

What Happens to Your Spouse's Property after S/He Dies

LEGAL HOTLINE FOR TEXANS

815 Brazos, Suite 1100

Austin, Texas 78701

(800) 622-2520

(512) 477-3950



What happens to your spouse's property after death depends on how the property was owned. In Texas, married couples can own property as:

- *Separate* property, including property that one of you owned or claimed **before** you got married, property that you inherited or were given during your marriage, and the recovery for personal injuries sustained by one of you during the marriage except for any recovery for loss of earning capacity during the marriage.
- *Community* property, including the property, other than separate property, acquired by either spouse during the marriage. There are two types of community property, sole management and joint.
- *Sole management community* property, including personal earnings, revenue from separate property, recoveries for personal injuries, and the increase and mutations of, and the revenue from, all property subject to a spouse's sole, management, control and disposition.
- *Joint community* property, including mixed or commingled sole management community property of both spouses.

Information Not Legal Advice

This pamphlet is for information only and is not a substitute for the advice of an attorney.

What happens to our community property if my spouse dies?

If there is a valid will, your spouse's separate property and his/her share of the community property will be divided according to the instructions in the will.

If your spouse dies without a will, your spouse's part of the community property may be transferred to you, unless your spouse has children or grandchildren who are **not** related to you.

If your spouse has children or grandchildren not related to you, they inherit your spouse's share of the community property. They also inherit 2/3rds of your spouse's separate personal property and a 2/3rds life estate plus the future interest in your spouse's separate real estate, subject to a survivor homestead estate in the home where the couple resided.

Is there a way to make sure my spouse gets all of our community property after I die?

Yes. There are two ways:

1. You can make a will that says you want all community property to go to your spouse, or
2. You can change the ownership on your community property to *community property with right of survivorship*. Then when you die, your share of the community property automatically transfers to your spouse. Depending on the facts and circumstances, you may or may not have to go to probate court.

How do we change ownership to *community property with right of survivorship*?

If you and your spouse agree, you can change the ownership to *community property with right of survivorship* by making an agreement in **writing**. You can make this agreement at any time during your marriage.

To be valid, your agreement must:

- List all of the assets to be owned with right of survivorship,
- Be signed by both spouses, and
- Be filed in your county recorder's office.

It's a good idea to *notarize* your agreement. This will help you in case someone questions the validity of the agreement.

It is **not** enough to have the words "*with right of survivorship*" on the property title. The agreement must be a separate written document that should use one of these phrases:

- with right of survivorship,
- will become the property of the survivor,
- will vest in and belong to the surviving spouse, or
- shall pass to the surviving spouse.

Do we need a lawyer to make the agreement?

You do not *have* to hire a lawyer, but it is highly recommended that you speak to a lawyer before you decide to make your agreement. A lawyer can evaluate your situation and help you decide if a will would be a better option for you.

Please review these advantages and disadvantages:

Advantages

- May be appropriate for some small estate.

Disadvantages

- Title companies may not be willing to transfer title without a court order (either to the surviving spouse or someone else).
- The agreement does not say what happens to the rest of your property, or what happens to the property when the surviving spouse dies. You still need a will.
- A spouse acting as attorney-in-fact for the other spouse may not have the legal authority to make changes or cancel the agreement.
- If the agreement is challenged, it may be expensive to defend it.
- A simple will providing for independent administration that may be probated as a muniment of title is less expensive and less cumbersome but accomplishes the same result as an agreement that needs to be adjudicated in probate court plus a will that must be probated in probate court.

Can we own our property as joint property with right of survivorship?

Yes. Joint property with right of survivorship can be used by any two or more owners, including married couples. Joint ownership with right of survivorship is for separate property. Since community

property may be converted to separate and separate property may be converted into community spouses have the choice of community property with right of survivorship or joint tenancy with right of survivorship.

Should our attorney include other conditions in the agreement?

It's a good idea to include this language, too:

"This agreement will end if either spouse wants to cancel the agreement and files a written cancellation at the county recorders office. It will also end if the spouses divorce."

However, under Section 455 of the Texas Probate Code, "If the agreement does not provide a method for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written agreement signed by one spouse and delivered to the other spouse."

Am I liable for my spouse's liabilities?

That depends on the type of liability and the characterization of the marital property. Sole management community property is not subject to nontortious liabilities of the other spouse such as contracts. All community property is subject to tortious liability of either spouse incurred during the marriage such as car accidents caused by one spouse. All marital property is subject to the duty to support your spouse and to provide "necessaries" such as food, shelter, clothing and medical care.

Does the surviving spouse have to go to court to transfer property with right of survivorship?

In order to retain marketable and insurable title to real estate under a community property right of survivorship agreement, an "Adjudication" of the agreement should be obtained by going to probate court after the first spouse dies. In most cases, after an Adjudication Order has been obtained in court, your surviving spouse may transfer legal title to real estate by just recording the Agreement, Adjudication Order and death certificate in the deed records in the county(s) where the real estate is located.

Can separate property be changed to community property?

Yes. You can make a written agreement to change your separate property to community property, and vice versa. It's best to get help from a lawyer.

Should married couples list both spouses' names on the title of their automobiles?

In Texas, all property acquired during the marriage is rebuttably presumed to be community including purchased automobiles. The Texas Department of Transportation has a prescribed form for Rights of Survivorship Ownership Agreement for a Motor Vehicle.

For more information...

Texas Law Help has useful information on many areas of the law. Go to www.texaslawhelp.org.

Legal Hotline for Texans: (800) 622-2520 or (512) 477-3950

Call our attorney-staffed legal hotline. Advice is free for Texans 60 and over or for anyone eligible for Medicare.