

TAX & ESTATE PLANNING ALERT

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A new opportunity in Florida: Community property trusts

On June 29, 2021, Florida Governor Ron DeSantis approved Senate Bill No. 1070, Chapter 2021-183, which enacted the Florida Community Property Trust Act. This Act now gives married couples in Florida the option to create a “community property trust” (CPT) and imbue the trust property with the attributes of community property status.

What is community property, and why is it important?

Several states — Wisconsin, Washington, Texas, New Mexico, Nevada, Louisiana, Idaho, California and Arizona — are traditional community property states. In these traditional community property states, both spouses have equal, undivided rights to assets acquired during marriage, other than through gift or inheritance, even if acquired by only one of them. Each spouse’s right arises at the time the asset is acquired.

Compare that with the situation in common law marital property states like Florida, Illinois, Ohio and Pennsylvania. In common law marital property states, a spouse does not immediately obtain rights in property of the other spouse when acquired during the marriage. Rather, the rights of the non-owner spouse generally do not arise until determined or affirmed by a court in the event of divorce or death.

But the tax treatment of community property provides married couples in community property states a key advantage over those in common law marital property states. In states like Florida and Ohio, when one spouse dies, only that deceased spouse’s property receives a new cost basis equal to its fair market value as of the date of the deceased spouse’s death. The cost basis of property owned by the surviving spouse is unaffected by the death of the deceased spouse. **All** community property, however —

meaning both the deceased spouse's one-half interest **and** the surviving spouse's one-half interest — receives the *step-up* in basis when the first spouse dies. Why? Because the surviving spouse's half of community property is considered to have been acquired from the deceased spouse.

Consider the following example: A married couple, Roque and Lori, owned appreciated undeveloped land that they purchased several years ago in their joint names. They bought the land for \$100,000, and it is now worth \$1 million. Lori died last month, and Roque was able to sell the land last week for its \$1 million fair market value. In a common law state, Lori's one-half interest in the land would get a step-up in basis of \$500,000. Roque's one-half interest would have a cost basis of only \$50,000. Roque will have a capital gain of \$450,000 and will be responsible for \$90,000 in federal capital gains tax. Had they acquired the property while living in a community property state, both Lori's half and Roque's half would receive a step-up in basis. The property instead would have a cost basis of \$1M and thus no capital gain and no capital gains tax would be realized upon the sale. Roque would pay no capital gains tax. Way to go, Roque!

Community property trusts

Unlike most trusts created by married couples, CPTs are created jointly by the spouses with the specific intention of obtaining the rights and benefits of community property. Florida's new law requires that the CPT contain very specific language in capitalized font that clearly expresses the desire of both spouses to treat the trust property as community property. Once the CPT is established, the couple need only to transfer property to the CPT for community property status to attach. The trust property will be eligible for the tax benefits accorded to community property as illustrated above; property outside of the trust, however, can maintain their common law character.

CPTs are particularly advantageous for couples with highly-appreciated property, stocks or real estate (whether owned by one or both spouses) that could benefit from the full step-up in basis, particularly property that a surviving spouse would want or need to sell after the death of the first spouse. CPTs also simplify the estate and tax planning process, reducing the necessity for spouses to equalize the value of the assets held by each of them, as estate planners often suggest. For couples moving from community property states to Florida, the couple can more easily segregate their existing community property from non-community property acquired after the couple's relocation by transferring the existing community property to the CPT and keeping all other non-community property outside of the CPT.

As with all planning, the benefits of community property status should be weighed against possible consequences before implementing a CPT. If a spouse transfers their separate property to a CPT, the other spouse will immediately obtain an interest in that property. If the couple later divorces, the property that would have otherwise remained with the original owner-



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spouse will instead be divided between the couple. With this in mind, a married couple in a long-term, stable marriage is the best candidate for a CPT.

For more information, please contact [Marve Ann Alaimo](#), [Michael Sneeringer](#) or any member of Porter Wright's [Tax, Estate Planning and Personal Wealth Practice Group](#).