GASSMAN & MARKHAM ON FLORIDA AND FEDERAL ASSET PROTECTION LAW

Includes state and federal statutes and other resources.

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CHAPTER 3
FLORIDA LAW EXEMPTIONS

Florida has some of the most generous creditor exemption laws in the country and offers unlimited protection of homestead, annuities, and the cash surrender value of life insurance. Florida also provides protection for tenants by the entireties assets, wages, disability insurance, retirement plans, and other miscellaneous assets.

Florida has also opted out of the federal exemption system, meaning that Florida residents are required to use the Florida exemptions in bankruptcy, which often provides greater protection.

Nevertheless, these exemptions can be complicated and there are many areas where the law is unclear. Accordingly, advisors and professionals working in this area need to thoroughly understand Florida's exemption system and its implications.

1. TENANCY BY THE ENTIRETIES

A. INTRODUCTION

Tenancy by the entireties "immunity" dates back to the English common law and the time when a married woman could not hold property individually. Tenancy by the entireties is a form of property ownership whereby a husband and wife can hold property as an indivisible unit. An ownership interest in tenancy by the entireties property is non-severable without consent of both spouses, except in limited situations.[72] The property is not divisible on behalf of one spouse alone, and therefore cannot be reached to satisfy the obligations of only one spouse.[73] However, a creditor of both the husband and the wife can attach tenancy by the entireties property.

States other than Florida which recognize tenancy by the entireties, at least to some extent, include Alaska, Arkansas, Delaware, District of Columbia, Michigan, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Hawaii, Vermont, Virginia, Washington, and Wyoming. Where one spouse lives in Florida and another spouse lives in one of the other states that recog-

72 *See Hector Supply Co.*, 254 So.2d 780 (Fla. 1971).
73 *Winters v. Parks*, 91 So.2d 649, 651 (Fla. 1956).

nize tenancy by the entireties property, most likely the creditor protection will apply for the Florida resident spouse. The treatment of the other spouse will be subject to the law of where the other spouse resides.

B. DEFINITION OF TENANCY BY THE ENTIRETIES

Joint tenancy with right of survivorship is not enough, because the law requires that "the 6 unities" exist. The 6 unities may be summarized as follows:

1. Unity of possession - both spouses have joint ownership and control - it may be acceptable that a deposit agreement allows either spouse to withdraw independently of the other on the theory that the power to withdraw is an expression of an authority of agency given by each spouse to the other.
2. Unity of interest - each spouse has the same interest in the account - it is not a problem if one spouse deposits all or most of the funds into the account as long as each spouse has the same interest immediately after the deposit.

3. Unity of time - the interests of both spouses in the asset must originate simultaneously in the same instrument, such as on the signature card. **Do not try to convert an individual account into a tenancy by the entireties account. Instead, transfer assets from the individual account to a new tenancy by the entireties account**.

   TRAP - If one spouse is the owner, do not just add the other spouse's name to the title. At a minimum, make a complete transfer from the initial spouse as owner to both spouses as tenants by the entireties.

4. Unity of title - both spouses must have ownership under the same title.

5. Survivorship - on the death of one spouse, the other spouse becomes the sole owner of the entireties property. A general power of appointment given to one spouse over joint assets may vitiate tenancy by the entireties status.

6. Unity of marriage - of course, the owners must be legally married under Florida law. Many clients become confused and believe that joint accounts with any third party or a significant other will be protected. Same sex marriages from other states will not be recognized by Florida Courts for purposes of this exemption.[74] **NOTE** – In the case of *In re Caliri*[75], joint accounts created before marriage were found not to qualify as tenancy by the entireties where the couple did not overtly transfer their interests to themselves as tenants by the entireties after the marriage.

   TRAP - Assets held jointly before the marriage should be re-transferred from the spouses jointly to themselves as tenants by the entireties.

There have been a great many cases and factual situations where the question of tenancy by the entireties status of property was challenged by a creditor, both successfully and unsuccessfully. There have been, and will continue to be, many factual situations that will necessitate litigation in order to determine an outcome that is quite unpredictable.

C. DIRECT TRANSFERS FROM ONE SPOUSE TO TENANCY BY THE ENTIRETIES

IS A STRAWMAN NEEDED?

The English Common Law (before 1776) required tenancy by the entireties ownership to originate from a person or entity other than one member of the married couple, and the law therefore required a "strawperson" to take title from one spouse and then transfer it to tenants by the entireties. Florida did not adopt this requirement, as evidenced by the 1939 Florida Supreme Court Case *Johnson v. Landefeld*,[76] which became codified as Florida Statute Section 689.911 in 1941. This Statute applies to real estate but does not mention non-real estate assets. Support for the proposition that non-real estate assets, such as stock certificates and bank and brokerage accounts, may be transferred from one spouse to tenancy by the entireties can be found in fairly recent case law.

74 Fla. Stat. § 741.212.
75 347 B.R.788 (Bankr. M.D. Fla. 2006).
76 138 Fla. 511 (Fla. 1939).

A September 2011 Florida Bar Journal article mentioned below concluded that there was uncertainty in the law as to this area and that a legislative effort to clarify the confusion by statute was unsuccessful.

The author has done significant reading and research with respect to this issue, and has concluded that one spouse can transfer virtually any kind of asset into tenancy by the entireties, as perhaps best explained in the following letter to the editor of the Florida Bar Journal from October 2011:

> A Florida Bar Journal article titled *Are Florida Laws on Tenancy by the Entireties in Personalty as Clear as We Think?*, dated September 2011 raised concern that Florida law is unclear on the question of whether a married couple can own personalty as tenants by the entirety (TBE) unless authorized under the Florida statutes. The author also questioned the clarity of Florida law regarding the creation of an entireties estate in personalty after the 2001 Florida Supreme Court decision in *Beal Bank, SSB v. Almand & Assoc. Inc.*
>
> Extensive research and review of several Florida Supreme Court cases, DCA opinions, and bankruptcy court decisions has lead us to conclude that the law with respect to these issues is much more settled than the article seems to imply. Practitioners will want to review the three Florida Supreme Court cases that were not referenced in the article, and other citations mentioned in this letter.
>
> Florida law clearly permits a married couple to own all forms of personal property as TBE. Quoting solid prior precedent, the Florida Supreme Court stated in the 1925 case *Bailey v. Smith*, "Under the law in force in this State there may be a tenancy by entireties in both real and personal property; and whether such an estate exists as the result of the acquisition of property by and in the names of both husband and wife, must be determined by a consideration of the nature and terms of the transaction as portraying the intent of the parties and of the rules of law applicable thereto." 89 Fla. 303, 307 (Fla. 1925). *Beal Bank, SSB* only modified *Bailey* by applying a presumption that jointly owned bank accounts

are held as TBE unless there is evidence showing a contrary intent. Florida courts have consistently applied this presumption to all forms of personal property.

Furthermore, the case law confirms that one spouse is a separate entity from a TBE, and can, therefore, transfer property to the marital unit without the use of a strawman, as explicitly held in the 1939 Florida Supreme Court decision of *Johnson v. Landefeld*. 138 Fla. 511 (Fla. 1939). Florida courts have followed suit with respect to personalty. See e.g., *Hurlbert v. Shackleton*, 560 So. 2d. 1276 (Fla.1st D.C.A. 1990) (recognizing a spouse's right to transfer stock he owned individually to both himself and his wife as TBE); *In re Kossow*, 325 B.R. 478 (Bankr. S.D. Fla. 2005) (permitting a spouse to assign his interest in tangible personal assets he owned before marriage to TBE) for some of the several cases that reach the same conclusion.

Florida case law may not allow one spouse to add another spouse to an existing bank account or stock certificate, but that is much different than one spouse making a distinct transfer from himself or herself to facilitate the creation and funding of a new TBE account, stock certificate, or other asset.

One of the author's favorite law professors (who gave him a C+ in Tax!) left the following voicemail after the above letter came out, making the author's day:

Alan, this is _____. Voice out of the past, College of Law and so forth and so on. I just wanted to call and say thank you for writing the letter to the Editor and straightening them out with respect to the tenancy by the entirety law in this state. I was so tempted to do something but you know, I'm an old war horse, so I guess I just didn't have the hay any more, but I appreciate what you wrote. It was a well written letter and it certainly laid it out in a way, that I think, most people would be able to now understand the law. Which was certainly misstated in the article. So, on behalf of everyone, thanks!

An article on this topic is as follows:

FLORIDA SUPREME COURT CASES CONFIRM TENANCY BY ENTIRETIES IN PERSONAL PROPERTY AND ABILITY OF ONE SPOUSE TO TRANSFER ASSETS TO TENANCY BY THE ENTIRETIES

By: Alan S. Gassman, J.D., LL.M, and Erica G. Pless, J.D., LL.M

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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1887

EXECUTIVE SUMMARY:

A Florida Bar Journal article titled *Are Florida Laws on Tenancy by the Entireties in Personalty as Clear as We Think?*, dated September 2011 raised concern that Florida law is unclear on the question of whether a married couple can own personalty as tenants by the entirety (TBE) unless authorized under the Florida statutes. The author also questioned the clarity of Florida law regarding the creation of an entireties estate in personalty after the 2001 Florida Supreme Court decision in *Beal Bank, SSB v. Almand & Assoc. Inc.*

Extensive research and review of several Florida Supreme Court cases, DCA opinions, and Bankruptcy court decisions has lead us to conclude that the law with respect to these issues is much more settled than the article seems to imply. Florida case law clearly permits a married couple to own all forms of personal property as TBE. *Beal Bank, SSB* only modified the existing law by applying a presumption that jointly owned bank accounts are held as TBE unless there is evidence showing a contrary intent. Florida courts have consistently applied this presumption to all forms of personal property. Furthermore, the case law confirms that one spouse is a separate entity from a TBE, and can therefore transfer property to the marital unit without the use of a strawman, as explicitly held in the 1939 Florida Supreme Court decision of *Johnson v. Landefeld*.

Florida case law may not allow one spouse to add another spouse to an existing bank account or stock certificate, but that is much different than one spouse making a distinct transfer from himself or herself to facilitate the creation and funding of a new TBE account, stock certificate or other asset

Practitioners will want to review the three Florida Supreme Court cases that were not referenced in the Florida Bar Journal article, and other citations mentioned in this article.

FACTS:

A Florida Bar Journal article titled *Are Florida Laws on Tenancy by the Entireties in Personalty as Clear as We Think?*, dated September 2011 concluded that

FLORIDA SUPREME COURT CASES CONFIRM TENANCY BY ENTIRETIES IN PERSONAL PROPERTY AND ABILITY OF ONE SPOUSE TO TRANSFER ASSETS TO TENANCY BY THE ENTIRETIES

By: Gassman and Pless

Florida law is unclear regarding the status of TBE and personal property in Florida. The following article is a response to some of the issues raised in the Florida Bar Journal article.

COMMENT:

A Florida Bar Journal article titled *Are Florida Laws on Tenancy by the Entireties in Personalty as Clear as We Think?*, dated September 2011 (the "September 2011 Article") raised concern that Florida law is unclear on the question of whether a married couple can own personal property as tenants by the entirety (TBE) unless authorized under the Florida statutes. The author noted that there are Florida statutes which provide specific guidance on the TBE status of mortgages, motor vehicles, mobile homes, and real estate but indicated that there was limited support to allow ownership as tenancy by the entireties in non-real estate assets other than those with specific statutory guidance. The author also questioned whether Florida law permits an asset or assets to be transferred from one spouse into tenancy by the entireties.

As the author noted, the 2001 Florida Supreme Court case of *Beal Bank, SSB v. Almand & Assoc.* addressed whether bank accounts can be held as TBE. The Court in Beal Bank held that a married couple can own bank accounts as TBE and clarified that joint spousal assets are presumed to be owned in a tenancy by the entireties if all of the unities are present and there is no indication of a contrary intent.

Florida case law is quite clear that a married couple can own all forms of personal property as tenants by the entireties as pronounced in at least seven Florida Supreme Court cases and numerous other decisions. Furthermore, at least three Florida Supreme Court cases and multiple other cases also confirm that one spouse is a separate entity from a tenancy by the entireties entity, and therefore can transfer property from one spouse to a tenancy by the entireties.[1]

Personal Property Can be Held as Tenants by the Entireties – And Taking Title Jointly with Proper Intent and Documentation is All that is Needed

In the 1913 Florida Supreme Court case of *English v. English*, tenancy by the entireties was confirmed to exist under our common law.[2] The Court stated "[w]e

find the principle very clearly thus laid down in 15 Amer. & Eng. Ency. of Law 847 (2d.)."[3] The Court noted that "[t]he common law has been expressly declared by statute to be of force in this State. We have also had occasion frequently to declare that the common law is in force in this State, except where it is modified by competent governmental authority."[4] Finding no conflicting statute, the Court held that land conveyed from one spouse to both himself and his spouse was held as TBE.

The Florida Supreme Court extended the status of TBE to personal property in the 1925 Florida Supreme Court case of *Bailey v. Smith*, in which several mortgages were payable to "Paul W. Bailey and Jenny M. Bailey," a married couple.[5] The Court cited to its decision in English v. English as well as three other cases and a legal encyclopedia declaring that "[t]his character of estate exists at common law in personal property as well as in realty."[6] The Court further confirmed that the common laws of England were in force in Florida, and not inconsistent with this conclusion. The Court also quoted Tiffany on Real Property for the proposition that "there may be a tenancy by the entireties in both real and personal property."[7] This decision was issued before Florida Statute § 689.115 was passed to codify that mortgages can be held by tenants by the entireties. Before the age of widespread use of legal encyclopedias and internet research the legislature would often codify Florida Supreme Court decisions so that lawyers who had statutes could look up the law. This is still a good practice.

Bailey v. Smith was quoted in the 1949 Fifth Circuit U.S. Court of Appeals case of *Doing v. Riley*, which noted that "no decision of that [the Florida Supreme] court nor statute of the state [of Florida] prescribes the procedure by which an estate by the entireties in personal property may be created. The statement 'the acquisition of property by and in the names of both husband and wife,' plus an intent to create such an estate, seems to be about all that has been written by the state [Supreme] court on the subject."[8] The Fifth Circuit U.S. Court of Appeals indicated that they would "have no difficulty in sustaining an estate by the entireties in personal property if it had been evidenced by a bill of sale to the husband and wife and there was evidence that the requisite intent to create such an estate."[9] However, the Court did not find sufficient evidence to confirm that the joint assets were held as tenants by the entireties in the subject case.

FLORIDA SUPREME COURT CASES CONFIRM TENANCY BY ENTIRETIES IN PERSONAL PROPERTY AND ABILITY OF ONE SPOUSE TO TRANSFER ASSETS TO TENANCY BY THE ENTIRETIES

By: Gassman and Pless

Reinforcing its position that a tenancy by the entireties exists in Florida with regards to personal property, the Florida Supreme Court in *First National Bank v. Hector Supply* stated:

> [I]t appears that a tenancy by the entirety in personalty was recognized prior to 1776 in certain cases involving mortgages [Coppin Case, 2 P.Wms. 496, 24 Eng. Reprint 832 (1728)], bequests [Atcheson v. Atcheson, 11 Beav. 485, 50 Eng. Reprint 905 ()], and money lent [Christ's Hospital v. Budgin, 2 Vern. 683 (1712)]. One could fairly say that the entireties theory was applied to personalty in instances where equity chose to support the wife lest she be unjustly deprived of her personal property, or in instances where profits and moneys derived from land held by the entireties was transformed into choses in action.[10]

It is quite clear from the foregoing cases that Florida law recognizes a tenancy by the entireties in personalty, and that there is no issue as to any aspect thereof.

Personal Property and Any Other Asset Can be Transferred from One Spouse Directly to TBE

The September 2011 Article raised concern that *Beal Bank* provides support for the proposition that ownership of an asset cannot be transferred from one spouse to both spouses as a tenancy by the entireties.[11] Although the Fifth DCA in *Beal Bank* did not recognize a TBE when the wife's name was simply added to the bank account, the Court's decision does not preclude a spouse from transferring individually owned personal property to the marital unit as TBE. For example, adding a wife's name to a husband's bank account will not result in a TBE account, but opening a new TBE account and having one spouse transfer funds to that new account from a prior individual account will create a TBE asset, in the authors' opinion. Similarly, adding a spouse's name to an existing stock certificate will not create a TBE ownership, but cancelling a stock certificate in the name of one spouse and issuing a new certificate as tenants by the entireties between spouses will be sufficient to create a TBE asset, in the opinion of the authors.

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The Florida Supreme Court has never given any indication that a tenancy by the entireties cannot be the result of a transfer from one individual spouse to both parties as tenants by the entireties. In the 1939 case *Johnson v. Landefeld*, the Florida Supreme Court held:

> A man having title to real estate not his homestead may by appropriate deed convey it to his wife and to himself as tenants by entireties so that such property will not pass to a son under a subsequent will of the grantor husband. The legal effect of the deed in this case is to convey to the wife an interest in the entire estate equal to that reserved by the husband, and the express intent is to *create an estate by the entireties*.[12]

Shortly thereafter in 1941, the Florida legislature codified this right in Florida Statute § 689.11. In 1957, the United States Court of Appeals for the Fifth Circuit confirmed that pursuant to the Florida statute, the use of a third party, commonly referred to as a "strawman," was not necessary to create an entireties estate in real property between spouses.[13]

Furthermore, in *Ohio Butterine v. Hargrave*, the Florida Supreme Court dismissed the argument that a transfer to a tenancy by the entireties by a spouse would "enable dishonest persons to prevent creditors from collecting their just debts."[14] Disagreeing with this statement, the Court quoted from an 1871 Indiana Supreme Court case, *Chandler v. Cheney*, adopting language that directly permits the transfer of assets from a husband to tenancy by the entireties:

> It is assumed that [the transfer to TBE] would enable a man to fraudulently conceal and cover up his lands so that the same could not be reached by his creditors. Such would not be the result. The husband could not, by taking a conveyance to himself and wife, defraud his creditors any more than he could effect the same object by taking a conveyance directly to his wife, or to some third person. If an estate by entirety is created to cheat, hinder, or delay creditors, and the husband has not other property subject

> to sale to pay his debts, the conveyance can be declared fraudulent and set aside in the same manner that any other fraudulent conveyance would be, and such a proceeding would be governed by the same principles of law and rules of evidence as any other proceeding to set aside as fraudulent any other conveyance. The authorities go to the extent of holding that while an estate by entirety exists it cannot be seized and sold for the debts of the husband, but such estate may be attacked and destroyed on account of fraud.[15]

In *Beal Bank*, the Florida Supreme Court opinion confirmed that the testimony of one of the husband's was "that none of the monies in any of the accounts had been derived from property owned solely in his name, at least during the two years preceding the hearing."[16] The above quoted language makes it clear that the trial court and Fifth DCA Appeals judges were looking at a two year transfer time period to confirm that this would not be considered a fraudulent transfer by the husband into tenancy by the entireties.[17] In footnote 21, the Court acknowledged that "Beal Bank does not assert that in this case there was any intent to defraud creditors in the creation or maintenance of the Almands' joint bank accounts with their wives."[18] Therefore, the accounts that satisfied all of the required unities were determined to be held as entireties, regardless of if they had been the result of a transfer from a husband to tenancy by the entireties, as long as the fraudulent transfer rules did not apply.The Court in *Beal Bank* only modified its earlier decisions in *Bailey* and *Hector Supply* by applying a presumption that a tenancy by the entireties estate exists with regards to bank accounts held by a married couple unless there is evidence showing a contrary intent.

Specifically, the Court stated:

> [w]e hold that 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.[19]

Nowhere in *Beal Bank* does the Court overrule *Bailey* and subsequent cases that permit spouses to hold personal property as TBE, nor does it restrict a spouse from transferring personal property to the marital unit as a tenancy by the entirety.

As the United States District Court for the Southern District of Florida clarified in the 2006 opinion of *Goldman v. Dzikowski*, "[i]n *Beal Bank*, the Florida Supreme Court receded from its earlier position to the extent that earlier cases did not 'adopt a presumption of a tenancy by the entireties in personal property similar to that in real property.'"[20] The District Court confirmed that Florida operates under the presumption that married couples intend to create a tenancy by the entirety in real property unless there is express language declaring a different intent. Interpreting *Beal Bank*, the District Court follows: "[l]ikewise, application of the presumption to the acquisition of *personal property* should only occur absent express evidence that contradicts such intent."[21]

The *Beal Bank* case confirmed that a tenancy by the entirety is viewed as a separate unit, stating that "when a married couple holds property as a tenancy 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.'"[22] In the 1920 case, *Ohio Butterine Co. v. Hargrave*, the Florida Supreme Court once again quoted the Indiana Supreme Court's 1871 case, *Chandler v. Cheney* and adopted its explanation of tenancy by the entirety:

> As between husband wife, there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as to the husband. Then how can the husband possess any interest separate from his wife, or how can he alienate or encumber the estate, when all the authorities agree that the wife can neither convey nor encumber such estate. We are of the opinion that, from the peculiar nature of this estate, and from the legal relation of the parties, ther[e]

> must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it; and it necessarily and logically results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife.[23]

The *Beal Bank* decision further stated that "our jurisdiction has treated bank accounts and other personal property differently," with reference to the presumption of whether titling to joint names is considered to create a tenancy by the entireties.[24] The court indicated "we have applied a 'different standard' by requiring that "not only must the form of the estate be consistent with entireties requirements, but the intention of the properties must be proven."[25] The 'different standard' consists of the two-part test that the Court of Appeals for the Fifth Circuit applied in *Doing v. Riley*.[26] The Court in *Beal Bank* further explained that "[a]lthough we understand the considerations that originally led to this court's decision not to adopt a presumption of a tenancy by the entireties in personal property similar to that of real property, we conclude that stronger policy considerations favor allowing the presumption in favor of tenancy by the entireties when a married couple owns joint property."[27] Thus, the *Beal Bank* decision concentrated on what the presumption of the characteristic of a bank account would be (between TBE or joint with right of survivorship), and did not address whether personal assets could be held as tenants by the entireties.

The *Beal Bank* decision noted the requirement for "unity of time" (the interest must have commenced simultaneously), and in Footnote 6 of the decision, with respect to the above quoted language, the Court indicates "although the authors of a recent Florida Bar Journal article on this topic suggests that unity of time should be omitted from the list of tenancy by the entireties requirements the Almands do not raise the issue of the continued viability of this requirement, *and thus we do not discuss it*.[28] In the article mentioned by the Court (the "April 1999 Article"), entitled *Marital Bank Accounts as Entireties Property: What is the Current State of Florida Law*, the authors speculated that Florida law would require a third party to transfer personal property from individual ownership to a tenancy by the entirety in order to satisfy the unities of time and title.[29] However, Florida case law reaches the opposite result.

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By: Gassman and Pless

The authors of the April 1999 Article expressed concern about whether individual ownership of an asset could be transferred into a tenancy by the entireties, and discussed three cases with respect to this, one being the 5th DCA *Beal Bank* decision, *Amsouth Bank v. Hepner* and *Winters v. Parks*.[30] In *Beal Bank* and *Winters v. Parks*, the Court did not recognize a tenancy by the entirety when one spouse added the other spouse's name to an individually owned account after it had been opened. However, there is an important distinction between having one spouse transfer monies from an individually owned bank account into a new tenancy by the entireties account, as opposed to having one spouse add another spouse's name to an existing individually owned account. As the *Beal Bank* and *Winters* cases discuss, the unities of time and title would not be satisfied by adding the spouse's name to the individually owned account. This same issue was addressed in the 2011 case, *In re Aranda*.[31] The Bankruptcy Court for the Southern District of Florida held that the addition of the wife's name to the husband's bank account did not satisfy the unity of time and therefore the account was not held as TBE. However, as stated previously, a transfer by one spouse of funds from an individually owned account to a new TBE account would satisfy the time and title unities, thereby creating a TBE.

The issue in *Hepner* was whether an automobile could be held as TBE, and pursuant to Florida Statute § 319.22, the Court decided that it was not held as TBE because the vehicle was titled in the name of the husband *or* the wife. Florida Statute § 319.22 provides that when a motor vehicle or mobile home is titled in the names of the spouses using the disjunctive, "or" such vehicle is held in a joint tenancy, not a TBE.

The authors of the April 1999 Article suggested legislation in order to assure that it should not be necessary "to erect the fiction of a transfer through a straw party in order to create the estate intended by the grantor."[32] Several states including Hawaii and Wyoming have codified the right of a spouse to transfer personal property to both spouses as TBE without the use of strawman.[33] As discussed below, Florida courts have embraced this position and so should the legislature.

The author of the September 2011 Article stated that *Beal Bank* implied that a strawman may be necessary to effect an inter-spousal transfer of personal property to a TBE, although the 1939 Florida Supreme Court case of *Johnson v. Landefeld* described above did not require a strawman for real property, thereby implying

a strawman would not be necessary for personal property.[34] Further, a number of District Court of Appeal and Bankruptcy Court decisions have explicitly permitted transfers of stock, non-real estate physical objects, and mortgages from one spouse to TBE. For example, in the often quoted 1990 case of *Hurlbert v. Shackleton*, the First District Court of Appeals recognized the right of a spouse to transfer personal property to the marital unit as TBE.[35] In this case, the husband transferred stock he owned individually to both himself and his wife as joint tenants. The Court stated, "[t]he trial court found that Dr. Shackleton's interest in C & S was one held with his wife as tenants by the entireties. Because the C & S certificate issuing 50 shares to them both does not itself designate the form of interest taken, the court could find that the stock was held by the Shackletons as tenants by the entireties."[36] The Court remanded the case to the trial court so that it could determine if the husband "had the requisite fraudulent intent at the time he transferred the affected assets" that would cause the transfer to be avoided.[37]

The First DCA and counsel for the plaintiff therefore analyzed the transfer, and had no issue with the husband making the transfer of individually owned corporate stock into tenancy by the entireties.

In the 1998 case, *Sackett v. Shahid*, the First District Court of Appeals determined that stock individually owned by the husband had not been properly transferred to the marital unit.[38] The DCA stated:

> [a]lthough the Shahids testified that they intended to have the stock in Shoreline transferred into their joint names as tenants by the entireties, there is no documentation in the record (i) of a transfer by Mr. Shahid of any part of his sole ownership interest to his wife or to himself and his wife as tenants by the entireties or (ii) of the issuance by Shoreline of any shares of stock to Mrs. Shahid or to Mr. and Mrs. Shahid as tenants by the entirety. The record contains only an unexecuted form document purporting to make a transfer of the stock from Mr. Shahid, as the sole shareholder, to himself and his wife as tenants by the entireties, but neither the Shahids nor their attorney could produce an

executed copy of this instrument.[39]

The foregoing language implies that if the Shahids had produced a properly executed document transferring the stock solely owned by Mr. Shahid to himself and Mrs. Shahid as TBE, the DCA would have held that the stock was owned as TBE.

In 1987, the Bankruptcy Court for the Middle District of Florida held in *In re Golub* that a TBE was created when a husband transferred his interests in a promissory note and profit sharing plan to himself and his wife as tenants by the entireties.[40] In this case, the debtor had entered into an Antenuptial agreement declaring that once married he would transfer his property to joint ownership with his wife. After the couple married, the husband assigned his interest in a promissory note to himself and his wife as joint tenants with the right of survivorship. He also assigned his interest in a profit sharing plan to himself and his wife as joint tenants. The Court analyzed whether the required unities for TBE were present and finding that they were stated, "the spouses have joint ownership and control, the interests are the same, the interests originate in the same instruments, the interests are commenced simultaneously and the interests recognize the unity of marriage."[41] However, the Court held that household furnishings brought into the marriage by the husband were not held by the entireties because the couple "failed to execute a conveyance after their marriage to accomplish their intent."[42] Collier on Bankruptcy cites to this case for the holding that "[p]ersonal property . . . [was] held as tenants by the entireties because [it was] conveyed to the husband and wife with the intention of being held as such."[43]

Following the above reasoning, in the 1990 case *In re Podzamsky*, the Bankruptcy Court for the Middle District of Florida held that a debtor husband failed to successfully transfer his partnership interest to himself and his wife as TBE.[44] The husband executed a document transferring his interest in a general partnership to himself and his wife and claimed it was held as TBE. However, the Court determined that the general partnership did not exist until after the document was executed. Therefore, the Court held that the couple did not own the partnership interest as tenants by the entirety because "there was no instrument of conveyance executed which clearly showed an intention to create a tenancy by the entirety and since the essential unities of an entirety estate did not exist."[45] Once again it can be

inferred that if the husband had executed a proper document transferring his interest to himself and his wife once the partnership was formed the Court would have found that an entireties estate existed.

After analyzing *Beal Bank*., the Bankruptcy Court for the Southern District of Florida found that a husband could assign his interest in tangible personal items to himself and his wife as TBE and that all unities were present to create a TBE. The Court stated that "a presumption arises that personal property is held as a tenancy by the entireties as long as the personalty was acquired by husband and wife in accordance with the unities of possession, interest, title, and time with right of survivorship."[46] The husband and wife in *In re Kossow* had executed an agreement before marriage indicating their intent to transfer property to each other as joint tenants once married. Once married, the husband assigned his interest in tangible personal property to himself and his wife. The Court determined that all of the unities were present to create a TBE. The Court noted that "an analysis of intent [was] not required based upon the Court's decision to extend the presumption of a tenancy by the entireties to personal property acquired in accordance with the unities of an entireties estate."[47]

Citing to *In re Kossow*, the Bankruptcy Court for the Middle District of Florida confirmed in the 2006 case, *In re Caliri* that "[a] property interest acquired prior to marriage can be converted to an interest held as tenants by the entireties through an assignment executed subsequent to the marriage."[48] Florida Jurisprudence 2d also cites to *In re Caliri* as the case representing Florida law on the subject.[49]

CONCLUSION:

From the foregoing analysis, tenancy by the entireties can exist in Florida for all forms of real and personal property, whether tangible or intangible. Furthermore, as with real property, there is ample support that a spouse can transfer his or her individual interest in personal property to the marital unit as TBE without the use of a strawman. Perhaps the legislature can act to confirm what the Florida Supreme Court has said on several occasions, as set forth above, in order to avoid future unnecessary confusion in this area.

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1 *E.g., Johnson v. Landefeld*, 138 Fla. 511 (Fla. 1939); *Ohio Butterine, supra* note 2; *Beal Bank, supra* note 1; *Doing, supra* note 2; *Hurlbert v. Shackleton*, 560 So. 2d 1276 (Fla.1st D.C.A. 1990); *Sackett v. Shahid*, 722 So. 2d 273 (Fla. 1st D.C.A. 1998); *In re*

FLORIDA SUPREME COURT CASES CONFIRM TENANCY BY ENTIRETIES IN PERSONAL PROPERTY AND ABILITY OF ONE SPOUSE TO TRANSFER ASSETS TO TENANCY BY THE ENTIRETIES

By: Gassman and Pless

Estate of Cardini, 305 So. 2d 71 (Fla. 3rd D.C.A. 1974); *Tingle v. Hornsby*, 111 So. 2d 274 (1st D.C.A. (1959); *In re Golub, supra* note 1; *In re Podzamsky*, 122 B.R. 596 (Bankr. M.D. Fla. 1990); *In re Kossow*, 325 B.R. 478 (Bankr. S.D. Fla. 2005). *In re Caliri*, 347 B.R. 788 (Bankr. M.D. Fla. 2006).

2*English, supra* note 2 at 430 (quoting the encyclopedia: "[I]t may be laid down as a general proposition that where land is conveyed to both husband and wife, they become seized of the estate thus granted *per tout et non per my*, and not as joint tenants or tenants in common. The estate thus created is, however, essentially a joint tenancy, modified by the common law doctrine that the husband and wife are one person. Upon the death of one spouse the entire estate goes to the survivor, but the survivor takes no new estate, since there is a mere change in the person holding, and not an alteration in the estate held. Neither spouse can alien or forfeit any part of the estate without the assent of the other, so as to defeat the right of the survivor. There can be no severance of the estate by the act of either, and no partition of the lands during their joint lives."

3 Id. at 430-431.

4 Id. at 431.

5 *Bailey, supra* note 2.

6 Id. at 307.

7 Id. at 308.

8 *Doing supra* note 2.

9Id. at 454 (quoting *Bailey v. Smith* at 305, *supra* note 2.).

10 *First Nat'l Bank, supra* note 2 at 779. The authors note that *Atcheson v. Atcheson* was decided in 1849.

11 *Beal Bank SSB, supra* note 1.

12 *Johnson, supra* note 3 at 513, emphasis added.

13 248 F.2d 528 (Fla. 1957).

14 *Ohio Butterine, supra* note 2 at 465 (quoting *Chandler v. Cheney*, 37 Ind. 399 (Ind. 1871).

15 Id. at 466.

16 *Beal Bank SSB, supra* note 1 at 51.

17 Perhaps the lower courts were under the impression that a two year fraudulent transfer statute would apply although the Florida Uniform Fraudulent Transfer Act applies a four year statute of limitation.

18 *Beal Bank SSB, supra* note 1 at 60.

19 Id. at at 58.

20 2006 U.S. Dist. LEXIS 97009 (S.D. Fla. 2006) (quoting *Beal Bank SSB, supra* note 1 at 57).

21 Id. at 10, *emphasis added.*

22 Id. at 53 (quoting *Bailey, supra* note 2 at 303).

23 *Ohio Butterine, supra* note 2 at 463 (quoting *Chandler v. Cheney*, 37 Ind. 399 (Ind. 1871)) "The estate is placed beyond the exclusive control of either of the parties, or the reach of creditors, unless it can be successfully attacked and set aisde for fraud. Any other rule would create injustice and hardship. If the husband can dispose of the estate during their joint lives, the wife is deprived of the enjoyment without her consent. . . . . The property belongs as much to the wife as to the husband, and she has just as clear, undoubted, and equitable a right to the use and enjoyment of the property during the existence of the marriage as she has to succeed to the estate upon the death of her husband. . . . The right of the wife to the joint enjoyment of the estate dur ing the marriage is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of her husband. The rights of the wife in the joint property are as sacred as those of the husband, and should be as firmly secured, guarded, and protected by the law as are his.There is an equity in equality; but there is gross iniquity and injustice in permitting the husband to deprive the wife of the use and enjoyment of an estate that does not belong exclusively to either, but to both, and which belongs as much to the wife as to the husband."

24 *Beal Bank SSB, supra* note 1 at 54.

25 Id.

26 *Doing, supra* note 2.

27 *Beal Bank SSB, supra* note 1 at 57.

28 Id. at 52, *emphasis added.*

29 Henry T. Sorenson and Philip V. Martino, *Marital Bank Accounts and Entireties Property What is the Status of Florida Law?* Florida Bar Journal, April 1999 at 60, 62).

30 *Beal Bank v. Almand & Assoc. Inc*., 710 So.2d 608, 616 (5th D.C.A. 1998); *AmSouth v. Hepner*, 647 So. 2d 907 (1st D.C.A. 1994); *Winters v. Parks*, 91 So. 2d 649 (Fla. 1956).

31 2011 WL 87237 (Bankr. S.D. 2011).

32 Id.

33 HRS §509-2; Wyo. Stat. § 34-1-140.
34 *Johnson, supra* note 3.
35 *Hurlbert, supra* note 2.
36 Id. at 1278.
37 Id. at 1280.
38722 So. 2d 273 (1st D.C.A. 1998).
39 Id. at 275.
40 *In re Golub, supra* note 2 The authors note that the assignment of the profit sharing plan may not be valid under ERISA rules but nevertheless the Court's analysis of a spouse's right to transfer personal property to TBE is correct.
41 Id. at 233.
42 Id.
43 13 Survey Collier on Bankruptcy FL, Survey of States Recognizing Tenancy by the Entireties Exemption, 2011.
44 *In re Podzamsky, supra* note 3.
45 Id. at at 599.
46 *In re Kossow, supra* note 3 at 485.
47 Id. at 486.
48 *In re Caliri, supra* note 3 at 798.
49 12 Fla. Jur. 2d. Cotenancy & Partition 27 (2011).

D. JOINT ACCOUNTS - BEAL BANK, SSB v. ALMAND AND ASSOCIATIES

On March 1, 2001, the Florida Supreme Court issued its decision in *Beal Bank*[77] after the Fifth District Court of Appeals certified that the question of whether certain bank accounts were considered as tenancy by the entireties was of great public importance.

In this 38 page opinion, the Florida Supreme Court endeavored to shed light on "what has been termed a morass in the common law . . . We hope to bring greater predictability and uniformity to the common law governing accounts held at financial institutions and to eliminate the confusion that has arisen from our prior decisions . . ." As the dissent in this opinion points out, however, the effect that this opinion will have on many different aspects of joint ownership will remain to be seen.

The court reviewed prior case law whereby married couples had been required to satisfy burdens of proof to show that they intended and indeed did have tenancy by the entireties accounts where brokerage firm account agreements and bank account signature cards and agreements have not explicitly provided for tenancy by the entireties. The court noted that in a tenancy by the entireties arrangement as between the spouses, the interest is non-severable by either spouse acting independently of the other.

77 780 So.2d 45 (Fla. 2001).

The court noted that the case law in Florida has long recognized that real property acquired in the name of a husband and a wife is considered to be held as tenancy by the entireties by rule of construction. The court noted that with personal property, it had applied a different standard by requiring that "not only must the form of the estate be consistent with entireties requirements, but the intention of the parties must be proven."

The court's primary holding was as follows:

> 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 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.

Thus, the burden will be on the creditor to prove by a preponderance of evidence that a tenancy by the entireties is not created.

The court discussed the following examples of bank account titling:

1. An express designation on the signature card that the account is held as tenancy by the entireties ends the inquiry as to the form of ownership. Thus, extrinsic evidence may not be brought up by a creditor in those circumstances.

2. Depositors may sign an express statement that tenancy by the entireties is not intended, coupled with an express designation of another form of legal ownership. In that circumstance no presumption of a tenancy by the entireties arises [and] this express disclaimer would end the inquiry as to whether a tenancy by the entireties was intended.

3. If the signature card does not expressly disclaim tenancy by the entireties, there is a rebuttable presumption that a tenancy by the entireties exists where the other unities are established.

4. If the financial institution does not offer a tenancy by the entireties form of account, and the signature card expressly states that

the account is not held by tenants by the entireties, no presumption of tenancy by the entireties ownership arises, but the debtor and the spouse may prove by a preponderance of the evidence that there was an intent to own the account as tenants by the entireties.

5. If the financial institution offered the option of tenancy by the entireties ownership, and the debtor and spouse affirmatively disclaimed tenancy by the entireties ownership and elected another form of joint ownership, then there would not be tenancy of entireties ownership, and the inquiry would end.

As a result of the factual scenarios described above, it seems clear that the only way to be absolutely sure of tenancy by the entirety status is for the lawyer to review all applicable paperwork relating to a subject account or other assets, if that is feasible.

The specific questions certified to the Florida Supreme Court in this case and the court's answers were as follows:

In an action by the creditor of one spouse seeking to garnish a joint bank account titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, should a presumption arise that shifts the burden to the creditor to prove that the subject account was not held as a tenancy by the entireties?
Florida Supreme Court Answer: Yes

In an action by the creditor of one spouse seeking to garnish a bank account jointly titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, but the signature card expressly states that the account is owned as a joint tenancy with right of survivorship, does that statement alone constitute an express disclaimer that the account is not held as a tenancy by the entireties?

Florida Supreme Court Answer: No

In an action by the creditor of one spouse seeking to garnish a bank account jointly titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, but the signature card expressly disclaims the tenancy by the entireties form of ownership, may the debtor resort to extrinsic evidence to prove that a tenancy by the entireties was intended if the debtor establishes that the financial institution did not offer a tenancy by the entireties form of account ownership?

Florida Supreme Court Answer: Yes

Caution -- Notwithstanding the *Beal Bank* case, clients should be careful in simultaneously establishing tenancy by the entireties accounts, and labeling them as such. The author generally recommends that clients who open accounts with institutions that do not offer a checkbox for tenancy by the entireties, put the actual letters TBE in the title of the account [example -- Dr. John and Mary Smith, TBE account]. Clients will continue to tell their lawyers that they have explicitly checked the tenancy by the entireties box or that such a box did not exist to be checked, in situations where they have inadvertently checked another box, didn't see the tenancy by the entireties box, or performed some other unexpected act that could destroy tenancy by the entireties status and surprise their advisers.

For example, suppose the account registration form provides the following option:

☐ Joint With Right of Survivorship

☐ Other _____

To create a tenants by the entireties account in this situation, the clients should fill in the "Other" blank with "Dr. and Mary Smith, as Tenants by the Entireties," but under the Mathews case, which is described in Section (E) below, it should also be sufficient to check "joint with right of survivorship" box, although this could lead to challenge if the creditor believes that the Mathews case could be overturned.

After the *Beal Bank* decision, there was some difference in opinion between bankruptcy courts as to whether the "Beal Bank Presumption" applied to tangible personal property, stock certificates, automobiles, and other assets. For a good discussion of this debate, see the bankruptcy court case of *In re Matthews.*[78]

Will the Florida law of tenancy by the entireties apply to bank accounts held in Florida even though the owners live in another state? Case law and Florida Statutes seem to support the idea that the law of the "situs" of the property would apply, which should entitle bank accounts in Florida to tenants by the entireties protection, regardless of whether the owners of the account live in Florida.

Florida Statute Section 655.55 states as follows:

78 360 B.R. 732 (Bankr. M.D. Fla. 2007).

(1) The law of this state, excluding its law regarding comity and conflict of laws, governs all aspects, including without limitation the validity and effect, of any deposit account in a branch or office in this state of a deposit or lending institution, including a deposit account otherwise covered by s. 671.105(1), regardless of the citizenship, residence, location, or domicile of any other party to the contract or agreement governing such deposit account, and regardless of any provision of any law of the jurisdiction of the residence, location, or domicile of such other party, whether or not such deposit account bears any other relation to this state, except that this section does not apply to any such deposit account:

(a) To the extent provided to the contrary in s. 671.105(2); or

(b) To the extent that all parties to the contract or agreement governing such deposit account have agreed in writing that the law of another jurisdiction will govern it.

Further, the statute defines "deposit account" as "any deposit account in one or more names" and includes a "joint account."

In the case of *Sanchez v. Sanchez*,[79] the court cited to Florida Statute Section 655.55 and found that Florida, rather than Venezuela, law governed the rights of the beneficiaries to Totten trust bank accounts upon the trustee's death, even though the trustee was domiciled in Venezuela.

The *Sanchez* court explicitly stated that "[i]t is well settled in Florida that the disposition of a joint bank account, including a Totten trust, is governed by the law of the situs of the account regardless of the domicile of any party to the account."

Further, the court stated that "[i]n the instant case, the subject Totten *trust bank accounts are located in a bank in Miami, Florida*, and accordingly *Florida law must govern* their disposition- even though (a) *Venezuela is the domicile of the decedent* who created the trusts, and (b) Venezuelan law is *contrary to Florida law* on the disposition of the trusts when, as here, the creator of the trust dies."

Although this case does not explicitly deal with a tenants by the entireties account, it supports the position that Florida law would apply because Florida is the situs of the account.

79 547 So. 2d 943 (Fla. 3d DCA 1989).

In another case, *McNeilly v. Geremia*,[80] a Bankruptcy Appellate Panel held that the "applicable nonbankruptcy law" that determined whether funds in a tenancy by the entireties account were exempt was the law of Vermont (where the bank account was located) not the law of Rhode Island (where the debtors lived and filed for bankruptcy). The court specifically stated, "the state law at play in § 522(b)(2)(B) is not 'keyed into the situs of the debtor's pre-petition domicile,' here Rhode Island, but is determined by the 'situs of the asset that is held by a debtor in bankruptcy as a tenant by the entireties.'"

E. STOCK CERTIFICATES

In a 2002 case, *Cacciatore v. Fisherman's Wharf Realty Ltd. Partnership*,[81] Florida's Fourth District Court of Appeal held that the presumption of tenancy by the entireties extends to **shares of stock held in certificate form titled in the joint names of spouses**. However, it is safer to title all stock certificates explicitly as tenants by the entireties.

What if, when purchasing the stock, the debtor had a choice between joint with right of survivorship or "other" with a blank line to fill in where he or she could have written in "tenants by the entireties"?

This is illustrated as follows:

☐ Joint With Right of Survivorship

☐ Other _____

In 2009, the Eleventh Circuit Court of Appeals, in *In re Mathews*,[82] found that a stock certificate titled "ROBERT L. MATHEWS & JOYCE M. MATHEWS JT TEN" was held as tenants by the entireties, despite the fact that they had the opportunity to check the "other" box and write in "tenants by the entireties," as demonstrated above.

"The Debtor signed a document titled 'Stock Certificate Registration Instructions' which provided the Debtor with five ownership options – (1) Individual, (2) Tenants in Common, (3) Other, (4) Joint Tenants with Rights of Survivorship, and (5) Uniform Gift to Minor. The blank next to 'Joint Tenants with Rights of Survivorship' was checked."

80 249 B.R. 576 (1st Cir. BAP 2000).
81 821 So.2d 1251 (Fla. 4th DCA 2002).
82 307 Fed.Appx. 266 (11th Cir. 2009).

The Eleventh Circuit found that "*Beal Bank* does not support the argument that the Debtor expressly disclaimed ownership of the stock as tenants by the entireties by checking the 'Joint Tenants with Rights of Survivorship' blank instead of checking the 'Other' blank and writing in 'Tenancy by the Entireties.'" The selection of another form of ownership "is not an express disclaimer *unless* the documentation *affirmatively* provides the debtor with an option to select tenancy by the entireties." The bankruptcy court decision that was overturned by this decision is described as follows:

> The bankruptcy court in the case *In re Matthews*[83] concluded that a bank officer who titled stock certificates as joint tenants with rights of survivorship with his wife should have known to title the certificates as tenants by the entireties and thus lost the protection.
>
> Debtor claimed that he never filled out any forms associated with the stock. He said either the "the people at Florida National" typed up the registration for him, that "somebody else" wrote "JT TEN" on the election form, or that he merely received the items in evidence as they were titled and took no actions to change them.
>
> The stock certificate for the stock of First National Bank of Orange Park was titled "Robert L. Mathews or Joyce M. Mathews (JTWROS)".
>
> The registration form was checked as "Joint Tenants with Right of Survivorship."
>
> The First National Bank stock certificate was titled the same as the first.
>
> Though Debtor was a director of the bank, he never took steps to change how the original stock certificate was titled.
>
> On the Ameris Bancorp merger Election form, Debtor wrote "Robert L. Or Joyce M. Mathews" and the stock certificate issued is titled "Robert L. Mathews & Joyce M. Mathews JT TEN" and Debtor took no action to have it changed.

83 360 B.R. 732 (Bankr. M.D. Fla. 2007)

Debtor testified of his intent to own all personal property jointly with his wife because if he died before her, the property would go straight to her without probate.

The evidence supported the fact that Debtor did know about tenants by the entireties.

Therefore, the bankruptcy court concluded that the Debtor, a sophisticated businessman, knew what he was doing and fully intended to own the stock as joint tenants with right of survivorship and expressly disclaimed ownership as TBE.

F. PROVISIONS IN LLC SHAREHOLDER OPERATING AGREEMENTS AND PARTNERSHIP AGREEMENTS CAN CAUSE LOSS OF TENANTS BY THE ENTIRETIES STATUS

The author often sees entities designed to be owned as tenants by the entireties, with organizational documents inconsistent with the law of tenancy by the entireties. An example would be a shareholder agreement where a company is owned partly by a husband and wife as tenancy by the entireties, but the agreement states that on the death of any shareholder, the company would buy out the stock of that shareholder. Florida case law does not provide a clear answer on whether the parties' intention and titling of the company to be owned as tenants by the entireties would override the contradicting language in the shareholder agreement. It seems clear, however, that the only way to guarantee that the ownership will be given tenancy by the entirety status is to ensure that the shareholder agreement is consistent with the law of tenancy by the entireties; thus, the agreement should provide that on the death of any shareholder, the spouse has an automatic right of survivorship to all stocks owned by that shareholder.

Savings clause language that the Author uses for LLC Operating Agreements is as follows:

16.17 Tenants by the Entireties Ownership. If and when any Membership Interest is owned by and between a husband and wife as tenants by the entireties, then the Florida Law of Tenants by the Entireties shall be controlling as between such husband and wife, in that upon the death of one spouse, the interest shall be automatically owned by the other spouse, and it shall require the joinder of both

spouses to act with respect to a tenancy by the entireties ownership interest, notwithstanding any provision under this Operating Agreement to the contrary. Further, notwithstanding any provision under this Operating Agreement to the contrary, the Florida rules of tenancy by the entireties, and not the provisions under this Operating Agreement, shall apply with respect to any obligation herein imposed, such that any Florida resident married couple owning their Membership Interest as tenants by the entireties are considered as one entity until after the death of one of them. Therefore such couple shall be considered one Member for all voting purposes, it shall require joint approval of married members owning their interests as tenants by the entireties to take any action with respect to such Membership Interest, and this Operating Agreement shall be construed accordingly. If one spouse is referred to as a Managing Member and the other spouse is not referred to as Managing Member under this Agreement or by subsequent agreement or designation, then the spouse that is referred to as a Managing Member shall be considered a Manager, with the Manager designation being separate and apart from the tenancy by the entireties common membership status of both spouses.

G. TAX REPORTING CONSISTENCY

Ownership of entities will often be reflected for federal and state tax reporting purposes, and there are often inadvertent inconsistencies between the tax reporting documents and the intended ownership structure. For example, if ownership in an S-Corporation or a partnership is held as tenants by the entireties, the original S-Corporation Form 2553 and K-1 forms attached to S-Corporation or partnership tax returns should reflect such ownership.

The IRS instructions for Form 1065 state: "Number of Schedules K-1. Attach one for each person who was a partner at any time during the tax year." By this instruction, the IRS appears to indicate that tenancy by the entireties owners of a partnership interest should receive 2 separate K-1 forms. The author sees no harm in issuing a single K-1 form to the spouses as tenants by the entireties and listing one of their social security numbers, particularly where the spouses file a joint return.

The instructions for Form 1120S do not provide any guidance on this.

Sometimes stock will be issued jointly to spouses as tenants by the entireties, but the initial IRS Form 2553 may show only one spouse as owner. An S election is not valid unless it is signed by each owner, so one spouse cannot sign for both spouse

s. Fortunately, the Treasury Regulations are somewhat lenient in allowing this mistake to be corrected.

If a shareholder is inadvertently not listed on the Form 2553, this results in the shareholder not consenting to the S Election. However, the regulations may allow a late filed S Election, even if this occurs many years after the original S Election was made.

The requirements under Treasury Regulation Section 1.1362-6(b) are as follows:

1. There was reasonable cause for the failure to file the consent;

2. The request for the extension of time to file the consent is made within a reasonable time under the circumstances; and

3. The interest of the government will not be jeopardized by treating the election as valid.

The Request for an Extension of Time to File the S Corporation Election Consents should be filed with the District Director or with the IRS Service Center that received the original Form 2553 Election for the Corporation.

H. CONTRACTS TO PURCHASE REAL ESTATE

Oftentimes husbands and wives will simply put their names on real estate contracts with deposits, without clearly designating that they hold the contracts as tenants by the entireties. It is safest to have a contract to purchase real estate explicitly state that it is held by spouses as tenants by the entireties.

I. U.S. TREASURY BONDS

Treasury Regulations indicate that United States Treasury Bonds cannot be placed in tenancy by the entireties. These may be owned by one individual or by the revocable trust of one individual, but it does not appear that they will qualify to be held directly as tenants by the entireties.

J. JOINT TAX REFUNDS

The bankruptcy court case *In re Kossow*[84] extended the holding in *Beal Bank* and found that a federal tax refund resulting from a joint tax return could be consid-

84 325 B.R. 478 (Bankr. S.D. Fla. 2005).

ered tenancy by the entireties property. The court stated that "a rebuttable presumption arises that all personal property, including a joint tax refund, is held as a tenancy by the entireties as long as the personalty is acquired by husband and wife in accordance with the unities of possession, interest, title, and time with right of survivorship."

In re Hinton[85] **found that the tax refunds can be owned as tenants by the entireties**, where the husband and wife filed joint returns, each refund check was jointly payable to husband and wife, and upon receipt of the refund check it was deposited into a joint account, expressly opened as a tenants by the entireties account. *In re Freeman*[86] also found that tax refunds can be owned as tenants by the entireties.

However, one Florida bankruptcy case, *In re Morine*,[87] distinguishes Kossow and Hinton. Unlike Hinton, in this case, the debtor did not deposit the tax refund into a tenancy by the entireties account before filing his bankruptcy petition. Therefore, the Court found that "**the tax refund check was not deposited into a tenancy by the entireties bank account before the date of filing as in Hinton, so this Court declines to extend its holding**." Interestingly, the Court did not mention the *Freeman* case described above.

After *Morine*, another Middle District case, *In re Gorny*,[88] relied upon *In re Hinton* and *In re Freeman* and held that the tax refund qualified for ownership as tenancies by the entireties. However, in *Gorny* there were joint creditors, so the tax refund was not exempt.

Subsequently, *In re Rice*[89] followed the holding from *Morine* that the interest of each debtor in a joint refund is the amount attributable to his income. The court found that a debtor who had filed a joint income tax return with a non-debtor, income-earning spouse did not have an interest in entirety for the tax refunds.

In a December 2012 case, *In re Newcomb*,[90] the Bankruptcy Court for the Middle District of Florida addressed the conflict concerning this issue in Florida courts. The court cites to *Gorny, Freeman, Kossow*, and *Hinton* to support the proposition that joint tax refunds constitute tenancy by the entirety property. The court further cited to *Morine* and noted that "[n]ot every court, however, has agreed that joint tax refunds constitute tenancy by the entirety property. Indeed, a split of authority on this issue exists within the Middle District of Florida." Here, the court declined to follow *Morine* and held that the joint tax refund was exempt as tenants by the entireties

85 378 B.R. 371 (Bankr. M.D. Fla. 2007).
86 387 B.R. 871 (Bankr. M.D. Fla. 2008).
87 391 B.R. 480 (Bankr. M.D. Fla. 2008).
88 2008 WL 5606583 (Bankr. M.D. Fla. 2008).
89 442 B.R. 140 (Bankr. M.D. Fla. 2010).
90 2012 WL 6043000 (Bankr. M.D. Fla. Dec. 4, 2012).

property.

It seems that tax refunds attributable in great part to one spouse as opposed to joint activities or investment losses will be considered to be tenancy by the entireties assets. The court, in *In re Garbett*,[91] held that a presumption exists that each debtor has equal interest in a joint tax refund, regardless of each debtor's respective contribution to the taxable income. The presumption is rebuttable based on facts and circumstances.

91 410 B.R. 280 (Bankr. E.D. Tenn. 2009).