

New Estate Planning Opportunities with Florida Trusts

Florida recently enacted two major pieces of legislation that provide significant new estate planning opportunities for families with ties to the sunshine state. The Community Property Trust Act (CPTA) and the Florida Uniform Directed Trust Act (FUDTA), both of which went into effect earlier this year, are summarized below.

Community Property Trust Act

Florida is not a community property state, however, CPTA allows married couples to opt into community property treatment by creating a "community property trust" and transferring assets to the trust. Assets that are owned as community property are deemed to be owned one-half by each spouse and, importantly, receive a "double step up in basis" at death. As demonstrated in the example below, if assets are instead owned as non-community property, only the deceased spouse's assets receive a basis step up, which can limit the surviving spouse's estate tax and other planning opportunities.

Example: Husband and wife reside in Illinois, which is not a community property state, and have a combined estate of \$10 million. Of that amount, \$8 million is titled in the husband's name and has a basis (or cost) of \$3 million. The remaining \$2 million is titled in the wife's name and has no built-in appreciation. If the husband dies first, his \$8 million receives a basis step up to fair market value, which eliminates the \$5 million of capital gain that would have been subject to tax if the husband had sold the assets during his lifetime. Therefore, the wife will hold the full \$10 million with no built-in gain. If the wife passes away first, the husband will receive her \$2 million without built-in gain, however, his own \$8 million is still subject to the \$5 million of appreciation. Therefore, he will pay capital gains tax if he decides to sell any portion of his own assets during his lifetime.

Alternatively, if the married couple reside in a community property state (or, potentially, if they create a community property trust) the full \$10 million of assets receives a stepped-up basis at the death of both spouses. The surviving spouse is not hamstrung by significant built-in gain on assets inherited from a deceased spouse, which can open the door to a myriad of additional estate and other tax planning opportunities.

Interestingly, CPTA does not require that the married couple reside in Florida to

POSTED:

Nov 19, 2021

RELATED PRACTICES:

[Trusts and Estates](#)

<https://www.reinhartlaw.com/practices/trusts-and-estates>

RELATED PEOPLE:

[Kelsey L. Berns](#)

<https://www.reinhartlaw.com/people/kelsey-berns>

create a community property trust, rather the trust must simply designate a "qualified trustee," which is defined as an individual who is a resident of Florida, or a bank authorized to act in the state. In theory, this means that couples residing in the 41 non-community property states across the country could elect into community property treatment simply by taking advantage of CPTA. Yet, it remains to be seen whether the IRS will treat assets in a Florida community property trust as community property for basis adjustment purposes as Florida is, by default, not a community property state. In addition, couples will want to strongly consider the creditor and divorce implications of creating a community property trust.

Florida Uniform Directed Trust Act

Under FUDTA, someone other than a trustee, referred to as a "trust director," directs the trustee with respect to certain acts or trust functions. FUDTA replaces prior Florida law governing directed trusts and clearly delineates the duties, powers and functions of trustees and trust directors. Specifically, FUDTA implements the following provisions:

- Allows for the appointment of a trust director, who directs the trustee with respect to specific trust functions, such as investment management of trust assets, discretionary distribution decision-making, etc.
- Provides that trustees and trust directors are, by default, subject to the same fiduciary duties.
- Limits the trustee from liability for acting in accordance with the trust director's direction, to the extent that the trustee first determines that the direction is within the scope of the trust director's powers.
- Eliminates the trustee's and trust director's duty to monitor one another or to inform another party, such as a beneficiary or the settlor, that the trustee or trust director would have acted differently.
- Requires the trustee and the trust director to provide information to one another if the information is related to a power or duty held by the other.
- Expands the definition of a trust's "principal place of administration" by including Florida if the trust so provides and a trust director's principal place of business or residence is in Florida.

FUDTA will likely make Florida a much more attractive state for those families wishing to bifurcate trust functions between a trustee and a trust director. This structure can work well when the trust holds special assets, such as interests in a closely held family business. It may also make sense for those who would like a



corporate fiduciary to handle the administrative functions of the trust but would like a family member or another individual to oversee certain trust functions, such as distributions on behalf of minor children.

With the enactment of CPTA and FUDTA, Florida continues to market itself as an attractive estate planning destination. And because neither of these acts requires the settlors or trustees of the trust to reside in Florida in order to take advantage of the planning opportunities they provide, they are certain to bring additional trust business to the state. Of course, it remains to be seen exactly how the IRS and the courts will interpret these new provisions and it is possible that they may be scaled back in the future.

If you are interested in learning more about these new opportunities, contact Reinhart's Florida estate planning attorneys, [Kelsey Berns](#) and John Herbers, your Reinhart attorney or a member of Reinhart's Trusts and Estates Practice.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.