LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By David J. Akins, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section
(List name of the section, division, committee, bar group or individual)

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Position Type The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of The Florida Bar
(Florida Bar, section, division, committee or both)

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Appearances before Legislators _____
(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff _____
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support [X] Oppose [ ] Technical Assistance [ ] Other [ ]

Proposed Wording of Position for Official Publication:

Support enactment of new Section 689.151 to the Florida Statutes to: (1) permit an owner of personal property to create a tenancy by the entireties by a direct transfer to the owner and the owner's spouse, or a joint tenancy with right of survivorship by a direct transfer to the owner and another person or

persons, without requiring an intermediate transfer through a strawman, (2) permit joint tenants to hold unequal shares or interests in personal property in a joint tenancy with right of survivorship while retaining the right of survivorship, (3) and facilitate proving the existence of tenancies by the entireties and joint tenancies with right of survivorship in personal property by codifying and clarifying existing common law evidentiary presumptions.

Reasons For Proposed Advocacy:

To: (1) eliminate the archaic need for an intermediate transfer through a strawman when an owner of personal property wishes to create a tenancy by the entireties with the owner and the owner's spouse or a joint tenancy with right of survivorship with the owner and another person or persons; (2) permit joint tenants to hold unequal shares or interests in personal property in a joint tenancy with right of survivorship without severing the joint tenancy and terminating the right of survivorship; and (3) facilitate proving the existence of tenancies by the entirety and joint tenancies with right of survivorship in personal property by codifying and clarifying existing common law evidentiary presumptions.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position _____
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) _____
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Family Law Section, TFB
(Name of Group or Organization) (Support, Oppose or No Position)

Florida Bankers Association
(Name of Group or Organization) (Support, Oppose or No Position)

Business Law Section, TFB
(Name of Group or Organization) (Support, Oppose or No Position)

Elder Law Section, TFB

Tax Section. TFB

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.

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Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed New Section 689.151, Florida Statutes

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I. SUMMARY

The proposed legislation ("§ 689.151") originates from The Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Law Section of The Florida Bar (the "RPPTL Section"). The scope of § 689.151 is limited to principles of law concerning interests in personal property held in tenancies by the entirety ("TBE") or joint tenancies with right of survivorship ("JTWROS"). The proposal has no application to any interests in real property.

The goals of § 689.151 are threefold:

1. To permit an owner of personal property to create a TBE or JTWROS by a direct transfer to the owner and another person or persons without requiring an intermediate transfer through a strawman. This goal is attained by modifying the common law unities applicable to TBE and JTWROS in personal property.

2. To permit joint tenants owning personal property in a JTWROS to hold unequal shares that are not equal while retaining the right of survivorship when both unequal shares and survivorship are intended. This goal is attained by modifying the common law unities applicable ax to JTWROS in personal property.

3. To facilitate proving the existence of TBE and JTWROS in personal property by codifying and clarifying existing common law evidentiary presumptions.

The general thrust of § 689.151 is to firmly move toward a transparent, workable framework that more fully implements the intent of co-owners of interests in personal property in the context of a more modern, common-sense, statutory-based environment for the creation of TBE and JTWROS relationships involving personal property. Enactment of the proposed legislation will bring needed clarity and certainty to an area of the law in which there is now considerable apprehension, confusion and misconception.

II. SUBSECTION-BY-SUBSECTION ANALYSIS

A. Subsection (1)

Current Situation:

At common law, four unities must be present to create a JTWROS relationship: (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 interests must have originated in the same instrument); and (4) unity of *time* (the interests must have commenced simultaneously). A fifth unity, unity of *person*, is also required to establish a TBE relationship.

Under Florida case law, subject to § 689.11, Fla. Stat. (discussed below), the required common law unities of *time* and *title* prevent the creation of a TBE or JTWROS unless the tenants acquire their interests at the same time and from the same source. Decisions of the Florida Supreme Court have continued to uphold the necessity of compliance with the common law unities. See, *Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45, 53 (Fla. 2001) ("For joint tenancies, " the owners' interests in the property must be identical, the interests must have originated in the identical conveyance, and the interests must have commenced simultaneously"); *LaPierre v. Kalergis*, 257 So.2d 33 (Fla. 1972); *First National Bank of Leesburg v. Hector Supply Company*, 254 So.2d 277 (Fla. 1971); *Kozacik v. Kozacik*, 26 So.2d 659 (Fla. 1946). However, several district court decisions have not adhered to that requirement and are in conflict with the Supreme Court decisions. See, *Simon v. Koplin*, 159 So.3d 281 (Fla. 2d. DCA 2015), which misconstrued *F.S.* 689.15 as abolishing the common law unities requirement if the instrument of transfer satisfies the statute by expressly providing for survivorship; *Ratsinka v. Estate of Denesuk*, 447 So.2d 241 (Fla. 2d DCA 1983); *D.A.D., Inc. v. Moring*, 218 So.2d 451 (Fla. 4th DCA 1969).

Because of the required unities of *time* and *title*, an existing owner of property cannot create a JTWROS in personal property with another person or create a TBE in personal property with his or her spouse by a direct transfer. See, *In re Aranda*, 2011 WL 87237 (Bankr. S.D. Fla. 2011) (account not held as TBE because the common law unity of time was not present).

This archaic restriction has caused practitioners to resort to the use of an indirect two-step "strawman" process to insure the effective creation of a TBE or JTWROS in personal property. In those instances, the existing owner transfers the property to a 3rd party strawman, who then transfers the property back to the owner and the other intended tenant or tenants, thereby satisfying the unites of *time* and *title*. Several states have enacted legislation modifying the common law unities to permit an existing owner to create a valid TBE or JTWROS by direct transfer. See, Minn. Stat. Ann. § 500.19; Wis. Stat. Ann. § 700.19; and Mich. Comp. Laws Ann. § 565.49.

Many years ago, the strawman problem was resolved with respect to TBE's in real property by the enactment of § 689.11, Fla. Stat. That statute validates (even retrospectively) the creation of TBE's in real property by direct transfer from the existing owner to the existing owner and his or her spouse. However, that solution was only partial because it did not validate the creation of TBE's or JTWROS's in personal property or JTWROS's in real property by direct transfers.

After struggling with the existing, muddled state of the law on creation of TBE's, the Bankruptcy Court in *In re Shahegh*, 2013 WL 364821 (Bankr. S.D. Fla 2013), asked, "[s]hould the concept of TBE ownership in personal property be changed and modified?

Florida Statutes Section 689.11 suggests that changes may also be warranted when it comes to TBE interests in personalty." Good public policy should disfavor a rule that makes it more difficult for spouses to create a TBE in personal property than in real property.

Effect of Proposed Changes:

Subsection (1) of § 689.151 validates the creation of TBE's and JTWROS's in personal property by direct transfer from an existing owner to the owner and another tenant or tenants and eliminates the need to resort to the use of a strawman in such instances. For example, Wife, who is the 100% owner of personal property Asset X, can effectively transfer Asset X to Wife and Husband, as TBE, notwithstanding the absence of the common law unities of *time* and *title*. It will no longer be necessary for Wife to first transfer Asset X to a strawman, who would then transfer Asset X to the Wife and Husband. The same will be true for an owner who wishes to create a JTWROS with one or more persons. This result is achieved by abolishing the common law unities of *time* and *title* insofar as they apply to the creation of TBE's and JTWROS's in personal property.

Good policy suggests that what currently can be accomplished only through an indirect two-step process with a strawman should be achievable directly. Legislation that accomplishes for personal property what Florida Statutes § 689.11(1) does for real property will better effectuate the parties' intent, provide greater uniformity and predictability, and reduce confusion and litigation.

The proposed change will not alter the existing exempt status of assets held in a TBE from the claims creditors of only one spouse because that exemption is based upon the separate and distinct common law unity of *person*, which is not abolished or affected in any way by the proposed change.

B. Subsection (2)

Current Situation:

Beal Bank, SSB v. Almand & Associates, 780 So.2d 45, 53 (Fla. 2001); *LaPierre v. Kalergis*, 257 So.2d 33 (Fla. 1972); *First National Bank of Leesburg v. Hector Supply Company*, 254 So.2d 277 (Fla. 1971); and *Kozacik v. Kozacik*, 26 So.2d 659 (Fla. 1946), clearly establish that the common law unities applicable to JTWROS's, including the unity of *interest*, are part of Florida law. The unity of *interest* requires equal shares and will not permit the creation or continuation of a JTWROS if that the shares are not equal. "If the shares of the cotenants were not equal, the unity of interest would be lacking and the estate could not be a joint tenancy." Orth, John V., "Presumed Equal: Shares of Cotenants," *ACTEC Law Journal*, Vol. 37, No. 3, Winter 2011, p. 463. Unequal shares may result from unequal contributions by tenants or from gifting between tenants. Even if shares that were equal at the creation of the JTWROS later become unequal, the JTWROS will be severed and converted to a tenancy in common, resulting in the loss of the incident of survivorship. Accordingly, current Florida law does not accommodate co-tenants who want both survivorship and unequal shares.

On a closely related matter, it should be noted that the multiple-party bank account statute, § 655.79, currently permits survivorship to operate on a such accounts without respect to what interests or shares, if any, are owned by the persons named in the account documentation prior to the death of any of them.

Effect of Proposed Changes:

Subsection (2) of § 689.151 permits joint tenants to hold unequal shares in personal property and still enjoy the advantages of survivorship from a JTWROS when both unequal shares and survivorship are intended. This result is achieved by abolishing the common law unity of *interest* insofar as it applies to the creation or continuation of JTWROS's in personal property. By statute, other states have exempted JTWROS from the required unity of *interest*. Orth, John V., "Presumed Equal: Shares of Cotenants," *ACTEC Law Journal*, Vol. 37, No. 3, Winter 2011, p. 463. See, Colo. Rev. Stat. Ann. **§** 38-31-101 and Minn. Stat. Ann. § 500.19. Subsection (2) of § 689.151 is similar to Florida's multiple-party bank account statute, § 655.79, insofar as it permits survivorship to operate on such accounts without respect to what interests or shares, if any, are owned by the persons named in the account documentation prior to the death of any of them.

While subsection (2) of § 689.151 allows tenants to hold unequal shares in a JTWROS, it is recognized that the shares held in most JTWROS's will be equal. In those states where JTWROS have been exempted by statute from the required unity of interest so as to permit unequal shares, "the presumption of equal shares that once applied only to tenancies in common now extends to joint tenancies as well, focusing additional attention on the evidence necessary to rebut it." Orth, John V., "Presumed Equal: Shares of Cotenants," *ACTEC Law Journal*, Vol. 37, No. 3, Winter 2011, p. 463. Accordingly, subsection (3)(c) of § 689.151 creates a rebuttable evidentiary presumption that such shares are equal. This presumption of equal shares, which is in line with the presumption of equal shares currently applicable to tenancies in common under Florida law, may be rebutted or overcome by evidence that the shares are not equal.

C. Subsection (3)(a)

Current Situation:

A presumption is an assumption of fact which the law makes from the existence of another fact or group of facts. § 90.301, Fla. Stat.

The 2001 landmark case of Beal Bank, SSB v. Almand & Associates, 780 So. 2d 45 (Fla. 2001), recognized that "stronger policy considerations favor allowing the presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property" and adopted that presumption. *Beal Bank* at 57. The Court then proceeded to establish a specific rebuttable presumption that an account titled in the name of both spouses is held as a TBE unless the account documentation *expressly* disclaims that form of ownership. *Beal Bank* at 58-61.

A statement that a TBE is not intended or that a tenancy in common is intended constitutes an express indication that a TBE is not intended. However, a statement in the

ownership documentation that the account is held as a JTWROS does not alone constitute an express disclaimer of TBE is because a TBE is "essentially a joint tenancy, modified by the common-law doctrine that the husband and wife are one person." *Beal Bank* at 60.

The presumption of intent that *Beal Bank* applied to a bank account applies to all personal property. *Cacciatore v. Fisherman's Wharf Realty Limited Partnership*, 821 So.2d 1251 (Fla. 4th DCA 2002). However, the rebuttable presumptions established by *Beal Bank* for personal property are not applicable to the creation of a tenancy by the entireties in real property. *Bridgeview Bank Group v. Callaghan*, 84 So.3d 1154 (Fla. 4th DCA 2012).

Effect of Proposed Changes:

Consistent with the policies adopted by *Beal Bank*, Subsection (3)(a) of § 689.151 essentially codifies the *Beal Bank* rebuttable presumption that personal property owned by both spouses is held as a TBE unless the ownership documentation expressly indicates that a TBE is not intended, subject to the proviso that a designation of JTWROS alone is not an express indication that a TBE is not intended.

Subsection (3)(a) provides that it is rebuttably presumed that:

> (a) Personal property owned by both spouses is owned by them as tenants by the entirety when:
>
> > (i) An ownership document neither specifies a form of ownership nor expressly indicates that a tenancy by the entirety is not intended; or
> >
> > (ii) There is a designation of joint tenancy with right of survivorship in an ownership document and no express indication that a tenancy by the entirety is not intended.

Subsection (3)(a) also provides that the stated presumption also applies when a spouse owning personal property adds the name of his or her spouse to an ownership document for that property that does not expressly indicate that a TBE is not intended. Thus, the spouses would be entitled to the rebuttable presumption of a TBE without first having to offer other evidence of a completed transfer or gift of an interest in the property.

Subsection (4) of § 689.151, discussed below, specifies how this rebuttable presumption may be rebutted or overcome.

D. Subsection (3)(b)

Current Situation:

In the case of personal property co-owned by non-spouses, if the ownership documentation indicates that the property is held as JTWROS, Florida case law currently recognizes that it is rebuttably presumed to be owned by them as JTWROS. See *Branch Banking & Trust Co. v. Ark Development/Oceanview*, LLC, 150 So.3d 817 (Fla. 4th DCA

2014); *Escudero v. Hasbun*, 689 So.2d 1144 (Fla. 3d DCA 1997)*; Hagopian v. Zimmer*, 653 So.2d 474 (Fla. 3d DCA 1995); and *Barlow v. Department of Health & Rehabilitative Services*, 512 So.2d 1069 (Fla. 1st DCA 1987).

As to personal property co-owned by spouses, *Beal Bank* held that a designation of JTWROS establishes a rebuttable presumption that it is held in a TBE *unless* the ownership documentation also contains an express indication that a TBE is not intended. *Beal Bank* at 57-61. This is because a TBE is "essentially a joint tenancy, modified by the common-law doctrine that the husband and wife are one person." *Beal Bank* at 60.

Although Florida Statutes § 689.15 provides that the common law doctrine of the right of survivorship does not prevail in Florida, it recognizes that a JTWROS may be created in either real or personal property when there is an express provision for the right of survivorship.

Effect of Proposed Changes:

Consistent with *Beal Bank* and other existing Florida case law such as *Branch Banking & Trust Co. v. Ark Development/Oceanview*, LLC, 150 So.3d 817 (Fla. 4th DCA 2014); *Escudero v. Hasbun*, 689 So.2d 1144 (Fla. 3d DCA 1997)*; Hagopian v. Zimmer*, 653 So.2d 474 (Fla. 3d DCA 1995); and *Barlow v. Department of Health & Rehabilitative Services*, 512 So.2d 1069 (Fla. 1st DCA 1987), subsection (3)(b) of § 689.151 codifies a rebuttable presumption that personal property is owned as JTWROS:

> . . . when the owner or owners designate or add the name of one or more persons in an ownership document indicating that they own or hold the property as joint tenants with right of survivorship.

In cases where the owners are spouses, subsection (3)(b) expressly provides that this presumption of JTWROS ownership is subject to the presumption of TBE codified in subsection (3)(a).

Subsection (4) of § 689.151, discussed below, specifies how this rebuttable presumption may be rebutted or overcome.

E. Subsection (3)(c)

Current Situation:

As noted in the above comments regarding subsection (2), due to the required common law unity of *interest*, the creation or continuation of a JTWROS under current law is dependent upon the existence of equal shares. If the shares of the tenants are not equal at the inception, a JTWROS may not be created and if they subsequently become unequal, the JTWROS will be severed and converted to a tenancy in common. Consistent with this requirement, Florida law appears to rebuttably presume that the shares of joint tenants are equal. *Beal Bank* at 53; *Joseph v. Chanin*, 940 So. 2d 483, 486 (Fla. 4th DCA 2006). Because of the unity of *interest* currently required for JTWROS, evidence that would rebut the presumption that shares are equal would also be evidence that the tenancy is a tenancy in common, not a JTWROS. Under Florida law, the presumption of

equal shares is clearly applicable to tenancies in common. *Julia v. Russo*, 984 So. 2d 1283, 1285 (Fla. 4th DCA 2008).

Effect of Proposed Changes:

Consistent with existing Florida case law, subsection (3)(c) of § 689.151 codifies a rebuttable presumption that the shares or interests held by joint tenants with right of survivorship or tenants in common in personal property are equal.

Subsection (3)(c) further provides that this presumption of equal shares may be rebutted or overcome by proof, by a preponderance of the evidence, of fraud, undue influence, lack of capacity, or contrary intent. This provision is also consistent with existing Florida law.

F. Subsection (4)

Current Situation:

The Florida Evidence Code recognizes two types of rebuttable presumptions. The category into which a particular presumption falls depends on the purpose for which it is created:

- Presumptions that are established to implement public policy (i.e., created to favor some desired policy). These presumptions affect the burden of proof and place the burden of disproving the presumed fact on the party against whom the presumption operates. These presumptions can only be rebutted or overcome by evidence that persuades the finder of fact that the presumed fact is not true. § 90.302-304, Fla. Stat.

- Presumptions that are established to simply facilitate the determination of the proceeding in which it is applied. These presumptions only affect the burden of *producing* evidence (i.e., they do not affect the burden of proof or persuasion) and can be rebutted or overcome by merely introducing credible evidence which, if believed, would be sufficient to disprove the presumed fact, regardless of whether the finder of fact is persuaded by that evidence.
  § 90.302-303, Fla. Stat.

The existing rebuttable presumptions codified in subsection (3) favor policies that facilitate the creation and proof of TBE and JTWROS in personal property and provide clarity with respect to the magnitude of the relative shares or interests in personal property held by the respective tenants, and are therefore presumptions that place a burden of disproving the presumed facts on the parties against whom the presumptions operate. *Beal Bank* at 58-59 ("The presumption we adopt is a presumption affecting the burden of proof pursuant to section 90.304, Florida Statutes (2000), thus shifting the burden to the creditor to prove by a preponderance of evidence[19] that a tenancy by the entireties was not created.").

Under existing law, the quantum or weight of the evidence required to rebut or overcome these "burden-shifting" presumptions (i.e., the required degree of persuasion) is generally a preponderance of the evidence, although "clear and convincing proof of contrary intent" is required in order to overcome the presumption applicable to multiple-party financial accounts that survivorship is intended. § 655.79(2), Fla. Stat.

Effect of Proposed Changes:

Subject to the provisions in subsection (3)(c) of § 689.151, subsection (4) generally specifies how the rebuttable presumptions codified in subsection (3) may be rebutted or overcome, including both the subject matter and persuasiveness of the evidence required. Under subsections (3)(c) and (4):

- *All* of the presumptions stated in subsection (3) may be rebutted or overcome by proof of fraud, undue influence, or lack of capacity, by a *preponderance of the evidence*.

- The presumption of ownership as a TBE stated in subparagraph (3)(a) may be rebutted or overcome by *clear and convincing proof* that a TBE was not intended or created.

- The presumption of ownership as a JTWROS stated in subparagraph (3)(b) may be rebutted or overcome by *clear and convincing proof* that a JTWROS was not intended or created.

- The presumption of unequal shares stated in subparagraph (3)(c) may be rebutted or overcome by proof of contrary intent by a *preponderance of the evi*dence.

Paragraphs (1) through (4), above, are consistent with existing Florida law except for the elevated burden of proof from "a preponderance of the evidence" to "clear and convincing proof" in paragraphs (2) and (3). The elevated "clear and convincing proof" standard required to rebut or overcome the presumptions of TBE and JTWROS codified in subsections (3)(a) and (3)(b) of § 689.151 is consistent with the elevated burden of proof required by the multiple-party financial account statute (§ 655.79(2), Fla. Stat.) in order to rebut the statutory presumption that survivorship is intended for those accounts.

G. Subsection (5)

Current Situation:

Existing Florida law provides that an express designation of TBE by spouses creates a conclusive or irrebutable presumption that the form of ownership is TBE. *Beal Bank* at 60. Once the facts giving rise to a conclusive presumption are proven, the presumed fact is conclusively established and the matter is removed from the fact finding process. In other words, the opposing party has no opportunity to disprove the predicate fact or the ultimate fact presumed. *Chandler v. Department of Health and Rehabilitative Services,*

593 So. 2d 1183 (Fla. 1st DCA 1992); Law Revision Council Note to § 90.301, Fla. Stat. ("Conclusive presumptions preclude the opposing party from showing by evidence that the presumed fact does not exist.").

In accordance with these principles, the *Beal Bank* court concluded that:

> [We] agree with the statement in *Hector Supply Co.* that an express designation on the signature card that the account is held as a tenancy by the entireties ends the inquiry as to the form of ownership. *Hector Supply Co.*, 254 So.2d at 781. Following *Hector Supply Co.*, other courts have excluded extrinsic evidence where the account documents clearly indicated the legal form of ownership. *See Morse v. Kohl, Metzger, Spotts, P.A.*, 725 So.2d 436, 437 (Fla. 4th DCA 1999) (holding that extrinsic evidence is inappropriate when both husband and wife signed the signature card, which specifically and clearly designated the account as one held as tenants by the entireties); *Sheeler v. United States Bank of Seminole*, 283 So.2d 566, 566 (Fla. 4th DCA 1973) (holding no further inquiry necessary where clear from the terms of the bank signature card that an estate by the entireties was expressly created).

Beal Bank at 60.

Effect of Proposed Changes:

Consistent with *Beal Bank* and the numerous Florida cases cited in *Beal*, subsection (5) of § 689.151 essentially codifies the *Beal Bank* presumption that an express designation of TBE by spouses creates a conclusive presumption that the form of ownership is TBE. Subsection (5) provides that:

> The intent to create a tenancy by the entirety is conclusively presumed when such a tenancy is designated by spouses in an ownership document for personal property, or when an owner of personal property adds the name of his or her spouse to an ownership document with a designation of tenancy by the entirety, provided that the designation or addition was not the product of fraud, undue influence, or a lack of capacity.

It should also be noted that the presumption codified in subsection (5) is narrower than the presumption stated in *Beal Bank* in multiple respects. For example, the presumed fact in *Beal Bank* is TBE ownership, whereas the fact presumed in subsection (5) from the spouses' express designation of TBE is only the *intent* to create a TBE. Moreover, subsection (5) provides that its presumption may be rebutted or overcome by proof that the TBE designation was the product of fraud, undue influence, or a lack of capacity.

Although some court decisions and legal commentators have expressed Due Process concerns regarding the constitutionality of conclusive presumptions, part VII, below, explains why subsection (5) does not present any problematic Constitutional issues.

H. Subsection (6)

Current Situation:

There is no "Current Situation" for subsection (6) of § 689.151 because it merely addresses the interrelationship between the proposed legislation and other existing statutes that deal with co-ownership or survivorship of interests in personal property.

Effect of Proposed Changes:

Subsection (6) explains the interrelationship between § 689.151 and several existing statutes dealing with co-ownership or survivorship of interests in personal property. Subsection (6) provides that proposed § 689.151 is not intended to change or affect the application of the following existing statutes: § 319.22 (joint motor vehicle titles), § 655.78 (bank protection for multiple-party accounts), § 655.79 (multiple-party accounts/survivorship), § 655.80 (convenience accounts), § 655.82 (pay-on-death accounts), § 689.115 (mortgages and notes they secure), and §§ 711.50 - 711.512 (transfer-on-death registrations). The intent of subsection (6) is to give priority to the existing listed statutes over § 689.151 in any situation where it and one or more of the listed existing statutes would both apply to the same matter and give a different result.

I. Subsection (7)

Current Situation:

There is no "Current Situation" for subsection (7) of § 689.151 because it is merely the definitional part of proposed § 689.151.

Effect of Proposed Changes:

Subsection (7) contains self-explanatory and straight-forward definitions of basic terms used in proposed § 689.151. The importance of this subsection is to emphasize that § 689.15 is intended to apply to all types of personal property other than beneficial interests in trusts to which the Florida Trust Code, Ch. 736, apply.

J. Subsection (8)

Current Situation:

There is no "Current Situation" for subsection (7) of § 689.151 because it is merely a rule of construction applicable to proposed § 689.151.

Effect of Proposed Changes:

Subsection (8) is a rule of construction for § 689.151 that preserves all common law rules and principles applicable to JTWROS and TBE *except* to the extent those rules or principles are modified by the provisions of the proposed section. Accordingly, in the absence of conflict, the proposed statute does not replace or supersede any existing common law.

Only the following subsections of § 689.151 are intended to change the common law:

- Subsection (1): By permitting an owner of personal property to create a TBE or JTWROS by a direct transfer to another person or persons without requiring an intermediate transfer through a strawman. This is accomplished by modifying the common law unities of time and title as they apply to TBE and JTWROS in personal property.

- Subsection (2): By permitting joint tenants owning personal property in a JTWROS to hold interests that are not equal to each other so that the doctrine of survivorship may operate on unequal shares. This is accomplished by modifying the common law unities as they apply to JTWROS in personal property.

- Subsection (4): By elevating the burden of proof required to rebut or overcome the presumptions of TBE and JTWROS codified in subsections (3)(a) and (3)(b) of § 689.151 from "a preponderance of the evidence" to "clear and convincing proof."

K. Subsection (9)

Current Situation:

Insofar as the presumptions stated in § 689.151 and discussed above essentially codify and clarify existing Florida law, those presumptions are already applicable to proceedings pending on or before the effective date of § 689.151.

Effect of Proposed Changes:

The presumptions stated in § 689.151 and discussed above do not change existing law because they essentially codify and clarify current Florida law.

L. Subsections (10 and 11)

Current Situation:

There is no "Current Situation" for subsections (10) and (11) of § 689.151 because it is merely a rule of construction applicable to proposed subsections (1) and (2).

Effect of Proposed Changes:

As discussed in the earlier comments regarding subsections (1) and (2) of § 689.151, they change existing law: (i) to permit an owner of personal property to create a TBE or JTWROS by a direct transfer to another person or persons without requiring an intermediate transfer through a strawman; and (ii) to permit joint tenants owning personal property in a JTWROS to hold shares that are not equal so that the doctrine of survivorship may operate on unequal shares when both unequal shares and survivorship are intended.

After finding that subsections (1) and (2) are remedial in nature, subsections (10) and (11) of provide curative rules of construction which permit parties having pre-existing ownership arrangements to also benefit from the changes implemented by subsections (1) and (2), subject to reasonable safeguards to protect from impairment of existing rights. For example, the curative aspects of subsections (1) and (2) would address the following problems that could arise with respect to transactions or ownership arrangements created prior to the effective date of § 689.151:

- Both spouses are still alive and one spouse claims there was no TBE because their joint ownership was created by a direct transfer of one of the spouses without going through a strawman.

- Joint tenant (JTWROS) or a spouse (TBE) dies and, contrary to the parties' actual intent, the decedent's estate claims that there was no TBE/JTWROS because the joint ownership was created by a direct transfer by one of the tenants without going through a strawman and that the decedent's former interest is an estate asset.

- Joint tenant (JTWROS) dies and, contrary to the parties' actual intent, the decedent's estate claims that there was no JTWROS because the shares were not equal and that decedent's share is therefore an estate asset.

The reasonableness of the curative aspects of subsection (10) of § 689.151 is strongly supported by the fact that application of the changes made by subsections (1) and (2) will be consistent with the intent and best interests of persons who may claim an ownership interest in the property.

In order to insure that the application of subsections (1) and (2) to pre-existing arrangements does not unreasonably impair rights acquired prior to the effective date of § 689.151, subsections (10) and (11) contain two very important limitations. First, subsection (11) provides that nothing in § 689.151 shall impair the rights of any lienholder or creditor acquired prior to its effective date. This provides very broad protection to creditors and lienholders against any retroactive application that would in any way impair their pre-existing rights.

Second, subsection (10) provides that its application shall not impair any right acquired prior to the effective date of § 689.151 if that right is confirmed in a judicial proceeding commenced within 2 years after the effective date. This limiting safeguard is patterned after several curative real property statutes that validate defective transactions or instruments made prior to the effective date of the curative statute, provided that no action to contest the validity of the transaction or instrument is commenced within one year of the effective date of the curative statute. For example, see § 689.11, Fla. Stat. (validating both future and *past* direct transfers of real property from an owner-spouse to the owner and his/her spouse without going through a strawman notwithstanding the required unities of time and title) and §§ 694.08 and 695.05, Fla. Stat. (validating certain instruments notwithstanding lack of proper acknowledgment, seal, or witnesses). Subsection (10) of § 689.151 provides greater protection to pre-existing rights than these

real property statutes because subsection (10) permits an action to confirm the validity of that right to be brought at any time within two years of the effective date of § 689.151.

III. 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 instead be revenue neutral.

IV. DIRECT IMPACT ON PRIVATE SECTOR

The proposed legislation will have a direct positive impact on the private sector by: (1) making rights in co-owned personal property more reflective of the owners' intent; and (2) providing greater certainty, clarity, and predictability concerning rights and liabilities associated with co-owned personal property. The codification, clarification, and consolidation of evidentiary presumptions concerning the form of ownership and extent of interests in co-owned personal property will be extremely beneficial to members of the Bar advising clients on those issues.

V. CONSTITUTIONAL ISSUES

Subsection (5) of § 689.151 essentially codifies the *Beal Bank* presumption that an express designation of TBE by spouses creates a conclusive presumption that the form of ownership is TBE. Although some court decisions and legal commentators have expressed Due Process concerns regarding the constitutionality of conclusive presumptions, the Florida Supreme Court has expressly approved this conclusive presumption as recently as 2001 in *Beal* Bank, which held that:

> [We] agree with the statement in *Hector Supply Co.* that an express designation on the signature card that the account is held as a tenancy by the entireties ends the inquiry as to the form of ownership. *Hector Supply Co.*, 254 So.2d at 781. Following *Hector Supply Co.*, other courts have excluded extrinsic evidence where the account documents clearly indicated the legal form of ownership. *See Morse v. Kohl, Metzger, Spotts, P.A.*, 725 So.2d 436, 437 (Fla. 4th DCA 1999) (holding that extrinsic evidence is inappropriate when both husband and wife signed the signature card, which specifically and clearly designated the account as one held as tenants by the entireties); *Sheeler v. United States Bank of Seminole*, 283 So.2d 566, 566 (Fla. 4th DCA 1973) (holding no further inquiry necessary where clear from the terms of the bank signature card that an estate by the entireties was expressly created).

Beal Bank at 60.

It should also be noted that the presumption codified in subsection (5) is narrower than the presumption stated in *Beal Bank* in multiple respects. For example, the presumed fact in *Beal Bank* is TBE ownership, whereas the fact presumed in subsection (5) from the spouses' express designation of TBE is only the *intent* to create a TBE. Moreover,

subsection (5) provides that its presumption may be rebutted or overcome by proof that the TBE designation was the product of fraud, undue influence, or a lack of capacity.

For the foregoing reasons, it is concluded that the proposal does not present any problematic Constitutional issues.

VI. OTHER INTERESTED PARTIES

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

6083680.00012-FL BAR COMM AD

5-20-18 REVISION

An act relating to tenancies by the entirety, joint tenancies with right of survivorship and tenancies in common in personal property; creating s. 689.151, F.S.; abolishing the common law requirements of unity of time and title with respect to joint tenancies with right of survivorship and tenancies by the entirety in personal property; abolishing the common law requirement of unity of interest with respect to joint tenancies with right of survivorship in personal property; codifying or establishing presumptions concerning tenancies by the entirety, joint tenancies with right of survivorship and tenancies in common in personal property; providing exclusions; providing for supplementation by common law; providing for applicability to certain transactions occurring prior to the effective date; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 689.151, Florida Statutes, is created to read:

689.151. Tenancies by the entirety, joint tenancies with right of survivorship, and tenancies in common in personal property.

(1) With respect to joint tenancies with right of survivorship and tenancies by the entirety in personal property, the common law requirements of unity of time and title are abolished.

(a) A joint tenancy with right of survivorship in personal property may be created in the existing owner or owners and another person or persons through a direct transfer by the existing owner or owners.

(b) A tenancy by the entirety may be created in personal property owned by one spouse through a direct transfer to both spouses.

(2) With respect to joint tenancies with right of survivorship in personal property, the common law requirement of unity of interest is abolished and the shares or interests of joint tenants may be equal or unequal.

(3) It is rebuttably presumed that:

(a) Personal property owned by both spouses is owned by them as tenants by the entirety when:

(i) An ownership document neither specifies a form of ownership nor expressly indicates that a tenancy by the entirety is not intended; or

(ii) There is a designation of joint tenancy with right of survivorship in an ownership document and no express indication that a tenancy by the entirety is not intended.

The presumption stated in subsection (3)(a) also apply when an owner of personal property adds the name of his or her spouse to such an ownership document.

(b) Except as provided in subsection (3)(a), personal property is owned as joint tenants with right of survivorship when the owner or owners designate or add the name of one or more persons in an ownership document indicating that they own or hold the property as joint tenants with right of survivorship.

(c) The shares or interests held by joint tenants with right of survivorship or tenants in common in personal property are equal. This presumption may be overcome by proof of fraud, undue influence, lack of capacity, or contrary intent, by a preponderance of the evidence.

(4) Unless otherwise stated, the rebuttable presumptions in subsection (3) may be overcome by proof of fraud, undue influence, or lack of capacity, by a preponderance of the evidence, or by clear and convincing proof that the presumed tenancy was not intended or created.

(5) The intent to create a tenancy by the entirety is conclusively presumed when such a tenancy is designated by spouses in an ownership document for personal property, or when an owner of personal property adds the name of his or her spouse to an ownership document with a designation of tenancy by the entirety, provided that the designation or addition was not the product of fraud, undue influence, or a lack of capacity.

(6) This section shall not affect the application of s. 319.22, s. 655.78, s. 655.79, s. 655.80, s. 655.82, s. 689.115, or ss. 711.50 - 711.512.

(7) As used in this section:

(a) “Ownership document” means an instrument or record of transfer or instrument or record evidencing ownership.

(b) “Personal property” means all property except “real property,” as that latter term is defined in s. 192.001, and except an interest in a trust to which ch. 736 applies.

(c) “Record” has the meaning given in s. 605.0102.

(8) The common law of joint tenancies with right of survivorship and tenancies by the entirety supplements this section except to the extent modified by it.

(9) The presumptions stated in this section shall apply to all proceedings pending on or before its effective date and to all proceedings commenced on or after the effective date.

(10) Subsections (1) and (2) are remedial in nature and, except as provided below, shall apply to transactions occurring prior to the effective date of this section to the extent that those transactions relate to the existence of a joint tenancy with right of survivorship or a tenancy by the entirety on the effective date of this section, provided that such application shall not impair any right acquired prior to the effective date of this section if that right is confirmed in a judicial proceeding commenced within 2 years after that effective date.

(11) Nothing in this section shall impair the rights of any lienholder or creditor acquired prior to the effective date of this section.

Section 2. This act shall take effect upon becoming law.