

Same sex, same issues?

How the right to marry raises issues regarding real estate ownership

On May 20, 2014, a federal judge declared in *Whitewood v. Wolf* that Pennsylvania's statutory prohibition of same-sex marriages was unconstitutional. Reactions to *Whitewood* were rapid, fervid, and diverse. But the real-estate implications of the decision have been largely overlooked.

"From a real-estate perspective, the right to marry presents both pluses and minuses for same-sex couples," says William Maffucci, an attorney at Semanoff Ormsby Greenberg & Torchia, LLC.

Smart Business spoke with Maffucci about the positive and negative impacts that *Whitewood* has on same-sex spouses with regard to real estate.

What's the good news for same-sex spouses with regard to real estate?

The principal benefit of marriage with regard to the real property in Pennsylvania and most other states is that married couples can own property through a distinct estate known as a 'tenancy by the entirety.' This has a few advantages. Chief among them is that the property so held is immune from creditors who have claims against only one of the spouses. A judgment by such a creditor against only one spouse does not create a lien on the entireties property, so the married couple can sell it without having to pay off the judgment.

Unmarried couples can own property only as 'tenants in common' or as 'joint tenants.' In both cases a judgment against one of the owners does effect a lien upon that owner's interest, and the couple can't sell the property free and clear of that lien without paying off the judgment or reaching some other accommodation with the creditor. Worse, the holder of a judgment against one of the owners has the right to levy upon and order a sheriff's sale of that owner's interest in the property.

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The *Whitewood* decision presented the question of whether same-sex spouses can hold property as tenants by the entirety. But the decision did not focus on ownership issues — whether of real or personal property — at all. The judge examined only whether Pennsylvania's prohibition on same-sex marriage was constitutional. The question of whether same-sex spouses would have the right to own property as tenants by the entirety was left for other courts, or the legislature, to decide. That has not happened yet in Pennsylvania.

Is there any doubt as to what the answer will be, once the question is formally decided?

I have posed that question to hundreds of real-estate attorneys in Pennsylvania and elsewhere, and most predicted that, yes, eventually the courts or legislature will recognize that same-sex spouses can hold real property as tenants by the entirety. Yet some have hedged their bets. When drafting deeds to real property to be held by same-sex spouses, they have included a contingency clause. It specifies that the parties intend that the property be conveyed to the same-sex spouses holding as tenants by the entirety but also that, in the event a court refuses to recognize that same-sex spouses have the right to create an entireties estate, the parties would hold title as joint tenants with a right of survivorship — a form of ownership that, for nonmarried

couples who are confident that they will live together for life, is generally preferable to a tenancy in common.

What's the bad news that *Whitewood* presents, from a real-estate perspective, to same-sex couples?

The principal disadvantage of the *Whitewood* decision for same-sex couples who choose to marry does not regard real estate directly: By marrying, same-sex couples might thereby subject themselves to the 'marriage penalty' that has long applied to married couples under the Internal Revenue Code. Pooling their income and filing jointly often bump the spouses into a higher tax rate than the rate that would have been applicable if both had filed as single persons.

But marrying has other negative tax implications that do have particular relevance to real estate. They regard the annual deductibility limits for passive rental-real-estate losses; the annual maximum deductibility limits for capital gains, including gain on the sale of real estate; maximum mortgage-interest-deduction-debt limitations; and the annual net-investment-income exemption for net investment income tax. These are complicated provisions that same-sex couples who own real estate and who want to get married should discuss with their tax advisers. ●