USE OF JOINT SPOUSAL TRUSTS IN COMMUNITY PROPERTY STATES: STILL THE GOLD STANDARD OF ESTATE PLANNING?

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Unlike common law states that have not historically favored the use of a single joint revocable trust for spouses (hereafter referred to as the Joint Spousal Trust or JST), the JST has long been the gold standard estate planning tool of choice in community property states. The JST can simplify a couple's estate plan into a single plan for both spouses. It can avoid duplicate costs and fees associated with separate plans, potentially avoid a need for separate counsel, and provide remarkable flexibility to plan for the disposition of the estate for benefit of the surviving spouse and generations beyond. The JST can be used in planning for married couples with a modest estate of $100,000 who are merely looking to avoid probate. It can also be used for those married couples with larger estates, even including those with $100 million and beyond in the ultra-high net worth category. The JST can be drafted to address complex asset management, investment management, tax planning, asset protection, spendthrift planning, special needs planning, and dynastic planning for multiple generations. Its flexible nature continues to allow the JST format to morph from decade to decade with each change in the federal estate tax world. While the benefits of the JST can be useful in many different jurisdictions, they are particularly popular in community property states due to how well they fit with the core tenets of community property law.

The broad application of the JST across multiple types of estates, from modest to very wealthy, has led to the development of an entire cottage industry of "trust mills." These trust mills originally drummed up business through door-to-door solicitations and TV commercials. More recently, the tool of choice has become the internet pop-up ad offering document production software. The trust mills often mass produce one-size-fits-all estate plans for a flat fee, often using fear tactics and promises of low cost to attract customers. While these mass-produced plans certainly are a far cry from a custom-crafted estate plan drafted by a skilled practitioner, the widespread use of these mass-produced trusts has converted the world of probate administration into one of trust administration, and has opened up the world of trust planning to those with more modest estates. Having a trust is no longer a tool limited to the wealthy. In community property states, having a JST is as common as having a car, a house, or an IRA. But just like cars, a JST's appearance of simplicity can be misleading. And just like cars, JSTs come in different makes and models, with all kinds of bells and whistles. It is not surprising to have a newly married couple client say "We want the same thing you did for our parents. Can you just replace our names in the form for theirs?" Clients are often shocked to find out that a JST that is appropriate for one couple may be entirely inappropriate for another, even though they both reside in a community property state.

This article is not intended to be an in-depth exploration of community property or estate planning in community property states. Rather, this article is designed to be used in conjunction with more expansive materials related to the use of JSTs in non-community property states, and to provide practitioners in those jurisdictions the opportunity to understand why JSTs are such a common planning tool in community property jurisdictions. In this article we will explore the use of the JST in community property states, including both the benefits and potential consequences of using this planning technique.

BRIEF OVERVIEW OF COMMUNITY PROPERTY

To understand why the JST became the standard estate planning tool of choice in community property states, it is first necessary to understand the basic concepts of community property and how it is administered.

The basic principle of community property law is that all property that a married couple acquires during the marriage (other than by a gift or inheritance) is the property of their marital community. It does not matter whether it was earned only by one spouse or the other. If earned during the marriage, it belongs to the marital community. Both spouses have equal, undivided interests in the community property from their marriage, and such rights are vested in both spouses, often regardless of title. This is very unlike the situation that occurs in non-community property states where the vesting or interest in the property of the other spouse may only arise at time of divorce or on death. What is more, community property states presume that all property owned by the married couple that was acquired during the marriage is community property, other than by gift or inheritance, and proving otherwise requires strong proof that the property or source of funds used to acquire such property was not from a community property source. While it is possible to trace the source of property to separate property, in reality, married couples do not often take caution to maintain good records or to avoid commingling of their assets. Accordingly, tracing is difficult and, in many cases, impossible to accomplish successfully.

Spouses can, in most states, enter into an agreement before marriage (a “prenuptial”), during marriage (a “postnuptial”) or after marriage (a “divorce settlement”) to establish, alter, or confirm whether property will be community or separate property. Therefore, spouses are not stuck with the law at hand, and may contract with each other to determine how their property will be characterized. But regardless of whether characterized as separate property, community property, or a combination of both, the ability of spouses to transfer, encumber, use, and gift such property during life, or bequeath such property on death, will depend greatly on the character of that property in a community property state.

Application of community property concepts varies within community property states

There are currently nine community property states, including Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. Puerto Rico and Guam are also community property jurisdictions. However, not all community states follow a “common” or “uniform” community property law. Community property law is a statutory creature, often further defined by case law, and each state has its own variation of that law, making broad generalizations difficult. Good planners must recognize the state-by-state differences and look to the specific statutory authority in the jurisdiction(s) at issue. Historically, this concept was easy to accomplish and understand. But today, it has become increasingly complex to determine what law applies, given the mobility of clients, multiple marriages and families, ownership of assets in a variety of states with varying laws, and family members who reside not only in different states but often in different countries. While discussion of the rules associated with resolving conflicts of laws is beyond the scope of this article, such issues can be relevant to planning for clients with community property in different jurisdictions.

Management and titling of community property

Unlike common law states, where the title to property really matters, in a community property state, it may mean very little depending on the type of asset at issue. Just because a spouse places his or her name alone on title does not mean that the asset is the separate property of that spouse. This is often a source of concern for estate planning attorneys who are only representing one spouse in a community property state. While the client might think (or even insist) that the asset is his or her property alone, there is a risk that the client's spouse will not agree with that position. It is almost a certainty that that spouse will not agree at time of divorce. Characterization of an asset as community property will affect each spouse's rights to manage the property during the marriage. Some community property states will allow one spouse alone to manage the community property asset subject to certain fiduciary obligations owed to the other spouse. However, in many community property states, one spouse acting alone may not convey, encumber, transfer, gift, or otherwise dispose of community property without the affirmative (often written) consent of the other spouse. There are variations of these general management and conveyance concepts across the various community property states. Therefore, unilateral transfers by one spouse without the other in relation to community property is risky, and may be subject to attack in divorce, on death, and even by third-party creditors in debt disputes and bankruptcy. Planners in community property states must take great care to avoid transfers of community property in violation of the applicable community property laws at issue.

Transfers of community property during marriage

In many community property states, the transfer of community property during marriage, assuming it is done properly and with the consent of both spouses, could destroy the community property nature of that property. Therefore, transferring community property, even just one spouse's one-half undivided interest in the community property, can destroy the community property character of the asset and eliminate the benefits of community property. While this impact will vary from state to state, the transfer of one spouse's one-half interest in the community property membership in a family business (with consent of the other spouse) to that spouse's separate revocable trust might sever the community character. Alternatively, if the consent of the other spouse is not properly attained, the transfer may be void (or voidable) by the other spouse, or even by a third party such as a creditor. Concepts of fraudulent conveyances are applicable to community property and may be applied to unwind a transfer by one spouse.

Transfers of community property on death/divorce

With few exceptions, a deceased spouse's one-half interest in community property is transferable on death by the deceased spouse's estate plan. Accordingly, while the spouses are restricted during the marriage, these restrictions are lifted when the community is terminated by death or divorce. On death, a spouse is free to transfer his or her interest to not only to his or her surviving spouse, but to anyone else.

Rights of creditors in community property states

The rights of creditors vary greatly from one community property state to another. In general, creditors can often attach the community property to satisfy the debts of the marriage, and even the debts of either spouse. But some states restrict the ability of one spouse to encumber the community without the consent of the other spouse, leaving creditors in these states to take great care to obtain consents by both spouses when lending. On the other hand, the separate property of one spouse is not generally liable for the debts of the other spouse in these states, providing asset protection planning opportunities between the spouses. However, when realizing that an asset titled in the name of one spouse alone does not make the asset separate properties, creditors in community property states will often require both spouses to sign off as part of transactions.

Tax planning and community property

Designation of property as community property can in fact have tax benefits and consequences to an estate plan.

Federal recognition

Federal law, and specifically tax law, has recognized community property.[1]

Income tax basis step-up

Perhaps the most well-known tax attribute or benefit to community property rests in the income tax benefit known as the double basis step-up. Under federal income tax law, community property (both the deceased spouse's interest and the surviving spouse's interest) receive a full step-up in income tax basis on death of the deceased spouse due to the fact that the property is a "whole" pursuant to Internal Revenue Code section 1014(b)(b). This can, in cases of low-basis assets, be a virtual panacea for a surviving spouse in a community property state. It can also be a great benefit to heirs as well. A surviving spouse may be more willing to freely gift and conduct additional estate planning transfers following the deceased spouse's passing that would not have been desirable prior to the step-up in basis. An important note: This double step-up only applies to community property and the IRS has been very particular about this application. It will not be applicable to property held in the form of quasi-community property or joint tenants with right of survivorship acquired after 1976. It is possible to seek a court order confirming jointly titled property as "community property," but absent sufficient evidence to support the confirmation, the IRS will not be bound by such state court's conclusions in most circumstances under the Bosch decision.[2] Therefore, to take advantage of this, clients will want to be certain that their property is in fact designated to qualify as community property.

Income tax deduction planning for charitable gifts

Charitable gifts made by a spouse from separate property that results in a charitable deduction carry-forward will be lost if the donating spouse dies prior to use of the carry-forward. But that does not occur if the gift was of community property, at least as to one-half since the surviving spouse was also a contributor.

Benefits to registered domestic partners

In those states where couples can be registered as domestic partners, there may be income tax-bracket planning opportunities if the income is recognized as community property under the applicable state's law.[3]

Federal estate and gift tax planning for community property

There are many estate and gift tax planning opportunities in community property states for married couples, a few of which are as follows:

Gift splitting

The community property system automatically does the gift splitting for spouses when community property is gifted. Couples can gift $30,000 to a donee without need to file a gift tax return under the annual gift tax exclusion.

Equalizing estates

Community property systems automatically equalize the estate of each spouse on death, providing a one-half interest in the assets, regardless of title, to each spouse. Spousal portability has made this less useful today than in the past, but it remains a useful tool where credit shelter planning is applicable. This is still a very important planning tool for those states that recognize registered domestic partners for whom spousal portability is not applicable.

Automatic discounting

Without need for overly expensive discounting appraisals valuing the decedent's one-half interest, community property is often discounted on an estate tax return known as a "Propstra discount."[4]

BENEFITS OF A JOINT SPOUSAL PLAN IN A COMMUNITY PROPERTY STATE

Understanding the above general tenets of community property, it is easy to understand why JSTs are the primary tool of choice for married couples. A few of the highlights that the JST provides are as follows.

Time and cost efficiency

Most clients are busy living and are not willing to invest the time, energy, or financial resources in a long, drawn-out estate planning process. Ease, efficiency, and often costs are driving factors whether they should be or not. Often, one spouse is more motivated than the other, and if both had to separately retain counsel, let alone do separate plans, the estate planning might never happen. This reality might not alone be a good reason to do a JST, but it is nevertheless one of the reasons clients often prefer a JST over other options.

Community property characterization is not impacted by transfer to a JST

Use of a JST fits perfectly into the tenets of community property. A married couple can transfer their community property quickly and easily to a JST without altering the community property character of the assets. Separate counsel, separate trusts, and expensive and time-consuming transmutation agreements all become unnecessary when the JST is used.

JSTs can also hold separate property

In most community property states, the JST can also retain the character of all property held therein. Accordingly, while community property character is not altered, neither is separate property characterization. So long as the couple carefully identifies and maintains their property character by title and/or use, they can manage both their separate property and community property interests all in the JST.

Probate avoided

The JST assets are not subject to probate. The benefit of this is not only as to both spouses but also as to assets in multiple states. Another benefit in many community property states is also the ability to list an "intent" to transfer assets to the trust on a schedule to the trust, and still avoid probate through a special proceeding that confirms the asset to the trust after death.

Simplicity of administration on death

Often, the spouses are the co-trustees of the JST during their marriage. On the death of the first spouse, it is common for the surviving spouse to continue as sole trustee. The fact that the surviving spouse is already on the accounts and has access to all the trust assets makes the administration process less onerous for a surviving spouse. Accounts are less likely to be closed or blocked, and a surviving spouse trustee can continue to pay bills and function following the first spouse's death.

JSTs can be simple, complex, or something in between; and due to revocable status, can be changed over time

The JST's flexibility is quite amazing, allowing it to be used for multiple scenarios. Several examples are as follows.

All to survivor

The JST can, in its simplest form, provide for the deceased spouse's share to pass all to the surviving spouse and continue in a single trust for the remaining life of the surviving spouse. Even if the estate is subject to estate tax, this form of planning, coupled with spousal portability election, can defer the estate tax until the surviving spouse's death, and take advantage of the deceased spouse's unused exemption (DSUE).

All to survivor with disclaimer option

The JST can further provide a special option that allows the surviving spouse to disclaim all or some portion of the deceased spouse's estate, to pass outright to alternative beneficiaries or more commonly to be held in a separate "disclaimer trust." This can be used to allow a surviving spouse to take advantage of locking in the use of some or all the deceased spouse's estate tax exemption instead of electing spousal portability. This can also be useful if a surviving spouse wishes to also fund a disclaimer trust to take advantage of the deceased spouse's generation-skipping tax (GST) exemption that is not protected under spousal portability election.

Percentage to survivor with disclaimer option

The JST can provide that all of the surviving spouse's interest in the trust, plus some portion (rather than all) of the deceased spouse's estate can pass to a surviving spouse, and some other portion of the deceased spouse's estate can pass to children of the decedent or otherwise.

Use of credit shelter trust planning

The JST can provide for a division of the surviving spouse's and deceased spouse's respective shares in the trust estate, with very different beneficiaries of each. This can be important when spouses have children from prior marriages. The surviving spouse's share can pass to a survivor's trust (commonly called "share A") and the decedent's share can pass to the "decedent's trust," (commonly called "trust B," "bypass trust," or "creditor shelter trust") allowing each spouse to direct his or her share of the estate, and taking advantage of the decedent's estate tax and GST exemptions, and further allowing the surviving spouse to take advantage of any remaining DSUE thereafter. This allows spouses to have comfort that their individual intentions on death will be upheld.

Combining QTIP, creditor shelter, and disclaimer options

Building on the above, the JST can provide that the portion of the decedent's estate that exceeds the exemption be held in a marital QTIP trust for the benefit of the surviving spouse for life, taking advantage of tax deferral through application of the marital deduction. Various funding formulas can determine if the QTIP or credit shelter portions are funded in a pecuniary or in a fractional share formula.

Mandatory QTIP with disclaimer option

With the increase in estate tax exemptions and spousal portability, estate taxes may not be a concern; instead, the focus can quickly turn to income tax planning, and getting a second bite at the double basis step-up on the surviving spouse's death. This planning became very popular in 2012 and increased even more so in 2018 with the large exemptions. This may lose some favor if exemptions return to more modest numbers and/or if basis step-up is eliminated.

With dynastic planning

With any of the above JST formats, married couples can also build into the JST outright, short-term, long-term, or even dynastic trust planning for one or more generation of beneficiaries. Building on all the above with dynastic terms can make use of the couple's GST exemptions and asset protection features. Further, in states with long or no perpetuity periods, these trusts can be perpetual.

While all of the above may be possible to also accomplish in separate trusts established by each spouse, the simple ability to do it all in a single JST is remarkable and a very attractive to clients.

JST can be coordinated with separate trusts

In some cases, a spouse may not wish to place separate property in the JST. However, the JST can be drafted to coordinate on death with a spouse's separate property plan.

Ability to separately revoke/modify as to separate property

Many spouses like the idea of being able to separate, revoke, or modify the JST as to their own respective separate property, and the JST can be drafted to separate the type of action necessary to address separate property held in the JST from the requirements for modification of the community property held therein.

Ability to amend bequests on death as to community property

While one spouse alone may not be able to revoke the trust as to community property during marriage, a spouse alone can alter or amend the dispositive provisions as to his or her community property on death, either under a power of amendment or alternatively under a power of appointment. This is different and more flexible than holding property out of trust in other forms of title such as “community property with right of survivorship.” Property held in community property with right of survivorship may, under many state laws, prohibit one spouse from unilaterally terminating the rights of survivorship in favor of the other spouse, at least not without consent of the other spouse.

Double basis step-up

The ability to get a double basis step-up on the death of the first spouse to the entirety of the community property is one benefit that non-community property state planners struggle to duplicate. The step-up is automatic and does not require extra action or planning to accomplish. Of course, a JST is not required for this benefit, and the mere act of holding any assets as community property, whether in or out of trust, will accomplish this benefit. There are some unusual planning opportunities that have recently arisen in this area. Specifically, certain states such as Alaska, South Dakota, and Tennessee have adopted statutory form “community property trusts” where both residents and also non-residents who are married can establish a special trust for community property, and the trust can treat the property therein as community property so long as it is held in that trust subject to the laws of those jurisdictions.[5] These trusts generally require a trustee of such a trust to be a resident of that state. In theory, these trusts are designed to provide the benefit of the community property double step-up to those spouses who do not live in a community property state. Time will tell whether these are successful for divorce, asset protection, estate planning, and/or tax planning purposes.

RISKS IN USING JOINT SPOUSAL TRUSTS

While the use of JSTs is common in community property states, it is not always the right fit. Further, there are some potential negative consequences that clients should be advised of in advance of planning.

Confirmation of representation

Joint representation of clients presents problems, but those problems and confidences can be even more exaggerated and difficult when the clients are spouses. While waivers of conflicts are often permissible, just because conflicts can be waived, does not always mean they should be waived. Counsel should confirm whom he or she is representing, and if it is a joint representation, proper waivers of conflict should be put in writing as is often mandated by state law. Drafting a JST does not mean that counsel must represent both spouses jointly, and it is still possible to draft a JST for a couple but only represent one of the spouses, with the other represented by separate counsel. When a joint engagement is undertaken, consider the following issues.

No Confidential Communications

In many marriages in community property states, couples share their assets as 100 percent community property. This is often more likely in longer marriages in which it is impossible to differentiate the community and any separate property assets. The presumption of community in these situations will prevail. These clients may have the same desire for their respective plans involving providing for themselves, then the spouse, and then the kids, in that order. Accordingly, a joint engagement and JST can be a perfect solution. Further, this client couple might have no secrets from each other. However, just because it can be done, does not mean it should always be done. Differences of opinion on end-of-life planning exist more and more these days and spouses might not share everything.

Joint representation means that communications are not going to be confidential and one spouse could demand to know what the other disclosed to counsel. Lawyers practicing in this area can tell endless stories of the calls they have received after the joint spousal meeting from one spouse or the other to disclose sensitive information to counsel as attorney/client privileged—such as the existence of other relationships, an illegitimate child, or even the desire to create a separate, secret trust for a paramour. One spouse might wish to confidentially share important information that he or she does not trust the other spouse with, or duties that he or she does not believe his or her spouse can handle, such as investment or fiduciary duties. Further, in a joint engagement, there may be assets that one spouse has that the other is unaware of, or that he or she does not want to share with his or her spouse.

The examples of uncomfortable situations are endless, and it is no wonder that attorneys in non-community property states have continued to question the propriety of one lawyer representing both spouses. But the high cost of legal representation and convenience of a single attorney, along with a joint estate plan, has driven the concept of a single attorney handling all of it to be the norm. At a minimum, joint engagement requires consideration and evaluation before assuming it is proper. It further necessitates educating the couple on the limitations of that joint engagement. Additional matters to consider include the following.

Issues arising due to prior separate representation of one spouse

Given the high number of marriages that end in divorce and the fact that clients are getting married later in life, it is not surprising that many clients have already engaged counsel long before their current marriage or marital planning. It is not uncommon in community property states for one spouse to ask counsel to convert the engagement to handle the joint plan without realizing that long-time counsel could later be conflicted out in the event of disputes or divorce as a result of this joint engagement. Counsel should carefully review these conflict issues with their clients before agreeing to expand the engagement to a joint spousal representation.

What is the scope of the joint engagement?

Will the joint engagement include all matters of the couple, both separate and joint? Or will it be limited in scope to cover only the joint plan, with counsel also representing the spouses on their separate property plans in a different engagement?

Is one spouse controlling the planning decisions of the other?

Not all spouses within a marriage equally share in their duties within the marriage. Often, one handles the finances and legal matters, while the other handles the child-raising or household duties. These roles within the relationship can affect the type of decisions that they make in planning. If each had separate counsel, their discussion and participation could be very different. Counsel should be careful to include both in the planning decisions. Recognizing that a spouse's plan will affect the other spouse, is recommending a QTIP trust going to negatively affect the other spouse? These are difficult issues that counsel can and should be aware of in this type of engagement.

How will counsel address one spouse's subsequent unilateral request to change the plan?

Since a spouse can bequeath his or her separate property and one-half of the community property elsewhere on death, counsel can face challenging situations if one spouse later wishes to change his or her portion of the plan, either through a separate amendment or more likely through exercise of a power of appointment without notice or disclosure to the other spouse. Counsel should be careful to avoid this type of situation. This is often the case when spouses decide to divorce and one spouse calls counsel to dissolve the plan. This author has a general policy of not agreeing to amend a joint plan as to one spouse or the other during marriage without the consent of the other so long as it is a joint engagement.

Determining the character of the assets as separate vs. community on the Schedule to a JST

Because a JST can in fact maintain the character of both separate property and community property, it is common to want to designate the identity and character of such assets on a Schedule A to the JST. Practices vary greatly on this point. Some practitioners have a firm policy against identifying character out of fear of malpractice in event of a divorce. Others take a more practical position that where the spouses identify property character, counsel can rely on that character. This author takes a further practical position in avoiding binding either spouse to the character on the Schedule A. Under Nevada law, a Schedule A would not qualify as a marital agreement as to character unless the spouse signatures are notarized thereto. For that reason, if character is identified on a Schedule A, it is a point of reference and does not necessarily foreclose a later challenge by either spouse.

When clients desire (or require) more formality in character determination, a marital agreement or transmutation agreement might be required. The factors necessary to find a binding and enforceable agreement as to property characterization vary by state. If predeath, many states will require the agreement to satisfy the Uniform Marital and Premarital Agreements Act,[6] if adopted. Others may rely on common law principals of contract. Post-marital agreements are often less onerous, but just as important to follow the requirements under the applicable law.

JST on second marriage

Careful consideration should be given to whether a JST is ideal in a second marriage. Sometimes, there are good reasons to keep assets separate and a separate property trust might still be best for certain assets and certain clients in community property states. Tying children of a prior marriage to a second spouse for long periods can be difficult, and even more undesirable when that second spouse is controlling the trust for benefit of the children from a prior marriage.

Divorce concerns — JST might not be ideal for separate property

While the JST can hold separate property and keep it separate from community property, it might not be the best choice in all cases. When clients have significant separate property assets, or are not good at avoiding commingling, it may be simpler to keep things separate both in title and trust. Further, rarely has this author seen a spouse in a divorce "agree" that an asset is the separate property of the other until the ink on the settlement agreement is dry. Many spouses try to take possession of their separate property held in a JST during divorce, only to find themselves in a fight over whether it has been commingled or converted to community property in some way. Since both spouses are generally co-trustees, the owner spouse is often unable to free up that separate property asset unilaterally during the divorce.

Lack of confidentiality and privacy

Because a JST contains the assets of both spouses, the trust is also often subject to disclosure requirements in the event of a spouse's incapacity or death. If both spouses' estates are in the same trust, the surviving spouse may lose a degree of confidentiality as to the size of his or her estate; and the children may also see the entire plan prior to the surviving spouse's death. Whether this is a good or bad thing is very case-specific. Certain jurisdictions like Nevada do allow for restriction on the right of a beneficiary to review a trust. However, while those provisions can be drafted in theory, in practice they are difficult to administer.

Asset protection planning

A JST can be used in states like Nevada to form a joint self-settled spendthrift trust (otherwise known as a DAPT). But the JST may not be ideal to hold both spouses' separate property when it is a joint DAPT. The difficulty, however, is that if spouses are doing separate DAPT planning in community property states, they need to be extra careful that the planning involves property determination of the separate property characterization. Creditors can easily challenge DAPTs where a separate property DAPT is funded with property previously characterized as community property. Transmutation agreements or post marital agreements need to strictly comply with state law to be effective against the other spouse in divorce or creditors.

Clients with JSTs who move to non-community property states

Clients with community property in a JST should consult with counsel if moving to a non-community property state, and/or if acquiring non-community property in the name of the JST. There are a variety of conflicts of law issues that can arise depending on whether the issue is divorce, death, state/federal tax, and asset protection. Questions can arise as to whether a non-community court will enforce a transmutation or marital agreement executed in a community property state. The reverse of this is also true for those spouses relocated from a non-community property state to a community property state. This topic can become even more complex when premarital agreements from one state, estate plans from another, and divorce courts in a third are considering these issues. Practitioners should be careful to remember that judges—and especially family court judges—might not be entirely familiar with all of the nuances of complex estate planning, and might elect, rightly or wrongly, to apply their own state's laws. Therefore, drafting provisions in the JST that clarify the clients' intent can go a long way toward helping a judge reach the proper conclusion in these situations.

TAX ISSUES REQUIRE SOME CONSIDERATION ON DEATH

Generally, the JST is revocable (a grantor trust), thereby avoiding need for a separate tax identification or tax return. Spouses who file jointly are rarely affected negatively by a JST in community property states. But pay attention to those situations in which differences can matter, such as when the commingled income from community and separate property assets in a JST must be reported separately by spouses filing separate returns. A more complicated issue arises when a death occurs and the trust, as combined in a single JST, must be accounted for in two separate estates, namely that of the surviving spouse and that of the decedent. Practitioners in community property states have long dealt with the realities of this division, whether in a JST or not. Often, practitioners will theoretically divide the assets by taxpayer for estate tax purposes even if the actual division is not required under the terms of the trust.

CONCLUSION

JSTs continue to be the planning tool of choice in community property states for most married couples. But for those who move frequently or who own significant property they intend to retain as separate, this planning technique might not be a good fit. Further, for those married to a spouse with a high credit risk, it might be less than ideal. In those cases, a bifurcated plan involving separate property trusts for separate property, and a JST for community property could be more appropriate. Regardless, counsel should continue to approach joint engagements with appropriate disclosures and conflict waivers when representing both spouses in joint planning and take caution to avoid a one-size-fits-all plan.

Notes

1 See, e.g., Estate of Parson v. United States, 460 F.2d 228 (5th Cir. 1972) (community property interest in life insurance policy); Commissioner v. Porter, 148 F.2d 566 (5th Cir. 1945) (income distributed from non-community property states to a resident of a community property state); Noble v. Commissioner, 138 F.2d 444 (10th Cir. 1943).

2 Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

3 PLR 201021048; Chief Counsel Advice Memorandum 201021050.

4 See Propstra v. United States, 680 F.2d 1248 (9th Cir. 1982).

5 See Alaska Stat. 34.75.100(a); S.D.CL 55-17-1; Tenn. Code Ann. 35-17-103(2).

6 Uniform Marital and Premarital Agreements Act, available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f5d36125-9433-c7d8-28ec-6244f4a316e6&forceDialog=0.