

Florida Community Property Trusts

Rethinking Client Trust Logistics With A New Powerful Catalyst.



By: Alan Gassman and Christopher Denicolo

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Alan S. Gassman, Esquire and Christopher J. Denicolo, Esquire provide members with commentary that examines the planning implications of Florida's Community Property Trust Act.

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Here is their commentary:

EXECUTIVE SUMMARY:

Effective July 1, 2021, Florida has enacted a Community Property Trust Act that allows for married couples to "opt-in" to community property treatment for assets held in a trust that meets certain requirements. As described below, community property can have considerable income tax planning benefits on the death of the first spouse due to Internal

Revenue Code Section 1014(b)(6), which provides for all community property assets (including the surviving spouse's interest in community property) to receive a full step-up in basis upon the death of the first dying spouse. Hats off to the Judiciary Committee of the Real Property, Probate and Trust Law Section of the Florida Bar and countless others for working with State Senator Berman and State Representative Diamond to design, draft, and implement what we believe to be the best Community Property Trust legislation in the Country.

Community Property: An Overview

Some of the key information regarding this community property overview has been derived from an excellent article written by Steve R. Akers as part of his ACTEC 2013 Fall Meeting Musings, which can be found at <https://www.naepcjournal.org/journal/issue16d.pdf>.

What is Community Property?

There are two primary types of legal regimes concerning the ownership of property by legally married couples – community property law states and common law states (also known as separate property states). Under a community property system, all property of the spouses is considered to be either “community” or “separate” property. All property acquired during the marriage is generally presumed to be community property unless clear and convincing evidence demonstrates that the property is the separate property of one spouse only. For example, property received by one spouse as a gift or inheritance as his or her “sole and separate property” generally becomes the sole and separate property of that spouse. (See, Steve R. Akers, ACTEC 2013 Fall Meeting Musings, November 2013, pg. 3).

In the United States, there have historically been eight community property states and two territories that have applied community property law:

- Arizona
- California
- Idaho
- New Mexico
- Louisiana
- Texas
- Nevada
- Washington (state)
- Guam
- Puerto Rico

The laws in these states generally evolved from Spanish law, except that Louisiana's community property law came from France.

It is worth noting that in Louisiana, married couples who have assets characterized as community property can modify or terminate community property characterization only upon joint petition and a finding by a court that this serves their best interests. (La. Civ. Code Ann. art. 2329) In the other community property states, couples can simply enter into matrimonial agreements during marriage (without petitioning a court) that modify or terminate (“transmute”) their community property characterization of assets, and may be required to record such agreements to transmute real estate.

Wisconsin became the ninth member of the “community property state” club in 1986 when it became the first state to adopt the Uniform Marital Property Act, which is a community property system developed by the National Conference of Commissioner on Uniform State Laws. In 1998, Alaska also enacted the Uniform Marital Property Act on an elective basis so that couples who reside in Alaska have the choice of having the community property law apply or not apply.

While the nine community property states discussed above are all considered “community property states,” it should be noted that there are differences among the laws of the community property states. Exhibit 25.18.1-1 of the IRS Manual details many of these differences.

As noted by Steve Akers, Oklahoma and Oregon had opt-in community property systems briefly, but quickly repealed them less than a year after enactment of the Revenue Act of 1948. This was shortly after Abraham Lincoln invented the internet and Jonathan G. Blattmachr considered an installment sale to a Defective Grantor Trust. (Steve R. Akers, ACTEC 2013 Fall Meeting Musings, November 2013, pg. 3.)

Alaska adopted an innovative “opt-in” Community Property Trust law in 1998, which is described below, and Tennessee, South Dakota, and Kentucky also adopted “opt-in” community property systems in 2010, 2016, and 2020. The Kentucky and Tennessee statutes are very similar.

Alaska’s Community Property Act, which was enacted in 1998 under the leadership of Jonathan G. Blattmachr, provides that non-Alaskans can hold assets in Alaska Community Property Trusts, with the expectation that all assets of the trust will receive a step-up in basis upon the death of the first spouse.

Likewise, the Tennessee Community Property Trust law that was enacted in 2010 allows for non-Tennessee residents to hold assets in Community Property Trusts. Under the Tennessee Community Property Trust law, the obligation of one spouse incurred before or during the marriage can be satisfied only from that spouse’s one-half of the trust. On a spouse’s death, half of the value of the trust reflects the deceased spouse’s share and the other half reflects the surviving spouse’s share. These provisions are similar to Florida’s new rules, which are discussed below.

In March of 2020, Kentucky followed suit and enacted their own Community Property Trust legislation that allows non-resident married couples to place assets in Community Property Trusts.

While the Alaska, Tennessee, and Kentucky Acts seek to provide non-residents with the ability to “opt-in” to the advantages of community property, commentators have

pointed out concerns about whether the trusts will be afforded such tax treatment, and that creating such trusts can potentially forfeit valuable creditor protection benefits.

Effective July 1, 2021, Florida has joined the ranks of the “opt-in” Community Property Trust jurisdictions by enacting the Florida Community Property Trust Act, which is described in more detail below...[Continue reading the article PDF here.](#)

Married Couple’s Trust Decision Chart

	JEST (Joint Exempt Step-Up Trust)	Tenants by the Entireties Trust	Joint Trust – Not TBE, JEST, or CPT	Florida Community Property Trust	Tennessee Community Property Trust	South Dakota Community Property Trust	Alaska Community Property Trust	Kentucky Community Property Trust
Step-Up in Basis After First Death	Probably Yes	Only Half of a Step-Up	Depends Upon Drafting and Logistics	Probably Yes	Probably Yes	Probably Yes	Probably Yes	Probably Yes
Creditors of One Spouse Can Reach Trust Assets	Yes – the Debtor Spouse’s Share	Protected from Either Spouse’s Creditors	Depends Upon Trust Drafting	One-Half of Trust Assets Exposed to One Spouse’s Creditors	One-Half of Trust Assets Exposed to One Spouse’s Creditors	All of Trust Assets Exposed to One Spouse’s Creditors	All of Trust Assets Exposed to One Spouse’s Creditors	One-Half of Trust Assets Exposed to One Spouse’s Creditors
Can Create Credit Shelter Trust With More Than Half of the Trust Assets	Yes, All Trust Assets May Go Into Credit Shelter Trusts	Up to Half, But Only by Disclaimer or Surviving Spouse Will Not Have a Power of Appointment	Depends Upon Drafting – Be Careful!	Only as to One-Half	Only as to One-Half	Only as to One-Half	Only as to One-Half	Only as to One-Half
May Share Upon Divorce as Set Forth in Pre- or Post-Nuptial Agreement	Yes	Probably Not	Yes	Yes – Spouses can agree on the dissolution of property Fla Stat. 736.1508	Yes – Spouses can agree on the dissolution of property	Yes – Spouses can agree on the dissolution of property	Yes – Spouses can agree on the dissolution of property	Yes – Spouses can agree on the dissolution of property
May Be Converted from Former Joint or Individual Trust	Yes	Yes	N/A	No – Must Be Created On or After July 1, 2021 as a new Florida Community Property Trust	N/A	Yes	Yes	Yes
Complicated to Draft?	Yes	Simpler than JEST	Will Depend Upon Specifics	Simple to Draft if the Statute is Followed	Simple to Draft if the Statute is Followed	Simple to Draft if the Statute is Followed	Simple to Draft if the Statute is Followed	Simple to Draft if the Statute is Followed
Requires a “Qualified” Trustee	No	No	No	Yes	Requires a Tennessee Trustee	Requires a South Dakota Trustee	Requires an Alaska Trustee	Requires a Kentucky Trustee

State	Requirements	Creditor Protection	Property Included	U.S.C. s. 1014(b)(6)
Florida	<p>(1) Expressly declares that the trust is a community property trust within the meaning of this part</p> <p>(2) Has at least one trustee who is a qualified trustee, provided that both spouses or either spouse also may be a trustee</p> <p>(3) Is signed by both settlor spouses consistent with the formalities required for the execution of a trust under this chapter.</p> <p>(4) Contains substantially the following language in capital letters at the beginning of the community property trust agreement:</p> <p>THE CONSEQUENCES OF THIS COMMUNITY PROPERTY TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE DURING THE COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND UPON THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD BE SIGNED ONLY AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD</p>	<p>(1) An obligation incurred by only one spouse before or during the marriage may be satisfied from that spouse's one-half share of a community property trust.</p> <p>(2) An obligation incurred by both spouses during the marriage may be satisfied from a community property trust of the settlor spouses.</p>	All property owned by a community property trust is community property under the laws of the state during the marriage of the settlor spouses.	<p>36.1511 Application of Internal Revenue Code; community property classified by another jurisdiction.--For purposes of the application of s. 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. s. 1014(b)(6), as of January 1, 2021, a community property trust is considered a trust established under the community property laws of the state. Community property, as classified by a jurisdiction other than this state, which is transferred to a community property trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than the state retains its character as community property to the extent otherwise provided by ss. 732.216-732.228.</p>

	SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE.			
South Dakota	<p>An arrangement is a South Dakota special spousal trust if 1) one or both spouses in a marriage transfer property to a trust, 2) the trust expressly declares that some or all the property transferred is South Dakota special spousal property as provided in this chapter, 3) and at least one trustee is a qualified person. A South Dakota special spousal trust is enforceable without consideration. Both spouses or either spouse may be a trustee. The trust must be signed by both spouses. The trust may be revocable or irrevocable.</p> <p>For purposes of this section, a qualified person is any person who meets the requirements of §§ 55-3-41 and 55-3-39, but without regard to whether that person is the transferor.</p> <p>4) A South Dakota special spousal trust shall contain the following language in capital letters at the beginning of the trust:</p> <p>THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR</p>	<p>Notwithstanding anything contained in § 55-17-9 to the contrary:</p> <p>(1) A provision of a revocable South Dakota special spousal property trust does not adversely affect the interest of a creditor unless the creditor has actual knowledge of the trust when the obligation to the creditor is incurred. The interest of a creditor in an irrevocable South Dakota special spousal property trust may be subject to the rights and liabilities of a creditor with respect to transfers under chapter 55-16 as provided in § 55-17-6;</p> <p>(2) A spouse shall act in good faith with respect to the other spouse in matters involving South Dakota special spousal property. The obligation under and effect of this</p>	The trustee of a South Dakota special spousal trust shall maintain records that identify which property held by the trust is South Dakota special spousal property and which property held by the trust is not South Dakota special spousal property.	<p>For purposes of the application of § 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. § 1014(b)(6), as of January 1, 2016, a South Dakota special spousal trust is considered a trust established under the community property laws of South Dakota. For purposes of this chapter, the term, special spousal property, means community property for those purposes. Community property as classified by a jurisdiction other than South Dakota transferred to a South Dakota special spousal trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than South Dakota retains its character as community property to the extent otherwise provided by South Dakota law.</p>

	MARRIAGE, AT THE TIME OF A DIVORCE, AND AT THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK INDEPENDENT LEGAL ADVICE.	section may not be varied by a South Dakota special spousal property trust.		
Alaska	<p>(a) A community property agreement must be contained in a written document signed by both spouses and classify some or all of the property of the spouses as community property. It is enforceable without consideration.</p> <p>(b) A community property agreement must contain the following language in capital letters at the beginning of the agreement: THE CONSEQUENCES OF THIS AGREEMENT MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE</p>	<p>(i) An obligation incurred by only one spouse before or during marriage may be satisfied only from the property of that spouse that is not community property and from that spouse's interest in community property. This subsection does not apply to an obligation described in (b) of this section.</p> <p>(k) An obligation incurred during marriage by both spouses may be satisfied from property of each spouse that is not community property and</p>	(h) The trustee of a community property trust shall maintain records that identify which property held by the trust is community property and which property held by the trust is not community property.	N/A

	SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE.	from the community property.		
Tennessee	<p>(c) A community property agreement may not adversely affect the right of a child to support.</p> <p>An arrangement is a community property trust if one or both spouses transfer property to a trust, that:</p> <p>(1) Expressly declares that the trust is a Tennessee community property trust;</p> <p>(2) Has at least one (1) trustee who is a qualified trustee whose powers include, or are limited to, maintaining records for the trust on an exclusive or a nonexclusive basis and preparing or arranging for the preparation of, on an exclusive or a nonexclusive basis, any income tax returns that must be filed by the trust. Both spouses or either spouse may be a trustee;</p> <p>(3) Is signed by both spouses; and</p> <p>(4) Contains the following language in capital letters at the beginning of the trust:</p>	<p>(a) An obligation incurred by only one spouse before or during marriage may be satisfied from that spouse's one-half (1/2) share of a community property trust.</p> <p>(b) An obligation incurred by both spouses during marriage may be satisfied from a community property trust of the spouses.</p>	(c) All property owned by a community property trust will be community property during marriage.	N/A

	<p>THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE.</p>			
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