



## Pending Legislation: Tenants-By-The-Entireties

*Regina Jaeger, CTFP*  
*Vice President, Senior Trust Relationship Officer*

As a Trust Relationship Officer, I spend a fair amount of time with clients to make sure the titling of their assets and their beneficiary designations are consistent with their estate planning goals. In addition, many times clients have concerns about creditor claims. There are many different ways to hold the ownership (title) of real property. An important element of an individual's overall estate plan is to understand how ownership will affect the distribution of assets upon their death and the exposure of their assets to creditor claims.

In Michigan, forms of ownership include individual tenants-in-common, joint tenants, joint-tenants-with-rights of survivorship, and tenants-by-the-entireties. Each form has different exposure to creditor claims. Moreover, two bills have been introduced in the Michigan legislature that would enhance the current laws that surround tenants-by-the-entireties ownership. Before we explore the impact of the proposed changes, let us review some of the rules that pertain to joint ownership.

When more than one person owns an asset, the asset is generally not included in the estate of the decedent (the individual that has passed) for distribution purposes if there exists a right of survivorship. This means that the asset will generally pass directly to the surviving owner, or owners, without necessitating probate and bypassing distribution through a will or a trust, if a trust exists. The value of the interest could, however, cause an estate tax to be paid. This is an important element in understanding how an individual's assets will be distributed to their beneficiaries on their death.

Another important aspect to know about co-ownership

is that it provides the surviving owner(s) with different rights to the property. For example, real property that is titled in the name of more than one individual as tenants-in-common means that when one owner dies or sells their

share, the remaining tenant(s) are entitled to only their fractional share. Each tenant's share passes to his or her estate at death when there is no automatic survivorship right. This is in contrast to co-ownership as joint-tenants-with-rights of survivorship, in which the interest of the deceased automatically passes to the surviving owner by operation of law, thereby avoiding probate. It is important to note that a tenant-in-common interest can also be forcibly sold by a judgment creditor.

Tenants-by-the-entirety ownership is reserved for spousal joint ownership of real property. It provides the unique benefit of creditor protection to spouses.

Both spouses mutually own the property as a unity of one rather than a type of fraction where each would have their own individual ownership rights. The entireties ownership cannot be claimed by a creditor of an individual spouse. Only creditors of the couple may make claims against the entireties property.

There are currently two bills well on their way through Michigan's state legislature and, barring any unforeseen challenges, they are expected to pass relatively soon. One bill would permit a married couple to classify all of the assets titled in their joint trust's name as being held as tenants-by-the-entireties. As discussed above, the unique benefit of entireties ownership is creditor protection. If the bill passes as expected, assets held in the name of an "entireties trust"

**“Tenants-by-the-entirety ownership is reserved for spousal joint ownership of real property. It provides the unique benefit of creditor protection to spouses.”**

would be protected from the creditor claims of one spouse. This is a significant benefit, especially for individuals where one spouse has an occupation or profession that exposes their assets to a high degree of liability. Further, on the death of one spouse, the creditor protection might continue with regard to the entireties trust assets for the surviving spouse's benefit. Consequently, entireties trust assets would be protected from creditors for the lifetime of both spouses (as the bill is currently interpreted). One drawback to entireties ownership is that on the death of one spouse, there is only a 50% increase in the income tax basis of the entireties asset. Accordingly, if the surviving spouse sells the asset, the survivor could incur capital gains.

The second bill would amend a long-standing Michigan statute that defines the assets that can be held by spouses as tenants-by-the-entireties. This bill would expand the type of assets that can be owned by the entireties, thus enabling virtually all assets held to enjoy the creditor protection afforded to all entireties assets.

These bills will greatly benefit spouses who want to own their assets jointly and to avoid the delays, expense, and publicity associated with probate by adopting a trust, but who also worry about creditor claims against one spouse if title to an asset is not in their joint names but is held in the name of a trust. We will keep you informed if these bills are passed. ☐