Community Property, Separate Property, Death and Divorce for California Real Property Tip Sheet

California is a community property state. Tip Sheet by Deed and Record discusses how real property is owned and how California’s community property rights intersect to create legal consequences in divorce and death.

HUNTINGTON BEACH, Calif. (PRWEB) February 14, 2019 -- California is a community property state. Tip Sheet by Deed and Record discusses how real property is owned and how California’s community property rights intersect to create legal consequences in divorce and death.

Real property acquired prior to marriage or by inheritance is separate property. In a divorce, the non-owning spouse has no ownership of separate property. Separate property owned jointly by both spouses destroys the protection of separate property in a divorce but avoids probate on death of the first spouse.

Separate real property owned only in the name of the deceased spouse is distributed in probate court. If the deceased spouse had a will, distribution is as directed in the will. Absent a will or trust, the surviving spouse receives two-thirds of the real property if the deceased spouse has one child, or one-thirds of the real property if the deceased spouse has more than one child. If the separate property is owned by a trust created by the owning spouse, the real property is protected in a divorce and avoids probate administration on death.

Real property acquired during the marriage is community property. In a divorce the real property is owned equally by both spouses. On death of one spouse, community property owned either as “joint tenants” or as “community property with the right of survivorship” transfers to the surviving spouse without probate administration. But on the death of the first spouse there is capital gains consequence between these two options.

Real property owned as joint tenancy is presumed community property in divorce but separate property on death. On death this separate property presumption prevents a full mark up to fair market value of the real property’s capital gains tax basis. Because of this, the California legislature authorized a relativity, new method for married couples to own real property.

The new method is “community property with the right of survivorship.” This co-owner designation for married couples allows for the surviving spouse to take a step-up in basis to market value for 100% of the real property. Regardless how community real property is jointly owned, if the survivor takes no preventive action, the real property must be administered in probate court on the death of the surviving spouse.

How real property is owned and California’s community property rights intersect in real property to create legal consequences in divorce and death. Separate property protection in a divorce is lost under joint ownership, but probate is avoided on the death of the first spouse. Both spouses are equal owners of community property and have equal rights in divorce and death. The actual words on a deed of “community property with the right of survivorship” have favorable capital gains tax advantage to the surviving spouse.

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