



Agency Bulletin: 2017-FL02

Date: May 8, 2017
To: FNTI Florida Title Agents
From: Florida Underwriting, John N. Redding, Esq.
RE: Same-sex marriages / real estate and title related issues

Recently, I have been asked to address same-sex marriages and how this applies to real estate and title related issues. Many issues are still untested, but I shall address them in this bulletin as they presently stand, and continue to monitor the developing law germane to same-sex marriages, in Florida.

In January of 2015 the United States Supreme Court in its decision in the case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) addressed the issue of same-sex marriages and held that the “Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.” Regardless of one’s own personal beliefs on the matter, this is now the law of the land, and we must all work within its parameters, and through its challenges.

First and foremost, I believe we must address the taking of title in and to real property in Florida. When a lawfully married, same-sex couple takes title to real property, their marital status should be reflected on the deed. However, until some of the legal challenges have been tested it is prudent to ask them how they want to take title. They may choose between a *Tenancy in Common*, the fallback *Joint Tenancy with Rights of Survivorship*, or they may take title as “a married couple” and create the *Estate by the Entireties*. It is important to note that an unmarried couple who takes title in an *Estate by the Entireties*, only have a tenancy in common. See *Reinhardt v. Diedricks*, 439 S.2d 936 (Fla. 3d DCA 1983.) If they are unsure, they may want to seek the opinion of counsel of their choice, so as to preserve the integrity of any estate planning that may be in place.

From my research, I have found that there may be a hesitation to use “Husband and Husband” or “Wife and Wife,” so we really do not want to offer this option, as we certainly do not wish to embarrass or anger the parties. It is my belief that with this change, it is likely that all married couples in Florida will begin to be identified as “a married couple” on title deeds and this then, would become the standard language to create an *Estate by the Entireties*, in Florida.

When addressing the *Estate by the Entireties* it is important to note that prior to January of 2015, the only married couple that existed in Florida, was the union of a husband

and wife (man and woman.) As such all of the cases addressing an *Estate by the Entireties* refer to marriages of husband and wife, and while this has yet to be tested, it would seem to be nothing more than an anachronism, and not serve as a limitation. Therefore, it is my belief that the protections afforded a married man and woman under the *Estate by the Entireties* in Florida, once tested, will extend to those lawfully married in a same-sex union.

Among these protections is the probate avoidance, survivorship element as well as the protections that are related to judgement creditors. For example, “[a] judgment creditor has no right to property held by the debtor in an estate by the entireties.” *Bridgeview Bank Grp. v. Callaghan* (Fla. 4th DCA, 2012) citing *Ohio Butterine Co. v. Hargrave*, 84 So. 376 (Fla. 1920). When real property is conveyed to a husband and wife, that conveyance serves to create an *Estate by the Entireties*. See *English v. English*, 63 So. 822 (Fla. 1913). Here, anachronisms aside, it is clear that the protections may logically be extended to lawfully married same-sex couples, once tested.

Until these legal issues are tested and we have some definitive rulings on same, our position is as follows:

- When conducting any type of transaction that would require a joinder of spouse, and the title vested informs you that he or she is lawfully married in a same-sex union, the joinder of spouse will be required for any conveyance or mortgage of homestead property.
- When a lawfully married same-sex couple is taking title to real property, the deed may reflect that the parties are married e.g. John Doe and Jim Doe, a married couple. As is the case in all transactions, the parties, or their legal counsel must make this decision, and advise the title agent as to how title should be taken.
- Unfortunately, when title is vested in a lawfully married same-sex couple, as to any potential judgments and liens against one spouse, these should be treated as having attached, rather than relying on the *Tenancy by the Entireties* to relieve this burden. As the law develops and is tested, updates will be provided.
- Unfortunately, when title is vested in a lawfully married same-sex couple, and there is no recitation of survivorship contained in the title deed, when one of the spouses die, a probate must be required and administered, rather than relying on the *Tenancy by the Entireties* to relieve this burden. As the law develops and is tested, updates will be provided.
- Regarding properties held by lawfully married same-sex couples that acquired the property prior to January 2015, as was the case with all unions prior to this change, the estate interest does not automatically convert. If the title vesting is in John Doe and Jim Doe, with no recitation as to the estate interest, it is a *Tenancy in Common*, if the title vesting is in John Doe and Jim Doe, as Joint Tenants with Rights of Survivorship (or some variation thereof,) it is a *Joint Tenancy with Rights of Survivorship*.