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## TBE ownership becomes more powerful

In today's litigious society, clients routinely express an interest in protecting their most sacred possession — their homes. Although other assets may have greater economic value, one's home symbolically represents security. In my wealth protection practice, I often advise married couples to hold title to their primary residence as "tenants by the entirety" (TBE) to reap asset protection benefits. However, changes in legislation have opened the doors to even more options.

With origins in ancient common law, TBE ownership continues to be an incredibly powerful tool. Under TBE, spouses are considered to own property together as a single legal entity. Therefore, creditors of an individual spouse may not attach and sell the interest in the property of a debtor spouse. Only creditors of both spouses may attach and sell the interest in the property owned by TBE.

TBE is only one form of joint ownership. In other forms of joint ownership, such as joint tenancy, any one joint tenant may encumber or transfer the property without the consent of the other tenants. Similarly, a creditor may obtain a judgment against one joint tenant and encumber the property. In contrast, property owned as TBE may not be sold or transferred by one tenant without the consent of the other tenant. In addition, with TBE upon the first spouse's death the property automatically passes to the survivor by operation of law and outside of probate.

States like Delaware and Florida have become attractive asset protection havens as both states allow virtually any asset

can be held as TBE—investment portfolios, secondary residences and interests in business entities. However, in Illinois, only homestead property (a primary residence) can be held as TBE.

Where one spouse is in a profession laden with litigation concerns, some attorneys may suggest holding title to the primary residence in the other spouse's name (or revocable trust). Imagine a situation where Dr. Denise transfers title of the couple's primary residence to Stay at Home Husband, Stan. Denise and Stan were primarily concerned with medical malpractice lawsuits. However, when Stan is involved in a terrible car accident and faces an ugly personal-injury lawsuit there is no protection. The transfer of the primary residence to Stan made it difficult for a malpractice creditor of Denise to reach; however, the home is now

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### THE BUZZ



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susceptible to a lawsuit against Stan. Traditionally, a primary residence could be held as TBE or through client's revocable living trusts. To determine whether to hold title at TBE or through client's revocable living trusts, attorneys would ask, what has a greater probability — one client facing a lawsuit or both clients dying simultaneously? More often than not, married couples were advised to hold title to their property as TBE.

In January 2011, House Bill 5282 (now PA 96-1145) became effective. Although the law has been in effect for over a year and a half, many have not yet taken advantage of the new legislation. The law added language to the Joint Tenancy Act (765 ILCS 1005/1c) and the Code of Civil Procedure (735 ILCS 5/12-112), which allows title to homestead to be held through a spouse's revocable living trusts, as TBE.

Specifically, where the primary residence is held in a revocable trust (or trusts) created by a husband and wife and both the husband and wife are the primary beneficiaries of one or both of the trusts. If the deed conveying title specifically states the interests are to be held as TBE, then the estate created shall be deemed to be TBE. Similarly, unless the property was transferred to TBE with the sole intention of avoiding creditors, the property is not required to be sold upon judgment against only one of the tenants. Essentially, clients like Denise and Stan no longer have to choose between holding title through revocable living trusts or as TBE. We now have the best of both worlds — for both estate planning and asset protection purposes.

For centuries, TBE was a right afforded only to a traditional married couple. However, effective June 1 of last year, the Illinois Religious Freedom Protection and Civil Union Act extended the rights of a married couple to same-sex and different-sex couples who enter into a civil union. Today, couples in a civil union in Illinois are afforded the same asset protection as married couples with respect to their primary residence. As such, partners in a civil union may also hold title to their primary residence through their revocable living trusts, as TBE.

The transfer of title for your primary residence is documented through a quit claim deed. It is a nominal cost to prepare and record a quit claim deed and the asset protection benefits of holding the home as TBE (or TBE through revocable living trusts) are phenomenal.