

How You Hold Title to Real Property May Create a Real Life Problem

By: [Beth S. Cohn](#)

If you were a married couple living Arizona, you had three options as how to hold the title to real property in Arizona. The choices were:

- community property,
- joint tenants with right of survivorship ("JTWROS") and
- tenants in common.

Now, under A.R.S. § 33-431, there is a fourth option - community property with right of survivorship ("CPWROS").

HISTORY

Prior to the existence of CPWROS, if married couples wanted to avoid probate and did not have an estate large enough to use a trust for estate planning purposes, their choice was JTWROS. The language in the Deed to create a JTWROS needs to include specific language in the granting portion requiring vesting to be as JTWROS. Although not required under A.R.S. § 33-431 (B), an acceptance is usually attached to the Deed specifically stating that the grantees are not accepting title to the property as community property, as tenants in common or as CPWROS. This acceptance is signed by the grantees and attached to the Deed for recording.

WHAT CHANGES WITH THE ADDITION OF CPWROS?

Now, if married couples want to avoid probate and their estate is not large enough to use a trust as an estate planning tool, their choice includes holding property as either JTWROS or CPWROS. The language in the Deed **still requires specific language in the granting portion** of the Deed requiring vesting to be as CPWROS. Although not required under A.R.S. § 33-431 (C), an acceptance is usually attached to the Deed specifically stating that the grantees are not accepting title to the property as community property, as tenants in common or as JTWROS. This acceptance is signed by the grantees and attached to the Deed for recording.

Although this seems straight forward and simplistic, many Deeds are not prepared by attorneys. If the Deed does not have the specific and appropriate language in the grant section to create the JTWROS or CPWROS, the most likely legal result will be that the couple owns the property as community property and does not have any survivorship rights. There is a legal presumption in Arizona that husbands and wives own property as community property when acquiring it with community funds. If they attempt to transfer title to be held as JTWROS or CPWROS and have a technical error in the granting language of the Deed, even if the acceptance has been signed and recorded, the survivorship right is not created and under A. R. S. § 33-431. Instead, they have created community property.

WHY IS THE TECHNICAL LANGUAGE IMPORTANT?

You may be wondering why this is important. It is critical when one of the spouses dies and the property has to be probated to achieve the desired ownership. In many cases, the property will pass to the surviving spouse under a Will or to a Trust for the benefit of the surviving spouse. If there is no Will and the property passes by intestate succession, it may not pass to the surviving spouse. Under intestate succession laws it will pass as follows:

- If there are children only from the current marriage, the property will pass intestate to the surviving spouse.
- If there are children of the deceased spouse from a prior marriage and none from the current marriage, the property will pass intestate ½ to the children from the prior marriage and ½ to the surviving spouse.
- If there are children of the deceased spouse from both a prior marriage and the current marriage, the property will pass ½ to all of the children and ½ to the surviving spouse.

As you can see, this is particularly problematic when the property is the personal residence of the surviving spouse and home for the children from the current marriage.

When both spouses are living, an incorrect Deed can be fixed. Unfortunately, many times these issues are not discovered until one of the spouses has passed away or when the surviving spouse wants to sell the property. If all children of the deceased spouse are children of the surviving spouse, a probate or similar procedure can result in the surviving spouse owning the property. If this is not the case, the only other alternative is to file a petition with the court to correct the Deed. If an acceptance of JTWRROS or CPWRROS has been signed and attached to the defective Deed, the argument to the court is that the parties intended to create the JTWRROS or CPWRROS, except for the technical error in the preparation of the Deed. If there are children from a prior marriage and they don't object to the process, the result should be favorable.

The Arizona Courts have recently reviewed this issue. In two different cases, the courts have held that language in the acceptance attached to a defective Deed will allow reformation of the deed if the intent of the parties to the Deed can be clearly shown. If the property is sold, will the responsible title company honor the survivorship based on the Acceptance attached to the Deed or will it require reformation based on these cases? My experience is that it depends on the title company.

To avoid unnecessary legal fees, having a property that is difficult to sell because of potential title problems or not having the property pass cleanly to the surviving spouse, have the Deed prepared by an attorney. This ensures that the technical language is correct if you are holding the property as either JTWRROS or CPWRROS.

About the author: [Beth S. Cohn](#) is a shareholder at the Phoenix law firm of [Jaburg Wilk](#). She chairs the [business law](#) department and is a State Bar of Arizona certified tax specialist and a CPA. Beth can be reached at bsc@jaburgwilk.com or 602.248.1030

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