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## Tea for Two, and Two for TBE?<sup>1</sup> Why Many Same-Gender Couples Living in Nonrecognition States Should Title Their Assets as Tenants by the Entireties

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Tea for Two,  
And two for TBE,  
Many clients want to own assets jointly,  
If not sure, why not try and see. . . . .”

On and well before July 4, 1776, the law of England, and thus the laws of each of the original 13 and many subsequently admitted U.S. states provided that husbands and wives could own their assets jointly as tenants by the entireties (TBE). TBE gives both parties an equal and undivided interest in the property and provides a result neither spouse alone nor any

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<sup>1</sup> The author’s topical homage to the 1924 song “Tea for Two and You for Me,” lyrics by Irving Caesar and performed by Doris Day and Gordon MacRae in the 1950 movie “Tea for Two.”

creditor would be able to break the tenancy or have a claim against such joint assets.<sup>2</sup>

Today exactly one-half of the states and the District of Columbia<sup>3</sup> recognize TBE as a form of ownership between married couples, and 13 of these jurisdictions<sup>4</sup> prohibit creditors of one spouse from having access to the TBE assets. The other TBE states offer varying degrees of creditor protection.

The law of England did not recognize same-sex marriages until this was legislated in the United Kingdom effective March 13, 2014. As of June 26, 2014, 13 of the jurisdictions that recognize TBE,<sup>5</sup> and seven of the jurisdictions that provide “pure protection” for TBE have recognized same-gender marriage,<sup>6</sup> as set forth in the chart below. “Pure Protection” refers to those state laws that protect TBE assets from the creditors of only one spouse.

What should same-gender couples do who reside in states that recognize TBE but not same-gender mar-

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<sup>2</sup> In a state that recognizes creditor protection for tenancy by the entireties assets, a creditor holding a judgment against one spouse generally is not able to reach the tenancy by the entireties assets.

<sup>3</sup> Alaska, Arkansas, Delaware, D.C., Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

<sup>4</sup> Delaware, D.C., Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Pennsylvania, Vermont, Virginia, and Wyoming.

<sup>5</sup> Delaware, D.C., Hawaii, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.

<sup>6</sup> Delaware, D.C., Hawaii, Indiana, Maryland, Pennsylvania, and Vermont.

riage (Florida, Mississippi, Missouri, North Carolina, Virginia and Wyoming)? Will the Supreme Court confirm that TBE is a viable option when a same-gender couple is married in a jurisdiction that allows TBE, and resides in a jurisdiction that allows TBE and creditor protection for TBE? As the gay rights movement pushes forward, with marriage as the hot topic in the wake of the Supreme Court's landmark decision in *United States v. Windsor*,<sup>7</sup> this issue and other similar issues remain unanswered.

In the vast majority of situations, we believe that the best strategy for same-gender couples, who would otherwise own their assets jointly with right of survivorship, will be to attempt to establish TBE status while having back-up structures and mechanisms, as they may choose. This is to protect the couple in case the TBE is not recognized.

For example, Brittany and Angela are a Florida couple who have children together and have shared their assets for a number of years. They were recently married in Delaware, but Florida does not recognize their marriage. Angela is an obstetrician, and has a high risk of being sued by patients. Brittany works part-time as a podiatrist, and also drives the children to school, soccer, and other events. Brittany was in a car accident recently and one of her friend's children was injured. The other driver received a ticket, and Brittany does not expect to get sued, but unfortunately the damages could exceed the limits of her liability insurance policy. You explain that it could be several years before the U.S. Supreme Court finally decides whether all states must recognize same-gender marriages that are consecrated in a state that recognizes them, and that until then it will be unclear in Florida and many other states as to whether the joint assets of same-gender married couples will be treated as held as TBE for purposes of creditor protection.

Most of the assets of Angela and Brittany have been held a limited liability company (LLC) owned 5% by Angela and 95% by Brittany. They ask about placing the ownership of the LLC into TBE so that if Brittany were in a car accident they would not lose or have a charging order against 95% of their LLC.

A large portion of the couple's other assets have been held in an LLC owned 90% by a revocable trust owned by Brittany and 10% in a revocable trust owned by Angela. Angela and Brittany had a cohabitation agreement and more recently have entered into a Marital Property Agreement that provides that their assets would be equally divided in the event that either of them files a court petition to separate their assets.

You explain that, if the attempted TBE is not recognized, the creditors can make claim to the one-half

ownership held by the debtor spouse, but that mechanisms can be put into place to provide a degree of protection if TBE will not be recognized.<sup>8</sup> You also explain that, because they are now married, Angela could transfer enough ownership of the LLC to Brittany so that they will be equal owners, and no gift tax return would need to be filed. They could then transfer the ownership of the LLC to themselves as TBE, which may or may not be recognized, as discussed below.

Each state has had a different evolution or legislative history that causes the formation and recognition of TBE to be different in each state. However, it is a common requirement that joint assets that are held with right of survivorship will not be considered as TBE assets unless and until there is a conveyance by the spouses, through a straw man, from themselves as joint tenants, to themselves as TBE, by deed, bill of sale, establishing new accounts, cancellation and reissuance of stock certificate, or whatever else is needed to satisfy the legal requirements that apply in that state.

For example, in Florida, real estate owned before a marriage with right of survivorship, as well as bank accounts and stock certificates, will not be considered as TBE property until the couple reconveys the real estate or stock certificate from themselves as joint owners to themselves as TBE. In the case of bank or brokerage accounts, the spouses must open new TBE accounts and transfer or ledger the jointly held money or assets over into TBE.

You also explain to Angela and Brittany that bank and brokerage accounts held in a financial institution that exists only in a state that does not recognize TBE may not be considered TBE assets, even if the titling is otherwise correct.

From the above discussion, it seems clear that any same-gender couple wishing to own assets jointly with right of survivorship in a state that recognizes creditor protection for TBE assets will be well advised to retitle the assets as TBE to have a degree of creditor protection that may not otherwise apply.

Nevertheless, clients need to understand that it may be many years before our courts, legislatures, and case law provide exact guidance and predictability as to the degree of protection that TBE will receive.

This is why many Floridians establish Florida LLCs that in turn own assets that may be situated outside of Florida to assure that the ultimate ownership qualifies as TBE.

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<sup>8</sup> Many same-gender couples choose to own their assets jointly, and normally this will be with right of survivorship between them. If a creditor gets a judgment against one joint owner, then the one-half ownership interest of that joint owner would normally become accessible to the creditor.

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<sup>7</sup> 133 S. Ct. 2675 (2013).

You also explain that, under Florida law (and the laws of most other states), if a married couple owns interests in an LLC jointly but not as TBE, and a creditor receives a judgment against only one spouse, the creditor cannot reach into the LLC or take over one-half ownership, but instead only receives a charging order that gives it the right to monitor the LLC and to receive one-half of any LLC distributions to the debtor spouse. Such a creditor has no right to require that the LLC make distributions, so typically charging order positions are bought off by debtors for a small percentage of the underlying value of the assets that are held in the entity to which the charging order attaches.

Brittany and Angela might also consider establishing a Delaware TBE trust. By legislation passed in 2010, Delaware law provides that assets held by a Delaware trustee under a bona fide Delaware TBE trust will be considered as TBE assets, notwithstanding the residency or other potential circumstances of the married couple.

It is unknown whether a Florida court will apply Delaware law to analyze the status of assets owned beneficially in a Delaware TBE trust by spouses who are resident in Florida if Florida does not recognize TBE for same-gender marriages. Regardless, the Delaware creditor protection trust statute may apply to provide protection from creditors of the couple. This is assuming that the full faith and credit clause of the Constitution does not require Delaware to follow a court decision in Florida that may deny applying Delaware law to a case involving a Florida LLC that has assets originating from Florida but is owned by a Delaware TBE trust. A decision that may indicate how a court would view this would be the 2013 case of *Waldron v. Huber (In re Huber)*,<sup>9</sup> which has been widely discussed. In that case, a federal judge from the Western District of Washington found jurisdiction over an Alaska trust having an Alaska trustee, where the grantor lived in Washington state and funded the trust under circumstances found to have been a fraudulent transfer (for the purpose of avoiding creditors) and the trust in Alaska held only a \$10,000 account and ownership of an LLC that in turn owned Washington real estate.

It is worth noting that Tennessee has an asset protection and TBE trust statute<sup>10</sup> that many commentators believe is stronger and more thoroughly drafted than Delaware's statute. This new Tennessee statute was legislated to go into effect on July 1, 2014.

It is also worthwhile to note that TBE protection also applies under the federal Bankruptcy Code and,

based on the statement issued in February 2014 by Attorney General Eric Holder,<sup>11</sup> same-gender married couples residing in states that do not recognize their marriages may nevertheless file as married persons in bankruptcy under the federal Bankruptcy Code. Presumably, this means that, if a married individual has creditors who do not have a claim against his or her same-gender spouse and resides in a state that does not recognize TBE, the bankruptcy court in the state where he or she resides will provide protection of TBE. This should be true regardless of whether the law in that state provides creditor protection or recognition for same-gender couples.

It would therefore seem that the protection of TBE assets will be more certain for same-gender married couples who file bankruptcy even when they live in a state that does not recognize their marriage or creditor protection for TBE assets.

Notwithstanding the above conversation, you explain to Angela and Brittany that it could be decades before the law in this area is ever clear, and other creditor protection vehicles, such as annuities, life insurance, homestead, and asset protection trusts may be employed as and when applicable.

On April 19 and 20, 2014, Oregon and Pennsylvania became the 18th and 19th states to recognize same-gender marriages, respectively. These are just the two most recent decisions furthering same-gender marriages since the *Windsor* decision, issued in June 2013. *Windsor* struck down part of the Defense of Marriage Act (DOMA) and forced the federal government to recognize same-gender marriages. Using the logic set forth in *Windsor*, many states, including Kentucky, Ohio, Indiana, and Tennessee, have held that bans on same-gender marriages are completely unconstitutional. No federal court has held that such bans are constitutional.

With the same-gender marriage landscape shifting so quickly, many estate planners representing same-gender couples who are married in a "recognition state" are left to ponder whether traditionally recognized marital rights will also be given to same-gender couples. Equal Protection is the constitutional guarantee that *no person or class* is denied the same protection of the laws that is enjoyed by other classes. Under this definition of Equal Protection, one would assume the class of same-gender people could not be discriminated against for sexual orientation. For this reason, it seems like a no-brainer for estate planners to use TBE in states such as Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and Vermont, where same-gender

<sup>9</sup> 493 B.R. 798 (Bankr. W.D. Wash. 2013).

<sup>10</sup> Tenn. Code Ann. tit. 35, ch. 15, part 5. (This is Tenn. Code Ann. §§35-15-501, *et seq.*)

<sup>11</sup> See <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html>.

marriage and TBE are both recognized.<sup>12</sup> Things start to get more fuzzy in states that are only required to recognize legitimate out-of-state same-gender marriages.

In the 2013 Ohio case of *Obergefell v. Kasich*,<sup>13</sup> which forced Ohio to recognize legitimate out-of-state same-gender marriages, U.S. District Judge John G. Heyburn II said that Ohio's refusal to recognize gay marriage is "unenforceable in all circumstances." Also within the ruling was the acknowledgment that, once the government attaches benefits to marriage, it must constitutionally grant equal protection to all. With TBE undeniably being one of those benefits provided to heterosexual married couples, logically courts would extend that line of reasoning to recognize same-gender TBE as well. Therefore, in states that recognize legitimate out-of-state same-gender marriages, couples should title their assets as TBE if state law protects such assets from the creditors of either partner. States like Ohio are seemingly in a transition to fully allowing same-gender marriages. However, over half the states still do not recognize same-gender marital rights at all.

The states that provide significant creditor protection, but not same-gender marriage recognition, are Florida, Indiana, Michigan, Mississippi, Missouri, North Carolina, Virginia, and Wyoming.<sup>14</sup> Estate planners representing same-gender couples who re-

side in these states face the greatest dilemma due to the potential upside of successfully titling assets as a TBE. These estate planners should strongly consider continuing to push the envelope and having their clients title their assets as TBE. Since the 2013 *Windsor* decision, courts in these jurisdictions have been far more willing to recognize that laws favoring heterosexual couples are unconstitutional.

The chart following the text of this article shows the states that recognize TBE, and the degree of creditor protection associated with it.

Advisors representing same-gender couples who reside in TBE states that offer creditor protection attributes should consider advising their clients to title assets and entities between them as TBE, and advise on the possible impact of such titling. The creditor protection aspects may be especially important for medical or other professionals who work in areas of high risk or for business people who guarantee debts or have other possible obligations for which their same-gender spouse would not be responsible.

Clients who need or wish to have a higher chance of success, if a creditor were to pursue assets, may wish to consider using a Delaware or Tennessee TBE trust. Both states have legislation that specifically provides that their TBE rules will apply to assets held under a trust that has an active trustee and assets held in that state. Time will tell whether the Full Faith & Credit Clause of the U.S. Constitution will permit assets held in a trust under one state to be classified pursuant to the characterization laws of that state, but it cannot hurt to try.

<sup>12</sup> Please see the chart that follows the text of this article.

<sup>13</sup> No. 1:13-CV-501, 2013 BL 193284 (S.D. Ohio July 22, 2013).

<sup>14</sup> Please see the chart that follows the text of this article.

<b>STATE</b>	<b>LAW</b>	<b>PURE PROTECTION</b>	<b>ALLOWS SAME-GENDER MARRIAGE</b>
Alaska	Recording a judgment against a judgment debtor, thus creating a judgment lien against property owned by the judgment debtor, does not sever a TBE between the judgment debtor and spouse. <i>Smith v. Kofstad</i> , 206 P.3d 441 (Alaska 2009).	No	No
Arkansas	Real property owned by the husband and wife as TBE may be sold under execution to satisfy a judgment against the husband, subject to the wife's right of survivorship. <i>Morris v. Solesbee</i> , 892 S.W.2d 281 (Ark. Ct. App. 1995).	No	No
Delaware	Creditors of a spouse have no interest in realty that is held as TBE. <i>Johnson v. Smith</i> , 1994 WL 643131 (Del. Ch. 1994).	Yes	Yes

<b>STATE</b>	<b>LAW</b>	<b>PURE PROTECTION</b>	<b>ALLOWS SAME-GENDER MARRIAGE</b>
D.C.	Although TBE property is liable for the spouses' joint debts and for the individual debts of the surviving cotenant, it is unreachable by the creditors of one tenant. <i>Morrison v. Potter</i> , 764 A.2d 234 (D.C. 2000).	Yes	Yes
Florida	Property is subject only to the debts of both spouses. <i>In re Matthews</i> , 360 B.R. 732 (Bankr. M.D. Fla. 2007).	Yes	No
Hawaii	An estate by the entirety is not subject to the claims of the spouse's individual creditors during the joint lives of the spouses. <i>Sawada v. Endo</i> , 561 P.2d 1291 (Haw. 1977).	Yes	Yes
Illinois	TBE in real property is available for homestead property only. <i>Premier Property Management, Inc. v. Chavez</i> , 728 N.E. 2d 476 (Ill. 2000).	No	Yes
Indiana	Generally, the creditor of one spouse may not seize, sell or attach TBE property. <i>Anuszkiewicz v. Anuszkiewicz</i> , 360 N.E.2d 230, 232 (Ind. Ct. App. 1977).	Yes	Yes (law took effect June 1, 2014)
Kentucky	A creditor cannot force a sale of property owned by husband and wife as TBE, but the debtor spouse's expectant interest can be sold. <i>Coleman American Companies, Inc. v. Leasure</i> , No. 2007-CA-002310-MR, 2008 BL 343968 (Ky. Ct. App. Dec. 12, 2008).	No	No
Maryland	Because TBE property is owned by the husband and wife as the marital unit, it is not subject to the claims of individual creditors of either spouse. <i>Schlossberg v. Barney</i> , 380 F.3d 174, 178 (4th Cir. 2004).	Yes	Yes
Massachusetts	The property is protected from creditors of the debtor spouse, so long as the nondebtor spouse lives in the house. <i>Coraccio v. Lowell Five Cents Sav. Bank</i> , 612 N.E. 2d 650, 654 (Mass. 1993). If the nondebtor spouse no longer occupies the residence, it is subject to the execution for the debts of the other spouse. <i>In re Snyder</i> , 231 B.R. 437, 443 (Bankr. D. Mass. 1999).	No	Yes
Michigan	<i>In re Strausbough</i> , 426 B.R. 243 (Bankr. E.D. Mich. 2010). A TBE form of concurrent ownership is intended to protect the marital estate. In a TBE, neither husband nor wife may sell or encumber property to a third person without consent of the other spouse. To the extent of joint debt, TBE property is not protected from claims of the joint creditors.	Yes	No
Mississippi	Mississippi statutory authority states that assets of a debtor do not include "[a]n interest in property held in TBE to the extent it is not subject to process by a creditor holding a claim against only one tenant." Miss. Code Ann. §15-3-101(b)(iii).	Yes	No
Missouri	<i>Hanebrink v. Tower Grove Bank &amp; Trust Company</i> , 321 S.W.2d 524, 527 (Mo. Ct. App. 1959).	Yes	No

<b>STATE</b>	<b>LAW</b>	<b>PURE PROTECTION</b>	<b>ALLOWS SAME-GENDER MARRIAGE</b>
New Jersey	While New Jersey recognizes TBE, creditors of either spouse have the right to reach TBE property, including debtor-spouse's present interest therein, subject to the right of survivorship; thus, a creditor who does so becomes a tenant in common, in possession with nondebtor-spouse. <i>In re Etoll</i> , 425 B.R. 743 (Bankr. D.N.J. 2010).	No	Yes
New York	A TBE cannot be divided absent consent of both spouses. <i>Prario v. Novo</i> , 645 N.Y.S.2d 269 (N.Y. 1996). This applies only to real estate.	No	Yes
North Carolina	Where property is held as TBE, any judgment against only one of the spouses may not attach to the real property while it remains as a TBE. <i>Dealer Supply Co. v. Greene</i> , 422 S.E.2d 350 (N.C. Ct. App. 1992).	Yes	No
Ohio	Only recognizes TBE if established prior to April 4, 1985. Ohio Rev. Code Ann. §5301.21.	No	No
Oklahoma	Some, but not all, creditors can pursue the obligations of individual spouses in the TBE property. <i>See Okla. Stat. Ann. tit. 60, §74.</i>	No	No
Oregon	The interest of a judgment debtor spouse, as TBE with nondebtor spouse, may be sold on execution, and the execution purchaser only obtains the debtor spouse's interest, which ceases to exist should a debtor spouse predecease the nondebtor spouse. <i>Hoyt v. American Traders, Inc.</i> , 725 P.2d 336 (Or. 1986).	No	Yes
Pennsylvania	Property held as TBE is unavailable to satisfy the claims of the creditor of one of the tenants. <i>Johnson v. Johnson</i> , 908 A.2d 290 (2006).	Yes	Yes
Rhode Island	In <i>Cull v. Vadnais</i> , 406 A.2d 1241 (1979), the court held that a creditor had the right to attach a debtor-spouse's interest in real property held as TBE.	No	Yes
Tennessee	Where the debtor owns property with a nondebtor spouse in a TBE, only the debtor's survivorship interest is subject to execution, not the debtor's present, possessory interest. 16 <i>Tenn. Prac., Debtor-Creditor Law and Practice</i> §15:33 (2d ed.).	No	No
Vermont	If a TBE is validly created, it is protected from the sole creditors of an individual debtor. <i>RBS Citizens, N.A., v. Ouhgrabka</i> , 30 A.3d 1266 (Vt. 2011). The court noted that the property held by husband and wife, as husband and wife, is protected from the sole creditors of either the husband or the wife. <i>Anchor Foundations, Inc. v. Ingalls</i> , 191 Vt. 641 (2011) (unpublished).	Yes	Yes
Virginia	Property that is held in TBE by spouses is protected from the claims of the debtor's individual creditors. <i>In re Bradby</i> , 455 B.R. 476 (Bankr. E.D. Va. 2011).	Yes	No

<b>STATE</b>	<b>LAW</b>	<b>PURE PROTECTION</b>	<b>ALLOWS SAME-GENDER MARRIAGE</b>
Wyoming	Wyoming law does not allow a judgment creditor to seize property held by a husband and wife as TBE to satisfy the individual debts of one of the spouses. <i>Colorado Nat. Bank v. Miles</i> , 711 P.2d 390, 393–94 (Wyo. 1985).	Yes	No