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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2914

Date: **14-Oct-21**

From: **Steve Leimberg's Estate Planning Newsletter**

Subject: **Alan Gassman, Jonathan Blattmachr & Brock Exline: Using the Florida Irrevocable Community Property Trust to Protect an Elderly Couple from Abuse**

"Effective July 1st, married couples can establish trusts having one or more Florida trustees that can qualify to be considered to be 'community property' for purposes of receiving a full new step-up in income tax basis to fair market value on the death of either spouse. This will be the primary reason that many married couples living in Florida and elsewhere will establish Florida Community Property Trusts, but there is another good reason for elderly couples who wish to protect their assets from potential predators, including their own children."

Alan Gassman, Jonathan Blattmachr and **Brock Exline** provide members with commentary that reviews how Florida's Community Property Trust Act can be used to protect an elderly couple from abuse. Members who wish to learn more about this topic should consider watching Jonathan and Alan in their exclusive **LISI** Webinar titled: Florida Snowbird Planning: When and How to Use Florida, New York and APT Jurisdiction Trusts.

Alan S. Gassman, J.D., LL.M., is a partner in the law firm of **Gassman, Crotty & Denicolo, P.A.**, and practices in Clearwater, Florida. He is a frequent contributor to LISI, and has published numerous articles and books in publications such as BNA Tax & Accounting, Estate Planning, Trusts and Estates, and Interactive Legal and is coauthor of Gassman and Markham on Florida and Federal Creditor Protection and several other books. His email address is agassman@gassmanpa.com. Alan is presenting with a panel at the 46th Annual Notre Dame Tax & Estate Planning Institute on the subject of termination of charitable trusts. More information on the 46th Annual Notre Dame & Estate Planning Institute, which will be held as a virtual conference on Thursday, October 29, and Friday, October 30, can be viewed by clicking here. Please join us! Alan is also the Executive Producer of the free newsletter known as the Thursday Report, which is sometimes published on Thursdays. To obtain your free

subscription, email info@gassmanpa.com and make sure the subject of the email is “Secret Decoder Ring.”

Jonathan G. Blattmachr is Director of Estate Planning for **Peak Trust Company** (formerly Alaska Trust Company), co-developer of **Wealth Transfer Planning**, a computer system for lawyers, published by Interactive Legal Systems and its Editor-in-Chief, director of Pioneer Wealth Partners, LLC, author or co-author of nine books and over 500 articles, and a retired member of Milbank, LLP, and of the Alaska, California, and New York Bars.

Brock Exline is a second year law student at Stetson University College of Law. He graduated from Stetson University with a Bachelors of Arts in Political Science. Brock is also the Florida Bar Liaison for the Stetson Business Law Society.

Here is their commentary:

EXECUTIVE SUMMARY:

Effective July 1st, married couples can establish trusts having one or more Florida trustees that can qualify to be considered to be “community property” for purposes of receiving a full step-up in income tax basis to fair market value on the death of either spouse. This will be the primary reason that many married couples living in Florida and elsewhere will establish Florida Community Property Trusts, but there is another good reason for elderly couples who wish to protect their assets from potential predators, including their own children.

The authors also explain the possible concerns voiced by Jonathan Blattmachr with respect to whether the Florida Community Property Trust Act will deliver the full step-up in basis on the death of one spouse.

COMMENT:

Lawyers are challenged when representing elderly individuals who may have one or more aggressive or imbalanced children. A big challenge occurs when one or both parents get sick and the aggressive or imbalanced child shows up and moves in with them. When that happens, estate planning documents and intentions can change and the unruly, aggressive, or imbalanced child can end up inheriting all of the assets or spending them contrary to the parent’s wishes, which may leave the

parents penniless and/or take assets away from other desired beneficiaries.

Florida's new Community Property Trust Act allows married couples to set up irrevocable community property trusts that must be for their sole benefit, without the requirement to provide notice of the trust, trust accountings, or other information to secondary beneficiaries, which may include their children or other relatives.

Florida Statute Section 736.1504 provides that the settlor spouses of a Florida community property trust may agree upon whether the trust is revocable or irrevocable. Section 736.1504 further provides that "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." This part of the statute gives the settlor spouses wide latitude to administer the trust without having to inform and give notice to descendants who would otherwise be considered qualified beneficiaries under a non-community property trust instrument.

As used in the Florida Trust Code, the term "beneficiary" under the Florida Law refers to the universe of individuals who have a beneficial interest in a trust, as well as to any person who has a power of appointment over trust property in a capacity other than as trustee. For purposes of determining the beneficiaries of a trust, it is immaterial whether the interest is present or future, vested or contingent, or whether the beneficiary is ascertainable or even living.

By contrast, Section 736.0103(19) defines the term "qualified beneficiary" to refer to only a limited subset of all trust beneficiaries. Essentially, the class is narrowed to the living persons who are current beneficiaries, intermediate beneficiaries, and first-line remainder beneficiaries, whether the interest is vested or contingent.

The statutory language applicable under Florida Statute Section 736.0103(19) is as follows:

> 'Qualified Beneficiary' means a living beneficiary who, on the date, the beneficiary's qualification is determined:
>
> > (a) is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

Florida Statute Section 736.0103 further defines the term “Distributee” as a beneficiary who is currently entitled to receive a distribution (emphasis added), and the term “permissible distributee” as a beneficiary who is currently eligible to receive a distribution (emphasis added).

The concept of a “Qualified Beneficiary” is important with respect to trust administration because the Florida Trust Code requires that a trustee has a duty to “inform and account” to a trust’s qualified beneficiaries. Beneficiaries who are not qualified beneficiaries are not entitled to the same privileges.

Because Florida Statute Section 736.1504 dictates that only the settlor spouses will be considered qualified beneficiaries of the community property trust until the death of one of the settlor spouses, the trustee of a Florida community property trust owes no duty to the settlor spouses’ descendants or other qualified beneficiaries (while both settlor spouses are alive) to keep them reasonably informed of the trust and its administration.

For example, assume that Ma and Pa Kettle establish an irrevocable trust to benefit them for their lifetime and to provide future benefits for their children and grandchildren after the death of the survivor of Ma and Pa Kettle. In such a case, Ma and Pa are the current beneficiaries, their children are the intermediate beneficiaries, and their grandchildren are the first-line remainder beneficiaries. As qualified beneficiaries, both Ma and Pa’s living children and living grandchildren are entitled to be reasonably informed of the trust and its administration. Reasonably informing the qualified beneficiaries entails providing accountings, complete copies of the trust instrument, relevant information about the assets and liabilities of the trust, and providing due notice in the event of a trust modification, all of which can be expensive and cumbersome.

If the irrevocable trust is not a community property trust under the Florida

Community Property Trust Act, then the qualified beneficiaries of the trust (including the successor beneficiaries after the death of Ma and Pa Kettle) will be entitled to receive trust accountings and other information regarding the trust. However, if the irrevocable trust is established as a community property trust under the Florida Community Property Trust Act, then such remainder beneficiaries are not entitled to trust accountings or other information, regardless of their status as beneficiaries. Trust accountings typically must be completed based upon a prescribed form and format which can cause additional costs of administration. This makes the Florida community property trust an attractive planning tool for an elderly couple that once had an irrevocable trust established but does not want to have any administrative inconvenience associated with providing trust accounting and other information to other beneficiaries of the trust.

An alternative to providing qualified beneficiaries directly with notice is to appoint a “Designated Representative” in the trust document under Florida Statute Section 736.0306. The Designated Representative can be any individual named in the trust document, other than the trustee. The Designated Representative can be authorized to waive the right to receive accountings, copies of the trust, and other information on behalf of one or more beneficiaries and can represent and bind one or more of the beneficiaries with respect thereto. The Designated Representative has to be willing to assume these responsibilities and understanding that beneficiaries may be upset and may sue the Designated Representative. Nevertheless, the Designated Representative is shielded from liability under Florida Statute Section 736.0306(4) from the beneficiary whose interests are represented by the Designated Representative, or to anyone claiming through that beneficiary, for any actions or omissions to act that are made in good faith by the Designated Representative.

The new Florida Community Property Trust Act, which is intended to allow assets to get a step-up in basis on the death of the first dying spouse provides a new opportunity for planners to help elderly or infirm couples protect their assets without being required to give notice to descendants or other qualified beneficiaries. Even though such a trust can be irrevocable the trust language can allow amendments to the trust when approval is received from one or both of the spouses if they are confident in one or more trusted individuals to verify that there is no undue influence or circumstances that would cause an amendment to be problematic.

For example, assume Ma and Pa Kettle establish an irrevocable Florida community property trust to benefit them for their lifetime, and to benefit their children and grandchildren after the death of the survivor. Although Ma and Pa's children and grandchildren would normally be considered qualified beneficiaries, because under a Florida community property trust, Florida Statute Section 736.1504 dictates that only the settlor spouses are considered qualified beneficiaries, the trustee of Ma and Pa Kettle's irrevocable community property trust owes no duty to reasonably inform the children and grandchildren of the trust administration. As a result, Ma and Pa's aggressive, unruly, or imbalanced child is left "out of the loop" and may be unable to manipulate his or her way into a larger inheritance.

Florida trust experts are aware of another way to have someone eliminated from being a "Qualified Beneficiary" during the lifetime of an individual trust beneficiary. If a beneficiary holds a power of appointment over an individual who would otherwise be a "qualified beneficiary," then notice and waiver provided to the holder of the power will be sufficient to satisfy the notice and the accounting requirements. This is provided by Florida Statute Section 736.0302, which specifically states that the holder of a power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

Nevertheless, giving Ma or Pa Kettle the right to divest one or more of their descendants from an irrevocable trust can cause a significant danger because one or more unruly descendants may influence one or both spouses to exercise the power of appointment to exclude siblings and other descendants that are not favored by the person exercising the undue influence.

Critics of this type of irrevocable trust planning will point out that Ma and Pa Kettle should have the right to change their trust, and their dispositive intentions for as long as they live.

This may be accomplished by having the trust agreement name Trust Protectors who may be trusted advisors or close and trustworthy friends of the family who would be able to make changes upon the request of Ma and Pa Kettle, subject to such ground rules as the trust may provide. Another variation of this concept involves giving Ma and Pa Kettle powers of appointment with respect to the trust, but these may be excludable only with the consent of one or more Trust Protectors, who must approve any such exercise of the power of appointment.

While the Florida Legislature passed the new Community Property Trust Act to enable married couples to get a step-up in basis on the first death, Jonathan Blattmachr has pointed out legitimate concerns as to whether an elective community property arrangement like the Florida Community Property Trust Act will be recognized by the IRS as a legitimate community property arrangement to qualify all trust assets for a fair market value date of death basis step-up on the death of the first dying spouse. There is a question as to whether it is possible to have community property trust assets treated as community property for federal income tax purposes when the assets held are not 100% accessible to the creditors of one spouse or where the property does not remain community property if distributed out of the trust while the spouses are both alive or whether the property will satisfy the requirement under Section 1014(b)(6) of the Code that it must be community property under the law of a state (or territory) since Florida does not really have a community property system. . Alaska community property trust law more closely follows traditional community property law by allowing creditors of one spouse to access 100% of the assets held in a community property trust. Plus Alaska has a full panoply of community property laws for married couples who elect into the Alaska community property system. Therefore, the Alaska community property trust may be a safer vehicle to receive a step-up in basis on the death of one spouse.

While the step-up in basis on the first death may be the primary reason that most married couples will use Community Property Trusts, the incidental benefit of not having to inform children or other descendants, not having to account to them, and not even being able to make distributions to or for their benefit from the Trust are other advantages that may be very attractive to planners who are worried about difficult situations that often face elderly clients that have forceful or abusive descendants.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman

Jonathan Blattmachr
Brock Exline

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