Florida's New Community Property Trust Act

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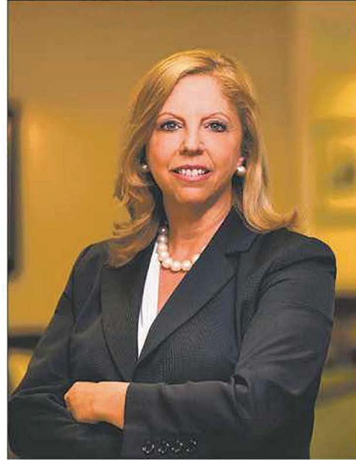
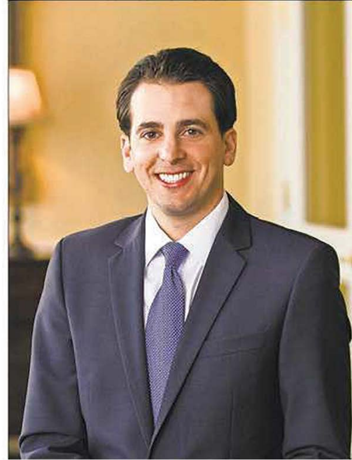


Lisa Schneider



Josh Goldglantz

Effective July 1, 2021, Florida enacted the "Community Property Trust Act" (the "Act") which now enables married couples to take advantage of certain planning benefits not previously afforded to Florida residents. The Act allows married couples to "opt-in" to community property treatment for assets held in a Florida Community Property Trust, provided the trust meets certain statutory requirements. So, what is the benefit of owning community property?

Florida, like a majority of states, is a separate property state with regard to ownership of property by married couples. Alternatively, there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. In community property states, all property owned by a married person is either deemed community property or the separate property of one spouse. In addition, any property acquired during marriage is presumed to be community property unless there is clear and convincing evidence that the property is the separate property of one spouse. Although Florida, and some other states, permit married couples to own property as "tenants by the entirety," this form of property ownership has vastly different characteristics than property categorized as community property. Two of the main differences between tenants by the entirety property ownership in Florida and community property ownership is that tenants by the entirety provides rights of survivorship and asset protection benefits. With respect to rights of survivorship, with tenants by the entirety, when one spouse dies, the legal title to the property automatically passes to the surviving spouse. Alternatively, with community property, in general, spouses have the right to devise their shares of the property as they wish by will or trust. With respect to creditor protection, Florida law provides that tenants by the entirety property is protected from a creditor of either spouse. In general, with community property, one-half of the community property may be exposed to one spouse's creditors.

However, community property has a significant income tax benefit that is not afforded to tenants by the entirety, or any other jointly owned property. Section 1014(b)(6) of the Internal Revenue Code provides that all community property assets, including the surviving spouse's interest in community property, receives a full step-up in basis upon the death of the first spouse. This income tax treatment is specific to property held by a decedent and a surviving spouse under the community property laws of any state. As such, the principal benefit to establishing a Florida Community Property Trust is to obtain this "full step-up in basis" treatment upon the death of the first spouse.

Florida Statute §736.1511 specifically provides that for purposes of the application of Section 1014(b)(6) of the Internal Revenue Code, as of January 1, 2021, a Community Property Trust is considered a trust established under the community property laws of the state. In addition, Florida Statute §736.1503 sets out the following specific requirements in order for a trust to qualify as a Community Property Trust under the Act: (1) the trust expressly declares that the trust is a Community Property Trust within the meaning of the Act; (2) the trust has at least one

See Trust Act, Page 25

Lisa A. Schneider practices in Gunster's West Palm Beach office and leads Gunster's Trust & Estates practice, co-chaired the firm's Women's Leadership Forum, and co-chairs the firm's mentorship program. She focuses her practice on counseling families as to wealth preservation and transfer tax techniques, with a focus on planning for complex family structures and business succession. Lisa was selected by the Robb Report's WORTH Magazine as one of the "Top 100 Attorneys" in the United States and has been ranked by Chambers High Net Worth Guide for private wealth law.

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Trust Act

Continued from page 12

trustee who is a "qualified trustee" (defined in Florida Statute §736.1502 as a resident of Florida or a company authorized to act as a trustee in Florida), provided that both spouses or either spouse also may be a trustee; (3) the trust is signed by both settlor spouses consistent with the formalities required for the execution of a trust under Chapter 736; and (4) the trust contains substantially the following language in capital letters at the beginning of the Community Property Trust agreement: 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 SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE. ALTHOUGH NOT A REQUIREMENT, IT IS STRONGLY ADVISABLE THAT EACH SPOUSE OBTAIN THEIR OWN SEPARATE LEGAL COUNSEL PRIOR TO THE EXECUTION OF THIS TRUST.

The "opt-in" feature of the Act permits Florida residents (and potentially residents of other states) to establish a Community Property Trust and qualify the assets held therein as community property. This could be a powerful income tax planning tool for the right clients and situation. Married couples interested in income tax planning with a Community Property Trust should speak with their tax advisor about the benefits and limitations of such planning.

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Continued from page 13

from Fred would be exhausted first, before reducing her lifetime exemption. If Ethel remarried and husband number two pre-deceased her, Fred's DSUEA would be lost to her. Ethel is entitled to the DSUEA of her most recently deceased spouse. However, if Ethel divorced spouse number two, and she died before he did, Fred would still be considered Ethel's most recent deceased spouse.

To obtain the benefits of Portability, an election has to made with the Internal Revenue Service. The election for Portability is made by filing a Form 706, United States Estate (and Generation-Skipping Transfer) Tax return. The Form 706 must be timely filed, that is nine months after date of death, (or within 15 months from date of death if a six-month extension was timely filed) by the executor of the decedent's estate.

If an executor is filing a Form 706, for Portability, ie., a return which would not otherwise be filed because the value of the decedent's gross estate is below the decedent's lifetime exemption, the IRS does permit the estimation of asset values to be reported, provided those estimates are in good faith and due diligence can be demonstrated.

Since the introduction of Portability and because of its utility, many estates have wanted to make the election. But were precluded from doing so, because the nine-month filing window (of within 15 months with a timely filed extension) had closed. In response to demand for late filing relief for estates not otherwise required to file Form 706, and to eliminate the need to petition the IRS by Private Letter Rulings (a significant user fee required), the IRS issued Revenue Procedure 2017-34 which provides for an additional extension of time to file to the second anniversary of the decedent's death, for decedents dying after January 2, 2016.

If the surviving spouse is a non-US citizen, the DSUEA can become available the non-citizen surviving spouse, when that surviving spouse becomes a U.S. citizen (provided the executor of the most recent deceased spouse made a Portability election). Special rules apply to a Qualified Domestic Trust (QDOT), which permit a marital deduction for trust assets benefitting a non-citizen surviving spouse.

With the lifetime exemption in jeopardy of being reduced by current proposals in Congress or the 2025 roll back already on the books, married couples, surviving spouses and their advisors should not overlook this technique to maximize the utility of a married couple's combined lifetime exemptions, and thereby eliminate the need to pay gift or estate taxes on wealth transfers, which could be transferred tax free. Portability has the potential to simplify estate planning considerations for moderately wealthy couples.

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Continued from page 14

cases, incapacity is more challenging than death. Appointing a durable power of attorney to manage your affairs if you are incapacitated is one of the most important things you can do. In terms of healthcare and medical decisions, spousal rights do not automatically apply for unmarried couples and consequently, doctors may not take direction from or even provide updates to your significant other.

Some simple planning and communication can go a long way in providing clarity to the people closest to you. Make sure to spend some time with your trust and estate attorney to make sure your plan is reflective of your intentions.

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Continued from page 18

3. Provide the appraisal to your estate planning advisor, along with current information on the value of traditional assets in your portfolio.

4. Be sure to consider the personal feelings of your heirs when planning to convey a valuable collection. For instance, one child or grandchild might have a strong sentimental connection for vintage comics or Pokeman games, while other heirs might prefer to receive an equivalent value in stocks or bonds.

5. Alternatively, you might want to sell your collection or some of the pieces at a time when values are high and allocate those funds to other categories. This could reduce the risk of a future downturn in collectible values. Timing the top of the market is extremely difficult, don't be greedy!

6. Keep copies of the professional appraisal for your records. This will provide valuable documentation for your heirs, as well as your insurance company.

Regardless of the nature of your collection, incorporating current market appraisals into your estate plans will go a long way to reducing potential conflicts among your heirs, so you can feel confident about your personal legacy.

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Continued from page 19

In some states, such as Connecticut and Massachusetts, non-resident estate tax is levied as a percentage of the entire asset value, not just the portion owned by the decedent, making gifting strategies during your lifetime that much more important.

Connecticut takes it one step further and will look through an LLC or S Corporation if it is being used for a non-business purpose, and the proportionate percentage owned by the non-resident decedent will be taxed. Due to the nature of this calculation, an asset (even if left entirely to a surviving spouse) would incur estate tax.

A gift of this same asset may not suffer the same fate. There appears to be a loophole in Connecticut law that may allow gifts of the same property to escape gift tax.

Non-resident estate tax applies to all tangible personal property and real estate in a non-resident state that has an estate tax. After making your move to Florida, it is important to revisit the tax laws in the states where you left assets behind in order to fulfill your tax-savings and wealth transfer objectives.