

Tenancy by the entirety illinois memo



**ASSIGN
BUSTER**

WHAT IS THE LAW OF TENANCY BY THE ENTIRETY?

ANSWER: An estate held in tenancy by the entirety is limited to “homestead” property held by a husband and wife “during coverture. The Illinois statute authorizing transfer of property into tenancy by the entirety states as follows: “Whenever a devise, conveyance, assignment, or other transfer of property, including a beneficial interest in a land trust, maintained or intended for maintenance as a homestead by both husband and wife together during coverture shall be made and the instrument of devise, conveyance, assignment, or transfer expressly declares that the devise or conveyance is made to tenants by the entirety, or if the beneficial interest in a land trust is to be held as tenants by the entirety, the estate created shall be deemed to be in tenancy by the entirety. ” (765 ILCS 1005/1c).

CAN LAND HELD IN TENANCY BY THE ENTIRETY BE REACHED BY A JUDGMENT CREDITOR?

ANSWER: Yes, if the sole intent of the transfer was to avoid payments existing at the time of the transfer beyond the transferor’s ability to pay those debts as they became due. The Illinois Code of Civil Procedure states that property held in tenancy by the entirety may be reached by a judgment creditor in very limited circumstances: Any real property, any beneficial interest in a land trust . . . eld in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants, except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the

time of the transfer beyond the transferor's ability to pay those debts as they become due. (735 ILCS 5/12-112).

This "sole intent" intent standard is different than the standard required to prove a transfer of property was fraudulent pursuant to the Fraudulent Transfer Act. Under the Fraudulent Transfer Act, a transfer made by the debtor is fraudulent as to the creditor if it was made "with actual intent to hinder, delay, or defraud any creditor of the debtor." (740 ILCS 160/5). In a case reconciling the two standards, the Illinois Supreme Court in *Premier Property Management, Inc. v. Chavez*, 191 Ill. d 101 (2000), held that a creditor "may break through that protection (afforded by a tenancy by the entirety) only where the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.

"Id. at 109. The Court reasoned that the two standards were distinguishable since "under the sole intent standard, if property is transferred to tenancy by the entirety to place it beyond the reach of the creditors of one spouse and to accomplish some other legitimate purpose, the transfer is not avoidable." Id. at 110.

Such a transfer would be avoidable under the actual intent standard, which only requires any actual intent to defraud a creditor. In the facts of *Premier*, a husband conveyed his interest in his residence from himself, as sole owner, to himself and his wife, as tenants by the entirety in June 1996. In late 1996, *Premier Property* secured a judgment against the husband and filed an

action to set aside the conveyance as fraudulent under the Fraudulent Transfer Act. The Illinois Supreme Court remanded to the Circuit Court to allow Premier to amend its complaint. Thus, the Court did not indicate the outcome of that case based on its merits.

IS THE SOLE INTENT STANDARD AN INSURMOUNTABLE OBSTACLE TO JUDGMENT CREDITORS IN REACHING PROPERTY HELD IN TENANCY BY THE ENTIRETY?

ANSWER: Uncertain. There has been very little case law addressing fraudulent transfers to tenancies by the entirety since the Premier decision. However, in one of the few cases on point, the Second Circuit Appellate Court affirmed a decision in favor of a judgment creditor in a fraudulent transfer action against a debtor who transferred his residence to a tenancy by the entirety: In *LaSalle Bank, N. A. v. DeCarlo*, 336 Ill. App. 3d 280 (2nd Dist. 2003), the Appellate Court held that evidence supported a finding that a husband's sole intent in transferring residence into tenancy by the entirety was to avoid paying debts existing at time of transfer.

In *LaSalle Bank*, the appellate court affirmed a judgment against the husband in September 3, 1999. *Id.* at 281. The husband transferred the property from him and his wife in joint tenancy to a tenancy by the entirety on September 20, 1999. *Id.* The Appellate Court reasoned that the Trial Court's finding that the husband transferred the property to tenancy by the entirety solely to avoid a judgment creditor was not against the manifest weight of the evidence because

- 1) the husband owned less than \$4, 000 of assets at the time he transferred the property into tenancy by the entirety,
- 2) the husband didn't make the transfer " around 1998" when he was advised to do so by a family attorney in order to protect the estate and make the " transfer easier" upon his death, since his assets were tied up in the business,
- 3) the husband did not own the residence individually or as a tenant in common with his wife, in which case there may have been a legitimate reason to transfer the property to tenancy by the entirety other than to avoid a judgment debt. 3) the husband made the transfer to tenancy by the entirety at a time when to not make such a transfer would have rendered him insolvent, and
- 4) the transfer was made within days after the Appellate court affirmed the judgment entered against him. Id. at 286. The Appellate Court also held that it is only the intent of the debtor husband that is relevant to the inquiry. Id. at 284. It did not matter what the wife did or did not know