THE KIRWAN LAW FIRM

How To Title Accounts as Tenants By The Entireties

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I am assuming here that you already know what Tenants by the Entireties is, you fully understand the downsides associated with it, and you want to use that form of ownership with respect to one or more of your financial accounts. If you do not understand what a Tenants by the Entireties bank account is or do not understand the downsides associated with this type of ownership, please see the chapter on TBE in my book, The Asset Protection Guide for Florida Physicians. Please remember that a Tenants by the Entireties bank account will ALWAYS be a joint account owned SOLELY by a married couple. If the account owners are not married or if the account is owned by a business or Trust, it cannot be titled as TBE.

In 2001, the Florida Supreme Court decision often referred to as the Beal Bank case, changed the law in Florida to state that if a husband and wife create a joint bank account, there is a presumption that the couple intended to create a Tenants by the Entireties bank account regardless of whether the words "Tenants by the Entireties" appear on the paperwork establishing the account. There is, however, a dangerous trap for the unwary.

When you go to the bank to set up a new bank account, you have to fill out certain legal paperwork that is often times referred to as a "Signature Card" or "Account Application." This document will typically have a number of "check the box" options to choose what type of account ownership you would like to create. For example, your options might include Joint Tenants With Rights of Survivorship (JTWROS), Tenants in Common (TIC), or Tenants by the Entireties (TBE or JTBE). Other options may include things like "Joint Account - Married."

NOW FOR THE CRUCIAL PART YOU MUST PAY ATTENTION TO. If the signature card / account application includes a Tenants by the Entireties (TBE or JTBE) option, and you or the Bank employee check a different box (for example, JTWROS), then you have NOT created a TBE account despite the Florida Supreme Court's holding in the Beal Bank case. YOU MUST CHECK THE "TBE" BOX.

If, on the other hand, there is no Tenants by the Entireties (TBE or JTBE) option on the signature card / account application, then checking an option like "Joint Tenants With Rights of Survivorship (JTWROS)" or "Joint Account - Married" will create a TBE account due to the Beal Bank case.

Please understand that it is YOUR RESPONSIBILITY to carefully examine the Signature Card / Account Application and ensure the correct account ownership options have been properly made.

If you try to argue later in court that the bank made a mistake, or that you didn't understand what you were doing, or that you thought the Beal Bank case applied in all circumstances, YOU WILL LOSE and your account will be UNPROTECTED.

<u>Location of the Asset Dictates TBE Status</u>

The general rule is that the laws of the state where the property resides will determine (i) whether TBE is an available means of owning assets (i.e., some states do not have TBE ownership), and (ii) if TBE is an effective means of protecting assets since different states treat TBE differently. TBE is recognized for REAL ESTATE ONLY in Alaska, Indiana, Kentucky, New York, North Carolina, and Rhode Island. TBE is recognized for other types of assets in Arkansas, Delaware, Florida, Hawaii, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, Wyoming. But do not be lured into a false sense of security. Each states law are slightly different and as you saw in the first part of this memorandum, they are not always intuitive. People who want to rely on TBE to protect their assets should always seek the opinion of an attorney who practices in the area of asset protection, and who is admitted to practice law in the state where the property is located.

<u>Financial Institution / Governing Law</u>

Another trap for the unwary exists for people who have established bank or brokerage accounts with financial institutions located outside of Florida. For example, in the bankruptcy case of <u>In re Gillette</u>, 248 B.R. 845 (Bankr. M.D. Fla. 1999), Mr. and Mrs. Gillette, a married couple who lived in California, deposited money in a short term bond fund and a separate money market account with a financial institution located in Wisconsin. They later moved to Florida where Mrs. Gillette ultimately filed for bankruptcy. In her bankruptcy petition, Mrs. Gillette characterized her one-half interest in these two accounts as exempt (i.e., protected) because they were TBE accounts. The bankruptcy trustee disagreed and argued that despite the fact that Mrs. Gillette was a Florida resident at the time she filed her bankruptcy petition, Florida law should NOT be applied in determining whether the accounts were held by the Gillettes as TBE. Instead, the bankruptcy trustee argued that either California law (the state where the Gillettes lived when the account was initially opened) or Wisconsin law (the state where the financial institution was located) should be applied. Not surprisingly, neither of these jurisdictions recognize TBE ownership.

In keeping with the general rule that the location of the asset determines whether TBE will apply, the court held that Wisconsin law should apply resulting in Mrs. Gillette's interest in those accounts being available to her creditors. In making its determination, the court stated "the entity known as Strong Funds [i.e., the financial institution] is located in Wisconsin, the statements relating to the Money Market Fund and the Short Term Bond Fund were generated in Wisconsin, and the checks written on the money market fund were 'payable through Firstar Bank Milwaukee, N.A.' located in Milwaukee, Wisconsin." Therefore, if you have accounts with a bank or brokerage firm located in another state, you may not be able to protect those accounts **<u>even if the words "tenants by the entireties" appear on the statement</u>**. It will be important to pull out your account agreement (i.e., that little book filled with unintelligible legalese that you probably threw in the trash can) to see which state's laws govern your account. If it isn't Florida (or another state that provides for TBE ownership of financial accounts), there is a good argument that your account will NOT be protected as TBE. I recently reviewed a document for a financial institution that had a lengthy separate agreement regarding TBE ownership of their accounts but then, at the end, stated that Nebraska law governs the account and the determination of tenants by the entireties ownership. And Nebraska does NOT recognize TBE. So despite their verbose legalese about tenants by the entireties, my client had no TBE protection

Some Additional Steps

Here are some additional steps you can take to help ensure your joint accounts with your spouse qualify as TBE accounts.

Add a Description

First, the best option is always to see the words "Tenants by the Entireties" on your account which should always be the case if you checked the "TBE" box. But if there was no TBE box for you to check, you can see if your bank allows you to add a description to your account. Many banks allow you to label your account things like "My Summer Vacation Account," or "Peter's College Savings Account." If your bank allows this, consider naming your account something like "The John and Jane Doe Tenants by the Entireties Account." This will be one more way to demonstrate your intent to create a TBE account.

Sign a Tenants by the Entireties Affidavit

Second, consider signing a Tenants by the Entireties Affidavit. A Tenants by the Entireties Affidavit is a legal document, notarized and signed under penalties of perjury, that clearly states your intent to own assets like bank accounts and other non-titled assets (e.g., furniture, art, collectibles, your 90 inch flat screen TV, etc.) as TBE. A properly drafted Tenants by the Entireties Affidavit can also help to preserve the TBE nature of assets that are gifted between spouses or subject to other circumstances that could destroy the TBE ownership of an asset. If you are interested in having the Kirwan Law Firm draft one for you, please give my office a call. The cost is $400.

Ensure the Account Was Initially Created in Your Joint Names

Finally, understand that in order for a bank or brokerage account to be properly established as Tenants by the Entireties, the account needs to be created as a joint account from the account's inception. For example, assume Husband was busy so Wife simply went to the bank and opened the account in her name. The following week, Husband goes to the bank and has his name added to the account. The bank is located in Florida which recognizes TBE ownership of bank accounts, the "Tenants by the Entireties" box is properly checked, and the account statement clearly states"Tenants by the Entireties." Despite the fact that the account appears to be a valid TBE account, unfortunately it is not. This also happens when a couple gets married. Husband and Wife may have bank and/or brokerage accounts, for example, and after they are married, add their new spouse to their account. Again, even if the now joint account appears on its face to be a TBE account, it will not be considered to be one for asset protection purposes. If a judgement creditor ordered the account history of one of these "used to be single - now joint" accounts and discovered that a spouse was added to an existing account originally set up in the name of a single spouse, the account will be fully reachable by the creditor.

Checking Your Existing Accounts To Make Sure They Are Owned as Tenants by the Entireties

The only way to ensure that your existing joint accounts with your spouse are TBE accounts is to call your bank and ask them to send you a copy of the ORIGINAL signature card / account application WITH YOUR SIGNATURE ON IT. If you decide to just look on your statements, accept some explanation on the bank's website, or trust the nice bank employee on the phone, you will be doing so at your own peril.

You Cannot Change a Non-TBE Account into a TBE Account

Many people think that they can change an account that is was not initially set up properly or that was initially a single account by having the bank update the signature card to read TBE. The unfortunate truth is that the account must set up as a TBE account from it's inception. Therefore, if you discover that you have a joint account that does not qualify as a TBE account, your only option is to close that account, open a new TBE account, and transfer the money from the old account to the new one. Despite the fact that doing so can be a real pain in the neck, it's your only option to ensure you have solid Tenants by the Entireties protection.