

# MEMORANDUM TO CLIENTS AND FRIENDS

## FROM JEANETTE M. LOMBARDI

OCTOBER 12, 2023

## The Florida Community Property Trust Act

Dear Clients and Friends,

I hope you enjoyed your summer in good health. It was truly warm here this summer and I am looking forward to some cooler fall weather.

In this memo, I wanted to provide you with a plain speak summary of a new Florida statute which became effective on July 1, 2022, known as the Florida Community Property Trust Act (FCPTA), and is contained at Florida Statutes Section 736.1501, et. seq. This newly enacted law has not been tested against scrutiny by the Internal Revenue Service, but the express intent of the statute is to allow trusts created pursuant to the Statute to provide “community property” status on the assets held in trust created pursuant to the Statute (FCP Trust).

Florida is not a community property state; it is a common law state, where the title to the property will be presumed to determine ownership. For example, if a vehicle is titled in the husband’s name, that vehicle is presumed to be owned by the husband. Unlike Florida, community property states have a property system which governs ownership of assets between a married couple<sup>1</sup>. In a community property state, all property acquired during the marriage (other than gifts or inheritances) are deemed to be owned by both spouses, each owning one-half, regardless of how the property is titled. In the above example, if the vehicle is titled to the husband (and was not a gift or inheritance), then the vehicle is presumed to be owned one-half by the husband and one-half by the wife.

The FCPTA is important to us because this recently enacted law may provide married couples with an additional tax savings strategy. By incorporating a FCP Trust created pursuant to the statute, it will confer community property status on all of the assets within the FCP Trust, and all income and appreciation on the assets<sup>2</sup>. Now, you are probably still wondering how this provides tax savings. The tax savings is the consequence of having all of the property within the FCP Trust receive a full step-up in basis<sup>3</sup> on the assets titled and held in such a trust upon the first to die; essentially wiping the slate clean as to any imbedded gains in highly appreciated assets. The FCPTA is based upon the legal authority found in section 1014(b)(6) of the Internal Revenue Code which provides that community property held by the deceased spouse and the surviving spouse under community property laws of any state are afforded a step-up in basis. Although this Florida Statute has not been “tested” as passing Internal Revenue scrutiny, it was drafted with such an intent and the express language to create the intended consequence of community property status and the benefit of the full step-up in basis.

An additional benefit of the FCPTA is that if you have previously resided in a community property jurisdiction (such as California, Nevada, Texas, Washington, Wisconsin, Idaho, New Mexico, Arizona and Louisiana) the FCPTA will allow you to easily continue to hold your assets as community property

<sup>1</sup> I am designating the spouses as husband and wife for the sake of clarity in the illustrations, but the spouses could be same sex couple.

<sup>2</sup> The FCP Trust can also be drafted to exclude certain property from the definition of community property, or you can simply plan to not transfer or title all of your property to the FCP Trust.

<sup>3</sup> This is assuming appreciation on the assets. It is always possible that some or all of the assets will not have appreciated significantly or have a loss.

without having to later take any affirmative action to establish the community property status upon the death of the first spouse.

Whether or not you may benefit from a FCP Trust needs to be evaluated on an individual basis, taking into account asset structure, length of marriage, potential creditor issues and the like. Also, you need to be aware there are some mandatory provisions for a trust to comply with the FCPTA:

- (1) the trust must expressly declare whether some or all of the assets are to be classified as community property;
- (2) there must be at least one qualified trustee (defined as a Florida resident, or a company authorized to act as trustee in Florida);
- (3) the trust must be created and signed by both spouses; and
- (4) the trust must contain specific disclaimer language as to the risks and consequences of entering into such a trust in the event of divorce or creditor claims.

The above is a synopsis to simply let you know this new tool is available in Florida to both Florida residents and non-Florida residents alike. If you believe you could benefit from this type of trust, please feel free to contact me. Welcome back!



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