



How to Hold Title to Your Real Property in California

By Jan Cummins
June 3, 2008

Your choice of words on the title of your real property can control how your property passes when you die, how much tax your survivors will have to pay, and how freely you can manage your property while you are alive. This article describes the possible ways that an individual can hold title to real estate in California, gives the basic legal consequences of each one, and provides an imaginary scenario of how each form of title might affect your life.

How you hold title to your real property is especially important at death, because the form of title can have a major impact on the tax situation, both in calculating the size of your estate for estate tax purposes and in positioning your property so that it can best take advantage of the capital gains tax step up in basis rule at death. This article is limited to a discussion of the most widely used ways of holding title. It is not an attempt to provide personal legal advice. Before you rely on any of this information, you should consult an attorney to find out how the law applies to your particular situation.

What are the possible ways you can hold title to your property in California?

Sole ownership, Tenants in Common, Joint Tenancy, Community Property, Community Property with Right of Survivorship and Revocable Trust ownership are all possible forms for holding title to real property in California. In California, Community Property ownership is only available to married people and to registered domestic partners. Federal law recognizes Community Property ownership for married people only. For tax reasons, it is therefore very important for couples who are registered domestic partners to seek legal advice before taking joint title to property together.

Irrevocable Trusts, Partnerships and Corporations can also own property, but the intricacies of those forms of property ownership is beyond the scope of this article.

The step up in basis at death rule and form of title

An important part of tax planning is the proper consideration of the step up in basis for capital gains tax purposes on property that is owned by a person who has died. Current federal tax law provides that a new cost basis for property owned at death is set at the value of the property on the date of death. This is especially important when comparing Joint Tenancy with Community Property.

A home owned by an elderly person for many years will have a new basis set at that person's date of death. When the people who inherit the elderly person's home go to sell it, they will owe very little or nothing in the way of capital gains tax because of the new basis. If the basis had not

been “stepped up,” capital gains tax would be owed on the sale of the home based on the original purchase price. For example, a home bought in 1970 for \$40,000 and worth \$1,500,000 in 2007; if sold for \$1,500,000 while the owner is still alive, even accounting for the \$250,000 per person homeowner’s exclusion, the owner would be liable for 15% capital gains tax and applicable state income tax (possibly 8% in California) levied on \$1,210,000, for an approximate total tax of \$300,000. If the home was instead sold after the owner died in 2007, there would be zero capital gains tax.

Sole ownership

Sole ownership is the simplest form of ownership. Even with sole ownership, it is important to note whether or not you are married, and if you are married, to state whether or not you are holding the property as Separate Property or as Community Property. For instance, a married woman owning Separate Property would take title as “Jane Smith, a married woman, as her sole and separate property.”

Tenants in Common

Tenants in Common is a form of title that allows unrelated persons to own property together while keeping the property interests totally separate from each other. The most important quality of Tenants in Common title is that the property interest remains in your estate when you die. It does not automatically pass to the other owners. You pass it on to your heirs or your beneficiaries. You can also sell your interest or give it away while you are alive, with very few restrictions. Each Tenants in Common interest works independently of the others, and all legal rights and obligations can usually be passed on to the new owner(s). Your Tenants in Common interest will be valued as a pro rata share of the entire property for estate tax purposes and will be included in your estate.

Joint Tenancy

The most notable feature of Joint Tenancy is that at the death of a joint owner title automatically passes the share of the deceased owner to the surviving joint owners. For legal purposes, your Joint Tenancy interest simply disappears at your death in favor of the other joint owners. Because of this, Joint Tenancy has been a favored form of title for married couples or other family members for centuries. The property avoids probate because it is never in the deceased person’s estate. It technically passes and changes legal title just at the moment of death.

However, the federal tax authorities do not take the view that the Joint Tenancy interest is not in the estate. The federal tax consequences of Joint Tenancy at death can be onerous. For unmarried Joint Tenancy owners, the share of property ownership attributed to the deceased person’s estate is equal to the percentage of the purchase price paid by that person. If there is no proof of investment, the presumption of the IRS is that the deceased person paid 100% of the purchase price. For married joint owners, the IRS presumes that each person invested 50% of the purchase price, but then also only allows credit for a step up in basis for 50% of the value of the property to date of death values.

A Joint Tenancy interest can be sold or given away while the owner is still alive, but in doing so, he or she converts his or her share to a Tenants in Common share. The passage on death feature of the Joint Tenancy title is eliminated as far as the former owner's share is concerned.

Community Property

Community Property is a form of title unique to Community Property law states like California. It is only available to married people or registered domestic partners. Taking title in Community Property provides the advantages of Tenants in Common ownership, where each person retains full ownership of his or her 50% share of the property, but taking title in Community Property also protects the property interest for the spouse in case of death. All Community Property goes to the surviving spouse at death unless it is granted elsewhere by the decedent's will. There are also other special legal protections for the spouse when property is held in the form of Community Property.

At death, only the value of the one half interest in the property held by the decedent is included in his or her estate for estate tax purposes, but the full 100% of the value of the property is stepped up in basis for capital gains tax purposes for the survivor of a married couple. This step up in basis tax advantage is not available for the survivor of a registered domestic partnership. Since federal law does not recognize the validity of registered domestic partnerships, it is only under California State law that such couples can enjoy the advantages of Community Property ownership.

Community Property with Right of Survivorship

A fairly new form of title in California, Community Property with Right of Survivorship, was created to combine the advantages of holding title in Community Property and in Joint Tenancy. This new form of title simply adds the passage on death feature to the Community Property title. It can provide the best of both worlds.

This form of title is best suited to situations where married couples choose not to establish a trust. It passes property directly to the surviving spouse at the death of the first spouse, avoiding probate in the same way a Joint Tenancy does, while retaining any tax advantages of Community Property ownership.

A word about Tenancy by the Entirety

Tenancy by the Entirety is not a recognized legal form of title in California law, but you may encounter it if you are dealing with out of state real property. Most states in the U.S. use a modified form of the British common law for marital property law, and Tenancy by the Entirety is an important feature of that law. California and a few other states, mostly in the West, are the exception in the U.S. Tenancy by the Entirety conflicts with the Community Property laws.

Tenancy by the Entirety is a form of title similar to Joint Tenancy, in that it provides passage on death benefits, but it can only be used by married couples, to whom it offers additional protections over Joint Tenancy. Its can be compared in some ways with the new California form of title, Community Property with Right of Survivorship. A more detailed discussion of Tenancy by the Entirety is beyond the scope of this article.

Revocable Trust ownership

A trust can own any kind of property that an individual can own. In California, a trust holds property through the trustee, who is the legal owner. In most Revocable Trusts, the person who owns the property, called the grantor or the settlor, is also the trustee, at least at the beginning. An example of the way title would be held in such a circumstance is: “Jane Smith, trustee of the Jane Smith Revocable Trust.”

If you have a Revocable Trust, and you hold property jointly with your spouse, Community Property is usually the best form of joint ownership from which to transfer property from yourself to the trustee of your Revocable Trust. Community Property title does not have the passage on death feature of Joint Tenancy that could remove your property from the Trust at your death or cause your property to be taxed as Joint Tenancy property. When property is transferred from Community Property ownership to Trust ownership, it also preserves the capital gains tax advantages of Community Property ownership at the death of one of the spouses, because the underlying character of title to the property remains the same when it is transferred into the trust.

The story of Bob and Jane: The evolution of holding title

Bob Jones was a single man with a good job. When he had saved some money, he decided to buy a home. He took title to his new home as “Bob Jones, a single man.”

Bob then met Jane Smith, and they fell in love. Bob and Jane weren’t ready to get married, but they wanted to live together, so Jane moved into Bob’s house. After she had lived there for a couple of years, Jane decided that the house would be a good investment for her, and that she would like to do some remodeling. She offered to buy 50% of it from Bob, and he agreed. They completed the transaction and changed title to “Bob Jones, a single man, and Jane Smith, a single woman, as Tenants in Common.”

A few years later, when Jane decided to make her will and became aware of the importance of forms of title on property at death, she approached Bob and asked him if he would be willing to change title from Tenants in Common to Joint Tenants, so that the survivor of the two of them would not have to share ownership of the house with someone else if one of them should die. Bob agreed, and they changed title to “Bob Jones, a single man, and Jane Smith, a single woman, as Joint Tenants.”

Shortly thereafter, Jane became pregnant. Bob had been proposing marriage for years and she had been resisting it, but now her views on marriage suddenly changed, and she suggested to Bob that they should get married. He agreed. After they were married, and their twins Jack and Jill were born, Bob heard about the tax advantages of holding property as Community Property. He approached Jane and suggested that they change title on their home, to take advantage of their married status and protect their tax situation. Jane understood the advantages of making the change, so they retitled their home as “Bob Jones and Jane Smith, Husband and Wife as Community Property with Right of Survivorship.”

By the time the twins were 7 years old and established in school, Jane had gone back to work. Bob and Jane sat down one day to discuss their finances, and realized that their net worth was

considerably higher than it was when the twins were born. Their retirement benefits and money market accounts had grown to the point that they owned much more, even excluding the value of their home, than the \$100,000 each that could cause either of their estates to be subject to probate if one of them died. (Jane had recently read an article about avoiding probate, and had discovered that an estate is subject to the court procedure of probate in California if the deceased person owns \$100,000 or more in property at death that is not held in transfer on death forms of title, life insurance, IRAs and other retirement benefits.) Bob and Jane decided to consult an attorney and create a basic estate plan that would include a Revocable Trust.

When Bob and Jane went into their attorney's office to sign the documents for their new estate plan, they also signed two new deeds as their attorney advised, first taking title as "Bob Jones and Jane Smith, husband and wife as Community Property," and then as "Bob Jones and Jane Smith, trustees of the Jones and Smith Revocable Trust."

None of their transfers, except Bob's first purchase of the home and the sale of 50% of the home to Jane, triggered any transfer tax or reassessment, because they all had been transfers to themselves. There is no tax penalty for changing title on property you own and plan to continue owning. All Bob and Jane had to pay were the recording fees.

Which form of title is best?

There is no best form of title for every person and every situation. Community Property in one of its forms is usually the best form of title for married people, but not always. Many married people wish to hold some property as Separate Property.

There can be a presumption in favor of either Community Property or Separate Property, depending on the words on the deed. The choice of words for holding title should be chosen with care. Those words may determine how the property passes at the owner's death, because a title of Joint Tenancy can and usually will override the deceased owner's explicit instructions in his or her valid will.

Joint Tenancy is a powerful legal tool, and should be used with caution. Unfortunately, it is commonly overused as a form of joint title between spouses, most likely because title insurance agents sometimes use it without consulting clients. It is reasonable to expect that title insurance companies are very careful not to practice law, so it is understandable that they will fall back on the custom of the industry if they are not given specific instructions by the client. The passage on death benefits of Joint Tenancy may blind people to its potential negative tax consequences, but it is far more likely that it is used because it has been used by so many for so long. There is safety from liability in following custom.

The most important thing to remember in taking title to property is to do so carefully and to be aware of what you are signing. The form of title in which you hold your property can have important legal and tax consequences. It is to your advantage to obtain competent legal advice before determining the best form of title for your property.

A chart showing the ways to hold title and their characteristics is below.

Concurrent Co- Ownership	Community Property (CP)	CP with Right Of Survivorship	Joint Tenancy	Tenancy in Common	Revocable Trust
Parties	Husband and Wife or Registered Domestic Partners	Husband and Wife or Registered Domestic Partners	Any number of related or unrelated persons.	Any number of individuals.	Any individuals or entities.
Division of Interest Title	Equal shares. Community ownership.	Equal shares. Same as CP but transfer on death title.	Equal shares. Joint ownership.	Equal or unequal. Separate proportional ownership.	Equal or unequal. Title held by trustee.
Possession	Equal	Equal	Equal	Equal	Depends on provisions of trust.
Effect of Death	Decedent's half can be willed to another person. If not willed away, passes to spouse by petition to court.	Not divisible by will. Passes automatically to surviving spouse on death.	Decedent owner's share passes in equal shares to other joint owners.	Decedent owner's share passes by will or by succession under the Probate Statutes.	Dependent on the terms of the trust. The trust does not die when its settlor does.
Presumption	If no strong evidence to the contrary, all property acquired by husband or wife during marriage is CP.	Deed must specifically state CP with right of Survivorship to get automatic passage to spouse on death.	Deed must state that title is joint tenancy.	If title is not stated, tenancy in common is presumed, unless CP presumption applies.	Trust can only be created by written instrument. Title is held by trustee.

Jan Cummins is an Estates, Trusts, and Elder Law attorney practicing in San Mateo, California.

© 2008 Jan Cummins. All Rights Reserved. This article is intended to provide general information for informational purposes only and should not be relied upon as a substitute for legal advice from a qualified attorney.