

# A PRIMER ON TENANCY BY THE ENTIRETY

Created By 765 ILCS 1005/1c (1991)



## Prerequisites:

1. **Husbands and wives only<sup>1</sup>**
2. **Homestead property only**
3. Conveyance document should specifically recite that grantees are **husband and wife** and that they are taking title “**not as joint tenants or tenants in common, but as tenants by the entirety.**”<sup>2</sup>

BENEFITS AND PROTECTIONS	LIMITATIONS
1. Has “right of survivorship” as with joint tenancy.	1. Tenancy harder to sever.
2. Tenancy can be severed only by a conveyance signed by both parties, by the dissolution or annulment of the marriage, or by the death of one of the parties.	2. Judgment remains an exception to title insurance coverage as long as spousal judgment debtor remains in title on the property, and judgment remains an inchoate “lien-in-waiting” which ripens into an actual lien upon death of one spouse, or dissolution of marriage, or upon change of principal residence.
3. Entirety estate (e.g., principal residence) generally <b>cannot be forced to be sold to satisfy a judgment entered against one spouse for his or her separate debt.</b>	3. Insulating effect only extends to claims of individual creditors during <b>joint</b> lives of the spouses, so, upon death of one spouse or judgment of dissolution, sale of property can be forced to satisfy lien.

## DEVELOPMENTS SINCE PASSAGE OF THE ACT:

- The act has been amended to provide that the protections of Tenancy by the Entirety in Illinois do **not** apply to transfers accomplished “with the **sole intent** to avoid the payment of debts existing at the time of the transfer beyond the transferor’s ability to pay those debts as they come due.” The Illinois Supreme Court, in its decision in **Premier Property Management v. Chavez**, 191 Ill. 2d 101, 728 N.E.2d 476, 245 Ill. Dec. 394 (2000), held that the “**sole intent**” standard of the amendment, not the “actual intent” standard of the Fraudulent Transfer Act, was the proper test for determining the validity of a transfer, and noted that it provides broader protection to consumers.
- **Federal tax liens** will also trump the protection of Tenancy by the Entirety. The United States Supreme Court stated in **United States v. Craft**, 122 S. Ct. 1414 (April 17, 2002), that “The Supremacy Clause [of the U. S. Constitution] provides the underpinning for the Federal Government’s right to sweep aside state-created exemptions.”
- **Cooperatives:** The Seventh Circuit Court, in **Maher v. Harris Trust & Savings Bank**, 506 F.3d 560 (7th Cir. 2007), addressed the issue of whether debtors could take advantage of the protection afforded to real estate held in tenancy by the entirety to protect their cooperative ownership from collection efforts initiated against the husband. The debtors owned shares of stock in a cooperative as tenants by the entirety. Along with their co-op shares, the Mahers had the right to occupy their unit during their lifetime under the terms of a proprietary lease, but their ownership interest was in personal property (stock), rather than in the real estate. The court concluded after reviewing Illinois homestead and tenancy statutes that Illinois state courts would conclude that, because the debtors’ interest in the cooperative qualified as a homestead and that interest was maintained as a homestead by both the husband and wife, the estate created was deemed to be in tenancy by the entirety.

<sup>1</sup> See item under “Developments Since Passage of the Act” discussion, following, regarding Civil Union Partners.

<sup>2</sup> Early decisions had required that any deed purporting to create a tenancy by the entirety track the statutory language **precisely** and specify that grantees are “husband and wife.” A bill introduced by Representative Sidney Matthias in 2001 at the urging of the Illinois Real Estate Lawyers Association (“IRELA”) and subsequently signed into law **deleted** the requirement with respect to the creation of a tenancy by the entirety between a husband and wife that a husband and wife must be named and expressly identified as such in the instrument. (P.A. 92-136, amending 765 ILCS 1105/1c, eff. Jan. 1, 2002.) While designation of “John Client and Mary Client, his wife, as Tenants by the Entirety” is now sufficient to create the estate for individuals, [and, arguably, designation of “John Client and Mary Client as Tenants by the Entirety” may also be sufficient], subsequent amendments regarding applicability of tenancy by the entirety to revocable inter vivos trusts and to partners in a civil union create some doubt about the wisdom of failing to include at least some designation of the marital (or civil union) status of the grantees. Thus, although the prior “magic language” requirement technically has been relaxed, *some* designation sufficient to identify the grantees as “husband and wife” or as partners in a civil union (e.g., “John Client and Mary Client, his wife, as Tenants by the Entirety”, or “John Client and Pat Client, partners in a civil union, as Tenants by the Entirety”) appears to be good practice. Where a marriage is dissolved, the estate will become, at least initially, a tenancy in common. Where key requirements of the act are not followed, or where property ceases to be the family homestead, the estate will be deemed a **joint tenancy**.

- **Public Act 96-1145** amended the Joint Tenancy Act and Code of Civil Procedure to provide that where the homestead is maintained in a **revocable inter vivos** (living) **trust** or **revocable inter vivos trusts** created for estate planning purposes by both husband and wife, the husband and wife are the primary beneficiaries of the trust or trusts, and the deed or deeds in trust specifically state that the interests of the beneficiaries to the homestead property are held as tenants by the entirety, the estate created is a tenancy by the entirety. *Effective January 1, 2011.*

The language added to **765 ILCS 1005/1c** reads:

“... Where the homestead is held in the name or names of a trustee or trustees of a **revocable inter vivos trust** or of **revocable inter vivos trusts** made by the settlors of such trust or trusts who are husband and wife, and the husband and wife are the primary beneficiaries of one or both of the trusts so created, and the deed or deeds conveying title to the homestead to the trustee or trustees of the trust or trusts specifically state that the interests of the husband and wife to the homestead property are to be held as tenants by the entirety, the estate created shall be deemed to be a tenancy by the entirety. ...”

- **Public Act 96-1145** also amended §12-112 of the Code of Civil Procedure, **735 ILCS 5/12-112**, to address revocable inter vivos trusts:

Any real property, or any beneficial interest in a land trust, or any interest in real property held in a **revocable inter vivos trust** or **revocable inter vivos trusts** created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants, except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due.

- Passage of the **Religious Freedom Protection and Civil Union Act** (750 ILCS 75/1 *et seq.*), effective June 1, 2011, arguably resulted in a broadening of the category of persons who can hold title as Tenants by the Entirety, i.e., the protection arguably has been extended to Civil Union Partners who are not “husband and wife” in the traditional sense.

### *Areas To Be Resolved and/or Developed:*

- Property jointly occupied by Father & Mother (50%), and by Child and Child's spouse (50%).
- Property partially used for commercial purposes (e.g., a two-flat with a business on first floor), or changed use.
- Property with principal residence as well as other related or supporting buildings or structures on “homestead” land.
- Health Care Industry, Credit Card Industry stance: “Debt of one spouse is debt of the other.”

### *The Statute:* (765 ILCS 1005/1c) (from Ch. 76, par. 1c)

Sec. 1c. Whenever a devise, conveyance, assignment, or other transfer of property, including a beneficial interest in a land trust, maintained or intended for maintenance as a homestead by both husband and wife together during coverture shall be made and the instrument of devise, conveyance, assignment, or transfer expressly declares that the devise or conveyance is made to tenants by the entirety, or if the beneficial interest in a land trust is to be held as tenants by the entirety, the estate created shall be deemed to be in tenancy by the entirety. **Where the homestead is held in the name or names of a trustee or trustees of a revocable inter vivos trust or of revocable inter vivos trusts made by the settlors of such trust or trusts who are husband and wife, and the husband and wife are the primary beneficiaries of one or both of the trusts so created, and the deed or deeds conveying title to the homestead to the trustee or trustees of the trust or trusts specifically state that the interests of the husband and wife to the homestead property are to be held as tenants by the entirety, the estate created shall be deemed to be a tenancy by the entirety.** Subject to the provisions of paragraph (d) of Section 2 and unless otherwise assented to in writing by both tenants by the entirety, the estate in tenancy by the entirety so created shall exist only if, and as long as, the tenants are and remain married to each other, and upon the death of either such tenant the survivor shall retain the entire estate; provided that, upon a judgment of dissolution of marriage or of declaration of invalidity of marriage, the estate shall, by operation of law, become a tenancy in common until and unless the court directs otherwise; provided further that the estate shall, by operation of law, become a joint tenancy upon the creation and maintenance by both spouses together of other property as a homestead. A devise, conveyance, assignment, or other transfer to 2 grantees who are **not in fact husband and wife** that purports to create an estate by the entirety shall be construed as having created an estate in **joint tenancy**. An estate in tenancy by the entirety may be created notwithstanding the fact that a grantor is or the grantors are also named as a grantee or the grantees in a deed. **No deed, contract for deed, mortgage, or lease of homestead property held in tenancy by the entirety shall be effective unless signed by both tenants.** This Section shall not apply to nor operate to change the effect of any devise or conveyance.

This amendatory Act of 1995 is declarative of existing law. (Source: P.A. 92-136, eff. 1-1-02, and P. A. 96-1145, eff. 1-1-11.) *(Emphasis added.)*

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