IN 2014, the Census Bureau reported there was 56 million married couples in the United States. Of that number, 252,000 were same-sex couples. The 2013 U.S. Supreme Court decision in United States v. Windsor gave many same-sex couples the incentive to marry because of access to federal benefits. With the pending Supreme Court decision in Obergefell v. Hodges, it is likely that number will increase.

Traditionally, most couples buy their first home after they get married. That is, after all, what married people do: they buy a house, start a family and settle down in their nascent grown-up world.

Times have changed and a growing percentage of home-buying couples are unmarried. Unlike their married counterparts, however, these couples do not enjoy most of the same legal protections. Unfortunately, many of those couples, straight and gay, are not considering the legal issues inherent in the home-buying process. Too often, that oversight becomes painfully clear when a relationship ends. And, one thing is certain: all relationships end.

Too many people believe they can save money with DIY legal sites and download a deed complete it, record it (or not) and never see a need to consult a lawyer. Those actions often mean significantly higher attorney fees and costs when they need to untangle the web they wove.

Unmarried couples are considered legal strangers to each other. They may enter into contracts that will provide legal remedies. Couples in personal, romantic relationships often learn too late that they have limited legal options without a written contract. When a relationship ends, the fallout can be brutal.
In 2014, an Illinois appellate court issued a ruling that gave unmarried couples equitable rights in property and assets that accrued during the relationship. This was a major change in Illinois law. This decision overrules a 1979 Illinois Supreme Court decision, *Hewitt v. Hewitt*¹ that denied property rights to unmarried couples. It is unusual for an appellate court to overrule a Supreme Court decision.

*Hewitt* was decided when Illinois had strong legislative policies supporting the view that lawsuits by unmarried couples could not be brought. Illinois law criminalized unmarried cohabitation and had abolished common law marriage. There were also court decisions that refused to grant custody for unmarried parents. The appellate court reviewed the situation since *Hewitt* and decided the concerns reflected in that decision no longer exist.

Under *Blumenthal*, courts may adjudicate property disputes between unmarried couples and provide equitable distribution of the assets. The court also addressed the issue of imposing a constructive trust on these assets. However, the Illinois Supreme Court has agreed to hear the appeal and the long-term impact of *Blumenthal* is undetermined.

Not all states permit equitable claims. Some states adopted “anti-Marvin”² laws limiting the rights of cohabitants to use equitable theories to claim compensation when relationships end. It will be interesting to see if the Illinois Supreme Court reaches that conclusion.

**TYPES OF REAL ESTATE OWNERSHIP**

There are several types of ownership possibilities:

- Sole ownership;
- Joint tenants with right of survivorship;
- Tenants in Common/proportional ownership;
- Equal ownership with loan;
- Living trust.

Tenancy by Entireties is only available to married couples and will not be discussed.

**Sole Ownership**

This is common when one partner owns the property before the relationship begins or purchases the property with separate funds. The owner wants to maintain complete ownership and control. The owning partner holds title and controls the sale rights, proceeds, succession rights after death and tax deductions.

The other partner has no ownership rights. The non-owner is viewed as a tenant and any payments made are considered “rent.” The non-owner’s status is important because the homeowner insurance policy does not cover the other partner, that person needs renter’s insurance. The non-owner cannot deduct interest or property taxes and has no tax benefits from the arrangements.

A couple may decide to put only one name on the deed when they purchase a house. This occurs because one partner has poor credit history and would not qualify for a mortgage, has outstanding liens or judgments or only one partner is contributing the entire purchase price.

Sole ownership is not a good idea if both partners are contributing to the purchase and upkeep because the non-owner’s rights are compromised when the relationship ends.

Unmarried and unregistered domestic partners will have difficulty claiming a property interest in this type of ownership arrangement. This is particularly true if the owner bought the property before the relationship began or with personal funds afterwards.

However, equity claims are becoming more common and, if there is evidence showing a contribution, usage, promises made, behavior, services, sacrifice, etc., those claims may be successful.

¹ 77 Ill. 2d 49 (1979)
² *Marvin v. Marvin*, 18 Cal.3d 660 (1976)
For the most part, however, such equity claims fail because of the Statute of Frauds that requires any interest in real estate must be in writing.

Several years ago, Bob and Ray, an unmarried gay male couple living in Florida, decided to move all of their assets into the name of one man. They did this for business and tax reasons. They failed to memorialize their intentions in writing. Bob, who owned everything, also failed to sign a will. Then Bob died. After the funeral, Ray and Bob’s family returned to the house. The family encouraged Ray to take a walk on the beach, which he did. He returned to discover the locks had been changed and he could no longer enter the home he shared with Bob. The family took possession of everything, including Ray’s dog. They refused him all access.

Since Bob died intestate, his heirs were within their rights under Florida law to take this action. It took Ray and his lawyer months to obtain a court order allowing him back in the house. Bob’s family refused to disclose the shelter where they took the dog. Ray never got his dog back.

Had Bob and Ray signed an agreement concerning the property or prepared an estate plan, the outcome would have been different.

**Joint Tenants With Right Of Survivorship**

This form of ownership is shared equally and both partners have equal interests in the real estate. This is the preferred form of co-ownership among partners with similar financial resources.

The co-owners equally share in the acquisition of the property and all closing costs. They have equal rights and obligations to improvement costs and tax deductions. Either of them may trigger a buyout or sale and proceeds will be distributed equally. When one dies, the title automatically vests in the survivor. Any will provisions to the contrary do not trump the recorded deed.

The couple needs a written co-ownership agreement if they intend there to be unequal shares on death or in a breakup. Without such an agreement, they are deemed to have an equal interest.

A joint tenancy with right of survivorship (“JTWROS”) can be seen to represent the co-owners’ intentions for the disposition of the property following death. It is the least expensive, fastest and most definitive manner of passing property between co-owners at death. The real estate is not subject to probate.

While some jurisdictions still require strict adherence to the four unities, many states have abolished the requirement by statute or case law. In those states that enforce the requirement, there is no joint tenancy and ownership reverts to a tenancy in common, if the requirement is not met.

- **Unity of time** requires both tenants to acquire the interest at the same time. At common law, using a “straw man” conveyance could satisfy the “time” requirement. The owner conveys the property to someone (straw man) and that person then conveys the property to the couple as joint tenants;
- **Unity of title** occurs when the co-owners’ interests arise out of the same instrument;
- **Unity of interest** requires that both tenants have the same property interest. Each owner must have the same type of interest running for the same amount of time;
- **Unity of possession** means that both tenants have the right to possess the entire property.

An owner that adds a partner’s name after the purchase will not comply with the four unities. This may raise a future issue of whether the JTWROS deed is valid and enforceable.

An important consideration for clients to remember is that either party can transfer her interest to another person at any time. Doing so terminates the joint tenancy and creates a Tenancy in Common. Also, either party can seek a mortgage on their 50% share and that will end the joint tenancy.
Tenants In Common/Proportional Ownership

As tenants in common (“TiC”), each owner has a distinct share. These can be equal or unequal shares and involve two or more owners.

There may be an increase in this type of ownership in the future as more people decide to co-own with more than just one other person. In some cases, multiple couples are buying real estate as co-owners in order to get something better than what they could afford on their own. This is different than an investment purchase. The couples buy property as their primary residence even if the property purchased may be a multi-family building.

Couples purchasing as TiC often happens when one partner has greater savings or income than the other. The couple contributes proportionate shares to the acquisition and improvement costs.

In a perfect world, each partner contributes a preset “rent” payment into a joint account. The couple uses that account to pay all expenses associated with the house. Any amounts over that “rent” payment are shared proportionately. When the house is sold, the sale proceeds are also shared proportionately.

The couple needs to address the succession issues that arise following death or separation. These issues and the tax deduction allocation are best determined by a written agreement.

The couple needs to decide the percentage breakdown before buying the house. For example, if one contributes 75% toward the down payment and the other 25%, the deed can reflect that difference in ownership interests.

The written agreement is used to spell out what percentage each partner holds.

Unlike property held in JTWROS, on the death of one tenant, that share becomes part of the decedent’s estate and passes under the terms of the will or the state’s intestacy statute. There are no automatic survivorship rights and couples are well advised to prepare a comprehensive estate plan.

While this can be done at the same time the written co-ownership property agreement is negotiated, the couple should consider doing it separately. Issues involving joint representation arise in this situation. Each partner should have her own lawyer review the written agreement before signing it.

Even though a TiC deed does not provide automatic survivorship benefits, in some states, the couple can circumvent that issue by executing a Transfer on Death deed or affidavit.

When the property is sold, each owner receives specific share based on percentage or ownership interest that is reflected in the deed or the written agreement.

Each owner has the right to sell her interest to a third party or use it as security for a mortgage.

A TiC deed is often not a good idea unless both partners intend to leave the property to a third party at death. Discussing these issues is imperative for couples to consider before buying a house.

Transfer On Death Deed/Affidavit; Beneficiary Deed

A transfer on death (“TOD”) or beneficiary deed allows an owner to name a beneficiary and successor beneficiaries who will take title to the property after her death. Some TOD laws require the beneficiary to survive the owner in order to take the property. If the beneficiary predeceases or fails to survive the owner, the property becomes part of the decedent’s estate. Naming a contingent or successor beneficiary removes that problem.

Twenty-four states and the District of Columbia have transfer on death or beneficiary deed options that are available to unmarried couples.

A JTWROS deed is not always the best form of title and, if available, a TOD or beneficiary deed may be a option. Couples taking property as Tenants in Common can benefit from a TOD deed.

3 AZ, AK, AR, CO, DC, HI, IL, IN, KS, MN, MO, MT, NE, NV, NM, ND, OH, OK, OR, SD, VA, WA, WI, WV, WY.