

Creditors and Non-Probate Assets

By Yahne Miorini, LL.M.

1.) Inter Vivos Trusts

Va. Code Ann. §55-545.05 (3) clearly states that at the settlor's death of a revocable trust, the trust property is subject to the settlor's creditors, cost of estate administration, funeral expenses, and the statutory allowances of the surviving spouse and children but only to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

2.) Retirement Plans

Qualified plans are subject to the Employee Retirement Income Security Act ("ERISA"). First, these plans cannot be assigned or alienated. It seems that as long as the benefits and funds are held by the plan, the creditors of the employee are protected. It is not sure that they will still be protected once the benefits have been paid to the beneficiaries.

Individual retirement plans are not protected by ERISA and are

subject to state law. Va. Code Ann. §34-34 (B) provides that non-qualified retirement account should have the same protection as permitted under federal bankruptcy law.

3.) Life Insurance Policies

Va. Code Ann. §38-2-3122 provides that the beneficiary of a life insurance policy shall be protected against the creditor claims of the insured. However a creditor would be entitled to the amount of any policy premiums paid with intention to defraud creditors, with interest, for the proceeds of the policy.

In addition, the cash surrender value may be reached by the creditors of the insured if the insured has retained the right to change the beneficiary¹. Finally, do not forget the IRS estate tax lien on the cash surrender value².

4.) Joint Tenancy

Va. Code Ann. §64.1-140 provides that a fiduciary does not have the obligation to asset a claim against a joint owner with right of survivorship. But, if someone in interest requests it in writing within 6 months from the date of initial qualification, then the fiduciary shall make a claim.

The law on multiple accounts was changed in 1980. Regardless on when the account has been created³, there is as of July 1, 1980. a presumption that a principal/agent relationship has been created⁴. In addition, there is a presumption of convenience when the account has been opened between persons who are not married to each other.

¹ Va. Code Ann. §38.2-3123

² United States v. Bess, 78 S.Ct. 1054, 357 U.S. 51 (1958)

³ Va. Code Ann. §6.2-620

⁴ Va. Code Ann. §6.2-619