WHEN MARRIAGE MATTERS â?? Part 2: Various Ways Marital Status Can Affect Title

Description

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Conveyances and Creditors

Moving beyond the advantages and exceptions to survivorship, all the remaining advantages to a tenancy by the entirety are rooted in the concept of *one flesh*. In effect, the unity of marriage treats spouses as one unit, and the rationale therefor may have its origins as far back as Genesis 2:24, where Adam and Eve and all those married after them are considered *one flesh*.

Because both spouses are considered one unit, neither spouse may dispose of the property unilaterally.[1] In other words, a deed from one spouse alone is void. The one limited exception to this rule is where one spouse conveys his or her interest in the property to the other spouse, as long as the non-granting spouse evidences agreement to the conveyance by some act, such as recording the deed.[2] But noteâ??this exception is only good law until July 1, 2017, when it was superseded by Va. Code Â§ 55.1-136, which states: *Except as otherwise provided by statute, no interest in real property held as tenants by the entirety shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors.*

Consistent with this restriction, no creditor of only one spouse can attach property held by the marital unit.[3] In other words, judgments or other involuntary liens against one spouse do not attach. The rationale behind this rule is that whatever a debtor can voluntarily transfer, his creditor can reach.[4] If one spouse-debtor cannot unilaterally transfer his or her interest in property held as tenants by the entirety, then a creditor of that one spouse cannot reach it either.

This protection offered a tenancy by the entirety has its limits, however. While a judgment against one spouse does not attach, a judgment against both spouses certainly does, and even separate judgments against each spouse by the same creditor on a related issue attach as well.[5]

Perhaps the most well-known exception to this â??judgments against one spouse do not attachâ?• rule involves federal tax liens, such as IRS liens. Pursuant to the United States Supreme Courtâ??s decision in *U.S. v. Craft*, a federal tax lien against one spouse *does* attach.[6] There, there Court reasoned that a spouseâ??s lack of ability to alienate property held as tenants by the entirety is not the only property right he or she may have. There are other property rights as well, including the right to use the property, to receive income from it, and to exclude others from it. The Court looked next at 26 U.S.C. Â§6321, the federal statute authorizing tax liens, which reads as follows:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States *upon all property and rights to property, whether real or personal*, belonging to such person. (emphasis added)

The Court noted that the statutory language authorizing the tax lien is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. Thus, the Court decided that the rights of one spouse in property held as tenants by the entirety is within the broad scope of the tax lien statute.

Similar to the exception for federal tax liens is another probable exception for federal judgments that have been reduced to a judgment lien. While this issue does not seem to have been squarely decided in Virginia, the reasoning of the United States Supreme Courtâ??s decision in *Craft* seems applicable to federal judgment liens as well.[7] The statute authorizing federal judgment liens is 28 U.S.C. Â§ 3201, which states in relevant part as follows:

(a)Creation.â??

A judgment in a civil action shall create a lien on all real property of a judgment debtor on filing a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of section 6323(f) of the Internal Revenue Code of 1986. A lien created under this paragraph is for the amount necessary to satisfy the judgment, including costs and interest.

(b)Priority of Lien.â??

A lien created under subsection (a) shall have priority over any other lien or encumbrance which is perfected later in time.

Note that the lien is imposed â??on all real property of a judgment debtorâ?• and â??shall have priority over any other lien or encumbrance which is perfected later in time.â?• In the words of the Supreme Court in *Craft*, such language seems broad and reveals on its face that Congress meant to reach every interest in property that a judgment might have. Furthermore, this statute authorizing federal judgment liens specifically references 26 U.S.C. Â§ 6323(f), the procedure for filing a tax lien authorized by 26 U.S.C. Â§ 6321, the subject of the Courtâ??s decision in *Craft*. Again, it has not been squarely decided in Virginia whether a federal judgment lien attaches to rights of one spouse in property held as tenants by the entirety. But a strong argument can be made for it, and at least one court has used similar reasoning to extend the *Craft* decision to apply a federal restitution judgment against property held by the judgment debtor as a tenant by the entirety.[8]

So far, the list of exceptions to the â??judgments against one spouse do not attachâ?• rule includes the well-known exception of tax liens and the probable exception for federal judgments. But thereâ??s one moreâ??a little known exception involving judgments for â??emergency medical care.â?• The relevant statute is Va. Code Â§ 8.01-220.2:

Â§ 8.01-220.2. Spousal liability for medical care.

Each spouse shall be jointly and severally liable for all emergency medical care furnished to the other spouse by a physician licensed to practice medicine in the Commonwealth or by a hospital located in the Commonwealth, including all follow-up inpatient care provided during the initial emergency

admission to any such hospital, which is furnished while the spouses are living together. For the purposes of this section, emergency medical care shall mean any care the physician or other health care professional deems necessary to preserve the patientâ??s life or health and which, if not rendered timely, can be reasonably anticipated to adversely affect the patientâ??s recovery or imperil his life or health.

Any lien arising out of a judgment under this section against the judgment debtorâ??s principal residence held as tenants by the entireties shall not be enforced unless the residence is refinanced or is transferred to a new owner.

Note that a number of prerequisites must be fulfilled before a judgment rendered under this Code section can affect property held as tenants by the entirety. First, the services rendered must be â??emergency medical careâ?• and the definition offered by the statute is hardly a bright line rule, leaving a broad interpretation as the safer interpretation for title examination purposes. Second, such care must be rendered while the spouses are living together. Third, a judgment lien against a coupleâ??s person residence cannot be enforced unless it is refinanced or transferred to a new owner, leaving open the question whether a judgment lien would attach to other property held by the couple as tenants by the entirety.

And most importantly, note that this Code section was *repealed* as of July 1, 2023, so it only pertains to judgment recorded prior to that date.

Trusts

Before we leave the â??judgments against one spouse do not attach rule,â?• there is one more context to consider: trusts. Does this rule have relevance when a married couple holds title in a joint trust or separate trust?

It most certainly does. When property is conveyed to a trust, it may surprise some to learn that a judgment recorded against the settlor during the settlorâ??s lifetime attaches to trust property.[9] If the trust is revocable, the entire trust property is subject to the lien. If the trust is irrevocable, the lien attaches to the maximum amount that can be distributed to or for the settlorâ??s benefit.

Given this vulnerability to judgments, it becomes necessary to consider whether the settlor is married and, if so, whether the property was once held with the settlorâ??s spouse as tenants by the entirety. According to Va. Code Â§ 55.1-136,

any 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, so long as (i) they remain married to each other, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their property, including where both spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts.

Note, however, that in order to gain protection under this statute, the subject property must be held by the spouses as tenants by the entirety and subsequently conveyed to the trust(s). Presumably, if a

husband and wife bought property and directed the seller to convey the property directly to their trust(s), there would be no protection under this statute.

Bankruptcy

At this point, the list of advantages to holding title as tenants by the entirety are almost as long as the various exceptions to those advantages. But we are not done. In the words of those late night infomercials, â??But wait! Thereâ??s more!â?• What about when one spouse declares bankruptcy? Does real property held as tenants by the entirety get excluded from the bankruptcy, or is it included? To put it another way, is it an advantage in this context or is it another exception?

The answer: itâ??s a little bit of both. Once a debtor files bankruptcy, 11 U.S.C. Â§ 541 defines what becomes property of the bankruptcy estate, including â??all legal and equitable interests of the debtor in property as of the commencement of the case.â?•[10] As the Fourth Circuit has noted, this language sweeps broadly enough to include property held as tenants by the entirety, even where only one spouse has filed bankruptcy.[11] Nevertheless, a debtor may exempt property from the estate pursuant to 11 U.S.C. Â§ 522(b)(3)(B), which allows a debtor to claim as exempt â??any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety . . . to the extent that such interest . . . is exempt from process under applicable non-bankruptcy law.â?•

This then begs the question whether, as a matter of Virginia non-bankruptcy law, property held as tenants by the entirety is â??exempt from process.â?• To be â??exempt from processâ?• means to be exempt from the legal process that a creditor my use to exert influence on a debtorâ??s real property in satisfaction of a debt. Examples include the process of attachment, levy, or partition. If such property is exempt from such process, then a debtor can exempt it from being included in the bankruptcy estate, thereby protecting it.

So, thenâ??is property held as tenancy by the entirety exempt from process? The answer is both â??yesâ?• and â??no.â?• As explained in the previous section, in general such property is exempt from process (and thereby protected) from creditors of only one spouse. But it is not exempt from process when the process involves a federal tax lien or (probably) a federal judgment. And so, when it comes to bankruptcy, when the only one spouse declares bankruptcy, property held as tenancy by the entirety may be exempt from the bankruptcy estate unless the property is encumbered by a tax lien, federal judgment, or similar encumbrance.[12]

Deeds

It has already been noted that because a married couple is considered one unit, when real property is owned by both spouses, a deed from one spouse alone is generally void, with a very limited exception that is no longer applicable.[13] But there is a bit more to say about deeds and married couples, which requires us to go back to basics.

Fundamental to the notion of transferring title is the statutory basis regarding the means by which such title is transferred. The Virginia Code is clear: *No estate of inheritance or freehold in lands shall be conveyed unless by deed or will.*[14] These are the only two means available to transfer title to real estate.

Or is it? As has been already demonstrated several times, there seems to be an exception to every ruleâ??and this is no exception! In the context of a divorce and the allocation of marital property between spouses, the Virginia Code empowers the court to â??transfer or order the transfer of real or personal property or any interest therein to one of the parties.â?•[15] And so there are really three methods of transfer: deed, will, or court order.

Of these three methods, letâ??s focus on the *form* to one of those methods: the deed, and how marriage can affect its form. Generally, when considering deeds for adequate consideration, it is not necessary to recite the marital status of the grantor, but if so recited, it is *prima facie* evidence of such fact.[16] Recitals as to marital status, as other recitals in deeds, are conclusive against parties claiming under the deed, but not as to third persons.[17]

Recall, however, the discussion on augmented estates, above. The rule is different when it comes to deeds for no or inadequate consideration. Excluded from the augmented estate calculation is the value of property conveyed with the written joinder of, or consent in writing of, the surviving spouse. Therefore, prudent practice dictates that when title is transferred for no consideration or inadequate consideration, it is indeed necessary to recite the marital status of the grantor(s) (and, if necessary, add the joinder of the non-owning spouse) in order to foreclose the possible augmented estate rights of the non-owning spouse in the event the owning-spouse dies first.

Divorce[18]

Divorce is the end of marriage, so it makes sense to tackle this topic towards the end of this article. Recall the previous section entitled, â??Conveyances and Creditors,â?• wherein it was explained that judgments and other liens recorded against only one spouse do not attach to property held as tenants by the entiretyâ??unless of course we are talking about IRS liens, federal judgments and other such mattersâ??those do attach. Also recall that this form of tenancy is only available to a married couple. Once that marriage is ended, however, so does this form of tenancy. Upon divorce, property held as tenancy by the entirety is held as tenants in common.[19] Consequently, after a divorce becomes final, any recorded judgment or lien against one spouse attaches to that spouseâ??s interest in the property.

It is for this reason, as a practical matter (and with a little dose of paranoia), that settlement agents frequently required married sellers to sign a continuous marriage affidavit when a judgment against one spouse is revealed by a title search. We worry that though the spouses claim to be married at the time of closing, we want them to swear that not only are they married at the time of closing, but that they have been continuously married during the entire time that they have owned the subject property. For if, by some slim chance, this selling couple divorced and then remarried during the tenure of their ownership, then a judgment against one spouse may have attached to the property, requiring payment and release.

Death

Divorce may be the end of marriage, but death is the end of us all, so it seems appropriate to end our discussion with this topic. Death and marriage can create different results, depending on the context.

Consider the first context: property owned by a married couple as tenants by the entirety. Recall the previous section entitled, â??Survivorship.â?• Survivorship is a fundamental feature of this form of tenancy. When one spouse dies, we do not look to that spouseâ??s will or to the laws of intestate succession; we just look to the surviving spouse as the sole owner of the subject property. Thatâ??s

the end of the analysis.

But now consider a different context: property owned by only one spouse. What happens when that spouse dies? If that spouse left a will, we look to the will to determine who owns the property. If that devisee is not the surviving spouse, we may have to consider the laws of dower and curtesy if such death occurred before 1991, and if after, we may have to consider the augmented estate rules in effect at the time of death, both of which are discussed above.

If that spouse did not leave a will, we look to the laws of intestate succession, which state that the property is now owned by the surviving spouse, unless the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case, two-thirds of the estate descends and passes to the decedentâ??s children and their descendants, and one-third of the estate descends and passes to the surviving spouse.[20]

Conclusion

Marriage matters. From the beginning, Virginia has recognized its profound impact on title to real estate, from the now abolished rights of dower and curtesy to the present day rules on augmented estates. Holding title as tenants by the entirety offers many protections against judgments and other liens, but it is also riddled with many nuanced exceptions, such as federal liens and judgments, hospital liens for emergency medical care, and whether such property can be excepted from the bankruptâ??s estate. Divorce unravels these protections. And death does as well, but offers the surviving spouse new privileges, such as survivorship and the elective share under augmented estate rules. In view of all these moving parts, the title examiner would do well to consider the marital status of any owner in the chain of title.

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[1] *Hausman v. Hausman*, 233 Va. 1 (1987). See also Va. Code Â§ 55.1-136 (â??Except as otherwise provided by statute, no interest in real property held as tenants by the entirety shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors.â?•).

[2] *Evans v. Evans*, 290 Va. 176 (June 4, 2015). In *Evans*, D and W owned property as tenants by the entirety. D alone conveyed his interest to W. W subsequently created a trust, a will and a deed conveying the property to herself as trustee. That deed specifically referenced the deed from D to W. The Court reasoned that such acts by W evidenced her intent to join in the conveyance from D to W. In other words, W acted like the D to W deed was effective. She made a trust and then conveyed the property into that trust. By doing such acts, it was as if W joined in the conveyance from D alone to W. Consequently, the conveyance to D alone to W was valid.

[3] *Jones v. Conwell*, 227 Va. 176 (1984).

[4] *Id.*

[5] *Rogers v. Rogers*, 257 Va. 323 (Va. 1999).

[6] *U.S. v. Craft*, 535 US 274 (2002).

[7] *See, e.g., In re Conrad*, 544 B.R. 568 (Bankr. D. Md. Jan. 4, 2016) (extending the reasoning in *Craft* to apply a federal restitution judgment against property held by the judgment debtor as a tenant by the

entirety).

[8] *In re Conrad*, 544 B.R. 568 (Bankr. D. Md. Jan. 4, 2016).

[9] Va. Code Â§ 64.2-747.

[10] 11 U.S.C. Â§ 541(a)(1).

[11] *Sumy v. Schlossberg*, 777 F.2d 921, 925 (4th Cir. 1985).

[12] *In re Anderson*, 603 B.R. 564 (W.D. Virginia 2019).

[13] *See* â??Tenancy: Conveyances and Creditors,â?• *supra*.

[14] Va. Code Â§ 55.1-101.

[15] Va. Code Â§ 20-107.3.

[16] *Harman v. Stearns,* 95 Va. 58, 27 S.E. 601 (1897).

[17] *DeFarges v. Ryland and Brooks,* 87 Va. 404, 12 S.E. 805 (1891).

[18] Here we discuss divorce *a vinculo* (Latin for â??from the bondâ?•) as opposed to divorce *a mensa* (Latin for â??from bed and boardâ?•â??i.e., a separation).

[19] Va. Code Â§ 20-111.

[20] Va. Code Â§ 64.2-200.

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