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ISSUES TO CONSIDER WHEN COUNSELING SAME-SEX COUPLES

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In June 2013, on the issue of same-sex marriage, the United States Supreme Court issued two opinions, *United States v. Windsor*, 133 S.Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *Windsor*, the U.S. Supreme Court held that a federal law defining marriage as the union between a man and a woman as husband and wife, and that prohibited the recognition of same-sex marriages, was unconstitutional as a deprivation of the equal liberty of persons protected by the Fifth Amendment. The U.S. Supreme Court in *Windsor*, however, was concerned solely with federal law; it did not address State law with respect to allowing or recognizing same-sex marriages. This was the subject of the second case, *Perry*, which came before the U.S. Supreme Court on what appeared to be the issue of whether Proposition 8, the California constitutional provision adopted by ballot initiative that defined marriage as the union between a man and a woman, was unconstitutional (for the reasons the U.S. Supreme Court would express in *Windsor*). The U.S. Supreme Court, however, held that it could not rule on that issue because the Petitioners, who were individuals that had supported the Proposition 8 ballot initiative, did not have standing to bring the case before the U.S. Supreme Court. The standing issue arose in *Perry* because the true party with standing – the State of California – elected not to appeal the initial ruling from the Northern District Court of California that Proposition 8 was unconstitutional.

Florida Case Law May Force a Change in the Law

Based upon the limits of the holdings in *Windsor* and *Perry*, States can enforce laws and constitutional provisions that define marriage as the union between a man and a woman, and States can refuse to recognize same-sex marriages performed under the laws of another State. However, the status of this view of the law may be changing. There have been several recent trial court decisions holding that Florida's constitutional provision and statute that define marriage as the union between a man and a woman are unconstitutional.[1] In addition, in response to the appeal of a trial court order denying a divorce to a same-sex couple, the Second District Court of Appeals is seeking to bypass appellate level review and have the issue determined directly by the Florida Supreme Court.[2] While the impact of these trial court decisions are stayed pending appellate review, similar laws in other States are also subject to decisions holding such laws are unconstitutional and therefore it may result in the U.S. Supreme Court addressing this topic once again.

Article I, Section 27 of the Florida Constitution was added by a ballot initiative in 2008 and defines "marriage" as "the legal union of only one man and one woman as husband and wife" and clarifies that definition by stating "no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." This same provision is repeated in Sec. 741.212, F.S., which was enacted in 1997. As a result, Florida law currently

prohibits a same-sex couple from marrying under Florida law, and prohibits the recognition in Florida of the marriage of a same-sex couple who had been lawfully married in another State.

However, even under Florida's current laws, a same-sex couple who are Florida residents are free to marry in other States. Similarly, same-sex couples who have married in another State, or who may get married in another State, may own real property in Florida, may reside in Florida and establish their homestead in Florida, may plan to purchase real property in Florida, or may plan to move to Florida to do all of the foregoing. Based upon these potentials alone, it is likely real estate and estate planning/probate practitioners will need to address a variety of issues when counseling their same-sex couple clients due to these differences in State laws that regulate marriage. Now that several trial courts in Florida have held that Florida's constitutional provision and statute are unconstitutional, the counseling of the same-sex couple as a client has become that much harder due to the uncertainty of the future of Florida's law.

Effect on Tenants By The Entirety

One problem with counseling the married same-sex couple is the impossibility of predicting the future of Florida's laws. One important question in any case addressing whether Florida's constitutional provision and statute are unconstitutional, whether from a direct challenge to Florida's laws or as a result of a U.S. Supreme Court opinion that would be controlling precedent, is the question of timing. If Florida's laws are determined to be unconstitutional, would such a determination be retroactive such that both Florida's constitutional provision from 2008 and statutory prohibition from 1997 would be deemed never to have existed.[3] If the effect on Florida law is retroactive, a practitioner could easily see how such a ruling would impact the title to real property already owned by a same-sex couple who had been married in another State. The question then becomes whether there be a "springing" *tenants by the entirety* if all of the other unities of title were present when the same-sex couple acquired their Florida real property after their lawful marriage under the laws of another State. A similar impact would arise in the ownership, conveyance, devise, and descent of Florida property that is or was the homestead of the married same-sex couple. The impact may even be greater when attempting to establish an estate plan for the married same-sex couple who may or may not have minor children.

Presently, Sec.689.15, F.S., provides that a devise, transfer or conveyance made to two or more shall be held as *tenants in common* unless the deed expressly provides for the right of survivorship. Further, Sec. 689.11, F.S., provides that a conveyance from one spouse to both spouses in a marriage is held as *tenants by the entirety.* As a result, in a conveyance to both spouses in a same-sex couple (even if they had been lawfully married in another State), current Florida law would disregard the marriage of the same-sex couple and the title to the Florida property held by the two spouses would likely be held as *tenants in common*, even if the deed recites that the grantees are "married." If it seems there is an uncertainty about title to Florida real property that is held by a married same-sex couple, that uncertainty will likely continue until it has been determined whether Florida's laws are constitutional. That seeming

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uncertainty is magnified due to the issue of whether such a determination would be retroactive.

For example, a practitioner may be requested to counsel a same-sex couple on their purchase of a Florida homestead or of other Florida real property. One important issue that may arise is the form of ownership of the Florida homestead or of other Florida real property. Under Florida's definition of marriage, a married same-sex couple can only own Florida real property as *tenants in common* or as *joint tenants with right of survivorship*, and cannot own real property as *tenants by the entirety*. As a result, under present Florida law, the protections and benefits built into the *tenants by the entirety* form of ownership, including the requirement of joinder to convey or mortgage the real property owned as *tenants by the entirety*, and including certain protections from creditors, are not available to a same-sex couple who have been lawfully married in another State. Counseling married same-sex clients may require a discussion and comparison of the different forms of tenancies so that the clients can determine how they wish to hold title to their Florida real property and how they wish the property to descend or devise upon the death of one spouse.

At first glance, the inability of a same-sex couple to own real property as *tenants by the entirety* may not seem to be a big problem, but upon closer inspection, the protections given to ownership of real property as *tenants by the entirety* is difficult to replicate under ownership of real property as *tenants in common* or as *joint tenants with right of survivorship*. While the *joint tenants with right of survivorship* form of ownership can provide the same result as *tenants by the entirety* form of ownership upon the death of the first spouse, i.e. the surviving spouse becomes the sole owner of the real property upon the death of the first spouse, the *joint tenants with right of survivorship* form of ownership can be terminated by one spouse without the consent or joinder of the other spouse, thereby preventing the surviving spouse from sole ownership upon the death of the other spouse. Similarly, with individually owned property or property owned as *tenants in common*, a Will (or other document of testamentary disposition, such as a revocable trust) can be drafted to provide the same results as the *tenants by the entirety* form of ownership, but, again, a Will (or trust) can be changed or destroyed by the one spouse, without the consent of the other spouse, thereby preventing the surviving spouse from sole ownership upon the death of the other spouse. Irrevocable trusts or an entity (i.e. corporation, limited liability company, or some form of partnership) may be formed for ownership of real property with the intent to provide the same protections given by *tenants by the entirety*, but that may be difficult as well. Even Cohabitation Agreements and Domestic Partner Agreements can provide some of the protections provided by the *tenants by the entirety* form of ownership, but agreements can be changed, breached, or deemed unenforceable for a variety of reasons.

Effect on Homestead

These same considerations may impact how a Florida lawyer provides estate planning and asset protection counseling. Consider Article X, Section 4 of the Florida Constitution, the homestead and exemption provision. While Section 4(a) provides for the homestead

protection from forced sale, which has repeatedly been upheld by the Florida Supreme Court,[4] Section 4(b) states "[t]hese exemptions shall inure to the surviving spouse or heirs of the owner." This protection is not available to the surviving spouse in a same-sex marriage. For example, suppose that, (a) a spouse in a same-sex marriage dies a Florida resident, (b) the decedent's only living family member is the surviving spouse, (c) the decedent owned the house in which the couple resided, all of which is classified as the decedent's homestead, (d) the decedent's Will devises all assets to the surviving spouse, and (e) a claim against the decedent's estate is reduced to a judgment. If the couple were an opposite-sex couple, the homestead would be protected from the judgment because the recipient of the homestead, i.e., the surviving spouse, would be a protected recipient under Florida law, and thus the homestead protection from creditors is preserved. However, with the same-sex married couple, because Florida does not recognize the marriage, the surviving spouse is neither a "spouse" nor a protected heir, and the judgment can then become a lien upon the title to the homestead owned by the deceased spouse.

Similar results occur under Section 4(c), which states, in part, "[t]he homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." Suppose that one spouse in a marriage dies owning the family's homestead. The decedent is survived by a spouse and adult lineal descendants, who are not the lineal descendants of the spouse. The decedent attempts under his Will to devise the property to the adult lineal descendants. If the marriage were an opposite-sex marriage, the devise is invalid because the only permissible devise of homestead property when a decedent dies survived by a spouse and adult lineal descendants is a fee simple devise to the surviving spouse. Under these circumstances, the devise fails and the surviving spouse receives a life estate with a vested remainder in the adult lineal descendants (with a 50% *tenants-in-common* severance option). If the marriage is a same-sex marriage, the spouse is not considered to be "spouse" under Florida law, and so, for homestead purposes, the decedent was not survived by a spouse or minor child, so the homestead is freely devisable to anyone. Thus, the devise is upheld and the surviving spouse has no right of recourse.

Conclusion

While this article is not intended to be a discussion of what is right or wrong about Florida law, or about the constitutionality of Florida's law and the definition of marriage, this article is intended to address the type of counseling that could or should be provided to a member or to both members of a same-sex couple. Clearly, ownership of real property in Florida by a married same-sex couple as *tenants in common*, as *joint tenants with right of survivorship*, or via a trust or other entity, or under a Cohabitation or Domestic Partner Agreement, may not provide all of the protections that the same-sex couple desires or needs. The married same-sex couple should be well advised of these issues so that they can make an informed decision on how they wish to own their Florida real property, how they wish to protect it, and how they wish to establish their estate plan.

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[1] Huntsman et. al. v. Heavilin et. al., Monroe County Circuit Court, Case No. 442014CA000305A001KW (July 17, 2014); Pareto et. al. v. Ruvin et. al., Miami-Dade County Circuit Court, Case No. 2014-1661-CA-01 (July 25, 2014); Brassner v. Lade, Broward County Circuit Court, No. 13-012058 (37) (August 4, 2014); Estate of Bangor, Palm Beach County Circuit Court. Case No. 502014CP001851XXXXMB (August 5, 2014); Brenner et. al. v. Scott et. al., N.D. Fla. Case No. 4:14cv107-RH/CAS (August 20, 2014); Grimsley et. al. v. Scott et. al., N.D. Fla., Case No. 4:14cv138-RH/CAS (August 20, 2014).

[2] *See* Shaw v. Shaw, Fla. 2 Dist. Ct. App. Case No. 2D14-2384 (August 27. 2014).

[3] For a more detailed analysis of the potential retroactivity issue, *see* George D. Karibjanian, *State Law DOMA: What if Unconstitutionality Becomes a Reality, Part Three*, LISI ESTATE PLANNING NEWSLETTER #2219 (April 29, 2014) http://www.leimbergservices.com.

[4] Butterworth V. Caggiano, 605 So.2d 56 (Fla. 1992); Tramel v. Stewart, 697 So. 821 (Fla. 1997); Havoco of America, Ltd. v. Hill, 790 So.2d 1018 (Fla. 2001); Chames v. DeMayo, 972 So.2d 850 (Fla. 2007).