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Are your joint accounts with your spouse protected from creditors? The concept of tenancy by the entireties

A common misperception is that financial accounts such as bank and brokerage accounts owned jointly by husband and wife are exempt from the claims of each individual spouse's creditors. This issue has been the subject of ongoing litigation and much confusion in the courts.

The Florida Supreme Court in the 2001 decision of *Beal Bank, SSB vs. Almand and Associates, etc., et al.* attempted to resolve what many legal commentators referred to as a "morass." In the *Beal Bank* case, married couples opened multiple bank accounts. The couples contended that the accounts were Tenancy by the Entireties. Creditors of one spouse individually argued that the accounts were joint tenancy with right of survivorship. The form of ownership would dictate whether the creditors could garnish the accounts.

Only certain forms of asset titling can protect assets from the claims of an individual's creditors. One such form of ownership is Tenancy by the Entireties ("TBE"). Property held as TBE possesses six characteristics:

- (1) unity of possession (i.e. joint ownership and control);
- (2) unity of interest (the interests in the account must be identical);
- (3) unity of title (the interests must have originated in the same instrument);
- (4) unity of time (the interests must have

commenced simultaneously);

(5) survivorship; and

(6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

TBE is unique to married couples because of the sixth characteristic. Just because a married couple has a joint account, however, does not mean the account is TBE. A married couple may hold property jointly as tenants in common or as joint tenants with a right of survivorship. Ownership as tenants in common does have the characteristic of unity of possession but does not share any other characteristics or unities with TBE or joint tenants with a right of survivorship ("JTWRS"). TBE and JTWRS share the characteristic of survivorship as well as the unities of interest, title and time. In short, for both TBE and JTWRS, the account owners' interests must be identical, the interests must have originated in the identical conveyance, and the interests must have commenced simultaneously.

Despite the similarities in form between TBE and JTWRS, there are significant differences in the legal consequences between the forms of ownership when creditors of one spouse seek to garnish the assets, when one spouse declares bankruptcy or when one spouse attempts to recover monies transferred without his or her permission.

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When a married couple holds an account as TBE, each spouse owns the entire account and not a share of the account. An TBE account belongs to neither spouse individually. On the other hand, when a married couple owns an account as JTWRs, each spouse is considered to have a separate share. The distinction between each spouse owning the whole as opposed to each owning a share is critical for asset protection. If an account is JTWRs, a creditor of one of the joint tenants may attach the joint tenant's portion of the account to recover that joint tenant's individual debt. The opposite is true for TBE accounts. When property is held TBE, only the creditors of **both** husband and wife, jointly, may attach the TBE account. Such an account is not divisible on behalf of one spouse alone, and accordingly it cannot be reached to satisfy the obligation of only one spouse.¹

The law has always been clear that there is a presumption when spouses own real property together that such ownership vests title in the married couple as TBE. Personal property such as a bank or brokerage account has not enjoyed such a presumption. Courts have required that in order to establish TBE for bank and brokerage accounts the married couple must meet all the TBE requirements and must prove the intent of the parties to have an account characterized as TBE.

Many banks and brokerage houses never provide married couples the opportunity to declare their intent to establish TBE accounts. Additionally, many married couples reasonably should have the expectation that legal consequences of holding a bank or brokerage account jointly should be no different than owning a home jointly.

The Court in the Beal Bank case made three significant holdings affecting married couples who can establish the necessary elements of TBE. First, merely establishing the elements of TBE shifts the burden to a creditor to prove that a bank or brokerage account was not held as

TBE. Second, if the signature card required to open the account states that the account is JTWRs, that statement alone is not an express disclaimer and does not preclude the account from being TBE. Finally, if a signature card expressly disclaims TBE, the married couple may use extrinsic evidence to prove that TBE was intended if the married couple can establish that the financial institution did not offer TBE accounts.

The holdings in the Beal Bank case offer significant opportunities for married couples to prove they intended an account opened to be TBE. The only way to insure such treatment, however, is to open accounts with financial institutions that explicitly offer TBE classification. A word of caution that while TBE offers creditor protection from an individual spouse's creditors, such protection disappears when one spouse dies. Additionally, if both spouses pass away, both TBE and JTWRs accounts are subject to probate. Accordingly, more sophisticated asset protection and estate planning alternatives should be explored. However, as between JTWRs and TBE accounts, TBE offers substantial benefits that should not be ignored. Check with your financial institutions as to the nature of your accounts and the availability of TBE. Consult with your financial advisor and attorney for plans and strategies specific to your needs.

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¹Upon the death of either spouse, a JTWRs or TBE account passes to the surviving spouse without being subject to a probate proceeding in Florida. Probate is the court process whereby assets of a decedent are distributed.