

California's New Form of Holding Title to Real Estate

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Community Property with Right of Survivorship

On July 1, 2001, California Civil Code §682.1 will go into effect, which will enable a husband and wife to take title to real property as community property with a right of survivorship. Added to the Civil Code by Assembly Bill 2913 ("AB 2913"), Section 682.1 provides that the community property of a husband and wife, when expressly declared in a transfer document to be community property with right of survivorship, shall pass to the survivor upon the death of one of the spouses, without any need for a probate administration.¹ Such title will give married couples the benefit of probate avoidance and the tax benefit of community property (assuming that the property value has increased from the time of purchase to the date of death of the first spouse to die). In a rising real estate market, the property will receive an automatic step-up in tax basis (to fair market value) for both spouses' interests in the real property at the time of the first spouse's death.² Further, the Code section also provides that, prior to the death of either spouse, the right of survivorship may be terminated in the same way a joint tenancy may be severed.

Current Forms of Holding Title

Prior to the introduction of Section 682.1, the California legislature provided four standard forms of holding title to real property owned by multiple persons - joint interest, partnership interest, interests in common, and community interest.³ As a result, it has been common for married couples to take title to real property either as joint tenants or as community property. These methods of holding title are, however, insufficient for married couples that would like the probate avoidance benefit of joint tenancy, as well as the tax benefit of community property. According to a recent article, some couples in the past have taken title as "husband and wife as joint tenants," and nevertheless claimed intent to hold title as community property.⁴ However, the IRS often took the position that each spouse's interest in the property held under this title form was the separate property of each spouse.⁵ With the enactment of Section 682.1, couples will, by recording a new deed, be able to take advantage of a new form of holding title that will provide them with the benefit of joint tenancy and community property.

Effect of Section 682.1

Section 682.1 states that title declared in the transfer document to be community property with right of survivorship may be accepted in writing on the face of the document by a statement signed or initialed by the husband and wife grantees. Conflicting opinions have been expressed as to whether Civil Code Section 682.1 requires the husband and wife grantees to sign or initial the grant deed declaring title in the new form.⁶ Therefore, until this issue is resolved, it may be advisable for husband and wife grantees taking title in this form to sign the deed, along with the grantor, in order to assure vesting in community property with right of survivorship.

¹ AB 2913.

² See Internal Revenue Code §1014.

³ Cal. Civil Code §682.

⁴ James A. Vickman, *New Title: Community Property with Right of Survivorship*, PROB. SOLUTIONS, Winter 2001, at 1, 3.

⁵ Id at 3.

⁶ Lawrence E. Green, *Reader Alert: A New Form of Title in California - Community Property with Right of Survivorship*, CAL. REAL PROP. J., Winter 2001, at 20-22; James A. Vickman, *supra* note 5 at 3.