



Common Forms of California Residential Ownership

How Should I Take Ownership of the Property I am Buying?

California real property purchasers who ask their real estate, escrow and title professionals this important question must understand these professionals may identify methods of owning property. However, they may not recommend a specific form of ownership, as this would constitute practicing law.

Because real property is among the most valuable of assets, the question of how parties take ownership of their property is of great importance. The form of ownership taken – the vesting of title – will determine who may sign various documents involving the property and the future rights of the parties in the transaction. These rights involve such matters as real property taxes, income taxes, inheritance and gift taxes, transferability of title and exposure to creditors' claims. Also, how title is vested can have significant probate implications in the event of death.

Ownership of Real Property

Tenancy in Common

A tenancy in common is created whenever an instrument conveys an interest in real property to two or more persons, and specifies tenancy in common. If a recorded conveyance document does not expressly specify the tenancy (joint tenancy, community property, etc.), the legal presumption is that the vesting is tenancy in common. The interest in the property owned may be any fraction of the whole; thus one party may own one-tenth, another three-tenths, and a third party may own the remaining three-fifths. There is no right of survivorship; each tenant owns an interest that vests in his or her heirs or devisees upon death.

Joint Tenancy

Joint tenancy exists when two or more persons are joint and equal owners of the same undivided interest in specified property. The main characteristic of joint tenancy is the right of survivorship. When a joint tenant dies, his or her interest in the property is terminated, and the estate continues in the survivor or survivors.

The usual method of creation of a joint tenancy is by a deed describing the grantee as follows: "to A and B, as joint tenants." The words "with right of survivorship" are often added, but are not a requisite, since this right is an incident of a joint tenancy, whether expressly recited or not.

Problems have frequently arisen regarding the true character of the ownership of property by husband and wife as joint tenants. The same issues now apply to registered domestic partners and same-sex spouses. Frequently such property, despite the status of joint tenancy ownership, has been treated as community property for purposes of succession, transfer, disposition in divorce or seizure by creditors. It may be shown that property taken in joint tenancy was thereafter converted into community property by either an oral or written agreement.

The contention that joint tenancy property is in fact community property is often raised in divorce cases. The court does not have the power to make an award of separate property, but if it is established that joint tenancy property is in fact community property, the court may award such property to a spouse or registered domestic partner.

Upon the death of one joint tenant, the title automatically passes to the survivor. Title insurance companies will require some formal procedure before recognizing the new owner. Two methods are followed: Filing an Affidavit of Death of Joint Tenant or obtaining a court decree of death of joint tenant.

Community Property

Community property is a creation of the Civil Law of Rome and came to California via Mexico. In general, community property represents the earnings and accumulations of the marriage. Persons who are not married to each other, or are not registered domestic partners, cannot hold community property together.

All property of married persons or registered domestic partners that is not their community property is the separate property of one or the other. **Separate property consists of:**

- ▶ Property owned before marriage or registered domestic partnership
- ▶ Proceeds of separate property, such as dividends, rents, profits or property received in exchange for separate property
- ▶ Gifts and inheritances received after marriage or registered domestic partnership
- ▶ Property agreed between the spouses or registered domestic partners to be separate property
- ▶ Earnings of one spouse or registered domestic partner when he or she is living separate and apart from the other spouse or registered domestic partner

All deeds conveying community property must be signed by both spouses or registered domestic partners.

Community Property with Right of Survivorship

This is a form of vesting title to property owned together by spouses or by registered domestic partners. It shares many of the characteristics of community property but adds the benefit of the right of survivorship similar to title held in joint tenancy. There may be tax benefits for holding title in this manner. The interest must be created on or after July 1, 2001.

On the death of an owner, the decedent's interest ends and the survivor owns the property. For example: Bruce Buyer and George Buyer, registered domestic partners, as community property with right of survivorship.

Legal and Tax Consequences

How title is vested has important legal and tax consequences. As a California real property purchaser, you may wish to consult an attorney or tax advisor to determine the most advantageous form of ownership for your particular situation.

Common Forms of Residential Ownership Chart

HOW TO TAKE TITLE TO REAL PROPERTY



	TENANCY IN COMMON	JOINT TENANCY	COMMUNITY PROPERTY	COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP
PARTIES INVOLVED	Any number of persons (can be spouses)	Any number of persons (can be spouses)	Only spouses or domestic partners	Only spouses or domestic partners
DIVISION	Ownership can be divided into any number of interests, equal or unequal	Ownership interests are equal	Ownership interests are equal	Ownership interests are equal
TITLE	Each co-owner has a separate legal title to his or her undivided interest	There is only one title to the whole property	Title in the "Community" (similar to title being in a partnership)	Title in the "Community" (similar to title being in a partnership)
POSSESSION	Equal right of possession	Equal right of possession	Equal right of possession	Equal right of possession
CONVEYANCE	Each co-owner's interest may be conveyed separately by its owner	Conveyance by one co-owner severs the joint tenancy	Both co-owners must join in conveyance of real property – separate interests cannot be conveyed	Both co-owners must join in conveyance of real property – separate interests cannot be conveyed
PURCHASER'S STATUS	Purchaser of an undivided interest becomes a tenant in common with the other co-owners	Purchaser of an undivided interest becomes a tenant in common with the other co-owners	Purchaser can only acquire whole title of community – cannot acquire a part of it	Purchaser can only acquire whole title of community – cannot acquire a part of it
UPON DEATH	Upon co-owner's death, his or her interest passes by will to devisees, or to heirs by intestate succession	Upon co-owner's death, his or her interest passes automatically to the survivor(s)	Upon co-owner's death, decedent's half passes automatically to surviving spouse unless willed to another party (Consult attorney with specific questions)	Last survivor owns property individually
SUCCESSOR'S STATUS	Portion passing by will results in tenancy in common between devisee and survivor	Last survivor owns property in severalty	Portion passing by will results in tenancy in common between devisee and survivor	Last survivor owns property individually
CREDITOR'S RIGHTS	Co-owner's interest may be sold on execution sale to satisfy his creditor – creditor becomes a tenant in common	Co-owner's interest may be sold by execution sale to satisfy a judgment lien. Joint tenancy is severed, and creditor becomes tenant in common with other co-owner	Co-owner's interest cannot be seized and sold separately (whole property may be sold to satisfy debts of either spouse depending on the debt – consult attorney with specific questions)	Co-owner's interest cannot be seized and sold separately (whole property may be sold to satisfy debts of either spouse depending on the debt – consult attorney with specific questions)
PRESUMPTION	When vesting (form of ownership) is not specified, tenancy in common is presumed by law	Must be expressly stated and properly formed	Rebuttable presumption that any property acquired by spouses is community property (Consult attorney with specific questions). Must be specified on deed for title insurance purposes	Rebuttable presumption that any property acquired by spouses is community property (Consult attorney with specific questions). Must be specified on deed for title insurance purposes