Florida Community Property Trusts -

Saving Tax & Avoiding Pitfalls

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Overview

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2. What is new in the world of community property?
3. What is a Florida Community Property Trust (CPT)?
4. Why is it important to know about community property?
5. Benefits of a CPT.
6. Issues and complexities, and how to navigate around them.
7. Tax analysis and IRS authority on CPTs.
8. CPT planning with Florida homestead.
9. Ethical considerations in representing both spouses in CPT planning.
10. Comparison of ownership options for spouses.

What is community property?

- Term used to describe the marital property rights couples have during life, in the event of divorce, and at death.
- No uniform definition of community property. Not defined in the uniform act, each community property jurisdiction is different. One reason why this area of the law is so complex.
- Some universal truths.
  - If the marriage is terminated by death or divorce, the community property will be divided 50/50.
  - Title does not control ownership. A spouse's ownership rights to community property exist regardless of which spouse is holds title.

How is it created?

- If the married couple lives in a community property jurisdiction - all property owned or acquired by the married couple is community property (subject to exceptions).
- Can be created by married couples in common law states with an opt-in community property regime - for, example Florida's Community Property Trust Act.
- Separate property can now be converted to Florida community property through a CPT. However, Florida community property cannot be created outside of a CPT. On the other hand, community property established in another jurisdiction can continue to exist for married couples living in Florida.

Which states have community property?

- 9 U.S. States - California, Texas, Louisiana, Arizona, Washington, Wisconsin, New Mexico, Nevada and Idaho.
- Many foreign countries have community property.
- 6 Opt-in States - Alaska (1998), Tennessee (2010), South Dakota (2016), Kentucky (2020), Florida (2021), Kansas (2026).
- 16 states, including Florida, have adopted some form of the Uniform Community Property Disposition at Death Act.
- 4 states have adopted the new Uniform Community Property Disposition at Death Act since it was passed in 2021, including Colorado, Nebraska, North Carolina, Arkansas and the District of Columbia. The new Uniform Act specifically recognizes community property acquired in opt-in community property states.
- Vested community property rights do not disappear when couples move. For example, Florida case law protects a surviving spouse's rights to community property. See Quintana v. Ordono, 195 So. 2d 577 (Fla. 3rd DCA 1967).

What is new in the world of community property?

- Income Tax Focus. Federal estate tax exemption amount was increased and made permanent in 2025. Married couples have $30 million of combined gift/estate tax exemption. Income tax planning is important for all clients; estate tax planning affects less than 1%. Approximately 3,900 estates trigger federal estate tax each year.
- Kansas Community Property. In 2026, Kansas became the sixth state to enact opt-in community property legislation. It is now possible to select among six states to determine which provides the strongest support for the double step-up in basis.
- No Adverse IRS Rulings. No negative rulings from the IRS have been published since the passage of Florida's Community Property Trust Act in 2021. No positive rulings either.
- New Uniform Act. Community property acquired by couples in community property jurisdictions is not affected by a mere change in the couple's domicile. New Uniform Community Property Disposition at Death Act addresses: (1) recognition of community property held by couples in "opt-in" community property states, (2) providing a framework to address passing outside of probate to the detriment of a spouse, (3) recognizing community property under all spousal relationships where it is permitted in other states, (4) establishment of clear procedures for reclassifying community property to avoid inadvertent forfeiture of rights, (5) recognition of reimbursement rights for a spouse harmed by unauthorized lifetime transfers, mismanagement, and similar actions, and (6) increased protections for third parties transacting in good faith.

What is a Florida Community Property Trust?

- Joint trust, established by a married couple, that meets the requirements of the Florida Community Property Trust Act. Property owned by a CPT is Florida community property.
  - Important Note. Distinguish between a pre-existing joint trust holding community property held by the couple acquired in a community property jurisdiction. The property remains community property under the laws of the original community property jurisdiction.
  - Caution. Before unwinding an established joint trust holding community property from another jurisdiction, carefully consider whether that is the best plan for your client. A CPT is NOT always better.

How do you draft a Florida Community Property Trust?

- Comply with the Florida Community Property Trust Act. Fla. Stat. Section 736.1501-1512.
- Must have the all-caps warning language at the beginning of the CPT.
- Can be revocable or irrevocable. However, surviving spouse must be able to amend surviving spouse's one-half share.
- Must be signed by both spouses. The same formalities required for the execution of a will are required for CPT (unless irrevocable).
- No consideration is needed.

Drafting a Florida Community Property Trust

- Start with all-caps warning language in §736.1503.
- Expressly declare the purpose of the trust is to establish a CPT.
- Beneficiaries are the spouses. There are no other qualified beneficiaries (see §736.1504).
- Spouses can be trustees; however, at least one trustee must be a Florida resident.
- CAREFUL drafting. Joints trusts with dual settlors are inherently more complicated. Special attention is required in drafting (1) methods for amending the CPT by the spouses, (2) revocation of the CPT, (3) distributions during the lifetime of the spouses, (4) provisions that apply in the event of divorce and (5) division and distribution on the death of the first spouse to die, and each spouse's power to direct his or her one-half at death. For example, if BOTH spouses must take joint action to revoke the CPT it may NOT be revocable; this can significantly complicate the analysis of whether there is an immediate taxable gift on funding of the CPT.
- CAREFUL funding. For example, if the CPT is funded with Florida homestead, the limitations on devise must be addressed. Avoid taxable gifts in connection with CPT funding efforts.
- Enforcement issues. For example, any term that would "*violate public policy or general law imposing a criminal penalty, or result in the property not being treated as community property under the laws of a relevant jurisdiction*" is unenforceable. See §736.1512 and 1504(1)(d).
- Income Tax Reporting. During the lifetime of both spouses, file on under one spouse's SSN, and make sure spouses elect to file a joint federal income tax return. After death of the first spouse, the income tax reporting for a joint just is more complicated.

Why is it important to know about community property?

- More than 25% of the population lives in a community property state. Couples are moving out of community property states to Florida. Florida is the fastest growing state in the U.S.
- As the estate planning and tax advisor for the couple, you NEED to know these rules.
- Legal and tax attributes of community property are very different than what we are used to in Florida. For example:
  - Title. Title does not control ownership at death. The property is owned 50-50 regardless of whose name is on the title.
  - Gift and Estate Tax. Community property (and property traceable to community property) should NOT be transferred to certain types of irrevocable trusts. For example, community property should NOT be transferred to spousal lifetime access trust (SLAT).
  - Basis Adjustment. The basis in both halves of community property will be adjusted to fair market value on the death of the first spouse.
  - Valuation Discounts Apply. Potential TRAP - Charitable gifts of community property may result in valuation discounts for fractional ownership, which may REDUCE the federal income and estate tax charitable deduction.

Why consider a Florida Community Property Trust?

- #1 Reason. Income tax planning opportunities for the surviving spouse.
- Double Step-Up. Even though, ONLY one-half of community property is included in the gross estate of the first spouse to die . . . BOTH halves of appreciated community property receive a step-up in basis. WOW! We don't find this anywhere else in the IRC.
- Florida Community Property. Married couples can reduce income taxes on the sale of appreciated property after the death of the first spouse by creating Florida community property with a CPT.
- Income Tax Planning v. Estate Tax Planning. Estate tax planning is not important for most couples with current exemption levels ($30 million for married couple). Income tax planning remains an estate planning focus for all clients.

Should EVERY married couple with appreciated assets have a CPT?

Arguably, yes, IF (1) the CPT and its funding and administration avoid the pitfalls mentioned in this presentation and (2) the couple understands the complexities and fees.

- Structuring the CPT. The CPT can be an overlay to the spouses' otherwise properly drafted estate planning documents.
- Termination of the CPT. The CPT would terminate on the death of the first spouse to die, and each spouse's one-half interest could be distributed to their respective separate revocable trusts.
- Keep Existing Revocable Trusts. With this structure, the separate revocable trusts remain the foundational planning documents, and the CPT is only used to achieve the "double step-up in basis" for appreciated property owned at the time of death.
- The CPT does not replace the couple's separate revocable trusts.

Example #1 - Business Owner

- A married couple starts a new business and has a combined basis of $1 million in their shares. There are 100 shares issued and outstanding, and each spouse owns 50 shares.
- Years later, the business appreciates in value, one spouse dies, and the fair market value of the business is $8 million. The surviving spouse wants to sell the business and slow down.
  - Gain without a Florida Community Property Trust if sale occurs after death of first spouse: $3.5 million
    - Only the one-half owned by the deceased spouse receives a step-up in basis.
  - Gain with a CPT if sale occurs after death of first spouse: $0
    - ❖ “Double Step-Up” in Basis

Example #2 - Appreciated Florida Homestead

- Florida homestead is an attractive asset class for “double step-up” planning with Florida Community Property Trusts.
- Over the last 10 years, there has been significant appreciation in value (in many cases, there is substantial appreciation in excess of the amount allowed to be excluded from income on the sale of a personal residence ($250,000 per person / $500,000 per couple)).
- Best use case: married couple with stable marriage, possibility that one spouse may die soon and other spouse may live a long time, highly appreciated Florida homestead, surviving spouse plans to sell. Perfect situation for a CPT.
  - Not for Young Couples: not the best plan for younger couples with long life expectancy, couples with an unstable marriage, couples that need to protect assets from creditor claims, non-citizen spouse.
  - What about Couples in their 90s: is it worth the complexity and risk, knowing there won’t be much time between the first spouse to die, and the second spouse’s death?
- Example: Assuming a property worth $5 million and basis of $1 million, the tax savings for the surviving spouse could be in the range of $500,000
  - Surviving spouse may want to sell and downsize, or move, with $0 income taxes

Benefits and Advantages

- #1 Benefit - Double Step-Up. Appreciated property owned by the Trust SHOULD be treated as community property under I.R.C. §1014(b)(6). As a result, the appreciated community property owned by the Trust will receive a step-up in basis.
- But WAIT, There are OTHER OPTIONS! Clients may be able to achieve the same, or better, results with other planning. For example, transferring appreciated assets to the spouse with the shorter life expectancy may be a better plan.
- Ownership by Spouse with Short Life Expectancy (**Option #1**). Compared to a CPT, this strategy is (1) simpler, (2) does not involve complex valuation rules associated with fractional interests in property, and (3) there are no tax uncertainties. However,
  - No Crystal Ball. Spouses could die out of order
  - He is Really Great, But . . . Monied spouse may not be comfortable transferring significant assets to the other spouse
  - No Death Bed Planning. Must complete transfers between spouses at least 1 year before death, if the assets are being devised back to the spouse that originally owned the low basis assets.
    - Important Note - Death Bed Planning Can Still Work. If the assets are being devised to children, there would be a full step-up, even if the transfers were made the day before death. What if the low basis assets are devised to a trust for the spouse (and not the spouse directly)? Will I.R.C. Section 1014(e) still apply? The analysis is more complex and depends on the terms of the trust and many other factors.

Benefits and Advantages

- Upstream Basis Planning (**Option #2**). Briefly, this kind of planning can be used for any individual (married or single) with appreciated assets. Major benefit is that this planning can benefit the married couple during their lifetime!
  - How it Works. Essentially, the individual with the appreciated assets would transfer the assets to (or in trust for) a trustworthy family member with a modest estate, short life expectancy, and no creditors. The appreciated assets would be included in the gross estate of the older family member at his or her death, which would eliminate all built-in gains. See "Senior Powers of Appointment," by David A. Handler & Christina Lazo. Trusts & Estates, September 2020.
- Joint Exempt Step-Up Trust (JEST) (**Option #3**). This is another type of trust designed to achieve (1) a step-up in basis on all of the couple's assets on the death of the first spouse and (2) the full funding of a credit shelter trust for the surviving spouse. See Florida Community Property Trusts by Alan Gassman and Chris Denicolo comparing the JEST Trust to a Florida community property trust.
- CAUTION - Spouse with Shorter Life Expectancy Already Owns Low Basis Assets. Do not transfer to a CPT without understanding the risks. If the spouse with the shorter life expectancy and title to the low basis assets transfers them to the CPT, and then dies first within 1 year of the transfer, will both halves receive a full step-up in basis? Will the first spouse to die have enough assets to fully fund a GST tax-exempt trust? Are the clients worse off than with no CPT planning? This is a trap. Remember, the goal is to make sure the couple is NO WORSE OFF.

Benefits and Advantages

- Sale by Surviving Spouse Required. It is important to note that the double step-up is only helpful if the surviving spouse actually sells the appreciated property.
  - However . . . Option to Sell Tax Free Is Inherently Valuable. However, even if the appreciated property is not sold, the surviving spouse will benefit from having the option to sell appreciated assets without income taxes. Providing options, flexibility, and peace of mind for the surviving spouse is an important part of estate planning for most married couples.
- Should Younger Couples Consider this Planning? Planning with CPTs revolves around the double step-up in basis at death. For younger couples with long life expectancies, the probability of this planning saving income tax is low. Their current appreciated assets will likely be sold, and new assets will be purchased with a new tax basis.
- Remember, Does not Apply Across the Board - Certain Asset Classes Do NOT Benefit. It is important to note that retirement accounts, qualified plans, IRD items, and life insurance will not benefit from the double step-up in basis at death.

Benefits and Advantages

- What About Clients Moving to Florida from a Community Property Jurisdiction? Below are the benefits of a CPT over traditional planning for clients moving to Florida from a community property jurisdiction:
  - No Complicated Tracing. Avoids the need for complex and expensive tracing, if the community property assets are not segregated and accounted for after the move.
  - Includes Homestead. Allows your Florida homestead to be treated as community property (which is not currently allowed under Florida law outside of the Florida Community Property Trust).
  - Broader Application. FUCPRDA is limited in its scope. For example, it does not apply to revocable trust assets.
  - Less Complex for Florida Residents. Don't need to consider laws of another state or country.
  - Stronger Tax Support? MAYBE. Arguably, a CPT provides more support for treating the property as community property for federal income tax purposes than existing Florida law. However, many practitioners believe long-standing Florida case law, FUDCPRDA, and 1993 WL 1609164 (IRS FSA) provide ample support for community property treatment and qualification for the Double Step-Up, whereas the CPT is untested.
    - Practice pointers. (1) Not one size fits all. Do not unwind an existing funded community property trust without cautiously considering the pros and cons. (2) Associate with local counsel in the original community property jurisdiction before making any changes.
- Is Simplification a Benefit? The answer is NO. Community property, joint trusts, and the associated legal and tax analysis are complicated. For this reason, the planning and reporting of community property involves an elevated level of risk and expense.

Pitfalls and Tax Issues

- #1 - Less Creditor Protection. A CPT offers LESS protection against creditor claims than tenants by the entireties (TBE) property during the lifetime of both spouses.
  - Self-Settled Asset Protection Trusts - Not Permitted in Florida. A creditor of one spouse would be able to reach that spouse's one-half (1/2) interest in the property owned by the Trust. This is the case even if the Trust is irrevocable. Self-settled asset protection trusts are not permitted in Florida (although they are permitted in other states that have opt-in community property trusts).
- More Asset Protection - Compared to Traditional Community Property. Importantly, a Florida Community Property Trust may provide stronger protection than other types of community property; for example, community property acquired by the spouses while living in California would be subject to creditor claims of either spouse.
- Most Asset Protection - Florida Homestead – Fully Protected from Creditor Claims. Homestead property transferred to a CPT will maintain its protections and exemptions as if owned by one or both of the settlor spouses and will not be treated as a change of ownership for the purpose of reassessing the property.
  - Homestead Acreage Limits - Note, however, that in the case of homestead property that exceeds the applicable acreage limits, TBE ownership may be the better option.

Pitfalls and Tax Issues

- How to Improve Creditor Protection – Multi-Member LLC. It may be possible to increase the level of asset protection that can be provided with a CPT by incorporating a multi-member Florida limited liability company ("FLLC").
  - Example. If spouses established a CPT with property having a fair market value of $1 million, a future creditor seeking to enforce a judgment against one spouse would be able to access $500,000 of such property. However, if the spouses established a CPT with interests in a multi-member FLLC that owns property having a fair market value of $1 million, the creditor may be limited to obtaining a charging order against that spouse's one-half interest in the FLLC (provided it is then considered to be a multi-member LLC).
- CPT is 100% Owner - Multi-Member or Single-Member LLC? It is not clear if an FLLC owned 100% by a CPT will be considered a multi-member LLC. It is possible that the FLLC will be treated as a single-member LLC, and therefore its owners would not have the same protections as the owners of a multi-member FLLC. To ensure that the FLLC owned by the CPT will be treated as a multi-member FLLC, each spouse should retain an ownership interest in the FLLC.
- Valuation Discounts Apply to LLCs. Before deciding to maintain assets owned by the CPT in an FLLC, the spouses would need to consider that the step-up in basis may be reduced if valuation discounts apply on the death of the first spouse.
- 754 Election After Death of First Spouse. If the FLLC was taxed as partnership for federal income tax purposes, the FLLC can make a "754 election" on the death of the first spouse. If the election is made, there is an increase the inside basis of partnership assets pursuant to I.R.C. §743(b).

Pitfalls and Tax Issues

- #2 - Change to Property Rights. Contributing property to a CPT could result in significant changes to the couple's property rights during life, at death, and in the event of a divorce. For example, in the event of divorce, the Trust property will be distributed one-half (1/2) to each spouse. Keep in mind, 50% of marriages end in divorce.
- #3 - Limited Trust Funding for Surviving Spouse. Upon the death of the first spouse, one-half (1/2) of the CPT becomes the property of the surviving spouse (or subject to amendment or withdrawal). As a result, ONLY one-half (1/2) can of the CPT can used to fund an irrevocable trust for the benefit of the surviving spouse.
  - Protection from Creditors. ONLY one-half (1/2) can be protected from the surviving spouse's creditors with an irrevocable trust.
  - GST Tax Planning. Similarly, ONLY one-half (1/2) can be used to fund a GST tax exempt trust on the death of the first spouse to die. Remember, the GST tax exemption is NOT portable.
  - Restricting Transfers Outside the Family. CPT CANNOT be used to limit the surviving spouse's ability to transfer one-half of the assets after the death of the first spouse. The surviving spouse MUST be permitted to amend the CPT as to the surviving spouse's one-half share.

Pitfalls and Tax Issues

- #4 - Takes 1-Year to Implement. If a spouse dies within one (1) year of funding the CPT will not work as intended. Step-up in basis will be limited under I.R.C. §1014(e). The result likely depends on which spouse initially owned the appreciated property.
  - Example: Spouse with low basis assets makes a gift to a Florida Community Property Trust. If the other spouse (donee spouse) dies within one (1) year of funding, and the assets are devised to the surviving spouse who initially held the low basis assets, it is possible that the deceased spouse's one-half of the Trust will not receive a step-up in basis. However, the surviving spouse's one-half of the Trust may still receive a step-up in basis (which is a better result than no planning).
- Avoiding Application of I.R.C. §1014(e).
  - Devise to Children. If the assets are not devised to the donor spouse, the limitations under I.R.C. §1014(e) will not apply. For example, if wife transfers low basis assets to husband, and husband dies one week later, and if husband's will devises such assets to children, the children will have a basis in the assets equal to the fair market value of such assets as of the date of the husband's death. As a result, the children can sell the assets and will not have to recognize the pre-death built-in gain.
  - Disclaimer by Surviving Spouse. Even if the assets were devised to or in trust for the surviving spouse, the surviving spouse could make a qualified disclaimer under I.R.C. §2518, and would then be treated as having predeceased, which would avoid the application of I.R.C. §1014(e).

Pitfalls and Tax Issues

- #5 Complex to Draft and Administer - Example - Non Pro-Rata Funding. Under community property law, on the death of the first spouse, one-half of each asset is ALREADY owned by the surviving spouse, was NEVER in the deceased spouse's estate, and is treated as owned by the surviving spouse AT ALL TIMES. If on the death of the first spouse each asset of the CPT is allocated one-half to each spouse's share, the assets should be treated as community property under I.R.C. Section 1014(b)(6). However, if on the death of the first spouse certain assets are allocated 100% to either spouse's share, will the double step-up still apply?
  - I.R.C. Section 1014(b)(6) requires that at least one-half of the community property be included in the deceased spouse's estate. The question is whether this code requirement is determined on an asset-by-asset basis, or because one-half of the value of the trust is included in the deceased spouse's gross estate, it qualifies under I.R.C. Section 1014(b)(6).
  - Florida Bar Journal Article on Community Property Trusts "This approach would result in no basis adjustment to the [**property allocated 100% to the surviving spouse's share**] because less than one-half (actually none) would be included in the deceased spouse's gross estate." See I.R.C. Section 1014(b)(6).
- Recommendation - Consider requiring that one-half of EACH asset owned by the CPT be allocated to each spouse's share. Even though the Florida Community Property Trust Act allows for non-pro funding, require a one-half interest in each be distributed to the decedent's estate and one-half to the surviving spouse. Advise trustees to divide the assets on a 50/50 basis.

Pitfalls and Tax Issues

- #7 - Taxable Gift on Funding. Without proper planning, a transfer to a joint trust may result in an immediate taxable gift that does NOT qualify for the gift tax MARITAL DEDUCTION. This would not be a good result for a client with a taxable estate. To minimize the extent of any unintended tax issues at the time of funding a Florida Community Property Trust, the following steps are generally advisable.
  - Identical Funding - Transfers Between Spouses PRIOR to Funding. Each spouse should fund the Trust at the same time, with identical assets, to minimize gift tax risk (which still may exist because each has different life expectancy, which affects valuation of the gift). This may require a spouse holding separate property to first retitle the property into separate but equal ownership before contributing the property to a Florida Community Property Trust. Any gift from one spouse to the other (BEFORE funding the Trust) should qualify for the gift tax MARITAL DEDUCTION (unless the spouses are not U.S. citizens). In addition, any deemed "exchange" between U.S. citizen spouses should not result in taxable income (unless the property has negative basis). See I.R.C. §1041(a).
    - Note: If the Florida Community Property Trust is funded exclusively with community property the spouses acquired while living in a community property jurisdiction, each spouse should be making similar contributions for gift tax purposes.
  - Each Spouse Right to Revoke. Each spouse can be permitted to unilaterally revoke the Trust and receive one-half of Florida Community Property Trust assets. If each spouse retains the right to revoke the Trust, any gift between spouses because of unequal contributions to the Trust should be incomplete.

Pitfalls and Tax Issues

- #8 - Have Think About What Happens if CPT is NOT Treated as Community Property on the Death of the First Spouse – For Example – Estate Tax Treatment. Provided that the deceased spouse's interest in the CPT is treated as community property for federal tax purposes, one-half of the value of the CPT will be included in the gross estate of the first spouse to die. However, if the deceased spouse's interest in the CPT is NOT treated as community property, the results may be different. For example, the analysis to determine the portion included in the gross estate of the first spouse to die for a joint revocable trusts established with separate property (not community property), can be complex.
- #9 - Have to Monitor for Loss Property - Step-Down in Basis for Loss Property. Built-in capital loss property owned by the Trust will be treated as community property under I.R.C. §1014(b)(6). As a result, upon the death of the first spouse to die, all built-in capital loss property owned by the Trust will automatically have a reduced basis equal to fair market value. In that event, having the property treated as community property may possibly increase income taxes for the surviving spouse. A Florida Community Property Trust should not be used to hold or maintain loss property.
- #10 - Potential Changes in the Tax Law. If step-up in basis is eliminated by a change in the tax laws, or if the tax benefits of community property are eliminated by a change in the law, and that was the primary reason for establishing the Florida Community Property Trust, clients would have wasted the time, effort, and resources associated with establishing and maintaining the Trust.

Pitfalls and Tax Issues

- #11 - Non-Citizen Spouse. Remember, there are limitations on gifts to a non-U.S. citizen spouse. For 2026, the annual limitation on gifts to non-U.S. citizen spouses is $194,000. Proceed with caution before planning with any kind of joint trust (including a CPT) with a non-U.S. citizen spouse.
- #12 - Uncertainty in Planning with Real Estate Located Outside of Florida. Although there is support for treating real estate located outside of Florida as Florida community property if owned by a CPT for purposes of I.R.C. §1014(b)(6), the result is not certain. This is especially true if the property is located in a non-community property state, or common law state that has not adopted protections for community property rights. In determining whether there is community property under state law, the IRS may apply the law of the state where the property is located.
  - Potential Solution – Florida LLC. Instead of direct ownership of non-Florida real estate and tangible personal property by the Florida Community Property Trust, spouses should consider transferring such property to a Florida limited liability company. This structure will increase the likelihood that the trust's interest in the LLC (which owns the real estate and tangible personal property located outside of Florida) will be treated as community property under the Florida Community Property Trust Act.

Pitfalls and Tax Issues

- #13 - Uncertain Results for Married Couples Outside of Florida. There is no requirement under the Community Property Trust Act that either settlor spouse reside in Florida (only that there be a Florida trustee). However, if neither spouse lives in Florida, it may affect whether the rights of the spouses under applicable state law are sufficient to establish "community property" within the meaning of I.R.C. §1014(b)(6). If a Florida trustee is the only Florida connection, is that sufficient to establish community property for the couple under I.R.C. §1014(b)(6)?
  - Open Question. It is unclear how the IRS will weigh the domicile of non-Florida settlor spouses against the designation of Florida law under the CPT to determine if there is in fact community property for purposes of state law. The federal taxation of the assets of the CPT will depend on whether the assets are community property for purposes of state law.

Pitfalls and Tax Issues

- #14 Uncertain Income Tax Rules for LLC owned by CPT. When an INDIVIDUAL owns 100% of a limited liability company, it is eligible to be taxed as a disregarded entity for federal income tax purposes and is not required to file a federal income tax return. When a CPT owns 100% of a limited liability company it is unclear if it will be treated as a disregarded entity for federal income tax purposes. Provided such ownership interest is recognized by the IRS to be the same as ownership of a limited liability company held "*solely by a husband and wife as community property under the laws of a state*," then a limited liability company owned 100% by a CPT can be treated as a disregarded entity for federal income tax purposes.
- TRAP – Only Certain Trusts Can Own S-Corporation Shares. Not all trusts are qualified to own S-corporation shares. One of the most common exceptions is a grantor trust. A grantor trust is an eligible shareholder.
  - Both Spouses Living. If the CPT is revocable by either spouse, it will be a "grantor trust."
  - After the Death of First Spouse. The CPT may not be a grantor trust. Determination of grantor trust status after the death of the first spouse is complicated, with no clear guidance.
  - Reminder. If clients plan to contribute any interest in an S-Corporation to a CPT, make sure the CPT will be an eligible shareholder at the time of contribution, and think through how the Trust will be taxed after the death of the first spouse.

Florida Community Property Trust - Pitfalls and Tax Issues

- #15 - Uncertain Results when Gifts From a Florida Community Property Trust. There is nothing in the Act that prohibits spouses from gifting assets from a CPT to third parties. If the trustee (while both spouses are living) transfers assets from a CPT to a child of one of the spouses (for example), what is the result? Pursuant to Fla. Stat. §736.1505(5), when property is distributed from a CPT, the property shall no longer be considered community property under the Act (but may retain its character as community property pursuant to the laws of another jurisdiction). Assuming the property transferred by the trustee to the child is not community property under the laws of another jurisdiction, is the transfer from the CPT to the child treated as a gift of community property for federal estate, gift and GST tax purposes, or as a gift of separate property? Who is the transferor of the property for federal transfer tax purposes? Should the couple reclassify the property as separate property after distribution from the CPT? What are the GST tax consequences of a gift from CPT to an irrevocable trust for children and grand children?
- #16 - Fractional Interest Discounts Apply. The valuation rules under I.R.C. Section 2040 DO NOT apply to community property. Instead, the property is valued under I.R.C. Section 2041, and each spouse has a fractional one-half interest. As a result, on the death of the first spouse, it is often the case that valuation discounts will apply on the death of the spouse. The reduced valuation will LIMIT the step-up in basis on appreciated property. Question: What is the value of the deceased spouse's one-half interest in the CPT with a non-pro rata funding?
  - Improves Estate Tax Planning: Valuation discounts can be helpful if the value of the assets will be subject to federal estate tax.
- #17 - Must Coordinate with Existing Premarital or Postnuptial Agreement. If clients have an existing premarital or postnuptial agreement in place, carefully consider the impact of a Florida Community Property Trust. Clients must first determine if the Trust is permitted under the agreements, and then whether any changes are required prior to entering into the Florida Community Property Trust. Beware of inadvertent modification of existing marital agreements.

Pitfalls and Tax Issues

- #18 - Must File a Joint Income Tax Return. Spouses that establish a CPT should file a joint federal income tax return to avoid the complications that may arise with separate income tax reporting for opt-in community property trusts. After the death of the first spouse, the CPT may not longer be a grantor trust (at least in part). The analysis can be complicated in the case of joint trust on the death of the first settlor.
- #19 - Transaction Costs. It is important to note that the planning and administration associated with the CPT will continue after the death of first spouse. Specifically, the surviving spouse and the surviving spouse's advisors will need to establish the cost basis for the assets owned by the CPT, appropriately report such basis on the applicable post-death tax returns (1040, 1041, 706, 8971), be prepared to respond to any audits, and make sure the parties are aware of associated tax risks and uncertainties.
- #20 - Lack of Finality. Even after the CPT has been terminated and subsequent sale of assets have been reported, it will likely be several years before the surviving spouse can be certain the CPT worked as intended. Generally, the IRS statute of limitations remains open for 3-years after the tax return has been filed.

CPT Planning with Florida Homestead

- Documentary Stamp Taxes. Avoid triggering documentary stamp taxes when transferring homestead to a CPT. Best practice would be to first divide the property into 50-50 tenants-in-common ownership, and then each spouse transfers one-half to the CPT.
- Real Estate Taxes. Best practice is to confirm with the property appraiser there will not be a reassessment for ad valorem tax purposes. Again, best practice would be to first divide the property into 50-50 tenants-in-common ownership, and then each spouse transfers one-half to the CPT.
- Minor Child. Florida homestead is not subject to devise if the deceased spouse has a minor child.

CPT Planning with Florida Homestead

- Overview. The combination of Florida homestead and community property is a NEW area of Florida law. Why, because FUDCPRDA does NOT apply to homestead. Investment of community property in a Florida homestead or tenants by the entirety account creates a "*conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested*."
- No Minor Child: Homestead is owned by a CPT and there are no other assets in the CPT. First spouse dies without a minor child.
  - Share of the surviving spouse. Is the vesting of the share of the surviving spouse in the Florida homestead a "*devise*" for purposes of Section 4, Article X of the Florida constitution? Under traditional community property principals, the answer is no. Does it matter whether the surviving spouse's one-half interest in the Florida homestead is devised directly to the surviving spouse on the death of the first spouse to die? Or, can the surviving spouse's one-half interest continue to be held in the CPT, which is subject to revocation by the surviving spouse?
  - Share of the deceased spouse. One-half of the Florida homestead is the share of the decedent spouse and subject to testamentary devise. If the decedent spouse's one-half share is not devised directly to the surviving spouse (outright and free of trust) there will be an invalid homestead devise. What if the decedent spouse's one-half interest is held in further trust?

Florida Homestead – Strategies for Avoiding Devise Limitations

- Homestead Waiver Agreement (the Gold Standard)
  - A spouse can waive homestead rights under §732.702.
  - A homestead waiver agreement entered into by spouses after the marriage should be signed with the same formalities and include the same financial disclosures as a postnuptial agreement.
- Homestead Waiver by Deed
  - Homestead devise limitations can also be waived by the spouses in the deed transferring ownership to the CPT. See §732.7025. For a more detailed discussion see the 2019 ActionLine article authored by Joe Tschida.
- Exception for Irrevocable Trusts
  - Can a CPT be made irrevocable to avoid the homestead devise limitations that would otherwise apply on the death of the first spouse? Or if there is a minor child?
  - Remember, the surviving spouse must have the power to amend the CPT with respect to the surviving spouse's one-half share after the death of the first spouse.
  - Given this limitation, can a CPT qualify as a trust described in §732.4017(2)?

Florida Homestead – Strategies for Avoiding Devise Limitations

- LLC ownership and 99-year lease
  - If the homestead is owned by an FLLC with the CPT as its sole member, the homestead will not be subject to devise limitations.
  - However, without more planning, the homestead will also not qualify as homestead for ad valorem tax purposes. If the spouses entered into a 99-year lease with the FLLC, the spouses' interest in the lease would qualify for homestead ad valorem tax treatment.
- Distribution of the Entire Homestead Directly to the Surviving Spouse
  - The CPT can be drafted to comply with the Florida devise limitations applicable to the decedent spouse's one-half share.
  - The CPT can direct that upon the death of the first spouse, the decedent spouse's one-half share in the homestead property be devised to the surviving spouse, outright and free of trust.

Florida Homestead – Strategies for Avoiding Devise Limitations

- Can Devise Limitations be Avoided with Post-Death Funding: Homestead is owned by a CPT and there are other assets in the CPT of the same or greater value. First spouse dies without a minor child. Can the Trustee allocate 100% of the Florida homestead to "*the share of the surviving spouse*" and an equal value of other assets to "*the share of the decedent spouse*?"
- Funding of Shares. Pursuant to §736.1507 "*the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation*." Furthermore a "*distribution in kind may be on the basis of a non-pro rata division of the aggregate value of the trust assets*."
- Vesting of Homestead. However, protected Florida homestead vests immediately on death. In one case, the court noted that title vests "*in a twinkle of an eye*." When and how does protected Florida homestead vest in the case of a CPT? Is the vesting delayed until after the trustee decides to allocate the Florida homestead to one, or the other, or both spouses' shares?

Tax Analysis

- State Law Analysis Controls. State law controls the characterization of property within the meaning of I.R.C. §1014(b)(6).
  - Appreciated property owned by the CPT on the death of the first spouse to die SHOULD receive a double step-up in basis under I.R.C. §1014(b)(6) BECAUSE the CPT assets have ALL the essential characteristics of traditional community property.
  - However, this analysis has not been confirmed.
- *Harmon* Case. The IRS could argue that property owned by the Florida Community Property Trust does not qualify as community property under I.R.C. §1014(b)(6). The IRS could cite to the *Commissioner v. Harmon* case as authority for its position.
  - In the *Harmon* case, the U.S. Supreme Court held that a state statute allowing a married couple to ELECT community property treatment will NOT be recognized as community property for federal income tax REPORTING purposes. Cannot split income in opt-in states.
  - The IRS may take the position that the *Harmon* case should apply to opt-in community property trust legislation in Florida, and extend its application to I.R.C. §1014(b)(6).
- Distinguishing *Harmon*. (1) I.R.C. §1014(b)(6) was adopted AFTER *Harmon* and applies to community property under the laws of ANY state; there is no limitation in the Code to "traditional" community property states only. (2) Only applies to federal income tax reporting, not application of I.R.C. §1014(b)(6).

No Guidance from the IRS

- IRS Has Declined to Comment. In IRS Publication 555, the IRS expressly declined to comment on the federal income tax treatment of community property trusts established in non-community property jurisdictions. It is unclear why the IRS has refused to comment; however, some practitioners believe the IRS views these trusts as abusive and providing too much flexibility.
- IRS Guidance Coming Soon? The recognition of CPT assets as community property under the code for basis step-up purposes in not included in the IRS 2025-2026 priority guidance plan.
- Question for the Audience. Is anyone aware of a pending case or ruling on the double-step up for CPTs?
- Botton Line. We do not know whether the double step-up in basis will apply to property owned by a CPT on the death of the first spouse.

Achieving Finality

- Waiting Out the 3-Year IRS SOL. Surviving spouse will NOT know whether the CPT "*worked*" as intended until after the IRS statute of limitations (typically 3 years) has passed on the federal income tax return(s) filed to report the sale of the surviving spouse's one-half (1/2) interest in the CPT.
  - Example. Spouse dies in November of 2026, and surviving spouse sells her one-half share of the assets of the CPT in December of 2026 and then reports the sale on the surviving spouse's federal income tax return (IRS Form 1040), which is filed in October of 2027. No finality until October of 2030.
    - Questions. What disclosures are required to be provided to the IRS in connection with the income tax reporting on the surviving spouse's 1040? Is there a risk of return preparer penalties?
    - Best Practice. Spouses should consult with their CPA (who will be reporting the sale after the death of the first spouse) to confirm the CPA is comfortable with the plan for filing the 1040 and 1041s, and the plan for reporting the sale of assets owned by the CPT after the death of the first spouse.
  - Will the 706 and 8971 bind the IRS if the Step-Up for the Surviving Spouse's One-Half is Reported? Likely not. IRS Form 706 and IRS Form 8971 may not prevent the IRS from taking issue with the basis reported on the surviving spouse's 1040 reporting the sale of surviving spouse's share of the CPT assets after the death of the first spouse.

Enforcing a Florida Community Property Trust

- Unenforceable CPT. A court can determine that a CPT is unenforceable if:
  - Trust is unconscionable
  - Not executed voluntarily
  - Fraud, duress, coercion or overreaching
  - Lack of financial disclosure (see specific language in §736.1512).
  - Generally speaking, the grounds for challenging a CPT are similar to ground for challenging a premarital / postnuptial agreements.
- Best Practice: Use the same techniques and formalities applicable to a postnuptial agreement.
  - (1) Careful compliance with financial disclosure rules (full list of assets and liabilities, tax returns, income projections), (2) separate counsel for each spouse, (3) memo to clients explaining pros, cons and risks, documenting each spouse had ample time to review planning.
  - Spouses are NOT required to have independent counsel.
- Unenforceable Terms. Any term that would "*violate public policy or general law imposing a criminal penalty, or result in the property not being treated as community property under the laws of a relevant jurisdiction*" is unenforceable. How will this language be applied by the courts?

Florida Rules of Professional Conduct

- Interesting Dynamic. Couples most likely to establish CPTs are the same couples that most likely have the SAME lawyer
- Advantages: reduced legal fees, collaboration, same lawyer being used for estate planning
- Potential conflicts of interest.
  - Changing rights in the event of a divorce
  - Changing distribution of property at death
  - A waiver of homestead rights is often required
  - Pre-funding ownership transfers between spouses
  - Less creditor protection

How to Analyze Conflicts Under the Rules. First, the lawyer must remember the lawyer has two separate clients. A married couple is NOT a client under the Rules of Professional Conduct. The lawyer owes FULL duties under the Rules to EACH spouse. Protections under the Rules for couples being jointly represented are not diminished.

Legal and Ethical Issues

- Ethical Issue. Will a joint representation be permitted under Rule 4-1.7?
  - It depends: Are the spouses' interests aligned? Can the same lawyer provide "*competent and diligent representation*" to both spouses?
  - Statutory language warning about the risks of joint representation. Does this increase scrutiny under the Rules?

- Malpractice Issue. Is there an increased risk to the lawyer in drafting a CPT for both spouses given the statutory warning language? Note, estate planning is a high-risk practice area (actually, it ranked at the top in terms of number of claims).

- Closing Thoughts.
  - Are the ethical issues associated with representing both spouses with a CPT really that unique?
  - For example, the ethical issues in establishing and funding a SLAT a very similar.

	Comparison Chart					
		Florida Community Property Trust	TBE Property	Separate Revocable Trusts	Non-Reciprocal Intervivos QTIP Trust	LLC Ownership (One-half Owned by Each Spouse)
	Asset Protection While Both Spouses are Living	No protection against joint creditors. A creditor of one spouse may access the debtor spouse's one-half of the trust property.	Protects assets from creditors against one spouse. No protection against joint creditors. Exposure for debtor who becomes surviving spouse.	Assets owned by one spouse's revocable trust will not be subject to creditors of the other spouse. No protection against joint creditors.	Protected from creditor claims; however, income is required to be distributed.	Charging order protection against creditor claims (even joint creditors).
	Asset Management While Both Spouses are Living	Assets can be managed and controlled consistent with estate planning goals.	Both spouses have equal rights to property. One spouse may be able to unilaterally exercise his or her rights over a TBE account.	Each spouse has full control and authority over the assets owned by his or her revocable trust.	Assets can be managed and controlled consistent with estate planning goals; however, the trusts are irrevocable and cannot be changed after formation.	Assets can be managed and controlled consistent with estate planning goals.
	Division in the Event of Divorce	Each spouse is entitled to a one-half share of the trust.	Equitable distribution statutes will apply.	Equitable distribution statutes will apply.	Donee spouse will continue to receive all income from that spouse's QTIP Trust, even after the divorce.	Equitable distribution statutes will apply.
	Disposition on Death of First Spouse	One-half share is property of the surviving spouse and one-half share is subject to disposition by the decedent.	Passes automatically to the surviving spouse. No amount will be subject to disposition by the decedent, unless the surviving spouse disclaims.	Deceased spouse's trust assets are subject to disposition by the decedent. Surviving spouse will continue to be in control of his or her revocable trust.	Irrevocable trust(s) may be established for the surviving spouse. The assets of any credit shelter trust can be excluded from the taxable estate of the surviving spouse (even though the surviving spouse was the donor of the initial QTIP Trust).	One-half owned by the deceased spouse is subject to disposition by the decedent.
	Ability to Limit Transfers While Both Spouses are Living	In many cases, each spouse will have the power to unilaterally revoke the CPT.	No, both spouses have equal access to TBE accounts.	Each spouse has full control over the assets owned by his or her revocable trust.	Yes, QTIP trust can limit transfers.	Yes, an LLC can limit transfers outside the family.
	Gift Tax on Formation and Funding (assuming both spouses are U.S. citizens)	Can be carefully drafted and funded to avoid adverse gift tax consequences at the time of funding, and by the surviving spouse on the death of the first spouse to die.	No gift tax concerns in establishing TBE property.	No gift tax concerns in funding the revocable trusts.	Provided a QTIP election is made on a timely filed gift tax return, the entire gift may qualify for the gift tax marital deduction.	No gift tax concerns in funding the LLC.
	Basis Adjustment on Death of First Spouse (assuming no transfers within 1 year of death)	All of the assets of the CPT should be adjusted to fair market value on the death of the first spouse to die. Valuation discounts could apply in determining fair market value.	One-half of the assets will be adjusted to fair market value on the death of the first spouse to die. Note exception for pre-1977 property.	Assets owned by the revocable trust of the deceased spouse will be adjusted to fair market value.	Assets owned by the QTIP trust established for the benefit of the deceased spouse will be adjusted to fair market value on the death of such spouse.	LLC interest included in taxable estate of deceased spouse will be adjusted to fair market value; however, valuation discounts may erode basis increase for appreciated property.
	Estate Tax on Death of First Spouse	One-half of the assets should be included in the taxable estate of the first spouse to die under I.R.C. §2033.	One-half of the assets will be included in the taxable estate of the first spouse to die under I.R.C. §2040. Note exception for pre-1977 property.	Assets owned by the revocable trust of the deceased spouse will be included in his or her taxable estate under I.R.C. §2038.	Assets owned by the QTIP trust established for the benefit of the deceased spouse will be included in the deceased spouse's taxable estate under I.R.C. §2044.	LLC interest owned by the first spouse to die will be included in his or her taxable estate. Valuation discounts may be used to reduce estate taxes.
	GST Tax Planning On Death of First Spouse	A one-half share will be available to fund a GST exempt trust.	Unless surviving spouse disclaims, no amount will be available to fund a GST exempt trust.	Assets in the deceased spouse's revocable trust will be available to fund a GST exempt trust.	Unless a reverse QTIP election was made at the time of funding by the surviving donor spouse, the deceased spouse's GST exemption can be allocated to the QTIP trust.	LLC interest owned by the first spouse to die may be used to fund GST exempt trust.

Thank you

