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TURNING STRAW INTO GOLD: THE ALCHEMY OF TENANTS BY THE ENTIRETY AFTER LOUMPOS

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Joseph M. Percopo, LL. M.

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Agenda

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II. TBE Defined
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VI. TBE Federal Taxation
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Forms of Property Ownership in Florida

- Separate Property
- Life estate/remainder (regular or enhanced)
- Joint tenants with rights of survivorship (“JTWROS”)
- Tenants by the Entirety (“TBE”)
- Community Property (through Florida community property trust)

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TBE Defined

"Although a tenancy by the entireties and joint tenancy with right of survivorship share all of the same characteristics of form, there are significant differences in the legal consequences between the forms of ownership when creditors of one spouse seek to garnish these assets, when one spouse declares bankruptcy, or when one spouse attempts to recover monies transferred without his or her permission. **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.' Thus, property held by [a married couple] as tenants by the entireties belongs to neither spouse individually, but each spouse is seized of the whole**. In a joint tenancy with right of survivorship, each person has only his or her own separate share ('per my'), which share is presumed to be equal for purposes of alienation; whereas, for purposes of survivorship, each joint tenant owns the whole ('per tout'), so that upon death the remainder of the estate passes to the survivor."

Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45, 53 (Fla. 2001) (*emphasis added & internal citations omitted*)

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Common Law TBE Creation

Six Unities of TBE

1. Possession – Joint ownership and control
2. Interest – Interest in property is identical
3. Title – Interests must have originated in the same instrument
4. Time – Interests must have commenced simultaneously
5. Survivorship – Interest passes to survivor upon one's death
6. Marriage/Person – Parties must be married and intend to take as TBE
    - Such intent does not require knowledge of TBE but only that the couple intended to take ownership as one indivisible unit

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TBE Characteristics

- TBE ownership is available for any property ownership in Florida regardless of the domicile of the owners
- Rights of Survivorship (not subject to devise)
- Asset is for the benefit of both spouses
- Each spouse owes a duty to the other
- Non-severable – Asset must only be severed, partitioned, or transferred with the agreement of both spouses
- Asset is not available to individual creditors of a spouse

CREDITOR EXCEPTIONS:

IRS - Federal Taxes
Joint Debt of both spouses (separate judgements against spouses is insufficient)
Fraudulent Transfer

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TBE Severance



- Death
- Divorce
  - §689.15 – converts to TIC
- Mutual Agreement
  - Sheldon v. Waters
  - “Divorce or death will end such a tenancy, and so may both parties by an agreement to do so. If they plainly agree on a division of the proceeds of a sale, their agreement will be effectuated and the agreed part of each will be his or her separate property.”
- Intentional Act Inconsistent with TBE
  - Conveyance from 1 spouse to the other & acceptance
  - May be inferred from conduct
    - Vining v. Martyn(Wife’s permission for Husband to use TBE funds as pledge for his sole debt severer the TBE nature)
  - Includes Murder and Abuse (§§732.802 & 8031)
- Foreclosure of property?
  - Grossfeld v. Security (Fla. 3d DCA 4/17/2024)

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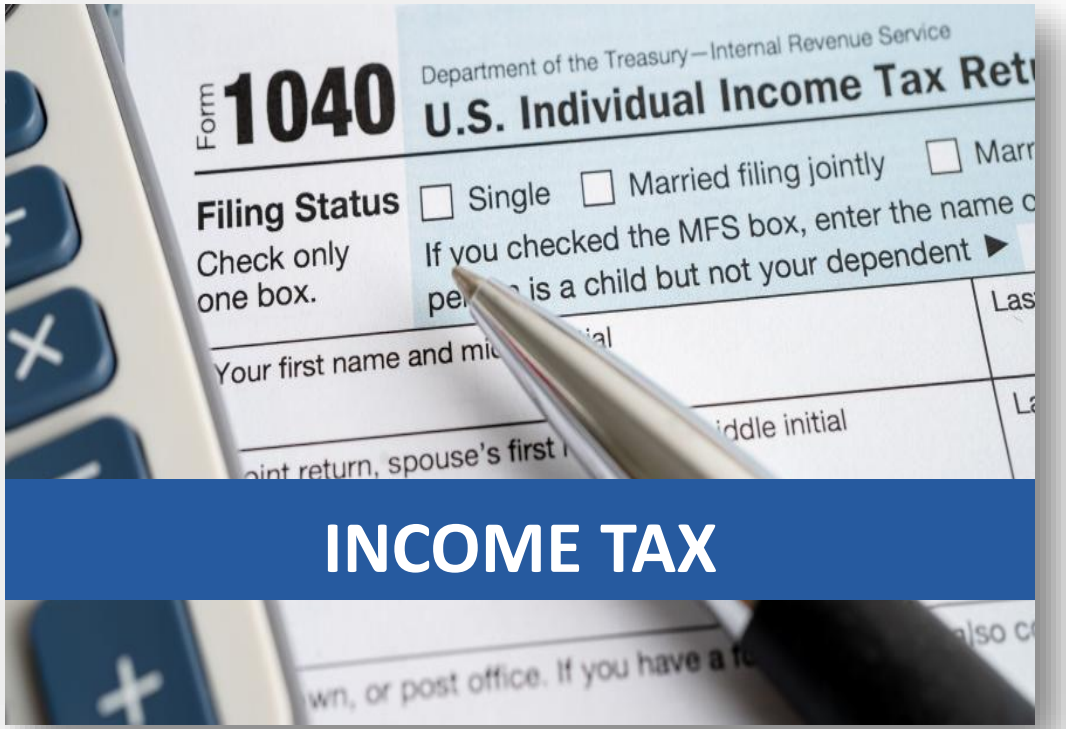
TBE Federal Taxation - Income



- 50% of the income is properly reportable by each spouse
- Is an LLC owned solely as TBE a single member (*disregarded entity*) or multi-member (*partnership*) for Federal Tax purposes?

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TBE Federal Taxation - Gift

- Creation of TBE by one spouse for both is a presumed gift of 50% of the asset
- Courts prioritize substance over form in determining the true donor and donee of a gift
- Citizen Spouse
  - Unlimited Marital deduction (present interest)
- Non-Citizen
  - Annual limitation ($190K)
  - Real property
  - All other property



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TBE Federal Taxation - Estate

- IRC §2040 provides that the value included in the decedent's gross estate of TBE property is 50% of the interest held by both the decedent and the spouse (*"qualified joint interest"*)
- Special Valuation Rule
  - No discounts are applied
- IRC §1014 Basis Adjustment



IRC §2040

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Real Property

Creation

- *Methods*:
  - Common law unities; or
  - Conveyance by one or both spouses to both spouses
- *Fla. Stat. §689.11* –
  - Permits conveyance of real property by one spouse to the other to create TBE
  - Statutorily eliminated need for Unity of Time or Title
- *Fla. Stat. §689.115* –
  - Presumption of TBE when spouses jointly take or acquire a mortgage

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Real Property Cases



Real property acquired in the name of spouses creates a presumption of TBE ownership unless conveyance expressly states otherwise

- Beal Bank, SSB v. Almand and Assocs., 780 So.2d 45 (Fla.2001); Ramos v. Estate of Ramos, 329 So.2d 172, 173 (Fla. 3rd DCA 2021)

TBE presumption is not rebuttable absent fraud

- Bridgeview Bank Group v. Callaghan, 84 So.3d 1154 (Fla. 4th DCA 2012)

Life estate or remainder interest in real property may be owned as TBE

- Clemons v. Thornton, 993 So.2d 1054 (Fla. 1st DCA 2008) (life estate)
- Sunshine Resources, Inc. V. Simpson, 763 So.2d 1078 (Fla. 4th DCA 1999) (remainder)

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Bank Accounts

Creation

- *Methods*:
  - Common law unities
  - TBE designation on account
- *Fla. Stat. §655.79* –
  - Statutorily eliminated need for Unity of Time or Title
  - A "deposit account" in the name of a married couple "shall be considered a tenancy by the entirety unless otherwise specified in writing"
    - Note – this **does not include an investment or brokerage account**
  - Loumpos v. Bank One, 423 So.3d 856 (Fla. 2025)
    - Spouse added to existing account and designated TBE at time of addition – Conflict:
      - Versace v. Uruven, LLC (4th DCA 2022) = TBE
      - Loumpos v. Raymond James (2nd DCA 2024) = Not TBE
    - "[S]ection 655.79, Florida Statutes, authorizes a joint spousal bank account to be held as a tenancy by the entireties even if the account was originally established by one spouse"

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Bank Account Presumptions

#1 - If TBE is expressly stated and:

- **Unities are present, then TBE is conclusively presumed.**
- **Unities of time & title are not present, then a presumption of TBE arises which is rebuttable only by fraud, undue influence, or clear & convincing evidence.**

#2 - If TBE is not expressly disclaimed and the form of ownership is silent or as JTWROS, then if unities are present there is a rebuttable presumption of TBE.

#3 - If unities are present but TBE is disclaimed or another form of ownership is selected, then:

- **If the financial institution does not offer TBE, a rebuttable presumption arises that the account is not TBE.**
- **If the financial institution offers TBE, then a conclusive presumption arises that account is not TBE.**

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Bank Account Cases

Disclaimer of TBE may occur through incorporation by reference (terms & conditions)

- Storey Mountain, LLC v. George, 357 So.3d 709 (Fla. 4th DCA 2023)

Unilateral ability for one spouse to withdraw from account does not preclude TBE status of the account

- Beal Bank; In First Nat'l Bank v. Hector Supply Co., 254 So. 2d 777 (Fla. 1971)



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Other Personal Property

Creation

- Common Law Unities
- No statutory method (unsuccessful attempt years ago)

General Rules Established by Beal Bank

- Unities of possession, interest, title, time, survivorship, and marriage are necessary to create TBE
- "**[P]resumption** in favor of a tenancy by the entireties when a married couple **jointly owns personal property**."
- Presumption shifts the burden of proof to the creditor to prove by preponderance of evidence that TBE was not created

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TANGIBLE Personal Property Cases



Vehicles (including Mobile Homes) **– Ownership with conjunction "And" between owner names may be owned as TBE**

- AmSouth Bank of Florida v. Hepner, 647 So.2d 907 (Fla. 1st DCA 1994)



Vehicles (including Mobile Homes) – **Ownership with conjunction "Or" between owner names "shall be held in joint tenancy"**

- Xayavong v. Sunny Gifts, Inc., 891 So.2d 1075 (Fla. 5th DCA 2005)
- Fla. Stat. §319.22(2)(a)1



Artwork

- Robinson v. Robinson, 651 So.2d 1271 (Fla. 4th DCA 1995)



Furnishings & Household Items

- Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005)



Jewelry – Possible but difficult because unity of possession is required

- Connell v. Connell, 93 So.3d 1140 (Fla. 2d DCA 2012**)**

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INTANGIBLE Personal Property Cases

Stock Certificates

- Cacciatore v. Fisherman's Wharf Realty Limited Partnership, 821 So.2d 1251 (Fla. 4th DCA 2002)

LLC Ownership Interest

- Romagnoli, 631 B.R. 807, 809 (Bankr. S.D. Fla. 2021)

Stock & Limited Partnership Interests

- Berlin v. Pecora, 968 So.2d 47 (Fla. 4th DCA 2007)

Promissory Notes

- Vandenberg v. Wells, 721 So.2d 453 (Fla. 5th DCA 1998)

Certificate of Deposits (CDs)

- Norman v. Bank of Hawthorne, 321 So.2d 1112 (Fla. 1st DCA 1975)

Investment Accounts/Brokerage Accounts

- Wallace v. Torres-Rodriguez, 341 So.3d 374 (Fla. 3d DCA 2022)

Bonds

- Hurlbert v. Shackleton, 560 So. 2d 1276 (Fla. 1st DCA 1990)

Checks Payable to Spouses

- Gibson v. Wells Fargo Bank, N.A. 255 So 3d 944 (Fla. 2d DCA 2018)

Income Tax Refund

- In re Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005)

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TBE Trusts

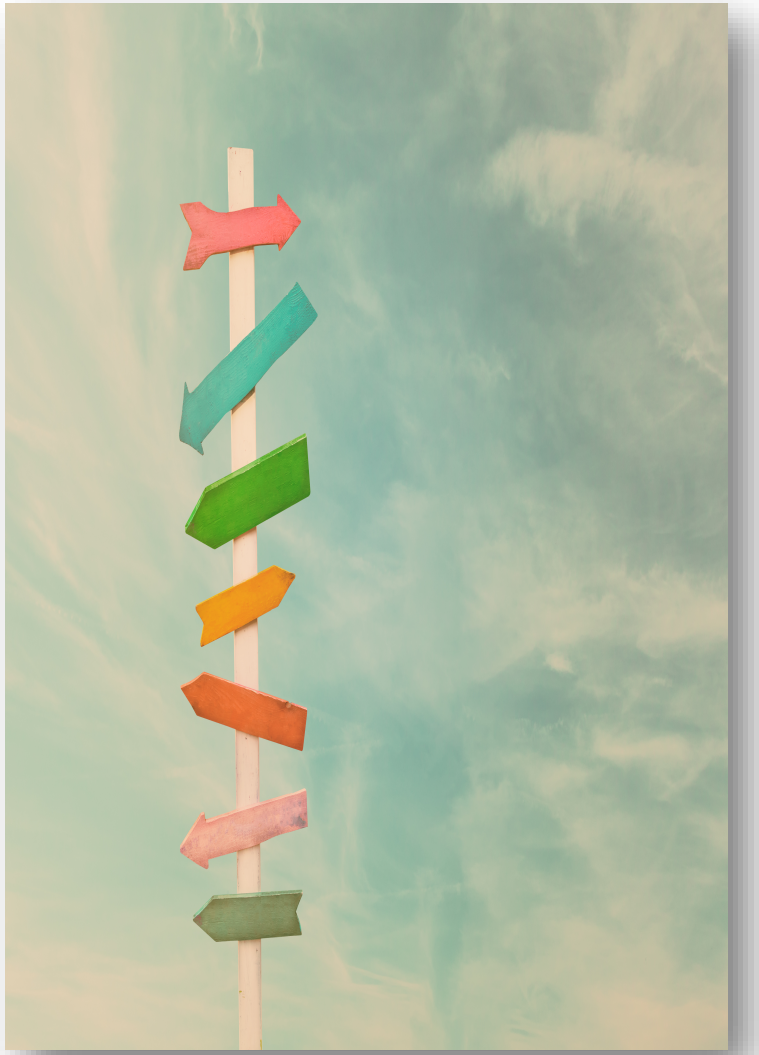
Current Law is unclear, and therefore, an attempted use of a TBE trust could result in the termination of TBE status of the property

Supportive Case Law

- Romagnoli, 631 B.R. 807, 809 (Bankr. S.D. Fla. 2021)
- Passalino v. Protective Group Sec., Inc., 886 So.2d 295, 297 (Fla. 4th DCA 2004)
- Snyder v. Dinardo, 700 So.2d 726 (Fla. 2d DCA 1997)

Adverse Case Law

- Givans, 623 B.R. 635 (Bankr. M.D. Fla. Sept. 30, 2020)
- Quaid, 2011 WL 5572605 (M.D. Fla. Nov. 16, 2011)
- Rollins v. Alvarez, 792 So. 2d 695 (Fla. 5th DCA 2001)



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Establishing TBE Presumption

The Challenge:

1. Establishing the 6 unities of TBE remains challenging because personal property "is generally not under mandate of record… may easily be passed …[and] may change hands with great frequency." First Nat'l Bank v. Hector Supply Co., 254 So.2d 777, 780 (Fla. 1971).

2. Beal Bank established a presumption of TBE for all personal property when the 6 unities are present without an expressed disclaimer of the TBE form of ownership. However, in that case the Court "point[ed] out that even without application of the presumption…there was competent substantial evidence in the form of the testimony…to support the trial court's finding that" the personal property was TBE.

3. Therefore, the safest way to evoke the TBE presumption for personal property is with competent substantial evidence that the unities were present.



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Establishing TBE Presumption (cont.)

The Question:

What constitutes “competent substantial evidence” sufficient to establish the six unities to conjure the TBE presumption for spouses?

The Answer:

TBE Financial Account Affidavit (Appendix C – Materials)

- Sworn statement acknowledging 6 unities and TBE intent
- Executed – sworn statement + 2 witnesses + notary

TBE Ownership Agreement (Appendix A – Materials)

- Written TBE expression (intent) & Acknowledgment of 6 Unities
- Lists assets (assets before marriage and/or after marriage)
- Provisions addressing later acquired property
- Executed – 2 witnesses + notary

TBE Assignment (Appendix B – Materials)

- Spouses convey specified personal property to themselves as TBE
- Executed – 2 witnesses + notary

Impact of Timing

- Executed before or after marriage
- Fraudulent Transfer Rules

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Establishing TBE Presumption (cont.)

The Support:

Agreement executed subsequent to TIC conveyance created a valid JTROS interest

- Forehand v. Peacock, 77 So.2d 625 (Fla. 1955)
- JTROS + Marriage = TBE

Marital agreement not to be ignored by Judge

- Hannon v. Hannon, 740 So.2d 1181(Fla. 4th DCA 1999)

Marital agreement prevented common law gift presumption & was evidence of intent

- Turchin v. Turchin, 16 So.3d 1042 (Fla. 4th DCA 2009);
- In re Newcomb, 483 B.R. 478 (Bankr. M.D. Fla. 2012)

Prenuptial agreement and subsequent assignment created TBE of premarital assets

- Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005) (pre & post, but tax return?)

Despite prenuptial agreement established TBE intent, TBE ownership was only granted for those assets conveyed by assignment after marriage and not for unassigned assets

– In Re Golub, 80 B.R. 230 (Bankr.M.D.Fla.1987)

Premarital property conveyed after marriage pursuant to a prenuptial agreement was TBE and not a fraudulent transfer

- Green v. Casper, 346 So. 2d 1204 (Fla. 3d DCA 1977)

Postnuptial agreement did not prevent fraudulent transfer claim

- Puleo v. Golan, 201 So. 3d 37 (Fla. 3d DCA 2014)



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Establishing TBE Presumption (cont.)

The Support – No Strawman

"Stringent rules of the common law…courts of chancery…refuse[] to follow…[i]f made upon good or meritorious considerations, and free from imposition or fraud, they are looked upon with favor, and upheld in chancery."

- Waterman v. Higgins – 1891 Florida Supreme Court Case

Husband's transfer of stock and bonds to himself and wife were TBE despite lack of Unity of Time

- Hurlbert v. Shackleton, 560 So. 2d 1276 (Fla. 1st DCA 1990)

Strawman was not necessary for real property to be titled JTROS

- LaPierre v. Kalergis, 257 So. 2d 33 (Fla. 1971)
- Ratinska v. Estate of Denesuk, 447 So.2d 241 (Fla. 2d DCA 1983)

However, not all courts have concurred with dispensing the strawman:

- SE Property Holdings, LLC v. McElheney, 2016 WL 7494300 (N.D. Fla. May 7, 2016) (LLC?)

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TBE Practice Tips – *General*

- Explain how TBE operates (*survivorship and creditor protection*)
  - Avoid TBE Trusts until law becomes settled
- Discuss consequences of creation (gift treatment and **transmutation to marital asset**)
- Review assets in detail with clients
  - Determine if an asset is TBE and which assets are desired to be TBE assets
  - May need to request additional documents to ensure TBE is not precluded
- Whenever possible expressly state asset is owned as TBE on the account or document
  - Investment accounts, bank accounts, stocks, bonds, LLC interests, partnership agreements, assignment of interests, promissory notes, checks, etc.
- Execute TBE agreement, assignment, or financial affidavit which includes spouses' agreement for assets to be owed as TBE and to convey the assets to spouses as TBE to establish 6 unities
  - Include list of assets
  - Consider including statement of intent for future acquired assets
- TBE ownership does not avoid Florida fraudulent transfer rules
  - Consider having client execute a financial affidavit (proof of solvency)
  - Transfer of TBE assets itself is not a fraudulent transfer

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TBE Practice Tips

Real Property

- Deeds ideally should include “as husband and wife” and/or “as tenants by the entirety” (especially helpful for married couples with different last names)
- Confirm deed lists both spouses, that they were married at the time the deed was executed, and they did not designate a different form of ownership
    - If acquire before marriage or ownership appears wrong or unclear, execute a new deed to create TBE ownership



Bank Accounts

- Gold - Close old account, open new account, and declare TBE
- Silver – Add spouse to account and declare TBE
- Bronze –
    - When TBE is not an available option for a new account, try adding “TBE” to the signature card or when signing name add “TBE” to end of signature, then execute a TBE Affidavit
    - If TBE not allowed by institution and institution will not permit the “TBE” indication anywhere on the new account, then execute TBE Affidavit



Other Personal Property

- Brokerage/Investment – confirm all 6 unites present, if not MUST open new account
- Use strawman to ensure all 6 unities are present
- Execute ownership agreement and Assignment
- Avoid TBE for cars

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Let’s Connect!



Joseph M. Percopo, Esq.
(407) 841-1200 | JPercopo@deanmead.com

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