

# Community Property

## WITH RIGHT OF SURVIVORSHIP

**Real property conveyed to a married man or woman is presumed to be community property, unless otherwise stated.** Community property is distinguished from separate property, which is property acquired before marriage by separate gift or bequest, after legal separation, or which is agreed in writing to be owned by one spouse. Existing law provides that upon the death of a married person, one-half of the community property of a husband and wife belongs to the surviving spouse and the other one-half belongs to the heirs or devisees of the decedent. Each spouse has the right to dispose of one-half of the community property by will.

**Joint tenancy is a form of vesting title to property owned by two or more persons in equal interest, subject to the right of survivorship in the surviving joint tenant(s).** Title must have been acquired at the same time, by the same conveyance, and the document must expressly declare the intention to create a joint tenancy estate. When a joint tenant dies, title to the property is automatically conveyed by operation of law to the surviving joint tenant(s). Therefore, joint tenancy property is not subject to disposition by will. Husband and wife holding title to real property as joint tenants cannot will their individual interest, and upon the death of one spouse, title vests in the surviving spouse.

In spite of the fact that husband and wife hold title as joint tenants with right of survivorship, surviving spouses have urged and probate courts at times have decreed that joint tenancy property was in fact community property and then awarded one-half of the interest in the property to the surviving spouse and one-half to the decedent. The purpose of the surviving spouse's petition to the court is that such decree also ensured that the surviving spouse received the favorable tax status of community property under federal law, although the effect of this decree against the IRS has been questionable.

Since July 2, 2001, a new form of vesting title to real property owned by husband and wife during their marriage, which they intend to own together, has been added. **COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP.** This form of holding title shares many of the characteristics of community property but adds the benefit of the right of survivorship similar to title held in joint tenancy. The goal here is to establish the right of survivorship benefit while also ensuring favorable tax status under federal law and to avoid the practice of getting a probate decree that joint tenancy was in fact community property.

**The salient aspects of Community Property with Right of Survivorship are:**

- It must be expressly declared in the transfer document that the property is Community Property with Right of Survivorship.
- The fact that the property is Community Property with Right of Survivorship may be – but it does not have to be accepted in writing on the face of the document by a statement signed or initiated by the grantees.
- Upon the death of one of the spouses, the property will pass to the survivor, without administration, subject to the same procedures as property held in joint tenancy.
- The right of survivorship may be terminated prior to the death of either spouse pursuant to the same procedures by which a joint tenancy may be severed.
- The new law became effective July 1, 2001, and applies only to instruments created on or after that date.

**How should I take ownership of the property I am buying?** is an important question real property purchasers ask their real estate, escrow and title professionals every day. This includes questions about the advantages or disadvantages of the new Community Property with Right of Survivorship as a form of ownership. Though these professionals may identify the many methods of owning property, they may not recommend a specific form of ownership, as doing so would constitute practicing law. Further, the problem with responding with a correct answer from a real estate point of view is that serious tax implications might dictate an opposite conclusion. Real estate professionals should urge real property purchasers to carefully consider their titling decision prior to closing, and to seek counsel should they be unfamiliar with the most suitable choice for their particular situation.

