

**ASSET PROTECTION COMMITTEE OF
THE REAL PROPERTY, PROBATE AND TRUST LAW
SECTION OF THE FLORIDA BAR**

**WHITE PAPER ON PROPOSED
ENACTMENT OF FLORIDA STATUTES SECTION 736.05057**

I. SUMMARY

The proposed legislation originates from The Asset Protection Committee (the “Committee”) of the Real Property, Probate and Trust Law Section of The Florida Bar (the “RPPTL Section”).

The proposed legislation would enact new Florida Statutes Section 736.05057 to provide that spouses may validly maintain the creditor protection characteristics of tenancies by the entirety (“TBE”) property within the context of a joint revocable trust that meets the requirement of the proposed statute.

Joint trusts are often the primary estate planning vehicle for married Florida residents of modest means. Many middle class Floridians rely on joint trusts to simplify asset titling, provide for consolidated care during incapacity, minimize administration expenses, and avoid probate. These same Florida residents seek the protection of Florida’s TBE laws, and the Committee believes that the same public policy goals of protecting such residents exist regardless of whether that ownership is vested in the spouses, individually, or in a joint trust that meets the specifications set forth in the proposed legislation.

The proposed legislation is necessary because there is currently disagreement among practitioners, and unclear legal precedent, as to whether the creditor-protected status of TBE property continues inside a properly structured trust.

The statute is not intended to extend TBE protection to a new or previously unprotected class of assets. A transfer of assets to a trust that meets the requirements of the proposed statute does not convert property that was not TBE property before the transfer into property to which the TBE exemption applies. Enactment of the proposed legislation will merely provide that existing TBE property transferred to a joint trust described in the proposed statute will not operate to disrupt the exemption that the TBE property enjoyed before the transfer. The proposed legislation does not expand or alter any presumptions regarding what is or is not TBE property, and it does not shift the burden of proving whether a particular asset is subject to the protections of TBE.

II. CURRENT SITUATION

At common law, six unities must coincide to qualify property as TBE: (1) unity of possession (joint ownership and control); (2) unity of interest (the interest in the property must be identical); (3) unity of title (the interest must have originated in the same instrument); (4) unity of time (the interest must have commenced simultaneously); (5) survivorship (on the death of one spouse, the survivor must become the sole owner); and (6) unity of marriage (the parties must be married at

the time the property became titled in their joint names). See *Beal Bank, SSB v. Almand & Assoc.*, 780 So. 2d 45, 52 (Fla. 2001).

Subsequent cases have touched on the issue of preserving the above unities within the context of trust ownership. However, each case was based on a unique and limited set of facts, and collectively such cases do not provide certainty as to the TBE status of property held in a standard joint revocable trust that meets the parameters set forth in the proposed legislation. This leaves many Florida residents “in the dark” as to one of the State’s most compelling protections for its married residents.

In 2001, the Fifth District Court of Appeals in *Rollins v. Alvarez*, 792 So.2d 695 (Fla. 5th DCA 2001), denied TBE protection to property that had been transferred to a trust over which only one spouse had control based upon a disruption of the unity of possession and unity of interest. In that case, husband and wife created an *inter vivos* trust and transferred TBE property to that trust. Husband was named as the sole trustee with the power to distribute income and principal to both husband and wife during their joint lifetimes. Husband was also granted the sole power to amend, modify or revoke the trust during his lifetime. Due to husband’s unilateral control over the trust, the transfer was deemed tantamount to TBE property being conveyed to a single spouse with unqualified fee simple title. The court noted, “[t]here is no dispute that the effect of this transfer to the trustee destroyed any tenancy by the entireties that may have existed in the property pre-transfer.”¹ *Id.* at 696 n. 2.

In 2004, the Fourth District Court of Appeals in *Passalino v. Protective Group Securities, Inc.*, 866 So.2d 295 (Fla. 4th DCA 2004), upheld the TBE status of property that was transferred to an attorney’s trust account.² Husband and wife deposited the sale proceeds from their TBE residence into their attorney’s trust account. The creditor argued that the transfer disrupted the unity of title and possession as the attorney was the only person in possession of and with authority over the funds; thus, the TBE character of the property had been severed. The court rejected the creditor’s argument, noting that the TBE character is retained “where the parties clearly intended their property to be held as a tenancy by the entireties by exercising beneficial ownership of the property and controlling the property’s disposition.” *Id.* at 297.

¹ The most recent case to discuss the severance of TBE upon transfer to trust was decided in December of 2020. *In re Hughes*, 2020 WL 7388075 (N.D. Ill.). The court upheld the protected status of Illinois TBE homestead property against husband’s creditors. The property was transferred from husband and wife, as tenants by the entirety, to a trust of which the wife was the grantor with “the sole right to revoke or terminate the trust.” *Id.* at 1. Wife was also the sole trustee with the power to distribute income and principal for the benefit of herself, her husband, and her children. The trust contained valid spendthrift clauses with respect to the husband and children. The court concluded that husband’s beneficial interest in the trust did not enter into the bankruptcy estate as the wife was the sole grantor and trustee and there was a valid spendthrift clause under Illinois law. The creditors attempted to argue that the trust property was not protected as it proceeded from the husband as the initial owner of the property with his wife as tenants by the entirety. The court rejected this argument, noting that when husband and wife conveyed the property to the trust “they did so as a single legal entity. Title ‘proceeded from’ that entity, not from [the husband] himself.” *Id.* at 6. While not at issue in the case, the court noted that “courts differ on whether the conveyance of entireties property to a spendthrift trust severs the tenancy or renders the trust’s spendthrift provision unenforceable.” *Id.* at 6 n. 6.

² The Florida Trust Code does not apply to attorney trust accounts.

In 2011, the Federal District Court for the Middle District of Florida in *Quaid v. Baybrook Home of Polk Cnty., LLC*, 2011 WL 5572605 (M.D. Fla.), denied TBE protection to TBE property transferred to a trust over which only one spouse had control. Wife established a revocable trust, which named her husband and son as successor trustees and her husband as the sole beneficiary upon her death. During her lifetime, only wife had the ability to control trust assets and to revoke or amend the trust. Husband transferred TBE assets to the trust during wife's lifetime. Upon wife's death, husband's creditors sought collection against such assets on the grounds that they were no longer TBE assets and husband was a settlor with respect to the trust assets in question. The court held that "when assets are transferred to a trust in which only one party maintains control, the terms of the trust eliminate any TBE protection." *Id* at 2. However, the court ultimately found that the assets were not subject to husband's creditors as he was not a settlor of the trust as only his wife had the power to revoke the transfer or withdraw the assets. Upon wife's death the spendthrift provisions of the trust protected the assets from husband's creditors.

In September of 2020, the Bankruptcy Court in *In re Givans*, 623 B.R. 635 (Bankr. M.D. Fla. 2020), denied TBE protection to a residence that was initially TBE and was subsequently transferred to a trust. Husband and wife transferred the TBE residence to a joint trust. The court noted that "they held bare legal title as Trustee of the Trust. Because a trust is not a married individual, the Trust cannot own the Property as tenants by the entirety. The unity of marriage does not exist as to the Trust." The court also placed considerable emphasis on the fact that the children of the settlors were also beneficiaries of the trust and thereby received an equitable interest in the trust property, which disrupted the unity of interest necessary for TBE property.

In direct contrast to *In re Givans*, the court in *In re Romagnoli*, 321 B.R. 807 (Bankr. S.D. Fla. 2021) upheld the preservation of TBE protection to assets transferred to a joint trust. In *In re Romagnoli* the debtor and his wife were the grantors and co-trustees of the trust. The debtor, his wife, and their minor child were beneficiaries. Debtor and his wife transferred TBE property to the trust. The court noted that if TBE property was contributed to the trust then the debtor and his wife could only jointly remove the TBE property from the trust and if the property were removed from the trust it would continue to retain its TBE status. In short, the creditor had no remedy even if substituted in for debtor as a trustee of the trust.

The above cases that decide against TBE protection ultimately hinge on the absence of one of the six unities required for TBE. For example, *Rollins* and *Quaid* both focus on the disruption of the unity of possession as only one spouse was granted the ability to revoke or amend the trust in question. The proposed legislation seeks to narrowly define the requirements of a joint trust that allows continuation of TBE status for TBE property transferred to such a trust. Those requirements are aimed at preserving the status quo of all parties (spouses and spouses' creditors).

No Florida court or federal court has provided a conclusive precedent as to the retention of TBE-protected status within a carefully structured joint trust that meets the characteristics of the proposed legislation, and the varying outcomes under the above cases continues to leave Florida residents "in the dark" as to the status of TBE property in the context of joint trusts. There is no compelling policy reason to bar the protection of TBE status within a joint trust that meets the requirements of the proposed legislation and does not otherwise create a new protected category of property nor deny creditors satisfaction that would otherwise be available. Married couples have a legitimate expectation that TBE property is protected from the creditors of either spouse,

and ownership via a trust structure that preserves the exemptions that would (or would not) be available if the settlor spouses had held the property individually should not disrupt that expectation.

III. EFFECT OF PROPOSED LEGISLATION (DETAILED ANALYSIS OF PROPOSED STATUTE)

A. Effect of Proposed Legislation.

The proposed statute would offer a clear path as to the continuation of the protected status of TBE property transferred to a joint trust meeting the requirements set forth in the statute. The essential characteristics of the six unities required at common law would be maintained provided such structure is followed. The proposed legislation does not otherwise shift the burden of proving that a TBE exemption applies to specific property or proceeds. That analysis remains the same whether owned by spouses individually or within a joint trust that satisfies the requirements of the proposed legislation.

B. Specific Statutory Provisions

1. Subsection (1)

Subsection (1) defines “TBE trust property” and “proceeds” for purposes of the proposed legislation. Property is limited to property that is already TBE property before its transfer to a trust, to which the statute applies. “Proceeds” are assets attributable to the sale, lease, exchange or other disposition of property transferred to the trust, income from the property, and claims and insurance proceeds attributable to the property.

The proposed statute does not allow for the transmutation of non-TBE property into TBE property via a conveyance to a trust. The proposed legislation is focused on the preservation of prior TBE status when the structure of the trust to which the TBE assets are transferred does not otherwise alter the relationship between the spouses and the TBE property in question.

2. Subsection (2)

Subsection (2) sets forth the provisions in the trust agreement and the factual circumstances that are required to maintain the TBE exemption of property transferred to such a trust. It is the heart of the proposed legislation.

The trust must: (i) be revocable by either or both of the settlors during their joint lifetimes; (ii) if the trust is revoked during the joint lifetimes of the settlors then the trustee must distribute any property and proceeds to the settlors as tenants by the entirety; (iii) the settlors must both be living and remain married to each other; (iv) the property and proceeds must be held for the settlors benefit during the course of their marriage, but the terms of the TBE trust agreement allow the settlors to permit the trustee to make distributions to other persons; and (v) upon the death of the first settlor the surviving settlor has the power to revoke the trust as to the property and proceeds and vest full title in the surviving settlor, individually.

If a trust meets the requirements of subsection (2), then property that was TBE property prior to its transfer to the trust, and the proceeds of such property, will obtain the benefit of TBE protection from the settlors' separate creditors. Creditors stand in the same relationship to the TBE property of the settlors titled to the trust as they would with respect to TBE property titled to the Settlers, individually. Upon termination of the marriage or the death of the first settlor, the same avenues are available for creditors that would otherwise have been available to individually-owned TBE property.

3. Subsection (3)

Subsection (3) clarifies that the protections afforded by this statute apply regardless of who is serving as trustee.

4. Subsection (4)

Subsection (4) allows one or both of the settlors to transfer non-TBE property to the trust, and any property so transferred retains its character as non-TBE property inside the TBE trust.

5. Subsection (5)

Subsection (5) addresses the treatment of property and proceeds with respect to dissolution of marriage and related provisions under Chapter 61, Florida Statutes and elective share rights and related provisions under Part II of Chapter 732, Florida Statutes. For purposes of those statutory regimes property and proceeds held in trust under the proposed legislation are treated the same as TBE property titled to the settlors, individually.

6. Subsection (6)

Subsection (6) provides that upon the death of the first settlor the exemption from the first settlor's individual creditors with respect to the property and/or proceeds continues for the benefit of the surviving settlor. This subsection maintains the status quo of TBE property following the death of one settlor with respect to the separate creditors of the first settlor to die. The same exemption to claims of the deceased settlor's creditors apply as if the settlors had owned the property and/or proceeds as TBE property, individually.

7. Subsection (7)

Subsection (7) provides that upon the death of the first settlor the property and/or proceeds are subject to the claims of the surviving settlor's creditors. This subsection maintains the status quo of TBE property following the death of one settlor with respect to the separate creditors of the surviving settlor. The creditors of the surviving settlor have the same claims against the property and/or proceeds as they would have if the property and/or proceeds were owned by the surviving settlor individually.

Subsection (7) also provides that the surviving settlor is granted the same rights to disclaim a portion of the property and/or proceeds under Chapter 739, Florida Statutes, subject to the same

restrictions thereunder, as the surviving settlor would have had upon the death of the first settlor if the property and/or proceeds were titled as TBE in the settlors' individual names.

8. Subsection (8)

The termination of the settlors' marriage by dissolution, invalidity or annulment operates to terminate the TBE protection granted to property and/or proceeds under subsection (2) above, just as such protection would be terminated if the property and/or proceeds were titled as TBE in the settlor's individual names prior to the termination of the settlors' marriage.

9. Subsection (9)

For purposes of Sections 732.401 and 732.4015, Florida Statutes, a residence owned by a trust described in subsection (2) that meets the definition of property in subsection (1) and that is used by the settlors as their homestead is treated as property owned by the settlors as TBE under those sections and not as protected homestead for purposes of Constitutional restrictions on devise of homestead. After the death of the first settlor these sections would apply to the homestead property in question. Once again, the proposed legislation is seeking the same result as if the property were owned by the settlors, individually, as tenants by the entirety.

10. Subsection (10)

Subsection (10) maintains the status quo with respect to the burden to prove the TBE exemption. The burden of proof for property and/or proceeds held within a trust described in subsection (2) is the same as if the settlors owned such property, individually, as tenants by the entirety. Nothing in the proposed legislation is intended to diminish the rights of creditors that would otherwise be available with respect to the settlors' assets, TBE or otherwise.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments. It should be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

The certainty and predictability that the proposed legislation will lend to rights and liabilities in TBE property titled to a joint trust that meets the requirements set forth in the statute will benefit the private sector.

VI. CONSTITUTIONAL ISSUES

The proposed legislation is prospective in application. There are no known Constitutional issues.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Family and Business Law Sections of The Florida Bar and the Florida Bankers Association.

1 Section 736.05057, Florida Statutes, is created to read:

2 **736.05057 Transfer of tenants by the entirety property to**
3 **trust**

4 (1) As used in this section:

5 (a) "TBE trust property " means any property owned by married
6 persons as tenants by the entirety at the time of its transfer to
7 the trustee of a TBE Trust, and includes proceeds.

8 (b) "TBE trust" means a trust which satisfies the requirements
9 of this section.

10 (c) "Proceeds" means:

11 1. Assets attributable to the sale, lease, exchange or
12 other disposition of TBE trust property;

13 2. Income attributable to TBE trust property;

14 3. Claims arising out of a loss or damage to TBE trust
15 property, and proceeds of insurance payable to the trustee on
16 account thereof.

17 (2) TBE trust property shall have the same exemption from the
18 claims of the settlors' respective separate creditors as it would
19 have if legal title were still held by the settlors as tenants by
20 the entirety if the instrument creating the TBE trust provides
21 that:

22 (a) The trustee shall hold the TBE trust property for the sole
23 benefit of both settlors during their marriage and the trustee may
24 distribute TBE trust property and income only to or for the
25 benefit of the settlors or otherwise as both settlors direct;

26 (b) The TBE trust is revocable by either or both of the
27 settlers during their marriage to each other, and if the TBE trust
28 is revoked during that time the trustee shall immediately
29 distribute the TBE trust property to the settlers as tenants by
30 the entirety, or as otherwise directed by both settlers;

31 (c) If the settlers' marriage ends at the death of the first
32 settlor, the trustee shall hold the TBE trust property for the
33 sole benefit of the surviving settlor during his or her lifetime,
34 during which time the surviving settlor can revoke the trust as to
35 the TBE trust property in its entirety and, in that event, the
36 trustee shall immediately distribute all TBE trust property to the
37 surviving settlor or otherwise as the surviving settlor shall
38 direct; and

39 (d) The exemption of TBE trust property from the claims of
40 the settlers' respective separate creditors shall immediately
41 terminate if the settlers: (i) are no longer married to each
42 other; (ii) cease being the sole beneficiaries of the TBE trust
43 property; or (iii) take any action with respect to their equitable
44 and beneficial interest in the TBE trust property that would
45 effectively sever or terminate a TBE in the property if they held
46 legal title individually.

47 (3) This section applies if one, both, or neither of the settlers
48 serves as trustee of the trust.

49 (4) If one or both of the settlers or another person transfers
50 property that is not TBE trust property to the trustee of a TBE

51 trust any such property, and all income, increases, receipts, and
52 claims attributable to such property retain, as assets of the
53 trust or as distributed from the trust, its character as property
54 that is not TBE trust property.

55 (5) Unless provided to the contrary in a writing signed by both
56 settlers, and subject to the requirements of s. 732.702, TBE trust
57 property held in a TBE trust shall be treated as being owned by
58 the settlers as tenants by the entirety for purposes of
59 determining a settlor's marital property rights under Ch. 61 and
60 for purposes of part II of ch. 732.

61 (6) Upon the death of the first settlor:

62 (a) All TBE trust property that was exempt from the claims of
63 the first deceased spouse's separate creditors immediately prior
64 to his or her death shall have the same exemption from such claims
65 after his or her death as would have applied if the settlers held
66 the TBE trust property outside the trust as tenants by the
67 entirety.

68 (b) All TBE property is subject to the claims of the
69 surviving settlor's separate creditors to the same extent that
70 such property would be so subject if solely owned by the surviving
71 settlor.

72 (c) For purposes of Ch. 739, the surviving settlor may
73 disclaim an interest in TBE trust property, as if such TBE trust
74 property were owned by the settlers as tenants by the entirety
75 immediately before the death of the first settlor.

76 (7) If the settlors' marriage terminates by dissolution,
77 invalidity or annulment, upon the court's order dissolving or
78 annulling the marriage or the court's determination that the
79 marriage was invalid, the exemption from the claims of the
80 settlors' separate creditors provided for in this section
81 immediately terminates.

82 (8) For purposes of ss. 732.401 and 732.4015, during the settlors'
83 marriage TBE trust property used by either or both settlors as
84 their homestead shall be treated as property owned by them as
85 tenants by the entirety outside of the trust, and for purposes of
86 s. 731.201 is not protected homestead. If the settlors' marriage
87 terminates by the death of the first settlor to die, there is no
88 devise of the homestead within the meaning of s. 732.4015. Upon
89 the surviving settlor's death the homestead is property to which
90 ss. 732.401 and 732.4015 apply.

91 (9) In any proceeding relating to the exemption of TBE trust
92 property from the claims of a separate creditor of either or both
93 settlors, the burden to prove such exemption is the same as if the
94 TBE trust property were owned by the settlors or settlor
95 individually.

96 (10) The provisions of this section are in addition to, and not in
97 derogation of, any common law allowing property titled in the name
98 of the trustee of a trust to be, or to be treated as, tenants by
99 the entirety property.

100 (11) This section shall take effect upon becoming law, and it
101 applies to all TBE trust property transferred by settlors to the
102 trustee of a trust that satisfies the requirements of Subsection
103 (2) on or after the effective date of the statute.