

Take Full Advantage Of Community Property Laws

As a result of varying state laws, moving between states can change the nature of the property you own, which in turn can affect your estate plan. Laws concerning community property offer a prime example of how your property rights can be affected, depending on where you live currently, where you lived previously and where you may move in the future. Currently, nine states have some form of community property law: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

What Is Community Property?

The main difference between separate and community property states relates to how property acquired during marriage is divided. This classification affects lifetime ownership rights and rights in the property at death.

Each spouse owns a present, equal and undivided interest in the community property. Generally, property acquired during marriage, regardless of how it is titled, is

community property. This includes property acquired through the personal efforts of either spouse and income generated from sales proceeds from community property. Community property does not however, typically include property received by gift or inheritance.

Moving From One Type Of State to Another

When moving from a community property jurisdiction to a common law jurisdiction, the property generally retains its community character, although enforcement by a common law jurisdiction is difficult. Courts outside community property jurisdictions have not always adhered to the community property concept.

When moving from a separate property state to a community property state, spouses may acquire rights in each other's property that they never would have had if they had remained in a separate property state. Community property states generally provide for

some mechanism to classify or reclassify a couple's property by agreement.

Regardless of the general rules, keeping separate property separate is often possible, even if moving into a community property state. By agreement of the parties, you may often involuntarily convert separate property to community property however, so take care. The same classification issues arise when moving from a community property state to a separate property state. Again, property can retain its character as community property or it can end up being converted to separate property.

Community Property And Step-Up in Basis

Aside from the rights that spouses may gain or lose when moving between states, there are important tax considerations. When moving from a community property state to a separate property state, tax advantages can be lost.

On death, a fair amount of all property that an individual owns receives a step-up in basis to its value at the date of death, or if an election is properly made, its value six months after the date of death. When a husband and

wife own property in joint tenancy, on the death of the first spouse, only one-half of the property receives a step-up in basis. However, when the property is community property, regardless of how it is titled, the entire asset receives a step-up in basis. This can result in significantly lower tax liability, especially if it is likely that the asset will be sold before the death of the surviving spouse. As a result, it can be tax smart for couples who move from community property states to separate property states to take the necessary action to preserve the community character of assets.

For example, if you and your spouse move from a community property state and purchase real estate in a new, separate property state, consider reflecting the community character of the assets in the deed. Do this by reciting that you take title as "husband and wife," with an additional recital that you hold your property as community property to be governed under the laws of your former state of domicile. While it is not clear that this approach will work to allow for the "double" step-up in basis upon the death of the first spouse, it certainly bolsters the argument.

Another way to try to preserve the community character of assets is to fund a revocable joint trust with community property before

oving out of your community property state and selecting the laws of the community property state as the governing law.

How Will State Property Laws Affect You?

Moving between states can have a great impact on your and your spouse's property rights, as well as on the taxation of property on your deaths. If you are considering a move, determining the impact the new state property laws will have on you, your spouse and your current estate plan is essential.