

Tenancy by the Entirety, aka “Free Asset Protection for Your Clients”

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Tenancy by the entirety is a special form of joint tenancy with a right of survivorship that is only available to married couples. It has existed in Tennessee for well over 100 years. Mississippi and Arkansas also recognize this type of ownership, as do many others, but not all states recognize it. The primary difference between “Tenants by Entirety” and “Joint With Right of Survivorship” in Tennessee is that Tenants by Entirety makes the assets protected from lawsuits against one spouse or the separate creditors of either spouse. That is to say the trust assets are protected from separate creditors of each spouse, but not a joint creditor of both spouses (i.e. Someone that both spouses are liable to). Tenants by the Entirety in Tennessee automatically includes right of survivorship. In Mississippi, you have to specify that you want a Tenants by Entirety account to also have rights of survivorship.

There are three primary reasons that assets owned as Tenancy by the Entirety are exempt from the *separate* creditors of either spouse, during the marriage.

1. With tenancy by the entirety, the husband and wife *as a unit* have the right to the current use and enjoyment of the property. [*Robinson v. Trousdale County*, 516 S.W.2d 626, 632 \(Tenn.1974\)](#). The Court held in *Robinson*, that each spouse shall have a *joint right* to the use, control, incomes, rents, profits, and possession of property, and neither spouse may sell, encumber, alienate or dispose of any portion thereof except his or her right of survivorship, without the consent of the other.
2. Each spouse possesses a right of survivorship, that is to say, when one spouse dies, the other spouse retains the right to receive and own the entire property for his/her life.

3. Each spouse's present right to use and enjoy the property may not be transferred without the consent of the other spouse. *Robinson, 516 S.W.2d at 632.*

EXAMPLE

For example, during the marriage, a creditor (such as a lawsuit plaintiff) against the Wife is not entitled to tenants by the entirety property, because the husband also has the right to use the entire property, and because the husband has the right to the use the property for the rest of his life if the wife dies first. A third party, such as a lien creditor, may not own a present interest in the property without the approval of both spouses. *Third Nat'l Bank, 789 S.W.2d 254 (Tenn. 1990, at 255).*

Furthermore, in the example above, if the wife dies first, the creditor loses, because the Husband has the full right of survivorship and inherits the property free of wife's creditors. However, if the Husband dies first, then the creditor wins, because the entire property will pass automatically to the Wife, and then be exposed to the Wife's creditor. This has always been the primary problem with Tenancy by the Entirety. There is a new Tennessee Trust which is a joint living revocable trust that removes this problem and improves the protection, but that trust is beyond the scope of this article.

Some brokerage and banking companies allow an account to be specifically titled as "Tenants by the Entirety." When this option is present and the choice is between "Joint with Rights of Survivorship" and "Tenants by the Entirety" you should almost always use Tenants by the Entirety because only accounts titled as such have the asset protection discussed above.

LIMITATIONS

As stated above, Tenants by the Entirety ownership does not protect from the joint creditors of a married couple. Therefore, they should be careful to avoid creating joint

liabilities or subjecting themselves to lawsuits against both of them. For example, they should not co-sign loans together, if possible. Also, cars should not be titled in both of their names because then they would both be sued in the event of an accident that was their fault. Another limitation is the inability to create a trust for the surviving spouse for tax planning and asset protection purposes. One last limitation of TE ownership versus a trust is that if both spouses die together, there will be two separate probate administrations. As discussed below, these limitations can be resolved by a new type of Revocable Trust between spouses.

SOLUTION TO LIMITATIONS

Due to the limitations outlined above, Tennessee passed a new law effective July 1, 2014 that improves on this protection by allowing married couples to create a joint revocable trust that makes the protection even better. With the new joint revocable trust, the married couple no longer runs the risk of losing all the TE assets when the first spouse dies, and can do more advanced estate and GST tax planning. I am happy to discuss that new type of trust at any time.

CONCLUSION

Owning assets as Tenants by the Entirety provides a “no cost” form of asset protection to your clients that should generally be used if the choice is between “joint with right of survivorship” and Tenants by the Entirety. Before changing to TE from any form of ownership other than joint with rights of survivorship, you should consult with a competent estate planning attorney. Clients may also wish to review the deeds to their houses and other real estate to ensure that real estate is also protected. The protection offered by Tenants by the Entirety can be further improved with a joint revocable Tenants by the Entirety Trust.

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