt under non-bankruptcy law. Florida law recognizes tenancy by the entirety and protects entireties property from creditors of one debtor spouse. See, e.g., *Beal Bank, SSB v. Almand & Assoc.*, 780 So.2d 45, 52 (Fla. 2001).

<sup>32</sup> 623 B.R. 635 (Bankr. M.D. Fla. 2020).

<sup>33</sup> *Id.* at 638-39. Under the terms of the revocable trust, upon the death of either spouse, the surviving spouse became the income beneficiary of the trust and upon the death of both spouses, their two children were beneficiaries of the property held by the trust.

<sup>34</sup> *Id.* at 639.

trust is not a married individual, the Trust cannot own the Property as tenants by the entirety. The unity of marriage does not exist as to the Trust.<sup>35</sup>

In so holding, the *Givans* court pointed out that the spouses could not have it both ways, that in gaining the probate advantages of the revocable trust, they gave up the protection of the tenancy by the entirety estate against certain creditors. In exchange, they gained other benefits, such as circumventing probate proceedings for their children, who have a present equitable interest in the property as trust beneficiaries.<sup>36</sup> So, at least historically, married couples in states that retained the tenancy by the entirety were often forced to make the choice between the survivorship and creditor protection of the entirety estate and the probate advantages of trust law.

## **II. Preserving the Advantages of Creditor Protection for Tenancy by the Entirety Property**

Because of the requirement of unity of marriage to form a tenancy by the entirety, creditor protections that remain after conveyance of entirety property to a trust is a matter of state law. Currently, roughly one-half of the tenancy by the entirety states have acted to protect married couples' creditor protection and alleviate the necessity of choosing between the creditor protection of the entireties estate and the probate avoidance and other advantages of the revocable inter vivos trust. Of the 25 tenancy by the entirety jurisdictions, 11 states and the District of Columbia allow entirety property to retain its creditor protection despite conveyance to a trust.<sup>37</sup> These states have created a species of trust sometimes referred to as a qualified spousal trust.

Currently, the 12 U.S. jurisdictions with qualified spousal trust statutes are Delaware,<sup>38</sup> the District of Columbia,<sup>39</sup> Ha-

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<sup>35</sup> *Id.* at 641 (emphasis in original); *see also Anderson*, 561 B.R. at 242 (“Because the [t]rusts are not married individuals, the accounts are not owned as tenants by the entirety.”).

<sup>36</sup> *See Givans*, 623 B.R. at 643.

<sup>37</sup> *See* Appendix B to this article, which contains a chart showing the 12 jurisdictions and the relevant statute. Notably, Florida has not enacted such a statute. *See, e.g., Givans*, 623 B.R. at 641.

<sup>38</sup> 12 DEL. CODE ANN. § 3334.



waii,<sup>40</sup> Illinois,<sup>41</sup> Indiana,<sup>42</sup> Maryland,<sup>43</sup> Missouri,<sup>44</sup> North Carolina,<sup>45</sup> Oregon,<sup>46</sup> Tennessee,<sup>47</sup> Virginia,<sup>48</sup> and Wyoming.<sup>49</sup> Additionally, New Jersey recognizes creditor protection for entirety property conveyed to a trust as a result of a court decision.<sup>50</sup>

When states have extended tenancy by the entirety creditor protection to trust property, they have typically stipulated certain conditions that must be present for the entirety property transferred to a trust to retain immunity to the claims of one of the spouse's separate creditors. These conditions, along with variations in the statutes, are set out below in a state-by-state examination.

### DELAWARE

Delaware allows entirety property to be transferred to a trust and retain its creditor protection if the trust is revocable by one or both spouses.<sup>51</sup> The statute, in its entirety, provides:

Where spouses make a contribution of property to 1 or more trusts, each of which is revocable by either or both of them, and, immediately before such contribution, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, the sole remedy available to the creditor with respect to such trust property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.<sup>52</sup>

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<sup>39</sup> D.C. CODE § 42-516.

<sup>40</sup> HAW. REV. STAT. ANN. § 509-2.

<sup>41</sup> 765 ILL. COMP. STAT. 1005/1c.

<sup>42</sup> IND. CODE ANN. § 30-4-3-35.

<sup>43</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-511.

<sup>44</sup> MO. REV. STAT. § 456.950.

<sup>45</sup> N.C. GEN. STAT. § 41-65.

<sup>46</sup> OR. REV. STAT. § 130.518.

<sup>47</sup> TENN. CODE ANN. § 35-15-510.

<sup>48</sup> VA. CODE ANN. § 55.1-136.

<sup>49</sup> WYO. STAT. ANN. § 4-10-402.

<sup>50</sup> See *Estate of Van Riper v. Dir.*, Div. of Tax'n, 193 A.3d 878, 883 (App. Div. 2018), *aff'd*, 226 A.3d 55 (2020).

<sup>51</sup> 12 DEL. CODE ANN. § 3334.

<sup>52</sup> *Id.*

Specifically, Delaware law is unique in stating that the “sole remedy of a creditor of a single spouse would be to force the trustee to convey the property back to husband and wife as tenants by the entirety.”<sup>53</sup> Once property is transferred back to the married couple as tenants by the entirety, Delaware courts would deem it not reachable by a creditor of a single spouse.<sup>54</sup> In this manner, creditor protections are maintained, but other protections provided by the trust, including tax and estate planning benefits, may be lost. It is also significant that the limited protections provided by Delaware only apply to revocable trusts. The Delaware statute does not require that the trust declare the grantors’ intention that the property remains a tenancy by the entirety, or that the trust refer to the statute.<sup>55</sup>

### *DISTRICT OF COLUMBIA*

The District of Columbia allows tenancy by the entireties property that is subsequently conveyed to a trust to retain its creditor protections as long as three requirements are met: the couple must remain married or in a domestic relationship<sup>56</sup> with each other,<sup>57</sup> the property must continue to be held in trust,<sup>58</sup> and both spouses, or domestic partners, must remain beneficiaries of the trust.<sup>59</sup> If these three conditions are met, immunity from separate creditors is presumed.

The statute provides, in relevant part, as follows:

[P]roperty held . . . in a tenancy by the entirety that is subsequently conveyed to a trustee of a joint or separate revocable or irrevocable trust shall be presumed to have the same immunity from the claims of the separate creditors of the spouses or domestic partners as

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<sup>53</sup> *Id.*

<sup>54</sup> *See, e.g.,* Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 400 (Del. 1978), citing Heitz v. Sayers, 121 A. 225 (Del. Super. Ct. 1923)(both cases, though in contexts different than the transfer of the property to a revocable trust, stand strongly for the protection of the non-debtor spouse).

<sup>55</sup> *See* H. ZARITSKY & F. AGHDAMI, TAX PLANNING FOR FAMILY WEALTH TRANSFERS AT DEATH: ANALYSIS WITH FORMS (Thomson Reuters 2014 & Supp. 2022-1).

<sup>56</sup> The District of Columbia is the only jurisdiction to specifically authorize the entireties estate for domestic partners.

<sup>57</sup> D.C. CODE § 42-516 (d)(1)(A).

<sup>58</sup> D.C. CODE § 42-516 (d)(1)(B).

<sup>59</sup> D.C. CODE § 42-516 (d)(1)(C).

would exist if the property were still held by the spouses or domestic partners as tenants by the entirety; provided, that:

(A) The spouses or domestic partners continue to be married or in a domestic partnership with one another;

(B) The property continues to be held in trust by the trustee or the successors in trust of the trustee; and

(C) Both spouses or domestic partners are beneficiaries of the trust.<sup>60</sup>

The D.C. statute does authorize voluntary payment of creditors from trust assets. However, for such a payment to be made, it must either be directly supported with the express language for the trust, or only on the written consent of both spouses or domestic partners.<sup>61</sup> That subsection also provides that upon the death of the first spouse, trust property will continue to be immune from the separate creditors.<sup>62</sup> This protection mirrors the protection that would be had if the property had not been conveyed to the trust.

## HAWAII

Hawaii authorizes the retention of creditor protection for tenancy by the entireties property even after conveyance to a trust. The Hawaiian statute provides in pertinent part:

(b) Conveyance of any real property located in the State and held by spouses or reciprocal beneficiaries as tenants by the entirety:

(1) To a joint trust as tenant in severalty for their benefit and which is revocable and amendable by either or both during their joint lifetime; or

(2) In equal shares as tenants in common to their respective separate trusts, each of which is revocable and amendable by the respective grantor, or any accumulation of such conveyed property, shall have the same immunity from the claims of their separate creditors as would exist if the spouses or reciprocal beneficiaries had continued to hold the real property or its proceeds as tenants by the entirety.<sup>63</sup>

The statute authorizes the continuing creditor protections only for revocable trusts and allows spouses to retain the protections despite use of more than one trust.<sup>64</sup> The allowance of sepa-

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<sup>60</sup> D.C. CODE § 42-516 (d)(1).

<sup>61</sup> D.C. CODE § 42-516 (d)(2).

<sup>62</sup> D.C. CODE § 42-516 (d)(3).

<sup>63</sup> HAW. REV. STAT. § 509-2(b).

<sup>64</sup> *Id.*

rate trusts for the spouses opens the door to a wider selection of traditional estate planning options without losing creditor protections. Regardless of whether separate trusts are used, the statute requires that the spouses be reciprocal beneficiaries.<sup>65</sup> This can be accomplished by naming one spouse the beneficiary of the other spouse's trust and vice versa. Additionally, the name of the spouse or reciprocal beneficiary must appear in the name of the trust.<sup>66</sup> If these formation requirements are met, the property is immune from creditors of a single spouse.<sup>67</sup>

The statute also lays out requirements to keep the protections gained on formation. The first requirement is that the spouses remained in a "registered reciprocal beneficiary relationship."<sup>68</sup> This clause merely requires that the couple remain married or otherwise registered with the state as a married couple. Additionally, subsection (g) provides the possibility for spouses to waive creditor immunity with written consent or inclusion of waiver in the trust instrument. However, subsection (c)(3) notes that subsection (b), authorization of creditor protections, would be inapplicable if waiver was provided under subsection (g). The statute is not clear whether the creditor immunity would be inapplicable only to the property that received waiver or if the trust in its entirety would become subject to the sole creditor. Thus, caution should be used if exercising waiver under this section to avoid exposing more assets than intended to creditors.

The treatment of the trust property upon the death of one spouse mirrors the treatment of the property as if it had not been conveyed to a trust but rather continued to have been held by the couple as tenants by the entirety. This means that property that was immune to claims of a sole spouse's creditor prior to the death of the debtor spouse retains its immunity upon the death of the debtor spouse.<sup>69</sup> Should the couple divorce or otherwise seek to annul the marriage, the property transfers back to the former spouses as tenants in common.<sup>70</sup> This selection of a new concurrent estate is warranted in that the divorcing couple likely

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<sup>65</sup> *Id.*

<sup>66</sup> HAW. REV. STAT. § 509-2(c)(4).

<sup>67</sup> HAW. REV. STAT. § 509-2(b)(2).

<sup>68</sup> HAW. REV. STAT. § 509-2(c)(1).

<sup>69</sup> HAW. REV. STAT. § 509-2(d).

<sup>70</sup> HAW. REV. STAT. § 509-2(f).

would not want to hold the property as joint tenants with the right of survivorship. The Hawaii statute also sets out the burden of proof under the statute, providing that where a challenge is brought against property held in a manner compliant with the statute, the respondent claiming immunity from creditors bears the burden of proving that the trust and conveyance of the property complies with the statute.<sup>71</sup>

### ILLINOIS

The Illinois law allows homestead property<sup>72</sup> to be deemed a tenancy by the entirety property and enjoy the creditor protection of tenancy by the entirety property where the property is (1) held in one or more revocable trusts created by a married couple,<sup>73</sup> and (2) the couple are the primary beneficiaries of one or both of the trusts,<sup>74</sup> and (3) the deed conveying title to the trustee states specifically that the interests of the spouses in the property is to be held as tenants by the entirety.<sup>75</sup> Such an estate by the entirety continues only as long as the spouses remain married to each other; divorce converts the tenancy into a tenancy in common.<sup>76</sup>

It is important to note that the Illinois statute restricts creditor protections to that property designated as a homestead. Illinois law defines homestead as property the owner intends or maintains for use as his or her residence.<sup>77</sup> As currently written, only \$30,000.00 of property would be immunized from creditor

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<sup>71</sup> HAW. REV. STAT. § 509-2(h).

<sup>72</sup> See 735 ILL. COMP. STAT. ANN. 5/12-901. At the time of this writing, the homestead exemption was only \$15,000 per individual or \$30,000 per couple, but a bill was introduced in the 2023 Illinois legislative session to increase that amount substantially – to a “modern homestead exemption” defined as the greater of \$260,000 and the most recently available median sales price” of a home in the debtor’s area. See 2023 Illinois House Bill No. 2377, Illinois 103 Gen. Assembly-First Regular Session.

<sup>73</sup> 765 ILL. COMP. STAT. ANN. 1005/1c.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, see ZARITSKY & AGHDAMI, *supra* note 55, at § 407(4)(c)(ii), *citing* 765 ILL. COMP. STAT. ANN. 1005/1c.

<sup>76</sup> 765 ILL. COMP. STAT. ANN. 1005/1c.

<sup>77</sup> 735 ILL. COMP. STAT. ANN. 5/12-901.

claims under the entirety statute.<sup>78</sup> This is inadequate protection at best for most people, and married couples may wish to look for alternatives to tenancy by the entirety to provide protection against creditors.

### INDIANA

Indiana law provides a method to ensure that property held as tenants by the entirety and subsequently transferred to a revocable trust will not lose its creditor protections.<sup>79</sup> To that end, the Indiana statute specifies that the intent of the statute is to create a matrimonial trust the purpose of which is to ensure that “if real property is transferred to one (1) or more revocable trusts created by a husband and wife for estate planning purposes, the husband and wife will maintain real estate ownership protections equivalent to those they would have if they owned that real property in an estate by the entirety.”<sup>80</sup> The property held in the matrimonial trust retains many of the same features as traditionally held tenancy by the entirety property.<sup>81</sup> These include a restriction on severance of the property during the marriage,<sup>82</sup> immunity from separate creditor claims during the marriage,<sup>83</sup> and elimination of the trust upon the dissolution of the marriage.<sup>84</sup>

One difference between a matrimonial trust and traditionally held tenancy by the entirety property is that the Indiana statute does not state that the trust must give the surviving spouse a right of survivorship in the trust property. Rather, the statute provides that the matrimonial trust will terminate if the surviving spouse is not reserved a life estate or other similar interest in the

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<sup>78</sup> See 735 ILL. COMP. STAT. ANN. 5/12-901. At the time of this writing the homestead exemption was only \$15,000 per individual or \$30,00 for a couple, but a bill was introduced in the 2023 Illinois legislative session to increase that amount substantially – to a “modern homestead exemption” defined as the greater of \$260,000 and the most recently available median sales price” of a home in the debtor’s area. See 2023 Illinois House Bill No. 2377, Illinois 103 Gen. Assembly-First Regular Session.

<sup>79</sup> IND. CODE ANN. § 30-4-3-35.

<sup>80</sup> IND. CODE ANN. § 30-4-3-35(a).

<sup>81</sup> See IND. CODE ANN. § 32-17-3-1.

<sup>82</sup> IND. CODE ANN. § 30-4-3-35(1).

<sup>83</sup> IND. CODE ANN. §§ 30-4-3-35(1), (m).

<sup>84</sup> IND. CODE ANN. § 30-4-3-35(s).

trust property.<sup>85</sup> Therefore, it is paramount that the proper reservation language is present in the matrimonial trust to avoid destruction of the trust on the death of one settlor spouse. Another characteristic of the Indiana law is that, upon the death of one spouse, the surviving spouse is not automatically free and clear of claims by creditors of the deceased spouse. Rather, the court determines, based on the trust language and the interest of the surviving spouse in the property, whether creditors can attach. If the trust is drafted appropriately, it would seem that a creditor would be unable to attach or execute on the property, but there is no case law challenging such writing. The lawyer should keep this provision in mind, however, when constructing or considering an estate plan dealing with entirety property or considering a transfer of entirety property.

A final provision of interest in the Indiana statute is subsection (i) which states that a guardian of a husband or wife may make an election, such as waiving the creditor protections for some or all of the trust property or electing to treat property as marital property, in compliance with the trust instrument or with approval of the court.<sup>86</sup> There is no case law considering a situation where a spouse, acting as a guardian for the other spouse, has made such an election. Therefore, caution should be used when determining whether such an election is valid, and any foreseeable elections should be addressed by the trust agreement to avoid mandatory judicial oversight.

## MARYLAND

Maryland has authorized the immunization against creditors of tenancy by the entirety property that is transferred to a trust.<sup>87</sup> The relevant statute provides:

Property of a husband and wife that was held by them as tenants by the entirety and subsequently conveyed to the trustee or trustees of one or more trusts, and the proceeds of that property, shall 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

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<sup>85</sup> IND. CODE ANN. § 30-4-3-35(p).

<sup>86</sup> IND. CODE ANN. § 30-4-3-35(i).

<sup>87</sup> The statute applies to entireties property transferred to a trust after October 1, 2010. MD. CODE ANN., EST. & TRUSTS § 14.5-511(i).

hold the property or the proceeds from the property as tenants by the entirety[.]<sup>88</sup>

To achieve this immunity, the statute requires that (1) the spouses remain married,<sup>89</sup> the property or proceeds of it continues to be held in trust,<sup>90</sup> both spouses are beneficiaries of the trust,<sup>91</sup> and the trust or other conveyancing instrument expressly states that the relevant section, § 14.5-511(b), shall apply to the property.<sup>92</sup> The statute further expressly provides that, upon the death of one spouse, the property shall continue to be immune to the claims of that spouse's sole creditors as if the property had remained in a tenancy by the entirety.<sup>93</sup> In a dispute as to the immunity of the claims of a separate creditor, the burden of proof on the immunity issue rests with the trustee.<sup>94</sup>

There is case authority in Maryland considering whether property is immune to a sole spouse's creditor where the sole debtor spouse was acting as an agent, with actual or implied authority, of his or her spouse. In *Kvedera v. Mondravitzky*,<sup>95</sup> the Maryland Court of Appeals considered the rights of a contractor creditor who, under contract with the husband alone, made substantial improvements upon the lot owned by the spouses as tenants by the entirety.<sup>96</sup> The Maryland Court of Appeals held that, while the non-contracting wife could not be liable for the debt merely due to her co-ownership of the entirety property, she could be liable on the debt of the contracting spouse, if she had expressly or impliedly authorized the action or subsequently ratified it.<sup>97</sup> This agency law-based ruling could result in non-debtor spouses being exposed to unanticipated creditor claims as to entirety property whether transferred to a trust or not.

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<sup>88</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-511(b).

<sup>89</sup> *Id.* § 14.5-511(b)(1).

<sup>90</sup> *Id.* § 14.5-511(b)(2).

<sup>91</sup> *Id.* § 14.5-511(b)(3).

<sup>92</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-511(b).

<sup>93</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-511(c).

<sup>94</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-511(f).

<sup>95</sup> 125 A. 591 (Md. Ct. App. 1924).

<sup>96</sup> *Id.* at 593-94.

<sup>97</sup> *Id.* at 594.



*MISSOURI*

Since 2011, Missouri has authorized a revocable “qualified spousal trust” that preserves the immunity from separate creditors of one debtor spouse that is a hallmark of the tenancy by the entirety estate.<sup>98</sup> To qualify for this protection, the statute requires that (1) the settlors of the trust be married at the creation of the trust, and (2) the trust must be maintained for the benefit of both spouses with each spouse having the right to receive distributions from the entire trust.<sup>99</sup> Once transferred, the property will be subject to the creditor protection of tenancy by the entirety property at common law. Like many other states, Missouri allows the trust to be a single joint trust or a trust “held and administered in two separate shares of one trust for the benefit of each of the settlors [spouses].”<sup>100</sup>

Significantly, unlike many states, Missouri does not care about the manner in which the property was held prior to conveyance to the trust.<sup>101</sup> Amendments in 2015 make it clear that spouses need not retitle separately- or jointly-owned assets into a tenancy by the entirety before transfer to the trust in order to acquire creditor protections of the tenancy by the entirety.<sup>102</sup> This is convenient for married couples who owned property prior to marriage as joint tenants or tenants in common, otherwise the couple would have been required to retitle that property as tenants by the entirety after marriage and then transfer it to the trust.<sup>103</sup>

The Missouri statute directs that, upon the death of one spouse, the property is distributed in accordance with the then-current trust language.<sup>104</sup> This is a change from some of the states previously examined. If the married couple had elected to keep

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<sup>98</sup> MO. REV. STAT. § 456.950. Missouri’s 2011 statute and its 2015 amendments also provides other estate planning advantages that, while significant, are beyond the scope of this article.

<sup>99</sup> MO. REV. STAT. § 456.950(1)(2)(a).

<sup>100</sup> *Id.* § 456.950(1)(2)(b).

<sup>101</sup> MO. REV. STAT. § 456.950(3).

<sup>102</sup> *Id.* (“All property at any time held in a qualified spousal trust, without regard to how such property was titled prior to it being so held, shall have the same immunity from the claims of a separate creditor of either settlor as if such property were held outside the trust by the settlors as tenants by the entirety”).

<sup>103</sup> *See id.*

<sup>104</sup> MO. REV. STAT. § 456.950 (5).

their interests in two separate shares or trusts, then the property held in the deceased spouse's separate share may pass into an irrevocable trust for the benefit of the surviving spouse under the terms of the governing instrument.<sup>105</sup>

Missouri allows further increased flexibility by allowing personal property to receive entirety protections upon transfer into a qualified spousal trust.<sup>106</sup> This protection allows married couples to protect personal property such as financial accounts. Of note, Missouri does not restrict the availability of the tenancy in relation to motor vehicles like the prohibition discussed *infra* in the Virginia section.<sup>107</sup> Therefore, a Missouri couple would be able to hold a motor vehicle in a trust that receives tenancy by the entirety creditor protections.

One final provision of note in the Missouri statute is its language stating that the newly created trust and its protections for married persons shall apply "to all trusts which fulfill the criteria set forth in this section for a qualified spousal trust *regardless of whether such trust was created before, on, or after* [the 2011 effective date of the statute]."<sup>108</sup> Decisions of federal bankruptcy courts have limited the statute's attempt at retroactive creditor immunity protections and instead held that the applicable Missouri state law is the law that was in effect in Missouri on the date of the debtor's bankruptcy filing.<sup>109</sup>

## NORTH CAROLINA

North Carolina has codified the retention of protection against separate creditors when tenancy by the entireties property is conveyed by spouses to a joint trust or two separate trusts.<sup>110</sup> The creditor protections are retained as long as (1) the spouses remain married,<sup>111</sup> (2) the property continues to be held in trust,<sup>112</sup> and (3) both spouses remain a beneficiary.<sup>113</sup> Of note,

<sup>105</sup> *Id.*

<sup>106</sup> MO. REV. STAT. § 456.950 (4) ("property means any interest in any type of property").

<sup>107</sup> *Cf.* VA. CODE ANN. § 46.2-622.

<sup>108</sup> MO. REV. STAT. § 456.950 (8).

<sup>109</sup> *See In re Brewer*, 544 B.R. 177 (Bankr. W.D. Mo. 2015); *In re Reuter*, 499 B.R. 655 (Bankr. W.D. Mo. 2013).

<sup>110</sup> N.C. GEN. STAT. § 41-65(a).

<sup>111</sup> N.C. GEN. STAT. § 41-65(b)(1).

<sup>112</sup> *Id.* § 41-65(b)(2).

North Carolina does not require that the trust be revocable. Rather, the statute merely requires that the settlors of a joint trust or of each separate trust be married.<sup>114</sup>

One important note regarding the North Carolina statute, and its reliance on the underlying state law of tenancy by the entirety is that, if the entirety estate terminates, by death or divorce,<sup>115</sup> then any active judgment against a sole spouse can be executed on the property interest of that sole spouse, regardless of whether the debt was accrued during the marriage.<sup>116</sup> If, however, the non-debtor spouse survives the debtor spouse, the creditors of the debtor spouse will be unable to execute on the property as the deceased spouse is held to have no estate or interest that is descendible or divisible.<sup>117</sup>

### OREGON

The Oregon statute that authorizes continued protection against separate creditors upon conveyance of entirety property to a trust is relatively simple in comparison to the other statutes we have examined. It provides:

Real property of spouses married to each other that was held as tenants by the entirety and subsequently conveyed to the trustee or trustees of the joint revocable trust of the spouses or of the separate revocable trust of each spouse shall have the same immunity from the claims of a spouse's creditors as would exist if the spouses had continued to hold the property as tenants by the entirety[.]<sup>118</sup>

The protections are stipulated on the spouses (1) remaining married, (2) the property remaining in trust, and (3) both spouses being beneficiaries of that trust.<sup>119</sup> Of note, Oregon restricts the application of creditor protections to revocable trusts.<sup>120</sup>

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<sup>113</sup> N.C. GEN. STAT. § 41-65(b)(3).

<sup>114</sup> N.C. GEN. STAT. § 41-65(e).

<sup>115</sup> N.C. GEN. STAT. § 41-60(b)(1)-(2).

<sup>116</sup> *Id.* § 41-60 (b) (“Upon termination of the tenancy by the entirety and the conversion of the real property held by the entirety to another form of estate, a judgment lien against one spouse during tenancy by the entirety, if still active and unsatisfied, shall attach at that time to that spouse’s interest in the new estate.”).

<sup>117</sup> N.C. GEN. STAT. § 41-64 (a).

<sup>118</sup> OR. REV. STAT. ANN. § 130.518 (1).

<sup>119</sup> OR. REV. STAT. ANN. § 130.518 (1)(a)-(c).

<sup>120</sup> OR. REV. STAT. ANN. § 130.518 (1).

*TENNESSEE*

Tennessee has codified creditor protections for trust property originally held as tenants by the entirety but later transferred to a trust.<sup>121</sup> That statute provides that entirety property shall retain its immunity from the separate creditors of either spouse as long as (1) the couple remains married,<sup>122</sup> (2) the property remains in trust,<sup>123</sup> (3) the trust(s) are revocable while both settlors are still living,<sup>124</sup> (4) both spouses remain current beneficiaries of the trust,<sup>125</sup> and (5) the trust language refers to the statute.<sup>126</sup> The third requirement is particularly attractive as it allows traditional estate planning wherein when one spouse dies, their separate trust names the surviving spouse as a beneficiary and becomes irrevocable.

When the first spouse dies, the property continues to enjoy immunity from the separate creditors of the deceased spouse.<sup>127</sup> However, any interest that vests in the surviving spouse may be subject to that spouse's separate creditors.<sup>128</sup> This effect may warrant estate planning to avoid individual vesting of the property and thereby retain its creditor immunity.

The Tennessee statute does provide a means for waiver of the creditor immunity by express statement in the trust document or written consent of both spouses.<sup>129</sup> This is not, however, the only path to waiver of creditor immunity. Subsection (e) provides that the trustee is required to furnish financial statements for the trust.<sup>130</sup> Those statements must include a description of property that is immune from the claims of separate creditors.<sup>131</sup> Failure to include that property on the financial statements constitutes waiver of the immunity.<sup>132</sup> The statute contains several exceptions that turn on whether the creditor immunity was evidenced

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<sup>121</sup> TENN. CODE ANN. § 35-15-510.

<sup>122</sup> TENN. CODE ANN. § 35-15-510 (b)(1).

<sup>123</sup> TENN. CODE ANN. § 35-15-510 (b)(2).

<sup>124</sup> TENN. CODE ANN. § 35-15-510 (b)(3).

<sup>125</sup> TENN. CODE ANN. § 35-15-510 (b)(4).

<sup>126</sup> TENN. CODE ANN. § 35-15-510 (b) (5).

<sup>127</sup> TENN. CODE ANN. § 35-15-510 (c).

<sup>128</sup> *Id.*

<sup>129</sup> TENN. CODE ANN. § 35-15-510 (d).

<sup>130</sup> TENN. CODE ANN. § 35-15-510 (e)(1).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

by a publicly recorded document, or if the trust document, in its entirety, is provided to the creditor.<sup>133</sup> If the entirety property is discoverable as public record or the entire trust document is given to a creditor, the obligation to disclose on the financial statements is waived. Thus, it would be prudent to record such documents as a shield against a trustee failing to fulfill these obligations.

### VIRGINIA

The state of Virginia authorizes tenancy by the entirety property to retain creditor protections even after that property is conveyed to a trust.<sup>134</sup> The statute provides:

[A]ny property of spouses that is held by them as tenants by the entirety and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, and any proceeds of the sale or disposition of 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[.]<sup>135</sup>

For property to retain its immunity from the separate creditors of one spouse, (1) the couple must remain married, (2) the couple must continue to hold the property in trust, and (3) both spouses must remain beneficiaries of a joint trust or of separate trusts that holds a one hundred percent (100%) interest in the property.<sup>136</sup> In Virginia, married couples may use an irrevocable trust without losing the immunity from separate creditors,<sup>137</sup> while some other jurisdictions, including Oregon, require that the trust be revocable.<sup>138</sup>

Like Missouri, Virginia allows both real and personal property of the married couple to be held as tenants by the entirety.<sup>139</sup> This provides substantial protection for joint assets like bank and retirement accounts. Unlike Missouri, however, in Virginia, motor vehicles cannot be held in tenancy by the entirety.<sup>140</sup> While this limits the applicability of the personal property rules,

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<sup>133</sup> TENN. CODE ANN. § 35-15-510 (e)(2).

<sup>134</sup> VA. CODE ANN. § 55.1-136.

<sup>135</sup> *Id.*

<sup>136</sup> VA. CODE ANN. § 55.1-136 (C).

<sup>137</sup> *Id.*

<sup>138</sup> *See, e.g.,* OR. REV. STAT. ANN. § 130.518 (1).

<sup>139</sup> VA. CODE ANN. § 55.1-136 (A).

<sup>140</sup> VA. CODE ANN. § 46.2-622.

it is still highly attractive to shield personal property like joint financial accounts from a spouse's separate creditors.

### WYOMING

The state of Wyoming authorizes creditor protections for entirety property conveyed to a trust.<sup>141</sup> The statute provides:

Any property of a husband and wife that is held by them as tenants by the entireties . . . and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, shall have the same immunity from the claims of their separate creditors as it would if it had remained held by the entireties . . . .<sup>142</sup>

For property to keep its immunity from separate creditors, (1) the couple must remain married,<sup>143</sup> (2) the property must continue to be held in trust, and (3) the trust instrument or conveyance must explicitly reference the statute.<sup>144</sup> Much like Virginia, Wyoming allows the retention of creditor protection for transfers to either revocable or irrevocable trusts.<sup>145</sup>

Wyoming is the only state to explicitly discuss a Department of Health lien on the estate in the statute enabling immunity from separate creditor claims, stating “[n]othing in this section shall be construed to limit or otherwise alter the authority granted to the department of health to assert a claim against an estate under W.S. 42-4-206 or to file a lien under W.S. 42-4-207 as could be asserted against a tenancy by the entirety.”<sup>146</sup> Inspection of the cited statutes, § 42-4-206 and § 42-4-207, shows that the Wyoming Department of Health is restricted from filing such

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<sup>141</sup> WYO. STAT. ANN. § 4-10-402.

<sup>142</sup> *Id.* Wyoming's statute, like the statutes of a few other states, is unmodified post *Obergefell v. Hodges*, 576 U.S. 644 (2015), and continues to refer to “husband and wife” as opposed to “spouses.”

<sup>143</sup> WYO. STAT. ANN. § 4-10-402 (c)(i) (“They are both living and remain as husband and wife;”). The statutory requirement that the spouses “are both living and remain as husband and wife,” WYO. STAT. ANN. § 4-10-402 (c)(i), could be read to impose an additional requirement. It is unclear whether “living” modifies “as husband and wife,” thus amounting to a further requirement that the spouses are “living as husband and wife” or “living as spouses” in addition to just both being alive. We shall presume it is the latter.

<sup>144</sup> WYO. STAT. ANN. § 4-10-402(c).

<sup>145</sup> *Id.*

<sup>146</sup> WYO. STAT. ANN. § 4-10-402 (e). In both cited statutes, § 42-4-206 (claims against estates) and § 42-4-207 (recovery of incorrect payments), execution is held in abeyance while the surviving spouse still resides on the property.

a claim until the surviving spouse dies.<sup>147</sup> However, once the surviving spouse dies, the Department could assert a claim for services provided both to the surviving spouse and the first spouse to die.<sup>148</sup> For example, if spouses A and B hold property by the entirety that has been conveyed to a revocable trust and A receives nursing services provided by the Department, the Department cannot assert a claim for A's services during B's lifetime. Upon B's death, however, the Department could assert its claim against B's estate for services provided to A.

### NEW JERSEY

New Jersey does not provide statutory immunity from separate creditor claims against entirety property conveyed to a trust. Instead, New Jersey case law lends credence to the assertion that these protections may be retained despite conveyance of entirety property to a trust. Specifically, the New Jersey Court of Appeals considered the question of whether a tenancy by the entirety was severed by conveyance of the entirety property to a trust in *Estate of Van Riper v. Director, Div. of Taxation*.<sup>149</sup> There, the estate argued that entirety property that had been transferred to a joint trust created a one-half interest in the property for both spouses.<sup>150</sup> The court stated there was “no basis for assuming that when [the spouses] transferred the property to the trust, [they] created an estate in which they both held one-half interests in the property. Furthermore, [the husband's] death did not alter the nature of [the wife's] interest in the property.”<sup>151</sup> While in this case the state Division of Taxation was seeking inclusion of the entire value of property in an estate for inheritance transfer tax purposes,<sup>152</sup> it remains highly persuasive on the argument that immunity from creditors is not lost on the conveyance of the entirety property to a trust and that spouses do not have a 50% interest in entirety property, but that each has an undivided interest in the whole.

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<sup>147</sup> WYO. STAT. ANN. § 42-4-206.

<sup>148</sup> WYO. STAT. ANN. § 42-4-206 (a).

<sup>149</sup> *Estate of Van Riper v. Dir., Div. of Tax'n*, 193 A.3d 878 (N.J. Super. Ct. App. Div. 2018), *aff'd*, 226 A.3d 55 (2020).

<sup>150</sup> *Id.* at 882.

<sup>151</sup> *Id.* at 883.

<sup>152</sup> *Id.* at 882-83.

Giving trust properties creditor immunities as if it were held by the entirety is more problematic when determined by judicial decision. A judicial decision, as opposed to a statutory mandate, can leave open many questions including whether the trust should be named in a specific manner like in Hawaii,<sup>153</sup> whether personal property can receive protections upon contribution to the trust like in Missouri and Virginia,<sup>154</sup> or whether an irrevocable trust could receive the same benefits as in the District of Columbia.<sup>155</sup> These questions have not been tested in the New Jersey courts. While these questions remain unanswered, practitioners should use caution when making transfers of tenancy by the entireties property to trusts in the state.

If the immunities normally attendant to the tenancy by the entireties estate are found to extend to trust property in New Jersey, then it is necessary to look to the treatment of the estate outside of the trust arena to determine what protections exist. New Jersey allows spouses to encumber their own survivorship interest as well as one half of the rents.<sup>156</sup> Thus, it is likely that the court would hold that spouses retain the ability to encumber the property to the limit of their interest despite transfer to a trust.

## CONCLUSION

Tenancy by the entirety has been a function of American property law since the adoption of the common law. There is a rich body of statutes and case law in one-half of the states that authorizes the modern version of the estate. Some tenancy by the entirety states have expanded on the entirety estate to bring the creditor protections to trusts that hold property of married persons, and some states even extend the doctrine to personal property. The tenancy by the entirety already rests on the legal fiction

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<sup>153</sup> See *supra* text at notes 63-71.

<sup>154</sup> See *supra* text at notes 108-109 and 139.

<sup>155</sup> See *supra* text at note 60.

<sup>156</sup> See *Belding & Bernhard, Inc. v. Advokat*, No. A-3425-05T5, 2007 N.J. Super. Unpub. LEXIS 712, \*18 (N.J. Super. Ct. App. Div. Apr. 16, 2007)(In New Jersey, “the interest of a debtor-spouse is subject to levy by that spouse’s judgment-creditor.” The judgment creditor “may levy on and sell that spouse’s right of survivorship as well as his or her undivided one-half interest in the life estate for the joint lives of the tenants.”).



that spouses are one person, therefore there is no reason to restrict that same legal fiction from expanding the protections of the marital estate to trust property of a married couple.

**Appendix A**

State	Is Tenancy by the Entireties Authorized?	Authority
Alabama	No	<i>Donegan v. Donegan</i> , 15 So. 823, 824 (Ala. 1893).
Alaska	Yes	Alaska Stat. §§ 34.15.110; 34.15.140.
Arizona	No	No case of first impression.
Arkansas	Yes	<i>McLain v. McLain</i> , 820 S.W.2d 295, 296 (Ark. Ct. App. 1991).
California	No	<i>Zanelli v. McGrath</i> , 82 Cal. Rptr. 3d 835, 844 (2008).
Colorado	No	Colo. Rev. Stat. § 38-31-201.
Connecticut	No	<i>Whittlesey v. Fuller</i> , 11 Conn. 337, 341 (1836).
Delaware	Yes	<i>Fischer v. Fischer</i> , 864 A.2d 98 (Del. Ch. 2005).
District of Columbia	Yes	D.C. Code § 42-516.
Florida	Yes	<i>English v. English</i> , 63 So. 822 (Fla. 1913).
Georgia	No	Ga. Code Ann. § 44-6-190.
Hawaii	Yes	Haw. Rev. Stat. Ann. § 509-2.
Idaho	No	<i>In re Antonie</i> , 432 B.R. 843, 851 (Bankr. D. Idaho 2010).
Illinois	Yes	765 Ill. Comp. Stat. Ann. 1005/1c.
Indiana	Yes	Ind. Code Ann. § 32-17-3-1.
Iowa	No	<i>Kettler v. Sec. Nat'l Bank</i> , 805 N.W.2d 817, 825 (Iowa Ct. App. 2011).
Kansas	No	<i>Hall v. Hamilton</i> , 667 P.2d 350, 360 (Kan. 1983).
Kentucky	Yes	Ky. Rev. Stat. § 381.050.
Louisiana	No	Louisiana is a stranger to English common law and has no case of first impression.
Maine	No	Me. Rev. Stat. tit. 33, § 159.

State	Is Tenancy by the Entireties Authorized?	Authority
Maryland	Yes	<i>Arbesman v. Winer</i> , 468 A.2d 633, 636 (Md. Ct. App. 1983).
Massachusetts	Yes	Mass. Ann. Laws ch. 184, § 7.
Michigan	Yes	<i>Tkachik v. Mandeville</i> , 790 N.W.2d 260, 265 (Mich. 2010).
Minnesota	No	<i>Wilson v. Wilson</i> , 45 N.W. 710, 711 (Minn. 1890).
Mississippi	Yes	Miss. Code Ann. § 89-1-7.
Missouri	Yes	Mo. Rev. Stat. § 442.025.
Montana	No	<i>In re Clark</i> , 387 P.2d 907, 912 (Mont. 1963).
Nebraska	No	Neb. Rev. Stat. Ann § 76-118.
Nevada	No	Nev. Rev. Stat. Ann. § 111.065.
New Hampshire	No	N.H. Rev. Stat. Ann. § 477:18.
New Jersey	Yes	N.J. Stat. § 46:3-17.2.
New Mexico	No	<i>McDonald v. Senn</i> , 204 P.2d 990, 995 (N.M. 1949).
New York	Yes	N.Y. Est. Powers & Trusts Law § 6-2.2.
North Carolina	Yes	N.C. Gen. Stat. § 41-56.
North Dakota	No	<i>Renz v. Renz</i> , 256 N.W.2d 883, 885 (N.D. 1977).
Ohio	No	Ohio Rev. Code Ann. § 5302.20 (establishes survivorship tenancy) Ohio Rev. Code Ann. § 5302.21 (conveyances between spouses will create survivorship tenancy).
Oklahoma	Yes	Okla. Stat. tit. 60, § 74.
Oregon	Yes	Or. Rev. Stat. Ann. § 93.180.
Pennsylvania	Yes	<i>Raiken v. Mellon</i> , 582 A.2d 1, 13 (Pa. Super. Ct. 1990).
Rhode Island	Yes	<i>Cull v. Vadnais</i> , 406 A.2d 1241, 1244 (R.I. 1979).
South Carolina	No	<i>Green v. Cannady</i> , 57 S.E. 832, 835 (S.C. 1907).

State	Is Tenancy by the Entireties Authorized?	Authority
South Dakota	No	<i>Schimke v. Karlstad</i> , 208 N.W.2d 710, 713 (S.D. 1973).
Tennessee	Yes	<i>Bryant v. Bryant</i> , 522 S.W.3d 392, 399 (Tenn. 2017); see also Tenn. Code Ann. § 36-3-505 (removal of coverture rules not to affect entireties estate).
Texas	No	<i>Wagenschein v. Ehlinger</i> , 581 S.W.3d 851, 857 (Tex. Ct. App. 2019).
Utah	No	Utah Code Ann. § 57-1-5.
Vermont	Yes	<i>Preston v. Chabot</i> , 412 A.2d 930, 932 (Vt. 1980).
Virginia	Yes	Va. Code Ann. § 55.1-136.
Washington	No	<i>Lynch v. Frost</i> , 727 P.2d 698, 700 n.2 (Wash. Ct. App. 1986).
West Virginia	No	<i>Wartenburg v. Wartenburg</i> , 100 S.E.2d 562, 565 (W. Va. 1957).
Wisconsin	No	<i>Nichols v. Nichols</i> , 168 N.W.2d 876, 878 (Wis. 1969).
Wyoming	Yes	<i>Ward Terry &amp; Co. v. Hensen</i> , 297 P.2d 213, 217 (Wyo. 1956).

## Appendix B

State	Must trust be revocable?	Must tenants be married?	Must property be owned as TbyE prior to transfer?	Must spouse be beneficiary?	Must name of spouse be on trust?	Can separate trusts qualify?	Contains a waiver provision?	Are creditor protections limited? (real property)	Authority
Delaware	Yes	Yes	Yes	No	No	Yes	No	No	12 Del. Code Ann. § 3334
District of Columbia	No	No	Yes	Yes	No	Yes	Yes	No	D.C. Code § 42-516
Hawaii	Yes	No, be married or registered reciprocal beneficiary	Yes	Yes	Yes	Yes	Yes	No	Haw. Rev. Stat. Ann. § 509-2
Illinois	Yes	Yes	No	Yes	No	Yes	No	Yes	765 Ill. Comp. Stat. 1005/1c
Indiana	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Ind. Code Ann. § 30-4-3-35
Maryland	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Md. Code Ann., Est. & Trusts § 14.5-511 <i>Kevedra v. Mondravitzky, Est.</i> 125 A. 591 (Md. Ct.App. 1924)

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Missouri	Yes, only if both settlors still living	Yes	No	Yes	No	Yes	Yes	No	Mo. Rev. Stat. § 456.950
North Carolina	No	Yes	Yes	Yes	No	Yes	Yes	No	N.C. Gen. Stat. § 41-65
Oregon	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Or. Rev. Stat. Ann. § 130.518
Tennessee	Yes, only if both settlors still living	Yes	Yes	Yes	No	Yes	Yes, in involuntary in some circumstances	No	Tenn. Code Ann. § 35-15-510
Virginia	No	Yes	No	Yes	No	Yes	Yes	No	Va. Code Ann. § 55.1-136
Wyoming	No	Yes	Yes	No	No	Yes	No	Yes, only in reference to a Department of Health lien	Wyo. Stat. Ann. § 4-10-402