

DEAN|MEAD

CONSIDERABLE CONSIDERATIONS

Florida Community Property Trust

Presented by:
Joseph M. Percopo

UNDERSTANDING THE NEW FLORIDA COMMUNITY PROPERTY TRUST, PART I

Vol. 96, No. 4 July/August 2022 Pg 16 Joseph M. Percopo Featured Article



UNDERSTANDING THE NEW FLORIDA COMMUNITY PROPERTY TRUST, PART II

Vol. 96, No. 5 September/October 2022 Pg 1 Joseph M. Percopo

Real Property, Probate and Trust Law



Death of a Spouse

A Florida Community Property Trust (FLCPT) is a joint trust that holds the assets of a married couple, and, while both spouses are alive, the assets generally may be used for their benefit. Upon the death of a spouse, even if the FLCPT is irrevocable, "the surviving spouse may amend a community property trust regarding the disposition of that spouse's one-half share of the community property."^[1] F.S. §736.1507 provides that "[u]pon 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 decedent spouse.*"^[2] Unless the FLCPT agreement provides otherwise, the trustee has the power to divide the assets in any manner between the



THE FLORIDA BAR

DISCLAIMER

This information is intended for teaching purposes only. It is not intended for actual use in legal documents for clients without careful analysis and review by an attorney licensed to practice law. Use of this information without careful analysis and review by a skilled attorney may cause serious adverse consequences. An attorney is solely responsible for the consequences from applying this information [using this form language] in actual legal documents. Absolutely no warranty or representation of any kind, whether express or implied, concerning the appropriateness or legal sufficiency of any information or language in this presentation is made by the presenter or his law firm.



FLORIDA COMMUNITY PROPERTY TRUST

Tax Law Basics

The Florida Community Property Trust Act

Considerations Before Creating a Florida Community Trust

Bringing it All Together

BACK TO (Tax Law) BASICS

No. 1 TAX BASIS

The sale of an asset is a taxable event which may result in gain or loss

Gain occurs when the value received is in excess of the taxpayer tax's basis

Generally, a taxpayer's basis in an asset is equal to the amount paid for the asset

Gifted assets have a carryover basis (from the donor)

Inherited assets, to the extent included in the decedent's gross estate, receive an adjusted basis equal to FMV

- ✓ Special inclusion rules for jointly owned property (JTROS and TBE assets)

BACK TO (Tax Law) BASICS

No. 2 TAX BASIS *Adjustment at Death*

Sole ownership

- ✓ 100% FMV basis adjustment

Tenants in common ownership

- ✓ FMV basis adjustment based on the interest (%) included in the decedent's estate

Joint tenants with rights of survivorship (other than spouses)

- ✓ Owned by other than just spouses, 100% inclusion in the decedent's gross estate reduced by amounts contributed by the other co-owners

JTROS (married) or Tenants by the entirety

- ✓ 50% FMV basis adjustment on the asset without any valuation adjustments (IRC §2040)

Community property and IRC§1014(b)(6)

- ✓ Only 9 states are community property states
- ✓ 100% FMV basis adjustment on the asset, provided at least 50% of the asset is included in the decedent's gross estate

BACK TO (Tax Law) BASICS

No. 3 TAX BASIS

EXHIBIT "A" COMMUNITY PROPERTY INCOME TAX ILLUSTRATION

Assets			
	Acquisition cost (Basis)	Fair Market Value (FMV)	Gain from Sale During Life
Stock	\$300,000	\$700,000	\$400,000
Real Property*	\$500,000	\$1,200,000	\$700,000
Total:	\$800,000	\$1,900,000	\$1,100,000
Long Term Capital Gains Tax (LTCG)**			
	15%	\$165,000	(Tax Owed)

Assets Owned:	100% Husband ("H")	100% Wife ("W")	H&W Tenants by the Entirety	H&W Community Property
H's Death Gross Estate Inclusion				
Stock	\$700,000	\$0	\$350,000	\$700,000
Real Property	\$1,200,000	\$0	\$600,000	\$1,200,000
W's New Asset Basis				
H's FMV Stock	\$700,000	\$0	\$350,000	\$700,000
W's Stock Basis	\$0	\$300,000	\$150,000	\$0
Total:	\$700,000	\$300,000	\$500,000	\$700,000
H's FMV Real Property	\$1,200,000	\$0	\$600,000	\$1,200,000
W's Real Property Basis	\$0	\$500,000	\$250,000	\$0
Total:	\$1,200,000	\$500,000	\$850,000	\$1,200,000
W's Stock Basis	\$700,000	\$300,000	\$500,000	\$700,000
W's Real Property Basis	\$1,200,000	\$500,000	\$850,000	\$1,200,000
Total:	\$1,900,000	\$800,000	\$1,350,000	\$1,900,000
W's Sale as Assets				
Total FMV	\$1,900,000	\$1,900,000	\$1,900,000	\$1,900,000
Total Basis	\$1,900,000	\$800,000	\$1,350,000	\$1,900,000
Gain:	\$0	\$1,100,000	\$550,000	\$0
LTCG 20% tax	\$0	\$165,000	\$82,500	\$0
W's Tax Savings	\$165,000	\$0	\$82,500	\$165,000

* Assumes no valuation discounts and

no eligibility for primary residence sale gain exclusion under IRC §121

**Calculated without application §1411 (3.8% net investment income tax)



FLORIDA COMMUNITY PROPERTY TRUST ACT

Effective July 1, 2021

Other states who have adopted similar laws: Alaska (1998),
Tennessee (2010), South Dakota (2016), Kentucky (2021)

Real Property Probate and Trust Law Section committee
drafted Act

Several years of work involved

The committee consulted with attorneys from the other
states

The New Act Part XV of the FL Trust Code

- **Florida Statutes §736.1501-1512**

Fla. Stat. §736.1501 – Short Title

Fla. Stat. §736.1502 – Definitions (*7 defined terms*)

FLORIDA COMMUNITY PROPERTY TRUST ACT

Fla. Stat. §736.1503 - Elements necessary to create FLCPT

1. Expressly declare that it is a FLCPT
2. Have at least one “qualified trustee”
 1. Florida resident or entity with Florida Trust Powers
3. Be signed by both spouses with the “formalities required for the execution of a trust;” and
4. Contain a specific disclosure in all capital letters (which warns about impact to rights pertaining to creditors, divorce, and death) at the beginning of the FLCPT

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



FLORIDA COMMUNITY PROPERTY TRUST ACT

Fla. Stat. §736.1504 - *Scope of FLCPT (freedom to draft)*

- Agreement may specify the rights, obligations, management, disposition of assets, revocability, and generally any other terms as long as they are not illegal or against public policy
 - Includes ability of decedent to direct how his or her interest will pass upon death
- Spouses are the only qualified beneficiaries while both alive
- Irrevocable FLCPT still amendable by surviving spouse at first spouse's death for his or her ½ share

Fla. Stat. §736.1505 – *Classification of assets*

- Assets transferred into trust become community property assets
- For as long as kept in the Trust
- It does not matter if grantor spouses are Florida residents

Fla. Stat. §736.1506 – *Creditors*

- 50% of assets subject to a spouse's individual creditors



FLORIDA COMMUNITY PROPERTY TRUST ACT

Fla. Stat. §736.1507 – *Death of a Spouse*

- Upon first spouse's death, the trustee selects the survivors 50% share, and the balance remaining constitutes the decedent's and subject to the decedent's testamentary provisions

Fla. Stat. §736.1508 – *Dissolution of Marriage*

- Upon divorce, assets are split 50/50 between spouses (equitable division not applicable)
- Default allows trustee to divide (special rules for real property and business interests)

Fla. Stat. §736.1509 – *Child Support*

- FLCPT does not adversely affect child support obligations



FLORIDA COMMUNITY PROPERTY TRUST ACT

Fla. Stat. §736.151 – *Homestead*

- Homestead retains homestead characteristics and protections in the FLCPT

Fla. Stat. §736.1511 – *Application of IRC*

- States intent to be community property for purpose of IRC §1014(b)(6)

Fla. Stat. §736.1512 – *Enforceability*

- FLCPT is not enforceable if (1) unconscionable, (2) not executed voluntarily, (3) fraud or duress, or (4) before signing fair and reasonable disclosure was not provided, spouse didn't waive disclosure, and spouse was unaware of assets/liabilities of other spouse

CONSIDERATIONS BEFORE CREATING AN FLCPT

TAX BASIS: Will the IRS respect the FLCPT?

The IRS has not directly addressed whether it would respect this kind of trust

- Despite the first enactment of a similar concept in 1998
- No known reported adverse cases

RPPTL Estate and Trust Tax Planning Committee was optimistic that the FLCPT would withstand IRS scrutiny, as well as other well know commentators

However, some commentators have been more skeptical of the IRS accepting it

Before using the FLCPT, the IRS risk should be disclosed and explained to clients

Query: If the IRS does not respect the FLCPT, would spouses be much worse off?



CONSIDERATIONS BEFORE CREATING AN FLCPT

TAX BASIS: Death Bed Funding



IRC § 1014(e) Rule: If a donor gifts appreciated assets, the donee dies within one year of the gift, and the property passes back to the donor, then the donor will maintain a carryover basis and not receive a basis adjustment to FMV on the donated assets

Interestingly, if at least 50% is included in the deceased donee's gross estate, then the donor spouse arguably should still receive a basis adjustment in his or her 50% and just not receive a basis adjustment for the deceased donee's 50% interest

The net effect for an appreciated asset would still result in a beneficial basis adjustment

CONSIDERATIONS BEFORE CREATING AN FLCPT

TAX BASIS: Fractional Ownership

Valuation discounts and control premiums may apply to non-publicly traded assets included in a decedent's gross estate

- Valuation adjustments are not generally optional
- Community property is by its very nature a fractional form of ownership

Fla. Stat. §736.1507 permits non-pro rata division of assets upon the first spouse's death, meaning the decedent's estate could include anywhere from 0% to 100% of a FLCPT asset

- Creates the potential to control whether a discount or a premium may apply
- Several circumstances could influence the desired allocation, such as:
 - ❖ Elective share funding;
 - ❖ QTIP marital share funding;
 - ❖ Taxable estate (discounts preferred);
 - ❖ Nontaxable estate (premiums preferred);
 - ❖ Creditor concerns; and
 - ❖ Basis adjustment avoidance (FMV assets less than basis)
- **Will the IRS respect this ability to decide after the death of a spouse which assets are included in the decedent's estate?**
 - “Federal law determines how property is taxed, but state law determines whether, and to what extent, a taxpayer has ‘property’ or ‘rights to property’ subject to taxation.” *Aquilino v. United States*, 363 U.S. 509 (1960)

CONSIDERATIONS BEFORE CREATING AN FLCPT

TAX BASIS: Community Property “with Rights of Survivorship”

Is it possible to have a community property asset receive a full basis adjustment without valuation adjustments?

Community Property states have enacted a hybrid form of ownership – community property with rights of survivorship

IRC §2040 applies to property with “rights of survivorship,” and the section’s special inclusion rule does not include valuation adjustments – 50% FMV

Rev. Rul 87-98 and Field Service Advisory (1993 WL 1609164) provide support for beneficial hybrid treatment

- Both involved situation where community property assets were used to acquire property with rights of survivorship
- IRS found property was still community property and, in both situations, provided a full undiscounted basis adjustment to property involved



CONSIDERATIONS BEFORE CREATING AN FLCPT

TAX BASIS: Community Property “with Rights of Survivorship” (*continued*)

Fla. Stat. §689.15 provides that “real estate and personal property held by joint tenants shall not prevail...unless the instrument creating the estate shall expressly provide for the right of survivorship.”

Therefore, consider including language in the FLCPT that particular assets have “rights of survivorship” to mirror the Rev. Rule and FSA (which should lend itself to full basis adjustment without valuation adjustments):

“Any real property, including any real property that qualifies as our homestead under Article X, Section 4 of the Florida Constitution, titled in the name of the Trust shall be an asset with “rights of survivorship,” in accordance with Section 689.15 of the Florida Statutes, between us”

and/or

“Any non-publicly traded business interest titled in the name of the Trust shall be an asset with “rights of survivorship,” in accordance with Section 689.15 of the Florida Statutes, between us”



CONSIDERATIONS BEFORE CREATING AN FLCPT

DEATH OF A SPOUSE

§736.1507 provides that “[u]pon 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 decedent spouse.”

Unless the FLCPT provides otherwise, the trustee has the power to divide the assets in any manner between the surviving spouse’s share and deceased spouse’s share, provided the division results in each spouse receiving equal aggregate value

Division decisions can have unintended consequences, such: as an inequitable asset selection, creditor exposure, elective share funding issues, failure to qualify for a full fair market value (FMV) basis adjustment, or homestead devise restrictions

Consider including language about how assets are to be divided (specific asset division, pro-rata, or perhaps appointing someone to make the division:

“Upon the death of the first of us to die, the Surviving Grantor shall be charged with first selecting his or her 50% aggregate value of the community property Trust assets (which will be the Surviving Grantor’s share) with the remaining assets making up the deceased Grantor’s share. The Surviving Grantor may appoint a Special Independent Trustee for purposes of establishing the Surviving Grantor’s share of the community property trust assets. The survivor of us is encouraged to consult with competent counsel before proceeding to divide community property trust assets.”

CONSIDERATIONS BEFORE CREATING AN FLCPT

HOMESTEAD: Devise

Be aware of Constitutional devise restrictions (spouse & minor children)

No minor children

- Leaving homestead to spouse or in trust of which spouse has total control over the asset, should not create an invalid devise
- Other than to spouse, problem unless have nuptial or deed waiver on funding of homestead into FLCPT

Minor children

- Nuptial agreements and deed waivers do not help here
- Remember cannot even devise to a spouse only if minor children
- **Safest to**
 - ❖ Avoid putting homestead in FLCPT when there are minors or
 - ❖ Consider Irrevocable FLCPT Homestead Trust



CONSIDERATIONS BEFORE CREATING AN FLCPT HOMESTEAD: Devise (*continued*)

Possible Way to Avoid Issue if Homestead in FLCPT?

Florida Constitution restricts “devise” of homestead

Devise in the Probate Code means “a testamentary disposition of real or personal property”

After survivors ½ share established, Fla. Stat. 736.1507 provides 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.”

Homestead limitations on devise **may** be avoided by preventing any interest in the homestead from being part of the deceased spouse’s one-half share

- If successful, there would be no basis adjustment at all for the surviving spouse, thus TBE ownership would have been more helpful from a tax basis perspective
- **Probably do not want to be the test case!**



CONSIDERATIONS BEFORE CREATING AN FLCPT HOMESTEAD

Alienation

No restriction on transferring homestead while living, provided that the transferor spouse has the other spouse's consent

Regardless of how the homestead is owned, it will require both spouses participating in the deed transferring the homestead into the FLCPT to avoid an invalid transfer (and unwanted consequences)

Taxation & Creditor Protection

FLCPT Act provides that homestead tax and creditor protections are maintained by homestead transferred to FLCPT

WARNING –

FLCPT homestead is no longer TBE owned, thus, if property exceeds homestead size limits, then there is potential exposure to creditors

CONSIDERATIONS BEFORE CREATING AN FLCPT

CREDITORS

Debt of one spouse may be satisfied from that “spouse’s one-half share of a community property trust” (excluding protected homestead)

- Not a defined term by the act

Joint creditor can look to all FLCPT assets (except Homestead)

Fla. Stat. §736.1504(1) provides freedom to agree upon

1. “[t]he rights and obligations,”
2. “[t]he management and control,” and
3. “[t]he disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event, subject to §§736.1507 [death of a spouse] and 736.1508 [dissolution of marriage].”

A creditor claim should be deemed to be the “occurrence...of another event” that does not involve the death of a spouse or divorce of spouses and any attempt to satisfy such claim would involve the potential “disposition of the [FLCPT] property.”

Consider including language specifying in advance which assets will make up each spouse’s one-half share in the event of a creditor claim, or that requires the non-debtor spouse, an independent trustee/director, or some other party to determine the assets that comprise the debtor spouse’s one-half share

“If a creditor of either of us asserts a claim against this Trust or any community property trust assets, then the non-debtor spouse shall be charged with first selecting his or her 50% aggregate value of the community property trust assets with the remaining assets making up the debtor spouse’s share. If the creditor is a joint creditor of both of us, then we shall appoint a Special Independent Trustee for purposes of establishing each spouse’s share of the community property trust assets”

CONSIDERATIONS BEFORE CREATING AN FLCPT CREDITORS: *(continued)*

Which assets to expose to creditors?

Consider funding debtor's share with exempt homestead and/or multimember LLC interests which are subject to charging order protection

CAUTION: Fla. Stat. §736.1506 only carves out exceptions provided in Section 4 of Article 10 of the Florida Constitution (homestead and \$1,000 personal property) and does not include any other exemptions (no reference to Chapter 222 protections)

Debtor spouse's share must be equal to 50% of the aggregate assets (remember potential to use a control premium interest in LLC to get a bump in value counting toward 50%)



CONSIDERATIONS BEFORE CREATING AN FLCPT

CREDITORS: An example (*continued*)

FLCPT assets consist of a cash account (\$100), an investment account (\$200), and an interest in a multimember LLC (\$400) in which a majority of the members can take unilateral action (\$700 total).

If the LLC interest is divided 60/40

- a. the 60% interest with a 15% control premium has a FMV of \$276, **and**
- b. the 40% interest with a 30% lack of control/marketability discount has a FMV of \$112.

The LLC interest is worth \$388 (\$276+\$112), and the total value of the FLCPT assets is \$688 (\$100 + \$200 + \$388).

- The decedent spouse's one-half interest is \$344

If the controlling LLC interest (\$276) is allocated to the debtor spouse's one-half share, then only an additional \$68 of the cash need be allocated to the debtor spouse's share.

The non-debtor spouse receives \$32 cash, the \$200 investment account, and \$112 40% LLC interest.

However, when the valuation discounts are removed, the non-debtor spouse owns assets worth \$392 and the debtor spouse owns assets worth \$308.

In this example, more economic value is pushed to the non-debtor spouse while at the same time limiting the assets exposed to the debtor spouse



CONSIDERATIONS BEFORE CREATING AN FLCPT

LIMITED LIABILITY COMPANY: Changing Order Protection

FLCPT Act is silent on whether LLC owned by FLCPT would be single or multi-member LLC entity

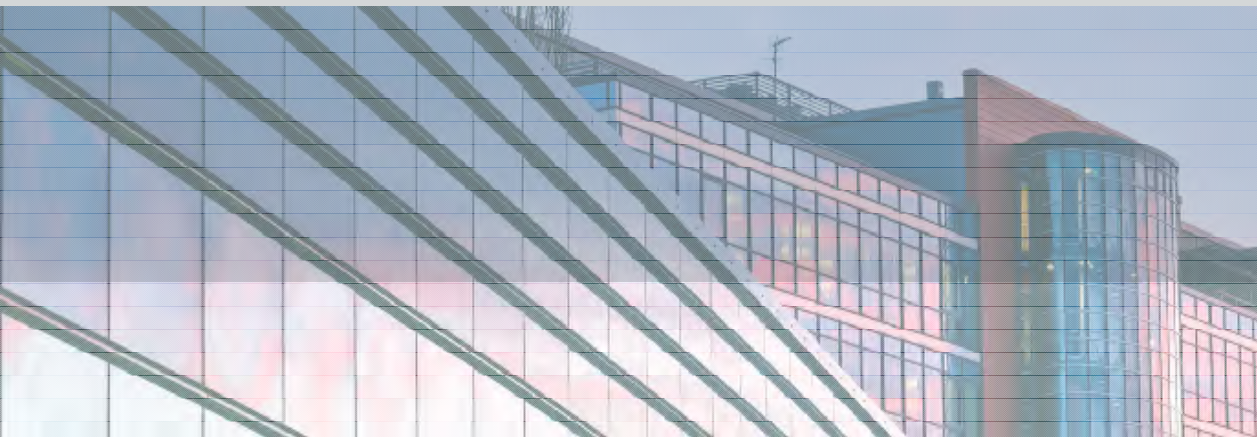
However, it is clear from the FLCPT Act that spouses (two people) are required to create a FLCPT, and each spouse has an interest in assets

Provided each spouse has some interest as part of his or her one-half share, that should be sufficient to create a multimember LLC and limit a creditor to a charging order as its exclusive remedy against a debtor spouse's interest

- Despite Fla. Stat. §736.1506 only protecting homestead, the charging order protection should still be available as it is the “exclusive remedy” pursuant to Fla. Stat. §605.0503(3), when dealing with a multimember LLC

Safest approach would involve an LLC owned by a person or entity other than the spouses to eliminate the notion of any argument that is it a single member LLC

- Consider using irrevocable gift trusts for children or other family to have a partial ownership interest
- Consider using operating agreement to support separate legal owners



CONSIDERATIONS BEFORE CREATING AN FLCPT LIMITED LIABILITY COMPANY: Tax Status

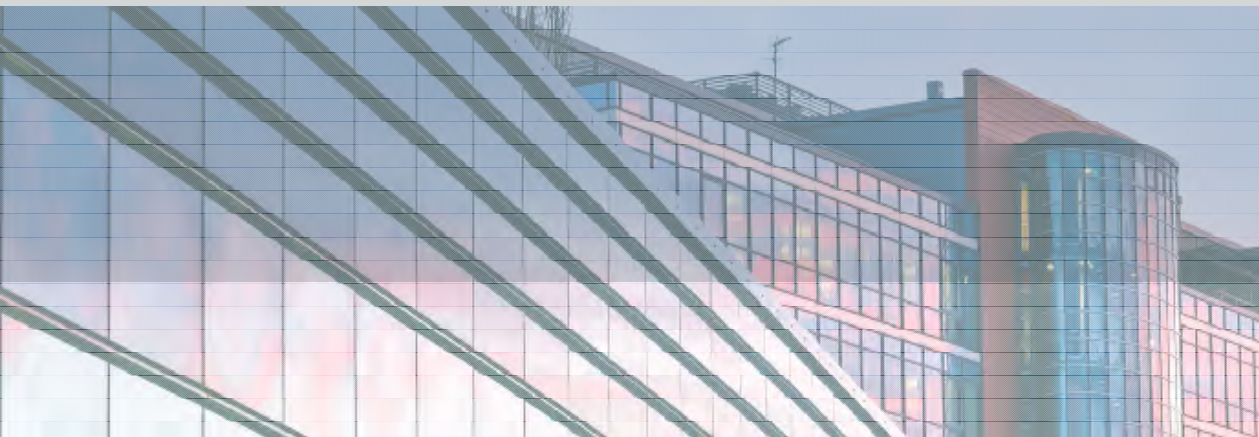
An LLC can elect for Corporate, S Corp, Partnership, or Disregarded entity taxation

1. Default for 1 = disregarded entity status
2. Default for 2+ = partnership taxation

IRS has provided that a community property LLC remains eligible to be treated as disregarded for federal tax purposes

- Means the LLC need not apply for its own EIN or file a separate partnership tax return

Consider use for §1031 exchanges to avoid same taxpayer rules when trying to involve a new LLC



CONSIDERATIONS BEFORE CREATING AN FLCPT S CORPORATIONS

Generally, a trust with more than 1 grantor is not an eligible owner

However, if spouses are the only grantors of the trust, then the trust remains an eligible owner as long as

- ✓ Spouses stay married (divorce = problem for S Corp status)
- ✓ No other grantors to trust
- ✓ Individual spouse does not otherwise become ineligible (i.e. lose or renounce US citizenship)

CONSIDERATIONS BEFORE CREATING AN FLCPT GIFTS TO US CITIZEN SPOUSE

Provided the FLCPT is revocable by 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 will qualify for the marital deduction and also avoid a taxable event.

If the FLCPT is or may become irrevocable, the FLCPT may not be eligible for the marital deduction unless it is carefully drafted to ensure it qualifies as a QTIP trust

- Be aware of asset level and Federal tax lifetime exemption limit for federal estate and gift tax exposure

Consider QTIP benefits:

- 2nd basis adjustment,
- Creditor protection for surviving spouse, and
- Use of GST exemption (which is not portable)

CONSIDERATIONS BEFORE CREATING AN FLCPT GIFTS TO NON-CITIZEN SPOUSE

If a citizen spouse sets up a FLCPT 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 count towards the annual non-citizen spouse gift exemption of \$164,000** (2022 limit, going up to \$175,000 for 2023).

Likewise, assets that pass at death from a citizen spouse to a non-citizen spouse are not eligible for the marital deduction without using QDOT

- **However, only an issue if assets passing exceed Federal tax lifetime exemption** (\$12M for 2022 and \$12.92M for 2023)

CONSIDERATIONS BEFORE CREATING AN FLCPT NUPTIAL AGREEMENTS

FLCPT Act is silent as to the application of a nuptial agreement

§736.1508 provides for 50/50 division of the “aggregate value” of FLCPT assets and specifically provides that principles of equitable division “do not apply to the disposition of assets and liabilities held in a community property trust”

- Default rules have Trustee split up the assets
- No real property or business interest can be transferred to both spouses unless they agree “in a separate written agreement executed during the dissolution of marriage action.”

Timing of executions

- Nuptial then FLCPT = FLCPT terms would control (provided fair disclosure was made)
- FLCPT then Nuptial = Nuptial terms would generally control
- Why? Nuptials and FLCPT can be amended by agreement of both parties

CONSIDERATIONS BEFORE CREATING AN FLCPT NUPTIAL AGREEMENTS (continued)

Regardless of a nuptial agreement, in the event of divorce the FLCPT Act requires:

- Distribution of “one-half of the trust assets to each spouse,” but need not be pro rata (only 50/50 split of value)
- Real property and business interests not to be co-owned unless agreed to during the dissolution process

Question – after 50/50 divided of FLCPT assets among spouses, could a nuptial agreement then further direct how each’s 50/50 share may be divided??

FLCPT is not ideal for spouses who, upon divorce, want assets to be divided other than 50/50

- Keep in mind spouses need not put all assets into the FLCPT
- Assets left out of FLCPT are not subject to its rules and would clearly be controlled by a nuptial agreement

FLORIDA COMMUNITY PROPERTY TRUST ACT

Enforceability

A properly executed FLCPT may still be challenged as to the enforceability

FLCPT is not enforceable if

1. unconscionable,
2. not executed voluntarily,
3. product of fraud or duress, or
4. before signing
 - a) fair and reasonable disclosure was not provided,
 - b) spouse didn't waive disclosure, and
 - c) spouse was unaware of assets/liabilities of other spouse

Consider including full disclosure of each spouse's assets and liabilities

- This approach, in addition to the enforceability benefit, should also qualify the FLCPT as a modification to a prior nuptial agreement

Example Language

"We have each made fair and reasonable disclosure of the property and financial obligations of each to the other as contemplated by Sections 61.079, 732.702, and 736.1512 of Florida Statutes. Schedule B and C attached hereto (and herein incorporated by reference) provide financial disclosures of John and Jane, respectively, as of the dates listed on each Schedule. Each financial disclosure Schedule is a good faith approximation of the various assets and liabilities. John and Jane expressly waive any right to disclosure of the property or financial obligations of the other beyond the disclosures already provided by each. Furthermore, John and Jane specifically agree that they are each fully aware of the other's financial situation and that any omission, incompleteness or inaccuracy of any financial Schedule by the other shall be deemed immaterial and shall not, under any circumstances, be a ground for setting aside or invalidating any or all of this Florida Community Property Trust"

BRINGING
IT
ALL
TOGETHER

Upside of FLCPT Act

Potential beneficial tax basis adjustment

- Value proposition to client for services

Allows for survivor or 3rd party to determine assets that make up the decedent estate, which in turn potentially allows control over which assets will receive a basis adjustment

Allows for selection of assets potentially exposed to creditors

Homestead creditor protection is maintained

Simplicity (no need to equalize assets between spouses or multiple trusts)

- Still have QTIP option available and use of GST exemption

Avoids need for tracing for community property brought into Florida

BRINGING IT ALL TOGETHER

Explain to Clients the Downside of the FLCPT (and follow-up with written correspondence), being sure to address:

Risk of IRS not respecting the FLCPT and the potential for changes in the law

Ability for survivor to change 50% of trust (the survivor's share) even when the trust is irrevocable and otherwise prohibits modification

50% creditor exposure to either spouse, or 100% exposure to joint creditor (excluding homestead)

50/50 split in event of divorce (regardless of the value contributed by each spouse)

BRINGING
IT
ALL
TOGETHER

Favorable Situations for FLCPT

Clients moving from community property states

**Clients already using or desiring joint trusts
(except when more than 50% of the trust assets
but not 100% irrevocable at first death)**

Older clients

No creditor concerns

Long term First marriages

**Highly appreciated assets owned by both or
either spouse**

- Stocks/bonds
- Investment accounts
- Real property

Other asset types

- Intellectual property
- Depreciated property
- Tangible personal property such as artwork, jewelry, gold, and collectibles

Highly appreciated homestead

**1031 exchange situations for spouses
desiring to use an LLC**

**BRINGING
IT
ALL
TOGETHER**

Situations Where FLCPT is LESS than Ideal

Second marriages

A non-citizen spouse

High risk professionals

Spouses with complex pre or post nuptial agreements

Desire to have entire trust become irrevocable after death of first spouse

Homestead in excess of size limitations (1/2 or 160 acres)

Homestead with minor children

Assets that have FMV less than basis (potential for step-down in basis)

BRINGING
IT
ALL
TOGETHER

Carefully Consider How To Draft FLCPT Revisions

Statutory warning language at the beginning

Expressing intent to create FLCPT

Defining community property and qualified trustee

Addressing rights and powers retained by spouses

Addressing divorce and creditors

Addressing division of assets upon 1st spouse's death

Addressing disclosure of assets and liabilities

Considering "rights of survivorship" for real property and non-publicly traded business interests

Considering any nuptial agreement

Review entire trust to ensure no provisions that conflict with the concept of community property treatment

“If spouses ultimately decide to create a FLCPT, it is of the utmost importance that practitioners carefully consider the specific terms and provisions to be included in the trust due to the significant impact they may have with regard to tax basis, the death of a spouse, homestead, creditors, business entities, gifts to spouse, nuptial agreements, and enforceability issues”

Joseph M. Percopo, Esq., Understanding the New Florida Community Property Trust, Part II, The Florida Bar Journal Vol. 96 No. 6 (September/October 2022)

JOSEPH M. PERCOPO

E: jpercopo@deanmead.com

O: (407) 841-1200

 <https://www.linkedin.com/in/joseph-m-percopo-70609a7/>

