

I prepare or review many grant deeds in my professional role. The following nugget of information is strictly to deal with the situation of how to hold title to community property in California by a married couple outside of a trust. The best way generally for a married couple holding title to community property in California outside of a trust is as follows: "Tom Smith and Jane Smith, husband and wife as community property with right of survivorship". I see too many people still holding title to real estate in a manner that is inconsistent with their stated objectives or are unaware of this recently enacted change in the law.

For those who like a brief over simplified explanation, please read on. In July of 2001, the California legislature enacted new law (Civil Code Section 682.1) to deal with the problems between joint tenancy with right of survivorship, community property laws and tax treatment for the basis in the real property upon death of a spouse. In short, there were problems for married couples who held title to real property as "joint tenants" or "as community property" upon the death of a spouse. If they held title as joint tenants, the couple was able to avoid the probate issue as the surviving spouse and co-joint tenant became the sole owner automatically upon death of the spouse. The surviving spouse would simply cause an Affidavit of Death of Joint Tenant to be recorded, and then, the surviving spouse was able to convey title in their own name. The problem was when the surviving spouse went to their accountant/tax preparer and were advised that she/he only received a 50% step up in her/his basis for the real estate. On the other end, if the couple held title as community property, the accountant/tax preparer usually advised the surviving spouse that she/he received a 100% step up in her/his basis for the real estate. The problem was that the property was subject to administration (probate). For example, a deceased spouse may leave behind a handwritten will wishing to leave her/his 1/2 interest in the real estate to a disfavored relative. You can imagine the problems. Thus, the new and improved form of holding title combines the best of both worlds for those married couples who do not elect to transfer all their assets into a revocable trust.

Naturally, the comments made herein are general in nature and may not be well suited for your particular situation and depends upon the facts, circumstances and objectives of the married couple. Further, there may be tax considerations that do not take into account other competing factors and goals. Please take the time to review your own particular situation with a tax and a legal professional and see if this newer form of holding title is appropriate, or evaluate if it now is the time to consider your need for an estate planning package.

Cordially,

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