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FLORIDA COMMUNITY PROPERTY TRUST ACT

Double Basis or Double Trouble?

With respect to property rights for married couples, the United States is divided into "common law" states and "community property" states. In common law states, upon the first spouse's death, jointly owned assets receive a step-up in basis equal to one-half of the appreciated value. If the surviving spouse sells the asset, capital gains tax will be owed on one-half of the appreciated value. In contrast, jointly owned assets in community property states receive a step-up in basis equal to the full value of the property, eliminating capital gains tax completely. Traditionally, Florida has been a common law state. However, the Florida legislature has recently passed the Community Property Trust Act ("CPTA"), which allows married couples to create a Community Property Trust ("CPT") and designate specific assets to be treated as community property in order to obtain this income tax benefit.

CPTA Overview

- ☐ The CPTA was enacted on July 1, 2021, and can apply to a CPT created on or after that date.
- ☐ CPTs must (1) include express language identifying the trust as a CPT; (2) have a Florida trustee or corporate trustee allowed to serve in Florida; (3) be executed by both spouses with the formalities required for the execution of wills in Florida; and (4) contain specific statutory language regarding the "extensive" consequences of CPTs.
- ☐ Once executed, a married couple must designate specific assets to fund the CPT.
- ☐ As noted above, a CPT can eliminate capital gains tax on a jointly owned asset, assuming the surviving spouse wishes to sell the asset upon the first spouse's death. Before the CPTA was implemented, the surviving spouse would only receive a step-up in basis equal to one-half of the value of a jointly owned asset.

CPT Caveats

CPTs can provide a significant income tax benefit. However, there are a few drawbacks and some uncertainty to consider before implementation.

- ☐ **Loss of Asset Protection**. Florida law allows married couples to jointly hold property via tenancy by the entirety (see https://ivanlawgroup.com/blog/f/tenancy-by-the-entirety) – assets held in this form of joint ownership cannot be garnished or attached by one spouse's individual creditors. In contrast, creditors of either spouse can reach one-half of the assets held in a CPT (except homestead property).
- ☐ **Divorce**. Designating specific assets as community property can materially affect property rights upon divorce. Simply put, the use of a CPT in an estate plan will only be successful if the parties remain married.
- ☐ **Uncertainty**. There is some uncertainty regarding how the IRS will treat transfers to a CPT created pursuant to the CPTA. Because the concept is relatively new and old case law provides reason for caution, there is some thought that the IRS may challenge such a transfer and argue the step-up in basis should be limited to one-half of the value.
- ☐ **Downward Basis Adjustment**. What is true for the step-up in basis if an asset appreciates is also true for the "step-down" in basis for an asset with a built-in loss or during a down market.
- ☐ **Non-U.S. Citizens**. If one spouse is not a U.S. Citizen, the contribution of separate property by the other spouse would not qualify for the unlimited marital deduction, creating potential gift tax issues.