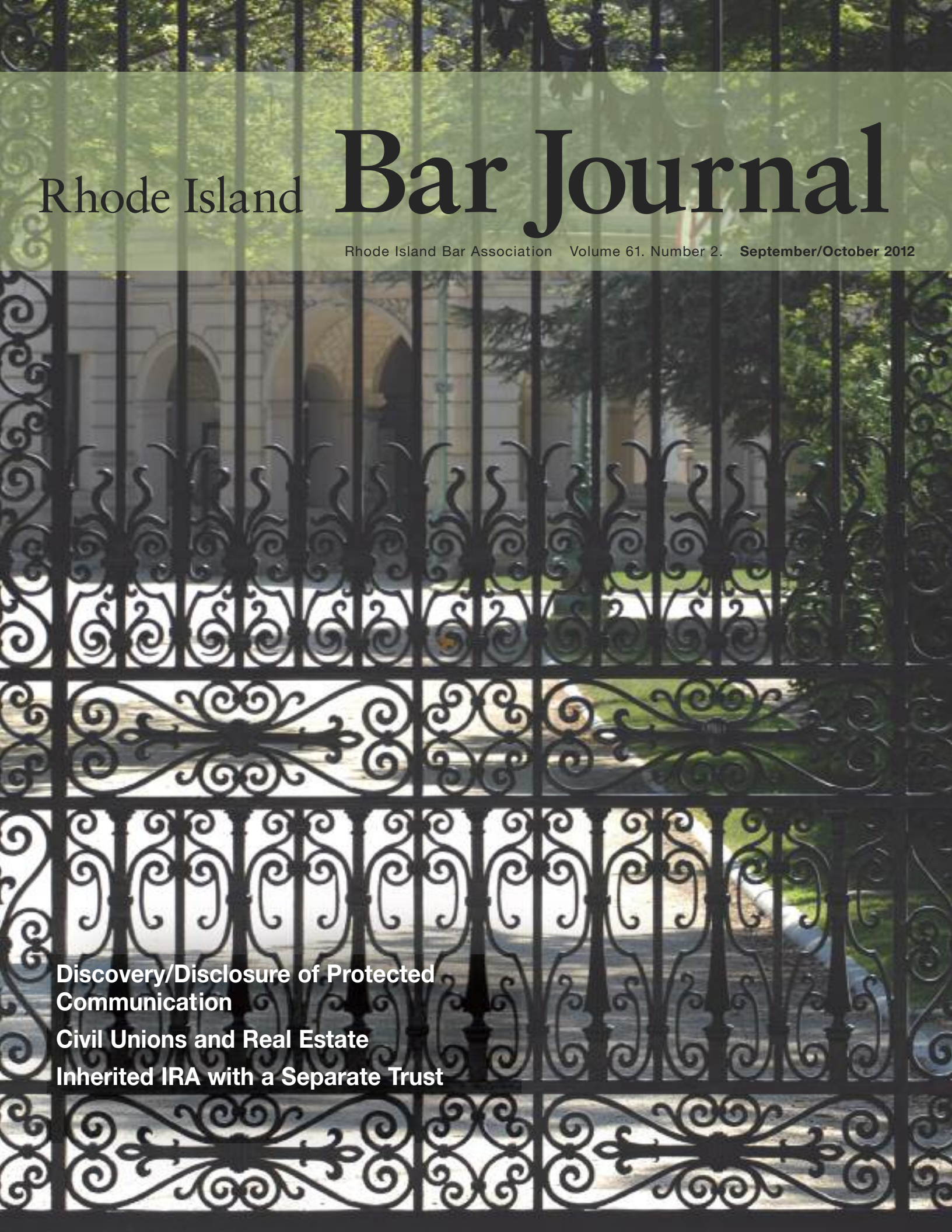

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The Breakers Gates, Newport,
by Brian McDonald

Civil Unions and Real Estate: How One Little Word Can Cause So Many Problems

David M. Dolbashian, Esq.
The Law Office of David M. Dolbashian, Esq., P.C., Providence

Edward Stravato, Esq.
Linear Title & Closing, Newport

The Rhode Island General Assembly may have inadvertently caused an issue pertaining to real estate for civil union partners.

"Wait a minute, how can there be a problem? Didn't they pass that civil union law last year?"
Correct, but that does not mean those couples in a civil union can hold property the same as a married couple.

"Wait another minute, that civil union law was supposed to grant those couples all the same rights as married couples, right?"
That may be the theory, but the application may not be so simple.

In 2011, the Rhode Island state legislature passed a statute allowing same-sex couples to be joined in a civil union,[1] making Rhode Island the 5th state in the country to pass such a law.[2] As the original bill for same-sex marriage was debated, the resistance to gay marriage within the State's bi-cameral chambers was strong enough that the civil union statute was seen as a compromise.[3] In doing so, the legislature may have inadvertently caused an issue pertaining to real estate for those civil union partners. Can a couple joined as civil union partners actually hold property as Tenants by the Entirety as would a married, heterosexual couple? Surprisingly, the answer may be no.

With the possibility of dredging up the painful days of first year law school property class, a brief review of concurrent estates is needed to understand the implication of what gay couples may be facing. Rhode Island recognizes three ways for two people to hold property together: Tenants in Common; Joint Tenants; and Tenants by the Entirety.[4]

Property held by two (or more) as Tenants in Common is such that the parties each hold an equal undivided share while they are alive. However, at the passing of one of the co-tenants, the remaining co-tenant does not retain the entire property automatically. Even if the surviving tenant were to be named in their co-tenant's last will or was their heir at law, such determinations for title purposes (and just as importantly, creditor liens) must be addressed through the decedent's estate, which means dealing with the required time, expense, and uncertainties of probate court. In Rhode Island, failure to state any other type of tenancy on the deed granting title defaults to being a Tenancy in Common for any grantees numbering two or more.[5]

If parties hold property in a Joint Tenancy, each holds an equal undivided share. At the death of one, the other becomes the sole owner of the decedent's share without the requirement of opening a probate estate. As a matter of law, the joint tenant has a right of survivorship. However, joint tenants can break their joint tenancy without the permission of the other tenant by simply deeding their share away. In doing so, the tenancy then reverts to a holding of Tenants in Common unless specified otherwise at the time of the co-tenant's alienation of the property.

The last tenancy is when property is held by two as Tenants by the Entirety. As with Joint Tenancy, holding property as Tenants by the Entirety grants a right of survivorship. However, there are three major differences between holding as Tenants by the Entirety and holding as Joint Tenants. The first is that only married couples are able to hold as Tenants by the Entirety.[6] The second difference is that, unlike Joint Tenants that can break their right of survivorship unilaterally, a change to the Tenants by the Entirety holding only can be accomplished with both parties' signatures.[7] The third is that due to the nature of the Tenants by the Entirety holding, it affords some more creditor protection than a Joint Tenancy would, mainly due to the lack of one party's unilateral ability to change the tenancy. The amount of protection Tenants by the Entirety potentially provides is more expansive, and, as such, it would appear to be the most desirous to have when receiving title to real estate with another individual. The marriage requirement severely limits those who are able to access it. However, Tenants by the Entirety is not universally accepted; Rhode Island is one of only 26 states that actually recognize Tenants by the Entirety as a form of tenancy.

Now that your nightmares of Blackacre and such phrases as "from A to O" have subsided, the connection between civil unions and real estate still may not be obvious. While the civil union statute purportedly gives same-sex couples

wishing to join in a state recognized union the ability to do so, the name or nomenclature does not indicate it as marriage. That last line is important because the State legislature did not pass a same-sex *marriage* bill. The actual statute also purports to equalize any and all rights as would be available had the couple been heterosexual.[8] However, the gender issue does not change the fact that civil unions are not marriages, not only by the terminology, but also by the legislative history of the failure to pass a same-sex marriage bill.

It is that legislative failure that could very well be the opening used to claim that same-sex partners holding property as Tenants by the Entirety may actually only hold it as Tenants in Common. (Under Rhode Island law, if a tenancy were to fail, such as Tenants by the Entirety, the tenancy does not revert the next step down (i.e. Joint Tenancy), but rather reverts to the default of Tenants in Common.) A claimant, such as an heir at law, may ask a court to declare property that was thought to be held originally by the parties with rights of survivorship actually be such that the surviving tenant would not be entitled to the decedent's share.

The Rhode Island civil union statute does specifically contain gender equalizing language.[9] By that initial blush, that fact alone should settle the issue. However, there are recent events that should give real estate practitioners cause for concern. In October 2011, The Providence Journal reported issues encountered by a couple that had taken advantage of the civil union law.[10] The civil union partners, along with their attorney, Susan Gershkoff, had approached the Rhode Island Division of Taxation with the intent of utilizing tax advantages that are routinely used by married couples. What they encountered was a refusal by the Division of Taxation to apply those provisions. The rationale for the tax office director's position was that the Rhode Island regulation in question was based on federal tax law, which does not recognize same-sex marriage or civil unions. Even though Rhode Island tax law was invoked by the civil union partners and the civil union law was to eliminate any different interpretation for gender based laws, the result was that an administrative department in this State still conflicted with the perceived intent of the civil union law, and more importantly, denied the couple what the law

supposedly had given them.

That has subsequently raised concerns among title insurance companies and real estate attorneys. Would partners to a civil union actually be entitled to all of the same rights, specifically including the right to hold property as Tenants by the Entirety? Rhetorically, it is unknown, and the consequences would not be felt immediately. In the future, potential claims from third parties could cause an unforeseen change in ownership, either through a possible action by a creditor against one of the couple or as intimated earlier, the death of one of the two partners. The failure of the Tenants by the Entirety could significantly change the chain of title going forward, and one who may have a legitimate claim to hold title had the couple been heterosexual and married, now would have that claim of ownership placed in doubt with a possible suit that could eventually be heard by the Rhode Island Supreme Court. That general hypothetical is what will concern a title insurance underwriter with respect to future conveyances. The uncertainty of who actually could potentially have claim to a property would present too much risk for any title insurance underwriter, thus preventing a surviving tenant the ability to convey clear and marketable title in the future.

Given those recent events, the ability for the real estate attorney to grant sound legal advice becomes very tenuous as to what the future will hold due in the inevitable contests against a surviving property holder who is also the surviving civil union partner. The doubt as to what the legislature's action had created, combined with a State agency's refusal to enable civil partner's wishes, now requires some adept footing for the real estate attorney when advising clients how to take property if they are civil union partners. To advise such a couple to accept a deed only as joint tenants may be denying them all of the protections that the law purports to give. To suggest that they should be able to take the property as Tenants by the Entirety may inadvertently be placing their hold on that property at the lowest tier of tenancy.

It is important to see how other states have dealt with similar issues. Out of the 26 states which recognize Tenants by the Entirety, only five also recognize civil unions: Rhode Island, Delaware, Illinois, Hawaii and New Jersey. Vermont also recognized both Tenants by the Entirety

and civil unions until 2007, when it began recognizing same-sex marriage. In 2000, Vermont was the first state to enact civil unions. Vermont House bill H. 847 was a thorough piece of legislation, totaling over 50 pages, and directly covered such topics as workers compensation rights of civil union partners, discrimination and divorce, amongst other topics. H. 847 also clearly and unequivocally stated that civil union partners are statutorily allowed to hold property as Tenants by the Entirety, clearing any questions about whether they met the old statutory definition of marriage.

When Delaware passed their civil union law in 2011, the Delaware legislature handled the issue of Tenancy by the Entirety in the same method that Vermont had used in 2000 by placing the definition directly into the civil union bill.[11] The Delaware civil union bill clearly defined a party to a civil union as fitting the spousal-specific definitions found throughout Delaware law, specifically including Tenancy by the Entirety. By directly stating within their civil union law that civilly-joined couples fit the definitions found in the Tenancy by the Entirety statute, Delaware bypassed the problem of potential judicial interpretation of the statute.

Illinois handled the issue of civil partners holding property as Tenants by the Entirety in a different manner. Initially, it was debated whether civil union partners in Illinois could hold property as Tenants by the Entirety.[12] However, a 2002 edit of the public laws of Illinois removed the language of "husband and wife" from the statutory requirement of Tenants by the Entirety, meaning any two persons may hold a property as Tenants by the Entirety.[13]

There are two states in which this issue is still up for debate. Hawaii passed its civil union act in 2011, and it went into effect on January 1, 2012.[14] The act was short and broad, and dealt mostly with the procedure to be joined civilly, rather than the substantive rights. In January 2012, Hawaii Senate Bill SB 2571 was introduced to further expand the rights of civil partners, specifically including the right to hold property as Tenants by the Entirety, but, to date, has not been enacted in any form. As for New Jersey, that state's law is also silent on whether civilly-joined couples can hold property as Tenants by the Entirety.[15]

It is interesting to note how Massachusetts handles Tenancy by the

Entirety. Although Massachusetts recognizes same-sex marriage, they have also placed certain protections in the language of their Tenants by the Entirety statute. Under Massachusetts law, should a Tenants by the Entirety holding fail because the parties were not married, that tenancy will revert to a Joint Tenancy, rather than the traditional common law default of Tenancy in Common.[16] This not only protects the property of couples where the Tenants by the Entirety failed for one reason or another, it also minimizes risk for insurance companies insuring the titles going forward.

Looking past the scope of the Rhode Island civil union statute, could same-sex couples, legally married in a state that recognizes same-sex marriage, move to Rhode Island and acquire property as Tenants by the Entirety? It appears they too would meet similar road blocks as would the couple joined in a civil union in Rhode Island. Even though a legally married couple would fulfill the Tenants by the Entirety's marriage requirement, the impediment is related to Rhode Island's history in addressing same-sex marriage through its Supreme Court as recently as 2007 with **Chambers v. Ormiston**.[17] The decision had been issued prior to the passage of the civil union law, but the court's decision adds to the ambiguity of how it may decide a civil union/property case when it arrives at its door. In **Chambers**, the Court determined that the Rhode Island Family Court did not have the authority to grant same-sex divorces. Among the factors as to why, the Court looked at the definition of marriage as it was understood by the State legislature at the time its grant of the Family Court's authority.[18] Even though the **Chamber's** decision was split, it may be the same logic the Court could use in the future to determine the availability (or lack thereof) of Tenants by the Entirety to those in civil unions, which, by definition, would not be marriages since marriage was not redefined or recast by the passage of the civil union statute.

The uncertainty that the civil union law has created as to this type of tenancy forms a void for the real estate practitioner, preventing him or her from accurately predicting the situation in the future. If there were to be new legislation revamping the civil union statute to a closer model of Vermont's initial foray

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into civil unions or Delaware's current model, or possibly an amendment to the current statute specifically stating that Tenants by the Entirety would be a specifically granted right for such couples, the uncertainty would be diminished (but not eliminated). However, there is little likelihood that this statute will be revisited any time soon. The other alternative could be to alter how the State recognizes Tenants by the Entirety, as was done in Illinois which eliminated any husband and wife language and allowed any party to hold as Tenants by the Entirety with another. That would not only address the issue for civil union partners in Rhode Island, but also the same-sex married moving into Rhode Island as well. Although historically a privilege exercised by just married couples, Tenants by the Entirety recognition is not inversely true: 24 states do *not* consider holding property as Tenants by the Entirety so ingrained with the essence of marriage as to recognize it as a valid tenancy in their state.

The current law may encourage those civil union partners in Rhode Island to take property as Tenants by the Entirety. As a real estate law practitioner, you would be well-served to inform them of these potential pitfalls that the future may hold, all due to one little word.

ENDNOTES

1 *R.I. Gen. Laws 15-3.1*
2 *MacDougall, Ian. "Rhode Island Passes Civil Unions Bill." Washington Times Online. Associated Press, 30 June 2011. Web. <http://www.washingtontimes.com>.*
3 *Gregg, Katherine. "Fox Says Gay Marriage Has No Chance, Backs Civil Unions." Providence Journal. 27 Apr. 2011. Web.*
4 ***Bloomfield v. Brown**, 67 RI 452, 456(1942).*
5 *R.I. Gen. Laws 34-3.1*
6 ***Van Ausdall v. Van Ausdall**, 48 RI 106, 108 (1927)*
7 ***Id.***
8 *R.I. Gen. Laws 15-3.1-6*
9 *R.I. Gen. Laws 15-3.1-7*
10 *Marcelo, Philip. "Despite R.I. Civil-Union Law, Gay Spouses Excluded From Tax Exemption." Providence Journal. 10 Oct. 2011. Web.*
11 *Delaware Senate Bill No. 30, § 214(a)*
12 *Gunnarsson, Helen. "Can Civil Partners Hold Property as Tenants by the Entirety?" Illinois Bar Journal 99.3 (2011): 118. Print.*
13 *Illinois Public Act 92-136 (2002).*
14 *Hawaii S.B. 232*
15 *N.J. Public Laws Chapter 246.*
16 *M.G.L. Chapter 184 § 7.*
17 ***Chambers v. Ormiston**, 935 A.2d 956(RI 2007)*
18 *Id. at 967.* ❖