

Understanding Trusts and How to Title to Real Estate

Estate planning frequently intersects with taxation, insurance, financial advising, and real estate ownership. While each profession operates within defined licensing boundaries, clients experience these issues as interconnected—particularly when real estate is involved.

At death, everything passes to others, either intentionally or unintentionally, with the commensurate procedures and expenses. Proper planning and titling can significantly protect assets, minimize or potentially eliminate capital gains and estate taxes through proper planning and titling.

In California, estates exceeding \$208,850 held in an individual's name alone generally require probate administration. Probate proceedings are public, time-consuming, and often costly, which is why proper titling and planning are used to avoid probate where appropriate.

The 6 ways to hold title to real property: Unmarried Person, Married as Sole and Separate Property, Tenants in Common, Joint Tenants with Right of Survivorship, Community Property with Right of Survivorship or in a revocable living trust. Tenants in Common can have more than two owners, and everyone can leave their interest to whomever they want. Joint Tenants can also have more than two owners, but the deceased owner's interest passes automatically to the surviving Joint Tenants. Community Property can only have two owners, either a husband and wife or registered domestic partners, and the deceased owner's interest passes automatically to the survivor.

Real property has a tax basis, generally equal to its purchase price plus improvements. Upon death, assets included in a decedent's estate typically receive a step-up in basis to fair market value as of the date of death. As a result, an immediate post-death sale may produce little or no capital gain, depending on market conditions. Federal law currently allows individual homeowners to exclude up to \$250,000 of capital gain, \$500,000 for married couples, on the sale of a primary residence, provided ownership and occupancy requirements are satisfied.

A significant tax distinction between Joint Tenancy and Community Property that is commonly overlooked is when one Joint Tenant dies only their interest in the property receives a stepped-up basis, whereas when one Community Property owner dies the entire property receives a step-up in basis, not just the deceased's half. If the property appreciated more than \$500,000 then the surviving Joint Tenant will pay capital gains on any amount over their

\$250,000 exclusion amount when they sell. Community Property receives a full step up to date of death value and the surviving owner may also qualify for the individual \$250,000 primary residence exclusion, subject to applicable ownership and occupancy requirements.

Property held as an Unmarried Person, Married as Sole and Separate Property, or as Tenants in Common often faces problems because at the sole owner's death the property must go through probate. Joint Tenancy avoids probate, at the first death, however, if the property remains titled solely in the surviving owner's name without additional planning, probate will generally be required at that owner's death. If an owner becomes incapacitated without appropriate planning documents, court-supervised conservatorship proceedings may be required. Conservatorship proceedings are public, time-consuming, and often expensive.

California permits use of Revocable Transfer on Death (TOD) deeds, allowing real property held in an individual's name to pass automatically at death to named beneficiaries without probate. This approach may be appropriate in limited circumstances after evaluating advantages and risks.

Because titling alone does not address incapacity planning, planning, management authority, or long-term distribution objectives, many California property owners ultimately incorporate real estate into a revocable living trust. When properly transferred, property generally retains its character and tax status within the trust. Property transferred to a trust from Joint Tenancy receives a half step-up on the first death, whereas property transferred into a trust from Community Property gets a full step-up at first death. Transfers of real property into revocable living trusts by a borrower are exempt from the due on sale clause under federal law, and generally do not trigger property tax reassessment when ownership interests remain unchanged. It allows successor trustees to manage or sell property during incapacity or after death without court involvement and enables tax planning, asset management, liquidity planning, and distribution planning.

This article is intended for general educational purposes only and should not be relied upon as legal or tax advice for any specific situation.

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