In California, prior to 2001, spouses could take title to real property in one of three ways: as their community property, as joint tenants, or as tenants in common. Effective July 1, 2001, California enacted Civil Code Section 682.1 allowing a husband and wife to hold title to their property as "community property with right of survivorship." This relatively new form of holding title combines the desirable tax features of community property with the right of survivorship of joint tenancy which has several legal implications.

Furthermore, with passage of the Domestic Partners Rights and Responsibilities Act of 2003 (California Family Code Sections 297 et seq.), registered domestic partners have many of the same legal rights as spouses and, thus, they too may take title in this manner. According to Section 297.5, "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." This legal article discusses the implications of this form of taking title.

Q 1. What is "community property with right of survivorship"?

A It is a form of taking title to jointly-owned property, available to a husband and wife (or registered domestic partners), combining the benefits of holding title as community property and the benefits of joint tenancy. As discussed below, it primarily impacts estate planning and tax treatment.

Q 2. What does this form of taking title mean?

A Previously, a husband and wife could hold title to jointly-owned property in several different forms: as community property, as joint tenants, or as tenants in common. Domestic partners could hold title as joint tenants or tenants in common. Each of these forms of holding title has distinct benefits relating to estate planning upon the death of one of the spouses or domestic partners. Holding title as community property provides a "stepped-up" tax basis for both halves of the property upon the death of the first spouse or domestic partner, but no automatic transfer of title. Holding title as joint tenants provides for the immediate and automatic transfer of title to the surviving spouse (domestic partner) upon the death of the first spouse (domestic partner), but only the decedent's portion of the property receives a step up in basis. Now, a husband and wife or registered domestic
partners can enjoy both benefits by taking title as community property with right of survivorship.

Q 3. What does a "stepped-up basis" mean?

A Under both federal and California law, when a person receives property from a decedent, the tax basis for that property is the fair market value of the property on the date of the decedent's death. For example, you just inherited property from your aunt that she purchased in 1970 for $25,000. Today the property is worth $250,000. Your tax basis in the property is $250,000 and not the $25,000 that your aunt originally paid for the property. When you dispose of property, your gain is the difference between your basis in the property and the sales price. Accordingly, the "stepped-up" basis is very important in calculating your capital gains when you ultimately dispose of the property.

Q 4. How is the "stepped-up basis" applied to property held as joint tenants?

A When two people own property as joint tenants, because the surviving joint tenant already owns one half of the property, the surviving joint tenant only receives a "stepped-up" basis on one half of the property. For example, a husband and wife hold property they purchased for $10,000 as joint tenants that is now worth $200,000. Each has an original basis of $5,000 in their one half of the property. When one spouse dies, the other spouse receives a step up in basis on the one half of the property formerly owned by the deceased spouse. One half of the property would have a basis of $100,000 (the "stepped-up" basis) and one half of the property would have a basis of $5,000 (the original purchase basis).

Q 5. How is the "stepped-up basis" applied to property held as community property?

A If a husband and wife own property as community property, both federal and California law provide a step up in basis for both halves of the property upon the death of the first spouse. Using the example in Question 4, upon the death of the first spouse, and assuming that the first spouse left his one half of the community property to his spouse, the surviving spouse would have a new basis of $200,000. Again, this would provide a significant capital gains advantage on the ultimate sale of the property and is the main advantage of holding property as community property.

Q 6. What is meant by the "right of survivorship"?

A When people own property as joint tenants, on the death of one co-owner, the title to the property automatically transfers to the surviving owner or owners. There is no probate or other legal proceeding required. In all other forms of joint ownership, such as community property or tenancy in common, there is no automatic transfer upon death; the deceased owner's portion of the title is transferred pursuant to a will, trust, or through the rules of intestate succession if there is no will or trust. The right of survivorship is the main advantage of joint tenancy. It is an inexpensive estate planning tool that avoids the expense and complication of drafting and probating a will or administering a trust.

When two people take title as joint tenants, if either person transfers his/her share to someone else (for example, by giving someone else a quit claim deed), it automatically terminates the joint tenancy and converts into a tenancy in common defeating the right of survivorship quality of a joint tenancy.
Q 7. How can a husband and wife (or registered domestic partners) take advantage of holding title as community property with right of survivorship?

A A husband and wife (or registered domestic partners) can transfer jointly held property to themselves as community property with right of survivorship. This can be accomplished in the following way: On the grant deed or quit claim deed the "grantors" would be the way the husband and wife or domestic partners currently take title to the property. For example, "Mary Jones and Tom Jones, joint tenants" or "Mary Jones and Tom Jones, as their community property." The "grantees" would be written as "Mary Jones and Tom Jones, as their community property with right of survivorship."

Q 8. Can any couple take advantage of this form of holding title?

A No. It is only available to a husband and wife or registered domestic partners. Other persons may take title as joint tenants or tenants in common. Furthermore, for complex estate planning issues, a trust may be the best form of taking title. It is advisable to talk to a probate attorney about such matters.

Q 9. Does this form of holding title apply only to real property?

A No. A husband and wife or registered domestic partners can hold title to both real and personal property as community property with right of survivorship.

Q 10. What must the surviving spouse or domestic partner do to "perfect" title acquired by right of survivorship?

A Although title held as community property with right of survivorship passes automatically to the surviving spouse or domestic partner upon the other’s death, in order to "perfect" title so that the property can be sold or financed with title insurance, the surviving spouse or domestic partner will need to record an Affidavit of Death of Spouse. This procedure is similar to the Affidavit of Death of Joint Tenant for joint tenancy property.

Q 11. How can the right of survivorship be terminated?

A Prior to the death of either spouse or domestic partner, the right of survivorship can be terminated in the same way as for joint tenancy. For example, one spouse or domestic partner can record a written declaration terminating the right of survivorship. Similarly, a recorded deed from one spouse (domestic partner) naming himself or herself as both grantor and grantee will terminate the right of survivorship. In addition, the spouses or domestic partners can mutually agree to terminate the right.

Q 12. What effect does holding title as community property with right of survivorship have upon a will?

A Property held as community property with right of survivorship, like joint tenancy property, passes automatically to the surviving title holder by operation of law and not by will. This feature is
Unlike community property without the right of survivorship. For property held as community property without the right of survivorship, each spouse or domestic partner has the right to dispose of his or her one half of the community property in his/her will to someone else (such as a child from a former marriage). If this feature is important to one of the spouses, then taking title as community property with right of survivorship may not be the right choice.

Q 13. *Should all married couples or domestic partners take title as community property with right of survivorship?*

A  The main benefits of community property with right of survivorship are probate avoidance with the right of survivorship and favorable tax treatment with the double "stepped-up" tax basis. For many couples, it will be a simple and inexpensive way to accomplish both. However, for many other couples, holding title in a living trust (intervivos trust) may offer more flexibility in estate planning and still reduce estate taxes and capital gains. The added flexibility of a trust is also desirable if there are children involved, and especially when there are children from a prior marriage. Even with the repeal of the estate tax (which is not effective until after December 31, 2009) in the recently-passed tax relief act, couples can increase the amount of wealth they transfer tax-free to beneficiaries through careful use of the "unified credit" and the marital deduction. The "unified credit" is the amount an individual can transfer upon death free of estate taxes. With the marital deduction, a spouse can transfer any amount to the surviving spouse free of estate taxes. Using trusts, a couple can essentially double the amount of the unified credit upon the death of the surviving spouse. Because there are positive and negative aspects to most estate planning choices, a husband and wife should confer with a probate attorney, accountant or estate planner before deciding which form of taking title is best for them.

Q 14. *Where can additional information regarding the topic discussed in this legal article be obtained?*

A  This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit [car.org](http://car.org). Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at (213) 739-8282, Monday through Friday, 9 a.m. to 6 p.m. and Saturday, 10 a.m. to 2 p.m.  C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at (213) 739-8350 to receive expedited service. Members may also submit online requests to speak with an attorney on the Member Legal Hotline by going to [http://www.car.org/legal/legal-hotline-access/](http://www.car.org/legal/legal-hotline-access/). Written correspondence should be addressed to:

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525 South Virgil Avenue  
Los Angeles, CA 90020

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