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Homeownership unlicensed**The gay marriage debate points out tax-law black holes for all unmarried couples**

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By JAY ROMANO**THE NEW YORK TIMES**

While there have been a number of same-sex couples who have participated in marriage ceremonies across the country, the official legal status of the couples will ultimately have to be sorted out by the courts.



Lawyers, however, say that with careful planning, these couples can obtain many of the same benefits available to married couples when ownership of real estate is concerned. That, of course, would be true of any two unmarried people who own real estate together.

At the same time, however, there are some benefits related to real estate that only married couples enjoy. The most striking involves the amount of the gain that is exempt from taxes in the sale of a property that is owned in the name of only one partner.

"Because the laws of marriage do not yet apply to same-gender couples, a substantial part of my practice is counseling clients on how to use the existing laws to create a framework to protect their relationships and their assets," said

Arlene P. Bluth, a Manhattan lawyer who specializes in representing lesbian, gay, bisexual and transgender clients.

Bluth explained that a fundamental issue for unmarried partners to address is the manner in which title to real estate is held.

The most basic form of property ownership by two or more people, Bluth said, is known as a tenancy in common. This, she said, is basically a partnership, and each partner has the right to possession of the entire property and each partner owns either a specified share of the property or a share equal to the other partner or partners.

Bluth explained that unless a deed specifically allocated a certain percentage of ownership to each partner, the partners in a tenancy in common each owned an equal share of the property.

Since an individual's ownership interest is independent from the other owners, however, each owner in a tenancy in common is free to sell or mortgage his or her interest without the consent of the other owner. And when one tenant in common dies, Bluth said, that individual's interest passes through his or her estate - either by will or in accordance with laws concerning inheritance when no will exists.

Another form of title to real estate, Bluth said, is known as a tenancy by the entirety. "This form of ownership is only available to persons who are legally married when they acquire the property," she said.

With this form of ownership, Bluth said, the spouses do not hold partial ownership interests in the property.



(Illustrations by PAT WELLS)

"Instead, each spouse owns 100 percent of the property and the right to possess the entire premises, subject to the parallel right of the other spouse," she said. And when one spouse dies, the surviving spouse automatically becomes the sole owner of the property, not because of any right of survivorship, but because he or she has always had a 100 percent ownership interest.

"In essence, upon the death of the first tenant by the entirety, his or her interest in the property merely disappears," Bluth said, adding that the law makes certain assumptions about how title to property will be held in the absence of a specific election by the parties to hold title in another way.

"The law assumes that a married couple acquiring real property or a co-op apartment take title as tenants by the entirety," she said. "And when unmarried people acquire real property or a co-op apartment, the law assumes that they take title as tenants in common."

There is, however, another way for unmarried people to take title to property: as joint tenants with right of survivorship.

"For those couples who cannot or do not wish to marry, but still have the desire to have title to the property automatically pass to the survivor of them, joint tenancy is the only option," Bluth said. "However, a joint tenancy is not nearly as stable as a tenancy by the entirety."

Joint tenancy, Bluth said, "is more like a tenancy in common with an added automatic right of survivorship of the other joint tenants." She added, however, that while a tenancy by the entirety could be dissolved only by consent or by a court order - typically in the form of a judgment of divorce - a two-person joint tenancy could be changed into a tenancy in common by one party without the consent of the other.

"All one joint tenant needs to do in order to unilaterally destroy the

survivorship interest and convert the joint tenancy to a tenancy in common is to convey away his interest or to execute and record a new deed to himself," Bluth said. "No consent to the transfer is necessary."

At the same time, neither a joint tenancy nor a tenancy in common provides the same level of protection against creditors as a tenancy by the entirety.

Jack H. Boyajian, a Manhattan lawyer who specializes in collection law, said that if a creditor gets a judgment against a joint- or co-owner, the creditor can ask a court to "partition" the property interests of the owners. Once that is done, the creditor can then force the sale of the debtor's interest, leaving the remaining partner with a stranger as a co-owner.

With a tenancy by the entirety, on the other hand, since each spouse simultaneously owns a 100 percent interest in the property, it is virtually impossible for a creditor to obtain an order for partition.

And without the partition, Boyajian said, the creditor can only file the judgment on the public record and hope the debt is paid off when the property is sold or refinanced.

Joel E. Miller, a Queens, N.Y., tax lawyer, said that in addition to being able to own property as tenants by the entirety, married couples can also take advantage of a tax break that unmarried couples cannot get.

Miller explained that under current tax law, property owners can exclude a certain amount of gain on the sale of a principal residence. For married couples filing jointly, he said, up to \$500,000 in gain can be exempt from taxes if the property was owned and used as a principal residence for two out of the five years preceding the sale. (Single taxpayers, and married taxpayers filing individually, he said, are entitled to an exclusion of up to \$250,000.)

So, Miller said, if an unmarried couple take title to property as joint tenants or as tenants in common, and both meet the ownership and use requirements, they can each exclude up to \$250,000 in gain on their tax returns. Married couples filing individually, of course, can do the same thing.

Different results occur, however, when title to the property is in only one person's name. With a married couple, Miller said, if the property is in one spouse's name, but the couple file a joint income tax return, the couple are entitled to an exclusion of up to \$500,000.

With an unmarried couple, on the other hand, if only one partner is the owner of the property, only that partner can claim an individual exclusion of \$250,000.

While it is not possible for unmarried couples to obtain the same tax benefits as a married couple, they can take steps to "fine-tune" their financial and ownership arrangements.

Bluth noted that wills were important for unmarried couples - whether gay or heterosexual - because the laws of intestacy did not provide for "life partners." "Unless people specifically make provisions for their life partners in their

wills, not only will their partners be shut out of any assets, but their widowed partners can be shut out of a home, a car, making funeral arrangements and more," she said.

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