JOSEPH E. SEAGLE**

** Admitted in the District of Columbia, North Carolina, South Carolina, & Florida

JOSEPH E. SEAGLE, P.A.
ATTORNEYS AT LAW
924 West Colonial Drive
Orlando, Florida 32804

Telephone: (407)770-0100
Facsimile: (407) 770-0200

FREQUENTLY ASKED QUESTIONS, ANSWERS, AND SOLUTIONS FOR GLBT CLIENTS CONCERNING REAL ESTATE TRANSACTIONS

I have been practicing law for over ten years, first in North Carolina and later in Florida. For most of that time, I have focused my practice on real estate transactions, and for all of that time, I have been an out gay man. As such, I have been called upon to advise many GLBT clients and their partners, concerning real estate legal matters. Below are some of the most common questions that I have received:

Q: I want to buy my new home with my life partner. My mortgage broker says that only I qualify for the loan, because my partner's credit and income are not that great. The broker says that I need to close the property in my name and then later deed it to my partner and myself. Can I do this?

A: Yes you can, but be prepared for the consequences. There are several problems that could arise:

1. Most mortgages contain what is called a "due on sale" clause. This means that if you transfer any interest in the property, even if you retain part of that interest, your lender has the right to accelerate the loan and can require that you pay it in full immediately upon the lender's demand. While this is uncommon, it is a remedy available to the lender that they can exercise at their will. If you are unable to refinance or otherwise pay off the loan in full, the lender then has the option to foreclose on the mortgage and take the property to pay off the debt.
2. Any gift to anyone other than a spouse is taxable for that portion of the gift that is worth more than $12,000.00. So if one partner gives half of the ownership of the property to the other partner, and that half is worth $100,000.00, a gift tax return would have to be filed for the $89,000.00 gift. For tax reasons, there would likely be no tax due on the gift itself, but it would raise a red flag for the Internal Revenue Service to delve more deeply into the partners' financial affairs if the return were not filed, but the gift was later discovered.
3. Documentary Stamp Taxes are the second largest source of revenue for the State of Florida after Sales Taxes. These taxes are due each time a deed, note or mortgage is made. When a person purchases real property inside the State of Florida, they are required to pay documentary stamp taxes based on the value of the sale of the property and on the value of the note and mortgage. At closing, the partner would pay the taxes on the note and mortgage while the seller would customarily pay them on the value of the deed. When the partner later gives one half of the title of the property to the other partner, the documentary stamp taxes on the one-half of the outstanding value of the mortgage would have to be paid again.
    a. Example: Partner 1 buys the property and borrows $250,000.00 to do so. At closing, Partner 1 pays $875.00 for documentary stamp taxes on the mortgage and another $500.00 for intangibles taxes on

the promissory note. The next month, Partner 1 deeds the property to Partner 1 and Partner 2. At that time, to record the deed into Partner 1 and Partner 2, Partner 1 is required to pay documentary stamp taxes on one-half of the value of the outstanding mortgage in the amount of $437.50, plus recording fees.

There is no reason that both partners cannot appear on the title at the initial closing. Although the note and other loan documents will be signed by the credit-worthy partner, and that partner will be "on the hook" for the payment of the debt, the other non-borrowing partner can join in the execution of the mortgage (consenting to the lien being placed on the jointly-owned property) and a few other minor documents at the closing. This avoids any violation of the due-on-sale clause and the need for any payment of additional documentary stamp taxes later. It also mitigates the need for filing a gift tax return, depending on how the purchase is structured. If the mortgage broker or lender insists that this cannot be done, you are advised to consult another mortgage broker or lender.

Q: My partner and I were married in Massachusetts. Can we take title as tenants by the entirety as a married couple in Florida?

A: Unfortunately, the short answer to this question is "no." Under Florida law, marriage is between one man and one woman only. The law does not recognize any marriage that does not fit this definition, regardless of what other states do. While this is the subject of much debate in the appellate courts, it is clear that – currently – they would not be recognized. Under the law, if a husband and wife own property as "husband and wife," they own it as tenants by the entirety. This gives them several automatic legal advantages:

i. First, the property will not be subject to being foreclosed to satisfy most judgments that are entered against just one of the spouses. If an unmarried couple own a property together, and one partner has a judgment entered against her, then the judgment creditor can potentially take that partner's one-half interest and foreclose on it to satisfy the judgment; not so with a legally married couple. Federal Tax Liens are the exception to this rule.

ii. Upon the death of the husband or the wife, the property automatically passes to the other spouse without the need for a probate proceeding. If unmarried couples own property together, and it is not titled properly, then the deceased partner's one-half interest in the property would be probated and pass to the deceased partner's heirs under the partner's will or by law if there is no will. This means that the surviving partner could wind up owning the property with the deceased partner's relatives.

iii. Finally, it helps serve as proof of ownership in subsequent divorce and property settlement proceedings. Unmarried couples do not enjoy the benefit of such proceedings, so there is no formal statutory method to determine the value of the ownership percentages.

First, the property should be titled properly to avoid the probate issues. Florida recognizes "Joint Tenancy with the Right of Survivorship." This phrase must be properly included on the deed to ensure that the property is properly titled. If this phrase is on the deed, then, upon the death of one partner, that partner's share of the property automatically passes to the surviving partner. It is not subject to probate or the deceased partner's heirs. Unfortunately, it does not protect against creditors of one spouse. Further, if there is later a dispute between the partners, they would be reduced to using litigation to partition the property. This is a lengthy and often expensive process that often

requires the property to be sold and the proceeds of the sale split between the partners. Finally, unlike tenancy by the entireties, joint tenancy with right of survivorship can be terminated unilaterally by one of the partners, simply by that partner secretly deeding the property to a "straw man" who would then deed it back to the partners, thus destroying the right of survivorship.

If the property is not the partners' homestead property (i.e. it is investment property instead of their primary residence), the partners could hold the property in a statutory Florida land trust, with a disinterested third-party as trustee. Within the land trust, provision could be made for the passing of the property upon the death of one of the partners, or upon the dissolution of the relationship. Also, the land trust would protect the privacy of the partners since there is no public record of the partners' ownership interest. The trust also would provide liability protection for the partners against creditors and judgments of either partner. However, this form of ownership in a trust is often disallowed by lenders and is not advised for use with homestead property.

Q: I am using my money and credit to buy the property. My partner and I haven't been together long, so I don't want to put my partner's name on title. However, my partner will be paying one-half of the mortgage and one-half of all the improvements and maintenance while we own the property. How can we do this?

A: There are two ways to do this. First, the property could be, as suggested above, titled into a Florida land trust with a disinterested third party trustee. As part of the trust agreement, the parties could enter into a joint venture agreement that spells out their rights and obligations in relation to the property during ownership as well as the plan in the event the partnership dissolves. The trustee, by the terms of the trust agreement, would require unanimous written authorization from the partners before selling, leasing, encumbering or giving away the property.

However, if the lender will not allow the property to be in a land trust, or if the property is homestead property, then the next possible solution is an equity sharing agreement. This agreement is between the parties and spells out the same things that the joint venture agreement above sets forth. One problem that often arises regarding these agreements, however, is the fact that one partner still owns the property in that partner's sole name. Without the benefit of a disinterested third party being on title, the titled partner has the ability to sell, lease, mortgage or give away the property without the other partner knowing about it until it is too late.

Q: My partner and I own our home together and now we're breaking up. What do I do?

A: Try to work it out amicably first. Try to keep emotion out of it as much as possible. There are local mediation and arbitration centers that can assist with this. If that fails, then each party should seek the representation of their own attorney who will ensure that the client's interest is protected and given voice. Often, if the partners initially worked with one attorney together to purchase the property, that attorney can not represent either party during the dissolution, as that would give rise to a conflict of interest.

Q: My partner died, and his name was the only one on the deed. We lived in the property for XX years, and I paid $$$ over the years for the upkeep and maintenance. Now his family has shown up and is demanding that I leave the property. What can I do?

A: This, unfortunately, is a question we receive more often than we would like. It is often the result of

forgotten deeds or simply lack of planning. Litigation is usually the only recourse in this event. The surviving partner may be able to assert resulting or constructive trust claims, or even betterment or unjust enrichment as a claim. However, ultimately, it is going to result often in money damages in favor of the surviving partner rather than an outright award of the property's possession. An attorney competent in complex probate and real estate litigation would need to be consulted further for advice.

It is best for partners to discuss these issues between themselves and with us early in the relationship or at least in the property-buying process to help ensure that problems do not arise in the future. It is always more expensive to fix the problem later than to prevent it in the first place.

Q: I have HIV/AIDS. I'm now selling my house. Do I have to disclose my status to potential buyers?

A: No. While you must disclose other material facts about the house that you know about, but are not readily observable by the buyer, Florida Statute Section 689.25(2) specifically excludes HIV/AIDS status as a material fact that must be disclosed to potential buyers of real estate.

Joseph E. Seagle, P.A. is a law firm that focuses its practice on real estate transactions, title insurance, business formations and transactions, land trusts and estate planning. It primarily represents owners and sellers of residential and commercial investment properties throughout Florida, including purchasers of foreclosure and other distressed properties. The firm and its affiliated land trust company, TRSTE, LLC, and title company, Precision Closing Services, LLC d/b/a PCS Title, take pride in providing the best customer service and attention to detail to their clients and customers, using the latest technology and information to provide its services for a reasonable fee. Fees are always discussed at the initial consultation, and can be paid by credit or debit card if preferred.

Most of the firm's employees are bilingual, being fluent in English and Spanish, and our attorneys are available for consultation at the client's convenience. Please call if you have any questions about what you have read here. Until then, I remain,

Cordially Yours,
JOSEPH E. SEAGLE, P.A.

Joseph E. Seagle, Esq.
For the Firm