

# A Primer on *Tenancy By The Entirety*

Created By 765 ILCS 1005/1c (1991)

- Prerequisites:**
1. **Husbands and wives** only
  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>1</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) <i>generally cannot be forced to be sold to satisfy a judgment entered against one spouse for his or her separate debt.</i>	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 may be forced to satisfy lien.

## **RECENT DEVELOPMENTS:**

- 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.”

## **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).

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<sup>1</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.” House Bill 1060, introduced by Representative Sidney Matthias 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 they must be named and expressly identified in the instrument as “husband and wife”. (Eff. 1-1-02.) (Designation of “John Client and Mary Client, his wife, as Tenants by the Entirety” is now sufficient to create the estate for individuals.) Although the prior requirement has been relaxed, designation of the grantees as “husband and wife” remains 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**.

- 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.”
- Impact of Illinois Religious Freedom Protection and Civil Union Act with same-sex couples seeking the protection.
- Property in a joint revocable inter vivos trust where husband and wife are the settlors of one trust.

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***Statutory Provisions:***

(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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