

# COMMUNITY PROPERTY OPT-IN & TRUST LAWS

PREPARED BY

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## COMMUNITY PROPERTY OPT-IN & TRUST LAWS

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In this whitepaper I'll review two recently enacted Florida statutes that provide additional opportunities in your estate plans. I'll also review one strategy to consider if you have adult children with highly appreciated property. The first statute affects married couples, The Florida Community Property Trust Act. The other new Florida law is for clients

who want a professional trustee, but don't want that trustee to change the custodian of your investments, whether that custodian is Schwab, E\*TRADE, Vanguard, Fidelity or your current investment advisor. The final strategy that I will review is known as the Optimal Basis Increase Trust (OBIT).

### Florida Community Property Trust Act (FCTA)

A benefit to taxpayers in community property states is the treatment of capital gains "step-up" at the death of a married individual. There are nine community property states in America:

Arizona, California, Idaho, Louisiana, Nevada,

New Mexico, Texas, Washington and Wisconsin. Two United States territories also claim community property treatment: Puerto Rico, and Guam.

The step-up in tax cost basis is treated differently in the other 41 common law states than in the community property states.

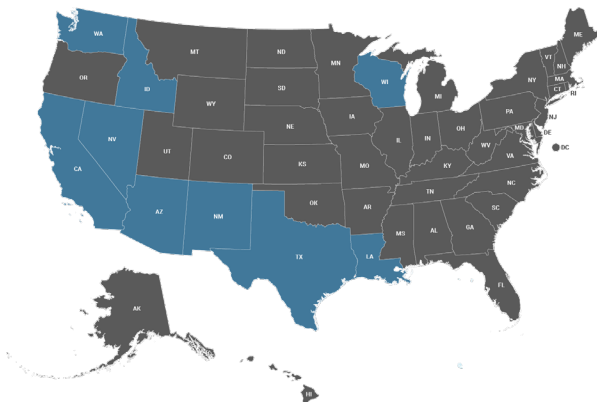
Allow me to explain by example:

### *Sale of Appreciated Stocks and Properties While Both Married Individuals Alive*

John and Jane Doe are married. They live in a common law, not a community property state. John dies. At the time of his death, John and Jane owned an investment account with stocks that have a combined fair market value of \$1,000,000 at the time of John's death, but a combined tax cost basis of \$400,000. If they had sold off the entire account on the day before John's death, they would have realized \$600,000 of capital gain. If their marginal capital gains tax rate was 20%, then they would have paid \$120,000 of federal capital gains income tax.

### *Sale of Appreciated Stocks and Properties After Death of First Spouse – Common Law State*

Same facts as above. If John and Jane, common law state residents, retained the account in-tact until John's death, and Jane sold off the entire account in the day after John's death, the account received a one-half step up in tax cost basis. Consequently, the basis increased from \$400,000 to \$700,000 (unrealized gain of \$600,000 at death receiving a one-half step-up, increasing the basis by \$300,000).



Therefore, if Jane sold the entire \$1 million portfolio, she realized a \$300,000 gain, resulting in \$60,000 of capital gains tax (\$300,000 X 20%).

### *Sale of Appreciated Stocks and Properties After Death of First Spouse – Community Property State*

Now assume the same facts as above, except that John & Jane reside in Nevada, a community property state. At John's death, even if Jane survives, their community property investment account enjoys a 100% step-up in tax cost basis to \$1 million. Therefore, if Jane sells the entire portfolio for \$1 million, she realizes **no capital gains and pays no federal income tax!**

### *Tax Legislation Doesn't Appear to Jeopardize Step-Up*

A concern earlier in 2021 was whether federal tax legislation would eliminate the step-up in basis at death laws. It appears as I write this whitepaper in November 2021 that Congress no longer intends to change the current law as it applies to step-up.

Consequently, married clients may wish to consider this new Florida law to maximize step-up on the first spouse's passing.

### *Details About the Federal Step-Up Law*

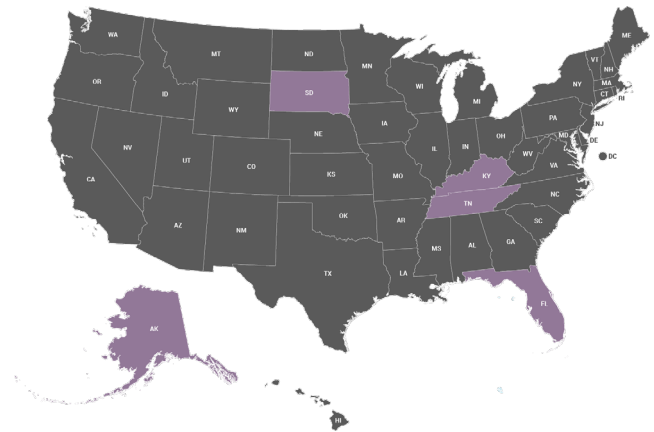
You might be interested to learn that "step-up" doesn't exactly describe how the federal income tax law works. The law adjusts assets to the fair market value at death, whether the assets go up or down in value. Therefore, if the value of an asset should decrease, then the value is so adjusted at death. The Optimal Basis Increase Trust (OBIT) is one strategy you may employ to ensure that only those assets that increase in value are adjusted. The OBIT is discussed later in this paper.

If a federal estate tax return is filed, the estate can choose an "alternate valuation date" which is six months from the date of death.

Consequently, if the six-month valuation date works better than the date of death values, then the estate can elect the alternate valuation date. Taxpayers cannot pick and choose which assets get alternate valuation; it is an all-or-nothing proposition. An exception to this rule applies to any assets sold between the date of death and alternate valuation date, in which case the date of disposal value applies.

Another little-known fact is that a one year holding rule applies. To prevent death-bed transfers to eliminate capital gains taxes, the law requires that assets and property gifted to another within one year of death will not receive an adjustment to fair market value.

### *Community Property Opt-In*



The Florida legislature, seeing the federal tax law benefits to taxpayers in community property states, joined Alaska, Kentucky, South Dakota and Tennessee in creating community property opt-in laws. The Florida Community Property Trust Act allows married couples to opt-in to community property treatment for assets held in a trust that meets certain requirements.

### *Florida Law Had a Community Property Statute on Books Before*

Florida has, for some time, permitted residents to retain community property status on assets. Under the Uniform Disposition of Community Property

Rights Death Act, a married couple that moved to Florida owning community property from a community property state could claim community property status when the first spouse died on those assets. This law, however, did not allow Florida residents to create community property on their assets acquired in Florida or in some other common law state. The new law allows residents to put assets into a community property trust and receive full community property treatment no matter where the assets were acquired.

### *Community Property Overview*

Under a community property system, all property of both spouses is either community or separate property. All property acquired during the marriage is generally presumed to be community property unless clear and convincing evidence demonstrates that the property is separate property of one spouse only.

### *Joint Trusts in Community Property*

Joint revocable trusts are popular in community property states and in the opt-in states. As noted above, the allure of Community Property Trusts is the ability to receive a full step-up in tax cost basis on the death of the first spouse. This step-up in basis applies to the full extent of 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 estate for federal estate tax purposes.

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 loophole provided by our tax 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.

### *Florida Community Property Trust Creation & Operation*

A Florida Community Property Trust must comply with statutory requirements. It must be:

- Created on or after July 1, 2021.
- Have at least one "Qualified Trustee" which is defined as a Florida resident or a company that is authorized to act as a trustee in Florida.
- Expressly declare that the trust is a community property trust with statutory language in capital letters prominently included.
- Signed by both spouses as Settlor consistent with trust execution formalities.

Upon the death of a spouse, one-half of the aggregate value of the property reflects the share of the surviving spouse and is not subject to testamentary disposition by the decedent spouse, or to laws of succession under Florida (or any other state's) law. The other one-half of the value of that property reflects the share of the decedent spouse and is subject to the decedent spouse's testamentary direction.

### *Creditor Issues*

There is required language that warns the married couple of the rights that each is giving the other in the event of divorce, as well as rights that they grant to creditors. As an example, when a married couple transfers assets to a community property trust, that would otherwise be creditor protected, such as tenants by the entirety's assets, annuities, life insurance, 529 Plans and wage accounts, they could cause the assets to be accessible to those creditors.

The Florida Community Property Trust Act attempts to exempt one-half of the assets from the creditors of one spouse, but does not appear to provide protection to all of the assets.

Some couples may transfer an interest in an LLC. If a creditor obtains a judgment against a Florida LLC member, the sole remedy to obtain the LLC assets is usually only a charging order against that member's intent in the LLC. The statutes are silent as whether a charging order will be the sole remedy of a judgment creditor in a Community Property Trust member.

Homestead property should still retain homestead status under Florida law after being transferred to a Community Property Trust.

### *Creditor Protection – Tenants by the Entirety Issue*

Some married couples, particularly those who are professionals, tend to place assets in tenants by the entirety to prevent a judgment creditor (such as in a malpractice suit) from gaining access to those assets. A question therefore arises whether beneficial interests in joint trusts may be afforded tenants by the entirety's protection.

While nothing in the Florida common law or statutory law prevents trust assets from being held as tenants by the entirety by 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 court's answer was no because the trust cannot meet the unities required for tenants by the entireties ownership." 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 as to which each, in the fiction of law, holds the entire estate as one person."

Commentators 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.

**For those clients of ours that rely on joint trusts for tenants by the entirety creditor protection treatment, please schedule a conference with us to discuss the ramifications of this recent court decision.**

### *Different Beneficiaries and Marriage Issues*

It follows that Florida Community Property trusts aren't for everyone. The best candidates are those who are in a long-term marriage, are unlikely to divorce, the ultimate beneficiaries are agreed upon and unlikely to change and will have no or minimal creditors at death.

If spouses do not have the same beneficiaries in the same amounts and proportions, a community property opt-in trust is not appropriate. Community Property Trusts will also supersede nuptial agreements between spouses, transforming non-marital property into marital property. Further, if the spouses are wary that the survivor will somehow thwart the agreed upon estate plan, voluntarily or involuntarily (e.g., by remarrying without a nuptial agreement), then a community property opt-in trust is not appropriate.

### *Estate Tax Planning*

While the estate tax exemption of \$11,700,000 per decedent has made estate tax planning less of a concern for most taxpayers, many factors have caused a great number of married couples to have the need for, and an interest in, estate tax planning.

The scheduled reduction in the estate tax exemption in 2026 is expected to be approximately \$6,500,000 if not changed sooner.







## **Craig Hersch**

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Craig R. Hersch is a Florida Bar Board Certified Wills, Trusts & Estates attorney and holds his Florida CPA license, with over 30 years of experience in his practice. Craig is a partner at Sheppard, Brett, Stewart, Hersch, Kinsey & Hill and has created several trademarked processes tied to his estate planning and administration practice, including The Family Estate & Legacy Program and The Estate Settlement Program.



Craig has authored six books for clients: The Florida Estate Planning Guide, Selecting Your Trustee, Common Cents Estate Planning, Legal Matters When a Loved One Dies, Asset Alignment and Your Estate Plan and Common Cents Estate Planning II. His work has appeared in several professional journals, including The Practical Tax Lawyer, and The Florida Bar Journal, as well as being on the editorial advisory board for Trusts & Estates Magazine, the premier trade journal for estate planning attorneys, CPAs, and financial advisors. Craig also writes a weekly estate planning column that is published in Sanibel's Island Sun newspaper and on his firm's blog.

Craig is a multiple graduate of the University of Florida with accounting and law degrees and has provided his expertise as a continuing education lecturer for The Florida Bar and the Florida Institute of Certified Public Accountants.

Craig holds an AV Martindale Hubbell rating, the highest attainable by the independent national attorney rating service, has been selected as a Worth 100 Top Attorney and has been named to the Super Lawyers list every year since 2009, a highly-esteemed recognition given to no more than five percent of attorneys in Florida.

During his free time, Craig enjoys competing in triathlons, having finished an Ironman distance race and seven half-Ironman races over the last decade. Craig is married to his wife, Patti, and they have three daughters: Gabrielle, Courtney, and Madison.

## **Michael B. Hill**

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Michael B. Hill is a partner at Sheppard Law Firm. Michael is a Florida Board Certified Will, Trusts & Estates attorney concentrating his practice in estate and wealth preservation and business succession planning.



Michael has extensive tax, legal and technology skills, enabling him to create unique plans for meeting client's individual and family needs.

Michael is a double graduate of the University of Florida, receiving his Bachelor of Science in Accounting in 1998, and his Juris Doctor, with honors, in 2001. He is a member of the Florida Bar Association, the American Bar Association, and the Lee County Bar Association.

Michael and his wife, Jamie, have four children, Connor, Chase, Lindsay, and Caleb. In his free time, when there is any, Michael enjoys playing golf, working out, and watching most Gator sports. As an alumnus of the Fightin' Gator Marching Band, you may be able to spot him on Florida Field as a member of the Alumni Band, which marches at one home football game each year.

**Hayley E. Donaldson**

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Hayley E. Donaldson has been recently promoted to partner with the Sheppard Law Firm, working closely with estate planning attorneys Craig R. Hersch and Michael B. Hill.



Hayley helps guide family members in the trust administration and probate process after the passing of their loved one.

Additionally, she assists clients with their tax and estate planning, drafting simple and complex wills, trusts, and related estate planning documents.

Hayley received her Juris Doctor from the University of Florida Levin College of Law, graduating first in her class. In law school she was a member of the Florida Law Review and Volunteer Income Tax Assistance (VITA) program which assists lower income individuals with their yearly tax returns.

Hayley is also a Certified Public Accountant (CPA) and worked previously as an Internal Audit Consultant for a national firm. Hayley has a Masters in Professional Accounting from the University of Texas and holds degrees in Accounting and Finance from the University of Miami. Raised in Fort Myers, she is also a proud graduate of the International Baccalaureate program at Fort Myers High School.

In her free time, Hayley enjoys running, swimming, and watching the Boston Red Sox.



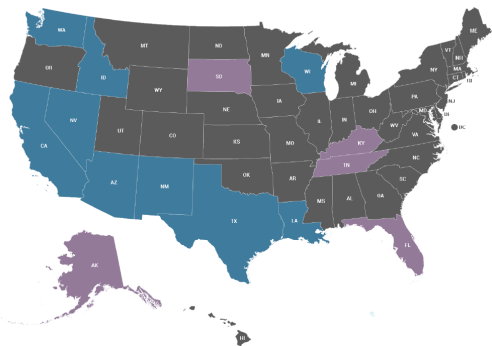
# Community Property Opt-In Trusts

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## GENERAL – WHY, WHO & HOW TO

### Why Community Property Opt-In Trusts (CPTs)?

On the first spouse's death, surviving spouses in community property states (AZ, CA, ID, LA, NV, NM, TX, WA) receive a complete FMV adjustment "step-up" in tax cost basis of their community property assets. American territory Puerto Rico is also a community property jurisdiction. Five states to date (AK, TN, SD, KY, FL) have enacted community property opt-in trust statutes to achieve the same results. See accompanying charts. Alaska enacted in 1998, Tennessee in 2010, South Dakota in 2016, Kentucky and Florida in 2021.

### Are the Community Property Opt-In Trust Laws based on a Model or Uniform Act?

No. In fact, a comprehensive review of each state's law is encouraged before creating a trust for a client under each state law.

### Must the Grantors of the Trust Be Residents of the State to Use the Opt-In Trust?

There appears to be no restriction for a non-resident to create a trust under an opt-in state statute. Florida specifically references non-residents as permissible grantors. In fact, the states creating CPT statutes are doing so to attract money management to that state's banks and trust companies from residents of states that do not offer the legislation.

### Who are the best candidates for using a CPT?

The best candidates are spouses in a strong marriage that is likely to last until one spouse dies and also have:

1. congruent thoughts on who they want to benefit from their estate and how those should benefit, are not likely to change their minds after the first spouse's death;
2. highly appreciated assets;
3. overweighted stock portfolio that they have delayed selling due to capital gains taxes;
4. rental real estate that has depreciated;
5. self created intellectual property, gold, artwork or other collectables, and
6. no present or foreseeable creditor concerns.

### Who might stay away from CPTs?

1. Blended families;
2. One or both spouses are engaged in a high liability profession;
3. A spouse or both have present or foreseeable creditor concerns
4. Spouses wish to maintain disproportionate ownership of assets;
5. Where divorce might occur;
6. Spouses have incongruent testamentary intent.

### Who must sign the CPT?

In all cases, both spouses must sign the CPT. A CPT is valid even absent consideration. Assuming testamentary disposition terms then the trust should be signed in accordance with state law governing such instruments.

## What are the trustee requirements?

See attached charts. Generally, at least one trustee must be either a resident of the CPT state or a national bank or trust company with trust powers in that state. Alaska and South Dakota require that the trust company's principal place of business be in their state. Temporary residents, such as military families and students, do not specifically qualify as a resident trustee in Alaska and South Dakota. It's unclear whether temporary residents of the other states would qualify.

## What legal or notice requirements must be drafted into the body of a CPT?

Under the state statutes, a notice is required warning the grantors of the legal consequences upon the transfer of assets and property into a CPT. These notices must be capitalized and appear at the beginning of the trust. See accompanying chart.

## Is the default of a CPT revocable or irrevocable?

Florida §736.1504 provides that the default is revocable. This is different than Alaska, Tennessee, Kentucky, and South Dakota models, which state that the default is irrevocable. This is likely because AK, TN, and SD are all DAPT states, meaning that self-settled trusts can be protected from the claims of creditors. It's nevertheless good practice to expressly state in the CPT whether it is revocable or irrevocable.

# BENEFITS

## What are some of the benefits provided by CPT?

Several benefits to using CPTs:

1. More clarity regarding full step-up in basis comparing to a Uniform Disposition of Community Property Rights at Death Act
2. Evens playing field with community property state residents.
3. Simplicity as opposed to guessing which assets should be titled in which spouse's trust to get step-up – who dies first? Or using untested methods like Joint Exempt Step-Up Trusts (JEST) and Step-up Grantor Retained Interest Trusts (SUGRIT)
4. No need for tracing. There would be a clear bifurcation between community and separate property. Using UDCPRDA requires detailed, labor intensive, forensic accounting to trace assets coming from a community property jurisdiction.
5. Evidence couples' intent, diminishing post-death litigation.

# DRAFTING OPTIONS

## May the CPT be amended?

CPTs may be amended. Florida's statute provides that "In the event of the death of a settlor spouse, the surviving spouse may amend a community property trust regarding the disposition of that spouse's one-half share of the community property, regardless of whether the agreement provides that the community property trust is irrevocable." See the other state's laws for variations as to amend some statutes provide that the trust specifically so provide.

## Are CPTs inflexible or are there drafting options available?

The statutes are commonly flexible, providing that the spouses may generally agree on:

1. The rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located;
2. The management and control of the property transferred to the trust;
3. Whether the trust is revocable or irrevocable;
4. The disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event;
5. The choice of law governing the interpretation of the trust; and
6. Any other matter that affects the property transferred to the trust and does not violate public policy or a statute imposing criminal penalty.

## Is it possible under the statutes to allocate specific assets in a CPT other than pro-rata?

Under Florida statute §736.1507 Death of a Spouse, "...Unless provided otherwise in the community property trust agreement, the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non-pro rata division of the aggregate value of the trust assets, on the basis of a pro-rata division of each individual asset, or by using both methods. The decedent's spouse's one-half share shall not be included in the elective estate." Tennessee, Kentucky and South Dakota statutes contain language similar to Florida's while Alaska CPT law has no such express language.

## Why is the allocation of specific assets and aggregate value important?

Several instances could influence a desired allocation, such as: (i) QTIP marital share funding; (ii) satisfaction of elective share – control premium satisfies more with less, opposite effect with discounts; (iii) taxable estate (discounts preferred); (iv) nontaxable estate (premiums to increase basis) (v) creditor concerns and (vi) basis adjustment avoidance for assets falling in value. (under IRC §1014(b)(6) deceased spouse's gross estate requires at least one-half inclusion in the deceased's gross estate for the surviving spouse's interest to also receive a FMV basis adjustment.)



## CONTRIBUTIONS/TRANSFERS OF ASSETS & PROPERTY

### Can a Grantor contribute any asset he or she wants into a CPT?

An asset that would properly be transferred into a revocable or irrevocable trust would likely qualify as an asset transferred that may be transferred into a CPT. Such a transfer would convert the asset into community property, which may alter the legal rights of the owner into a joint asset equally owned with a spouse.

### What about property owned in a state that is not a community property state or in the opt-in state?

For example, if Florida residents creates a CPT and one or both spouses transfer Indiana real estate into it, would those Florida residents also receive community property treatment upon the first spouse's death?

Yes, under the state statutes, there appear to be no restrictions indicating anything other than assets and property transferred into a CPT would, under state law, then be considered community property.

## What if a transfer of property is already subject to a common law state's statute that continues community property treatment?

The Florida statute provides that, "...Community property, as classified by a jurisdiction other than this state, which is transferred to a community property trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than the state retains its character as community property to the extent otherwise provided by ss. 732.216 – 732.228." (The Florida Uniform Disposition of Community Property Rights at Death Act). Commentators suggest that use of the CPT statutes demonstrate intent to retain community property treatment and are therefore more likely to achieve a full step-up than relying on a UDCPRDA statute.

### When determining the FMV at death, should discounts for lack of marketability, lack of control, minority interest and premiums for control interests be determined?

Yes. For a more thorough analysis of this aspect See Joseph M. Percopo, Understanding the New Florida Community Property Trust, Part I, Florida Bar Journal Vol. 96 No. 4 and Understanding the New Florida Community Property Trust Part II, Florida Bar Journal Vol. 96 No. 5



### Can posthumous transfers qualify for community property treatment?

Alaska law provides that "...property will be considered transferred to a community property trust if the property is subject to a nonprobate transfer on death as under AS 13.33.101 and the community property trust is designated as the beneficiary to receive the property under the transfer.

## What about transfers to a CPT within one year of death?

When common law property is converted to community property and the non-transferring spouse dies within one year of the conversion, IRC §1014(e) likely will limit the basis adjustment that the transferring spouse receives in the reacquired asset. The one-half interest deemed retained by the surviving/transferring spouse should receive a basis adjustment because such one-half interest was not gifted, making §1014(e) inapplicable.



## INCOME & APPRECIATION

The Florida statutory definition found in §736.1502(1) of what constitutes community property includes not only assets owned by the CPT, but also the income and appreciation therefrom. The definition was expanded to specifically include income and appreciation to address the recent ruling in *Philips v. Bremner-Philips*, 477 P.3d 626 (Alaska 2020), an Alaska Supreme Court decision finding that the income and appreciation from assets held in an Alaska CPT were not community property since the statute did not specifically provide they were to be treated as such.

### IRS GUIDANCE

#### Has the IRS provided guidance to community property treatment under a CPT?

Not much. The IRS publications are not directly on point either challenging or acquiescing to full step-up treatment.



See **IRS Field Service Advisory** 1993 WL 1609164 (Nov 24, 1993) addressing community property treatment of community property brought to a common law property state where the IRS held that “the controlling factor is the characterization of the property under state law.” It concluded that under Oregon law (common property state) the assets brought from California (community property state) would retain community property treatment resulting in the surviving spouse receive a full FMV basis step-up. This appears in line with states that adopt some form of a Uniform Disposition of Community Property at Death statute, which may be distinguished from the instant discussion.

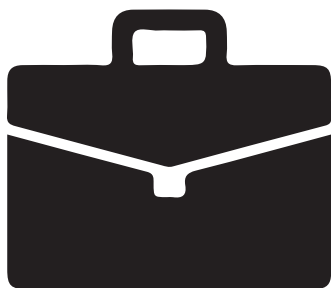
See IRS Publication 555 (entitled “*Community Property*”) most recently revised and released in 2016, does not consider the “federal tax treatment of income or property subject to the ‘community property’ election under Alaska state laws.” This publication only speaks to Alaska’s opt-in community property regime, and not to the efficacy of Alaska CPTs as to step-up at the first spouse’s death. Commentators suggest that the IRS may view this type of community property system as providing too much flexibility to taxpayers, (i.e., the ability to allocate assets and therefore manipulate which spouse reports what income in separately filed 1040s,) and that the Alaska-type system (and by extension other states mimicking it) more akin to an income tax avoidance ploy rather than a state property law system. With that being said, no IRS rulings have addressed step-up for property held under an opt-in statute, despite these laws being on the books for several years.

See *Commissioner v Harmon*, Internal Rev. Serv., Cat. No. 15103C, Community Property (Rev. 2016). During the 1940s some states (HI, MI, NE, OK, OR, PA) enacted laws



allowing residents to opt-in to community property treatment of assets. The US Supreme Court here ruled that an Oklahoma statute allowing spouses to elect community property treatment under that state's law would not be recognized for **federal income tax reporting**. However, some practitioners say Harmon does not stand for this proposition. They instead point to:

**Revenue Ruling 77-359**, the IRS concluded that the conversion of separate property to community property by residents of a community property state would be **effective for gift tax purposes while ineffective for the transmutation of income from such property**. It therefore appears the IRS will treat underlying community property as such and will not distinguish between elective and default community property unless it is for purposes of income splitting. Many practitioners believe that income splitting is the key distinguishing factor between the legislation at issue in Harmon and today's community property trust statutes, and thus why the IRS has not attempted to apply the Harmon ruling to disallow the full step-up on the death of a spouse with respect to community property trust assets.



## OTHER RELEVANT CASES

See *McCullum v. United States*, 59-2 U.S.T.C. ¶9957 (N.D. Okla. 1958) – married couple elected to treat property as community property under Oklahoma's opt-in community property law. The court provided that, "local law...property rights [are] determinative for tax purposes." The court determined the property was properly considered community property from the time of the original election and therefore, a full basis step-up was applied. It's important to note the court included in its analysis a reference to change in the community property laws that occurred after the spousal election, but before the decedent's death causing marital property to be treated as community property.

See also *Westerdahl v. Commissioner*, 82 T.C. 83 (1984). This involved Sweden's legislation in determining whether assets retained community property characteristics for purposes of the Internal Revenue Code. The Court looked to whether the subject community property law included rules that:

1. Make the community property liable for the managing spouse's separate torts;
2. Prevent the nonmanaging spouse from obligating by contract the community property;
3. Require, except in extraordinary circumstances, equal division of the community property upon partition at divorce;
4. Allow the managing spouse to discharge his separate debts from community property; and
5. Require the managing spouse to make an accounting of all community property, including wages, when partitioned at the time of divorce.



The Court concluded that the laws of Sweden give a spouse a present vested interest in marital property which matures when said property is contributed to the marriage by the other spouse. The court in *Angerhofer v. Commissioner*, 87 T.C. 814 (1986) performed a similar analysis in comparing the community property laws of Germany to those of US states. See also *Poe v. Seaborn* U.S. 101 (1930).

The conclusion that may be drawn from these cases is that if a state incorporates characteristics of the community property statutes from the eight original community property jurisdictions in its CPT legislation, it should be respected by the IRS. It appears those characteristics has been accomplished in the five CPT opt-in statutes, all which have not been challenged as of yet by the IRS.

## COMMENTARY

Several commentators support the proposition that CPT statutes achieve their goals.



See 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*, an unpublished manuscript on the with the author, reviewing a detailed understanding of the history and original purposes of IRC §1014(b)(6).

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), "Alaska community property should receive the same basis treatment under 1014(b)(6), because community property under Alaska law, like community property under Wisconsin law, is community property under the "community property laws of [a] State," as section 1014(b)(6) requires.

See Terry Prendergast, *South Dakota Special Property Trusts: South Dakota "Steps-Up" to the Plate and Hits a Home Run for Surviving Spouses*, 61 S.D. L. REV. 431 (2016) "South Dakota legislation clearly intends that the surviving spouse would receive a 100% step-up in basis on the property held in the Special Spousal Trust by the decedent and surviving spouse. Some have suggested that a state cannot allow an opt-in to community property in this specific circumstance, but in each of the nine states where community property is the default, spouses may opt-out by agreement. To allow spouses to opt-in, where common law property is the default, should be considered another side of the same coin."

See Alan Gassman & Christopher Denicolo, *The FCLPT: Rethinking Client Trust Logistics with a New Powerful Catalyst*, LISI Estate Planning Newsletter #2893 (July 8, 2021). "The McCollum decision seems consistent with the notion that Section 1014(b)(6) applies to elective community property as well as mandatory community property."



## Do some commentators harbor opposing views?

Yes. See Lester Law & Howard Zaritsky, *Basis After the 2017 Tax Act – Important Before, Crucial Now, Heckerling 2019*. "In light of the fact that there is disagreement among many who have studied this issue, what is clear [is] that it is unclear in Florida. What is clear is if you have jurisprudence in a state where the property 'is' community property and not that the surviving spouse has 'rights' in property that was at one time community property, then the property can be adjusted under IRC §1014(b)(6). If the property is not community property under the laws of Florida, there can be no adjustment."

See also William Roberts, *A Cautionary Tale of Community Property Trusts*, 47 Tennessee Blog (July 2011). "It is not clear that a Tennessee CPT will accomplish the legislative purpose of giving a married couple a [FMV] tax basis in assets held in the CPT at the time of the first death." And Jeremy T. Ware, *Section 1014(b)(6) and the Boundaries of Community Property*, 5 Nev. L. J. 704,722 (2005) "The elective nature of the regime calls into question whether the Service will allow the full step up for Alaska community property."



## CREDITORS

### Does a CPT shield the assets from the creditors of one or both spouses?

Generally, no. Florida, Tennessee and Kentucky law provide that obligations made by one spouse, before and during marriage, may be satisfied from that spouse's half share. Obligations by both may be satisfied by the CPT. Compare to tenants by the entirety (TBE) creditor protections – generally TBE assets have a stronger protection, although that protection can

suddenly vanish upon divorce or death of a spouse. Alaska and South Dakota are silent on this issue.

### **Can special drafting limit creditor access to assets?**

Rather than leaving the CPT silent, it may be prudent to include provisions specifying in advance which assets will make up each spouse's one-half share in the event of a creditor claim, or the CPT could require that the non-debtor spouse, independent trustee, or some other party determine the assets that comprise the debtor spouse's one-half share.

### **What about LLC interests? Can those be used to limit creditor access?**

All five states offer charging order protection for LLC interests. In anything other than a single member LLC, charging order protection appears to be the exclusive remedy for a creditor. Single member LLCs, however, in all five states offer exceptions to the sole charging order remedy. At issue, therefore, is whether a CPT owning a membership interest in an LLC would qualify as more than a single member LLC. Further, if both spouses are liable to a judgment creditor, it would appear that the public policy behind the charging order protection (protect the interests of a non-debtor member) is thwarted. Consequently, the safest approach is to consider a third member that could be an irrevocable trust that benefits a child, parents, third party or charity.



## **ENFORCEABILITY OF CPT**

### **Can a spouse challenge the enforceability of a CPT?**

Yes, the state statutes have common enforceability provisions.

### **Is lack of separate legal representation in the creation of a CPT deem it unenforceable?**

The lack of separate counsel for each spouse in the creation of a CPT is not a per se reason for the trust to be unenforceable. However, if one spouse is not fully informed of the terms and consequences of the trust, and if the trust was created under circumstances of undue influence or coercion, the trust could be challenged and potentially found to be unenforceable. However, the trust could be challenged and potentially found to be unenforceable if one spouse was not fully informed of the terms and consequences of the trust, or if the trust was created under circumstances of undue influence or coercion.

### **Will lack of disclosure affect the enforceability of a CPT?**

The requirement for fair and reasonable disclosure of property and liabilities may affect enforceability. A CPT may be unenforceable if, prior to execution, a spouse was not provided with fair and reasonable disclosure of the other spouse's property and liabilities, did not sign a waiver expressly waiving the right to disclosure, or was not otherwise aware of the property or financial obligations of the other spouse. It's therefore prudent to document in writing that the spouses waive disclosure or were aware of these factors prior to executing a CPT.

## **NUPTIAL AGREEMENTS & DIVORCE**

### **Are nuptial agreements mentioned in the CPT state statutes?**

The effect of nuptial agreements is not specifically mentioned in the state CPT statutes. A CPT would likely be considered a modification of a nuptial agreement made before the CPT, as fair disclosure is required of both a nuptial agreement and a CPT.

## What happens upon a dissolution of marriage?

A CPT will terminate on the dissolution of the settlor's spouse's marriage, with one-half of the trust assets being distributed to each spouse. The Florida statute specifically states that the default standards for distribution of assets in divorce (§61.075 – the equitable distribution statute) does not apply to assets held in a Florida CPT. The statutes generally permit the trustee to distribute the trust assets in kind, in divided or undivided interests, or on a pro rata or non pro rata basis, so long as the interests total fifty percent to each spouse, unless the CPT provides otherwise. This section goes further and provides that the trustee may not distribute real property or business interests in a manner which would leave the former spouses as co-owners of such assets post-divorce unless the spouse agreed to such ownership in writing.

## What about an action for dissolution of marriage?

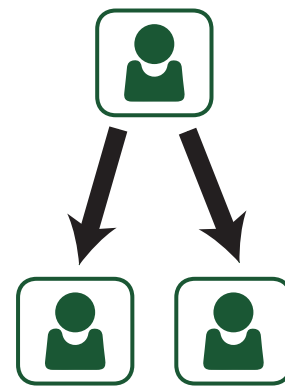
An action generally won't, in and of itself, dissolve the CPT, unless the settlor spouses have otherwise agreed or if the court having jurisdiction over the divorce proceedings enters an order terminating the trust. However, if a divorce action remains pending for 180 days, then a Florida CPT will automatically terminate, unless (i) a spouse objects to the termination, (ii) the court enters an order directing otherwise, (iii) the settlor spouses agree otherwise in writing during the divorce proceedings, or (iv) the trust agreement provides otherwise.

## What about a legal decree of separation?

This is generally regarded the same as a divorce decree. The Florida statute, by the way, dissolves the CPT by a legal decree of separation even though same are not recognized in Florida. This wasn't a mistake on the part of the drafters of the statute but was included by the drafters noting that out-of-state couples who may live in a state which recognizes legal separation, make take advantage of the Florida statute.

# DEATH OF A SPOUSE

Generally, CPTs can be amended if the agreement provides for amendment. The statutes allow for the surviving spouse to amend the disposition of their one-half share of the community property. Florida's §736.1507 specifically provides that “[upon] the death of a spouse, one-half of the aggregate value of the property held in a community property trust established by the settlor spouses reflects the share of the surviving spouse,” and “[t]he other one-half of the value of that property reflects the share of the surviving spouse.” (emphasis added).



## Can the trustee divide the assets in any manner between the surviving spouse's share and decedent spouse's share?

Yes, if the agreement provides so in most states. Florida's statute gives the trustee this default unless provided otherwise. Once each spouse's share is established, the surviving spouse is free to amend the CPT as it pertains to his or her share, and the deceased spouse's share shall be administered as provided in the CPT.

## What dangers exist if the trustee divides the assets disproportionately?

The surviving spouse serving as trustee without professional guidance could, for example, so divide the assets with unintended consequences, such as inequitable asset selection, creditor exposure, elective share funding issues, failure to qualify for a full FMV basis adjustment, or Florida homestead devise restrictions.

## Can the trust require that an independent party determine the asset allocation?

Yes. The trust could specifically designate a person, group or entity to make the division, so an attorney could be appointed within said group.



## FLORIDA HOMESTEAD ISSUES

### Should careful consideration be made to Florida Homestead Transferred to a CPT?

Absolutely. The Florida Constitution and Statutes provide that a decedent survived by a spouse or minor child must devise the complete homestead to the surviving spouse or minor child if there is no surviving spouse. While a nuptial agreement and deed signed by both parties may waive the surviving spouse requirement if there is no minor child, if there is a minor child there is no way to draft around the law.

Consequently, a FCPT that devises the homestead otherwise (including a testamentary trust solely benefitting the surviving spouse) is an invalid devise. Generally, invalid devises result in the surviving spouse choosing between a life interest or a 1/2 interest as tenants in common, with the remainder owned by the decedent spouse's descendants, per stirpes. This devise would inhibit any further sale or alienation of the residence and could also result in a cloud on the title if the descendants are going through a divorce or have other creditor issues.

If the trustee opts to allocate the entire homestead to the surviving spouse to avoid an involuntary devise, then there would be no basis adjustment to the homestead because less than one-half (actually none) would be included in the deceased spouse's gross estate.

## What about Florida Homestead Taxation and Creditor Protection?

Transferring homestead into a Florida CPT should not affect its homestead tax exemption and creditor protection under Florida law. The homestead should also continue to benefit under the Save Our Homes property tax assessment cap.

## THIS, THAT & THE OTHER

### Does a CPT comply with the QSST rules and Creditor Protection?

Before transferring ownership of an S corporation to a CPT, spouses must consider the eligible S corporation shareholder rules found under IRC §1361. If both spouses are eligible S corporation shareholders and the S corporation is owned by one or both spouses, then transferring the ownership interests into the CPT should not in and of itself cause a loss of the S election. A joint grantor trust between a husband and wife is treated as one shareholder and thus is eligible owner of an S corporation interest under Treas. Reg. §1.1361-1(e)(2). Under that same Treasury Regulation, the treatment of a joint trust as a qualified shareholder will cease upon the dissolution of the marriage for any reason other than death. See also PLR 200226006 (June 28, 2002).

### Are gifts to U.S. citizen spouses subject to gift tax?

Generally, spouses may gift assets outright to each other without limit or adverse tax consequences. Provided the CPT is revocable by the settlor spouses, any interest considered retained by one spouse is an incomplete gift and does not create a taxable event. Any interest considered gifted to the donee spouse should qualify for the marital deduction and also avoid a taxable event.



If the CPT is irrevocable or contains a provision that some part of it will become irrevocable at a future death or occurrence (such as the death of a spouse), the CPT may not be eligible for the marital deduction unless it is carefully drafted to ensure it qualifies under IRC §2056(b). A QTIP trust provides a great mechanism to provide a surviving spouse with a creditor protected bucket of assets, an allocation of the deceased spouse's unused GST exemption, and still have the QTIP trust assets enjoy a second basis step-up upon the death of the second spouse.

### **What about gifts to non-citizen spouses?**

A gift during life to a non-citizen spouse is only exempt annually up to \$175,000 in 2023 (IRC §2523(i)), said amount indexed to inflation. Any gift above that amount will be subject to tax. Therefore, if a citizen spouse establishes a CPT with a non-citizen spouse, the couple should be aware that one-half of the value of any transfers made to the trust by the citizen spouse may constitute gifts to the non-citizen spouse and result in gift tax if above said amount. Likewise, assets that pass at death from a citizen spouse to a non-citizen spouse are not eligible for the marital deduction under IRC §2056(d)(1). Here, a QDOT is necessary to be built into the CPT.

### **Can a CPT be used to facilitate an IRC §1031 exchange?**

Yes. A §1031 exchange allows taxpayers to sell real property without having to recognize immediate gain provided both the sale of real property and the acquisition of new replacement property. Here, the same taxpayer must be both the seller of the relinquished property and the buyer of the replacement property. To accomplish a degree of asset protection, a CPT can create a wholly owned LLC to own property that would subsequently be sold, with the replacement property purchased by the LLC. **See Rev. Proc. 2002-69. See also PLR 9751012; PLR 9807013; PLR 9850001; PLR 199911033.**

## **CONCLUSION**

There are far more upsides than downsides to creating a CPT for the right clients. Counsel should familiarize themselves with state statutes and recent cases, IRS rulings and pronouncements prior to recommending this strategy.

*The contents of this outline are ©2023 Craig R. Hersch and is not meant as legal advice. While every effort was made to convey accurate information, the author does not provide any assurances or warranties that the information is complete or consistent with current law. It is incumbent for clients to seek competent legal counsel, and for counsel to conduct their own research for said client.*



# Alaska Stat. § 34.77.100

Section 34.77.100 - Community property trust

(a) An arrangement is a community property trust if one or both spouses transfer property to a trust, the trust expressly declares that some or all the property transferred is community property under this chapter, and at least one trustee is a qualified person 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. A community property trust is enforceable without consideration. Both spouses or either spouse may be a trustee. The trust must be signed by both spouses. In this subsection, "qualified person" means

(1) an individual

(A) who, except for brief intervals, military service, attendance at an educational or training institution, or absences for good cause shown, resides in this state;

(B) whose true and permanent home is in this state;

(C) who does not have a present intention of moving from this state; and

(D) who intends to return to this state when away;

(2) a trust company that is organized under AS 06.26 and that has its principal place of business in this state; or

(3) a bank that is organized under AS 06.05 or a national banking association that is organized under 12 U.S.C. 21 - 216d if the bank or national banking association possesses and exercises trust powers and has its principal place of business in this state.

(b) A community property trust must contain the following language in capital letters at the beginning of the trust:

THE CONSEQUENCES OF THIS 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 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 trust may not adversely affect the right of a child to support.

(d) Except as provided in AS 34.77.010, 34.77.070(h), 34.77.080(b), and in (c) of this section, in a community property trust spouses may agree on

(1) the rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located;

(2) the management and control of the property transferred to the trust;

- (3) the disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event;
  - (4) the choice of law governing the interpretation of the trust; and
  - (5) any other matter that affects the property transferred to the trust and does not violate public policy or a statute imposing a criminal penalty.
- (e) A community property trust may not be amended or revoked unless the agreement itself provides for amendment or revocation, or unless the agreement is amended or revoked by a later community property trust. To amend or revoke the trust, the later community property trust is not required to declare any property held by the trustee as community property. The amended trust or the revocation is enforceable without consideration. However, notwithstanding the other provisions of this subsection, unless the community property trust expressly provides otherwise, at any time after the death of the first spouse the surviving spouse may amend the community property trust with regard to the surviving spouse's property to be disposed of at the surviving spouse's death. In this subsection, "surviving spouse's property" means the property that consists of the surviving spouse's separate property and the surviving spouse's share of the community property determined as of the date of the first spouse's death.
- (f) A community property trust executed during marriage is not enforceable if the spouse against whom enforcement is sought proves that
- (1) trust was unconscionable when made; or
  - (2) the spouse against whom enforcement is sought did not execute the community property trust agreement voluntarily; or
  - (3) before execution of the community property trust agreement, the spouse against whom enforcement is sought

    - (A) was not given a fair and reasonable disclosure of the property and financial obligations of the other spouse;
    - (B) 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; and
    - (C) did not have notice of the property or financial obligations of the other spouse.
- (g) Whether or not a community property trust is unconscionable is determined by a court as a matter of law.
- (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.
- (i) In addition to other transfers of property to a community property trust, property will be considered transferred to a community property trust if the property is subject to a nonprobate transfer on death under AS 13.33.101 and the community property trust is designated as the beneficiary to receive the property under the transfer.

*AS 34.77.100*

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# Tenn. Code § 35-17-102

## Section 35-17-102 - Chapter definitions

As used in this chapter:

- (1) "Community property" means property owned by a community property trust during the marriage of the settlor spouses;
- (2) "Community property trust" means an express trust that complies with § 35-17-103;
- (3) "Decree" means a judgment or other order of a court;
- (4) "Dissolution" means either:
  - (A) Termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity; or
  - (B) Entry of a decree of legal separation maintenance;
- (5) "During marriage" means a period that begins at marriage and ends at dissolution or the death of a spouse;
- (6) "Qualified trustee" means either:
  - (A) A natural person who is a resident of this state; or
  - (B) A company authorized to act as a fiduciary in this state pursuant to § 45-2-1001; and
- (7) "Settlor spouses" means a married couple that establishes a community property trust.

*T.C.A. § 35-17-102*

Acts 2010, ch. 658, § 1.

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## Tenn. Code § 35-17-103

### Section 35-17-103 - Requirements for community property trust

An arrangement is a community property trust if one (1) or both spouses transfer property to a trust, that:

- (1) Expressly declares that the trust is a Tennessee community property trust;
- (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 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.

*T.C.A. § 35-17-103*

Acts 2010, ch. 658, § 1.

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## Tenn. Code § 35-17-104

Section 35-17-104 - Agreement establishing community property trust - Amendments and revocation

- (a) In the agreement establishing a community property trust, spouses may agree on:
- (1) The rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located;
  - (2) The management and control of the property transferred to the trust;
  - (3) The disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event;
  - (4) The choice of law governing the interpretation of the trust; and
  - (5) Any other matter that affects the property transferred to the trust and does not violate public policy or a statute imposing a criminal penalty.
- (b)
- (1) Either spouse may amend a community property trust regarding the disposition of that spouse's one-half ( $\frac{1}{2}$ ) share of the community property in the occurrence of such spouse's death.
  - (2) Except as provided in subdivision (b)(1), a community property trust may not be amended or revoked unless the agreement itself provides for amendment or revocation.

*T.C.A. § 35-17-104*

Acts 2010, ch. 658, § 1.

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## Tenn. Code § 35-17-105

Section 35-17-105 - Classification of property as community property - Enforcement - Duration - Management and control - Effect of distributions

**(a)** Whether or not both, one or neither is domiciled in this state, spouses may classify any or all of their property as community property by transferring property to a community property trust and providing in the trust that the property is community property.

**(b)** A community property trust is enforceable without consideration.

**(c)** All property owned by a community property trust will be community property during marriage.

**(d)** The right to manage and control property that is transferred to a community property trust is determined by the terms of the trust.

**(e)** When property is distributed from a community property trust, it shall no longer constitute community property.

*T.C.A. § 35-17-105*

Acts 2010, ch. 658, § 1.

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# Tenn. Code § 35-17-106

Section 35-17-106 - Satisfaction of obligations

**(a)** An obligation incurred by only one (1) spouse before or during marriage may be satisfied from that spouse's one-half ( $\frac{1}{2}$ ) share of a community property trust.

**(b)** An obligation incurred by both spouses during marriage may be satisfied from a community property trust of the spouses.

*T.C.A. § 35-17-106*

Acts 2010, ch. 658, § 1.

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# Tenn. Code § 35-17-107

Section 35-17-107 - Death of a spouse

Upon the death of a spouse, one-half (1/2) of the aggregate value of the property owned by a community property trust established by the spouses reflects the share of the surviving spouse and the other one-half (1/2) reflects the share of the decedent. Unless provided otherwise in the trust agreement, the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non pro rata division of the aggregate value of the trust assets, on the basis of a pro rata division of each individual asset, or by using both methods.

*T.C.A. § 35-17-107*

Acts 2010, ch. 658, § 1.

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# Tenn. Code § 35-17-108

Section 35-17-108 - Dissolution of marriage

Upon the dissolution of the marriage of the settlor spouses, the community property trust shall terminate and the trustee shall distribute one half ( $\frac{1}{2}$ ) of the trust assets to each spouse, with each spouse receiving one half ( $\frac{1}{2}$ ) of each asset, unless otherwise agreed to in writing by both spouses.

*T.C.A. § 35-17-108*

Acts 2010, ch. 658, § 1.

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## S.D. Codified Laws § 55-3-39

Section 55-3-39 - When state law or jurisdiction provision valid, effective, and conclusive

Except as expressly provided by the terms of a governing instrument or by a court order, a general law or a state jurisdiction provision stating that the laws of this state govern is valid, effective, and conclusive for the trust if all of the following are true:

- (1) Some or all of the trust assets are deposited in this state or physical evidence of such assets is held in this state and the trust is being administered by a qualified person; in this subdivision, deposited in this state, includes being held in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in this state including South Dakota investments;
- (2) A trustee is a qualified person who is designated as a trustee under the governing instrument, a successor trusteeship, or designated by a court having jurisdiction over the trust; and
- (3) The administration, for example, physically maintaining trust records in this state and preparing or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that must be filed by the trust, occurs wholly or partly in this state.

The State of South Dakota and its courts have jurisdiction over a trust created in a foreign jurisdiction if the administration of the trust meets the three requirements set forth in this section.

Nothing in this section may be construed to be the exclusive means of providing a valid effective and conclusive state jurisdiction provision.

*SDCL 55-3-39*

SL 1998, ch 282, §20; SL 2004, ch 312, §6; SL 2010, ch 232, §3.

# Ky. Rev. Stat. § 386.620

Section 386.620 - Definitions for KRS 386 to 386.624

As used in KRS 386.620 to 386.624:

- (1) "Community property" means property owned by a community property trust during the marriage of the settlor spouses;
- (2) "Community property trust" means an express trust that complies with the requirements of KRS 386.622;
- (3) "Decree" means a judgment or other order of a court;
- (4) "Dissolution" means either:
  - (a) Termination of a marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity; or
  - (b) Entry of a decree of legal separation;
- (5) "During marriage" means a period that begins at marriage and ends at dissolution or the death of a spouse;
- (6) "Qualified trustee" means either:
  - (a) A natural person who is a resident of this state; or
  - (b) A bank or trust company authorized to act as a trustee within the state; and
- (7) "Settlor spouses" means a married couple that establishes a community property trust.  
*KRS 386.620*

Effective: July 15, 2020

Created 2020 Ky. Acts ch. 25, sec. 1, effective 7/15/2020.

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## Ky. Rev. Stat. § 386.622

Section 386.622 - Arrangement between spouses involving community property considered a community property trust - Requirements for - Provisions of written agreement - Amendment or revocation of trust - Consideration not required - Classification and distribution of property

- (1)** 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 requirements of KRS 386.620 to 386.624;
  - (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, 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.
- (2)** In the agreement establishing a community property trust, spouses may agree on and provide in writing:
- (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 to the trust;
  - (c)** The disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event;
  - (d)** The choice of law governing the interpretation of the trust; and
  - (e)** Any other matter that affects the property transferred to the trust and does not violate public policy or any statute imposing a criminal penalty.
- (3)** Either spouse may amend a community property trust regarding the disposition of that spouse's one-half (1/2) share of the community property in the event of a spouse's death.
- (4)** Except as provided in subsection (2)(a) of this section, a community property trust may not be amended or revoked unless the agreement itself provides for amendment or revocation.

**(5)** Whether or not both, one (1), or neither spouse is domiciled in this state, spouses may classify any or all of their property as community property by transferring property to a community property trust and providing in the trust that the property is community property.

**(6)** A community property trust shall be enforceable without consideration.

**(7)** 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.

**(8)** When property is distributed from a community property trust, it shall no longer constitute community property.

*KRS 386.622*

Effective: July 15, 2020

Created 2020 Ky. Acts ch. 25, sec. 2, effective 7/15/2020.

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## Ky. Rev. Stat. § 386.624

Section 386.624 - Satisfaction of obligation of one or both spouses from community property trust - Distribution of assets upon death of spouse or dissolution of marriage

- (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 property trust of the spouses.
- (3) Upon the death of a spouse, one-half (1/2) of the aggregate value of the property owned by a community property trust established by the spouses shall reflect the share of the surviving spouse and the other one-half (1/2) shall reflect the share of the decedent. Unless provided otherwise in the trust agreement, the trustee shall have the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non-pro rata division of the aggregate value of the trust assets, on the basis of a pro rata division of each individual asset, or by using both methods.
- (4) Upon the dissolution of the marriage of the settlor spouses, the community property trust shall terminate, and the trustee shall distribute one-half (1/2) of the trust assets to each spouse, with each spouse receiving one-half (1/2) of each asset, unless otherwise agreed to in writing by both spouses.

*KRS 386.624*

Effective: July 15, 2020

Created 2020 Ky. Acts ch. 25, sec. 3, effective 7/15/2020.

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# Fla. Stat. § 736.151

Section 736.151 - 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.

*Fla. Stat. § 736.151*

Added by 2021 Fla. Laws, ch. 183,s 38, eff. 7/1/2021.

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# Fla. Stat. § 736.1502

## Section 736.1502 - Definitions

Unless the context otherwise requires, as used in this part:

(1) "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. The property owned by a community property trust pursuant to this part and the appreciation of and income from such property shall be deemed to be community property for purposes of general law.

(2) "Community property trust" means an express trust that complies with s. 736.1503 and is created on or after July 1, 2021.

(3) "Decree" means a judgment or other order of a court of competent jurisdiction.

(4) "Dissolution" means either:

(a) Termination of a marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity; or

(b) Entry of a decree of legal separation maintenance by a court of competent jurisdiction in another state that recognizes legal separation or maintenance under its laws.

(5) "During marriage" means a period that begins at marriage and ends upon the dissolution of marriage or upon the death of a spouse.

(6) "Qualified trustee" means either:

(a) A natural person who is a resident of the state; or

(b) A company authorized to act as a trustee in the state.

A qualified trustee's powers include, but are not 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.

(7) "Settlor spouses" means a married couple who establishes a community property trust pursuant to this part.

*Fla. Stat. § 736.1502*

Added by 2021 Fla. Laws, ch. 183,s 30, eff. 7/1/2021.

## Fla. Stat. § 736.1503

### Section 736.1503 - Requirements for community property trust

An arrangement is a community property trust if one or both settlor spouses transfer property to a trust that:

- (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 PROPERTY TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE DURING THE COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND UPON THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD BE SIGNED ONLY AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE. ALTHOUGH NOT A REQUIREMENT, IT IS STRONGLY ADVISABLE THAT EACH SPOUSE OBTAIN THEIR OWN SEPARATE LEGAL COUNSEL PRIOR TO THE EXECUTION OF THIS TRUST.

*Fla. Stat. § 736.1503*

Added by 2021 Fla. Laws, ch. 183,s 31, eff. 7/1/2021.

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## Fla. Stat. § 736.1504

Section 736.1504 - Agreement establishing community property trust; amendments and revocation

(1) In the agreement establishing a community property trust, the settlor spouses may agree upon:

- (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 to the trust on dissolution, death, or the occurrence or nonoccurrence of another event, subject to ss. 736.1507 and 736.1508.
- (d) Whether the trust is revocable or irrevocable.
- (e) Any other matter that affects the property transferred to the trust and does not violate public policy or general law imposing a criminal penalty, or result in the property not being treated as community property under the laws of a relevant jurisdiction.

(2) In the event of the death of a settlor spouse, the surviving spouse may amend a community property trust regarding the disposition of that spouse's one-half share of the community property, regardless of whether the agreement provides that the community property trust is irrevocable.

(3) A community property trust may be amended or revoked by the settlor spouses unless the agreement itself specifically provides that the community property trust is irrevocable.

(4) Notwithstanding any other provision of this code, the settlor spouses 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. After the death of one of the settlor spouses, the surviving spouse shall be deemed to be the only qualified beneficiary as to his or her share of the community property trust.

*Fla. Stat. § 736.1504*

Added by 2021 Fla. Laws, ch. 183,s 32, eff. 7/1/2021.

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## Fla. Stat. § 736.1505

Section 736.1505 - Classification of property as community property; enforcement; duration; management and control; effect of distributions

- (1) Whether both, one, or neither is domiciled in the state, settlor spouses may classify any or all of their property as community property by transferring that property to a community property trust and providing in the trust that the property is community property pursuant to this part.
- (2) A community property trust is enforceable without consideration.
- (3) All property owned by a community property trust is community property under the laws of the state during the marriage of the settlor spouses.
- (4) The right to manage and control property that is transferred to a community property trust is determined by the terms of the trust agreement.
- (5) When property is distributed from a community property trust, the property shall no longer constitute community property within the meaning of this part, provided that 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.

*Fla. Stat. § 736.1505*

Added by 2021 Fla. Laws, ch. 183,s 33, eff. 7/1/2021.

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# Fla. Stat. § 736.1506

Section 736.1506 - Satisfaction of obligations

Except as provided in s. 4, Art. X of the State Constitution:

- (1) An obligation solely incurred by one settlor spouse before or during the marriage may be satisfied from that settlor spouse's one-half share of a community property trust, unless a greater amount is otherwise provided in the community property trust agreement.
- (2) An obligation incurred by both spouses during the marriage may be satisfied from a community property trust of the settlor spouses.

*Fla. Stat. § 736.1506*

Added by 2021 Fla. Laws, ch. 183,s 34, eff. 7/1/2021.

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## **Fla. Stat. § 736.1507**

Section 736.1507 - Death of a spouse

Upon the death of a spouse, one-half of the aggregate value of the property held in a community property trust established by the settlor spouses reflects the share of the surviving spouse and is not subject to testamentary disposition by the decedent spouse or distribution under the laws of succession of the state. The other one-half of the value of that property reflects the share of the decedent spouse and is subject to testamentary disposition or distribution under the laws of succession of the state. Unless provided otherwise in the community property trust agreement, the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non-pro rata division of the aggregate value of the trust assets, on the basis of a pro rata division of each individual asset, or by using both methods. The decedent's spouse's one-half share shall not be included in the elective estate.

*Fla. Stat. § 736.1507*

Added by 2021 Fla. Laws, ch. 183,s 35, eff. 7/1/2021.

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## Fla. Stat. § 736.1508

Section 736.1508 - Dissolution of marriage

**(1)** Upon the dissolution of the marriage of the settlor spouses, the community property trust shall terminate and the trustee shall distribute one-half of the trust assets to each spouse in accordance with subsection (3). For purposes of this act, s. 61.075 does not apply to the disposition of the assets and liabilities held in a community property trust.

**(2)** The initiation of an action to dissolve the settlor spouses' marriage does not automatically terminate the community property trust unless otherwise agreed to by the settlor spouses in writing or otherwise ordered by the court having jurisdiction over the dissolution proceedings between the settlor spouses. However, if an action to dissolve the settlor spouses' marriage remains pending for 180 days, the trust automatically terminates and the trustee must distribute one-half of the trust assets to each spouse in accordance with subsection (3), unless any of the following apply:

**(a)** A settlor spouse objects to the termination within 180 days following the filing of the dissolution action. At which time, either party may request that the court having jurisdiction over the dissolution proceedings between the settlor spouses determine if good cause exists to terminate the community property trust during the pendency of the dissolution of marriage action.

**(b)** The court having jurisdiction over the dissolution proceedings between the settlor spouses enters an order directing otherwise.

**(c)** The settlor spouses otherwise agree, in writing, while the dissolution of marriage action is pending.

**(d)** The community property trust agreement provides otherwise.

**(3)** Unless provided otherwise in the community property trust agreement, the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non-pro rata division of the aggregate value of the trust assets, on the basis of a pro rata division of each individual asset, or by using both methods. A trustee may not distribute real property or business interests in a manner that would leave the settlor spouses as co-owners of such assets post dissolution of the settlor spouses' marriage or termination of the community property trust, unless otherwise agreed to by the settlor spouses in a separate written agreement executed during the dissolution of marriage action. Notwithstanding any other provision of this section, the community property trust agreement cannot be terminated, and the assets cannot be distributed, in a manner that could cause the trust assets to not be treated as community property.

**(4)** The court having jurisdiction over the dissolution proceedings between the settlor spouses has personal and subject matter jurisdiction over the settlor spouses and the trustee of the community property trust for the purpose of effectuating the distribution of the community property trust assets consistent with the terms of the community property trust

agreement, in a manner ensuring that the trust assets retain their community property character.

*Fla. Stat. § 736.1508*

Added by 2021 Fla. Laws, ch. 183,s 36, eff. 7/1/2021.

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## **Fla. Stat. § 736.1509**

Section 736.1509 - Right of child to support

A community property trust does not adversely affect the right of a child of the settlor spouses to support, pursuant to s. 61.30 or the applicable law of another jurisdiction, that either spouse would be required to give under the applicable laws of the settlor spouses' state of domicile.

*Fla. Stat. § 736.1509*

Added by 2021 Fla. Laws, ch. 183,s 37, eff. 7/1/2021.

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## **Fla. Stat. § 736.1509**

Section 736.1509 - Right of child to support

A community property trust does not adversely affect the right of a child of the settlor spouses to support, pursuant to s. 61.30 or the applicable law of another jurisdiction, that either spouse would be required to give under the applicable laws of the settlor spouses' state of domicile.

*Fla. Stat. § 736.1509*

Added by 2021 Fla. Laws, ch. 183,s 37, eff. 7/1/2021.

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## **Fla. Stat. § 736.1511**

Section 736.1511 - Application of Internal Revenue Code; community property classified by another jurisdiction

For purposes of the application of s. 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. s. 1014(b)(6), as of January 1, 2021, a community property trust is considered a trust established under the community property laws of the state. Community property, as classified by a jurisdiction other than this state, which is transferred to a community property trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than the state retains its character as community property to the extent otherwise provided by ss. 732.216-732.228.

*Fla. Stat. § 736.1511*

Added by 2021 Fla. Laws, ch. 183,s 39, eff. 7/1/2021.

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## 26 U.S.C. § 1014

Section 1014 - Basis of property acquired from a decedent

### (a) In general

Except as otherwise provided in this section, the basis of property in the hands of a [person](#) acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such [person](#), be-

- (1) the fair market value of the property at the date of the decedent's death,
- (2) in the case of an election under section 2032, its value at the applicable valuation date prescribed by such section,
- (3) in the case of an election under section 2032A, its value determined under such section, or
- (4) to the extent of the applicability of the exclusion described in section 2031(c), the basis in the hands of the decedent.

### (b) Property acquired from the decedent

For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

- (1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;
- (2) Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent, with the right reserved to the decedent at all times before his death to revoke the trust;
- (3) In the case of decedents dying after December 31, 1951, property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent with the right reserved to the decedent at all times before his death to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust;
- (4) Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;
- (5) In the case of decedents dying after August 26, 1937, and before January 1, 2005, property acquired by bequest, devise, or inheritance or by the decedent's estate from the decedent, if the property consists of [stock](#) or securities of a foreign [corporation](#), which with respect to its [taxable year](#) next preceding the date of the decedent's death was, under the law applicable to such year, a foreign personal holding company. In such case, the

basis shall be the fair market value of such property at the date of the decedent's death or the basis in the hands of the decedent, whichever is lower;

(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;

[(7), (8) Repealed. Pub. L. 113-295, div. A, title II, §221(a)(74)(B), Dec. 19, 2014, 128 Stat. 4049]

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to-

(A) annuities described in section 72;

(B) property to which paragraph (5) would apply if the property had been acquired by bequest; and

(C) property described in any other paragraph of this subsection.

(10) Property includible in the gross estate of the decedent under section 2044 (relating to certain property for which marital deduction was previously allowed). In any such case, the last 3 sentences of paragraph (9) shall apply as if such property were described in the first sentence of paragraph (9).

**(c) Property representing income in respect of a decedent**

This section shall not apply to property which constitutes a right to receive an item of income in respect of a decedent under section 691.

**(d) Special rule with respect to DISC stock**

If stock owned by a decedent in a DISC or former DISC (as defined in section 992(a)) acquires a new basis under subsection (a), such basis (determined before the application of this subsection) shall be reduced by the amount (if any) which would have been included in gross income under section 995(c) as a dividend if the decedent had lived and sold the stock at its fair market value on the estate tax valuation date. In computing the gain the decedent would have had if he had lived and sold the stock, his basis shall be determined without

regard to the last sentence of section 996(e)(2) (relating to reductions of basis of DISC stock). For purposes of this subsection, the estate tax valuation date is the date of the decedent's death or, in the case of an election under section 2032, the applicable valuation date prescribed by that section.

**(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.

**(2) Definitions**

For purposes of paragraph (1)-

**(A) Appreciated property**

The term "appreciated property" means any property if the fair market value of such property on the day it was transferred to the decedent by gift exceeds its adjusted basis.

**(B) Treatment of certain property sold by estate**

In the case of any appreciated property described in subparagraph (A) of paragraph (1) sold by the estate of the decedent or by a trust of which the decedent was the grantor, rules similar to the rules of paragraph (1) shall apply to the extent the donor of such property (or the spouse of such donor) is entitled to the proceeds from such sale.

**(f) Basis must be consistent with estate tax return**

For purposes of this section-

**(1) In general**

The basis of any property to which subsection (a) applies shall not exceed-

(A) in the case of property the final value of which has been determined for purposes of the tax imposed by chapter 11 on the estate of such decedent, such value, and

(B) in the case of property not described in subparagraph (A) and with respect to which a statement has been furnished under section 6035(a) identifying the value of such property, such value.

**(2) Exception**

Paragraph (1) shall only apply to any property whose inclusion in the decedent's estate increased the liability for the tax imposed by chapter 11 (reduced by credits allowable against such tax) on such estate.

**(3) Determination**

For purposes of paragraph (1), the basis of property has been determined for purposes of the tax imposed by chapter 11 if-

**(A)** the value of such property is shown on a return under section 6018 and such value is not contested by the [Secretary](#) before the expiration of the time for assessing a tax under chapter 11,

**(B)** in a case not described in subparagraph (A), the value is specified by the [Secretary](#) and such value is not timely contested by the executor of the estate, or

**(C)** the value is determined by a court or pursuant to a settlement agreement with the [Secretary](#).

**(4) Regulations**

The [Secretary](#) may by regulations provide exceptions to the application of this subsection.

*26 U.S.C. § 1014*

Aug. 16, 1954, ch. 736, 68A Stat. 296; Pub. L. 85-320, §2, Feb. 11, 1958, 72 Stat. 5; Pub. L. 92-178, title V, §502(f), Dec. 10, 1971, 85 Stat. 550; Pub. L. 94-455, title XIX, §1901(c)(8), title XX, §2005(a)(1), Oct. 4, 1976, 90 Stat. 1803, 1872; Pub. L. 95-600, title V, §515(1), title VII, §702(c)(1)(A), Nov. 6, 1978, 92 Stat. 2884, 2926; Pub. L. 96-222, title I, §107(a)(2)(A), Apr. 1, 1980, 94 Stat. 222; Pub. L. 96-223, title IV, §401(a), Apr. 2, 1980, 94 Stat. 299; Pub. L. 97-34, title IV, §425(a), Aug. 13, 1981, 95 Stat. 318; Pub. L. 97-448, title I, §104(a)(1)(A), Jan. 12, 1983, 96 Stat. 2379; Pub. L. 105-34, title V, §508(b), Aug. 5, 1997, 111 Stat. 860; Pub. L. 107-16, title V, §541, June 7, 2001, 115 Stat. 76; Pub. L. 108-357, title IV, §413(c)(18), Oct. 22, 2004, 118 Stat. 1508; Pub. L. 111-312, title III, §301(a), Dec. 17, 2010, 124 Stat. 3300; Pub. L. 113-295, div. A, title II, §221(a)(74), Dec. 19, 2014, 128 Stat. 4049; Pub. L. 114-41, title II, §2004(a), July 31, 2015, 129 Stat. 454.

**EDITORIAL NOTES**

**REFERENCES IN TEXT**Section 811 of the Internal Revenue Code of 1939, referred to in subsec. (b)(6), was classified to section 811 of former Title 26, Internal Revenue Code. For table of comparisons of the 1939 Code to the 1986 Code, see Table I preceding section 1 of this title. See, also, section 7851(e) of this title for provision that references in the 1986 Code to a provision of the 1939 Code, not then applicable, shall be deemed a reference to the corresponding provision of the 1986 Code, which is then applicable. The Internal Revenue Code of 1939, referred to in subsec. (b)(9), is act Feb. 10, 1939, ch. 2, 53 Stat. 1. Prior to the enactment of the [Internal Revenue Code of 1986](#) [formerly I.R.C. 1954], the 1939 Code was classified to former Title 26, Internal Revenue Code. For table of comparisons of the 1939 Code to the 1986 Code, see Table I preceding section 1 of this title.

**AMENDMENTS**2015-Subsec. (f). Pub. L. 114-41 added subsec. (f). 2014-Subsec. (a)(2). Pub. L. 113-295, §221(a)(74)(A), amended par. (2) generally. Prior to amendment, par. (2) read as follows: "in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections." Subsec. (b)(7), (8). Pub. L. 113-295, §221(a)(74)(B), struck out pars. (7) and (8). Prior to repeal, par. (7) related to property representing a surviving spouse's one-half share of community property held by the surviving spouse and a decedent dying after Oct. 21, 1942, and on or before Dec. 31, 1947, and par. (8) related to property representing

*certain interests of the survivor in a joint and survivor's annuity in the case of a decedent dying after Dec. 31, 1950, and before Jan. 1, 1954.* **2010-Subsec. (f).** Pub. L. 111-312 amended section to read as if amendment by Pub. L. 107-16, §541, had never been enacted. See 2001 Amendment note below. Prior to amendment, text of subsec. (f) read as follows: "This section shall not apply with respect to decedents dying after December 31, 2009." **2004-Subsec. (b)(5).** Pub. L. 108-357 inserted "and before January 1, 2005," after "August 26, 1937,". **2001-Subsec. (f).** Pub. L. 107-16, §541, added subsec. (f). **1997-Subsec. (a).** Pub. L. 105-34 struck out "or" at end of pars. (1) and (2), struck out the period at end of par. (3) and inserted ", or", and added par. (4). **1983-Subsec. (b)(10).** Pub. L. 97-448 added par. (10). **1981-Subsec. (e).** Pub. L. 97-34 added subsec. (e). **1980-Subsec. (a)(3).** Pub. L. 96-222 substituted "section 2032A" for "section 2032.1". **Subsec. (d).** Pub. L. 96-223 repealed the amendment made by Pub. L. 94-455, §2005(a)(1). See 1976 Amendment note below. **1978-Subsec. (a).** Pub. L. 95-600, §702(c)(1)(A), designated existing provisions as pars. (1) and (2) and added par. (3). **Subsec. (d).** Pub. L. 95-600, §515(1), substituted "December 31, 1979" for "December 31, 1976" in heading and text. **1976-Subsec. (b)(6), (7).** Pub. L. 94-455, §1901(c)(8), struck out "Territory," after "under the community property laws of any State,". **Subsec. (d).** Pub. L. 94-455, §2005(a)(1), substituted provision relating to the applicability of this section to decedents dying after 1976 for provision relating to a special rule with respect to DISC stock. See Repeals note below. **1971-Subsec. (d).** Pub. L. 92-178 added subsec. (d). **1958-Subsec. (d).** Pub. L. 85-320 repealed subsec. (d) which made section inapplicable to restricted stock options described in section 421 which the employee has not exercised at death.

#### **STATUTORY NOTES AND RELATED SUBSIDIARIES**

**EFFECTIVE DATE OF 2015 AMENDMENT** Pub. L. 114-41, title II, §2004(d), July 31, 2015, 129 Stat. 456, provided that: "The amendments made by this section [enacting section 6035 of this title and amending this section and sections 6662 and 6724 of this title] shall apply to property with respect to which an estate tax return is filed after the date of the enactment of this Act [July 31, 2015]."

**EFFECTIVE DATE OF 2014 AMENDMENT** Amendment by Pub. L. 113-295 effective Dec. 19, 2014, subject to a savings provision, see section 221(b) of Pub. L. 113-295 set out as a note under section 1 of this title.

**EFFECTIVE DATE OF 2010 AMENDMENT** Amendment by Pub. L. 111-312 applicable to estates of decedents dying, and transfers made after Dec. 31, 2009, except as otherwise provided, see section 301(e) of Pub. L. 111-312 set out as an Effective and Termination Dates of 2010 Amendment note under section 121 of this title.

**EFFECTIVE DATE OF 2004 AMENDMENT** Amendment by Pub. L. 108-357 applicable to taxable years of foreign corporations beginning after Dec. 31, 2004, and to taxable years of United States shareholders with or within which such taxable years of foreign corporations end, see section 413(d)(1) of Pub. L. 108-357 set out as an Effective and Termination Dates of 2004 Amendments note under section 1 of this title.

**EFFECTIVE DATE OF 1997 AMENDMENT** Pub. L. 105-34, title V, §508(e)(1), Aug. 5, 1997, 111 Stat. 860, provided that: "The amendments made by subsections (a) and (b) [amending this section and section 2031 of this title] shall apply to estates of decedents dying after December 31, 1997."

**EFFECTIVE DATE OF 1983 AMENDMENT** Amendment by Pub. L. 97-448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97-34, to which such amendment relates, see section 109 of Pub. L. 97-448 set out as a note under section 1 of this title.

**EFFECTIVE DATE OF 1981 AMENDMENT** Pub. L. 97-34, title IV, §425(b), Aug. 13, 1981, 95 Stat. 318, provided that: "The amendment made by subsection (a) [amending this section] shall apply to property acquired after the date of the enactment of this Act [Aug. 13, 1981] by decedents dying after December 31, 1981."

**EFFECTIVE DATE OF 1980 AMENDMENTS AND REVIVAL OF PRIOR LAW** Amendment by Pub. L. 96-223 (repealing section 2005(a)(1) of Pub. L. 94-455 and the amendment made thereby, which had amended this section) applicable in respect of decedents dying after Dec. 31, 1976, and except for certain elections, this title to be applied and administered as if those repealed provisions had not been enacted, see section 401(b), (e) of Pub. L. 96-223 set out as a note under section 1023 of this title. Amendment by Pub. L. 96-222 effective, except as otherwise provided, as if it had been included in the provisions of the Revenue Act of 1978, Pub. L. 95-600, to which such amendment relates, see section 201 of Pub. L. 96-222 set out as an Effective Date of 1980 Amendment note under section 32 of this title.

**EFFECTIVE DATE OF 1978 AMENDMENT** Pub. L. 95-600, title VII, §702(c)(10), Nov. 6, 1978, 92 Stat. 2928, provided that: "The amendments made by this subsection [amending this section and sections 1001, 1223, and 2614 of this title] shall take effect as if included in the amendments and additions made by, and the appropriate provisions of the Tax Reform Act of 1976 [Pub. L. 94-455, Oct. 4, 1976, 90 Stat 1525]."

**EFFECTIVE DATE OF 1976 AMENDMENT** Amendment by section 1901(c)(8) of Pub. L. 94-455 applicable with respect to taxable years beginning after Dec. 31, 1976, see section 1901(d) of Pub. L. 94-455 set out as a note under section 2 of this title. Amendment by section 2005(a)(1) of Pub. L. 94-455 applicable in respect of decedents dying after Dec. 31, 1976, see section 2005(f) of Pub. L. 94-455 set out as an Effective Date note under section 1015 of this title.

**EFFECTIVE DATE OF 1971 AMENDMENT** Amendment by Pub. L. 92-178 applicable with respect to taxable years ending after Dec. 31, 1971, except that a [corporation](#) may not be a DISC for any [taxable year](#) beginning before Jan. 1972, see section 507 of Pub. L. 92-178 set out as a note under section 991 of this title.

**EFFECTIVE DATE OF 1958 AMENDMENT** Amendment by Pub. L. 85-320 applicable with respect to taxable years ending after Dec. 31, 1956, but only in the case of employees dying after such date, see section 3 of Pub. L. 85-320 set out as a note under section 421 of this title.

**REPEALS** Pub. L. 94-455, §2005(a)(1), cited as a credit to this section, and the amendment made thereby, were repealed by Pub. L. 96-223, title IV, §401(a), 94 Stat. 299, resulting in the text of this section reading as it read prior to enactment of section 2005(a)(1). See Effective Date of 1980 Amendments and Revival of Prior Law note above.

**ELECTION OF CARRYOVER BASIS RULES BY CERTAIN ESTATES** Pub. L. 96-223, title IV, §401(d), Apr. 2, 1980, 94 Stat. 300, as amended by Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: "Notwithstanding any other provision of law, in the case of a decedent dying after December 31, 1976, and before November 7, 1978, the executor (within the meaning of section 2203 of the [Internal Revenue Code of 1986](#) [formerly I.R.C. 1954]) of such decedent's estate may irrevocably elect, within 120 days following the date of enactment of this Act [Apr. 2, 1980] and in such manner as the [Secretary of the Treasury](#) or his delegate shall prescribe, to have the basis of all property acquired from or passing from the decedent (within the meaning of section 1014(b) of the [Internal Revenue Code of 1986](#)) determined for all purposes under such Code as though the provisions of section 2005 of the Tax Reform Act of 1976 [ Pub. L. 94-455] (as amended by the provisions of section 702(c) of the Revenue Act of 1978 [ Pub. L. 95-600] applied to such property acquired or passing from such decedent."



## UPCOMING DATES



MARCH 29/30, 2023



APRIL 26/27, 2023



MARCH 10, 2023  
JUNE 9, 2023  
SEPTEMBER 22, 2023  
DECEMBER 1, 2023



MARCH 24, 2023  
JUNE 23, 2023  
OCTOBER 6, 2023  
DECEMBER 15, 2023



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