A. TENANCY BY THE ENTIRETIES

The Florida law of tenancy by the entireties can be quite tricky, and a great many married couples assume that all of their joint assets are protected from the creditors of one spouse, without realizing that what they actu- ally own is a joint tenancy with a right of survivorship that does not satisfy all six of the unities required for tenancy by the entireties.

Of particular concern will be brokerage and bank accounts where the couple checked the joint with right of survivorship box instead of the tenancy by the entireties box when opening the account. When this occurs, it is not possible to change the account agreement, and a new account needs to be opened and will receive the assets from the prior account.

A good many other issues can apply when married couples attempt to own their assets as tenants by the entireties, and oftentimes a family limited partnership or family LLC will be established to be owned primarily by the husband and wife as tenants by the entireties in order to protect underlying assets using both tenancy by the entireties and charging order laws (which are mentioned below) at the same time.

Where one spouse lives in Florida and another spouse lives in one of the other states that recognize tenancy by the entireties property, the creditor protection will most likely apply for the Florida resident spouse. The treatment of the other spouse will be subject to the law of where the other spouse resides.

Married couples living in northern states who own property in Florida may also claim the tenancy by the entireties creditor immunity, which has been held to apply for real estate and may also apply for intangibles such as bank and brokerage accounts. In the case of In re Cauley, the Bankruptcy Court for the Middle District of Florida in 2007, allowed non-Florida residents to protect real estate located in Florida held as tenancy by the entireties from bankruptcy creditors, despite the fact that the property was not considered to be their home- stead. While non-Florida residents are not afforded homestead protections, tenancy by the entirety is created by common law and is not provided for in either statutes or the Florida Constitution. There is no case law that limits the protection of property held by tenancy by the entirety to Florida residents only, so according to Cauley, these protections apply to both residents and non-residents, and bankruptcy courts must apply the law of the state that is the situs of the debtor's real estate, so married couples living anywhere can apparently acquire Florida real estate as tenants by the entireties and protect it from the creditors of any one spouse!

Personal property held by tenants by the entirety is governed by the state of residence of the owners, and does not have the protection of Florida law if held in Florida. See In re Estate of Siegel, 350 So. 2d 89 (Fla. 4th DCA 1977).

The common law rules with respect to the elements required to qualify a property interest as tenancy by the entireties are reflected below, and were adopted from the English Common Law as it existed in 1776. The Florida Constitution specifically states that "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." These elements have been applied by subse- quent pronouncements of Florida courts occurring after 1868 when the Constitution was adopted.

To qualify property as tenants by the entireties, six unities must be satisfied. If any of these unities are not satisfied, then the joint asset will not be considered a tenancy by the entireties asset, and the consequent creditor protection from the creditors of any one spouse will not apply. These unities are as follows:

1. Unity of possession - both spouses have joint ownership and control - it may be acceptable that a deposit agreement allows either spouse to withdraw independently of the other on the theory that the power to withdraw is an expression of an authority of agency given by each spouse to the other.

2. Unity of interest - each spouse has the same interest in the account - it is not a problem if one spouse deposits all or most of the funds into the account as long as each spouse has the same interest immediately after the deposit.

3. Unity of time - the interests of both spouses in the asset must originate simultaneously in the same instrument, such as on the signature card. Do not try to convert an individual trust into a tenancy by the entire- ties trust. Instead, transfer assets from the individual trust to a new tenancy by the entireties trust.

4. Unity of title - both spouses must have ownership under the same title.

5. Survivorship - on the death of one spouse, the other spouse becomes the sole owner of the entireties property.

6. Unity of marriage - of course, the owners must be legally married under Florida law. Many clients become confused and believe that joint accounts with any third party or a significant other will be protected. Same sex marriages from other states will not be recognized by Florida Courts for purposes of this exemption. Florida Statute Section 741.212.

Assets held jointly before the marriage should be re-transferred from the spouses jointly to themselves as tenants by the entireties.

Note that in the case of In Re Caliri, U.S. Bankruptcy Court Middle District of Florida August 8, 2006, 347 B.R.778, joint accounts created before marriage were found not to qualify as tenancy by the entireties where the couple did not overtly transfer their interests to themselves as tenants by the entireties after the marriage.

It may be possible to place the beneficial ownership of a trust under a tenancy by the entireties owned LLC that may be disregarded for federal income tax purposes. Perhaps the client's will can state "I own an LLC jointly with my spouse and on the death of the survivor of us the ownership of that LLC shall be transferred to be

held under the trust, and the trust shall be administered and distributed pursuant to its terms" (This may work but should be thought through carefully.)

Experts do not all agree on whether a tenancy by the entireties owned LLC can be disregarded as a "single member entity" for federal income tax purposes, but this should be the proper treatment in a non-commu- nity property state. For a more in-depth explanation of this issue, you can read BNA's U.S. Income Portfolio on Disregarded Entities by Howard Abrams, Fred Witt & Lisa Zarlenga (704-2nd).