

TEXAS AND CALIFORNIA'S OPTION OF COMMUNITY PROPERTY WITH SURVIVORSHIP RIGHTS: TRIUMPHS, STRUGGLES, AND POTENTIAL IMPROVEMENTS

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I. INTRODUCTION

On July 1, 2001, California adopted a new property system by combining community property with right of survivorship.¹ As one of the nine community property states, California, like Texas, implemented a modified community property system in an attempt to reduce the differences between community property and joint tenancy.²

To begin, California's community property system holds that "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."³ Under the traditional community property system for both Texas and California, each spouse holds testamentary control over their one-half interest in the property.⁴ The death of one spouse terminates the community, leaving courts to determine the character of the property.⁵

Second, Texas and California define the right to survivorship as a "distinctive feature of joint tenancy" whereby a joint tenant's death automatically results in the transfer of the complete estate to the "surviving joint tenant or tenants."⁶ Under joint tenancy, a surviving joint tenant

1. See HARRY D. MILLER & MARVIN B. STARR, *MILLER AND STARR CALIFORNIA REAL ESTATE* 3D, 5 CAL. REAL. EST. § 12:40 (3d ed. 2006).

2. See *id.*

3. CAL. FAM. CODE § 760 (West 2004).

4. See, e.g., James S. Henderson, *Community Property with Right of Survivorship: What Is It, and Why Use It?*, http://www.ggu.edu/school_of_taxation/tax_news/attachment/Jim+Henderson+Article.pdf.

5. See 15 AM. JUR. 2D *Community Property* § 109 (2010).

6. See 16 CAL. JUR. *Cotenancy and Joint Ownership* § 7 (2010).

automatically receives the deceased joint tenant's entire interest in the estate, leaving the deceased's heirs without any claim to the estate.⁷ Community property and joint tenancy's right to survivorship conflict in theory because community property does not automatically pass to the surviving spouse upon death; whereas, joint tenancy's right to survivorship allows for the automatic transfer of property to the surviving joint tenant.⁸

Prior to the California legislature's 2001 amendment to the state Probate Code, most California residents likely perceived joint tenancy to be the more intelligent estate planning solution when faced with the choice of survivorship rights or traditional community property rights, because lay persons tend to believe that joint tenancy to be the cheaper option.⁹ By choosing a joint tenancy, this assures both the husband and wife that their name was on the deed of the real estate or security.¹⁰ On the same note, most lay persons did not intend to relinquish their community property benefits by forming a joint tenancy, but their actions resulted in terminating the community property due to the prior complexity of the California Probate Code.¹¹ As a solution, California, like Texas, created a modified community property system to merge the benefits of both right of survivorship and community property, thus mirroring the average lay person's intention when forming a joint tenancy in a traditional community system.¹²

The modified community property system serves as a model for preserving the private estate.¹³ Both California and Texas operate a modified community system with the choice of survivorship rights. To further clarify, the phrase "modified community property" simply means that a couple has a choice when allocating their community property estate to ensure survivorship rights.¹⁴ In other words, modified community property means that a couple chooses a community property alternative that employs survivorship rights while still maintaining a community estate instead of choosing traditional community property. This article will focus on how each state's application of the modified community property system can be improved by comparing case holdings and the effect of state and federal statutes on estate planning.¹⁵

7. See *Tenhet v. Boswell*, 554 P.2d 330, 336 (Cal. 1976) (holding that the "interest of the nonsurviving spouse extinguishes upon his death.").

8. See *id.*; see 15 AM. JUR. 2D *Community Property* § 109 (comparing whether the property to the surviving spouse is subject to administrative court procedure or is automatically transferred).

9. Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 89-90 (1961) (discussing how California's traditional community property system encouraged married couples to choose a joint tenancy without community benefits).

10. *Id.*

11. *Id.* at 90-91 ("[t]he widespread practice of putting community property in joint tenancy form is a sound indicator of the intention of laymen. . . However, people intend to have the advantages of both community property and joint tenancy.").

12. See Henderson, *supra* note 4.

13. See *id.*

14. See *id.*

15. See CAL. CIV. CODE § 682.1 (West 2001); see TEX. PROB. CODE ANN. § 439 (Vernon 2003).

In order to fully understand the modified community property system, this article will begin with Part II and discuss the application of the modified community property system. Part III will focus on the history of California and Texas's modified community property systems. Under Part IV, this topic will address the complications Texas and California have faced under a comingled system as well as the reasonable limits both states have implemented to minimize confusion. In Part V, non-probate and taxation benefits will shed light on how the modified community property alternative can benefit certain married couples. Furthermore, Part V will discuss recent federal tax changes and their effects on the modified community alternative. Lastly, Part VI will conclude with both California and Texas's strong and weak points in providing married couples with the option of community property with right of survivorship and how both states can improve by learning from one another.

In sum, this article will find that community property with right of survivorship is beneficial to personal estates when uncertainty in estate proceedings is effectively eliminated by state courts upholding the detailed planning procedures outlined by the state legislature. Furthermore, it will demonstrate how Texas and California can learn from each other's positive and negative qualities in implementing a modified community property system in order to better their own system of community property with right of survivorship.

II. THE APPLICATION OF THE MODIFIED SYSTEM

A. Brief Overview

Texas and California impose a key feature in the modified community property system—the states both provide for married couples a choice to use the combined system as an alternative method for dividing property upon death.¹⁶ Specifically, a community property holder must expressly declare that their community property is to constitute community property with right of survivorship through a transfer document.¹⁷ Under California and Texas law, both spouses have to sign a document specifying their intent that the right of survivorship apply to their community estate.¹⁸ The grantee, through the mechanism of survivorship, can then choose to accept the property transfer “through an initialed or signed statement on the face of the document.”¹⁹ As a result, the death of one of the spouses will trigger the community property's

16. See HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE 3D, 5 Cal. Real. Est. § 12:65 (3d ed.) (2006).

17. See CAL. CIV. CODE § 682.1 (West 2001) (stating that community property can be specified to include right of survivorship beginning July 1, 2001).

18. See TEX. PROB. CODE ANN. §§ 436–462 (Vernon 2003); see CAL. CIV. CODE § 682.1 (West 2001).

19. See *supra* note 18.

transfer as property held in joint tenancy to the surviving spouse, thus avoiding court administration and legal fees.²⁰

Using the option of community property with right of survivorship also allows couples to avoid executing separate survivorship agreements between themselves.²¹ One document specifying survivorship rights avoids inconsistency and confusion.²² Furthermore, the couples' intentions for their personal estate change, they only have to update one document.²³

B. A Hypothetical Demonstrating the Modified Community Alternative's Effects

Both the Texas and California legislature created modified community property system to combine the benefits of the right to survivorship's non-probate characteristic with community property's tax incentives.²⁴ To illustrate non-probate benefits, a hypothetical is necessary. For example, assume that Dr. and Mrs. Sanchez expressly declare a right to survivorship regarding their community property estate. Dr. Sanchez dies soon after, leaving Mrs. Sanchez automatically receiving ownership of Dr. Sanchez's one-half interest in the community estate.²⁵ Mrs. Sanchez will avoid probate administrative costs and own the entire interest in the estate while eliminating further court proceedings that would be used under traditional community property.²⁶

Under community property without survivorship rights, Mrs. Sanchez automatically gains her half of the community upon Dr. Sanchez's death, while the other half is subject to probate proceedings as well as a court decision as to who would receive Dr. Sanchez's one-half interest.²⁷ Mrs. Sanchez will likely be responsible for paying attorney fees for a court to determine the character of Dr. Sanchez's half-interest in the community estate.²⁸ Additionally, the probate proceedings could take months, especially if any appeals easily amplify the grieving process by serving as a constant reminder of her husband's death.²⁹

20. See *supra* note 18.

21. See *Plaintiff's Proof of Prima Facie Case*, PPPFC § 17.12 (Mar. 2010).

22. See TEX. PROB. CODE ANN. §§ 436–462 (Vernon 2003) (providing for one document per couple).

23. See *id.*

24. See MILLER AND STARR, *supra* note 16, at § 12.65.

25. See CAL. CIV. CODE § 682 (West 2007).

26. See, e.g., *Grothe v. Cortlandt Corp.*, 11 Cal. Rptr. 2d 38, 40 (4th Dist. 1992) (noting that a surviving joint tenant acquires the entire estate).

27. See *Estate of John W. Murphy*, 15 Cal. 3d 907, 915–16 (Cal. 1976) (discussing the complications that arise when a widow's claims for community property are inconsistent with a will).

28. *Id.*

29. See, e.g., *In re Estate of Miramontes-Najera*, 118 Cal. App. 4th 750, 753–54 (Cal. Ct. App. 2004).

III. A HISTORY OF TEXAS'S AND CALIFORNIA'S MODIFIED COMMUNITY PROPERTY SYSTEMS

A. Texas and Community Property with Right of Survivorship

Similar to California's modified community property system, Texas also allows community property with right to survivorship on the condition that both spouses formally express survivorship rights in a transfer document they both sign.³⁰ In 1961, the Texas legislature amended the probate code, allowing community property with right of survivorship after the Texas Supreme Court declared community property with survivorship rights unconstitutional.³¹ Soon after, the Texas Supreme Court held that the new statute was unconstitutional and found that a married couple seeking right of survivorship would have to "partition their community property into separate property, [and] then execute survivorship agreements for the separate property."³²

1. A Step Backwards: *Hilley v. Hilley*

In the Texas landmark case during 1961, *Hilley v. Hilley*, the Texas Supreme Court held that spouses could not use a joint tenancy with right of survivorship to transfer community property to one another.³³ The Texas Supreme Court contended that spouses held three types of property: the husband's separate property, the wife's separate property, and community property.³⁴ "Since [community property with right of survivorship] converts community property into separate property which was not acquired by gift, devise, descent, nor set apart through partition, it is an attempt to change the character of the property by mere agreement."³⁵ For married couples seeking community property with survivorship benefits, the court held that both spouses must elect to partition the community property.³⁶ The *Hilley* ruling caused confusion for Texas couples because the partition rule forced couples to jump through several procedural hoops before they could formally establish their intentions with the community estate.

30. See TEX. PROB. CODE ANN. § 439 (Vernon 2001) (establishing right of survivorship).

31. See TEX. PROB. CODE ANN. § 46 (Vernon 2003); see *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961). This case prompted the Texas Legislature to enact a statute upholding survivorship rights, thus overturning the legality of the *Hilley* verdict; see also TEX. PROB. CODE ANN. § 439 (Vernon 2001) (establishing right of survivorship).

32. *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009).

33. See Jeffrey Wayne Dorril, *Chapter Eleven Bank Accounts: Can They Separate Community Property Between Spouses?* 36 BAYLOR L. REV. 535, 537 (Spring 1984).

34. *Id.*

35. See *id.* at 538.

36. *Id.*

2. *The Texas Turning Point for Spousal Survivorship Agreements*

Finally, in 1987, the Texas legislature passed a probate amendment allowing for survivorship rights in the Texas probate system.³⁷ The Texas legislature reasoned that a written instrument signed by both spouses providing for survivorship would simplify estate planning by eliminating an unnecessary will to represent the couple's intention of survivorship rights.³⁸ The 1987 amendment benefits Texas married couples in the following instances: mitigating legal expenses in drafting and allocating an unnecessary will, allowing couples a clear option from the outset of planning their estate, and providing couples with a choice that best represents their individual needs.³⁹ Furthermore, the Texas legislature specified that the right of survivorship will not be inferred when examining a joint account lacking written expression indicating survivorship.⁴⁰ In sum, the Texas legislature created certainty and consistency for married couples looking to circumvent unnecessary probate expenses during an emotional time, when attorneys and legal fees are the last issue that a mourning spouse wants to face.

B. California and Community Property with Right of Survivorship

As previously discussed, the California legislature enacted an amendment a decade ago, which provided couples with the option to choose community property with survivorship rights or traditional community property rights for their community estate.⁴¹ Section 682.1 provides that:

“[c]ommunity property of a husband and wife, when expressly declared in the transfer document to be community property with right of survivorship, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy.”⁴²

Furthermore, the amendment specifies that “[p]rior to the death of either spouse, the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed.”⁴³ Section 682.1 further

37. See *id.*; see Act of August 28, 1989, ch. 297, 1987 Tex. Laws 715 (providing that “spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes property of the surviving spouse on the death of a spouse.”); the Act became effective on August 31, 1987 and is codified as TEX. PROBATE ANN. Code § 439 (Vernon 2003).

38. See *Holmes*, 290 S.W.3d at 856.

39. *Id.*

40. See TEX. PROB. CODE ANN. § 439(a).

41. CAL. CIV. CODE § 682.1 (West 2001).

42. *Id.*

43. *Id.*

assures that married couples will rightfully have the flexibility to change their estate upon unforeseen future circumstances because it allows couples the chance to re-designate their wills.⁴⁴

Unfortunately, California estates do not benefit from this provision, unless designated as community property with right of survivorship on or after July 1, 2001.⁴⁵ Prior to this date, California allowed couples to designate joint property as either community or property held in a joint tenancy. In 1966, California discarded the policy that “ownership interest in property was stated in the title.”⁴⁶ As a result, courts no longer applied the presumption that a couple could designate a residence as a joint tenancy, even though the purchase of the residence out of community funds.⁴⁷

From 1966 to 2001, couples had to specify either community property or joint tenancy for their estate. In regards to the family home, however, California forced upon couples the label of community property despite what might be stated in the title.⁴⁸ During this time, California had a confusing system that denied taxpaying couples the benefit from both community property and right of survivorship.⁴⁹ Accordingly, when the California legislature decided to follow Texas in implementing community property with right of survivorship, married couples benefited by having the choice in how their estate would be handled upon the death of either spouse.⁵⁰ California gave married couples a voice in planning their community estate because it allowed couples to choose how they wished their estate to be handled.

IV. COMPLICATIONS TEXAS AND CALIFORNIA RECENTLY FACED WITH SURVIVORSHIP RIGHTS COMINGLED WITH COMMUNITY PROPERTY

A. *Holmes v. Beatty: Formal Designation of Survivorship Rights*

In *Holmes v. Beatty*, the Texas Supreme Court addressed how community property with survivorship rights affects securities accounts and security certificates from investment accounts when a couple fails to properly designate survivorship rights.⁵¹ Despite a mishap in formal estate planning documents, the court overturned the lower court’s decision and held that the parties adequately designated their intent to hold estate securities as having

44. *Id.*

45. *In re Marriage of Hilke*, 841 P.2d 891, 893–94 (Cal. 1992) (holding that a residence will be considered part of the community despite the title of the residence stating joint tenancy with right of survivorship).

46. *See id.*

47. *See id.*

48. *Id.* at 894.

49. *Community Property with Right of Survivorship: Hearing on A.B. 2918 Before the California Assembly Comm. on Judiciary* (Aug. 25, 2005) (overseeing the committee hearing was Sheila James Kuehl).

50. *See* CAL. CIV. CODE § 682.1 (West 2001).

51. *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009).

survivorship rights.⁵² The central controversy in this case arose from the designation “JT TEN” following each spouse’s signature on two investment accounts.⁵³ The lower court reasoned that survivorship rights had to be formally expressed within the joint tenancy document; therefore, “JT TEN” does not constitute survivorship rights.⁵⁴ Furthermore, the lower court expressed that the Texas legislature intended to rid estate planning documents of uncertainty and thus, survivorship rights had to be formally expressed instead of shortened with “trade-usage” such as “JT TEN.”⁵⁵

1. Providing Leniency and Reasonableness in Recognizing Survivorship Rights

In contrast, the Texas Supreme Court held that section 452 requires that a couple must use “survivorship language” in order to confer their intent for survivorship rights.⁵⁶ The Texas Supreme Court determined that the lower court’s view is harsh and inconsistent to the Texas legislature’s intentions.⁵⁷ Specifically, the Texas Supreme Court held that section 452 of the Probate Code is “less restrictive because agreements between spouses are less vulnerable to fraud.”⁵⁸ The court implies that leniency and reasonableness should not be erased simply because a couple fails to formally spell out “survivorship rights,” as long as the couple’s rights can be reasonably determined.⁵⁹ Although the court allowed the Holmes’s arguably incomplete document to suffice as a survivorship agreement, the court in turn supports a policy position that promotes efficiency by eliminating additional paperwork that would ordinarily be required upon an obvious short-form designation of survivorship rights.⁶⁰

2. Extrinsic Evidence

Despite the leniency in allowing “JT TEN” to represent the couple’s intention for community survivorship rights, *Holmes v. Beatty* did hold that

52. *Id.*; see U.S. v. Craft, 535 U.S. 274, 280 (2002) (noting that joint tenancy inherently has right of survivorship).

53. See *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009).

54. *Holmes v. Beatty*, 233 S.W.3d 494, 513 (Tex. App.—Houston [14th] 2007), rev’d, 290 S.W.3d 852, 852 (Tex. 2009).

55. *Id.* at 512–13.

56. See *Holmes*, 290 S.W.3d at 852.

57. See *id.*

58. See *id.*; see TEX. PROB. CODE ANN. § 452 (Vernon 2003). This section specifies the required formal language necessary to effectively designate survivorship rights, including “with right of survivorship”; “will become property of the survivor”; “will vest in and belong to the surviving spouse”; or “shall pass to the surviving spouse.”

59. See *Holmes*, 290 S.W.3d at 860.

60. *Id.* at 856.

extrinsic evidence cannot be utilized to prove survivorship intentions.⁶¹ Similarly, *Stauffer v. Henderson* sets the precedent for both *Holmes* and *Patterson* holding that extrinsic evidence of a couple's intent in creating survivorship is inadmissible when determining the property's character.⁶²

“For an account to comply with the requirements of section 439(a), there must be a written agreement signed by the decedent, and the agreement must provide that upon the death of any party, the interest of deceased survives to the other party.⁶³ Language to the effect that ‘the account is held as joint tenants with rights of survivorship’ is sufficient to create a valid survivorship agreement.”⁶⁴

The Texas legislature implemented a specific procedure as to what is necessary for a document to validly represent survivorship rights; however, recent court decisions like *Holmes* and *Patterson* have broadly interpreted the statute by ignoring minor mistakes.⁶⁵ Texas currently still forbids “outside” evidence to determine rights, which inherently clarifies survivorship agreements.⁶⁶ The controversy arises when an overbearing amount of leniency can, in turn, lead to future “minor” mistakes that eventually confuse the entire estate document.

3. The Result of *Holmes* and *Patterson*

Texas has encountered problems by not enforcing the formal process of transferring survivorship rights. On the surface, one can argue that overlooking miniscule errors saves unnecessary re-filing and legal fees; however, Texas has been inconsistent in how the law is applied. With *In re Patterson*, Texas encountered another recent inconsistency with formal procedure and survivorship rights.⁶⁷ In this case, a couple purchased three separate one-year certificates of deposit from Sunbelt Savings (now Bank of America), signed the documents, and checked a box designated for joint tenancy with right of survivorship.⁶⁸ The couple annually renewed the certificates of deposit, but the bank designated new account numbers (written above crossed-out old account

61. *Id.* at 858.

62. *See Stauffer v. Henderson*, 801 S.W.2d 858, 863 (Tex. 1990); *see also Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 363, 373 (Tex.—App. Houston [14th] 1997).

63. *See* TEX. PROB. CODE ANN. § 439(a).

64. *Id.*; *see Evans*, 946 S.W.2d at 363, 373 (referencing *Chopin v. Interfirst Bank Dallas, N.A.*, 694 S.W.2d 79, 83 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (discussing what is required for a transfer document to sufficiently grant survivorship).

65. *See* TEX. PROB. CODE ANN. § 439(a); *see also Holmes*, 290 S.W.3d at 852, 856; *see generally In re Estate of Patterson*, 2003 WL 22251204, at *1 (Tex. App.—Eastland, Oct. 2, 2003).

66. *See* TEX. PROB. CODE ANN. § 439(a).

67. *See In re Estate of Patterson*, 2003 WL 22251204, at *1 (Tex. App.—Eastland, Oct. 2, 2003).

68. *Id.*

numbers) without a new signature.⁶⁹ The court held that the survivorship rights transferred with the new account numbers.⁷⁰

Logically, the court's rulings in *Holmes* and *Patterson* make sense when striving to eliminate unnecessary paperwork and further legal fees.⁷¹ Why require the couple to waste their time re-emphasizing what they had already signed? With the new numbers written on the same document above the old, crossed-out account numbers, the court's ruling aligns itself with common sense. That is to say a third party could reasonably infer, by looking at the original document, that the new account numbers replaced the old account numbers. A problem can arise, however, when a financial institution fails to keep the new and old account numbers on the same document.⁷² Without a clear rule for how this holding will apply if more than one document is used, future courts will likely have inconsistent views and apply different standards as to what a third party can reasonably infer. In this instance, the court should clarify that new signatures and designations of survivorship rights are significant to avoid confusion and uncertainty. Rather than allowing courts to take legislation into their own hands, Texas courts can improve the modified community property estate planning process by ensuring that the same standards are implemented across the board.

4. *A Power Struggle*

The Texas legislature enacted section 439(a) of the Probate Code to allow married couples to express survivorship rights by following a formal process by signing a transfer document designating survivorship rights.⁷³ To continue certainty in survivorship rights, the Texas courts need to specify what action should be taken when a new, unsigned document is used to represent the original transfer.⁷⁴ In sum, the Texas Supreme Court inherently ruled against the formality of designating community property with survivorship rights, as implemented by the Texas legislature, by not following the exact procedure specified in section 439(a).⁷⁵ The Texas Supreme Court's decision presents a power struggle between the Texas Legislature and the Texas court system.⁷⁶ Several reasons can be given for the court's action such as the court wanting to set forth a policy that eliminates an overburdening amount of paperwork and a

69. *Id.*

70. *Id.*

71. See *Holmes v. Beatty*, 290 S.W.3d 852, 860–61 (Tex. 2009).

72. See generally *DeWitt v. DeWitt*, 1996 WL 437540, at *5 (Va. Ct. App. Aug. 6, 1996) (demonstrating the complexity and likely confusion of account numbers when multiple accounts are created in a marital estate).

73. See TEX. PROB. CODE ANN. 439(a) (Vernon 2003).

74. See, e.g., *Patterson*, 2003 WL 2251204, at *1–2.

75. See TEX. PROB. CODE ANN. § 439(a) (Vernon 2003); see, e.g., *Patterson*, 2003 WL 2251204, at *1–2.

76. See *supra* note 75.

policy that allows courts to determine paperwork mishaps on a case-by-case basis.⁷⁷ Despite these legitimate concerns, the Texas Supreme Court decided to interpret the formal standards for obtaining a binding survivorship agreement outlined by section 439(a) as being valid regardless of careless human error.

B. Presumptions of Community Property: How Debt and Divorce Affect a Modified Community Property System

In a recent ruling in *Kircher v. Kircher*, a California court held that section 13551 of the California Probate Code applies liability for debts incurred by a husband and wife's joint tenancy to the entire modified community property or "quasi" community property estate.⁷⁸ Furthermore, the court clarified that a spouse's debt on separate property is also subject to the liabilities imposed under section 13551.⁷⁹ The central issue of the case involved an ex-wife suing a widow for settlement payments agreed-upon by the decedent husband.⁸⁰ The court determined that the widow is personally liable to submit payments based upon her holding of the entire modified community property estate and her survivorship rights.⁸¹ The court reasoned that:

"[t]he Legislature's utilization, in section 13551, of terms pertaining to the characterization and disposition of all property held by spouses at the time of dissolution, manifests, in our view, a clear intent that the scope of the surviving spouse's personal liability encompasses all property which, at the time of the decedent's death, is characterized as community property or the decedent's separate property."⁸²

In *Kircher*, California strictly applies the California Probate Code with the ultimate goal of accurately representing the California Legislature's intent.⁸³ In comparison, the Texas court system applies the Texas Probate Code's formal

77. See *Holmes v. Beatty*, 290 S.W.3d 852, 860–61 (Tex. 2009).

78. See *Kircher v. Kircher*, 117 Cal. Rptr.3d 254, 260–62 (Cal. App. 1st. 2010). California courts often refer to community property with designated rights of survivorship as "quasi" community property. The term "quasi" community property has an interchangeable meaning with "modified" community property; see CAL. PROB. CODE § 13550–13551 (West 1990).

79. CAL. PROB. CODE § 13551 (West 1990). "The liability imposed by Section 13550 shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following:

(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse.
(b) The portion of the one-half of the community and quasi-community property belonging to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.
(c) The separate property of the decedent that passes to the surviving spouse without administration."

80. See *Kircher*, 117 Cal. Rptr.3d at 256–58.

81. *Id.* at 259–62.

82. *Id.* at 260.

83. See *id.*

requirements for officially designating a survivorship agreement for a community property estate as demonstrated by *Holmes* and *Patterson*.⁸⁴ Although California and Texas faced different issues in administering state probate procedures, California appears to seek the legislature's intent rather than operate on an unpredictable case-by-case analysis.⁸⁵

C. Reasonable Limits Imposed on the Modified Community Property System by California and Texas

California and Texas both limit the right of survivorship application by allowing either spouse to terminate the joint tenancy prior to death.⁸⁶ The joint tenant's right to terminate survivorship and resort back to a traditional community property system allows married property holders the freedom and flexibility to ensure that their interests will continue to be protected if they decide that the right of survivorship is no longer to their personal advantage.⁸⁷ In other words, California and Texas do not punish a community property holder for changing his or her opinion as to whether the right of survivorship represents his or her best interest. California and Texas also impose reasonable limits on community property with right of survivorship with multi-party account laws and joint checking accounts, which further allow spouses flexibility in controlling their private finances.

1. California's Multiple-Party Accounts Laws

Despite allowing community property holders to choose community property with right of survivorship, California limits the modified system by withholding its application to joint accounts in a financial institution that fall under the California Multiple-Party Accounts Law (CMPAL).⁸⁸ Specifically, the CMPAL applies to a "three-part bank account" between a depositor (or depositors) and a financial institution, comprising of a checking account, a savings account, and an investment certificate of deposit.⁸⁹

84. See *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009); see *In re Estate of Patterson*, 2003 WL 22251204, at *1 (Tex. App.—Eastland, Oct. 2 2003).

85. See *Kircher*, 117 Cal. Rptr.3d at 260.

86. See MILLER & STARR, *supra* note 16, at § 12.65.

87. *Id.*

88. See California Multi-Party Accounts Law, ch. 79, 1990 Cal. Legis. Serv. 79 (West 1990) (codified as amended at CAL. PROBATE CODE § 5100, § 5205 (West 1991); see generally MILLER AND STARR, *supra* note 16 (specifying that the right of survivorship does not apply to joint accounts affected by Part 2 or Part 5 of the California Probate Code).

89. See *supra* note 88 and accompanying text; CAL. PROB. CODE § 5122(a) (West 2009) (defining a multi-party account as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.").

The CMPAL is distinguished from the California Civil Code's section 682.1 creating a survivorship agreement between husband and wife.⁹⁰ The CMPAL falls under the California Probate Code rather than the California Civil Code.⁹¹ Under the California Civil Code's section 682.1, a formal survivorship agreement affects both real property and personal property.⁹² In contrast, bank accounts are not affected by section 682.1 but rather controlled under the California Probate Code.⁹³ Under the California Probate Code section 5301(a), a multi-party (joint) account allows for one spouse to hold a separate bank account with a non-spouse as long as the funds are from (1) separate property, or (2) both spouses have formally consented to community funds being used in the multi-party account, meaning that the non-holder spouse signs away their rights to these specific community funds.⁹⁴ Furthermore, while the account holders are alive, distributions of the bank account assets turn upon the proportion of net contributions by each holder unless the account holders form an agreement otherwise expressing their intent.⁹⁵ Under California Probate Code Section 5301, California allows survivorship rights of a joint account to pass to the surviving account holders rather than the decedent's estate.⁹⁶

Although the CMPAL allows for one spouse to create a joint account (with spousal consent or from separate property resources) that is virtually untouchable to the other spouse by specifying survivorship rights to a non-spousal party, the CMPAL does not allow a joint account to bypass a decedent's estate when the joint account simply contains names of multiple parties and fails to formally state "right of survivorship."⁹⁷ Furthermore, one spouse cannot create a joint or "multi-party" account with survivorship rights passing to a non-spouse if the account funds are used for a "partnership, a joint venture, or other business association" furthering business purposes.⁹⁸ Specifically, as previously defined, a spouse can only create a separate multi-party account if the account is solely between a set of depositors and a financial institution.⁹⁹ Thus, California provides additional flexibility by allowing multi-party accounts but only under strict conditions that protect both spouses' best interests, ultimately implementing a reasonable limitation on community property estates with right of survivorship.

90. CAL. PROB. CODE § 5301(a) (West 2009); *see* CAL. CIV. CODE § 682.1.

91. *See supra* note 90.

92. *See* CAL. CIV. CODE § 682.1.

93. *See generally* B.E. WITKIN ET AL., MULTI-PARTY ACCOUNTS LAW § 79, 4 Witsum Ch. VI s. 79, at 442-45.

94. *Id.*; *see* CAL. PROB. CODE § 5305(b) (West 2009).

95. *See* Witkin, *supra* note 93, at 444.

96. CAL. PROB. CODE § 5301.

97. *See* WITKIN ET AL., *supra* note 93, at 444 (citing *Crocker-Anglo Nat. Bank v. American Trust Co.*, 338 P.2d 617, 622-23 (Cal. App. 1959)).

98. *See* WITKIN ET AL., *supra* note 93, at 443; *see also* CAL. PROB. CODE § 5122(b)(1) (West 2009).

99. *See* CAL. PROB. CODE § 5122(a) (West 2009); *see also* MILLER & STARR, *supra* note 86, at § 12.65.

2. Texas Limits on Joint Accounts to Third Parties

Texas has also limited its application of community property with right of survivorship in regard to joint accounts to third parties. In *Hass v. Voight*, the court held that a husband creating a joint account with his son through community funds does not constitute a joint tenancy with right of survivorship.¹⁰⁰ For the son to have a right of survivorship, the couple had to jointly conduct one of the following: a partition of community funds, individually sign a revocation from either spouses, or a spousal gift in creating the father and son account.¹⁰¹ Within this case, the husband's death triggered the debate as to whether the son or the wife would have right to the joint account.¹⁰² Shortly after the husband's death, the wife passed, leaving the son and two daughters in dispute over the son and the father's joint account.¹⁰³ The court found that the account ought to be divided as community property with right of survivorship to the wife's estate, thus protecting the daughters' inheritance.¹⁰⁴ The court limited one spouse from engaging in non-approved transactions with community property without the other spouse's notice and consent.¹⁰⁵

Specifically, the court found that under the Texas Probate Code, under Section 455, both spouses must sign a revocation agreement terminating the joint tenancy survivorship rights to the disputed funds in order for the husband to create a joint account providing survivorship rights to his son out of the community estate.¹⁰⁶ Although the evidence does not prove a signed revocation agreement regarding the husband and son's account, the court notes that the couple would have to submit to Section 455 and sign a formal revocation agreement to this specific segment of the community estate in order for the joint account to grant survivorship rights to the son.¹⁰⁷ The court's reasoning emphasizes the need for formal adherence to the Texas Probate Code for transferring survivorship rights away from the wife.¹⁰⁸ Comparatively, Texas courts inconsistently apply the detailed requirements of the Texas Probate Code to substantive and procedural problems.¹⁰⁹

100. See *Haas v. Voigt*, 940 S.W.2d 198, 202–03 (Tex. App.—San Antonio 1996). Although this case was decided over a decade ago, its holding has been the precedent for recent Texas cases facing the same issue; see also *Beatty v. Holmes*, 233 S.W.3d 475, 487 (Tex. App.—Houston [14th] 2007); see also *In re West*, 2000 Tex. App. LEXIS, at *7838 (Tex. App. 2000).

101. See *Haas*, 940 S.W.2d at 203.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. See *Hass*, 940 S.W.2d at 202; see also TEX. PROB. CODE ANN. § 455 (Vernon Supp. 1997).

107. See *Haas*, 940 S.W.2d at 202.

108. *Id.*

109. *Id.*; see *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009); see *In re Estate of Patterson*, 2003 WL 22251204, at *1 (Tex. App.—Eastland, Oct. 2, 2003).

3. *Texas's Reasonable Limits on Substantive Rather than Procedural Problems Arising from Survivorship Agreements*

In *Haas*, the court rightfully reasoned that the only loop-hole for the father and son to have a joint account with survivorship rights funded by the father and mother's community estate is for both husband and wife to formally sign a revocation agreement and adhere to Section 455.¹¹⁰ The obvious difference between *Haas* in comparison to *Holmes* and *Patterson* is that *Haas* dealt with a substantive issue concerning the allocation of funds between family members while the latter two cases leniently apply the Texas Probate Code to procedural paperwork mistakes.¹¹¹ With *Haas*, Texas determines that substantive survivorship agreement issues will not be pacified with a lenient application of the Texas Probate Code.¹¹² Thus, Texas, like California, imposes reasonable limits on survivorship agreements when concerned with substantive matters such as joint accounts and the protection of both spouses' rights to the entire community estate.¹¹³

4. *Texas and California's Similar Limits on Community Property with Right of Survivorship*

Both California and Texas have imposed reasonable limits on the scope of community property with right of survivorship involving multiple-party accounts.¹¹⁴ Like California, Texas allows for either spouse to terminate survivorship rights and resort back to traditional community property rights, allowing for an estate to accurately represent the spouses interests by not punishing a couple for changing their mind.¹¹⁵ Community property with right of survivorship tends to allow couples to have the most freedom in estate planning when compared to only traditional community property or only joint tenancy.¹¹⁶ Along with this freedom, spousal survivorship agreements also eliminate the use of multi-party accounts using community funds without obtaining both the husband and wife's consent.¹¹⁷

Married couples historically lacked an option to designate survivorship rights in a community estate and they often misconceived that the traditional

110. See *Haas*, 940 S.W.2d at 202.

111. See *id.*; see *Holmes*, 290 S.W.3d at 855; see *Patterson*, 2003 WL 22251204, at *1.

112. See *Haas*, 940 S.W.2d at 202-03.

113. *Id.*

114. *Id.* at 203.

115. See MILLER & STARR, *supra* note 16, at § 12.65; see also TEX. PROB. CODE ANN. §§ 436-62 (Vernon 2003).

116. See James R. Ratner, *Community Property, Right of Survivorship, and Separate Property Contributions to Marital Assets: An Interplay*, 41 ARIZ. L. REV. 993, 1003-04 (Winter 1999).

117. C.f. CAL. PROB. CODE § 5305(b) (allowing tracing of separate funds and revocation of community property rights by a written agreement); see TEX. PROB. CODE ANN. § 455 (allowing revocation by one or both spouses in a written agreement).

community property system granted right of survivorship.¹¹⁸ Currently, married couples in California and Texas have a clear-cut choice that eliminates this earlier confusion and uncertainty.¹¹⁹ By giving couples a choice, a modified community property system benefits a couple by accurately representing a couple's intentions at all stages of life, while providing certainty that their intentions will be implemented upon death.¹²⁰

V. NON-PROBATE AND TAXATION BENEFITS

A. *Avoiding Probate Provides the Surviving Spouse with Both Monetary and Emotional Benefits*

For both monetary and emotional reasons, community property with right of survivorship will benefit the surviving spouse by avoiding probate.¹²¹ Under the Sanchez hypothetical and with the traditional community property system, Mrs. Sanchez could easily face a family feud over who will gain Dr. Sanchez's one-half interest in the community.¹²² For instance, in *In re Estate of Miramontes-Najera*, a surviving widow, Mrs. Miramontes-Najera, fought to obtain her husband's interest in the community estate during probate proceedings.¹²³ The lower court upheld payments-upon-death by her husband to third parties and left Mrs. Miramontes-Najera with primarily her one-half interest in the community estate.¹²⁴ The appeals court reversed the decision and held that the wife could enforce her community property interest on an asset-by-asset basis.¹²⁵ The appeals court reasoned that the surviving spouse is entitled to a one-half interest of each payment-upon-death issued by her husband because she did not consent to the payments at the time they were released.¹²⁶

In the Sanchez hypothetical, Mrs. Sanchez, as the surviving spouse, could avoid a fight similar to the legal battle in *In re Estate of Miramontes-Najera* by choosing (with her husband) to designate the community estate as having the right of survivorship. Couples can often overlook the emotional value of having an efficient and smooth transfer of property when planning an estate

118. See Ratner, *supra* note 116, at 1003–04.

119. CAL. CIV. CODE § 682.1(West 2010); TEX. PROB. CODE ANN. § 439 (Vernon Supp. 2009). California grants the option of a spousal survivorship agreement in the California Civil Code while Texas grants the same option in the Texas Probate Code.

120. See Ratner, *supra* note 116, at 1003–04.

121. See Ronald Chester, *Less Law, But More Justice? Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 199–200 (Winter 1999) (discussing how probate proceedings are emotional for families and proposing the use of alternative-dispute resolution to mitigate the emotional trauma a family experiences when dealing with a recent death and the new financial issues presented by estate transactions).

122. See *Miramontes-Najera*, 118 Cal. App. 4th at 753–54.

123. *Id.*

124. *Id.* at 754.

125. *Id.* at 759–60.

126. *Id.* at 756–57 (citing *Estate of Wilson*, 183 Cal.App.3d 67, 68–69 (Cal. Ct. App. 1986)).

because of the statutory nature of estate documents.¹²⁷ When the average person is looking at an estate document, the document more than likely seems like a mathematical formula that assures that the proper boxes are checked rather than a document that will take precedence during the traumatic time of losing a significant other.¹²⁸ Arguably, one of the primary benefits of community property with right of survivorship is the efficient nature in transferring spousal property without a series of court proceedings and legal battles. For Mrs. Sanchez, community property with right of survivorship would save her the emotional stress that court proceedings cost Mrs. Miramontes-Najera, thereby providing Mrs. Sanchez with one less worry during the grieving process of losing her husband.¹²⁹

B. Federal Taxation Implications

1. I.R.C. Section 2040 and the Option of a Revocable Trust

On the surface, Mrs. Sanchez appears to have skipped all tax implications with the community property with right of survivorship by avoiding probate proceedings. Despite Mrs. Sanchez automatically receiving the entire interest in the joint tenancy at her husband's death, "one-half of the value of [the Sanchez joint tenancy] would still be includible in the decedent's gross estate for federal estate tax purposes under [I.R.C.] Section 2040."¹³⁰ Under section 2040, community property with right of survivorship is still taxed by the federal government; however, taxpayers can still avoid this federal taxation by creating a revocable trust.¹³¹ A revocable trust severs the joint tenancy, and makes the surviving spouse's share of the former joint tenancy unreachable by the federal government.¹³² Thus, the entire estate can avoid federal taxation if the couple chooses to create a revocable trust.

Avoiding federal taxation is a key consideration in estate planning; however, a revocable trust does not benefit from an unlimited gift tax reduction since both spouses must consent to any alterations in the traditional revocable trust.¹³³ In order to receive the unlimited gift tax marital reduction, both

127. See RONALD R. CRESSWELL, ET AL., *CHAPTER 2: MANAGING THE ATTORNEY-CLIENT RELATIONSHIP: § 2:14: OTHER CONSIDERATIONS—DEALING WITH EMOTIONAL ISSUES—DEPRESSION AND GRIEF*, 1 TEX. PRAC. GUIDE WILLS, TRUSTS AND EST. PLAN. § 2:14 (2009).

128. *Id.*

129. *But c.f., Miramontes-Najera*, 118 Ca. App. 4th at 753–54, 757 (discussing the several court procedures that Mrs. Miramontes-Najera was subject to partake in at the on-set of her husband's death).

130. Arthur W. Andrews, *Community Property with Right of Survivorship: Uneasy Lies the Head that Wears a Crown of Surviving Spouse for Federal Income Tax Purposes*, 17 VA. TAX REV. 577, 580 (1998) (citing the I.R.C. § 2040(b)(1) to demonstrate how the federal government can still tax a joint tenancy upon the death of a joint tenant despite the termination of state probate procedures); see 26 U.S.C.A. § 2040.

131. See *Black v. Comm'r*, 765 F.2d 862, 863 (9th Cir. 1985).

132. *Id.*

133. See Robert A. Esperti & Renno L. Peterson, *Joint Trusts Are a Good Planning Tool for a Married Couple*, 20 EST. PLAN. 148, 150–51 (May/June 1993).

spouses must elect to withdraw “his or her separate trust property at any time without the consent of the other spouse.”¹³⁴ Accordingly, the ability to act without the consent of the other spouse creates a risk that one spouse can easily take advantage of and left in the dark as to the characteristics of their private estate.¹³⁵

2. *Comparing a Revocable Trust to Community Property with a Survivorship Agreement*

The inherent risk with creating a revocable trust is that the trust documents will not be drafted properly to take precautions against nonconsensual gift transactions.¹³⁶ With the trend of “do-it-yourself” estate planning kits, this risk is further amplified by the likelihood of a non-experienced layperson drafting mistakes that misrepresent the married couples’ intentions in the complexity of a revocable trust.¹³⁷ Under most circumstances, a revocable trust should only be sought if the couple uses “an experienced estate planning attorney who has personally met with the couple and determined that there is no ethical impropriety in representing them both” and who completely comprehends the couples’ intentions.¹³⁸ With community property with right of survivorship, both spouses must consent to changes made within their community estate regardless of any drafting mishaps.¹³⁹

In contrast, with a revocable trust, spouses may given into the temptation to opt for the right to change the trust to separate property without the consent of their spouse in order to receive a marital gift tax benefit under a loosely drafted trust agreement.¹⁴⁰ Married couples should also be weary of who they notify of the revocable trust’s existence.¹⁴¹ Maintaining privacy in creating the trust eliminates potential challenges by unsatisfied heirs—similar to the common problem associated with will disputes.¹⁴² In a sense, this creates yet

134. *Id.* at 50.

“To avoid unwanted gift problems on funding the joint trust, each spouse should be given the power to withdraw his or her separate trust property at any time without the consent of the other spouse. Retaining the unrestricted right to withdraw the grantor’s separate property makes any potential gift incomplete and thus creates no gift tax liability.” *Id.*

135. See *Miramontes-Najera*, 118 Cal. App. 4th at 753–55 (noting how a simple joint tenancy without community implications would allow Mr. Miramontes-Najera to make payments with community property without his wife’s consent and thus have those payments taken from the estate upon his death).

136. Esperti and Peterson, *supra* note 133, at 150–51.

137. See Esperti and Peterson, *supra* note 133, at 150; see also Mary Beth Beattie, *Top Ten Myths and Misconceptions in Estate Planning*, 36 MD. B. J. 3, 6 (Apr. 2003) (discussing how people with less than one million in assets often mistakenly assume that they do not need an estate planner).

138. See Esperti and Peterson, *supra* note 133, at 154.

139. See MARY F. RADFORD, REDFEARN WILLS AND ADMINISTRATION IN GEORGIA: GENERAL PROVISIONS FOR INTESATE AND TESTATE ESTATES, 1 Ga. Wills & Administration § 2.3 (stating that “the spouses cannot dispose of property during their life without mutual consent [with the modified system]”).

140. See Esperti & Peterson *supra* note 133, at 150–51.

141. See Frances H. Foster, *Trust Privacy*, 93 CORNELL LAW REV. 555, 563–64 (Mar. 2008).

142. *Id.* at 571–72.

another challenge for couples seeking a revocable trust rather than appropriating community property with survivorship rights.¹⁴³

In sum, a community estate held with right of survivorship allows for certain tax benefits while maintaining a community estate where both spouses must consent to changes made in the estate's property and funds.¹⁴⁴ Thus, in the modified community property system, "[t]he net result is that one spouse cannot unilaterally terminate survivorship rights" and transform the estate into separate property.¹⁴⁵ With a revocable trust, married couples can escape from federal taxes under Section 2040, but also have to face the issue of one spouse granting a non-agreed upon gift.¹⁴⁶ Ultimately, married couples can benefit from creating a revocable trust as long as they use professional resources, maintain privacy, and have a clear want and understanding that a revocable trust best meet both spouses' needs.¹⁴⁷ These challenges, however, can outweigh the benefits of creating a revocable trust depending on the individual nature of the couples' estate.

C. Issues of a "Stepped Up" Fair Market Value in the Community Property with Designated Survivorship Rights

1. Defining A "Stepped Up" Fair Market Value and Its Application

A fair market value is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction," meaning a fair market value is "the point at which supply and demand intersect."¹⁴⁸ A stepped up fair market value for real estate means that the value of the property is determined at the death of the owner rather than at the time of purchase.¹⁴⁹

To illustrate, suppose the Sanchez couple bought their home for \$100,000 dollars in 1960 and met the requirements for a stepped-up basis by having the estate treated as traditional community property at the time of Dr. Sanchez's death in November of 2009. In 2011, the Sanchez home's fair market value (FMV) has sky-rocketed to the price of 3 million dollars. Mrs. Sanchez, realizing the value, decides to put the home on the market and successfully sells the home for 3.2 million dollars during the same year. With the stepped-up basis, Mrs. Sanchez would be responsible for paying federal income taxes on only \$200,000 dollars—the difference between the FMV and the 2009 selling

143. *Id.*

144. See Thomas S. Featherston, Jr. & Julie A. Springer, *Marital Property Law in Texas: The Past Present, and Future*, 39 BAYLOR L. REV. 861, 897–98 (1987).

145. *Id.* at 898.

146. See Esperti & Peterson, *supra* note 133, at 150–51.

147. See *id.*; see also Foster, *supra* note 140, at 557–58.

148. BLACK'S LAW DICTIONARY 1587 (8th ed. 2004).

149. See Sharon Kovacs Gruer, *Inheritance and the New Carryover Basis Rules*, 5 MARQ. ELDER'S ADVISOR 74, 74 (Fall 2003).

price, rather than the difference between the FMV and the 1960 purchase price.¹⁵⁰

For a comparative example, suppose the Sanchez couple had their estate designated as community property with right of survivorship at Dr. Sanchez's death in November of 2009. In this situation, the home would only receive a stepped-up basis for Dr. Sanchez's half-interest.¹⁵¹ Therefore, Dr. Sanchez's half-interest would only face federal taxes on \$100,000 dollars.¹⁵² In contrast, Mrs. Sanchez's half-interest would be federally taxed based on the amount of \$1,550,000.¹⁵³ Thus, community property with right of survivorship imputes the drawback of not having the entire property qualify for a stepped-up basis for determining federal estate taxes, thereby imposing another consideration in determining whether right of survivorship best represents the married couple's intentions.¹⁵⁴

2. I.R.C. 1014(f) and the New Carryover Basis

Beginning after December 31, 2009, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) took effect to alter the stepped-up federal tax implications affecting the FMV at the time of a property holder's death.¹⁵⁵ Thus, Mrs. Sanchez would face a different federal tax obligation had Dr. Sanchez passed away after December 31, 2009.¹⁵⁶ I.R.C. Section 1014(f) repeals I.R.C. Section 1014 and replaces Section 1014 with Section 1022, providing for a new modified carryover basis.¹⁵⁷ The new modified carryover basis under Section 1022 allows property inherited from a decedent to "be equal to the lower of the assets' fair market value of the date of the decedent's death or the decedent's adjusted basis at that time."¹⁵⁸ The decedent's interest will now receive a stepped-up basis only for the aggregate amount of 1.3 million dollars of appreciation, with an additional 3 million dollars in basis

150. See generally *id.*; See 26 U.S.C.A. § 1014 (2005) (codifying I.R.C. § 1014(f)).

151. See Marilyn M. Polson & Laurie Wellons Valentine, *Community Property Issues*, BEP FL-CLE § 14.13 (2009).

152. See *id.* Dr. Sanchez would be federally taxed on the amount of \$100,000 because he would have \$1.5 million interest in the 3 million dollar FMV and he would have a 1.6 million interest in the 3.2 million dollar selling price (as would Mrs. Sanchez). Thus, Dr. Sanchez's taxable amount is calculated by 1.6 million dollars minus 1.5 million dollars, which equals to \$100,000.

153. See *id.* Mrs. Sanchez taxable amount is calculated by 1.6 million minus 50,000 (half of the 1960 purchase price), totaling \$1,550,000.

154. See Arthur W. Andrews, *Community Property with Right of Survivorship: Uneasy Lies the Head that Wears a Crown of Surviving Spouse for Federal Income Tax Basis Purposes*, 17 VA. TAX. REV. 577, 580-82 (Winter 1998).

155. See Gruer, *supra* note 149, at 75-76 (discussing how a "modified carryover basis" would replace the "stepped up basis" for deaths occurring after December 31, 2009).

156. See Gruer, *supra* note 149, at 75-76.

157. See *id.*; 26 U.S.C.A. § 1014 (Supp. 2009). The statute is amended by I.R.C. § 1014(f), codified as 124 Stat 3296, 26 U.S.C.A. § 1022 (Supp. 2009).

158. See Gruer, *supra* note 149, at 75.

increase or asset appreciation designated for the surviving spouse.¹⁵⁹ Thus, the EGTRRA has placed greater limits on wealthy couples escaping federal taxation by setting hard-line maximums.

With the original stepped-up federal tax incentive, couples wishing to hold community property with right of survivorship were punished by not qualifying for the stepped-up basis.¹⁶⁰ Under the new ramification of Section 1022, wealthy couples with an estate value exceeding the set maximums of 1.3 million dollars in appreciation and 3 million dollars in basis increase or asset protection will be most benefited by keeping their property as community with right of survivorship.¹⁶¹ For both Texas and California, married couples falling into this exceedingly wealthy category, are equally affected by these federal tax implications.¹⁶² Thus, community property with right of survivorship is presently the most secure option for California and Texas' ultra- wealthy. As for the majority of couples who will not exceed these maximum limits, traditional community property still gives high federal tax incentives which in turn serves as a current drawback to using community property with survivorship rights.¹⁶³

VI. CONCLUSION

A. Applying the Benefits of the Modified Community Alternative

1. The Extent of Freedom and Flexibility

The state legislatures of both Texas and California have both chosen to grant state citizens a choice in deciding how they wish to allocate their community estate by providing the option of survivorship rights.¹⁶⁴ Texas and California provide residents more freedom and flexibility through allowing married couples to avoid probate as well as unnecessary emotional trauma by designating community property with an automatic transfer to the surviving spouse.¹⁶⁵ In comparison to the *In re Estate of Miramontes-Najera* case, community property with survivorship rights can effectively eliminate stress associated with prolonged probate procedures, attorney's fees, and family battles.¹⁶⁶

159. See Gruer, *supra* note 149, at 75.

160. See 26 U.S.C.A. § 1014 (Supp. 2009).

161. See § 1022. Couples whose assets significantly exceed the maximum federal tax limits will not benefit from holding their property in traditional community property because the "stepped-up" basis has been replaced to federally cap loopholes for the wealthy.

162. See *id.*

163. See *id.*

164. CAL. CIV. CODE § 682.1 (West 2001); TEX. PROB. CODE ANN. § 439 (Vernon 2003).

165. See CRESSWELL ET AL., *supra* note 126, at § 2:14 (noting the importance in appropriately dealing with the client's emotional stress associated with legal proceedings).

166. See *Miramontes-Najera*, 118 Cal. App. 4th at 753-54.

On July 1, 2001, California granted its citizens the privilege of choosing a modified community property estate; however, the California legislature did not apply this benefit retroactively.¹⁶⁷ The non-retroactive nature of the California amendment mitigates confusion in applying the modified alternative by giving a clean-cut start date.¹⁶⁸ At the same time, the non-retroactive nature punishes couples who would have benefited by having a survivorship agreement tied to their estate but simply did not make the deadline.¹⁶⁹ Despite these considerations, the California legislature likely eliminated a flood of citizens seeking immediate rulings on their community estate's nature, thereby providing greater efficiency for the local court system. Inherently, the 2001 amendment's non-retroactive quality hinders freedom and flexibility for past estates; however, the end result promotes efficiency while providing a modified community property alternative for present and future generations.

On June 31, 1987, the Texas legislature formally adopted an amendment creating survivorship rights for a community estate.¹⁷⁰ Prior to the 1987 amendment, *Hilley v. Hilley* held that survivorship rights could not be comingled within a Texas community property estate.¹⁷¹ Through the Texas 1987 amendment, the Texas legislature formed a new law overruling the *Hilley* holding.¹⁷² In addition, the 1987 amendment provided for strict procedures in designating community survivorship rights. Under the Texas Probate Code, Section 452, the state legislature determined that only certain language would be deemed acceptable when conveying survivorship rights such as formally writing "with right of survivorship" or "shall pass to the surviving spouse."¹⁷³ Even with these strict procedures, Texas courts applied the required formalities on a case-by-case basis and provided leniency when couples failed to use code-specific language.¹⁷⁴ As a result, the Texas government has witnessed a power struggle between the state legislature and the Texas Supreme Court.¹⁷⁵ The Texas court system has allowed a heavy amount of freedom and flexibility when recognizing community survivorship agreements; however, the Texas legislature's formal requirements have been trampled on in the process.¹⁷⁶

167. See CAL. CIV. CODE § 682.1.

168. *Id.*

169. *Id.*

170. See Act of June 11, 1987, 70th Leg. R.S., ch. 297, § 1, 1987 Tex. Gen. Laws 4114-15 (codified at TEX. PROB. CODE ANN. § 439 (Vernon 2003)).

171. See *Hilley*, 342 S.W.2d at 565.

172. *Id.*; see TEX. PROB. CODE ANN. § 439(a).

173. TEX. PROB. CODE ANN. § 452.

174. See *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009) (holding that the written designation "JT-TEN" satisfied the requirements under Section 452); see, e.g., *In re Patterson*, No. 11-03-00070-CV, 2003 WL 22251204, at *1 (Tex. App.—Eastland, Oct. 2, 2003).

175. See *supra* Part IV.A.4.

176. See, e.g., *Holmes*, 290 S.W.3d at 855.

2. Improving the Modified Community Property Alternative

Both California and Texas can improve the application of the modified community property system in the following ways: (1) ensure that state courts uphold state legislation; (2) provide for state legislation that allows flexibility when couples do not fully adhere to concrete formalities; (3) continue to impose reasonable restrictions in community bank accounts; and (4) encourage couples to seek professional estate planners to best draft the couple's intentions.¹⁷⁷ Specifically, Texas can improve by either abiding by the state probate code's detailed requirements, or re-writing the strict requirements to add flexibility that allows courts to apply the code on a greater individualized basis.¹⁷⁸ In contrast, the California court system, as seen in *Kircher v. Kircher*, applies the probate code in alignment with the legislature's intent.¹⁷⁹ If the Texas legislature can amend Section 439 to include flexibility for the court system, this current issue presented by *Holmes v. Beatty* can be avoided.¹⁸⁰

Furthermore, California and Texas can continue to learn from one another in applying reasonable restrictions for multi-party accounts.¹⁸¹ For instance, Texas has a greater amount of case law on determining the ownership of multi-party accounts formed with community funds since the Texas legislature enacted modified community property fourteen years prior to California.¹⁸² Thus, California can use the Texas court's reasoning in *Haas v. Voight* when faced with a similar issue involving one spouse creating a joint account with a third party family member without the other spouse's consent.¹⁸³ Lastly, both states should encourage citizens to seek professional guidance when planning either a traditional community estate or a modified community estate with survivorship rights.¹⁸⁴ With the complexities and new legal ramifications constantly changing the estate planning field, both California and Texas couples will benefit from seeking an attorney to formally document and best represent intentions.¹⁸⁵

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177. See *supra* Part IV A.4; see also *supra* Part IV.C.3.

178. See *Holmes*, 290 S.W.3d at 855; see also *Patterson*, 2003 WL 22251204 at *1; see also TEX. PROB. CODE ANN. § 439.

179. See *supra* Part IV.B.1 (discussing the *Kircher* ruling).

180. See *Holmes*, 290 S.W.3d at 855 (stating the holding of *Holmes*).

181. See *supra* Part IV.C.

182. CAL. CIV. CODE § 682.1 (West 2001); TEX. PROB. CODE ANN. § 439.

183. See *Haas v. Voigt*, 940 S.W.2d 198, 202-03 (Tex. App.—San Antonio 1996).

184. See *Beattie*, *supra* note 136, at 6 (discussing how people from all income ranges should seek professional estate planning advice in order to avoid drafting mistakes).

185. See, e.g., *supra* Part V.C.2.