

By Phil Hunt

Special to the Times

Q: We are buying our first home and are wondering how to hold title. We are married and want to be sure that if anything happens to either of us that the other would be well taken care of. Our agent will not advise us, she said it would be practicing law and she can not do that. Can you tell us the best way to hold title?

A: She told you the right answer; I also cannot practice law. We have real estate licenses and are not attorneys, but that is not to say that we may know an answer to your question.

My answer is not to be construed as legal advice, you should be advised by an attorney. But I can tell you what I would do if it were me closing escrow on a property today.

As of July 1, 2001, there is a new way to hold title to property for married couples; it is called "community property with the right of survivorship." This new method of holding title combines the best aspects of "joint tenancy" and "community property" into one very favorable method of holding title.

Up until July 1, 2001, you could go with joint tenancy which would allow the automatic transfer of title to the surviving spouse with a 50-percent step-up in basis at the time of death. What that means is, at the date of death of the deceased spouse, the property would be appraised and 50 percent of the property would be stepped up to the new value. Example: Say you paid \$100,000 for the property back in 1975 and, today, it is worth \$650,000. If you had no step-up in basis, when the day came that you sold the property, you would have a tax liability of \$550,000 profit on the sale. With the step-up in basis, the deceased spouse's half would be \$325,000, the surviving spouse's half would remain at \$50,000. This would lessen the tax liability but not necessarily wipe it out.

The \$250,000 tax exemption from capital gains, per person, would take care of most of the tax liability, provided that you had lived in the property for two of the last five years. There would still be a tax liability on \$25,000.

At the current rate of 15 percent Fed and 9 percent State (it will most likely go up in 2013), it would cost you \$6,000 in capital gains tax.

Under the old rules of holding title as community property, there would be a full step up in basis upon the demise of the spouse. But, if there were no will, leaving the property to the surviving spouse, the surviving spouse gets only 50 percent of the property; the other half goes to other heirs.

Under the new community property with right of survivorship rule, the surviving spouse gets 100 percent of the property with a 100-percent step-up in basis — no probate proceedings necessary.

There are also living trusts and other methods to hold title. This article covers only one aspect of holding title; there are many other legal matters to consider before making a decision. Only an attorney who knows your legal status is qualified to advise you properly. I hope this helps.

Phil Hunt is a real estate broker in Castro Valley. Fax questions to 583-5480.