

Consider a *Tenancy by the Entirety Trust* to Protect Your Home



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TENANCY BY THE ENTIRETY became law in Illinois during the early 1990s as a form of home ownership. Our experience has been over the past 25 years, that most married couples, when closing on their home, are directed by their attorney to hold title as tenants by the entirety. This form of title is available for the ownership of a primary residence in Illinois held by a married couple in the names of both spouses (or people in a civil union).

An important advantage of holding real estate as tenants by the entirety is to ensure protection against creditors because such property, with few exceptions, is not liable to be sold if one of the parties has a judgment against him or her. Tenants by the entirety affords the same benefits as joint tenancy where the property automatically passes to the survivor in the event of the death of one of the parties. However, joint tenancy does not provide the same protections against creditors as is found in holding title as tenants by the entirety. However, neither joint tenancy nor tenants by the entirety will avoid the risk of probate if all of the title holders have passed.

One of the primary benefits of holding title to

a home in a trust is possible probate avoidance. However, despite popular belief, holding a property in trust does not automatically protect it against creditors. Holding a beneficial interest in a trust as tenants by the entirety was not originally available to people attempting to both protect their home from possible future creditors and avoid probate. Therefore, clients often had to make the choice of holding title in trust to avoid probate or holding title as tenants by the entirety without a trust for the protection against creditors.

The good news is that the tenancy by the entirety statute was amended in 2011 to afford the benefits of creditor protection along with the avoidance of probate by allowing the beneficial interest of a trust to be held as tenants by the entirety. In order to avoid probate, the tenants by the entirety couple must specifically designate a contingent beneficiary or beneficiaries (i.e., the person or persons to whom the property will pass after the primary beneficiaries' deaths). In addition, since the trustee must act according to the trust document, the home passes without probate. This means that there is far less of a chance of it being the subject of any possible will contest or other dispute brought in probate court.

If you own your primary home in Illinois as a married couple, it is a good idea to seek the services of a qualified attorney to ascertain whether you should transfer the title into a trust where the beneficial interest is held as tenants by the entirety. The common practice of attorneys advising clients to hold the title to their home at closings as tenants by the entirety without a trust may not be enough. The costs of placing the home into a trust where the beneficial interest is held as tenants by the entirety can be quite reasonable, and it is not necessary to have a bank or trust company involved. 



Joseph M. Lucas is a Barrington attorney with over 30 years of experience in the areas of real estate and estate planning, and has litigated the issue of creditor protection for homes held in tenants by the entirety.

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