LJN LAW JOURNAL NEWSLETTERS

The Matrimonial Strategist®

An ALM Publication

Volume 31, Number 1 • January 2013

For Better or for Worse: The Case Against Referenda On Marriage Equality

By Frank Gulino

On Nov. 6, 2012, voters in Maine, Maryland and Washington made history when they voted to legalize same-sex marriage. After defeats in each and every one of 32 prior state ballot initiatives, the 2012 Election Day victories marked the first time that supporters of marriage equality succeeded at the ballot box. Within days following the election, a published report indicated that, in the wake of the referenda successes, gay rights activists were preparing for another ballot initiative to legalize same-sex marriage, this time in the state of Oregon. *See* Harry Esteve, *Oregon May Be Next State For Gay Marriage Ballot Battle*, HuffPost Religion, Nov. 11, 2012, www.huffingtonpost.com/2012/11/11/oregon-gay-marriage-ballot_n_2110014.html. But while it is natural for same-sex marriage supporters to want to ride the current wave of ballot box victories for marriage equality, that instinct should be resisted because popular-vote referenda are simply not the appropriate vehicle for determining fundamental individual rights, like the right to marry.

continued on page 6

Real Estate Considerations in Divorce

By Gary M. Kaleita

While every divorce has its own unique issues and challenges, most separating couples face the same problems relating to the disposition of the former marital home. If real property issues are not thoroughly considered during divorce proceedings, financial and emotional problems could linger for years after the divorce is final. This article highlights several important issues that everyone who is going through a divorce or who is recently divorced should consider with regard to the disposition of marital real property, and offers some tips on how to address them. It is important to note that the information contained in this article is based on Florida law, so practitioners should consult the applicable laws governing their jurisdictions regarding these issues.

Types of Ownership

In Florida, there are three types of concurrent ownership of real property that can result when two people own real property together: a joint tenancy, a tenancy in common, and a tenancy by the entirety. Each type of ownership has different attributes. A married couple that acquires real property in Florida will automatically own the property as "tenants by the entirety" unless they specify otherwise. In a tenancy by the entirety, each, the husband and wife, is deemed to own the entire property. Only legally married spouses can own property in this manner. If two people own property together but are not married (including after the marriage has been dissolved), they can only own property as tenants in common or joint tenants (the attributes of these types of ownership are further distinguished below).

There are many advantages to owning real property as tenants by the entirety. First, because each party is deemed to own the entire property, neither party can unilaterally transfer or encumber his or her interest. Also, property that is owned as a tenancy by the entirety cannot be made available to satisfy the debts of only one of the two spouses. *Neu v. Andrews*, 528 So. 2d 1278, 1279 (Fla. 4th

continued on page 2

In This Issue

PERIODICALS

Real Estate

continued from page 1

DCA 1988). In other words, a creditor who obtains a judgment against only one spouse cannot levy on the property, nor can one spouse mortgage the property without the consent of the other. This is a significant benefit that is not available to those who hold the property as tenants in common or joint tenants. Additionally, upon the death of either one of the spouses, the deceased spouse's interest immediately and automatically passes to the surviving spouse. This is known as the "right of survivorship," which allows the surviving spouse to own the property outright without having to go through any probate proceedings. This is likewise available in a joint tenancy, but not a tenancy in common.

It is not uncommon for a couple to continue to own real property together after they are divorced. The moment a final judgment dissolving the marriage is entered by the court, the tenancy by the entirety will automatically become a tenancy in common. *McCarthy v. McCarthy*, 922 So. 2d 223 (Fla. 3d DCA 2005). In a tenancy in common, each person only owns a specified percentage interest in the property (or equal shares if no other percentage is specified). Accordingly, when two people are divorced and continue to own real property together, their ownership changes from a tenancy by the entirety to a tenancy in common. There are several potential problems this can pose.

First, either tenant in common is free to transfer or mortgage his or her interest without the consent of the other. This means that either former spouse could end up co-owning the property with a complete stranger in the event the other former spouse sells or transfers his or her interest in the property. Similarly, a creditor of one former spouse can levy on his/her interest and have it sold to satisfy a judgment, so the other former spouse could end up owning the property jointly with that creditor or a third party who buys it at the sale. Additionally, a tenant in common does not have a right of survivorship. This means that, upon the death of one of the two former spouses, the interest in the property does not immediately pass to the other, but rather passes by the will of the deceased former spouse, or by intestacy (*i.e.*, the statutory law of intestate succession) if there was no will. Even if the deceased former spouse provided in his or her will that the spouse's interest in the property should pass to the co-owning ex-spouse, the surviving ex-spouse will still have to go through probate proceedings before he or she can receive that interest, thus incurring more costs. It is obviously important for someone who is or will be newly divorced to realize the potential pitfalls associated with continuing to own property with his or her former spouse as tenants in common, so that he or she may proactively address the possible problems that may result.

Tax Considerations

Real property conveyances in Florida are generally subject to state documentary stamp tax when the deed is recorded. The documentary stamp tax rate for documents that transfer an interest in real property is currently 70 cents per $100 (except for Miami-Dade County). However, the transfer of a marital home from one spouse to another pursuant to a divorce is generally exempt from the payment of this tax. Therefore, a person going through a divorce should consider structuring

continued on page 3

Gary M. Kaleita is a partner at Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, FL, where he concentrates his legal practice on real estate development, finance and transactions, condominiums, property owners' associations, commercial leasing, commercial lending, and title insurance. The author wishes to thank **Paul D'Alessandro**, a summer clerk, for his assistance.

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Telephone: (877) 256-2472
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

The Matrimonial Strategist 023146
Periodicals Postage Paid at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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Real Estate

continued from page 2

the divorce settlement to provide for the transfer of the property to a spouse as part of the divorce settlement, if possible, rather than selling the home after the divorce to the former spouse or a third party, since this could save thousands of dollars in documentary stamp taxes.

In Florida, documentary stamp tax is also due when a promissory note is given to evidence a debt (the rate for this is 35 cents per $100), and intangibles tax is due if the promissory note (or any contingent obligation in the absence of a promissory note) is secured by a mortgage (the rate for this is 2 mills, which means the amount owed multiplied by 0.002). It is important to keep this in mind in the event one spouse gives the other a promissory note secured by a mortgage on the home as part of a divorce settlement because the parties will need to allocate and pay these taxes as part of the settlement.

As an initial proposition, consider whether one spouse's obligation to the other should even be evidenced by a promissory note or secured by a mortgage on the home. If the amount to be paid by one spouse to the other is very large, triggering a large tax, it is worthwhile to consult a real estate or tax attorney to determine if the obligation can be structured, evidenced and/or secured in a way that will avoid the imposition of the tax. Promissory notes and mortgages are convenient ways to evidence and secure one spouse's obligation to give the other spouse money pursuant to a settlement, but they are not the only ways. Alternatives are available, but are too complicated to discuss here. If the amount of tax payable on a promissory note and mortgage is prohibitive, just remember that there may be other options available, and investigate them with the assistance of an expert.

If the parties elect to transfer the home to one spouse, the IRS allows former spouses to transfer property to one another free from federal taxes if the transfer is "incident to divorce." The IRS includes specific time restrictions in the definition of "incident to divorce," so an attorney or tax professional should be consulted to ensure that the transfer complies with IRS requirements.

MORTGAGES

If the parties agree to use a note and mortgage, it is likely that the spouse to whom the obligation is payable will be receiving a second mortgage on the home, which would be subordinate to any existing first mortgage. In this situation, it is important to examine the first mortgage to make sure that the granting of a second mortgage is not a default under the first mortgage. Assuming a second mortgage is permitted, there are many provisions that the party receiving the second mortgage (the "lender spouse") should consider including in the mortgage in order to protect his/her interest from being extinguished by foreclosure of the first mortgage.

- First, the lender spouse would want provisions whereby the spouse giving the mortgage on the home (the "borrower spouse") agrees to pay all amounts due under the first mortgage in a timely fashion, to deliver to the lender spouse proof of payment upon request, to perform the covenants and conditions in the first mortgage, to keep the first mortgage free from default, and to notify the lender spouse immediately if any default does occur.
- The lender spouse may also wish to require that the borrower spouse obtain his or her written consent prior to modifying the first mortgage, or agreeing with the first mortgage holder to waive any payments or extend the period of repayment.
- The lender spouse would also benefit from a provision allowing the lender spouse to cure any default under the first mortgage in order to protect his/her second mortgage position from a possible foreclosure of the first mortgage. In such a case, the lender spouse would want to include a provision that entitles him or her to reimbursement for any payments made to the first mortgage holder on behalf of the borrower spouse in order to avoid a default, plus interest.
- Last, the second mortgage should provide that any default under the first mortgage would constitute a default of the second mortgage, so that the lender spouse could then declare the entire debt due and payable.
- There are other provisions that could be included in a second mortgage, but those mentioned above are important to keep in mind in order to protect the lender spouse's second mortgage position.

Unfortunately, it is very common for a divorcing couple to own a home that has negative equity (meaning they owe more on their mortgage note than the home is worth). If a divorcing couple is selling the former marital home for less than the outstanding balance due on their mortgage (a situation in which the house is sometimes termed "under water" and the sale is termed a "short sale"), they should be aware of the possible tax consequences. Banks will often approve a short sale, allowing sellers to accept an offer on the home that is less than the amount of the outstanding mortgage loan.

The bank may also forgive the remaining balance of the loan (*i.e.*, not require the sellers to repay the rest of the debt they owe), but this is not automatic and must be requested as part of the short sale approval. Normally, such a transaction would give rise to "discharge of indebtedness" income, which typically must be

continued on page 4

continued from page 3

included in one's gross income for federal tax purposes, since the IRS regulations provide that if a creditor forgives a debt that you owe, you have received a benefit which is taxable as if you had received income in that amount. However, Congress approved an exception to this general rule in the Mortgage Forgiveness Debt Relief Act of 2007 (the "Relief Act," which only applies to debts forgiven in calendar years 2007 through 2012). Under the Relief Act, taxpayers may exclude discharge of indebtedness income from their gross income for federal tax purposes if the indebtedness that was discharged was associated with their principal residence, and mortgage debt forgiven in connection with a foreclosure qualifies for this relief. However, the IRS regulations must be consulted to make sure that the residence qualified as the principal residence during the tax year in which the debt was forgiven.

If the homeowners do not qualify for the Relief Act and must report the discharge of indebtedness as income on their tax returns, it would be wise to determine whether the parties will file their tax return jointly and divide their tax liability, or whether they will file separate returns. If they file separately, they may agree in advance to split the tax liability, with each claiming one-half (or some other percentage) of the discharge of indebtedness income on their individual returns. Any of these situations may be specifically agreed to and included in the parties' settlement agreement to avoid any discord or confusion when tax returns are due after the divorce is final.

If the parties become tenants in common after the divorce and are still attempting to sell the former marital home, they generally share equally the cost of all payments due in regard to the former marital home, such as mortgage payments, taxes, repairs and insurance, which are necessary to maintain the home until it is sold. *Green v. Green*, 16 So. 3d 298, 300 (Fla. 1st DCA 2009). Therefore, if one former spouse makes these payments, he or she is generally entitled to a credit for half of the payments when the home is sold. *Id*. An exception to this rule exists when the mortgage payments are made to meet child support obligations (*i.e.*, if mortgage payments are accepted in lieu of a certain amount of child support). *Id*. It is also not uncommon for parties to agree in their marital settlement agreement that one spouse should receive credit for the amount he or she has solely and individually paid toward the mortgage, taxes, or insurance during the divorce proceedings, especially if neither spouse was living in the home at the time.

Selling the Home and Transferring by Deed

It may be wise for divorcing spouses to enter into a confidential agreement specifying certain details of the sale process in the event that the former marital home is still on the market when the divorce is finalized. In light of the current depressed housing market, it could take months or even years before the parties receive an acceptable offer for the purchase of the former marital home. It is sometimes difficult for the former spouses to agree after the divorce proceedings on many aspects of the sale process. In order to avoid future disputes regarding the sale, the parties should consider addressing those matters in advance during settlement negotiations. Their agreements would not be disclosed to anyone other than their attorneys, nor filed with the court except for enforcement purposes. These agreements could stipulate certain decisions that the parties agree to in advance, such as the price they both agree to accept, the realtor they would like to use, how long they will keep the house on the market before lowering the asking price, a possible means of making periodic purchase price adjustments if the house does not sell, and similar decisions. Agreeing to these terms in advance as part of the global divorce settlement may avoid future discord.

If the divorce settlement provides that one spouse is to receive a deed from the other, transferring title to the former marital home, it may be wise for the other spouse to insist that the deed be held in escrow until the spouse retaining the home has been able to refinance any prior mortgage debt on the home, thereby releasing the other spouse from liability. Often, parties will sign a deed in connection with a divorce settlement, transferring one spouse's interest in the former marital home to the other. However, if both parties were originally liable for the mortgage debt on the home, both will remain liable until the mortgage is refinanced by the spouse who keeps the home. If the deed is recorded while both parties are still liable for the mortgage debt, the spouse who is not keeping the home may be forced to pay the debt associated with a home in which he or she no longer has any interest. It may be advisable to put time constraints into the marital settlement agreement on the spouse keeping and refinancing the home, so that if the mortgage is not refinanced so as to release the other spouse from liability for the mortgage debt within a stipulated time period, the parties may go to mediation to decide how to proceed, force the sale of the house, or come up with some other mutually agreeable solution.

One last tip to consider is the type of deed used to transfer the marital home between the spouses. Many Florida family law attorneys have the parties execute a quit claim deed to make this transfer. Quit claim deeds are often used to clear title defects and release outstanding interests in property under circumstances where warranties of title are not an issue. A quit claim deed offers no warranties to the transferee regarding the status of title to the property, but merely transfers

continued on page 6

Suspension, Not Disbarment, Urged for Hiding Client Funds, Using Them

A lawyer who shielded a client's assets from the other spouse in a divorce proceeding and then used them himself should be suspended for three years but not disbarred, the Disciplinary Review Board (DRB) in New Jersey recommended on Oct. 25.

The 5-3 majority of the divided board saw Neil Malvone's relationship with the client as an illegitimate enterprise, not a lawyer-client bond, and as such "the lawyer would be guilty of theft from the true owner, but not of knowing misappropriation." The board added that "The difference between knowing misappropriation and theft is critical because not every theft committed by attorneys results in disbarment." The three dissenting board members voted for disbarment.

According to the majority opinion, Malvone, while with Lombardi & Lombardi in Edison, represented Michael King, his longtime friend, in a divorce case. The two discussed concealing money from King's wife, expecting her to seek equitable distribution of assets, and ultimately decided to transfer money to Malvone.

Beginning in November 2007, King wrote three checks, payable to cash and totaling $11,000. Twice, King noted the purpose of the check as "legal fees," and once as "fantasy football" — because they were partners in a fantasy football league that Malvone ran from his office.

Malvone deposited the checks into his personal savings account. He and King later disputed whether the money was to be placed into the firm's trust account.

King's divorce was finalized in September 2008 in a property settlement agreement prepared by Malvone. King was required to pay his wife $5,000, which he repeatedly asked Malvone to do from the money King had provided. Malvone put it off and eventually was unreachable.

After King ended up using retirement funds when ordered by the court to pay the $5,000, he went to the firm and talked to partner Michael Lombardi, who told him that Malvone had been terminated.

Lombardi had acquired Malvone's savings account statement through litigation against him, and showed King that the checks were deposited there and not in the firm's trust account.

Malvone had been put on a leave of absence in February 2009 and eventually terminated after he admitted a series of mistakes and dishonest conduct. In one matter, Malvone fabricated a $27,000 settlement, according to Lombardi's later testimony. After the visit, King filed an ethics grievance, in August 2009.

Malvone's bank statements showed he had withdrawn large sums from the account after depositing King's checks, an investigator from the Office of Attorney Ethics (OAE) discovered. King contended that he did not authorize Malvone to use the $11,000, but did not admit to the investigator that he was attempting to hide the money.

Malvone told the investigator that he originally intended to return the money in a lump sum, but forgot he was holding it and used it to pay bills and for other purposes. But during the ensuing ethics hearing before special master Bernard Shihar, Malvone said that although King did not expressly authorize use of the funds, it was permissible in order to "continue the plausibility of the fraud" and "make the deception more easily hidden."

Malvone testified that, after he left the firm, he enrolled in the Lawyers Assistance Program, saw therapists and learned he was suffering from depression. Malvone had taken on too much work, stopped sleeping, gained weight, went twice to the hospital with chest pains and was going through a divorce, he said. He later opened a solo practice, working only part time and under a proctor's supervision.

In February 2010, Malvone sent King an $11,000 check. Shihar found the expenditure unauthorized, but stopped short of calling it knowing misappropriation, finding no clear and convincing evidence that the money transfer fell under an attorney-client relationship. Shihar concluded that Malvone violated Rule of Professional Conduct 8.4(c) (failure to safeguard client funds) and recommended a one-year suspension.

Before the DRB, the OAE pushed for disbarment, contending that Malvone's conduct amounted to knowing misappropriation under RPC 1.15(a). On Oct. 25, the DRB recommended a suspension of three years. The Board found a conspiracy to hide the money, but no knowing misappropriation by Malvone. There was no clear evidence that King and Malvone agreed the money would be placed in the firm's trust account or that the funds were to remain untouched. In addition, the transfer does not amount to entrustment of funds, the majority said. "This cannot be called a situation in which the client charged the lawyer with the safekeeping of property in the lawyer's capacity as a fiduciary.

"Unquestionably, however, respondent masterminded and participated in an outrageous plan to defraud King's wife and the court," the majority continued. It called the conduct "simply deplorable and deserving of severe discipline," "methodical and calculated" and carried out "with nary a twinge of conscience." The majority did not hold Malvone's depression as a mitigating factor.

Three members voted for disbarment. At press time, the case had not been appealed or reviewed by the court of its own volition. Neither Malvone nor his lawyer returned calls. — **David Gialanella**, *New Jersey Law Journal*

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Real Estate

continued from page 4

any interest held by the transferor, subject to any claims that may exist against the transferor. However, when someone purchases property from a third party, he or she will usually get a warranty deed containing what are called "warranties of title." There are two types of warranty deeds: general warranty deeds and special warranty deeds. When a general warranty deed is used, the transferor is giving a warranty that, among other things, the transferor has the right to transfer the property to the new owner, the title is free and clear of any claims by third parties, and the transferor will defend the new owner's title against such claims. A special warranty deed is similar, but limits the transferor's liability to claims by third parties arising under the transferor (but not under prior owners).

If the divorcing parties execute a quit claim deed to transfer the property between them before the entry of the final judgment dissolving their marriage, a quit claim deed alone should be sufficient. This is because the parties still own the property as tenants by the entirety while they are legally married. As mentioned above, during their marriage, neither spouse may transfer or encumber his or her interest in the home without the consent of the other. If one transfers his/her interest to the other while they are still married, a third party's claim against one spouse's interest in the property (such as a mortgage, judgment or lien arising solely under that spouse) will not have attached to the property, so the spouse receiving the quit claim deed will obtain good title.

However, it is not advisable to use a quit claim deed to transfer title to the former marital home between spouses after the entry of the final judgment dissolving their marriage. After the divorce, either party's interest in the home can be encumbered by a mortgage, judgment or lien without the knowledge or consent of the other. Additionally, if such a mortgage, judgment or lien arose before the divorce, even though it did not encumber the home at that time because the home was held as a tenancy by the entirety, upon the dissolution of the marriage, it will automatically encumber the interest of the former spouse who is named in the mortgage, judgment or lien because the home has become a tenancy in common as a result of the divorce. If this problem arises, under a quit claim deed the transferee will have no recourse against the transferor and may be stuck with a property having title defects.

In the case of a transfer between former spouses after the divorce, it is prudent to use a warranty deed of either type. Since it is probable that the two spouses received a warranty deed from the party who initially sold them the marital home, as well as an owner's title insurance policy giving them title insurance on the home, a special warranty deed should be sufficient to transfer the title between the spouses after they divorce, so that the spouse receiving title gets the benefit of warranties of title. Alternatively, if a quit claim deed is to be used, the spouse receiving the quit claim deed should insist that the transferring spouse provide warranties of title separately, either in the marital settlement agreement or a separate document executed in conjunction with the quit claim deed. These warranties of title would allow the spouse receiving the deed to make a legal claim against the other spouse for compensation at a later date if a title defect existed in violation of the warranties.

Regardless of whether the parties decide to utilize a warranty deed or a quit claim deed to transfer title, it is advisable for the transferee spouse to obtain a title report on the property at the time they receive the deed from the other spouse, to verify that there are no judgments, liens or other claims against the title arising under the transferor spouse. If there are, they should be addressed in the context of the settlement in order to ensure that the spouse receiving title to the home does not have to address them later.

Conclusion

Besides those discussed above, there may be other real property or tax issues that arise during divorce proceedings. If you or someone you know faces these kinds of problems, it is advisable to discuss with your family law attorney the various real property and tax issues inherent in divorce proceedings so that you can determine the options available to best protect your financial and emotional interests.

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Marriage Equality

continued from page 1

The 2012 Referenda on Marriage Equality

In the State of Washington, a bill permitting same-sex marriage was signed into law on Feb. 13, 2012; it was to have taken effect 90 days after the end of the legislative session. But opponents moved quickly, taking advantage of a clause in the statute that permitted the law to be tested by public referendum. In Maryland, a statute legalizing same-sex marriage was signed into law on March 1, 2012; it was to become effective on Jan.1, 2013. But as in Washington, opponents of the Maryland law soon began a drive to place the issue before the electorate in November. As a result of the efforts by marriage equality opponents, referenda appeared on the ballot in both states on Election Day 2012, asking voters to make a choice between granting and prohibiting the right of same-sex couples to marry.

continued on page 7

Marriage Equality

continued from page 6

Voters in two other states, Maine and Minnesota, also saw same-sex marriage referenda on the ballot in 2012. In Maine, the referendum was the result of an unprecedented pro-marriage equality initiative, seeking to overturn the result of a 2009 referendum in which a majority of Maine voters repealed a statute, enacted that same year, which would have legalized same-sex marriage. And in Minnesota, where marriage is already defined in statute as the union of a man and a woman, a referendum was on the ballot seeking to enshrine that definition in an amendment to the state's Constitution. The results of the referenda were historic.

Historic Ballot Box Results In Favor of Marriage Equality

In all three states where the legalization of same-sex marriage was on the ballot — Maine, Maryland and Washington — a majority cast their votes in favor of marriage equality. It marked the first time that same-sex marriage was legalized by popular vote. And even in Minnesota, where same-sex marriage is illegal, voters rejected the proposed constitutional amendment that would have defined marriage as the union of a man and a woman, making that state the first in the country to vote against such an amendment.

But despite the historic, pro-same-sex marriage results at the ballot box in 2012, supporters of marriage equality should not be encouraged to leave their fortunes in the hands of voters. On the contrary, they should pursue marriage equality rights through legislation and, where appropriate, through constitutional challenges in the courts. For whatever the outcome of a referendum might be, there is a problem with leaving decisions that affect fundamental individual rights — like the right to marry as a matter of equal protection — to a majority vote of the electorate. It is a problem that undermines the role of our federal Constitution as a bulwark against majority oppression.

The Constitution As Protector of Minority Rights

One important role of the Constitution is to stand as a protection of the individual from oppression by the government. Another is to stand as a protection of the rights of the few from the will of the many, what Alexis de Tocqueville called the "tyranny of the majority." But the role of the Constitution as protector of minority rights is endangered when we cede to the majority decisions on whether unpopular minorities are entitled to constitutional rights, including equal protection under the law.

Divergent Outcomes: Marriage Equality in the Hands of Courts, Legislators and Voters

The danger of leaving decisions on equal protection to the dictates of a majority vote of the people has been evident in the outcomes of dozens of referenda on same-sex marriage that were held prior to Election Day 2012. The results of those referenda — in stark contrast to the holdings of high court jurists and the products of legislative debate and deliberation on same-sex marriage during the same period — illustrate the danger.

From 2003 to 2011, marriage equality became law in six states and the District of Columbia. In some of those states — Massachusetts, Connecticut and Iowa — same-sex marriage was legalized by judicial determinations that the state, as a matter of constitutional equal protection, could not deny same-sex couples the civil right to marry. In the others — Vermont, New Hampshire and New York, as well as in the nation's capital — legislators crafted laws designed to afford same-sex couples the civil right to marry while exempting religious institutions for which same-sex marriage violates long-held, sacred beliefs. But in every state where the legal definition of marriage was put to a direct vote of the electorate — prior to Election Day 2012, that had happened in 32 states — the result was always a majority vote against same-sex marriage.

The most famous (or, depending on one's point of view, infamous) decision left to a popular vote on the issue of same-sex marriage is undoubtedly the 2008 California ballot initiative known as Proposition 8. Following a California Supreme Court decision that had declared same-sex marriage a constitutional right, opponents of marriage equality sought to overrule the court by placing in the hands of the electorate a proposed amendment to the state's Constitution that would define marriage as the legal union of one man and one woman. Like every other state referendum on same-sex marriage, Proposition 8 resulted in a majority vote against marriage equality. Unlike every other state referendum on same-sex marriage, Proposition 8 worked to strip away the constitutional right to marry that had been granted to same-sex couples by the state's highest court.

The Proposition 8 vote has been declared unconstitutional by a federal district court, a decision upheld by the Ninth Circuit in February 2012. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 1021 (N.D. Cal. 2010), aff'd sub nom. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). A petition for certiorari filed during the

continued on page 8

Frank Gulino, a member of this newsletter's Board of Editors as well as the ABA's Council of Appellate Lawyers, is an Associate Professor of Legal Writing at the Maurice A. Deane School of Law at Hofstra University in Hempstead, NY.

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Marriage Equality

continued from page 7

summer of 2012 placed Proposition 8 before the United States Supreme Court for consideration in its current term. *See Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144). On Dec. 7, the Supreme Court announced that it would review the Proposition 8 case. It is expected that oral argument will be held in March, with a ruling handed down by late June.

Protecting Minority Rights From the Oppression of the Majority

James Madison, the Father of the U.S. Constitution, wrote of the dangers of majority oppression in words that are appropriate to this discussion. In one of the most often quoted of *The Federalist* papers, Madison wrote of the "great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." *The Federalist* No. LI (Feb. 8, 1788), in *The Complete Madison* 181 (Saul K. Padover ed. 1988). "If a majority be united by a common interest," Madison continued, "the rights of the minority will be insecure." *Id*. Society must provide against that "evil," Madison wrote, for "[i]n a society [in] which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger … ." *Id*. at 181-82.

Similarly, in perhaps the most famous of his *Federalist* essays, Madison noted the complaints that were "everywhere heard from our most considerate and virtuous citizens … that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority." *The Federalist* No. X (Nov. 22, 1787), in *The Federalist* 44 (Colonial Press ed. 1901).

In pointing out the danger of majority oppression, Madison was by no means dismissive of the importance of the right of every citizen to exercise religious freedom. On the contrary, Madison was a champion of religious liberty, both in his work on the Constitution of his home state of Virginia as well as in his formulation of the First Amendment to the federal Constitution, guaranteeing religious liberty to Americans. *See The Complete Madison* at 18-19. But Madison also recognized in *The Federalist* No. LI that "[i]n a free government the security for civil rights must be the same as that for religious rights." *Id*. at 182. Nor can there be any doubt that the right to marry is a fundamental civil right.

In its landmark decision striking down laws against interracial marriage, the Supreme Court long ago noted that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and described marriage as "one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (internal quotations omitted). So fundamental a right ought not be subjected to a public vote and the "tyranny of the majority."

Rather, as New York's highest court expressed in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), "the present generation should have a chance to decide the issue [of whether to legalize same-sex marriage] through its elected representatives." *Id*. at 12. Madison wrote eloquently on the virtue of securing individual rights through elected representatives, rather than by popular vote, to avoid majority oppression. "To secure the public good, and private rights, against the danger" of an overbearing majority faction, Madison proposed that public views be passed through what he called "the medium of a chosen body of citizens" — elected representatives — "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *The Federalist* No. X, in *The Federalist* at 47, 49. "Under such a regulation," Madison continued, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." *Id*. at 49.

Conclusion

The results achieved at the ballot box in 2012 by supporters of same-sex marriage were undoubtedly historic. And those results are further demonstration that popular support for marriage equality is on the rise. The voice of the people was heard. But it remains that the referendum is not the appropriate vehicle for determining fundamental individual rights.

By granting or limiting individual rights — like the right to marry — through legislation, the voice of the people can still be heard, filtered through the "chosen body of citizens" entrusted by the people with the drafting of laws. And should legislation be enacted that violates the constitutional rights of any individual or group, including the right to equal protection, the U.S. Supreme Court and state courts of last resort, as arbiters of the constitutionality of our laws, stand ready to right that wrong.

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