

Joint Ownership in Florida – Florida Homestead

Joseph M. Percopo, Attorney

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Materials

Joint Ownership in Florida – Full Detail Outline

Joint Ownership in Florida – Summary Outline

Joint Ownership of Florida Homestead

PowerPoint Slides

Forms of Property Ownership in Florida

Separate Property

Life estate/remainder (Traditional or Enhanced)

Tenancy in Common (“TIC”)

Joint tenants with rights of survivorship (“JTWROS”)

Tenants by the Entirety (“TBE”)

Community Property (through Florida community property trust)



Life Estate & Remainder Interest





Types

Traditional

A life estate is a form of ownership granting an individual the right to use and benefit from a property during their lifetime, after which ownership passes to the designated remainderman.

Enhanced (*Lady Bird Deed*)

A life estate with a special reservation of powers for the life tenant, allowing the life tenant to retain greater control over the property during their lifetime while ensuring the property passes to the remainder without probate upon the death of a life tenant.



Characteristics of Traditional Life Estate Death

Upon death of life **tenant**:

1. The life tenant's interest ceases and the remainderman become fee simple owners by operation of law, thereby avoiding probate
2. Interest is not subject to homestead devise restriction

Upon death of the **remainderman**:

1. The remainderman's estate is successor in interest and subject to probate (unless such interest was owned as JTWRORS or TBE)
2. Interest subject to homestead devise restriction if property homestead of the remainderman



Characteristics of Traditional Life Estate Life Tenant Rights & Responsibilities

- ✓ Exclusive right of possession
- ✓ Maintain homestead creditor protection and tax benefits
- ✓ Ability to rent and keep rental income (Responsible for income tax)
- ✓ Responsible for ordinary expenses, which include mortgage interest, general repairs and upkeep, as well as HOA fees, and insurance
- ✓ Liable for common law waste to property, which includes not paying property taxes, removal of timber, crops, or minerals, and any destruction to the property
- ✓ Unable to sell, encumber, or partition property without the consent of the remainderman



Characteristics of Traditional Life Estate Remainderman Rights & Responsibilities

- ✓ No right of possession until death of life tenant
- ✓ Responsible for principal payments on a secured debt, expense concerning the title to the property, environmental matters (such as hurricane damage), and extraordinary repairs
- ✓ Unable to sell, encumber, or partition property without the consent of the life tenant





Characteristics of Enhanced Life Estate Death

Upon death of life **tenant**:

1. The life tenants interest ceases and the remainderman become fee simple owners by operation of law, thereby avoiding probate
2. Interest is subject to homestead devise restriction because the retained powers are akin to a testamentary devise

Upon death of the **remainderman**:

1. The remainderman's estate is successor in interest and subject to probate (unless such interest was owned as JTWROS or TBE)
2. Interest subject to homestead devise restriction if property homestead of the remainderman



Characteristics of Enhanced Life Estate Reservation of Powers

Life tenant *usually* retains the exclusive use and enjoyment, as well as the right to sell, lease, encumber, pledge, lien, or dispose of the interest by gift or sale, without the consent of the remainderman.

Such powers are intended to allow the life tenant to divest (*destroy any and all rights*) of the remainderman, but absent such divestment upon the death of the life tenant the property passes to the remainderman or the remainderman's estate if the remainderman predeceased the life tenant.



Characteristics of Enhanced Life Estate Additional

Maintain homestead creditor protection and tax benefits for life tenant.

Life tenant bares all costs as related to the property and remainderman has no responsibility.

Not considered a transfer for DCF purposes and therefore does not cause Medicaid penalty.





Characteristics of Enhanced Life Estate

Potential Issues

Improper drafting of the reservation of powers

Title companies can be more difficult

Banks will not generally lend or refinance

Homeowners insurance gap (*if remainderman not listed as additional insured*)





Termination

Merger

Whenever the life estate and remainder coincide in the same person without any intermediate estate the estate shall merge into a fee simple.

Abandonment

Claim of title by life tenant other than as a life tenant

Adverse possession

Specialty equity of a purchaser



Termination (*cont.*)

Federal Taxation

Life tenant reports income on his or her return.

Entire value of interest owned at death included in gross estate & receives basis adjustment to FMV

Creation

Traditional

A specific formula of words is not necessary to create a life estate, as long as the language used manifests the intent to create a life estate

May be created in real property or personal property

Enhanced

An instrument creating a life estate which includes a reservation of powers



Tenancy in Common (TIC)





Unity of Possession

- ✓ Each tenant is entitled to possession, joint ownership, and control of property
- ✓ Each tenant has the unilateral right to use the property, exclude 3rd parties from the property, receive a pro rata distribution of income, obtain partition, alienate his or her share, encumber share, and devise share upon death





Characteristics

- ✓ No survivorship with other tenants
- ✓ Undivided fractional share ownership
- ✓ Presumption of equal interest among TIC owners
 - Presumption may be overcome by evidence of facts that no gift was intended and unequal contributions were made by the tenants
 - If ownership is among family, then presumption of equal ownership remains with any unequal contributions being considered a gift
- ✓ Accountability to the extent a tenant takes more than fractional share
- ✓ Ability to alienate, encumber, or mortgage interest
- ✓ Share expenses in proportion to their ownership
- ✓ Ownership subject to creditors of tenant



Federal Taxation

- ✓ Income is divided between owners to the extent that each is entitled to share
- ✓ Interest owned at death included in gross estate & receives FMV basis



Creation

✓ Fla. Stat. §689.15

- A devise, transfer, or conveyance of an interest in real or personal property made to two or more persons (with the exception of TBE) creates a TIC unless the instrument creating the estate expressly provides for survivorship
- A promissory note signed by two parties without language expressing survivorship is held by the payees as TIC

✓ Married Couples

- ✓ May own property as TIC provided it is their intent
- ✓ Upon divorce, TBE is converted to TIC ownership

A man in a dark suit is shaking hands with a man in a grey t-shirt and a woman in a blue and white plaid shirt. They are standing in a bright, modern office with large windows in the background. The man in the suit is holding a document. A dark blue horizontal bar is overlaid on the bottom half of the image, containing the title text and a document icon.

Joint Tenants with Rights of Survivorship (JTWROS)





Unities of JTWRORS

Possession

Joint ownership and control

Interest

Interest in property is identical

Title

Interests must have originated in the same instrument

Time

The interests must have commenced simultaneously

Survivorship

Interest passes to survivor upon one tenant's death



JTWROS Characteristics

- ✓ Rights of Survivorship
- ✓ Undivided equal interest ownership
- ✓ Accountability to the extent a tenant takes or withdraws more than interest
- ✓ Ability to alienate, encumber, or mortgage interest
- ✓ Creditors
 - During a debtor tenant's lifetime, their ownership interest is "per my" and is subject to the claims of the tenant's creditors
 - Upon death of debtor tenant, tenant's ownership is "per tout" and is no longer subject to claims of tenant's creditors



JTWROS Severance

Death

Divorce (JTWROS converts to TIC)

International act inconsistent with JTWROS

Withdrawal of funds from join bank account





JTWROS Taxation

Income is divided between owners to the extent that each is entitled to share

IRC §2040(a) provides that the value of JTWROS property included in the decedent's gross estate (other than property owned solely by a married couple) is the full value of the property, except to the extent that a portion of the consideration for acquiring the property was furnished by the surviving joint tenants and not originally derived from the decedent

Basis adjustment to FMV of interest included in gross estate





JTWROS Creation

Methods

Common law unities

Expressed designation of Survivorship

Fla. Stat. 689.15 – Real or Personal Property

JTWROS created (with the exception of TBE) only when the instrument creating the estate expressly provides for survivorship

Bank Accounts

Language indicating the account is payable to survivor is sufficient to create JTWROS ownership

Multiple-Party Accounts

Fla. Stat. 655.79 creates presumption of survivorship in deposit account

Automobiles

Using the word “or” between two or more owners creates JTWROS



Tenants by the Entirety (TBE)





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 (the interests must have commenced simultaneously)
5. Survivorship (interest passes to survivor upon one tenant's death)

6. Marriage/Person (parties must be married and intend to take as TBE)



TBE Characteristics

- ✓ Rights of Survivorship
- ✓ Each spouse owes a duty to the other
- ✓ Asset is for the benefit of both spouses
- ✓ Non-severable - Asset may only be severed, partitioned, or transferred with the agreement of both spouses
- ✓ Asset is not available to individual creditors of a spouse
 - TBE interest is owned “per tout”
 - *Exceptions*: IRS, joint debt of both spouses, fraudulent transfer in creation of TBE



TBE Severance

Death

Upon death of non-debtor spouse assets are no longer TBE and subject to debtor spouse's creditors

Divorce

Fla. Stat. §689.15 – real and personal property - TBE ownership converts to tenants in common ownership

Mutual Agreement

May be inferred from conduct

Intentional act inconsistent with TBE

1. Conveyance of real property by one spouse to the other spouse and other spouse acceptance of the deed
2. Murder or Abuse



TBE Federal Taxation

✓ **Income Taxation**

50% of the income is properly reportable by each spouse

✓ **Gross Estate Inclusion**

IRC §2040 provides that the value included in the decedent's gross estate of TBE property is 50% of the interest held by spouses (without application of fractional ownership discounts)

Surviving spouse only receives a stepped-up basis in 50% of the asset while retaining a carryover basis in the other 50%



TBE Creation

TBE ownership is available for any property ownership in Florida *regardless* of the domicile of the owners

Real Property

1. Methods
 - Common law unities; or
 - Conveyance by one spouse to both spouses
2. Fla. Stat. §689.11
 - Permits a conveyance of real property by one spouse to the other
 - Statutorily eliminated need for Unity of Time or Title
3. Fla. Stat. §689.115 - Presumption of TBE when spouses jointly take or acquire a mortgage
4. Real property acquired in the name of spouses creates a presumption of TBE ownership unless conveyance expressly states otherwise
5. TBE presumption is not rebuttable absent fraud
6. Life estate or remainder interest in real property may be owned as TBE



TBE Creation (*cont.*)

Bank Accounts

Methods to establish:

- Common law unities (provided no disclaimer of TBE); or
- TBE designation on account - *Creation by TBE Designation without unities is uncertain*

Fla. Stat. §655.79

- A “deposit account” in the name of a married couple “shall be considered a tenancy by the entirety unless otherwise specified in writing.”

Beal Bank Rules

- If unities are present and TBE is expressly stated, TBE is conclusively presumed
- If TBE is not expressly disclaimed and the form of ownership is silent or as JTWR0S, then if unities are present there is a rebuttable presumption of TBE
- 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

Disclaimer of TBE may occur through another writing incorporated by reference, such as a reference to a terms & conditions document

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



Other Personal Property

Methods to Establish

Common Law Unities

General Rules established by Beal Bank

Unites of possession, interest, title, time, survivorship & marriage are necessary to create TBE

“[P]resumption in favor of tenancy by the entiresities when a married couple jointly owns personal property.”

Presumption shifts the burden of proof to the creditor to prove by a preponderance of evidence that TBE was not created



Types of Other Personal Property

Tangible Personal Property

Vehicles (including Mobile Homes)

Artwork

Furnishings and household items

Jewelry

Intangible Personal Property

Entity Ownership (Stock certificates, LLC Ownership Interests, & Partnership Interests)

Promissory Notes

Certificate of Deposits (CDs)

Bonds

Checks payable to Spouses

Income Tax Refund

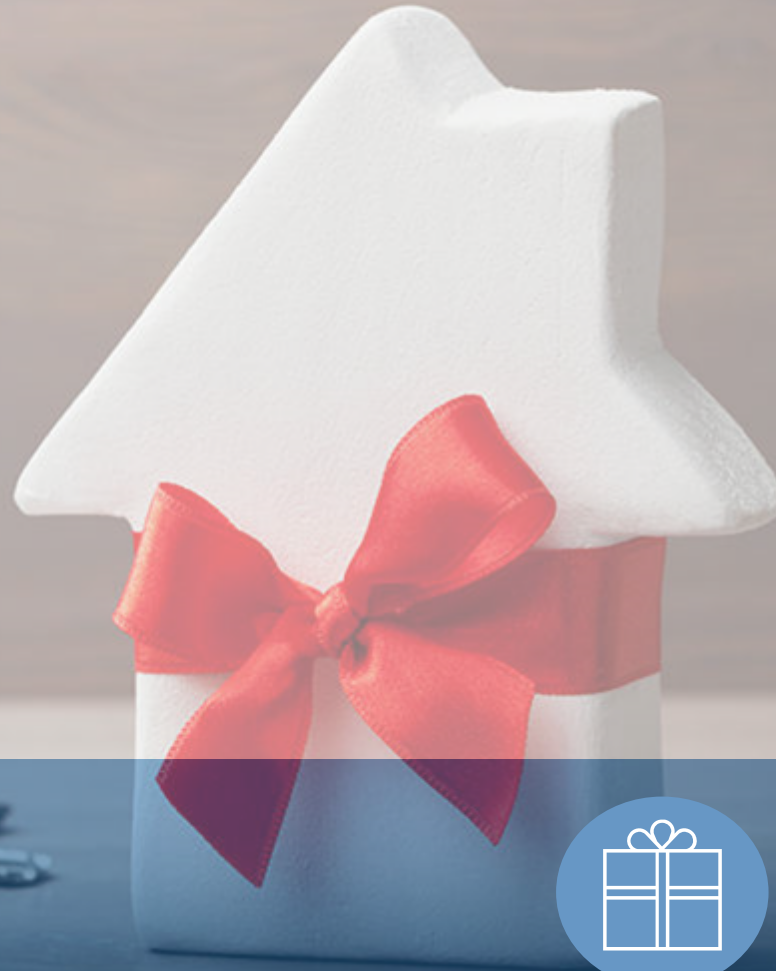


TBE Trusts

Current law is unclear, and therefore an attempted creation of a TBE trust could result in the termination of TBE status of the property.



Gratuitous Transfers





Elements of a Gift

Inter Vivos Gift

1. Present Donative Intent
2. Delivery
3. Acceptance

Gift Causa Mortis

1. Intent, delivery, acceptance AND contemplation of death from present illness or impending danger
2. A donor may revoke a gift if such peril has passed, the donor outlives the donee, or the donor's estate is insufficient to pay donor's debts after death

Absent any element = No gift has occurred



Presumptions Applicable to Gifts

Burden of Proof

- The donee must establish all essential elements of the gift
- If the claim of gift is asserted after death of alleged donor, donee's claim must be sustained by clear and convincing evidence
- Persons whose names appear in jointly titled assets have a due process right prior to the entry of an order impacting any interest the persons may have





Presumptions Applicable to Gifts

Gift Presumptions

- Joint Titling or Registration
 - a. When an asset is titled in a person's name but paid for by another person, a resulting trust arises in favor of the payor unless the payor manifested an intent inconsistent with such treatment
 - b. Asset registered or titled jointly = presumption of joint ownership
 - c. Assets titled as TBE are presumed to be a gift to the other spouse, and may only be overcome by clear and convincing evidence
- Relationship of Parties
 - a. No presumption of gift if purchaser of property titles property in name of another, unless payor has a family relationship
 - b. Presumption of a gift arises if purchaser of property titles property in name of a spouse, child, or other dependent family member
- Donee's Possession of Property
 - a. Possession has little weight if the claimant had access to the property after the death of the alleged donor



Presumptions Applicable to Gifts

Overcoming Gift Presumptions

Clear and convincing evidence is required to overcome gift presumption, such as:

- Purchaser did not intend to make a present gift,
- Purchaser maintains exclusive dominion and control, or
- Purchaser includes 2nd name on title for convenience.





Presumptions Applicable to Gifts

Florida Evidence Code

The gift presumption arising from joint titling or registration is a **presumption affecting the burden of proof** that places the burden of proof on the person claiming there was no gift.





Presumptions Applicable to Gifts

Presumption of **Undue Influence**

Burden of proof on the issue of undue influence is shifted to the person against whom the presumption operates.

Rebuttable presumption of undue influence arises when an individual in a fiduciary or confidential relationship was active in the procurement of a devise or gift in individual's favor.

The presumption of undue influence should not apply when spouses are involved in each other's estate plans or when a devoted child cares for an aging parent, as these situations are typically natural and appropriate.

Multiple Party Accounts





Ownership Prior to Death of Any Party

General

1. Each tenant's ownership interest during life, if any, must be Established
2. If a donee is unaware of his addition to a joint account, a completed gift has not occurred because the donee lacks knowledge and therefore lacks the ability to exercise any power of withdrawal
3. Donor's removal of name from joint account creates a completed gift

Establishing Ownership Interest

1. Funds belong to the parties in proportion to the net contributions by each
2. Absent proof of contributions = presumption of equal interests
3. Joint account statutes and account opening documents do not conclusively determine the nature or extent of the actual ownership interests



Ownership Prior to Death of Any Party (cont.)

Withdrawal & Accountability

1. Fla. Stat. §655.78 permits a financial institution to release any or all of the funds to any joint account holder without liability.
2. Withdrawal of funds, except in cases of TBE, terminates the joint tenancy.
3. A joint tenant's withdrawal of more than his or her share from the account is wrongful as between the parties to the account and the withdrawing tenant is liable to the remaining joint tenants.
4. A joint tenant may sue another joint tenant for wrongfully appropriating more than their fair share of the account.
5. A joint tenant may sue a third party who receives wrongfully appropriated funds to recover the funds or impose a constructive trust.



Fla. Stat. §655.79 – *Joint Ownership Accounts*

An account in the names of two or more persons creates a presumption that, upon the death of any one of them, all rights to the account vest in the surviving persons, unless a contract, agreement, or signature card expressly provides otherwise.

Presumptions

1. Decedent's share of funds remaining in account at death is a presumed gift to the surviving tenants.
2. Presumption of TBE for deposit account in name of spouses unless otherwise specified in writing.
3. The statutory presumption may be overcome fraud, undue influence, or clear and convincing proof to the contrary intent.



Fla. Stat. §655.82 – *Pay-on-Death (POD) Accounts*

The statute allows an account to be registered in the name of the current owner(s), with the account balance transferring to a designated beneficiary upon the death of the owner or last surviving owner, as specified in the deposit agreement with the bank. (Along with Fla. Stat. §655.825, replaced Fla. Stat. §655.81 – Totten trusts)

Account Types & Characteristics

1. Single-party account without POD designation
2. Single-party account with POD designation
3. Multi-party TIC account is **not** permitted to have POD designation
4. Multi-party JTWROS account without POD designation
5. Multi-party JTWROS account with POD designation

POD designation may be overcome by fraud, undue influence, or duress

POD designation may not be overcome by proving contrary intent



Fla. Stat. §655.80 – Convenience Accounts

A deposit account, excluding certificates of deposit, held by a principal who designates agents with authority to deposit, withdraw, or draw checks, with any changes to the account's terms solely controlled by the principal, and the agency relationship remains unaffected by the principal's death or incompetence unless otherwise specified. *(Included in the owner's probate estate)*





Tentative Trust Doctrine *Totten Trust Accounts*





Creation

A deposit in the depositor's name as trustee for another creates a revocable, tentative trust during the depositor's lifetime, becoming an irrevocable trust only upon the depositor's death if not revoked or disaffirmed.

Codified through Fla. Stat. §655.82 & Fla. Stat. §655.825





Characteristics

- ✓ Creator of account maintains complete control during lifetime
- ✓ Joint creators of account are considered to own interest as JTWRORS
- ✓ Depositor may withdraw from account
- ✓ Assets are subject to a depositor's creditors
- ✓ Account is not subject to probate, unless insufficient assets for probate admin
- ✓ Beneficiary does not have any control until death of depositor
- ✓ Not subject to Florida Trust Code



Revocation

Revocable at will of depositor

May be revoked by acts of depositor

Dissolution of marriage

Acts of Termination

1. Oral declaration of revocation
2. Provision, specific in nature, in Will clearly expressing intention to revoke
3. Inadequate assets to cover testamentary gifts, funeral, administration expenses, taxes, and other charges
4. Transfer or direction to transfer the account by the depositor



Florida Uniform Transfer-on-Death Security Registration Act

Ownership Prior to Death of Any Party

General

- Securities registered in beneficiary form transfer ownership to the designated beneficiary upon the death of the sole or last surviving owner
- Security is broadly defined to mean “a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account”

Creation

- A security is registered in beneficiary form when it designates a beneficiary to take ownership at the death of the owner(s) (including use of "TOD" or "POD")
- Multiple lifetime account owners own as JTWROS

Ownership Prior to Death of Any Party (cont.)

Characteristics

- Owner(s) maintains total control until death
- Acts as Will substitute
- Multiple beneficiaries share interest as TIC until account is divided
- If no beneficiary survives the owner or owners, then account becomes an asset of the estate of the owner or last to die of the owners

Revocation

- Designation can be changed by owner(s) at any time without beneficiary consent

Questions?

Contact me



Joseph M. Percopo, Attorney

