

CO-TENANCIES AND SAME-SEX MARRIAGES

A number of REALTORS® have inquired as to whether same-sex couples can hold property as tenants by the entireties. This question was thrust into the forefront after a federal court recently held that the Michigan Marriage Amendment¹ (“MMA”), which defines marriage as the union of one man and one woman, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *DeBoer v Snyder*, 973 F Supp 2d 757 (ED Mich 2014). (The *DeBoer* decision is presently on appeal.)

At the outset, it is important to understand that the acceptance of a deed by a register of deeds does not in and of itself have any legal significance. Any two people can record a deed declaring themselves to be tenants by the entireties. A register of deeds does not, and cannot, determine whether that declaration is accurate; he or she will simply record the deed. The entireties status will only become an issue if someone has reason to challenge that declaration at sometime in the future – for example, a challenge from an heir in the event of the death of one of the co-tenants, or from a creditor of one co-tenant alone.

A tenancy by the entireties is unique in that neither party can convey the property alone. In addition, the creditors of one spouse cannot get at property held in the entireties (with the possible exception of the IRS). A creditor would need a judgment against both spouses. As with joint tenancies, upon the death of one tenant by the entireties, title passes to the other by operation of law (*i.e.*, automatically) without the necessity of court proceedings or even a will. It

¹ “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” Cons. Art. I, §25.

is not difficult to see why the vast majority of married couples choose to hold real property as tenants by the entireties.

It is also important to keep in mind that a tenancy by the entireties may exist only if the persons are married at the time the deed is recorded. If two unmarried people attempt to take property as tenants by the entireties, a court will typically declare them to be tenants in common. *In re: Estate of Kappler*, 418 Mich 237 (1983). Moreover, if the parties are not married at the time of the conveyance, their later marriage will not create a tenancy by the entireties.

What all this means is that if a same-sex couple takes title today as tenants by the entireties, such a declaration will only stand if it is later determined that the couple was legally married at the time of the conveyance. *Spence v Jones*, 359 Mich 231 (1960). It would not be enough, for example, if the MMA is subsequently overturned such that the couple was free to legally marry. If the entirety status was struck down, the property would most likely be deemed to be held as tenants in common. In that case, the property could be reached by the creditor of only one party and moreover, in the event of death, title would not automatically vest in the survivor. A surviving spouse could in fact find himself or herself as a tenant in common with the deceased spouse's parent or sibling.

For these reasons, at the present time, same-sex couples in Michigan may choose to hold property as "joint tenants with rights of survivorship," which is the form of co-ownership most similar to a tenancy by the entireties. Note that under Michigan law, there is a difference between a "joint tenancy" and a "joint tenancy with rights of survivorship." A "joint tenant" can terminate the joint tenancy simply by conveying his or her interest to a third party, in which case the property is deemed to be held as tenants in common. On the other hand, if property is held as "joint tenants with rights of survivorship," while a co-tenant can still convey his or her interest, if

the person who conveyed his interest dies before the remaining joint tenant, then the third party is out of the ownership picture entirely. In addition, property held as joint tenants with rights of survivorship is better protected against claims from creditors of only one of the two co-tenants.

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