STETSON BUSINESS LAW REVIEW

COMMUNITY PROPERTY PLANNING IN NON-COMMUNITY PROPERTY STATES & UNDERSTANDING THE FLORIDA COMMUNITY PROPERTY TRUST ACT – OPPORTUNITIES, DEVELOPMENTS, AND TRAPS FOR THE UNWARY

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I. KEY TAKEAWAYS:

Before the reader gets bogged down with 100 rules and 300 exceptions, please keep your eyes open for the following key takeaways.[1]

1. **Community Property Defined.** Community property consists of all assets acquired by one or both spouses of a married couple while they reside in a community property jurisdiction.[2] This will include IRAs, assets held in only one spouse's name other than those acquired by gift, bequest, or devise, and the right to receive payment or assets in the future.[3] Gifts of community property typically require the consent of both spouses, and a gift of community property without dual consent of the spouses is voidable by the non-consenting spouse.[4] As a result, a gift lacking

1. Special thanks to Dr. Gerry W Beyer, whose presentation entitled *Community Property: Tips and Traps for Lawyers in Common Law States*, a 2021 presentation at the 47th Annual Notre Dame Tax & Estate Planning Institute was of tremendous help to the authors in the writing of this article. Many of the takeaways in the Notre Dame outline were derived from M. Read Moore and Nicole M. Pearl, *Coming Soon to Your State: Community Property*, ACTEC 2020 Fall Meeting, October 27, 2020.

2. Gerry W. Beyer, *Community Property: Tips and Traps for Lawyers in Common Law States*, 47th Annual Notre Dame Tax & Estate Planning Institute, at 1 (Oct. 22, 2021).

3. *See* IRM 25.18.1.3.10 (Feb. 15, 2005); *e.g.,* 26 U.S.C. § 408(g) (1983) (stating that tax laws apply regardless of whether IRAs are located in, and therefore affected by, community property law jurisdictions).

4. Beyer, *supra* note 2, at 38 (citing Trimble v. Trimble, 26 P.2d 477 (1933)).

consent of both spouses will generally be deemed incomplete for purposes of the federal gift tax.[5]

2. **Selected Definitions**. The following definitions can be helpful.

A. Transmute- to convert the character of community property to another status of ownership. Property can be transmuted from community property to separate property, or from separate property to community property by a couple who lives in a community property jurisdiction.[6] Typically, this occurs through the execution of an appropriate document by a married couple, which may need to be recorded in the public records when dealing with real estate.

B. Mutable. Derived from the Latin root "mut" for "changeable" or "tendency to change," this meaning is found in such words as 'commute, immutable, mutability, transmute, permute, and mutate.' Mutability ("the ability to change") is a fundamental aspect of choice of law principles in the United States which provide that legal rules governing the property of a married couple change depending on the couple's place of residence at different points in time, as further discussed below.[7]

C. Commingle. Commingling refers broadly to the mixing of funds belonging to one party with funds belonging to one or more other parties. Commingling may also refer to the mixing of assets characterized as community property with assets characterized as separate property, such that the original character of the assets mixed into the same account may become indeterminable. For example, in Florida divorce cases where marital property and non-marital property have been commingled, the non-marital assets can be transformed into marital assets and will be subject to equitable disposition on divorce if the original character of the marital and non-marital assets are not reasonably traceable.[8]

D. The Double Step-up in Basis. The double step-up in basis under Internal Revenue Code §1014(b)(6) allows for a full step-up

5. *Id.* (citing Treas. Reg. § 25-2511-2(b)); Harper v. Commissioner, 6 T.C. 230,238 (1946) (applying California law); Estate of Kelly v. Commissioner, 31 T.C. 493,502 (1958) (applying Louisiana law.)

6. *See generally* William D. Farber, J.D., LL.M, *Transmutation of Separate Property into Community Property*, 37 AM. JUR. Proof of Facts 2d 379 (originally published in 1984).

7. Beyer, *supra* note 2, at 17.

8. Dravis v. Dravis, 170 So. 3d 849 (Fla. Dist. Ct. App. 2015). In *Dravis*, cash gifts that a wife's mother gave to the wife during marriage lost their non-marital character when the gifts were commingled with marital money in a savings account. *Id.*

in basis to fair market value for community property jointly owned by a married couple on the death of one spouse. Under 1014(a), when a person inherits property, the property's tax basis is "stepped up"[9] to its fair market value as of the date of the owner's death.[10] This means that the heir's basis in the inherited property is adjusted to its date of death value, so that any appreciation in value that occurred during the decedent's lifetime is not subject to capital gains tax. Internal Revenue Code §1014(b) lists the seven types of property that are considered to have been acquired from or to have passed from the decedent for purposes of §1014(a). Further, §1014 (b)(6) provides that "property *which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State*, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate," shall be considered to have been acquired from or to have passed from the decedent.

As a result, the surviving spouse receives a stepped-up basis as to their one-half of the community property, and because this half, along with the decedent's half, are considered to have both been acquired from or to have passed from the decedent, both ownership interests in the community property are stepped up to the fair market value on the first spouse's death (assuming at least one-half of the whole of the community interest was includible the decedent's gross estate).[11]

The double step-up in basis is one of the central reasons why a married couple may wish to have their property treated as community property.

3. **Be Careful.** Be very careful when a married couple has or has had community property and has moved to a separate property state. It is safest to confer with a lawyer who practices in the state

9. Or "stepped down" when the fair-market value is less than the original cost of the property.

10. I.R.C. § 1014(a).

11. *See, e.g.,* Holt v. U.S., 39 Fed. Cl. 525, 527 (Fed. Cl. 1997) (providing that "the surviving spouse's one-half interest in community property, even though not actually passing through the decedent's estate, is defined, for basis purposes, as an interest acquired from the decedent). By virtue of this fiction then, the entirety of the community property achieves a step-up in basis-one-half by actual transfer from the decedent (as recognized in 1014(b)(1)); the other half (the surviving spouse's interest) pursuant to the constructive transfer recognized in 1014(b)(6)." *Id.*

where the community property came about or exists and a lawyer who understands how community property functions in the non-community property state that the couple has moved to in order to be sure that nothing is missed.

4. **Step-Up In Basis vs. Creditor Accessibility.** Notwithstanding the advantage of obtaining the step-up on income taxes if one spouse dies, many married couples are more concerned about the possible loss of community property assets to creditors while they are both living. For example, there may be potential exposure of assets to creditors, and a constructive gift made by one spouse when the other spouse transfers assets in his or her name to an irrevocable trust or otherwise, if the assets are community property.[12]

The debtor and creditor laws vary greatly among the community property states, as discussed in depth below.

5. When the Couple Moves to a Non-Community Property State. When a married couple moves from a community property state to Florida there is case law and literature to support the proposition that the community property assets remain as community property assets, if they are not sold or exchanged for other assets, unless and until they are transmuted out of community property status.[13,14] If they are sold or exchanged for other assets then the law is not as clear.

Where a couple that has moved from a community property state to a non-community property state wishes to primarily use a lawyer in the non-community property state, it may work best to keep the community property assets that were acquired in the community property state under a joint trust to ensure identification and to avoid the commingling of such assets. An added benefit of this arrangement is the ability to have the trust assets pass one-half to a new revocable trust established by the first dying spouse and one-half to a separate revocable trust established by the surviving spouse. This permits the lawyer in the non-community property state to use the same general forms and strategies as would normally apply under traditional community

12. *Id*. (stating community property may not be devised by a single spouse and may be "encumbered with debt").

13. A. M. Swarthout, *Annotation, Change of Domicile as Affecting Character of Property Previously Acquired as Separate or Community Property*, 14 A.L.R.3d 404 § 2[a] (originally published in 1967).

14. *See generally* FLA. STAT. §§, 736.1501-736.1512 (2021).

property law, with coordination to allow the joint community property trust to continue and pay into the non-community property trusts on the first death**.**

Married couples may also agree in a premarital agreement or marital property agreement that the laws of a particular state, including a state other than their domicile, will govern the married couple's rights in property acquired during the marriage.[15]

6. **Florida Case Law.** In the 1967 Florida case of *Quintana v. Ordono*, a husband took community property and sold it in exchange for a note, the note was found not to be community property, but the husband was found to be holding the note one-half as his own property and one-half as his wife's.[16] The wife's equitable interest in the note was considered to be held under a constructive trust for her benefit because it originally came from community property.[17] This case illustrates that in transactions affecting community property in non-community property states, where one spouse buys property in their own name, a resulting trust is generally found to exist in favor of the other spouse. This case further supports the legal position observed in Takeaway #4 above.

7. **Uniform Disposition of Community Property Rights at Death Act (UDCPRDA).** Florida and the below enumerated fifteen states have adopted the Uniform Disposition of Community Property Rights at Death Act,[18] which generally indicates that community property laws are replicated in Florida for inheritance purposes, unless or until community property that is brought to Florida by a former community property couple is transmuted.[19]

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15. RESTATEMENT (SECOND) OF CONFLICT OF L. § 258.

16. Quintana v. Ordono, 195 So. 2d 577, 580 (Fla. Dist. Ct. App. 1967).

17. *Id.* The elements that must be established for a court to impose a constructive trust are: (1) a promise, express or implied, (2) a transfer of property and reliance thereon, (3) a confidential relationship, and (4) unjust enrichment. Gersh v. Cofman, 769 So. 2d 407 (Fla. Dist. Ct. App. 2000). In the context of marital property disputes, constructive trusts are used to enforce the principles of equitable distribution. "Even when a property has not been acquired by fraud, a constructive trust will be imposed if equity would be offended should the property be retained by the person holding it . . . . This is so because a constructive trust is a remedial device with the dual objectives of restoring property to its rightful owner and preventing unjust enrichment . . . .The wife presents a classic case where the imposition of a constructive trust is necessary to do justice and 'prevent the unjust enrichment of one person at the expense of the other." PROPERTY DISPOSITIONS, FACS FL-CLE 6-1, citing Geiser v. Geiser, 693 So. 2d 59 (Fla. Dist. Ct. App. 1997).

18. Conveniently referred to as the "UDCPRDA," which also stands for "Understanding the Disposition of Community Property is Really Difficult and Agitating."

19. FLA. STAT. §§ 732.216-732.228. *See also* Beyer, *supra* note 2, at 22.

The UDCPRDA has also been enacted in Alaska, Arkansas, Colorado, Connecticut, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Oregon, Utah, Virginia, and Wyoming.[20]

Dr. Gerry Beyer has observed that "[t]he UDCPRDA is not a tax statute and on its face is limited to the spouse's rights of testamentary disposition over the property."[21] There is no binding federal tax authority known of by the authors that uses the UDCPRDA as support for obtaining the double step-up in basis under Internal Revenue Code §1014(b)(6). However, a 1993 IRS Field Service Advisory, which cannot be cited as authority, acknowledged that the UDCPRDA was enacted to ensure that the surviving spouse would have the same ownership rights in Oregon as she would have had if still domiciled in California.[22] The Advisory, in determining what a surviving spouse's tax basis would be in Oregon real estate purchased with the proceeds of the sale of a couple's California community property residence, found that both halves of the Oregon property were afforded the double step-up in basis on the death of the first spouse.[23]

8. **Trust Planning Constraints**. On the death of one spouse in a community property state, individually owned community property passes one-half through the probate or revocable trust estate of the first dying spouse, and thus pursuant to his or her Last Will and Testament, or intestate succession, while the other half is considered to be owned outright by the surviving spouse, regardless of titling, unless a specific state or federal law applies otherwise [such as Homestead or TBE in Florida].[24]

It is very common in community property states for spouses to form and fund a Joint Trust that declares its assets to be community property, and directs or confirms that on the first death 50% of the Trust assets will be owned directly and immediately by

20. Beyer, *supra* note 2, at 22.

21. *Id.*

22. *Id.* Field Service Advisories are not binding on the IRS or taxpayers, but often provide good background and an indication of how the IRS or a court might rule under particular circumstances. Field Service Advisories are issued in response to requests from IRS field personnel and are generally requested for purposes of legal guidance with regard to a specific situation of a specific taxpayer. Federal district courts have ruled that the IRS is not bound by field-service advisories and that the IRS need not treat similarly situated taxpayers similarly. Schering-Plough Corp. v. United States, No. 2:05cv-02575 (D. N.J. Dec. 3, 2007).

23. *Id.* (citing 1993 WL 1609164 (1993)).

24. 41 C.J.S. *Husband and Wife* § 383 (2023).

the surviving spouse, and 50% will pass as directed in the Trust to a Credit Shelter Trust to be held for the health, education, maintenance and support of the surviving spouse, subject to possible changes. If the assets so passing, along with other assets, will exceed the first dying spouse's estate tax exemption amount, such assets may pass to the surviving spouse through a marital deduction trust (which will almost always be a "Qualified Terminable Interest Property ("QTIP") Trust"), if facilitated under the Trust documents.[25]

9. **Consider a JEST.** As an alternative to the above, the married couple can transmute out of community property treatment and use separate revocable trusts by balancing assets between the spouses, or they may use a Joint Exempt Step-Up Trust ("JEST Trust") that may replicate the step-up in basis on the first dying spouse's death by use of a Power of Appointment exercisable by the first dying spouse.[26] The JEST offers the possibility of having more than just half of the Trust assets pass to fund a Credit Shelter Trust on the first death.[27] In fact, all of a JEST trust's assets may pass in this way.[28] The IRS has not approved the full step-up in basis but has issued private letter rulings and a Technical Advisory Memorandum ("TAM") (which have been criticized by some) to allow for up to all of the Trust assets to fund a Credit Shelter Trust.[29]

10. **Community Property Trusts.** Alaska, South Dakota, Tennessee, Kentucky, and Florida as of 2021 provide that a married couple living anywhere in the world can establish a Community Property Trust in the applicable jurisdiction by having a Trustee in the applicable state as sole Trustee or Co-Trustee of a specially drafted Community Property Trust.[30]

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25. Richard L. McCandless, *Drafting Marital Deduction Provisions*, 64 DICK. L. REV. 425, 425 (1960) (stating that marital deduction trusts offer tax deductible advantages).

26. Martin M. Shenkman, *Hecklering 2015 Nuggets Grantor Trusts, the Quest for Basis, and More!*, NAEPC J. Est. & Tax Plan., at 40 (2015).

27. *Id.*

28. *Id.*

29. *Joint Ownership, Joint Trusts and Basis-Step-up*, GREENLEAF TRUST (May 24, 2023), https://greenleaftrust.com/missives/joint-ownership-joint-trusts-and-basis-step-up/; I.R.S. Tech. Adv. Mem. 93-08-002 (Feb. 26, 1993); I.R.S. Priv. Ltr. Rul. 200101021 (Jan. 05, 2001); I.R.S. Priv. Ltr. Rul. 200210051 (Mar. 08, 2002); I.R.S. Priv. Ltr. Rul. 200403094 (Jan. 16, 2004).

30. Michael A. Sneeringer, *An Introduction to Community Property Trusts*, 35 PROB. & PROP. 34 (2021)..

The Community Property Trust assets will be exposed to creditor claims of one or both spouses in differing degrees, depending upon the state chosen, and the step-up in income tax basis for all Community Property Trust assets on the first death can be claimed on income tax returns, although the IRS has not blessed this result, and has specifically indicated in Publication number 555 entitled "Community Property" that was last updated in March 2020 that the IRS is not concluding whether a double step-up occurs by way of an elective community property regime.[31] IRS Publications are not binding on the IRS.[32]

11. **Support for Community Property Trusts.** The Tax Court opinion of *Angerhofer*, described below,[33] supports the proposition that individuals residing in a jurisdiction that allows a couple to decide if they want community property or not, permits the community property to be treated as such for income tax basis step-up planning purposes once the election is made. *Angerhofer* involved a German couple and Germany's choice of characterization rules and can be read to indicate that "if a state incorporates characteristics of community property statutes from the eight original community property jurisdictions in its community property trust legislation, it should be respected by the IRS (or at least by the Tax Court if the IRS challenges a taxpayer's classification of property as community in nature)."[34]

Alaska has a similar law that allows a couple residing in Alaska to elect into the community property regime.[35] Wisconsin law allows couples to elect out of its community property regime.[36] The other community property states and jurisdictions provide

31. *Publication 555 (03/2020)*, Community Property, IRS (Mar. 27, 2000), https://www.irs.gov/publications/p555#en_US_202001_publink1000264796.

32. 26 C.F.R. § 601.201 and 26 U.S.C. §6110(k)(3). Additionally, in *Bobrow v. C.I.R.*, 107 T.C.M. (CCH) 1110 (Tax 2014), the court emphasized that IRS published guidance is not binding precedent and that taxpayers "rely on IRS guidance at their own peril." *See also* Janet Novack, *`Taxpayers Rely On IRS Guidance At Their Own Peril,' Tax Judge Rules*, FORBES (Apr. 18, 2014), https://www.forbes.com/sites/janetnovack/2014/04/18/taxpayers-rely-on-irs-guidance-at-their-own-peril-tax-judge-rules/?sh=99225502ceab.

33. *See* Angerhofer v. C.I.R., 87 T.C. 814 (1986).

34. Joseph M. Percopo, *Understanding The New Florida Community Property Trust, Part II,* THE FLORIDA BAR (Oct. 2022), https://www.floridabar.org/the-florida-bar-journal/understanding-the-new-florida-community-property-trust-part-ii/#u6e00, quoting Travis Hayes, *To Share and Share Alike: An Examination of the Treatment of Community Property in Florida and the New Florida Community Property Trust Act*, at 28 (unpublished manuscript) (on file with the author). *See Angerhofer* at 827-29. Thank you to Steve Akers and Jonathan Blattmachr for their comments and insight on the Angerhofer decision.

35. Beyer, *supra* note 2, at 13.

36. *Id.* at 11.

that community property jurisdiction is mandatory, but that a couple can "transmute out" of community property status.[37]

12. **Don't Let Your Estate Plan be the Titanic.** There is much more to know, but the above is hopefully a good tip of a somewhat confusing and unstable iceberg.

II. UNDERSTANDING COMMUNITY PROPERTY & COMMUNITY PROPERTY TRUSTS – PRELIMINARY CONSIDERATIONS:

As noted above, Community Property can be defined as assets that are accumulated by one or both members of a married couple who reside in a community property state or jurisdiction, or who have placed such assets under a Community Property Trust if it is situated in a Community Property Trust jurisdiction.[38]

The Community Property Law is based upon the premise that each spouse in a married couple should have equal rights to ownership of property that they jointly acquire or that comes from the earnings of one or both spouses.[39] A central pillar of community property law is that a surviving spouse has the right to receive one half of all community property outright on the first death, with the dying spouse having the right to direct where the other half of the community property will pass.[40] Individual spouses residing in community property states have and receive "separate property" by inheritance, gift, or by reason of ownership before the marriage or before the married couple has moved to a community property state,[41] although, a married couple residing in a community property state may agree to have some or all of their formerly separate or other non-community property become community property.[42]

A primary advantage of community property is that upon the death of the first dying spouse, the surviving spouse will enjoy a

37. Noel Joseph Darce, *Interspousal Contracts*, 42 LA. L. REV. 727, 733 (1982); *see, e.g.*, CA Fam. Code § 850 (2022) (allowing the transmutation of property to change its status from community property to separate property).

38. Beyer, *supra* note 2, at 1.

39. *Id.*

40. *Id.* at 3.

41. *Id.*

42. *Id.*

step-up in basis on both ownership portions of the property.[43] A second advantage is the general fairness between the spouses. By contrast, in a non-community property jurisdiction (also known as a common law jurisdiction) one spouse may die owning significant assets that were earned solely by that spouse during the marriage and also may die owning significant assets accumulated before the marriage or inherited during the marriage.[44] In a common law jurisdiction, the surviving spouse may elect to receive a certain portion of the assets owned by the first dying spouse, commonly 30%, notwithstanding whether the surviving spouse was married to the first dying spouse when the assets were earned or accumulated.[45]

Other aspects of consideration with respect to community property occur when a married couple moves from a community property state to a non-community property state, and whether to transmute the community property assets to non-community property status, or to make efforts to maintain a characterization of community property for income tax basis planning.

Traps for the unwary include the possibility that a spouse is making a taxable gift for federal gift tax purposes when he or she funds a joint revocable trust that does not permit both spouses to separately have the right to terminate the trust, and in situations where a spouse transfers community property to a trust, and this is considered to be a gift made one-half by the other spouse,[46] or where a gift of community property is considered to have not occurred by reason of not having the consent of the other owner spouse.[47]

Effective July 1, 2021, Florida followed a handful of other states by enacting a Community Property Trust Act that allows married couples residing anywhere in the world to "opt-in" to

43. Richard B. Toolson, *Our Greatest Hits | Community property step-up in basis*, CPA JOURNAL ARCHIVES (Aug. 2017), https://www.cpajournal.com/2017/08/18/greatest-hits-community-property-step-basis/.

44. *See* Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating between Common Law and Community Property States,* 35 ACTEC J. 74-96, 75, 84, & 86 (2009) (highlighting the separation of assets upon death in common law states).

45. FLA. STAT. § 732.201.

46. Gerald Treacy, *Community Property: General Considerations,* Portfolio No. 802., BLOOMBERG TAX, https://pro.bloombergtax.com/portfolio/community-property-general-considerations-portfolio-802/ (last visited July 16, 2023).

47. For a good discussion on the tax and nontax implications of actual community property, see Howard M. Zaritsky & Farhad Aghdami, Tax Planning for Family Wealth Transfers at Death 4.06 (Thomson Reuters/WG&L 2014)

community property treatment for assets held in a trust that meets certain requirements.[48] As mentioned above, and described in-depth below, community property can have considerable income tax planning benefits 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.[49]

1. Criticisms of and Support for Community Property Trust Legislation

Renowned author and estate tax planning authority, Jonathan Blattmachr, astutely points out two important issues with Florida's Community Property Trust Act. First, the Alaska community property trust law more closely follows traditional community property law than the other community property trust states and therefore may be a safer vehicle to receive a step-up in basis on the death of one spouse.[50] Second, Blattmachr points out that the Uniform Disposition of Community Property Rights at Death Act ("UDCPRDA") does not explicitly provide that community property status continues when a couple moves to a non-community property state,[51] but we have found that the case law in the U.S. going back to 1826 does support the proposition that community property remains as such when a couple moves to a non-community property state.[52]

Blattmachr makes two additional points: A mere labeling of assets as community property is not sufficient to make them community property for federal tax purposes.[53] In that regard, *Angerhofer v. Commissioner*, is instructive.[54] The married couple

48. FLA. STAT. §§ 736.1501-736.1512.

49. I.R.C. § 1014(b)(6).

50. Alan Gassman, Jonathan Blattmachr & Brock Exline*, Using the Florida Irrevocable Community Property Trust to Protect an Elderly Couple from Abuse*, STEVE LEIMBERG'S EST. PLAN. EMAIL NEWSL. – ARCHIVE MESSAGE #2914 (NAEPC J. EST & TAX PLAN.), Oct. 14, 2021.

51. Sneeringer, *supra* note 30.

52. Robert Neuner, *Marital Property and the Conflict of Laws*, 5 LA. L. REV., 167, 171 (1943). *See also* A. M. Swarthout, *supra* note 13.

53. Jonathan G. Blattmachr, Howard M. Zaritsky & Mark L. Ascher, *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 REAL PROP. PROB. & T.R. J. 615 (1998).

54. Angerhofer v. C.I.R, 87 T.C. 814 (1986). Before changes were made to the Internal Revenue Code in 1984, a non-working spouse who filed separately was entitled to half of his

in *Angerhofer* were German citizens domiciled there and took the position that they lived under a community property regime pursuant to German law, which actually provides that married couples who live there will be subject to one of three different marital property regimes.[55] Unless a German couple agrees otherwise, they basically live under a separate property regime, but they can opt into one of the two other regimes.[56] The Tax Court found that one of those other regimes would be considered to be community property for federal income tax purposes, and the couple in *Angerhofer* ultimately conceded that they had never agreed to opt into the German equivalent of community property status.[57] The Tax Court decision can be read as dicta to indicate that the couple could have opted into the German community property regime and would have had their earnings treated as community property for U.S. federal income tax purposes. But the couple only opted into the regime that did not grant each spouse full community property rights in the view of the Tax Court.[58] The missing key ingredient under the German marital regime the couple opted into was that the first dying spouse would not have been able to bequeath his or her one-half of the marital assets however he or she wished to do so.

Similarly, in *Westerdahl v. Commissioner,* a majority of the Tax Court determined in a full Tax Court Opinion that under Swedish law the married couple's U.S. earnings were community property and that the non-working spouse did not have to pay U.S. income tax on her fifty percent share of such earnings.[59] The Court's decision rested on whether Swedish law gave the non-working spouse a present vested interest in the working spouse's earned income, an attribute that generally applies in community property jurisdictions in the United States. The Court determined that the Swedish law that applied to a married couple residing in Sweden was community property law, because the Swedish law essentially provided that the income of one spouse would be

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or her spouse's income subject to U.S. taxation (because the spouse worked in the U.S. or for an American employer) but was not responsible for paying U.S. income tax on the non-working spouse's half of such income.

55. *Angerhofer*, 87 T.C. at 815.
56. *Id.* at 820.
57. *Id.* at 827.
58. *Id.* at 829-30.
59. Westerdahl v. C.I.R., 82 T.C. 83, 95 (1984).

considered to be one-half earned by the other spouse.[60] The Court concluded that the non-working spouse did have a sufficient present vested interest in one-half of the working spouse's income and therefore deemed the earnings to be community property under the laws of the United States.[61] Because the earnings were treated as community property under the laws of the United States, the working-spouse was entitled to report only one-half of his or her United States earnings on their Federal Income tax returns for the years in issue.

As noted above in Takeaway #11, *Angerhofer* and *Westerdahl* can be read to indicate that if a common law state includes the traditional attributes of community property from the laws of the original community property jurisdictions within its community property trust legislation, it ought to receive recognition from the IRS, or at the very least, from the Tax Court, in the event the IRS disputes a taxpayer's classification of property as community property.[62]

Blattmachr has informed the authors that in drafting the Alaska Community Property Trust statutes he "slavishly" followed the Uniform Community Property Act, which Wisconsin enacted, and which the IRS concluded in Rev. Rul. 87-13 caused Wisconsin residents to have community property for federal tax purposes even though labeled "marital property" rather than "community property," (a label alone will not suffice.)[63] Because Florida does not grant the full panoply of rights and obligations that are normally granted under traditional community property laws,

60. *Id.* at 95. "We have weighed the presence and absence of the various attributes indicative of community property jurisdictions, and we are of the opinion that the laws of Sweden give a spouse a present vested interest in marital property which matures at the time the property is contributed to the marriage by the other spouse." *Id.*

61. *Id.* "Although certain attributes of a spouse's 'giftoratt' (the Swedish concept for marital property) may appear to suggest a deferred interest or claim in marital property rather than a present vested interest, all of these indicia are present in some of the recognized American community property states. We have weighed the presence and absence of the various attributes indicative of community property jurisdictions, and we are of the opinion that the laws of Sweden give a spouse a present vested interest in marital property which matures at the time the property is contributed to the marriage by the other spouse." *Id.*

62. *See* Percopo, *supra* note 34, citing Travis Hayes, *To Share and Share Alike*.

63. WISC. DEPT. OF REVENUE, PUB. 113, FEDERAL AND WISCONSIN INCOME TAX REPORTING UNDER THE MARITAL PROPERTY ACT (Feb. 2023). *See also* Howard M. Zaritsky & Farhad Aghdami, *Tax Planning for Family Wealth Transfers at Death 4.07[7][c][i]* (Thomson Reuters/WG&L 2014); Howard M. Zaritsky & Farhad Aghdami, *Tax Planning for Family Wealth Transfers During Life § 8:73* (Thomson Reuters/WG&L, 5th ed., repub'd 2023).

Blattmachr reasonably questions whether assets held in a Florida community property trust will qualify under Internal Revenue Code Section 1014(b)(6) to receive a stepped-up income tax basis when the first spouse dies.[64]

While Blattmachr's concerns are important and should be understood by all planners, there are established and respected community property law jurisdictions that are similar to even the most deviant state community property trust statutes. For example, the community property laws in New Mexico, Nevada, Washington, and Wisconsin limit a creditor owed a premarital obligation by one spouse to seize one-half of any community assets, but allow creditors who have claims attributable to actions taken during the marriage to levy upon all community property.[65] Moreover, Texas law distinguishes between "joint management" and "sole management" community property and allows post marital obligations to be satisfied by 100% of "joint management" community property, but only 50% of the nonliable spouse's "sole management" community property.[66] This is further discussed in-depth below.[67]

Additionally, Florida Probate lawyers need to be aware that Florida law will only permit a surviving spouse to successfully assert community property rights against the estate of a deceased spouse if the surviving spouse has filed an appropriate creditor claim within two years of the death of the first dying spouse or within the notice period permitted once a probate has been filed and proper notice has been given, whichever expires first.[68] Thus, Community property rights that flow through a Florida probate state will be lost if a claim is not made in a timely manner after proper notice has been provided.[69,]

64. Gassman, Blattmachr, & Exline, s*upra* note 50.

65. IRM, 25.18.1.3.14 (2023), https://www.irs.gov/irm/part25/irm_25-018-001.

66. *Texas Community Property & Spousal Debt*, BILLS.COM (updated Sep. 20, 2023), https://www.bills.com/learn/debt/texas-community-property.

67. *See infra* section V.

68. Fla. Stat. §§ 733.702(1), 733.710(1); *see Johnson v. Townsend*, 259 So. 3d 851, 853 (Fla. 4th Dist. Ct. App. 2018).

69. Juan C. Atuñez, *A User's Guide to Prosecuting Claims under Florida's Uniform Disposition of Community Property Rights at Death Act*, FLORIDA PROBATE + TRUST LITIGATION BLOG (Aug. 4, 2020), https://www.flprobatelitigation.com/2020/08/articles/new-probate-cases/marital-agreements-and-spousal/a-users-guide-to-prosecuting-claims-under-floridas-uniform-disposition-of-community-property-rights-at-death-act/; *see also* Johnson v. Townsend, 259 So. 3d 851(Fla. Dist. Ct. App. 2018). In general, a Florida probate estate creditor has three months after receiving formal notice, or 2 years if no notice is given, to file claims against the estate. F.S. §733.702; §733.710. *See also* Gassman, Exline, & Farrell,

2. A Brief History of Community Property and Community Property Trust Legislation

Some of the key information regarding this community property review 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 online.[70]

What is Community Property?

There are two primary types of legal regimes for property ownership for married couples — community property law states and common law states (also known as separate property states or non-community property states). Under a community property system, all property of the spouses is considered to be either "community" or "separate" property. In all community property states, except California, 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. In California, a preponderance of the evidence standard applies for proving the nature and extent of separate property of one spouse.[71] 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, unless affirmative steps are taken to characterize the property as community property.[72]

In the U.S., 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, and Puerto Rico.[73] The community property laws in these states generally evolved from Spanish law, except that Louisiana's community property law came from French law.[74] Wisconsin and Alaska became community

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Designing Trust Systems For Florida Residents: Planning Strategies, Things You Should Know, and Traps for the Unwary, Vol. 97, No.4, July/Aug 2023, 28.

70. Steve R. Akers, *ACTEC 2013 Fall Meeting Musings* (Nov. 2013), https://www.naepcjournal.org/journal/issue16d.pdf.

71. *In re* Marriage of Ettefagh, 150 Cal.App.4th 1578, 1591 (Cal. Ct. App. 2007).

72. Akers, *supra* note 70, at 3.

73. *Community Property States vs. Common* Law, ASSET PROTECTION PLANNERS. https://assetprotectionplanners.com/planning/community-property-states/.

74. Paul H. Dué, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78, 90 (1964).

players in 1986 and 1998, respectively, and their community property regimes are discussed below.[75]

Wisconsin became the ninth community property state in 1986 when it became the first state to adopt the Uniform Marital Property Act.[76] The Uniform Marital Property Act is a community property system developed by the National Conference of Commissioners on Uniform State Laws. In 1998, Alaska also enacted the Uniform Marital Property Act[77]on an elective basis so that couples who reside in Alaska have the choice of having the community property law apply or not apply without the need to form a community property trust.

While the nine community property states discussed above are all considered "community property states," there are numerous differences among the laws of the community property states. Exhibit 25.18.1-1 of the IRS Manual details many of these differences.[78] As noted by Steve Akers, Oklahoma and Oregon had opt-in community property systems briefly in the late 1930s and 1940s, but quickly repealed them less than a year after enactment of the Revenue Act of 1948, as further discussed below.[79,80]

There is great variation amongst the laws of the traditional eight community property states with regard to creditor laws, property characterization and more. For example, California,

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75. William G. More, *Community Property Comes to Wisconsin*, UNIV. OF WIS. LAW SCH. 9, https://media.law.wisc.edu/s/c_420/gyn2c/gargoyle_16_2_4.pdf; Thomas M. Featherston, Jr., *Separate Property or Community Property: An Introduction to Marital Property Law in the Community Property States*, BAYLOR UNIV. 1, 2 (2017).

76. *See* Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S. D. L. REV. 455, 458 (2003).

77. *See* Erica K. Smith, *Basic Estate Planning in Florida Chapter 14: Community Property Issue*s, THE FLORIDA BAR 11TH ED. 3 (2022).

78. I.R.S., *Community Property* (2017).

79. Akers, *supra* note 70, at 3.

80. *See* Jennifer E. Sturiale, *The Passage of Community Property Laws, 1939-1947: Was "More Than Money" Involved?*, 11 MICH. J. GENDER & L. 213 (2005) (observing that "[i]n response to the disparate treatment of taxpayers that resulted from *Earl* and *Seaborn*, a flurry of states adopted community property statutes between 1939 and 1947 – Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania. Eight states – Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington – already had community property laws in place. Before other states could similarly adopt community property statutes, Congress responded with the Revenue Act of 1948, which stated, in pertinent part, '[e]equalization is provided for the tax burden of married couples in common-law and community property states.' . . . In less than a year after the adoption of the Revenue Act of 1948, Michigan, Nebraska, Oklahoma, and Oregon repealed their community property statutes. Pennsylvania may have, as well, had the Pennsylvania Supreme Court not already found its state's community property laws unconstitutional."); *Id.* at 215–16 (citations omitted).

Arizona, New Mexico, Nevada, and Washington treat income from separate property as separate property, while Idaho, Texas, Louisiana, and Wisconsin treat income from separate property as community property.[81] These state by state variations are discussed in depth-below and underscore the importance of working with an experienced practitioner in the state where the community property originated.

In most 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, although they may be required to record such agreements in the public records to transmute real estate.[82]

Alaska adopted an innovative "opt-in" community property trust law in 1998,[83] which is described below; Tennessee,[84] South Dakota,[85] and Kentucky[86] also adopted "opt-in" community property systems in 2010, 2016, and 2020, respectively. The Kentucky and Tennessee statutes are very similar.

Alaska's Community Property Act, which was enacted under the leadership of 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 income tax basis upon the death of the first dying spouse.[87] While Alaska also has a strong Asset Protection Trust law, assets placed in an Alaska community property trust will not be protected from the creditors of the married couple, and in effect, creditors of one spouse can reach all assets held under an Alaskan community property trust, as further discussed below.[88]

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81. Beyer, *supra* note 2 at 2.

82. IRM, *supra* note 65 at 25.

83. *See* Shelly D. Merritt, *Planning for Community Property in Colorado*, COLO. LAW. 79, 85 (2002).

84. *See* J. Paul Singleton, *Yes, Virginia, Tax Loopholes Still Exist: An Examination of the Tennessee Community Property Trust Act of 2010*, 42 UNIV. OF MEMPHIS L. REV. 369, 378 (2011).

85. *See* A1 W. King III & Pierce H. McDowell III, *A Bellwether of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S. D. L. REV. 266, 299 (2017).

86. *See* Zaritsky, *Tax Planning for Family Wealth Transfers at Death: Analysis with Forms*, THOMSON REUTERS TAX AND ACCOUNTING 52 (2021).

87. Blattmachr et al., *supra* note 53, at 631.

88. ALASKA STAT. § 34.77.070 (2023).

Likewise, the Tennessee Community Property Trust Act that was enacted in 2010 allows for non-Tennessee residents to hold assets in community property trusts.[89] 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.[90] On a spouse's death, half of the value of the trust becomes the deceased spouse's share and the other half becomes the surviving spouse's share.[91] The provisions of Tennessee's Community Property Trust Act are similar to Florida's new rules, which are discussed below.

In 2016, the South Dakota Legislature passed a law authorizing the creation of a South Dakota Special Spousal Trust which permits the use of a trust to opt in to a community property system.[92] Interestingly, a South Dakota Special Spousal Trust can also be established as a self-settled spendthrift trust, which is referred to under South Dakota law as a qualified disposition in trust.[93]

In March 2020, Kentucky followed suit and enacted their own community property trust legislation which allows non-resident married couples to place assets into community property trusts.[94] While the Alaska, Tennessee, South Dakota, and Kentucky Acts seek to provide non-residents with the ability to "opt-in" to the advantages of community property,[95] commentators have voiced concerns about whether assets in such trusts will be afforded the "double" tax free step up in basis upon the death of the first spouse, while pointing out that creating such trusts can potentially forfeit valuable creditor protection benefits.[96]

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89. TENN. CODE ANN. § 35-17-105 (2023).

90. TENN. CODE ANN. § 35-17-106(a) (2023). For an additional discussion on Tennessee Community Property Trusts see Howard M. Zaritsky & Farhad Aghdami, *Tax Planning for Family Wealth Transfers at Death*, THOMSON REUTERS/WG&L 4.07[7][c][ii] (2014) and Howard M. Zaritsky & Farhad Aghdami, *Tax Planning for Family Wealth Transfers During Life* § 8:74 (Thomson Reuters/WG&L, 5th ed., repub'd 2023).

91. TENN. CODE ANN. § 35-17-107 (2023).

92. S.D. Codified Laws § 55-17-3. *See also* Zaritsky, *Tax Planning for Family Wealth Transfers at Death*, 4.07; *The Joint Revocable Trust*, WGL-TPFWTD ¶ 4.07[7][c][iii].

93. Zaritsky, *Tax Planning for Family Wealth Transfers at Death*, 4.07[7][c][iii].

94. KY. REV. STAT. ANN. §§ 386.620 –386.624 (2023). *See also* Howard M. Zaritsky & Farhad Aghdami, *Tax Planning for Family Wealth Transfers at Death* 4.07[7][iv] (THOMSON REUTERS/WG&L 2014); Howard M. Zaritsky & Farhad Aghdami, *Tax Planning for Family Wealth Transfers During Life* § 8:76 (THOMSON REUTERS/WG&L, 5th ed., repub'd 2023).

95. ALASKA STAT. § 34.77.100 (2023); S.D. CODIFIED LAWS §§ 55-17-5, 55-17-1, 55-17-3 (2023); TENN. CODE ANN. § 35-17-103 (2023); KY. REV. STAT. ANN. § 386.622(1) (2023).

96. *See, e.g.*, Paul Singleton, *Yes, Virginia, Tax Loopholes Still Exist: An Examination of the Tennessee Community Property Trust Act of 2010*, 42 U. MEM. L. REV. 369 (2011);

Effective July 1, 2021, Florida joined the ranks of the "opt-in" community property trust jurisdictions by enacting the Florida Community Property Trust Act[97], which is described in more detail below.

The following chart may be of use to readers as they review the remainder of this article:

3. Married Couples Trust Decision Chart

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

Sneeringer, *supra* note 30; Willaim Chad Roberts, *Feature Story: A Cautionary Tale: Community Property Trusts*, 47 TENN. B. J. 24 (2011).

97. FLA. STAT. §§ 736.1501 – 736.1512 (2023).

		Spouse's Creditors		dissolution of property	new Florida Community Property Trust		
Tennessee Community Property Trust	Probably Yes	One-Half of Trust Assets Exposed to One Spouse's Creditors	Only as to One-Half	Yes – Spouses can agree on the dissolution of property	N/A	Simple to Draft if the Statute is Followed	Requires a Tennessee Trustee
South Dakota Community Property Trust	Probably Yes	All of Trust Assets Exposed to One Spouse's Creditors	Only as to One-Half	Yes – Spouses can agree on the dissolution of property	Yes	Simple to Draft if the Statute is Followed	Requires a South Dakota Trustee
Alaska Community Property Trust	Probably Yes	All of Trust Assets Exposed to One Spouse's Creditors	Only as to One-Half	Yes – Spouses can agree on the dissolution of property	Yes	Simple to Draft if the Statute is Followed	Requires an Alaska Trustee
Kentucky Community Property Trust	Probably Yes	One-Half of Trust Assets Exposed to One Spouse's Creditors	Only as to One-Half	Yes – Spouses can agree on the dissolution of property	Yes	Simple to Draft if the Statute is Followed	Requires a Kentucky Trustee

III. THE COMPLEXITIES OF ESTATE PLANNING WITH COMMUNITY PROPERTY

1. Joint Revocable Trusts in Community Property

Joint revocable trusts have been the most popular trust instrument for married couples in community property states and can be used in the "opt-in" community property jurisdictions.[98]

98. For an additional discussion on Joint Community Property Revocable Trusts in non-community property states see HOWARD M. ZARITSKY & FARHAD AGHDAMI, TAX PLANNING FOR FAMILY WEALTH TRANSFERS AT DEATH 4.07[5], 4.07[7] (Thomson Reuters/WG&L 2014)

Community property contributed to a joint revocable trust will be treated as community property for federal tax purposes under Internal Revenue Code Section 1014(b)(6) as long as it is considered community property under state law.[99]

The language of Internal Revenue Code Section 1014(b)(6) permits a full step-up in income tax basis for all community property of the death of one spouse, and reads as follows:

"**(6)** In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;"[100]

The double step-up in basis under Internal Revenue Code Section 1014(b)(6) does not apply to quasi-community property or to property held as joint tenants with right of survivorship acquired after 1977.[101]

Assigning community property to a revocable trust is unlikely to change its character. For example, in *Katz v. US*, the assignment of a husband and wife's community property to the husband's revocable trust did not convert the property to the separate property of the husband.[102] There, the court held that the statutory presumption under California law that property acquired by spouses during marriage is community property was not overcome by the assignment of the community property to the revocable trust.[103]

The obvious allure of a community property trust is the ability to receive a full step-up in basis on the death of the first dying

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and HOWARD M. ZARITSKY & FARHAD AGHDAMI, TAX PLANNING FOR FAMILY WEALTH TRANSFERS DURING LIFE §§ 8:70 - 8:77 (Thomson Reuters/WG&L, 5th ed. 2013).

99. Rev. Rul. 66-283, 1966-2 C.B. 297 (explaining that "[f]or purposes of section 1014(b)(6) of the Code, H and W are considered as continuing to own the property transferred by them to the revocable trust as their community property.").

100. I.R.C § 1014(b)(6).

101. Gerry Beyer, Tex. Tech Univ. Sch. of L., Session 12A: Community Property Tips and Traps for Lawyers in Common Law States: Strategies for Migrating Clients at the 47th Annual Notre Dame Tax & Estate Planning Institute (Oct. 22, 2021).

102. Katz v. United States, 382 F.2d 723, 728 (9th Cir. 1967).

103. *Id.*

spouse under Internal Revenue Code Section 1014(b)(6), which provides that assets owned as community property will receive a new income tax basis equal to their fair market value on the death of the first dying spouse.[104] This "step-up" in basis applies to the full extent of all community property assets, and not just to the first dying spouse's interest in community property, regardless of whether only one-half of the value of the community property assets are included in the first dying spouse's gross estate for federal estate tax purposes.[105]

In other words, the surviving spouse will receive a step-up in basis for his or her interest in community property *even though* his or her interest is not subject to the federal estate tax system on the first dying spouse's death. This is an incredible advantage provided for community property owners in the Internal Revenue Code, since for federal estate tax purposes the first dying spouse's gross estate typically will include his or her separate property *and* his or her one-half interest in the community property.[106]

Conversely, assets owned jointly by spouses in a manner other than as community property (such as tenants by the entirety, joint tenants with right of survivorship, or tenants in common), where one half of the value of such assets is included in the estate of the first dying spouse for federal estate tax purposes, will receive a step-up in income tax basis only to the extent of the first dying spouse's interest on his or her death (i.e., 50% of assets held in this fashion, unless Internal Revenue Code Section 2036 applies).[107]

The IRS has not confirmed whether a step-up in basis applicable to community property under Internal Revenue Code Section 1014(b)(6) will apply to property held under an elective community property trust system. IRS Publication 555 entitled "Community Property" specifically provides that it "does not address the federal tax treatment of income or property subject to the 'community property' election under Alaska, Tennessee, and

104. Graham, *supra* note 76.

105. 1 AM. JUR. LEGAL FORMS 2D - FEDERAL TAX GUIDE TO LEGAL FORMS § 1:57 (2d. ed. 2023); I.R.C. § 1014(b)(6).

106. 34A AM. JUR. 2D *Federal Taxation* ¶¶ 143,101 & 143,182 (2023).

107. MYRON KOVE ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 273.30 (2022); I.R.C. § 2036 (an asset transferred by an individual before death may be considered to be earned by the individual per federal estate tax purposes if the individual retained the right (1) to possession or enjoyment of or the right to income from the property, or (2) or the right, alone or with another, to designate the persons who shall possess or enjoy or receive income from the property).

South Dakota state laws."[108] This language creates some doubt as to whether the IRS will respect an "opt-in" community property trust for the purposes of affording a full step-up in basis to the assets of the trust on the death of the first dying spouse. Further, commentators have expressed concerns about whether the full fair market value basis step-up will be recognized by the IRS, while pointing out that such trusts will often expose assets to creditors that would otherwise would not have had the ability to reach such assets.[109]

Jonathan Blattmachr believes that the position set forth in the above referenced IRS publication is probably incorrect.[110] He indicates that most of the lawyers in the eight original community property states have most of their married clients transmute their former separate property into community property to secure the "double" step up in basis under Internal Revenue Code Section 1014(b)(6) for their former separate property.[111] He also points out that the Tax Court opinion in *Angerhofer*, which is described under the executive summary of this article, provides support for the proposition that a German couple can opt into the German law community property regime to enable them to be considered to have full community property rights and treatment for federal tax purposes.[112] He also recommends that interested advisors read the article entitled "Tax Planning With Consensual Community Property: Alaska's New Community Property Law," which was written by Howard Zaritsky, Mark Ascher and Jonathan Blattmachr. The article discusses the Supreme Court's treatment of Oklahoma's opt-in community property legislation in the *Harmon* case and the further developments that occurred thereafter.[113] They concluded that opt-in community property, unless it constitutes an anticipatory assignment of income (as the Supreme Court so found in *Harmon*), is just as much community

108. INTERNAL REVENUE SERV., PUBLICATION 555, COMMUNITY PROPERTY (Rev. March 2020).

109. *See* DAVID WESTFALL & GEORGE P. MAIR, ESTATE PLANNING LAW AND TAXATION § 4.03 (2023) ("That the Alaska Community Property Act and the Tennessee Community Property Trust Act of 2010 apply only when spouses elect their application creates uncertainty as to whether income from property governed by these acts will be treated as income from community property for federal income tax purposes . . . ."); *see also* Roberts, *supra* note 96.

110. *See* INTERNAL REVENUE SERV., *supra* note 108.

111. I.R.C. § 1014(b)(6).

112. *See* Angerhofer v. Comm'r, 87 T.C. 814, 828 (1986).

113. Blattmachr et al., *supra* note 53, at 625–31.

property as it would be in a state (such as California) which has an opt in system only for what had been separate property and otherwise treats most assets acquired during the marriage as community property.[114]

2. Survivorship Rights in Community Property & The Uniform Disposition of Community Property Rights at Death Act

Generally, the first dying spouse's interest in community property (and such spouse's interest in separate property) can pass upon his or her death as he or she designates by will or trust while the surviving spouse's interest in community property will become the sole and exclusive property of the surviving spouse.

Sixteen states,[115] including Florida, have adopted the Uniform Disposition of Community Property Rights at Death Act (UDCPRDA). The UDCPRDA provides that community property acquired in a community property jurisdiction while a married couple resides there will be treated in a manner similar to what applies to community property under the testamentary disposition laws of the community property state as the result of the death of the first dying spouse when the couple has moved to a community property jurisdiction.[116]

In other words, the UDCPRDA does not explicitly indicate that the property will continue to be treated as community property, although such a result seems to occur in most, if not all, of the common law states.[117]

The UDCPRDA instead provides that upon the death of one spouse, the one-half of the assets that are community property will pass through probate based upon the testamentary instructions of the first dying spouse, and that the other half will pass directly to, or be completely controlled by, the surviving spouse; and the elective share, dower, courtesy, forced inheritance, or other such spousal share that typically apply in a non-community property

114. *Id.* at 629–31.

115. These 16 states are as follows: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, Oregon, Utah, Virginia, and Wyoming. Nebraska legislators have recently introduced a bill that would make them the 17th state to adopt the Uniform Disposition of Community Property Rights at Death Act (UDCPRDA). *Community Property Disposition at Death Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=425b0732-7ff0-4b28-ada1-fc2b4638f29e (last visited July 17, 2023).

116. UNIF. CMNTY. PROP. DISPOSITION AT DEATH ACT § 6 (UNIF. L. COMM'N 2021).

117. *Id.*

state will have no impact upon disposition of community property.[118] As the result of this, individuals who move from a community property state to one of the states that do not recognize community property may be well advised to establish and fund a community property trust before making the move, in order to make it more likely that the IRS will respect the community property status of such assets for income tax basis step-up purposes.

Despite the above mentioned reservations about the UDCPRDA and its effect, commentators have noted that states that have embraced the UDCPRDA should be more inclined to acknowledge the characteristics of transitory community property on the death of the first spouse than states that have not adopted the UDCPRDA.[119]

It is worth noting that the Uniform Law Commission's description of the Community Property Disposition at Death Act on their website as of the date of publication reads as follows:

> Community property acquired by a married couple retains its character as community property even when the couple relocates to reside in a non-community property state. This result creates potential distribution problems at the death of the first spouse and also creates potential estate planning opportunities. However, a probate court or trustee in a non-community property state may not recognize the character of community property in a decedent's estate, which could lead to misallocation of the decedent's property, and potentially to disputes between a surviving spouse and the decedent's other heirs. This act is an update of a 1971 act that applied only to probate proceeds. The [Act] also addresses non-probate transfers of community property and provides clear default rules to ensure the proper disposition of community property from any estate, in any jurisdiction. It is recommended for adoption by all non-community property states.[120]

The 1967 Florida Third District Court of Appeals case of *Quintana v. Ordono*[121] is a good example of how these rules work. The case involved a husband and wife who moved from Cuba to

118. Zaritsky, *supra* note 93.

119. Beyer, *supra* note 2, at 22; M. Read Moore & Nicole M. Pearl, *Coming Soon to Your State: Community Property*, Presentation at ACTEC 2020 Fall Meeting (October 27, 2020).

120. *Community Property Disposition at Death Act*, *supra* note 117.

121. Quintana v. Ordono, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967).

Florida in 1960 when Cuba was a community property country.[122] While the couple was residing in Cuba, the husband purchased stock in U.S. companies, which the court found to be community property.[123] After the couple moved to Florida, the husband sold the stock for an $810,000 promissory note, and then died intestate.[124] The children filed an action for a declaratory judgment determining the respective rights of the children and the widow in the note.[125] The court held that the law of the couple's domicile at the time of the acquisition of the property is the law which determines the property interests.[126] Therefore, under the laws of Cuba, the wife had a vested interest in the stock equal to that of her husband.[127] However, because the stock was sold in exchange for the promissory note while the couple were domiciled in Florida, the promissory note was controlled by Florida law and was therefore not community property.[128] The court ultimately applied an equitable remedy, concluding that half of the note, or its proceeds were to be held in a resulting trust for the wife, stating as follows:

> Under Florida law, if a portion of the consideration belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used . . . [t]herefore, while the husband held legal title to the note and contract, he held a one-half interest in trust for his wife.[129]

Commentators and practitioners often misconstrue the *Quintana* opinion to mean that property owned by a spouse in Florida will be considered community property if it has its origins in community property, but the court did not determine that the note, or its proceeds, constituted community property under Florida law.[130]

Quintana is the seminal case for this situation in Florida. Court decisions in other common law states have been relatively

122. *Id.* at 578.
123. *Id.* at 579–80.
124. *Id.* at 578–79.
125. *Id.* at 578.
126. *Id.* at 579–80.
127. *Id.* at 580.
128. *Id.*
129. *Id.*
130. *Id.*

uniform on this front, typically trying to respect the community property nature of monies used to purchase real property in the noncommunity property state. They often find that the spouses held the property as tenants in common or apply the equitable remedy of a resulting trust.[131] However, courts in community property states have occasionally held that real property in a common law state is community property, flying in the face of the "lex situs" principle discussed below.[132] For instance, in the case of *Tomaier v. Tomaier*, the California Supreme Court ruled that Missouri real property owned by a married couple domiciled in California should be considered community property. As a result, the court directed the husband to transfer an interest in the property to his wife. The court justified its decision by citing the notion that, according to general conflict of laws principles, a Missouri court would acknowledge that both the husband and wife would be considered to have equally contributed to the property's purchase price when the consideration for the purchase of the Missouri real property was community funds from California.[133]

The Florida UDCPRDA was enacted in 1992 and largely follows the Uniform Act in providing as follows:

> Upon the death of a married person, one-half of the property to which [the Act] appl[ies] is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state. The decedent's one-half of that property is not in the elective [share] estate.[134]

Florida Statute Section 732.224 is derived from the UDCPRDA and provides that the provisions of the Act do not "affect rights of creditors with respect to property to which [the

131. Beyer, *supra* note 2, citing Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964) (North Dakota mineral rights purchased with community property was treated as owned by the spouse as equal tenants in common under a resulting trust theory); Stone v. Sample, 62 So. 2d 307 (Miss. 1953) (finding that the proceeds from the sale of real property in Mississippi that had been purchased by a married couple who lived in Louisiana was owned equally by the spouses).

132. *Id.*

133. Tomaier v. Tomaier, 146 P.2d 905 (Cal. 1944).

134. FLA. STAT. § 732.219 (2022). Florida's UDCPRDA is codified in FLA. STAT. §§ 732.216 – 732.228.

Act] appl[ies]."[135] This means that there is no change to creditors' rights in community property when a married couple moves to Florida. For example, moving community property from California (a community property state) will not alter a California creditor's rights to pursue such assets, unless or until the couple transmutes the property treatment.

Florida Statute Section 732.225 permits married couples to sever or alter their interests in property by transmuting out of community property status, and specifically provides that the acquisition of Florida property that becomes the couple's homestead creates a "conclusive presumption that the spouses have agreed to terminate the community property attribute of the property reinvested."[136] Florida Statute Section 732.226 provides that the Act does not "authorize a person to dispose of property by will if it is held under limitations imposed by the law preventing testamentary dispositions by that person." The homestead presumption above is one such limitation.[137]

Property held in tenancy by the entirety and property maintained as homestead is explicitly carved out of Florida's UDCPRDA in Florida Statute Section 732.218(2).[138] As attorney and author Juan Antuñez notes, the section is "a poorly drafted and logically confusing amendment to the Uniform Act which states that certain real property is presumed not to be community property, but not homestead and TBE property."[139] Additionally, attorney Richard Warner has stated that Section 732.218(2) "is a blatant double negative and hence that section cannot be used for the support of anything."[140]

Some states have legislation that allows community property to be held with right of survivorship, and the IRS recognized in

135. FLA. STAT. § 732.224 (2022).

136. FLA. STAT. § 732.225 (2022).

137. FLA. STAT. § 732.226 (2022).

138. FLA. STAT. § 732.218(2) (2022) ("Real property located in this state, *other than* homestead and property held as tenants by the entirety, . . . [is] presumed to be property to which these sections *do not* apply." (emphasis added)).

139. Juan C. Antunez, *A User's Guide to Prosecuting Claims under Florida's Uniform Disposition of Community Property Rights at Death Act*, FL. PROB. TRUST LITIG. BLOG (Aug. 4, 2020), https://www.flprobatelitigation.com/2020/08/articles/new-probate-cases/marital-agreements-and-spousal/a-users-guide-to-prosecuting-claims-under-floridas-uniform-disposition-of-community-property-rights-at-death-act/.

140. Richard M. Warner, *Florida Community Property Rights Simplified, 38th Annual Attorney Trust Officer Conference*, THE FLORIDA BAR, Course No. 3241R, at 3.17 (Aug. 23, 2019), https://www.rpptl.org/uploads/VOLUME1revised.pdf.

Revenue Ruling 87–98 that community property could still be treated as community property for tax purposes even though it has a right of survivorship component.[141] For example, community property normally passes one-half directly to the surviving spouse on the first spouse's death by operation of law.[142] Property owned in this manner will be treated as community property for step-up in basis purposes under Internal Revenue Code Section 1014(b)(6).[143]

IV. DEALING WITH TRANSITORY COUPLES, TRANSMUTING AND IMPORTING COMMUNITY PROPERTY AND CHOICE OF LAW CONSIDERATIONS

When a married couple leaves a community property state and moves to a non-community property state, a great many authorities have indicated that the community property retains its character as community property,[144] unless the married couple transmutes out of community property characterization or places the community property into tenancy by the entirety or homestead in states like Florida, which have laws which provide that TBE and homestead property will no longer be considered to be community property.[145]

It was of great surprise to the authors that the Florida and other UDCPRDA(s) do not specifically say that the property retains its character as community property, but instead indicates that the property is distributed on death as if it was community

141. Rev. Rul. 87–98, 1987–2 C.B. 206 ("If property held in a common law estate is community property under state law, it is community property for purposes of section 1014(b)(6) of the Code, regardless of the form in which title was taken.").

142. FLA. STAT. § 736.1507 (2021).

143. *See* Rev. Rul. 87–98, *supra* note 141.

144. A. M. Swarthout, *supra* note 13.

145. *Id.* But the question Jonathan poses is: community property under the law of what state, territory, or country? If assets that were community property, say under Arizona law, which belonged to a couple that moves to Florida, is it realistic to think that the Florida courts will administer the property as community property under Arizona law? It cannot administer the property under Florida community property law as Florida has none (except as to its community property trust law which, would not apply to property brought to the state by the couple, unless, put into a proper community property trust.) If one thinks the Florida courts would administer the property as community property under the laws of the couple's former domicile, doesn't that mean that separate property brought to Florida would have to be administered under the law of the couple's prior domicile? This seems doubtful and if it remains, for example, community property under Arizona law, even though the couple has moved to Florida, then why would the legislature have seen the need to enact the Uniform Disposition of Community Property at Death Act (UDCPRDA)?

property, without even using the words "community property" in the section that talks about the inheritance.[146]

1. Choice of Law Principles

While community property is not known to the common law,[147] common law choice-of-law principles, such as the "partial-mutability" doctrine,[148] and the "lex situs rule,"[149] have been applied when adjudicating the disposition of property disputes where the spouses have not executed an effective choice of law provision by valid agreement.

A. The Partial-Mutability Doctrine

The partial-mutability doctrine essentially provides that the law of the individual or couple's domicile at the time of the acquisition of property governs the interests in movable assets such as personal property.[150] In *Quintana v. Ordono,*[151] described above, without explicitly using the term, Florida's Third District Court of Appeals adopted the partial mutability choice-of-law rule for testamentary property rights of married couples with imported moveable property from a community property jurisdiction.[152] The court stated, "by the almost unanimous authority in America, the '[i]nterests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired.'"[153]

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146. *See, e.g.*, FLA. STAT. § 732.219 (2023).

147. A. M. Swarthout, s*upra* note 13, at § 2[a] (stating "[T]he community property statutes of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are drawn from the Spanish, Mexican, or French law. Community property is not known to the common law. In the United States community property derives its existence from express legislation. . . .").

148. Jeffrey Schoenblum, *U.S. Conflict of Laws Involving International Estates and Marital Property: A Critical Analysis of Estate of Charania v. Shulman*, 103 IOWA L. REV. 2119, 2121 (2018). (Stating, "For nearly 200 years, the prevailing doctrine in the United States has been 'partial mutability.'"); *see also* Philip E. Henderson, *Conflict of Laws - rules on Marital Property,* 18 LA. L. REV. 557, 561 (1958).

149. Beyer, *supra* note 2, at 15.

150. Schoenblum, *supra* note 148; *Personal Property*, BLACK'S LAW DICTIONARY, 2nd Ed. Personal Property is defined as "[t]he belongings of an individual, excluding any real estate property or other buildings. Generally includes tangible and intangible assets of an individual."

151. Quintana v. Ordono, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967).

152. Antunez, *supra* note 139, at 4–5.

153. *Quintana,* 195 So. 2d at 579.

Jeffrey Schoenblum defines the partial mutability doctrine as follows:

> Under this conflict-of-laws rule, the right of a spouse in a movable asset[154] acquired during marriage is determined by the law of the state in which the spouses had their marital domicile at the time of the acquisition of the asset. Thus, if the spouses change their marital domicile during the marriage, it is entirely possible that different movable assets will be governed by different laws. This conflict-of-laws rule is widely known as 'partial mutability' because the law of the original marital domicile does not remain the governing law as to assets acquired after a change in marital domicile has taken place. In other words, there is 'mutability.' However, it is only 'partial' because with respect to rights acquired at a particular marital domicile, they are not mutable and are not lost simply by moving to a new marital domicile that does not recognize those spousal rights.[155]

B. The Lex Situs Rule

The Lex Situs rule, which primarily applies to real estate provides that such property is governed by the law of the jurisdiction where the property is physically located.[156] In other words, the laws of the place where the property is situated, also known as the "situs" apply. However, Dr. Gerry W. Beyer observes that "[t]he effect of the 'lex situs' rule followed by U.S states is that the characterization of real property acquired in a community property jurisdiction during marriage will depend on the source of the funds used to purchase the property."[157]

New Mexico Community Property Law Applied When a Texas Couple Owned New Mexico Property. In the New Mexico Supreme Court case of *In re Clarke's Will*,[158] the Court determined that New Mexico law, and not Texas law, would apply to resolve the question of whether the income earned on real estate purchased in New

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154. Movable assets generally refer to personal property such as cars, furniture, jewelry, etc. *See, e.g.,* Alena Geffner-Mihlsten, *Lost in Translation: The Failure of the Interstate Divorce System to Adequately Address the Needs of International Divorcing Couples*, 21 S. CAL. INTERDISC. L. J. 403, 410 (2012).

155. Schoenblum, *supra* note 148, at 2121.

156. Quinio v. Aala, 603 F. Supp. 3d 50, 51 (E.D.N.Y. 2022).

157. Beyer, *supra* note 2, at 15 (citing Harding v. Harding, 36 Cal. Rptr. 2d 184 (Cal. Ct. App. 1963); *In re* Pugh's Est., 139 P.2d 698 (Wash. 1932); *In re* Gulstine's Est., 6 P.2d 628 (Wash. 1932).

158. 285 P.2d 795 (N.M. 1955).

Mexico by an individual from Texas with his separate property was community property. Under Texas law, the income from separate property of a married individual is generally treated as community property, but under New Mexico law, such income is not community property and remains the separate property of the spouse who has received the earnings. The New Mexico Supreme Court interpreted the lex situs principle as indicating that the earnings generated on the rental property in New Mexico (which were purchased with source funds from separate property earned in Texas), needed to be evaluated according to New Mexico law. Due to the fact that New Mexico does not consider income from separate property as community property, the court determined that the income belonged to the deceased individual as separate property.

California Community Property Law Applied When a Texas Couple Owned California Property. Similarly, in *Commissioner v. Skaggs*,[159] The Court of Appeals for the Fifth Circuit held in a 2 to 1 decision that the marital rights of spouses in property depends upon the law of the place where the property is located, and that the law of the situs governs the nature of the income on such property. In *Skaggs*, a husband domiciled in Texas owned income-producing property in California that he had purchased with his separate property. The central property characterization issue hinged on whether the income generated by the property should be governed by the laws of the property's location, as per the lex situs rule, or if the domicile of the property owners should influence the tax treatment of the income on the property. The wife argued that the income from the property would have been deemed community property under the laws of Texas. However, the Court, in finding that California law applied to the characterization of the income on the property (thereby treating such income as separate property), emphasized that income taxation should adhere to the laws of the property's location, rendering the domicile of the property owners irrelevant in determining how the income should be taxed.[160]

The *Skaggs* Court, in coming to its conclusion, enunciated the interplay of these rules effectively:

159. 122 F.2d 721 (5th Cir. 1941), *cert. denied,* 315 U.S. 811 (1942).
160. *Id.* at 723-24.

> Marriage is a very personal matter, and its incidents are in general regulated by the law of the matrimonial domicile. But the Spanish and French laws touching community property, and those of California and Texas and other States derived from them, are held to be, in the vocabulary of the civilians, statutes real and not statutes personal; that is to say, they apply to things within a country's jurisdiction rather than to persons wherever they may be or go. *Hammonds v. Commissioner*, 10 Cir., 106 F.2d 420. It should follow that things, whether movable or immovable, actually situate[d] in a State and effectively within its power, should be governed by the law of that State. It is universally held that real or immovable property is exclusively subject to the law of the country or State in which it is situated, and no interference with it by the law of any other sovereignty is permitted. 11 Am.Jur., Conflict of Laws, § 30. And the question whether property is real or personal is to be solved by the law of the place where it is actually located. Id., Sec. 29. These rules apply to questions of the marital rights of spouses in property. 11 Am. Jur., Conflict of Laws, Sects. 50, 85; Id., Community Property, Secs. 10, 11.

It may be said then, that the marital property rights of spouses in personal property are governed by the law of the marital domicile, as per the partial-mutability doctrine, and that the property rights of spouses in real property are governed by the law of state where the real property is physically located, as per the lex situs rule.[161] However, as observed in the *Skaggs* decision above, the question of whether property is considered real or personal is to be solved by the law of the place where the property is actually located.[162] For example, states vary on the classification of a mobile home as real or personal property.[163]

It is worth noting that courts in common law states have recognized the community property nature of funds used to buy real property in the common law state, often finding that the spouses own the property as tenants in common.[164] Nevertheless, courts in community property states have held that real property in a common law property state is community property, in defiance of the lex situs rule.[165] As these cases suggest, it is not easy to

161. J. Thomas Oldham, Conflict of Laws and Marital Property Rights, 39 Baylor L. Rev. 1255 (1987) (*citing* Comm'r v. Porter, 148 F.2d 566 (5th Cir. 1945)).

162. *See also* 16 Am.Jur. 2d Conflict of Laws § 29.

163. *Classification, as real estate or personal property, of mobile homes or trailers for purposes of state or local taxation*, 7 A.L.R.4th 1016 (1981).

164. Beyer, *supra* note 2, at 21. (citing Rozan v. Rozan, 129 N.W.2d 694, 694 (N.D. 1964); Stone v. Sample, 62 So.2d 307, 307 (Miss. 1953); Rev. Rul. 72-433, 1972-2 C.B. 531, 1972 IRB LEXIS 172.).

165. Tomaier v. Tomaier, 146 P.2d 905, 905 (Cal. 1944).

predict whether a certain court will determine the property characterization issue to be one relating to personal property or real property, or even whether the court will apply American choice of law rules consistently and coherently.[166] This reality makes any analysis with an eye toward deriving a "general rule" from this body of law even more onerous.

C. Be Wary of Lurie – Physical Non-Real Estate Objects – What Law Applies?

Similar choice of law issues have arisen in the context of property owned as tenancy by the entireties that has been taken to a state that does not recognize tenancy by the entireties as a form of ownership. For example, two cases involving the same family, the Luries, and their impending bankruptcy claim, were decided by two different courts with conflicting outcomes. In *Lurie v. Blackwell*, the Supreme Court of Wyoming held that the law of the state of acquisition applied to determine the character of a sculpture.[167] The Luries had purchased the sculpture in Missouri, a tenancy by the entireties state, while both spouses resided there.[168] The couple later moved to Montana, which does not recognize tenancy by the entireties.[169] Years after moving to Montana, the couple sent the sculpture to Wyoming for a dealer to sell it.[170] A Missouri bankruptcy proceeding was pending and, in 1995, a judgment was rendered.[171] As a consequence, the sculpture was seized, but the wife claimed that it was held as tenancy by the entirety and thus was not subject to creditors.[172] The bankruptcy trustee, however, argued that Montana does not recognize tenancy by the entireties, and thus the sculpture should be subject to seizure.[173] The Wyoming Supreme Court held that the trustee could not seize the sculpture because the Luries were married at the time they acquired the sculpture in Missouri, they acquired the

166. Oldham, *supra* note 161, at 1272.
167. 51 P.3d 846, 846 (Wy. 2002).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 847.
172. *Id.*
173. *Id.*

sculpture in a state that recognized tenancy by the entirety, and creditors could thus not seize such property.[174]

In contrast, the Montana Supreme Court in the related case *of Lurie v. Sherriff of Gallatin County*, took the opposite approach and determined that the law of the situs controlled the characterization of tangible personal property.[175] Similar to *Lurie v. Blackwell*, at issue in *Lurie v. Sheriff of Gallatin County* was a sculpture purchased while the couple resided in Missouri, a tenancy by the entireties state, and was moved to Montana when the couple changed their residence to Montana, which is a non-tenancy by the entireties state.[176] The court held that the sculpture was no longer held as tenancy by the entireties because Montana does not recognize that form of property ownership, and as such, the sculpture was subject to the bankruptcy judgment.[177]

The *Lurie* cases demonstrate an important notion at the heart of these conflict of law issues: laws among states still vary, potentially leading to divergent results depending on the jurisdiction in which a legal matter is litigated, and the public policies and conflicting interests of other states that may be concerned with the case's outcome.

2. Save Yourself the Trouble – Have an Effective Choice of Law Agreement

The best way to avoid the application of the confusing principles above from a marital law standpoint is to have the married couple enter into an effective marital property agreement or premarital agreement which contains an effective choice of law provision. The courts will generally respect a married couple's choice of law to govern the property they acquire while married unless another state demonstrates a more compelling interest in seeing its laws applied. For example, where cases involve[178]deal with the rights of third parties, such as a creditor or someone who receives assets from one spouse, considerations of fairness may necessitate applying the law of the property's physical location.

174. *Id.* at 851.

175. Lurie v. Sheriff of Gallatin Cnty., 999 P.2d 342, 345 (Mont. 2000).

176. *Id.* at 344.

177. *Id.* at 345 (finding that sculpture was owned as joint tenancy or as tenancy in common property in Montana and sculpture was subject to execution on a validly issued writ.).

178. RESTATEMENT (SECOND) OF CONFLICT OF L. § 258 (AM. L. INST. 1971). *See also* Beyer, *supra* note 2, at 24.

Similarly, in cases involving movable property, greater weight will generally be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the applicable state law.[179]

Restatement (Second) of Conflict of Laws §187 reinforces the proposition above. It states that, in a contract, a court will typically honor the choice of law made by a married couple unless the chosen jurisdiction has no connection to the parties or the transaction, or if applying the chosen law contradicts a fundamental policy of a state that has a significantly stronger interest than the chosen state. In such cases, the state with the greater interest in the matter, which, absent the parties' choice of law would have been the governing law, takes precedence.[180]

On certain occasions, Florida courts have declined to uphold prenuptial agreements from foreign jurisdictions.[181] For instance, in 1961, before surviving spouses in Florida were given the right to an elective share (and the ability to waive such rights), a Florida court declined to enforce a prenuptial agreement from Quebec that waived dower rights. The court determined that enforcing such an agreement would contradict a strong public policy of Florida to have its laws apply to real property situated in the state.[182] However, in 1995, a Florida court upheld a choice of law provision designating Puerto Rico law regarding property other than real property in Florida, and remanded the case for further consideration of whether the choice of law clause was valid regarding Florida real property.[183] These cases underscore the importance of having a choice of law provision that designates both where the agreement will be litigated and what state law will apply.

This area of the law can be confusing, impractical, and far from definitive. Practitioners should be well-versed in both the laws in their state of practice and the laws of the state their clients are importing community property from.

179. RESTATEMENT (SECOND) OF CONFLICT OF L. § 234 (AM. L. INST. 1971).
180. *See id.* § 187.
181. Beyer, *supra* note 2, at 24.
182. *Id.* (citing Kyle v. Kyle, 128 So.2d 427, 427 (Fla. App. 1961)).
183. *Id.* at 25 (citing Estate of Santos, 648 So. 2d 277, 277 (Fla. App. 1995)); *see also* Franzen v. Franzen, 520 S.E.2d 74, 74 (N.C. App. 1999); Brown v. Gillespie, 955 S.W.2d 940, 940 (Mo. App. 1997); Estate of Levine, 700 P.2d 883, 883 (Ariz. App. 1985).

3. Community Property Should Retain its Character as Community Property after A Couple Moves to a Non-Community Property State.

Although Florida's UDCPRDA does not explicitly say that imported community property remains community property for purposes of testamentary dispositions, an American Law Report published in 1967 notes that "[w]hatever may be the underlying theoretical considerations that support it, the proposition that a change of domicil [sic] by a husband and wife from a state in which the community property system obtains to a state in which does not, or vice versa, has no effect on the character, as separate or community property, of property acquired prior to the removal or property into which such property can be traced, is almost universally accepted."[184]

To support this proposition, The American Law Report cites 39 cases dating back as far as 1826. In the 1827 Louisiana case of *Saul v. His Creditors*[185] the children of an insolvent father who had inherited from their mother commenced a proceeding claiming one-half of their father's property as the heirs of their mother, on the theory that her estate was community property.[186] The property involved was all acquired by the couple after they moved from the common law state of Virginia, where they married, to the community property state of Louisiana.[187] The opinion indicates that property acquired by the parties while they were residents of Virginia remained separate property and the property acquired while they were residents of Louisiana was community property.[188]

More than a century later, in 1937 the Eighth Circuit Court of Appeals case of *Johnson v. Commissioner*[189] reviewed an order of the Board of Tax Appeals redetermining deficiencies in the taxes imposed by the IRS. The taxpayer was married in Texas in 1886 and the wife had no assets of her own before or during the marriage.[190] In 1889, the couple moved from Texas (a community

184. A. M. Swarthout, s*upra* note 13, at § 3.
185. Saul v. His Creditors, 5 Mart. (n.s.) 569, 569 (La. 1827).
186. *Id.* at 571.
187. *Id.*
188. *Id.* at 608. "We conclude, therefore, that a community of acquests and gains did exist between the insolvent and the mother of the appellees, from the time of their removal into this state . . . "; *see also* Swarthout, s*upra* note 13.
189. Johnson v. Comm'r, 88 F.2d 952, 952 (8th Cir. 1937).
190. *Johnson,* 88 F.2d at 953.

property state) to Missouri (a non-community property state).[191] The taxpayer asserted that his income for the years 1927 through 1929 resulted from appreciation in value of the property that the couple brought from Texas, and therefore one-half of the income from the pre-1989 community property was taxable to his wife.[192] Joint federal income tax returns were not permitted under the U.S. Tax system until 1938.[193] The Court found that income and appreciation on the Texas community property was taxable one-half to the wife because after the couple left Texas "what was community property at the time continued to be community property."[194] This case has been cited on multiple occasions in law review and other articles discussing conflict of law and marital property rights.[195]

Based on the aforementioned case law it appears to the authors that while the UDCPRDA does not expressly declare that imported community property will remain as such for purposes of testamentary dispositions, the status of property as either community or separate will be determined by the laws of the state where the couple is domiciled when they acquire such property, or by the laws of the state where real property is physically located, unless or until they transmute out of community property treatment or place the property under a properly drafted and administered community property trust or into a homestead or tenancy by the entireties in Florida. The real key is not the label, as previously noted, but the rights that are retained or lost. Even if a "new" state (as it probably must) does respect the rights of each spouse to assets that were community property before they moved to the new state, it still begs the question of whether the assets are still community property under the law of the former state, territory or foreign country.

191. *Id.* at 953–54.

192. *Id.* at 954.

193. Manton v. Comm'r, 11 T.C. 831, 835 (1948) (recognizing the allowance of joint returns beginning in 1938).

194. *Id.* at 835.

195. James L. Buchwalter, *Conflict of Laws Regarding Immovable or Real Property, Generally*, 15A C.J.S. CONFLICT OF L. § 89, n. 7 (2023); Walter L. Nossaman, *Tax Problems Affecting Community Property*, 26 TEX. L. REV. 26, 39 (1947).

V. CREDITOR RIGHTS IN COMMUNITY PROPERTY

Creditor rights vary based on the state where the community property is located. As a general rule, most of the community property states allow the creditor of one spouse to reach all community property.[196] In a community property state, when one spouse incurs a debt, the debt can be categorized as either an individual debt of that one spouse, or a community debt of both spouses.[197] Some states define the distinction between separate and community debts by statute, while others have relied solely on case law.[198] It is well settled that a creditor owed a separate debt may reach the separate property of the debtor spouse,[199] but not the separate property of the nondebtor spouse.[200] However, the laws among the community property states have substantial variation as to whether or not a creditor holding a separate debt may reach community property in order to satisfy the debt.

Community property states generally treat creditors' rights in one of two ways:

1. "Creditors Can Take It All" States

All states, except Texas,[201] allow collection of at least some post-marital obligations from 100% of the couple's community property. Some states (California, Idaho, and Louisiana) allow most categories of creditors to collect all debts of either spouse from 100% of community property.[202] Other states (New Mexico and Nevada) only allow this with respect to post-marital obligations of either spouse.[203]

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196. *See generally* Treacy, *supra* note 46.

197. HON. WILLIAM H. BROWN, LAWRENCE R. AHERN, III & CHRISTOPHER M. CAHILL, 1 THE LAW OF DEBTORS AND CREDITORS § 6:86. (2023).

198. *Id.* (citing N.M. STAT. ANN. § 40-3-9 (West 2023); LA. CIV. CODE. ANN. art. 2359, 60, 63 (2023)).

199. *See, e.g.*, CAL. CIV. CODE § 5121 (West 2023); IDAHO CODE Ann. § 32-911 (West 2023).

200. *See, e.g.*, LA. CIV. CODE. ANN. art. 2345 (2023); TEX. FAM. CODE. ANN. § 5.61 (West 2023); WASH. REV. CODE ANN. § 26.16.020 (West 2023). There are some exceptions to this principle (e.g., debts incurred for necessities). *See* CAL. FAM. CODE § 910-14 (West 2023); NEV. REV. STAT. ANN. § 123.090 (West 2023).

201. TEX. FAM. CODE ANN. §3.201 (West 2023).

202. *See* Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 1 (2007).

203. *Id.*

In California, Idaho, and Louisiana, creditors of the debtor spouse can reach all community property if the debt is incurred during the marriage.[204] Idaho and Louisiana courts have held similarly that community property can be reached to satisfy separate debts.[205] In California, community property earnings of one spouse can be segregated from the other community property in order to insulate it from the debts of the other spouse incurred prior to marriage.[206]

By contrast, Nevada has a statute that was enacted in 1873 which provides that the non-debtor spouse's interest in community property is not accessible to satisfy the debtor spouse's premarital obligations.[207]

New Mexico law requires the creditor to first seek payment from the separate property of the debtor spouse before being able to attempt to attach the debtor spouse's one-half ownership in the community property.[208]

Generally, if one spouse incurs a debt, and there is no community property to satisfy the debt, the non-liable spouse's separate non-community property is not available to satisfy the debt, although the debtor spouse's separate property would be available.[209]

Planners may consider transferring assets to irrevocable trusts established in asset protection trust jurisdictions that may retain community property status.

Older family members, such as the parents or surviving parent of the grantor of an asset protection trust may be given general powers of appointment over trust assets to obtain a step-up in income tax basis even during the life of both spouses.

2. "Community Debt" States

Some states (Arizona, Washington and Wisconsin) "characterize post-marital debts as either community debt or separate debt." Community debt is debt that has been incurred to

204. *Id.*
205. *Id.*
206. CAL. FAM. CODE § 911(a) (2001).
207. NEV. REV. STAT. § 123.050 (2023).
208. N.M. STAT. ANN. § 40-3-10(A) (2023).
209. Beyer, *supra* note 2, at 4.

benefit the marriage or family.[210] Community debt can be satisfied from all community property.[211] Separate ("non-community") debt may only be satisfied from the debtor spouse's half of community property or from the debtor spouse's contribution to community property.[212] In these states, the presumption is that debts are community debts.[213]

In Arizona, all debts incurred during the marriage are presumed to be community debt unless clear evidence is presented to show that the debt is separate.[214]

Washington statutes permit community debt to be satisfied from the community property of both spouses, and the separate property of the debtor spouse.[215]

Wisconsin courts divide the debts incurred after the marriage into (1) family purpose obligations; or (2) non-family purpose obligations.[216] Debt incurred for family purpose obligations can be satisfied through the debtor spouse's separate property and all marital property, including community property.[217] Non-family purpose obligations can be collected from the debtor spouse's separate property and the debtor spouse's one-half interest in the couple's community property.[218]

Texas law provides for different rules as to a creditor's ability to access community property, depending on whether the debt results from a contract or tort claim, and whether the debt was incurred before or during the marriage.[219]

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210. IRS, COLLECTION OF TAXES IN CMTY. PROP.STATES, *Cmty. Debt States* (2018), https://www.irs.gov/irm/part25/irm_25-018-004.

211. *Id.*

212. *Id.*

213. *Id.*

214. ARIZ. REV. STAT. ANN. § 25-215 (2023) note (Community property and obligations—in general) (citing *Schlaefer v. Fin. Mgmt. Serv. Inc.*, 996 P.2d 745, 748 (Ariz. Ct. App. 2000)).

215. WASH. REV. CODE § 11.10.030 (2022).

216. *See St. Mary's Hospital Medical Center v. Brody*, 519 N.W.2d 706, 709 (Wis. Ct. App. 1994) (citing UNIF. MARITAL PROP. ACT § 8 cmt. at 26-27 (UNIF. L. COMM'N., 1996)).

217. WIS. STAT. § 766.55 (2023); Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 778-79 (1990).

218. Treacy, *supra* note 46.

219. For an excellent discussion of creditor's rights with respect to Texas community property, see Thomas M. Featherston, Jr, Creditors' Rights in and to the Marital Estate: What Property is Liable for which Debts?¸2013 ADVANCED EST. PLAN. & PROB.COURSE, State Bar of Texas (June 26, 2013).

Under the Tennessee Community Property Act, the obligation of one spouse incurred before or during the marriage can be satisfied only from that spouse's one-half of the community property trust.[220] 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.[221] Similarly, Florida's Community Property Trust Act provides that the debts and obligations of one spouse may be satisfied from that spouse's one-half share of the trust, regardless of whether the debt or obligation is incurred before or during the marriage.[222] As such, the Florida community property trust may not be attractive to spouses who prioritize creditor protection planning since assets owned as tenants by the entireties are generally being protected from the debts and obligations of one spouse. A joint debt or obligation of both spouses may be satisfied from the assets of the trust, which is similar to the treatment of joint debts and obligations vis-à-vis tenants by the entirety assets. An LLC owned partly by a community trust and partly by another person or family entity may facilitate charging order protection, as further discussed below.

Any further survey of the variations in the law in this area would exceed the scope of this discussion, however, a chart entitled "Creditor Rights in Community Property States" provided at the end of this article gives the matter further attention.

VI. ESTATE AND GIFT TAX CONSIDERATIONS

1. Gifts of Community Property

Gifts of community property made by one spouse are automatically considered to have been made one-half by each spouse, so that "gift splitting" by the filing of a gift tax return by the non-donor spouse is not required for community property transfers.[223] Steve Akers instructs the reader to "not make a gift of community property to a trust in which a spouse is a beneficiary if the desire is to exclude the trust assets from the gross estates of the spouses.[224] The beneficiary spouse will be treated as making

220. TENN. CODE ANN. § 35-17-106 (West 2023).
221. TENN. CODE ANN. § 35-17-107 (West 2023).
222. FLA. STAT. § 736.1506 (2022).
223. Akers, *supra* note 70, at 9.
224. *Id.*

the gift of one-half of the assets with a retained beneficial interest subject to 2036(a)(1)."[225]

Spouses generally must both consent to gifts of community property, and a gift of community property made without the proper authority is voidable at the option of the non-consenting spouse.[226] [227]

Furthermore, it is advisable to follow correct protocols when designating a beneficiary for a community property IRA or life insurance policy other than the surviving spouse, to prevent unforeseen or unintended outcomes.[228] If one spouse intends to leave a community property IRA or life insurance policy to someone other than their spouse, it is important to secure the other spouse's consent while they are still alive.[229] Typically, both spouses have a right to dispose of one-half of a community property IRA or life insurance policy, regardless of which spouse is the account holder or policyholder and with respect to beneficiary designations."[230] For example, under California law, a surviving spouse has the right to reclaim from the designated beneficiary their one-half interest in the community property if they did not consent to the beneficiary designation.[231]

Despite the surviving spouse's approval of a beneficiary designation, practitioners should consider whether to convert the community property asset into separate property to prevent it from being considered a gift by the surviving spouse upon the death of the policyholder or account holder.[232]

2. Estate Tax Implications

Much like how the community property system automatically equalizes gifts, it also automatically equalizes estates between spouses. For estate tax purposes, when the first spouse dies, his or her gross estate includes one-half of each item of the couple's community property, in addition to his or her separate property.[233]

225. *Id.*
226. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933).
227. Beyer, *supra* note 2, at 5.
228. *Id.* at 39.
229. *Id.*
230. *Id.* at 40, citing Nev. Rev. Stat. §123.230; RCW §6.15.020(6).
231. Cal. Prob. Code § 102.
232. Beyer, *supra* note 2, at 40.
233. Michaelle D. Rafferty, *Use of Joint Spousal Trusts in Community Property States: Still the Gold Standard of Estate Planning?*, 67 PRAC. LAW. 47 (2021).

Because of this, most well-advised couples who reside in community property states will either transmute out of community property treatment when appropriate or consider holding the community property in a Joint Trust that breaks up into two separate parts when one spouse dies.[234] Part one consists of the half ownership of the assets that continues in the name and under the control of the surviving spouse.[235] The other half of the assets will typically pass into a Credit Shelter Trust, with an overflow provision into a QTIP Trust for the surviving spouse and descendants.[236] More detail on the estate tax implications of community property is provided below.

3. Gift Tax on Funding

Planners should be aware that the funding of a community property trust may be considered to be a taxable gift by one spouse to the other, depending upon how much in assets each spouse transfers to the trust, and what legal rights each spouse will have over the trust.[237]

Steve Akers describes the issue masterfully in his ACTEC 2013 Fall Meeting Musings:

> Completed gift issues can arise even though the joint trust is revocable.
>
> In community property states, if the assets will pass to or for the benefit of the surviving spouse at a spouse's death and if spouses must act jointly to revoke the trust, there may be a completed gift upon creating the trust because the trust could be revoked only with the consent of a person who has a substantial adverse interest (reg.§ 25.2522-2(e)), and that causes a completed gift under the gift tax regulations. The older spouse may be treated as making a gift to the younger spouse that would not qualify for the marital deduction (because it would be a terminable interest without a mandatory income interest). Typically, joint trusts with community property provide that either spouse may unilaterally revoke the trust as to all community property held in the trust (i.e., both halves of

234. *Id.* at 51-52.
235. *Id.* at 52.
236. *Id.*
237. Karen Boxx, *The Use of Joint Revocable Trusts for Married Couples*, 61 PRAC. LAW. 53 (2015).

> community property). (The community property would be subject to the same ownership and management rights, but the trust layer would have been removed.)
>
> The Uniform Trust Code states that for revocable trusts holding community property, "the trust may be revoked by either spouse acting alone but may be amended only by the joint action of both spouses." (§602(b)).
>
> In common law property states, joint trusts often state that the contributions are treated as if made one-half by each spouse, that on revocation one-half of the trust assets would pass to each spouse, and that if a distribution is made to one spouse, an equal distribution is made to the other spouse.[238]

VII. CREATING A FLORIDA COMMUNITY PROPERTY TRUST

Florida's Community Property Trust Act (the "Act") introduces Florida Statutes Sections 736.1501 through 736.1512, and is very similar to the Alaska, Tennessee, South Dakota and Kentucky Acts.[239] The Act provides that "'Community Property' means the property and the appreciation of and income from the property owned by a qualified trustee of a community property trust during the marriage of the settlor spouses."[240]

A community property trust is a "trust that complies with s. 736.1503 and is created on or after July 1, 2021."[241] Therefore, it appears that a pre-existing trust cannot be converted into a community property trust, but trust assets existing on or before July 1, 2021, can be "decanted" or transferred into a new community property trust.

As stated above, "Community Property" is defined under section 732.1502(1) as "the property and the appreciation of and income from the property owned by a qualified trustee of a Community Property Trust during the marriage of the settlor spouses."[242] In defining "community property," section 732.1502(1) continues, stating: "The property owned by a community property trust pursuant to this part and the appreciation of and income from

238. *Id.*
239. Sneeringer, *supra* note 30, at 35.
240. FLA. STAT. § 736.1502(1) (2022).
241. *Id.* § 736.1502(2).
242. *Id.* § 736.1502(1).

such property shall be deemed to be community property for purposes of general law."[243] Readers should be aware that there is no definition of "general law" provided by the statutes, but it seems clear that it is intended that the property placed in Florida community property trust will be community property for purposes of obtaining stepped-up fair market value income basis under Internal Revenue Code Section 1014(b)(6). Jonathan Blattmachr asks, "could Florida pass an enforceable law saying that assets that were community property under the law of the couple's former domicile remain community property under the laws of that former domicile?"[244] Florida could pass a law that says this, but can such a law actually apply?[245]

A "qualified trustee" is defined under Florida Statute Section 736.1502 to be either "(a) a natural person who is a resident of [Florida], or (b) a company authorized to act as a trustee in [Florida]."[246] It is possible that almost any company or LLC formed in Florida could serve as a "Company Authorized As A Trustee in Florida" because Florida law does not prevent a company from acting as a trustee.

736.1502 defines settlor spouses to mean a "married couple who establishes a community property trust pursuant to (the statute)."[247]

For a married couple to form and maintain a Florida community property trust, the Act requires that one or both settlor spouses transfer property to a trust that meets the following four requirements:

"1. Expressly declares that the trust is a community property trust within the meaning of this [statute].

2. Has at least one trustee who is a qualified trustee "provided that both spouses or either spouse also may be a trustee."

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243. *Id.*

244. *See* Jonathan G. Blattmachr et al., *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 REAL PROP., PROB. AND TR. J. 615, 624 (1999) (questioning whether the state property laws of an individual's prior state can transfer to a new state when the individual moves).

245. *See id.* at 617 (detailing how a new look at community property laws can effectively enable an individual to choose a community property option and outlining the tax advantages that could come with allowing residents to utilize community property trusts). The IRS may argue otherwise.

246. FLA. STAT. § 736.1502(1).

247. *Id.*

3. Is signed by both settlor spouses consistent with the formalities required for the execution of a trust under this chapter.[248]

4. 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."[249]

Florida Statute Section 736.1504 provides that the trust agreement that establishes the community property trust may include an agreement by the settlor spouses upon the following:

"a. The rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located.

b. The management and control of the property transferred into the trust.

c. The disposition of the property transferred into the trust on dissolution, death, or the occurrence or nonoccurrence of another event, but subject to both of the following limitations:"[250]

> **Limitation 1** - Under Florida Statute Section 736.1507, upon "the death of a spouse, one-half of the aggregate value of the property held in a community property trust . . . is not subject to testamentary disposition by the decedent spouse or distribution under the laws of succession . . . [t]]he other one-half . . . reflects the share of the decedent spouse and is subject

248. FLA. STAT. § 736.1503(l).
249. *Id.*
250. FLA. STAT. § 736.1504(1)(a)–(c).

to testamentary disposition or distribution under the laws of succession of the state." [251]."

Limitation 2 - Florida Statute 736.1508 states that, upon dissolution of the marriage of the couple, the community property trust will terminate, and the trustee will distribute one-half of the trust assets to each spouse.[252]

It is important to note that Florida Statute Section 736.1508 appears to intend to provide that the married couple can contractually agree to share the assets of the community property trust other than equally in the event of the dissolution of marriage but this does not seem clear to the authors.[253]

The authors are not sure whether the spouses can have a prenuptial or postnuptial agreement that would require the equal ownership of assets received from the community property trust to be adjusted after receipt, such as upon the event of a divorce filing, after the literal language of the statute has been satisfied by facilitating an equal distribution.

It seems that once the assets are distributed from a Florida community property trust to the spouses while living, they will be considered to be the couple's separate property. Unlike Alaska law, which provides that assets contributed to an Alaska community property trust and declared to be community property under Alaska law remain community property under Alaska law if and when distributed out, Florida law does not continue to treat the assets as community property (as Florida has no community property law outside of a Florida community property trust).[254]

d. "Whether the trust is revocable or irrevocable." The presumption is that the trust is revocable unless stated otherwise.[255]

There are advantages to having an irrevocable community property trust. This includes the reduction of risk that one or more

251. FLA. STAT. § 736.1507.
252. FLA. STAT. § 736.1508(1).
253. FLA. STAT. § 736.1508(3).
254. *Alaska Property Division FAQs*, MARITAL LAWS, https://www.maritallaws.com/states/alaska/property-division (last visited July 18, 2023).
255. FLA. STAT. § 736.1504(1)(d). *See also supra* note 50 (supporting the assertion that an irrevocable community property trust includes a reduction of the risk of undue influence issues).

individuals may unduly influence the married couple to change the trust and to lose access to the assets thereof.[256]

e. Any other matter that affects the property transferred to the trust and does not violate public policy or general law . . . or result in the property not being treated as community property under the laws of a relevant jurisdiction." ."[257] The statute further provides that in the event of the death of a settlor spouse, the surviving spouse may amend the trust with respect to the disposition of the surviving spouse's one-half share of the trust "regardless of whether the agreement provides that the community property trust is irrevocable," or regardless of what the trust agreement says to the contrary.[258] This (and Limitation 1 described above[259]) underscores the principle that the surviving spouse's one-half of the community property trust is the surviving spouse's property that vests in the surviving spouse upon the first dying spouse's death. Moreover, this prevents distributions from being made to descendants, charities, or others from a community property trust, and causes a loss of flexibility, but enhances the protection of the married couple themselves.

Many married couples enter into joint trusts based upon the premise that the surviving spouse would be required to have the assets remain under the trust and be used only for the health, education, maintenance, and support of the surviving spouse and common descendants to preserve the assets for the common descendants or other family or charities that may be favored by the first dying spouse.[260] This is apparently not possible under a Florida community property trust, at least to the extent of the surviving spouse's 50% interest in the community property trust.

Furthermore, during the joint lifetimes of the spouses, they "shall be deemed to be the only qualified beneficiaries of a community property trust until the death of one of the settlor spouses, regardless of whether the trust is revocable or irrevocable."[261] "After the death of one of the settlor spouses, the

256. *What is an Irrevocable Trust?*, METLIFE (Nov. 3, 2022), https://www.metlife.com/stories/legal/irrevocable-trust/.

257. FLA. STAT § 736.1504(1)(e).

258. FLA. STAT. § 736.1504(4).

259. FLA. STAT. § 736.1507.

260. Zachary F. Lamb, *Joint Trusts: A Useful Tool for Some Married Couples*, WARD AND SMITH (July 5, 2022), https://www.wardandsmith.com/articles/joint-trusts-a-useful-tool-for-some-married-couples.

261. FLA. STAT. § 736.1504(4).

surviving spouse shall be deemed to be the only qualified beneficiary as to his or her share of the community property trust."[262] This is important because qualified beneficiaries have certain rights under Florida law, such as the right to receive trust accountings, and the right to access information regarding the trust instrument and the trust's activities.[263]

"Qualified beneficiary" is defined under Florida Statute Section 736.0103 as "a living beneficiary who, on the date the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date."[264]

Despite the advantages of a Florida community property trust, a married couple transferring assets to a community property trust may be causing assets that would otherwise be protected from creditors to be accessible to them, such as if and when the married couple may transfer tenants by the entirety's assets, annuities, life insurance, 529 Plans, and wage accounts to a community property trust.[265], [266]

Some couples may have the community property trust own the majority interest in an LLC that will have other members. The statutes are silent as to whether a charging order will be the sole remedy of the judgment creditor who has the right to receive one-half of the community property trust assets by reason of being owned by one spouse, or all of such assets by reason of being owned

262. *Id.*

263. *See generally* FLA. STAT. § 736.0813.

264. FLA. STAT. § 736.0103(19).

265. Joseph M. Percopo, *Understanding The New Florida Community Property Trust, Part II,* THE FLORIDA BAR (Oct. 2022), https://www.floridabar.org/the-florida-bar-journal/understanding-the-new-florida-community-property-trust-part-ii/#u6e00.

266. For an additional discussion on Florida Community Property Trusts, see HOWARD M. ZARITSKY & FARHAD AGHDAMI, TAX PLANNING FOR FAMILY WEALTH TRANSFERS AT DEATH
4.07[7][c][v] (Thomson Reuters/WG&L 2014) and HOWARD M. ZARITSKY & FARHAD AGHDAMI, TAX PLANNING FOR FAMILY WEALTH TRANSFERS AT DEATH § 8:77 (Thomson Reuters/WG&L, 5th ed., 2013).

by the other spouse, although it seems that the protection provided by Florida's charging order law will apply if an interest in a multiple member LLC is owned by a Florida community property trust.[267]

The safest approach would be to have voting-member interests owned by the minority member so that the creditor can only reach an LLC member interest that would not be able to vote to authorize or require liquidation or distribution from the LLC; however, a community property trust that does not control the voting rights of an entity that it owns part of may result in less than a full fair market value basis if the IRS argues that there should be a significant discount in value.[268]

VIII. HOMESTEAD ISSUES

Furthermore, Florida Statute Section 736.151 entitled "Homestead Property" provides that "[p]roperty that is transferred to or acquired subject to a community property trust may continue to qualify or may initially qualify as . . . homestead . . . provided that the property would qualify as . . . homestead [with title as] held in one or both of the settlor spouse's individual names", and the "[s]ettlor spouses shall be deemed to have beneficial title in equity to the homestead property held subject to a community property trust for all purposes, including for the purposes Section 196.031."[269]

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267. Florida's Charging Order Statute, FLA. STAT. § 605.0503, provides the following "[A] charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company." FLA. STAT. § 605.0503(6) further provides that: "In the case of a limited liability company that has more than one member, the remedy of foreclosure on a judgment debtor's interest in the limited liability company or against rights to distribution from the limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court." *Id.*

268. *See* Jospeh M. Percopo, *Understanding the New Florida Community Property Trust, Part II*, THE FLORIDA BAR (Oct. 2022), https://www.floridabar.org/the-florida-bar-journal/understanding-the-new-florida-community-property-trust-part-ii/#u6e00 (discussing the various implications on LLCs of Florida's new community property law).

269. FLA. STAT. § 736.151, which reads as follows: "Homestead Property. - (1) Property that is transferred to or acquired subject to a community property trust may continue to qualify or may initially qualify as the settlor spouses' homestead within the meaning of s. 4(a)(1), Art. X of the State Constitution and for all purposes of general law, provided that the property would qualify as the settlor spouses' homestead if title was held in one or both of the settlor spouses' individual names. (2) The settlor spouses shall be deemed to have beneficial title in equity to the homestead property held subject to a community property trust for all purposes, including for purposes of s.196.031."

Florida Statute Section 196.031 provides for the property tax treatment of homestead, which allows for a reduction of up to $50,000 in the assessed value of a Florida homestead for county property tax purposes.[270] The homestead exemption includes the additional benefit of an annual limitation in the increase in the assessed value of homestead property to the lesser of 3% or the increase in the Consumer Price Index (CPI) over the prior year.[271]

Under the Florida Constitution, the first dying spouse can only devise Florida homestead property to the surviving spouse unless waived in proper form.[272] Otherwise, if the homestead owner dies as the sole owner of homestead property and leaves a spouse and one or more descendants, then the spouse receives a life estate and the descendants receive a vested remainder interest, all by operation of law, notwithstanding what the will or trust of the homestead owner provided.[273] The Florida Statutes permit the surviving spouse to elect to receive a 50% undivided interest, and to have a 50% undivided interest in lieu of a life estate, and to have it vest in the descendants of the decedent homestead owner if a timely election is filed.[274] The 2014 case of *Stone v. Stone*[275] addressed this shortcoming by allowing a deed from a spouse to constitute a waiver of homestead rights, so that the first dying spouse's interest could be devised as the first dying spouse wished.[276] Since the *Stone* case, Florida Statute 732.7025 was enacted to provide a safe harbor method of having a spousal waiver of homestead by deed.[277] There is no language regarding the waiver of homestead rights included in the Florida Community Property Trust Act, so a spouse wishing to do so must rely on

270. FLA. STAT. § 196.031(b), which reads as follows: "Every person who qualifies to receive the exemption provided in paragraph (a) is entitled to an additional exemption of up to $25,000 on the assessed valuation greater than $50,000 for all levies other than school district levies."

271. Jerry Holland, *Save Our Homes - Assessment Cap On Homesteaded Property*, COJ, https://www.coj.net/departments/property-appraiser/save-our-homes-amendment-10 (last visited Mar. 26, 2023).

272. *See* FLA. STAT. § 732.4015.

273. *See* Jeffrey S. Goethe and Jeffrey A. Baskies, *Homestead Planning Under Florida's New "Safe Harbor" Statute*, FLA. BAR J., May/June 2019 at 36. "Devise-restricted homestead that is not validly devised or is not devisable descends as other intestate property, unless the decedent is survived by a spouse and one or more descendants, in which case the surviving spouse receives a life estate with a vested remainder in the then living descendants, per stirpes." *Id.*; *see also* FLA. STAT. § 732.401(1).

274. *See* FLA. STAT. § 732.401(2).

275. *See* Stone v. Stone, 157 So. 3d 295, 301-305 (Fla. Dist. Ct. App. 2014).

276. *Id.* at 305.

277. *See* FLA. STAT. § 732.7025(1).

Florida Statute 732.7025, or must execute an agreement to waive homestead rights.[278] Waiving homestead rights via deed under the new statute requires the following or substantially similar language to be included: "By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."[279] Florida Homestead rights can also be waived via a written contract or agreement, signed by the waiving party in the present of two subscribing witnesses.[280]

Perhaps more importantly, the community property trust statute provides comfort that the homestead creditor protection benefits afforded by Florida law will apply despite the property being titled under a trust and not directly in the spouses' names.[281] It would seem that this principle would be extended to cause homestead creditor protection to apply where the homestead property is owned by a Floridian's revocable trust that is not a community property trust. Many practitioners have believed homestead creditor protection would apply in such event,[282] but in the case of *In re Bosonetto,* a 2001 Middle District of Florida Bankruptcy Court Judge held that the homestead creditor protection does not apply to homestead property owned under a revocable trust.[283]

In *Bosonetto*, an 89 year-old widow signed a revocable trust and apparently intended to convey all of her tangible and intangible property thereto. The trust agreement provided that "even though record ownership or title, in some instances, may presently or in the future, be registered in my individual name, in which event such record ownership shall hereafter be deemed held in trust even though such trusteeship remains undisclosed."[284] A preliminary issue in the case was whether the trust, or Ms.

278. FLA. STAT. § 732.702. Homestead rights can also be waived by a written agreement under section 732.702, Florida Statues.

279. FLA. STAT. § 732.7025(1).

280. *See* FLA. STAT. § 732.702(1). FLA. STAT. § 732.702(2) further provides that each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement or contract is executed after marriage. No disclosure shall be required for an agreement executed before marriage. *Id.*

281. *See* FLA. STAT. § 732.7025.

282. *Florida Homestead Creditor Protection,* GONZALEZ, SHENKMAN & BUCKSTEIN PL https://www.gsblawfirm.com/florida-homestead-creditor-protection (last visited Apr. 4, 2023).

283. Crews v. Bosonetto (*In re* Bosonetto), 271 B.R. 403, 406-07 (Bankr. M.D. Fla. 2001).

284. *Id.* at 405.

Bosonetto individually, owned the homestead property. The Bankruptcy trustee successfully argued that because of the above language and Ms. Bosonetto's intent the monies that were used to purchase the homestead property came from the proceeds of a contract for deed which was owned by the Trust, that the homestead property was also owned by the trust, and not by Ms. Bosonetto individually.[285] As a result, the court, noting that the Florida Constitution provides that the homestead exemption to property owned by a "natural person," found that "because a trust is not a natural person, Defendant Bosonetto may not claim the Florida property is covered by the homestead exemption."[286]

Since this controversial 2001 decision was published, there have been three Florida District Court of Appeals cases and two Bankruptcy Court cases[287] that declined to follow the *Bosonetto* decision and found that homestead property owned under a revocable trust are protected from creditors, but the question of whether a Florida homestead loses its protection from creditors upon transfer to a revocable trust has not been ruled on by the Florida Supreme Court. It is worth noting, however, that homestead property held in trust can still receive the Florida homestead tax exemption that includes a 3% cap on assessed value increases, as long as the trust grants a present possessory interest for life to the individual or couple claiming the exemption.[288] Additionally, the Florida Attorney General, citing Fla. Stat. §196.041(2), has confirmed that a trust beneficiary specifically granted a life estate in real property under a trust agreement may qualify for the homestead exemption.[289] Opinions of the Florida Attorney General are not law or binding precedent, although they are commonly relied upon by practitioners.[290]

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285. *Id.* at 406. It was stipulated in the findings of fact that the contract for deed was specifically assigned to the revocable trust. *Id.*

286. *Id.* at 407.

287. *Compare In re* Alexander, 346 B.R. 546 (Bankr. M.D. Fla. 2006), *with In re* Edwards, 356 B.R. 807 (Bankr. M.D. Fla. 2006) (explaining that the same Middle District Court reached the opposite conclusion, finding that real property in a revocable trust was eligible for the homestead exemption).

288. Alan Gassman, Brock Exline, & Peter Farrell, *Designing Trust Systems for Florida Residents: Planning Strategies, Things You Should Know, and Traps for the Unwary,* FLA. BAR J., July/Aug 2023, at 28. *See also* Blakely Moore, *Can a Trust Qualify for the Florida Homestead Tax Exemption?*, PTM TRUST AND ESTATE LAW (Oct 28, 2022), https://ptmlegal.com/blog/can-a-trust-qualify-for-the-florida-homestead-tax-exemption.

289. Fla. Att'y Gen. Op. AGO 90-70 (1990); Fla. Att'y Gen. Op.AGO 2005-52 (2005).

290. *Requesting an Attorney General Opinion*, ATT' Y GEN. STATE OF FLA., https://www.myfloridalegal.com/attorney-general-opinions/frequently-asked-questions-

The new statute under Florida's Community Property Trust Act, which specifically provides that a homestead owned by a community property trust is protected from creditors, might be read to indicate that the Florida Legislature believes that property owned by a revocable trust would not be protected, but for having to pass this section of the statute to clarify that a community property trust can own homestead property without abrogating the creditor protection afforded by the Florida Constitution.

In addition, if this is only statutory protection because the Florida Constitution may not save the day, as asserted in *Bosonetto*,[291] then the Florida fraudulent transfer statute would still apply to a transfer of homestead by a debtor to a community property trust. The famous 2005 Florida Supreme Court case of *Havoco of America, Ltd. V. Hill*[292] established that the Florida homestead creditor protection trumps the Florida fraudulent transfer statute and would apply to the transfer of a statutorily exempt asset where the creditor protection of homestead emanates from the Florida Constitution. Married couples with potential creditor issues should therefore be advised that a transfer to a community property trust may be reversed by a creditor who existed or was expected to exist at the time of the transfer. While the general rule in Florida is that a creditor exempt asset can be transferred or converted into another creditor exempt asset without being considered to be a transfer for the purpose of avoiding creditors under the Florida fraudulent transfer statute, the Florida Supreme Court the has ruled that a transfer from homestead to another creditor exempt asset will be a transfer that can be set aside under the fraudulent transfer statute if done for the purpose of avoiding a creditor.[293]

Married couples may wish to serve as trustees of their community property trust but also have confidentiality as to the ownership of their homes. It is possible, and many times advisable, to have the community property trust be the sole beneficiary of a land trust which has another person or entity as its trustee so that

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about-attorney-general-opinions#:~:text=Attorney%20General%20Opinions%20serve%20to,in%20a%20court%20of%20law.

291. Crews v. Bosonetto (*In re* Bosonetto), 271 B.R. 403, 406-07 (Bankr. M.D. Fla. 2001).

292. Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001), *opinion after certified question answered*, 255 F.3d 1321 (11th Cir. 2001).

293. Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So. 2d 201, 206 (Fla. 1962).

the deed on the public record will show the name of an individual or LLC serving as Trustee other than the homeowners. In our experience, the county property appraisers in most, if not all counties, will permit the homestead exemption to be enjoyed while not revealing the names of the actual homesteading beneficial owners on the property appraiser website. Some property appraisers require the name of the beneficial owners to be included in one cell on their website, but that cell will only display a certain number of letters. For example, if the website can only display twenty characters, and the trust is beneficially owned for John and Molly Smith, the property appraiser may put "Hillary S. Jones, Esq. as Agent for her clients John and Molly Smith. If the property appraiser only lists the first 20 characters, then the property appraiser website will only show "Hillary S. Jones, Esq. a."

IX. BUILT IN PROTECTION FROM UNDUE INFLUENCE ETC.

Under Florida Statute Section 736.1512 entitled "Unenforceable trusts," a community property trust executed during marriage is not enforceable if:

(a) "The trust was unconscionable when made;(b) The spouse against whom enforcement is sought did not execute the community property trust agreement voluntarily; (c) The community property trust was the product of fraud, duress, coercion, or overreaching; or (d) before execution, the spouse against whom enforcement was sought:

(1) was not given a fair and reasonable disclosure of the property, and financial obligations of the other spouse, (2) Did not voluntarily sign a written waiver expressly waiving right to disclosure of the property and financial obligations of the other spouse beyond the disclosure provided, or

(3) did not have notice of the property or financial obligations of the other spouse."[294]

The above safeguard puts lawyers and other planners in a position where they must assure that each spouse is given fair and reasonable disclosure of the property and financial obligations of the other spouse.

294. FLA. STAT. § 736.1512 (2022).

Finally, Florida Statute Section 736.1512(3) provides that "a community property trust may not be deemed unenforceable solely on the fact that the settlor spouses did not have separate legal representation when executing the trust."[295] Nevertheless, it would be most prudent to recommend that each spouse should have separate independent legal counsel, or to at least ask each spouse to waive the opportunity to have separate independent legal counsel. It also is appropriate for the spouses to provide each other with full and fair disclosure of their respective assets and to observe other formalities applicable to the execution of marital agreements.

X. ADVANTAGES OF THE FLORIDA COMMUNITY PROPERTY TRUST

The two reasons that Florida's Community Property Trust Act may be preferred over other "opt-in" community property trust jurisdictions are:

(1) The creditors of one spouse can only reach such spouse's one-half of the assets held in a Florida community property trust (and generally not the other spouse's one-half of the trust assets).[296] Under the Alaska and South Dakota community property trust laws creditors of one spouse can reach all assets held in a community property trust.[297]

(2) More individuals will know a lawyer or potential trustee in Florida because Florida has a significantly larger population than Alaska, South Dakota, Tennessee, and Kentucky.[298]

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295. *Id.*

296. Christopher Weeg, *What is a Florida Community Property Trust?,* COMITER, SINGER BASEMAN & BRAUN (Apr. 22, 2022), https://www.comitersinger.com/blog/what-is-a-florida-community-property-trust/.

297. Jay Adkisson, *Community Property and Creditor-Debtor Law Explained*, FORBES (May 20, 2012, 12:21 PM), https://www.forbes.com/sites/jayadkisson/2012/05/20/community-property-and-creditor-debtor-law-explained/?sh=2d480b514233; *see* Jonathan G. Blattmachr, Howard M. Zaritsky & Mark L. Ascher, *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 Real Prop. Prob. & Tr. J. 615 (1999).

298. *Population Estimate for 2022*, STATS AM., https://www.statsamerica.org/sip/rank_list.aspx?rank_label=pop1 (last visited July.18, 2023).

Any person residing in the State of Florida can serve as the trustee or a co-trustee under a Florida community property trust.[299]

Before the enactment of the Florida Community Property Trust Act on July 1, 2021, married couples who wanted to enter into a community property trust had to have a trust company duly registered with Alaska, South Dakota, Kentucky, or Tennessee, or an individual residing in one of those states, serve as trustee of the trust.[300] Florida's Community Property Trust Act works the same way by permitting any Floridian or a qualified company to act as a trustee of a Florida community property trust, which broadens the universe of potential trustees of a community property trust established by Floridians.[301]

Specifically, Florida has approximately 1.5 times the population of the states of Alaska, South Dakota, Kentucky, and Tennessee combined, and one or both of the spouses can serve as sole trustee or co-trustees of the trust, by themselves or with others.[302]

As of 2022, the most populated states in the United States are (with the population numbers estimated):[303]

California (39,029,342 people)

Texas (30,029,572 people)

Florida (22,244,823 people)

New York (19,677,151 people)

Pennsylvania (12,972,008 people)

299. Blakely Moore, *Everything You Need to Know About Florida's Community Property Trust Act*, PTM TRUST AND ESTATE LAW (Dec. 16, 2022), https://ptmlegal.com/blog/everything-you-need-to-know-about-floridas-community-property-trust-act.

300. *United States: To Trust or Not to Trust– Florida's New Statutes Pave the Way for Expansion of Individual's Succession Planning Opportunities*, BAKER MAKENZIE (Aug. 26, 2021), https://insightplus.bakermckenzie.com/bm/tax/united-states-to-trust-or-not-to-trust-floridas-new-statutes-pave-the-way-for-expansion-of-individuals-succession-planning-opportunities.

301. Moore, *supra* note 299.

302. *See Population Estimate for 2022*, *supra* note 298.

303. *Id.*

Furthermore, a great many individuals who reside in the Northeast or the Midwest have close friends, relatives, or advisors in Florida that can serve as trustees of a community property trust.

For most married couples, the benefit of having a community property trust is that all assets under a community property trust will receive a fair market value date of death basis for federal income tax purposes if the Community Property Act[304] works, which is an issue described below. Other purposes include the avoidance of probate and guardianship, and having a trust agreement that can receive distributions under beneficiary designations if the surviving spouse does not survive. Most married couples will make IRAs, pensions, and life insurance payable to a surviving spouse or a trust for a surviving spouse that will be separate from a Florida community property trust, as described below.

1. Example

Harry and Sally Katz-Deli live in New York and are in their 70s. They have $3,000,000 worth of publicly traded stock for which they paid approximately $500,000. Neither of them has a crystal ball with respect to who will survive the other.

If they sell the stock now, they will have a $2,500,000 capital gain and may have to pay a 23.8% combined federal income tax and net investment income tax, not to mention a 9.65% New York state tax and 3.876% New York City tax.

The federal income and net investment income tax would be $595,000, and the New York state and local capital gains tax would be $338,150 if they are in the highest brackets.

If the stock is held entirely in the name of the first dying spouse, then all of the stock may receive a new income tax basis equal to its fair market value upon the death of such spouse, unless the deceased spouse received the assets as a gift from the surviving spouse within one year or less of the first death and the surviving spouse inherits it back. This increase in basis is known as a "step-up in basis." Nevertheless, in most situations, it is difficult or impossible to determine which spouse will die first. Further, Internal Revenue Code Section 1014(e) would prevent a step-up in

304. Timothy Barrett, *How Community Property Trusts Can Benefit Married Couples*, KIPLINGER (Sept. 18, 2022), https://www.kiplinger.com/retirement/estate-planning/605227/how-community-property-trusts-can-benefit-married-couples.

basis to the extent that the stock given to the first dying spouse came from the surviving spouse for no consideration and the stock passes to or for the benefit of the surviving spouse as a result of the first dying spouse's death.[305]

Section 1014(e) reads as follows:

> (e) Appreciated property acquired by decedent by gift within 1 year of death
>
> (1) In general. In the case of a decedent dying after December 31, 1981, if—
>
> (A) appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and
>
> (B) such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor), the basis of such property in the hands of such donor (or spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.[306]

If the stock is held in joint names (such as tenants by the entireties or joint tenants with right of survivorship), and one spouse dies while the stock is worth $3,000,000, then, immediately after the death of the first dying spouse, the surviving spouse will have the ability to sell the one-half of the stock inherited on the death of the first dying spouse for $1,500,000, and would pay no state or federal tax. However, if the surviving spouse sells his or her one-half of the stock that was held in joint names, such spouse would pay $297,500 in federal income and net investment income tax and $169,075 in New York state and local income tax (one-half of the tax described above, if all of the stock was sold before the death of the first dying spouse).

Instead of holding the stock jointly or placing it into the name of the spouse who may be expected to die first, Harry and Sally can establish a Florida community property trust and have it drafted by the estate planning lawyer for their daughter, who lives in Boca Raton, Florida, and their daughter can serve as trustee.

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305. I.R.C.§ 1014(e).
306. *Id.*

On the first death, the surviving spouse can have a $3,000,000 basis in the stock and pay no state, federal, or Medicare tax on the sale.

2. Important Notice for Assets Owned Jointly Before 1977 – The Gallenstein Rule.

Under the case of *Gallenstein v. United States,*[307] a joint asset or account funded by one spouse after 1955 and before 1977 can receive a full step-up in basis upon the death of the donor spouse. It may be best not to transfer such pre-1977 joint assets to a community property trust if the donor spouse has a significantly shorter life expectancy than the other spouse.

3. Full Funding of a Credit Shelter Trust

While the estate tax exemption of $12,920,000 per decedent has made estate tax planning less of a concern for most taxpayers,[308] many factors have caused a great number of married couples to have the need for, and interest in, estate tax planning.[309] The scheduled reduction in the estate tax exemption to one-half of its otherwise inflation-adjusted amount in 2026[310] (which is expected to be approximately $7,000,000), and Bernie Sanders' proposed plan that would have reduced the estate tax exemption to $3,500,000 and the gift tax exemption to $1,000,000,[311] stand to affect more taxpayers. These potential legislative changes, along with significant increases in net worth that have occurred as the result of the recent stock market growth and rising real estate

307. Gallenstein v. United States, 975 F.2d 286, 286 (6th Cir. 1992).

308. *Estate Tax,* IRS, https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax (last visited July 18, 2023).

309. *What is Estate Planning and Why is it Important?,* NATIONWIDE, https://www.nationwide.com/lc /resources/investing-and-retirement/articles/what-is-estate-planning (last visited July 18, 2023).

310. *Prepare for Future Estate Tax Law Changes,* FIDELITY (Feb. 9, 2023), https://www.fidelity.com/ learning-center/wealth-management-insights/TCJA-sunset-strategies.

311. Alan Gassman, *Senate Estate and Gift Tax Bill Will Reduce Exemption to $3,500,000 and Take Away Many Opportunities*, FORBES (Mar. 27, 2021), https://www.forbes.com/sites/alangassman/ 2021/03/27/senate-estate-and-gift-tax-bill-will-reduce-exemption-to-3500000-and-take-away-many-opportunities/?sh=685b93274712.

price, are incentivizing many married couples to learn about and engage in estate tax planning.

One challenge for many couples is how to lock up as much in assets as possible under a credit shelter trust on the first death, when the surviving spouse may have significant estate tax challenges, but the first dying spouse has only approximately half of the assets that can be used to fund a credit shelter trust and the value of such assets are far less than the exemption amount.

Many planners believe that it is fine to leave all assets to the surviving spouse and not make full use of the estate tax exemption of the first dying spouse by maximizing the funding of credit shelter trusts because the surviving spouse will receive the unused estate tax exemption of the first dying spouse under the portability rules if the first dying spouse's estate files an estate tax return in the proper manner. [312]These advisors may not be taking into consideration that one or more of the following issues may arise:

(1) The surviving spouse may remarry and then the new spouse may die, resulting in the portability allowance of the surviving spouse being reduced to whatever is available from the subsequent dying spouse;

(2) The portability allowance is not indexed to grow with inflation or with the growth of assets as would apply under a credit shelter trust;[313] and

(3) The portability allowance does not provide for the surviving spouse to "port" the first dying spouse's unused GST exemption.[314]

For example, let us assume that Harry and Sally have $7,000,000 in personally owned investment assets, a $1,000,000 home, and $3,000,000 in IRAs.

They also receive approximately $150,000 per year in pension income, and their assets are expected to grow at approximately 7.25% a year after taxes and expenses.

312. John Bunge & Jill Mastroianni, *IRS expands "portability" of key estate tax exemption*, HOLLAND & KNIGHT (July 12, 2023), https://www.hklaw.com/en/insights/publications/2022/07/irs-expands-portability-of-key-estate-tax-exemption.

313. *Credit Shelter Trusts and Estate Taxes,* FIDELITY (March 2022), https://www.fidelity.com/viewpoints/wealth-management/insights/credit-shelter-trusts.

314. Jean Gordon Carter & Stephen W. Murphy, *What is Portability for Estate and Gift Tax?* ACTEC, https://www.actec.org/estate-planning/portability-estate-tax-exemption/ (last visited July 18, 2023).

They have a 20-year life expectancy, despite eating a lot of deli food, including corned beef, pastrami, matzo ball soup, potato knishes, and egg creams almost every day.

In 20 years, their net-worth will be approximately $28,382,069.37 so they would like to not only avoid capital gains tax for the surviving spouse but also place as much as possible into a credit shelter trust on the first death.[315]

If Harry and Sally each presently have approximately $4,000,000 worth of assets in a separate revocable trust or $8,000,000 worth of assets in a joint trust that only has half of the assets locked up under a credit shelter trust on the first death, then there can be a significantly higher estate tax on the second death.

Harry and Sally may therefore consider a JEST ("Joint Exempt Step-up Trust") in lieu of a community property trust for their income tax basis and estate planning so that $8,000,000 can be set aside under a credit shelter trust after the first death.

XI. BUT IS THE JEST TRUST SUPERIOR TO THE COMMUNITY PROPERTY TRUST? - TAKE A SERIOUS LOOK AT THIS PLANNING TOOL

The Joint Exempt Step-Up Trust, or the "JEST", is a joint revocable trust established by a married couple. Under a JEST, the first dying spouse has the testamentary power to appoint all of the trust assets to creditors of his or her estate, which causes all assets of the trust to be included in his or her estate for federal tax purposes so that such assets may receive a new fair market value income tax basis under Code Section 1014, and be considered to be the assets of the first dying spouse for purposes of funding a credit shelter trust.[316]

Three Private Letter Rulings (PLRs) and a Technical Advisory Memorandum (TAM) published in 1999 and 2000 support this proposition, although there is some risk that the IRS might not follow these non-precedential pronouncements and take the position that the transfer of assets considered as owned by the

315. Under the Portability rules, the portion of the first dying spouse's $11,700,000 estate tax exemption (or whatever the exemption amount will be at the time of death) can be used by the surviving spouse, but the portability allowance (1) does not go up with inflation; (2) will be lost or replaced if the surviving spouse remarries someone who then dies before the surviving spouse and leaves no portability allowance: and (3) does not provide the same creditor protection for the surviving spouse as having a credit shelter trust funded.

316. *Id.*

surviving spouse to a credit shelter trust might be characterized as a gift by the surviving spouse.[317] One of these Private Letter Rulings was applied where each spouse had a separate Revocable Trust, and each spouse had a Power of Appointment over the assets of the Revocable Trust of the other spouse. This technique can work as well as a JEST, but is often considered to be confusing by clients and many advisors.[318] This risk is ameliorated by the design of the JEST, which contains provisions that cause the assets that were contributed to the trust by the surviving spouse to be held in a separate credit shelter trust of which the surviving spouse is not a beneficiary unless or until such spouse is added by a committee of independent trust protectors serving in a non-fiduciary capacity.[319]

Further, the JEST can be drafted so that the separate credit shelter trust might be deemed as funded by the surviving spouse if considered to be an incomplete gift for gift tax purposes by giving the surviving spouse the power to direct how assets may pass among the spouses' common descendants or otherwise upon death and requiring the surviving spouse's consent to any distribution from such separate credit shelter trust.[320]

The same PLRs and TAM that concluded that a credit shelter trust could be funded with assets considered as owned by the surviving spouse also concluded that those assets would not receive a new income tax basis, based upon the assertion that the arrangement constitutes a gift by the surviving spouse to the first dying spouse immediately before death, that is then inherited by the surviving spouse, thus triggering the Internal Revenue Code Section 1014(e) one-year rule.[321]

The PLRs and TAM, however, failed to point out that while Section 1014(e) applies when an asset is gifted to a decedent who devises it back to the donor upon death, it does not necessary apply

317. Alan Gassman, Christopher Denicolo & Kacie Hohnadell, *JEST Offers Serious Estate Planning Plus for Spouses – Part 1*, 40 Est. Plan. 3, 3-11 (2013); *see also* Susan L. Racey, *Joint Revocable Trusts*, 20 OHPRLF 77 (2008).

318. *Power of Appointment, Legal Information Institute*, CORNELL UNIV. L. SCH. (June 2022), https://www.law.cornell.edu/wex/power_of_appointment.

319. *Joint Exempt Step-Up Trust,* ULTIMATE EST. PLANNER, https://ultimateestateplanner.com/products/joint-exempt-step-trust-legal-document-form-jest/ (last visited July 18, 2023).

320. H. Zaritsky & Farhad, *Tax Planning for Family Wealth Transfers at Death: Analysis with Forms §4.07[3][b][iii]* (Thomson Reuters/Tax & Accounting 2014, with updates through July 2023) (providing an additional discussion on JESTS).

321. I.R.C.§ 1014.

in a situation where the assets are left to an irrevocable trust that may benefit the donor.

A properly drafted JEST may therefore contain provisions that would make it unlikely or potentially even impossible for the surviving spouse to benefit from the credit shelter trust that is funded with the assets considered to have been held by the surviving spouse. Section 1014(e) should not be implicated if the surviving spouse cannot benefit from assets that he or she is considered to have contributed to the trust, therefore allowing for a step-up in basis as to such assets on the first dying spouse's death. This is why a JEST Trust will typically provide that the surviving spouse will not be a beneficiary of the credit shelter trust established and funded with the assets of the surviving spouse on the first dying spouse's death unless or until any and all other trusts for the surviving spouse have been completely spent, and Trust Protectors acting in a non-fiduciary capacity, or the holder of a power of appointment without a fiduciary duty to exercise it may add the surviving spouse to the Trust. This would typically occur much more than three years after the trust assets may be sold with an assumed full step-up in income tax basis.

As a practical matter, assets held under a JEST trust might be sold to avoid capital gains taxes shortly after the death of the first spouse, and the surviving spouse would not be added to or considered to be a beneficiary of the JEST credit shelter trust unless or until it is clear that the income tax return for the tax year of the sale would not be audited, or that the audit would not be complete.

The JEST is clearly more complicated than the community property trust from the point of view of the drafter and for tax administration purposes, but should allow for the funding of a credit shelter trust from all assets of the JEST.

1. Non-Tax Considerations of Joint Trust Vehicles

Notwithstanding the allure and advantages of the use of community property trusts and JESTs, many married couples will prefer to have a simple joint trust that may be treated as a tenancy by the entirety's vehicle or a simple "joint with full or limited" right of survivorship vehicle. From a fundamental perspective, a joint trust can function essentially as a marital agreement between the spouses that defines the rights, obligations, and restrictions on

disposition associated with the assets of the trust. Advisors need to be very careful to explain the options that a married couple has with respect to this.

Many couples will decide to have their most appreciated assets held under community property trusts or JESTs, with less appreciated assets being held under tenancy by the entireties trusts (or as tenants by the entireties outright) to provide creditor protection so that a creditor owed money by only one spouse cannot reach the trust assets.

While nothing in the Florida common law or statutory law prevents trust assets from being held as tenants by the entireties of a married couple, a recent opinion issued by the Middle District of Florida Bankruptcy Court specifically states that "[t]he issue is whether a revocable living trust can own property as tenants by the entireties to exempt it from creditors' claims in bankruptcy cases. The answer is no because the trust cannot meet the unities required for tenants by the entireties ownership."[322] In reaching its decision, the Middle District of Florida Bankruptcy Court cited the 1941 Florida Supreme Court case of *Hunt v. Covington*:

"No persons except the husband and wife have a present interest in an estate by the entireties . . .. It is not subject to partition; it is not subject to devise by will; neither is it subject to the laws of descent and distribution. It is, therefore, an estate over which the husband and wife have absolute disposition and to which each, in the fiction of law, holds the entire estate as one person."[323]

The authors and many others disagree with the Bankruptcy Court Judge's conclusion and do not believe that the Court considered the fact that a married couple could own the beneficial ownership interest of a trust as tenants by the entireties. As a result of the *Givans*[324] case, many advisors will probably place a significant portion of a married couple's assets into a limited liability company owned as tenants by the entireties that may be "payable on the second death" under the Operating Agreement to a joint trust or to separate trusts upon the death of the first dying spouse.

322. *In re* Givans, 623 B.R. 635, 637 (Bankr. M.D. Fla. 2020).
323. Hunt v. Covington, 200 So. 76, 77 (Fla. 1941).
324. *Givans*, 623 B.R at 635.

XII. "STEP RIGHT UP" - WILL A COMMUNITY PROPERTY TRUST WORK?[325]

There is a question as to whether an elective community property arrangement like the Florida Community Property Trust Act will be recognized by the IRS as a legitimate community property arrangement to qualify all trust assets for a fair market value date of death basis step-up under Internal Revenue Code Section 1014(b)(6) on the death of the first dying spouse. The IRS has not formally commented on the efficacy of community property trust arrangements, although well-respected commentators have concluded that it "should qualify."[326] With the warning that this tax treatment is "not absolutely certain," Jonathan Blattmachr, Howard Zaritsky and Mark Ascher in "Tax Planning with Consensual Community Property: Alaska's New Community Property Law" provides extensive discussion of the *Harmon* case and statutory law that exists in this area. [327]

Since Blattmachr, Zaritsky, and Ascher published their article in 1998, the IRS updated its Publication 555 on community property to specifically provide that "[t]his publication does not address the federal tax treatment of income or property subject to the 'community property' election."[328] It is unknown whether the IRS will take a closer look at whether an "opt-in" community property trust will be afforded a step-up in basis to all trust assets in light of the advent of elective community property trust systems, and that Florida has implemented an elective community property trust regime which will open this planning tool to many more married couples who may have family, friends, or advisors in Florida who can serve as trustees to avoid paying trust company fees for a community property trust.

Commentators who urge caution point to the 1944 U.S. Supreme Court decision of *Commissioner v. Harmon*,[329] which involved a married couple who opted into community property treatment under an Oklahoma law that was passed to allow

325. "Step right up, Step right up, Step right up . . . The large print giveth [a]nd the small print taketh away." TOM WAITS, *Step Right Up, on* SMALL CHANGE (Asylum 1976).
326. I.R.C. § 1014 (b)(6).
327. Blattmachr et al., *supra* note 53, at 631.
328. INTERNAL REVENUE SERV., *supra* note 109, at 1.
329. Comm'r. v. Harmon, 323 U.S. 44, 45 (1944).

married couples living there to elect whether to have community property characterization apply to their assets.[330]

Before 1948, married couples could not file joint federal income returns[331], so each spouse would file a separate return and the spouse with more income would be in a higher tax bracket.[332] Married couples living in community property states were nevertheless able to divide their income from community property equally on income tax returns, giving them an advantage over married couples living outside of community property states.[333]

The U.S. Supreme Court held in *Harmon* that the act of electing into the community property regime constituted an "assignment of income"[334] and quoted the 1930 United States Supreme Court case of *Lucas v. Earl*.[335] *Lucas v. Earl* is one of the most famous United States Supreme Court tax cases, and provides that a taxpayer cannot avoid taxation on income by assigning in advance of receipt.[336]

While some read this case to indicate that it may not be possible to elect into community property status to receive tax advantages, the *Harmon* decision is somewhat vague and seems to base its conclusion on the fact that the Oklahoma statute "permits voluntary action which effects a transfer of rights of the husband and wife, the case is governed by *Lucas v. Earl* and other decisions of like import."[337] In essence, the majority opinion distinguished community property treatment applicable by operation of law upon marriage from community property treatment that applies "by contract" such as where an election is made by the married couple.

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330. *Id.*

331. George S. Goodell, *Taxation- Joint Returns and the Revenue Act of 1948*, 32 MARQ. L. REV. 213 (1948) (discussing income splitting provisions of the 1948 tax act).

332. *Id.*

333. *Id.*

334. *See Harmon*, 323 U.S. at 46.

335. Lucas v. Earl, 281 U.S 111, 111 (1930).

336. *See Harmon*, 323 U.S. at 46. "Under Lucas v. Earl an assignment of income to be earned or to accrue in the future, even though authorized by state law and irrevocable in character, is ineffective to render the income immune from taxation as that of the assignor. On the other hand, in those states which, by inheritance of Spanish law, have always had a legal community property system, which vests in each spouse one half of the community income as it accrues, each is entitled to return one half of the income as the basis of federal income tax." *Id.*

337. Blattmachr et al. *supra* note 53, at 626.

Howard Zaritsky has noted that "I think the JEST is a great technique for what it is seeking to do. It is a way to minimize the problems of 1014(e)."[338]

In a well-written dissent to the *Harmon* decision, Justice Douglas noted that the federal income tax law discriminates in favor of community property states and claimed that the Court's distinction between "consensual" and "legal" community property systems had no practical basis and could not be consistently maintained for federal tax purposes.[339] Justice Douglas went on to opine that "[t]he only apparent basis for such discrimination is that the community property systems in the eight states are traditional; that those eight states have a well settled policy; that Oklahoma merely gives its citizens a choice to get under or stay out of its community property system. Yet how can we say that the state which allows husband and wife to revoke or alter its community property system by contract has a more 'settled' policy towards community property than a state which gives husband and wife the choice to invoke its community property system or to keep their marital property on a common law basis? The truth is that there is a wide range of choices in each. But the fact that there is a choice should not be deemed fatal when Oklahoma's case comes before the Court . . ."[340]

The 1958 United States District Court decision of *McCollum v. United States* seems to support the proposition that the 1014(b)(6) step-up in basis will apply to community property created as a result of an election made by the spouses.[341] In *McCollum*, a married couple elected under the then-applicable 1943 Oklahoma law to treat their assets as community property, and in 1945 Oklahoma changed its law to require that all of a married couple's assets had to be considered to be community property.[342] Mr. McCollum died after the community property status became mandatory and Mrs. McCollum took a full step-up

338. Gassman, Crotty & Denicolo, *The Thursday Report- 1.15.15- On the First Day of Heckerling . . . ,*49TH ANN. HECKERLING INST. EST. PLAN. (Jan. 15, 2015), https://gassmanlaw.com/thursday-reports/thursday-report-1-15-15-first-day-heckerling/.

339. *See* Harmon, 323 U.S. at 55–56. The *Harmon* Court distinguished between "Consensual community property," which arises out of contract and "legal community property," which arises by "incident of marriage by the inveterate policy of the state." In this context, inveterate means long established and unlikely to change. *Id.*

340. *Id.* at 55–56. (J. Douglas dissenting).

341. McCollum v. U.S., 2 A.F.T.R. 2d 6170 (N.D. Okla. 1958).

342. *Id.*

in basis for the full value of the community property that existed on Mr. McCollum's date of death.[343] The court allowed the full step-up in basis.[344]

The *McCollum* decision seems consistent with the notion that Internal Revenue Code Section 1014(b)(6) applies to elective community property as well as mandatory community property. Although Oklahoma had a mandatory community property system, by the time the decision was reached, and because the property at issue was acquired before the change of law in 1945, the property would not have been community property under the 1945 Oklahoma community property law, except because of the fact that the McCollum's had previously designated it as community property under the elective system.[345]

Internal Revenue Code Section 1014 was enacted in 1948, only four (4) years after the Supreme Court decision in *Harmon*, and it is, therefore, possible that Congress recognized the issue by enacting Internal Revenue Code Section 1014(b)(6). This is evidenced by the fact that Congress made no mention in the statutory language and provided no legislative history that would distinguish between elective and mandatory community property systems that existed when the statute was updated. Internal Code Revenue Section 1014(b)(6) is very clear that the step-up in basis applies to the surviving spouse's share of community property "held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country . . . " (emphasis added), without distinction for elective community property laws or without regard to unique characteristics that a State might have with respect to its community property laws (such as creditor protection features).[346]

A 1977 Revenue Ruling discusses the differences between separate property and community property income, and references the *Harmon* case vis-a-vis the issue of whether income generated by the separate property has become community property by agreement between the spouses.[347] The ruling states that "[t]o the

343. *Id.*
344. *Id.*
345. I.R.C. § 1014(b)(6).
346. *Id.*
347. Rev. Rul. 77-359, 1977-2 C.B. 24 (IRS RRU 1977). "Accordingly, where a husband and wife residing in the State of Washington agree in writing that all presently owned

extent that the agreement affects the income from separate property and not the separate property itself, the Service will not permit the spouses to split that income for Federal income tax purposes where they file separate income tax returns."[348] The Ruling acknowledges that property converted from separate property to community property is community property for federal tax purposes, and makes no mention as to whether the Service will distinguish between elective and mandatory community property systems[349].

Blattmachr, Zaritsky, and Ascher conclude as follows on the step-up in basis tax issues:

Because the Alaska Community Property law's treatment under Internal Revenue Code Section 1014(b) remains untested, a couple seeking a full step-up in basis when the first spouse dies should preferably place all of their assets in the name of the spouse who is expected to die first. Unfortunately, crystal balls are scarce. Moreover, no change in basis occurs when a donor gives property to the decedent within a year of death and then acquires it directly or indirectly.

There are no known cases or audits, so the risk of this being an issue as a practical matter may be quite small. Nevertheless, the issue will have a larger profile on the IRS's radar now that Florida and its citizenry have entered this arena.

For those looking for reassurance, in a June 29th, 2021, Florida Bar Real Property, Probate, and Trust Law Section presentation entitled "An Examination of the New Florida Community Property Trust Act", Travis Hayes and Robert Lancaster stated that "The IRS is silent on the federal tax treatment of property subject to the community property election . . . silence doesn't mean ineffective . . . as it stands to date, Alaska established these in 1998, Tennessee in 2010, and there are no known cases where the IRS has challenged these opt-in community property trusts. And you know, I know from my personal discussions with trustees in

property and all property to be acquired thereafter, both real and personal, will be community property, such agreement changes the status of presently owned separate property and subsequently acquired separate property to community property." *Id.*

348. Rev. Rul. 77-359, 1977-2 C.B. 24 (IRS RRU 1977).

349. *See* Harmon, 323 U.S. at 54.

those jurisdictions, that they've not had any situation where they did not get the basis adjustment either."[350]

An additional concern with respect to Florida's Community Property Trust Act is whether it is possible to have community property when the assets are not 100% accessible to the creditors of one spouse. Because Alaska and South Dakota allow creditors of one spouse to access 100% of the assets held in a community property trust,[351] assets held in community property trusts in those states are treated more like traditional community property than with a Tennessee, Kentucky, or Florida community property trust.[352] Few articles have been written on this subject, and no definitive authority on this issue exists, but it is a possible argument that the IRS could use to support the proposition that Florida's "elective community property" statute does not result in the assets held under the trust being "real community property." Therefore, in the abundance of caution, it may be safer to use an Alaska or South Dakota community property trust for purposes of receiving the Internal Revenue Code Section 1014(b)(6) double stepped-up basis, although the authors do not believe that any such IRS argument would have any merit due to Internal Code Revenue Section 1014(b)(6) not making any distinction between the types of community property laws of the States.

XIII. CONCLUSION

In conclusion, the Florida Community Property Trust Act should be well understood by estate and tax planning professionals based in Florida, or who have Floridian clients or clients with Florida ties, as a potential tool that will benefit married couples who have substantially appreciated assets and would like to avoid federal income tax by being able to sell the assets after the death of the first dying spouse. In addition, estate and tax planners throughout the United States should be somewhat familiar with the various community property trust acts in order to determine

350. Travis Hayes & Robert Lancaster, *An Examination of the New Florida Community Property Trust Act*, FLA. BAR (2008).

351. ABA Section of Real Property, Trust & Estate Law, *An Introduction to Community Property Trusts*, 35-6 PROB. & PROP. (2021).

352. *See* TENN. CODE ANN. § 35-17-105 (2010) (explaining how a community property trust in Tennessee operates); KY. REV. STAT. ANN. § 386.622 (West 2020) (outlining what constitutes a community property trust in Kentucky); FLA. STAT. § 736.1503 (2022) (delineating the requirements for a community property trust in Florida).

which state will be most appropriate for clients for whom the community property trust would be a good fit.

Given that all five states have statutes that are probably effective to provide a full step-up in basis upon the first dying spouse's death,[353] the main criteria may be what family members or advisors, or trust companies would be preferable trustees. A secondary consideration might be whether all assets held under a Community Property Trust are accessible to creditors, such as using a state (Florida, Kentucky, or Tennessee) that does not expose 100% of the community property trust assets to creditors,[354] versus using a state (Alaska or South Dakota) that exposes all of the Community Property Trust assets to creditors.[355]

Perhaps more importantly, the new Act will cause advisors to discuss basis step-up and logistical planning with clients. A great many Florida lawyers suggest that their clients use predominantly one type of arrangement, such as where each spouse has a separate revocable trust, or the spouses share a joint trust that does not provide a full step-up on the first death.[356] Many lawyers still favor joint ownership of assets without using revocable trusts.[357] Well informed clients with similar circumstances will commonly choose different systems based upon their orientation, appreciation of tax planning strategies, and their perception of cost considerations and complexity.

Perhaps most importantly, The Florida Community Property Trust Act is a reminder that one size will not fit all and that married Floridians and other clients should have tailor-made estate plans to better protect and benefit themselves and their families while effectuating their wishes.

353. Sarah Sharkey, *What Is A Step Up In Basis and How Can I Get One?*, ROCKET MORTGAGE (Feb. 22, 2023), https://www.rocketmortgage.com/learn/step-up-in-basis.

354. Joseph M. Percopo, *Understanding the New Florida Community Property Trust,* 96-4 FLA. BAR J. 16 (2022).

355. Jonathan Petts, *What is Community Property?,* UPSOLVE (June 29, 2022), https://upsolve.org/learn/community-property/.

356. *Should You Create Separate Revocable Trusts or a Joint Trust?,* THE LYNCH LAW GROUP (Aug. 27, 2020), https://lynchlaw-group.com/benefits-of-seperate-revocable-trusts-for-married-couples/.

357. Julia Kagan*, Joint Owned Property: Definition, How It Works, Risks*, INVESTOPEDIA (Mar. 14, 2021), https://www.investopedia.com/terms/j/jointownedproperty.asp.

APPENDIX

Comparison of the Five Community Property Trust States

State	**Requirements**	**Creditor Protection**	**Property Included**	**U.S.C.s. 1014(b)(6)**
Florida	(1) Expressly declares that the trust is a community property trust within the meaning of this part (2) Has at least one trustee who is a qualified trustee, provided that both spouses or either spouse also may be a trustee (3) Is signed by both settlor spouses consistent with the formalities required for the execution of a trust under this chapter. (4) Contains substantially the following language in capital letters at the beginning of the community property trust agreement: The Consequences Of This Community	(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. (2) An obligation incurred by both spouses during the marriage may be satisfied from a community property trust of the settlor spouses.	All property owned by a community property trust is community property under the laws of the state during the marriage of the settlor spouses.	**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

	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.			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.
South Dakota	An arrangement is a South Dakota special spousal trust if 1) one or both spouses in a marriage transfer	Notwithstanding anything contained in § 55-17-9 to the contrary: (1) A provision of a revocable South Dakota	The trustee of a South Dakota special spousal trust shall maintain records that identify which property held	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

	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. 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.	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; (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 section may not be varied by a South Dakota	by the trust is South Dakota special spousal property and which property held by the trust is not South Dakota special spousal property.	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

	4) A South Dakota special spousal trust shall contain the following language in capital letters at the beginning of the trust: 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 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	special spousal property trust.		character as community property to the extent otherwise provided by South Dakota law.

	Independent Legal Advice.			
Alaska	(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. (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	(j) 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. (k) An obligation incurred during marriage by both spouses may be satisfied from property of each spouse that is not community property and from the community property.	(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

	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. (c) A community property agreement may not adversely affect the right of a child to support.			
Tennessee	An arrangement is a community property trust if one or both spouses transfer property to a trust, that: (1) Expressly declares that the trust is a Tennessee community property trust;	(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. (b) An obligation incurred by	(c) All property owned by a community property trust will be community property during marriage.	N/A

	(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; (3) Is signed by both spouses; and (4) Contains the following language in capital letters at the beginning of the trust: The Consequences Of This Trust May Be Very	both spouses during marriage may be satisfied from a community property trust of the spouses.		

	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.			
Kentucky	Any arrangement between spouses involving community property shall be considered a community property trust if one (1) or both spouses transfer property to a trust that: (a) Expressly declares that the trust is a Kentucky community property trust that meets the	(1) An obligation incurred by only one (1) spouse before or during marriage may be satisfied from that spouse's one-half (1/2) share of a community property trust. (2) An obligation incurred by both spouses during marriage may be satisfied from a community	All property owned by a community property trust shall be considered community property during marriage and the right to manage and control property that is transferred to a community property trust shall be determined by the terms of the trust.	N/A

	requirements of Sections 1 to 3 of this Act; (b) 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; (c) Is signed by both spouses; and (d) Contains the following language in capital letters at the beginning of the trust: The Consequences Of This Trust May Be Very Extensive,	property trust of the spouses		

	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.			

Comparison of Traditional Community Property States to Community Property Trust States

	Traditional Community Property States			
	California	**Texas**	**Alaska**	**Florida**
When do spouses become subject to state community property laws?	When the spouses are married and domicile in the state.	When the spouses are married and domicile in the state.	When the spouses choose to "opt-in" and create a community property trust under Alaska's community property laws.	When the spouses choose to "opt-in" and create a community property trust under Florida's community property laws.
When does the community property regime terminate (causing	Change of domicile, death of spouse, living separate and apart before	Change of domicile, death, decree of divorce or annulment.	Death of a spouse, dissolution, divorce, annulment,	Death of a spouse, dissolution, divorce, annulment,

subsequently acquired assets or future income to no longer be characterized as community property)?	dissolution with no present intent to resume marital relations and conduct evidencing a complete and final break in the marital relationship, legal separation, or judgment of dissolution.		legal separation.	legal separation.
What property is available to satisfy a premarital federal tax obligation assessed against only one spouse?	100% of all community property and all separate property of the liable spouse.	All separate property of liable spouse, 100% of joint management community property, 100% of liable spouse's sole management community property, and 50% of nonliable spouse's sole management community property. If a homestead is involved, contact counsel.	100% of trust assets are exposed to one spouse's creditors	50% of trust assets are exposed to one spouse's creditors
How is post marital income generated from separate property (e.g., rents, dividends, interest) characterized?	Separate property unless a portion is derived from CP time effort and skills. If so, an	Community property.	Separate property unless placed into a community property trust.	Separate property unless placed into a community property trust.

	allocation must be made.			
How does the state characterize appreciation in the value of separate property?	Separate property where appreciation is a "natural enhancement of SP" and spouse has expended a minimum of effort or effort has insignificant value. If spouse's labor or CP funds are used to acquire or improve the SP, a right of reimbursement exists, and it creates a community property interest in the asset.	Separate property. If community property funds or labor are used to acquire or improve the asset, an equitable lien is imposed against the spouse's separate real property, but the character of the separate property is not changed.	Separate property unless placed into a community property trust.	Separate property unless placed into a community property trust.
Does the state recognize common law marriage?	No, but it recognizes a common law marriage legally established elsewhere.	Yes. To qualify, spouses must cohabit in Texas, agree to be married and represent that they are married. Parties to a common law marriage must obtain a divorce or annulment to terminate the marriage.	No, but it recognizes a common law marriage legally established elsewhere.	No, but it recognizes a common law marriage legally established elsewhere.

Does the state recognize some form of domestic partnership as an alternative to marriage?	Yes	No	No	No
Does a domestic partnership under state law create community property rights and obligations?	Yes	Not applicable	Not applicable	Not applicable
Does a deed taken in the name of one spouse as sole and separate property create separate property?	No. Title does not determine the character of the property. It is rebuttably presumed to be community property.	Only if the deed also contains a recital that the consideration was paid from separate funds of that spouse. If so, the property is then presumed to be separate	Yes, but if the property is placed into a community property trust it becomes community property regardless of the title of the property.	Yes, but if the property is placed into a community property trust it becomes community property regardless of the title of the property.
How does the state characterize appreciation in the value of separate property? See paragraph 5 of IRM 25.18.4.13, Mortgage Reduction and Other Tracing Issues, for additional guidance.	Separate property where appreciation is a "natural enhancement of SP" and spouse has expended a minimum of effort or effort has insignificant value. If spouse's labor or CP funds are used to acquire or improve the SP, a right of	Separate property. If community property funds or labor are used to acquire or improve the asset, an equitable lien is imposed against the spouse's separate real property, but the character of the separate property is not changed.	Separate property unless placed into a community property trust.	Separate property unless placed into a community property trust.

	reimbursement exists, and it creates a community property interest in the asset.			
How does the state characterize property taken by spouses under a deed reflecting that the property is held in joint tenancy?	The property is rebuttably presumed to be a joint tenancy. Factors rebutting the resumption include: If acquired during marriage, if acquired with CP funds, if parties knew the legal consequences of JT vs. CP, if loan proceeds deposited into CP account.	Depends on source of funds used to acquire property. Community property remains CP unless a written agreement to partition is first executed. Otherwise property is CP with a right of survivorship. Property purchased with separate funds may be held as joint tenants, with undivided 1/2 interest being separate property.	Property will be held as joint tenants and considered separate property unless placed into a community property trust, at which point the property will be considered to be community property.	Property will be held as joint tenants and considered separate property unless placed into a community property trust, at which point the property will be considered to be community property.
How does the state characterize property taken by spouses under a deed reflecting that the property is held in tenancy in common?	The property is rebuttably presumed to be separate property. Very uncommon form of ownership between spouses	Community property, unless a written agreement to partition is executed. Property purchased with separate and community funds is owned as tenants in common.	Property will be held as tenants in common and considered separate property unless placed into a community property trust, at which point the property will be considered to be community property.	Property will be held as joint tenants unless placed into a community property trust, at which point the property will be considered to be community property.

Does the state recognize pre or post marital property characterization agreements?	Yes	Yes	Yes	Yes
What are the property characterization agreements called?	Premarital, post-marital, prenuptial or postnuptial agreements.	Premarital and marital or post nuptial agreements.	Premarital, prenuptial, post nuptial, post marital	Premarital, antenuptial, post-marital, prenuptial or postnuptial agreements.
Are property characterization agreements required to be in writing?	Premarital agreements must be in writing. Postmarital agreements need only be in writing if they involve real estate.	Agreements must be in writing.	Agreements must be in writing.	Agreements must be in writing.
Are property characterization agreements valid against creditors?	Yes. Premarital contracts before 1986 required to be recorded. After 1986, no need for recording to be valid. Premarital not subject to fraudulent conveyance laws. Post-marital need not be recorded, but are subject to fraudulent conveyance laws.	Yes, unless existing creditor's rights are intended to be defrauded by agreement.	Yes, unless existing creditor's rights are intended to be defrauded by agreement.	Yes, unless existing creditor's rights are intended to be defrauded by agreement.

Creditor Rights in Community Property States

Traditional Community Property States **Can a post-marital creditor of one spouse reach community property to satisfy the separate debt?**	
Arizona	**No**, a post marriage creditor of one spouse may not seize community property to satisfy the debt. *See, e.g.*, *State ex rel. Indus. Commn. of Arizona v. Wright*, 43 P.3d 203 (Ariz. App. 1st Div. 2002). But a premarriage creditor of one spouse may seize community property to the extent of the value of that spouse's contribution to community property that would have been the spouse's separate property if the spouse had remained single. *Hines v. Hines*, 146 Ariz. 565, 707 P.2d 969 (Ct. App. Div. 1 1985).
California	**Yes.** Cal. Fam. Code Ann. § 910. *See also Lezine v. Security Pacific Financial*, 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002 (1996) (illustrating that liability of community property is not limited to debts incurred for benefit of community but extends to debts incurred by one spouse alone exclusively for his or her own personal benefit).
Idaho	**Yes**. *See, e.g.*, *Gustin v. Byam*, 41 Idaho 538, 240 P. 600 (1925); *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123 (1976); *Bliss v. Bliss*, 127 Idaho 170, 898 P.2d 1081 (1995) (indicating that in Idaho prenuptial debts of spouses are payable from community property, although there may be egregious circumstances such as unfair dealing that would result in reimbursement to community even if no separate asset was enhanced in value and concluding that absent showing that spouse fraudulently or selfishly depleted community property to preserve separate assets, payment of prenuptial debts of one spouse by means of application of community property would not be recoverable by community).
Louisiana	**Yes**, although the non-debtor spouse may seek reimbursement if a divorce or dissolution occurs. La. Civ. Code Ann. arts. 2345, 2364; *Nicaud v. Fonte*, 503 So. 2d 79 (La. Ct. App. 5th Cir. 1987), writ denied, 506 So. 2d 1227 (La. 1987); *Shel-Boze, Inc. v. Melton*, 509 So. 2d 106 (La. Ct. App. 1st Cir. 1987) (indicating judgment creditor is entitled to satisfy obligation incurred by judgment debtor from wages of debtor's spouse that were community property when garnishment became effective); *Kerico v. Doran Chevrolet, Inc.*, 572 So. 2d 103 (La. Ct. App. 1st Cir. 1990) (holding due process is not violated by seizure of community property to satisfy judgment creditor of one spouse without serving notice on other); *Federal*

	Deposit Ins. Corp. v. Kemp, 766 F. Supp. 511 (E.D. La. 1991) (holding although contract of continuing guaranty is separate debt of guarantor, judgment against guarantor can be satisfied from community property during community property regime).
Nevada	**Yes.** *See, e.g.*, *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970) (holding spouse's separate debt may be satisfied out of community property). But non-debtor spouse is not liable for separate debts of debtor spouse incurred before marriage. Nev. Rev. Stat. Ann. § 123.050.
New Mexico	**Yes**, but only as to the debtor spouse's one-half interest in community property. N.M. Stat. Ann. §40-3-10. *See also Huntington Nat. Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935 (1993).
Texas	**Yes**, but only as to community property under the "sole management" of the debtor spouse or under the "joint management" of both spouses. *See, e.g.*, *In re Estate of Herring*, 983 S.W.2d 61 (Tex. App. Corpus Christi 1998); *Butler v. Butler*, 975 S.W.2d 765 (Tex. App. Corpus Christi 1998).
Washington	**No**, community property is generally insulated from a separate creditor if the separate debt is in contract. *See* Wash. Rev. Code § 26.16.200; *National Bank of Commerce of Seattle v. Green*, 1 Wash. App. 713, 463 P.2d 187 (Div. 1 1969); *deElche v. Jacobsen*, 95 Wash. 2d 237, 622 P.2d 835 (1980). But community property may be reachable by separate creditors if the debt is in tort. *See Haley v. Highland*, 142 Wash. 2d 135, 12 P.3d 119 (2000) (finding that victim of separate tort committed by one spouse can use tortfeasor spouse's one-half interest in community personal property to satisfy separate tort obligation if tortfeasor's separate property was insufficient to satisfy claim).
Wisconsin	**Yes**. *See Schultz v. Sykes*, 638 N.W.2d 76 (Wis. App. 2001) (Judgment creditor of wife had right to proceed against husband in garnishment action as long as husband's wages were properly classified as marital property under Wisconsin law.) *See also* Wis. Stat. Ann. § 766.55 and Wis. Stat. Ann. § 803.045.