JORGE M. ABRIL, P.A.
ATTORNEYS AT LAW
www.abrilaw.com

JORGE M. ABRIL
jmabril@abrilaw.com
CRAIG R. LEWIS
crlewis@abrilaw.com

THE AVAILABILITY OF FLORIDA'S TENANCY BY THE ENTIRETIES EXEMPTION TO NONRESIDENTS FOR PROPERTY LOCATED IN FLORIDA

Craig R. Lewis, Esq.*

Recently, a client who resides in another state inquired into its ability to claim a tenancy by the entireties exemption for property owned jointly by the client and the client's spouse, in order to protect the property from the claim of a creditor of the client individually. The research revealed a paucity of caselaw resolving the question to my satisfaction, thus making for an interesting topic for an article. A brief discussion of the questions follows.

Nature of the Entireties Exemption

Property held as a tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the property must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must have been married at the time the property became titled in their joint names). *Beal Bank, SSB v. Almand & Assoc.*, 780 So. 2d 45, 53 (Fla. 2001). When a married couple holds property as tenants by the entireties, each spouse is said to hold it "per tout," meaning that each spouse holds the "whole or the entirety, and not a share, moiety, or divisible part." *Bailey v. Smith*, 103 So. 833, 834 (Fla. 1925). Thus, property held by husband and wife as tenants by the entireties belongs to neither spouse individually, but each spouse is seized of the whole. Therefore, when property is held as a tenancy by the entireties, only the creditors of both the husband and the wife, jointly, may attach the property; it is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse. *See Winters v. Parks*, 91 So. 2d 649, 651 (Fla. 1956).

The tenancy by the entireties form of ownership exists with respect to real property and personal property. With respect to real property, "[a] conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent." *In re Estate of Suggs*, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981). With respect to a bank account, "as between the debtor and a third-party creditor (other than the financial institution into which the deposits have been made), if the signature card of the account does not expressly disclaim the tenancy by the entireties form of ownership, a presumption arises that a bank account titled in the names of both spouses is held as a tenancy by the entireties as long as the account is established by husband and wife in accordance with the unities of possession, interest, title, and time and with right of survivorship." *Beal Bank, SSB*, 780 So. 2d at 54. As such, when these elements are satisfied, the burden of proof is on the creditor to prove by a preponderance of the evidence that a tenancy by the entireties does not exist. *Id.*

All proceeds from the sale or rental of entireties property are also entireties property. *Passalino v. Protective Group Sec., Inc.*, 886 So. 2d 295, 297 (Fla. 4th DCA 2004).

Application of the Entireties Exemption to Nonresidents

The tenancy by the entireties exemption is a creature of common law, not set forth in the Florida Constitution or in the Florida Statutes, and therefore not subject to their limitation to Florida residents. *Beal Bank, SSB*, 780 So. 2d at 53; *In re Cauley*, 374 B.R. 311, 316 (Bankr. M.D. Fla. 2007).

The Cauley court reasoned:

> "[The Florida Statutes do] not apply to tenancy by the entirety property and do[] not therefore preclude a non-resident of Florida from claiming property located in Florida as exempt as tenancy by the entirety. Additionally, the Court has not found any authority to support the proposition that an individual, claiming Florida real property exempt as tenancy by the entireties must be a resident of Florida. The Court finds that no such requirement exists."

Accord *Republic Credit Corp. I v. Upshaw*, 10 So. 3d 1103 (Fla. 4th DCA 2009) (finding that judgment debtors could not claim a tenancy by the entireties exemption in Florida litigation for proceeds from the sale of real property located in California, because California law does not recognize such an exemption). This reasoning is consistent with the general principal that with respect to real property, the situs of the property dictates the laws that are applicable to it. *See Connor v. Elliott*, 85 So. 164 (Fla. 1920) ("So far as real estate or immovable property is concerned, the laws of the state where it is situated furnish the rules which govern its descent, alienation, and transfer, the construction, validity, and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same").

Conversely, with respect to personal property, the domicile of the owners of the property dictates the laws that are applicable to it. *See* *In re Estate of Siegel*, 350 So.2d 89 (Fla. 4th DCA 1977). That means that if the proceeds from the sale of entireties property in Florida are removed to a jurisdiction that does not recognize the tenancy by the entireties form of ownership, the proceeds will lose their entireties protection. But it also means that they will not be subject to garnishment in Florida. *See* *APR Energy, LLC v. Pakistan Power Resources, LLC*, 2009 WL 425975 (M. D. Fla. Feb. 20, 2009); *Skulas v. Loiselle*, No. 09-60096-CIV, 2010 WL 1790439 (S.D. Fla. April 9, 2010).

Conclusion

Based upon the foregoing authority, it appears that Florida real property owned by a married couple as tenants by the entireties is not subject to execution to satisfy a debt owed by one spouse, no matter where the couple resides. Furthermore, any proceeds from the sale of said property will likely be protected by the tenancy by the entireties as long as the proceeds are located in Florida, and unreachable through a Florida garnishment once they are removed.