

Florida Community Property Trusts -

Saving Tax & Avoiding Pitfalls

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Overview - Florida Community Property Trusts

- Community Property - Community Property Trusts.
- Income tax planning opportunities and examples.
- Advantages of Florida Community Property Trusts.
- Pitfalls and tax issues with Florida Community Property Trusts.
- Explaining Florida Community Property Trusts to clients.

What is a Florida Community Property Trust?

- Joint trust, established by a married couple, that meets the requirements of the Florida Community Property Trust Act.
- Specialized type of joint trust used for income tax planning for married couples with highly appreciated property.
- Florida Community Property Trusts were initially established in 2021.
- Alaska passed the first community property trust legislation in 1998 and other states have followed.

What is Community Property?

- Term used to describe the rights married couples have in their property (death, divorce, during life).
- No uniform definition of community property.
- Essential element - Community property is owned 50/50. If the marriage is terminated by death or divorce, the property will be divided 50/50.

How is it created?

- If created by married couples living in a community property jurisdiction - all property owned by the married couple, subject to exceptions.
- Can be created by married couples in common law states with opt-in community property - a specialized community property trust is required.
- For example, in Florida community property can only be created through a Florida Community Property Trust. Florida community property cannot be created outside of a Florida Community Property Trust.

What if a married couple moves from a community property state, or foreign country with community property, to Florida?

- What happens to their community property? What is it called? What rights are maintained? Are those rights affected by the passage of time? What state's law governs?
- Property rights at death are protected under Florida case law, the Florida probate code, and federal law.

Why is it important to know about community property?

- More than 25% of the population lives in a community property state. Couples are moving out of community property states to Florida. Florida is the fastest growing state in the U.S.
- Legal and tax attributes of community property are very different than what we are used to in Florida.
 - For example, title does not control ownership at death.
 - For example, community property should not be transferred to certain types of irrevocable trusts.

What other states have community property?

- 9 U.S. States - California, Texas, Louisiana, Arizona, Washington, Wisconsin, New Mexico, Nevada, Idaho, and many foreign countries.
- 5 Opt-in States - Alaska (1998), Tennessee (2010), South Dakota (2016), Kentucky (2020), Florida (2021).
- 16 states, including Florida, have adopted some form of the Uniform Community Property Disposition at Death Act.

What is the main reason to consider a Florida community property trust?

Income Tax Savings for Surviving Spouse

- The potential income tax planning opportunities for the surviving spouse.
- Only one-half of community property is included in the gross estate of the first spouse to die.
- However, both halves of appreciated community property receive a step-up in basis.
- This is commonly referred to as the “double step-up in basis.”
- Planning to reduce income tax is high priority for most clients. Less focus on estate tax planning with current exemption levels (\$30 million for married couple).

Example #1 - Business Owner

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

Example #2 - Appreciated Florida Homestead

- Florida homestead is also an attractive asset class for “double step-up” planning with Florida Community Property Trusts.
- Over the last 10 years, there has been significant appreciation in value (in some cases, there is substantial appreciation in excess of the amount allowed to be excluded from income on the sale of a personal residence (\$250,000 per person)).
- Best use case: married couple with stable marriage, advanced age, highly appreciated Florida homestead, surviving spouse plans to sell.
 - **Note:** likely *not* the best plan for: younger couples with long life expectancy, couples with an unstable marriage, couples that need to protect assets from creditor claims, non-citizen spouse.
- Assuming a property worth \$5 million and basis of \$1 million, the tax savings for the surviving spouse could be in the range of \$500,000
 - Surviving spouse may want to sell and downsize, or move, with \$0 income taxes

Florida Community Property Trust - Advantages

- Double Step-Up. Appreciated property owned by the Trust should be treated as community property under IRC §1014(b)(6). As a result, the appreciated community property owned by the Trust will receive a step-up in basis.
 - **Note**: Clients may be able to achieve the same, or better, results with other similar planning. For example, transferring appreciated assets to the spouse with the shorter life expectancy or up-stream basis planning.
- Alternative #1 - Transfer appreciated assets to spouse with shorter life expectancy . Compared to a Florida community property trust, this strategy is simpler, does not involve complex valuation rules associated with fractional interests in property, no tax uncertainties. Downsides: spouses could die out of order, the monied spouse may not be comfortable transferring lots of assets to the other spouse, must complete transfers between spouses at least 1 year before death, if the assets are being devised back to the spouse that originally owned the low basis assets initially. However, if the assets are being devised to children, there would be a full step-up, even if the transfers were made the day before death. What if the low basis assets are devised to a trust for the spouse (and not the spouse directly)? Will IRC Section 1014(e) still apply? The analysis is more complex and depends on the terms of the trust and many other factors.

Florida Community Property Trust - Advantages

- Alternative #2 - Up-stream basis planning. Briefly, this kind of planning can be used for any individual (married or single) with appreciated assets. Essentially, the individual with the appreciated assets would transfer the assets to (or in trust for) a trustworthy family member with a modest estate, short life expectancy, and no creditors. The appreciated assets would be included in the gross estate of the older family member at his or her death, which would eliminate all built-in gains. See Upstream Basis Planning – The Estate Planner’s Income Tax Planning Tool, Dillon Roberts, January 2026 Fla. Bar Journal.
- Alternative #3 - Joint exempt step-up trust. This is another type of trust designed to achieve a step up in basis on all of the couples' assets on the death of the first spouse. See Florida Community Property Trusts by Alan Gassman and Chris Denicolo comparing the JEST Trust to a Florida community property trust.

Florida Community Property Trust - Advantages

- Better Planning - Imported Community Property. For clients with community property acquired while living in a community property jurisdiction before moving to Florida, the new Florida Community Property Trust (i) will avoid the need for complex tracing rules, (ii) would allow your Florida homestead to be treated as community property (which is not currently allowed under Florida law outside of the Florida Community Property Trust), and (iii) may provide more support for treating the property as community property for federal income tax purposes than existing Florida law.
- Simplification is Not a Benefit. Community property and planning with Florida community property trusts is complicated. It can also be expensive, and the planning and reporting after the transaction can be involved.

Florida Community Property Trust - Pitfalls and Tax Issues

- Not Protected from Creditors. If asset protection is a high priority, a Florida Community Property Trust may not be the best option. Property owned by the Trust (other than Florida homestead, which is limited to one-half acre in a municipality) will be subject to *joint* creditor claims. In addition, a creditor of one spouse would be able to reach that spouse's one-half (1/2) interest in the property owned by the Trust. This is the case even if the Trust is irrevocable; self-settled asset protection trusts are not permitted in Florida. In one case, a Florida Community Property Trust may provide stronger protection, imported community property.
- Change to Property Rights – 50/50. Contributing property to a Florida Community Property Trust could result in significant changes to the couples' property rights during life, at death, and in the event of a divorce. For example, in the event of divorce, the Trust property will be distributed one-half (1/2) to each spouse.
 - Question: Can the same lawyer represent both spouses? Depends on whether the lawyer comply with Rule 4-1.7. Keep in mind 50% of marriages end in divorce. Keep in mind the Trust warning language that arguably increases risk for the lawyer. Solution? Robust documentation to clients and the ability to prove their informed consent in writing.
- Trust for Surviving Spouse - Funding Limited to 50%. An irrevocable trust can provide important protections from creditor claims and divorce. Upon the death of the first spouse, one-half (1/2) of the Trust property must be transferrable to the surviving spouse (*cannot be placed in an irrevocable trust for the benefit of the surviving spouse*). If the goal is to (i) maximize the benefits (and funding) of an irrevocable trust for the surviving spouse or (ii) fully utilize the first spouse to die's GST tax exemption, ownership of assets through a Florida Community Property Trust could be a missed opportunity to devise *more than* one-half (1/2) of the property to such trust. Remember, there is no portability of GST tax exemption to the surviving spouse.

Florida Community Property Trust - Pitfalls and Tax Issues

- Step-Down in Basis for Loss Property. Built-in capital loss property owned by the Trust will be treated as community property under IRC §1014(b)(6). As a result, upon the death of the first spouse to die, all built-in capital loss property owned by the Trust will automatically have a reduced basis equal to fair market value. In that event, having the property treated as Community Property may possibly increase income taxes for the surviving spouse. A Florida Community Property Trust should *not* be used to hold or maintain loss property.
- Tax Law Changes. Prior presidential administrations have proposed to eliminate the step-up in basis through new tax laws. If step-up in basis is eliminated by a change in the tax laws, or if the tax benefits of community property are eliminated by a change in the law, and that was the primary reason for establishing the Florida Community Property Trust, clients would have wasted the time, effort, and resources associated with establishing and maintaining the Trust.
- Death Within One Year of Funding. Step-up in basis could be limited under IRC §1014(e). The analysis likely depends on which spouse initially owned the appreciated property. Example: Spouse with low basis assets makes a gift to a Florida Community Property Trust. If the other spouse (donee spouse) dies within one (1) year of funding, and the assets are devised to the surviving spouse who initially held the low basis assets, it is possible that the deceased spouse's one-half of the Trust will not receive a step-up in basis. However, the surviving spouse's one-half of the Trust may still receive a step-up in basis (which is a better result than no planning).

Florida Community Property Trust - Pitfalls and Tax Issues

- Non Pro-Rata Funding. If on the death of the first spouse each asset of the CPT is allocated one-half to each spouse's share, the assets should be treated as community property under IRC Section 1014(b)(6). However, if on the death of the first spouse, certain assets are allocated 100% to either spouse's share, then the double step up may not apply.
 - IRC Section 1014(b)(6) requires that at least one-half of the community property be included in the deceased spouse's estate. The question is whether this code requirement is determined on an asset-by-asset basis, or because one-half of the value is shared it qualifies under IRS Section 1014(b)(6).
- Recommendation - Require that one-half of each asset owned by the CPT be allocated to each spouse's share. Even though the Florida Community Property Trust Act allows for non-pro rata funding, require a one-half interest in each be distributed to the Decedent's estate, and one-half to the surviving spouse. Advise trustees to divide the assets on 50/50 basis.
- It may be tempting to allocate assets non-pro rata to avoid fractional interest discounts. However, be aware that non-pro rata funding may cause a loss of step-up in basis.

Florida Community Property Trust - Pitfalls and Tax Issues

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

Florida Community Property Trust - Pitfalls and Tax Issues

- Real and Tangible Property Located Outside of Florida. It is unclear if real estate and tangible individual property located outside of Florida will be treated as Florida community property. This is especially true if the property is located in a non-community property state, or common law state that has not adopted protections for community property rights. Instead of direct ownership of non-Florida real estate and tangible personal property by the Florida Community Property Trust, spouses should consider transferring such property to a Florida limited liability company. This structure will increase the likelihood that the trust's interest in the LLC (which owns the real estate and tangible personal property located outside of Florida) will be treated as community property under the Florida Community Property Trust Act.
- Limited Liability Company. If clients are contributing an LLC to a Florida Community Property Trust, it is unclear whether the LLC will be treated as a multi-member LLC or a single member LLC. Please keep in mind that only multi-member LLCs will benefit from charging order protections under Florida law. It is unclear whether an LLC owned 100% by a Florida Community Property Trust can be treated as a disregarded entity for federal income tax purposes.

Florida Community Property Trust - Pitfalls and Tax Issues

- S-Corporations. Not all trusts are qualified to own S-corporation shares. One of the most common exceptions is a grantor trust. A grantor trust is an eligible shareholder. When is a trust a grantor trust? Is the trust revocable? If the Trust is revocable by either spouse, it will be a grantor trust. After the death of the first spouse, the Trust may not qualify. If clients plan to contribute any interest in an S-Corporation to a Florida Community Property Trust, make sure the Trust will be an eligible shareholder at the time of contribution, and think through how the Trust will be taxed after the death of the first spouse.
- Existing Premarital or Postnuptial Agreement. If clients have an existing premarital or postnuptial agreement in place, carefully consider the impact of a Florida Community Property Trust. Clients must first determine if the Trust is permitted under the agreements, and then whether any changes are required prior to entering into the Florida Community Property Trust.
- Transfers Out of a Florida Community Property Trust. If clients transfer assets out of a Florida Community Property Trust, will the property retain its character as community property? Is it clear the property is no longer community property?
- Fractional Interest Discounts. The valuation rules under IRC Section 2040 do not apply to community property. Instead, the property is valued under IRC Section 2041. As a result, on the death of the first spouse, it is often the case that valuation discounts will apply on the death of the spouse. The reduced valuation will limit the step-up in basis on appreciated property.

Florida Community Property Trust - Pitfalls and Tax Issues

Issues in Planning with Florida Homestead

- Careful planning to avoid triggering documentary stamp taxes and reassessment for ad valorem tax purposes.
- Beware of the devise limitations on the death of the first spouse.
- Example: Homestead is owned by a CPT and there are no other assets in the CPT. First spouse dies without a minor child. Note, Florida homestead is not subject to devise if the deceased spouse has a minor child.
 - Share of the surviving spouse. Is the vesting of the share of the surviving spouse in the Florida homestead a “*devise*” for purposes of Section 4, Article X of the Florida constitution? Does it matter whether the surviving spouse’s one-half interest in the Florida homestead is devised directly to the surviving spouse on the death of the first spouse to die? Or, can the surviving spouse’s one-half interest continue to be held in the CPT, which is subject to revocation by the surviving spouse?
 - Share of the decedent spouse. One-half of the Florida homestead is the share of the decedent spouse and subject to testamentary devise. If the decedent spouse’s one-half share is not devised directly to the surviving spouse (outright and free of trust) there will be an invalid homestead devise. What if the decedent spouse’s one-half interest is held in further trust?
 - The combination of homestead and community property is a new area of Florida law.

Florida Community Property Trust - Pitfalls and Tax Issues

Homestead Devise - Planning Options

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

Florida Community Property Trust - Pitfalls and Tax Issues

Homestead Devise - Planning Options

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

Florida Community Property Trust - Pitfalls and Tax Issues

Can Homestead Devise Limitations be Avoided Via Post-Death Funding?

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

Florida Community Property Trust - Pitfalls and Tax Issues

Can Homestead Devise Limitations be Avoided Via Post-Death Funding?

- Will Non-Pro Rata Funding Affect the Double Step-Up?
 - According to one author, if the entire protected homestead is allocated to the surviving spouse's share to avoid the homestead devise limitations, there would be "*no basis adjustment to the homestead property because less than one-half (actually none) would be included in the deceased spouse's gross estate.*" See Understanding the New Florida Community Property Trust, Part II, Joseph M. Percopo, Florida Bar Journal, September / October, 2022.
 - Query, is it the case that any property allocated exclusively to the surviving spouse's share will not receive a step-up? Or, is the legal interest for purposes of IRC §1014(b)(6) each spouse's one-half interest in the trust itself? Or, is the determination made on an asset-by-asset basis?
 - If the analysis is made on an asset-by-asset basis, then a non-pro rata funding may be problematic. I.R.C. §1014(b)(6)
 - To avoid this issue, consider requiring that one-half of each asset in the CPT be allocated to each spouse's one-half share of the CPT on the death of the first spouse to die. This would also be more in keeping with the treatment of community property on the death of the first spouse in community property jurisdictions.

Florida Community Property Trust - Tax Risks

- Lack of IRS Confirmation. Currently, there is no IRS authority directly confirming the intended tax treatment of property owned by a Florida Community Property Trust. As result, the federal tax treatment of property owned by a Florida Community Property Trust on the death of the first spouse is uncertain.
- IRS Challenge. The IRS could argue that property owned by the Florida Community Property Trust does not qualify as community property under IRC §1014(b)(6). The IRS could cite to the *Commissioner v. Harmon* case as authority for its position.
 - In the *Harmon* case, the U.S. Supreme Court held that a state statute allowing a married couple to elect community property treatment will not be recognized for federal income tax purposes.
 - The IRS may take the position that the *Harmon* case should apply to similar legislation passed in Alaska. See IRM 25.15.5.
 - It should be noted that the *Harmon* case predates IRC §1014(b)(6), and some practitioners believe that the *Harmon* case will not be used by the IRS to challenge the federal income tax treatment of property owned by a Florida Community Property Trust.

Florida Community Property Trust – Tax Risks

- IRS Has Declined to Comment. In IRS Publication 555, the IRS expressly declined to comment on the federal income tax treatment of community property trusts established in non-community property jurisdictions. It is unclear why the IRS has refused to comment; however, some practitioners believe the IRS views these trusts as abusive and providing too much flexibility.
- Time for Achieving Finality. You will not know whether the Florida Community Property Trust “*worked*” as intended until after the IRS statute of limitations (typically 3 years) has passed on the federal income tax return(s) filed to report the sale of the surviving spouse’s one-half (1/2) interest in the Florida Community Property Trust.
 - For example, if there is a death occurring this year and sale of the surviving spouse’s interest in April of 2026, you may not have finality until October of 2030.
 - IRS Form 706, and IRS Form 8971 do not provide finality.
 - Recommend coordinating with couple’s CPA regarding the plan for reporting the sale of assets owned by the Trust after the death of the first spouse.
 - What disclosures should be / are required to be provided to the IRS connection with the income tax reporting?
 - Can there be return preparer penalties?

Creating a Florida Community Property Trust

- The requirements for a CPT are set forth in §736.1503.
 - Declare that the trust is a CPT
 - At least 1 qualified trustee (Florida trustee)
 - Signed by both spouses with required formalities
 - Contain required all CAPs warning language mentioned above
- *Recommendation:* Draft your CPT to terminate on the death of the first spouse to avoid complicated drafting associated with joint trusts.
- Is a New Trust Agreement Required (§736.1502(2))?
 - No, as long as the trust is amended or restated after July 1, 2021.
 - Using an existing trust avoids the need to retitle and transfer the trust assets to a new trust.
- Capitalization and Placement (§736.1503(4))
 - Warning language is required at the beginning of the trust agreement and in all CAPs.

Creating a Florida Community Property Trust

- Revocable v. Irrevocable
 - Impacts formalities for execution, has gift tax implications, applicability of homestead devise limitations, can be misunderstood by clients.
 - Definition of a “revocable trust.” If both spouses must consent to any amendments, is the CPT an “irrevocable trust”?
 - Formalities for execution of a revocable trust with testamentary provisions, compared to formalities required for an “irrevocable” trust.
 - Gift tax implications of an irrevocable trust: possible taxable gift on funding.
 - Why would a couple want to establish an irrevocable CPT? Keep in mind, a surviving spouse must continue to have the power to amend the CPT after the death of the first spouse with respect to the surviving spouse’s share.
- Inadvertent Modification of Marital Agreement
 - Beware of inadvertent modification of existing premarital agreement, or postnuptial agreement, by spouses entering into a CPT or inadvertent modification of CPT by spouses entering into postnuptial agreements signed after the CPT.

Enforcing a Florida Community Property Trust

- A court can determine that a CPT is unenforceable if:
 - Trust is unconscionable
 - Not executed voluntarily
 - Fraud, duress, coercion or overreaching
 - Lack of financial disclosure (see specific language in §736.1512).
- *Recommendation:* Use the same techniques and formalities applicable to a postnuptial agreement.
 - Careful compliance with financial disclosure rules (full list of assets and liabilities, tax returns, income projections), separate counsel, memo to clients explaining pros, cons and risks, documenting each spouse had ample time to review planning.
- Lack of independent counsel.
- Unenforceable terms: terms contrary to Florida public policy, terms that would result in the property not being treated as community property.
- Surviving spouse right to amend his or her one-half share.

Ethical Issues

- Couples most likely to establish CPTs are the same couples that most likely have the same lawyer
- The lawyer must remember the lawyer has two separate clients
- The lawyer owes full duties under the Rules of Professional Conduct to each spouse
- Protections under the Rules for couples being jointly represented are not diminished
- Advantages of joint representation: reduced legal fees, collaboration, same lawyer being used for estate planning
- Potential conflicts of interest
 - Management while both spouses are living
 - Divorce
 - Elective share
 - Death
 - Homestead
 - Prefunding ownership transfers
 - Creditors
 - Irrevocable vs. Revocable

Ethical Issues

- Rules of professional conduct
 - Can the same lawyer provide “*competent and diligent representation*” to both spouses?
- Will a joint representation be permitted under Rule 4-1.7?
 - It depends: Are the spouses' interests aligned?
- Statutory language warning about the risks of joint representation. Does this increase scrutiny under the Rules?
- Adds to the risk of unenforceability.
- Are the ethical issues associated with a CPT really that unique?
 - What about decisions regarding ownership for tax and asset protection planning?
 - What about establishing a SLAT?

Comparison Chart

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

Thank you

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