



TENANCY BY THE ENTIRETY

A Trap for the Unwary

Married couples in Florida are often aware of the potential benefits associated with holding title to property via tenancy by the entirety (“TBE”). However, not too many are familiar with the pitfalls and perils that frequently arise when utilizing this form of ownership. While holding legal title as TBE can create asset protection if used properly, there are significant risks that accompany this strategy.

TBE Overview

- In Florida, married couples are the only entity that can hold legal title as TBE. In fact, this form of ownership is only available in about half of the United States.
- For a TBE to be created, there must be (1) unity of possession; (2) unity of interest; (3) unity of title; (4) unity of time; (5) unity of marriage; and (6) unity of survivorship.
- With few exceptions, property held as TBE cannot be garnished or attached by one spouse’s individual creditors.

TBE Disadvantages

- **Difficulty Creating Valid TBE.** In many cases, problems arise due to a faulty assumption that an asset is being held as TBE. As mentioned in the overview above, six characteristics must be present in order to create ownership as TBE. Common examples where married couples fail to establish ownership as TBE include:
 - **Adding a spouse’s name to an already existing bank account.** This strategy fails as the parties’ interests did not originate at the same time.
 - **Deed improperly drafted or wrong box checked.** While property in Florida owned by a married couple is presumed to be TBE, if a deed states property is held as “tenants in common” or the wrong box is checked on a bank account application, this presumption goes out the window.
 - **Assets held jointly before marriage.** If a soon to be married couple jointly buys a new house, the property does not automatically become TBE upon marriage.
- **Divorce.** Property held as TBE becomes property held as tenants in common following divorce, allowing each former spouse’s individual creditors the opportunity to attach.
- **Death.** Upon death of one spouse, TBE property passes to the surviving spouse and is now vulnerable to the surviving spouse’s individual creditors.
- **Increased Liability.** TBE ownership of cars, boats or other recreational vehicles can result in liability for both spouses under Florida’s dangerous instrumentality doctrine. For example, if an accident occurs in a car held as TBE, all other TBE property can be subject to risk due to the potential liability of both spouses. If the car was held in one spouse’s name, only that spouse would be at risk.
- **Tax Planning.** When a spouse dies, TBE property transfers to the survivor and is not included in the deceased spouse’s estate, making it more likely that the survivor’s estate will be subject to federal estate tax. Holding property as TBE may reduce the amount of effective estate tax planning that can be accomplished for married couples.