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# Agnew Law Office

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*An Estate Planning Law Firm*

## **TENANCY BY THE ENTIRETY**

There are three types of concurrent ownership, or ownership of property by two or more persons:

- ✓ Tenancy in Common
- ✓ Joint Tenancy
- ✓ Tenancy in the Entirety

### ***Tenancy in Common***

When property is owned by two or more persons as tenants in common, each person owns an undivided interest in the entire property. When one person dies, their undivided interest will pass through their estate, not to the surviving owner (or owners).

### ***Joint Tenancy***

Joint Tenancy is a form of ownership that has “*rights of survivorship.*” When property is owned by two or more persons as joint tenants, each person still owns an undivided interest in the entire property. However, when one person dies, their undivided interest will pass to the surviving owner (or owners), not through the estate of the deceased owner.

### ***Tenancy by The Entirety***

The last form of concurrent ownership, Tenancy by the Entirety, may only be created by married persons. In addition, a married couple may only own their personal residence as Tenants by the Entirety. Like Joint Tenancy, Tenancy by the Entirety is a form of ownership with rights of survivorship. When one spouse dies the surviving spouse becomes the owner of the entire property.

The most significant feature of Tenancy by the Entirety rests in the **asset protection** afforded by this type of ownership. Under a Tenancy by the Entirety, creditors of an individual spouse may not attach or sell the interest in the residence of a debtor spouse. Only creditors of the couple may attach and sell the interest in the property owned by Tenancy by the Entirety (i.e. if the couple defaults on the mortgage note, the bank may still foreclose on the property). The enforcement of judgements section of the Illinois Code of Civil Procedures states, in part:

*Any real property held in tenancy by the entirety shall not be liable to be sold upon judgment 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.*

Unlike Tenancy in Common or Joint Tenancy, Tenancy by the Entirety will only exist as long as ALL of the following conditions are met:

- The owners are husband and wife.
- The owners remain married to each other.
- The property is their personal residence.

Another difference between a Tenancy by the Entirety and a Joint Tenancy or Tenancy in Common is that a Tenant by the Entirety may not sell or give away his or her interest in the property without the consent of the other tenant. In a Tenancy in Common, persons may sell or give away their ownership interest. Joint Tenants do have a right of survivorship, but a Joint Tenant may sell or give away his or her interest in the property. If a Joint Tenant sells his or her interest in a Joint Tenancy, the tenancy becomes a Tenancy in Common, and no tenant has a right of survivorship. A Tenancy by the Entirety cannot be reduced to a Joint Tenancy or Tenancy in Common by a conveyance of property. Generally, the couple must divorce, obtain an annulment, or mutually agree to amend the title to the property to extinguish a Tenancy by the Entirety.