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### **ANALYZING COMMUNITY PROPERTY HELD IN A REVOCABLE TRUST By Randy Spiro**

Revocable Trusts in community property states often contain a provision stating that community property transferred to the trust by a husband and wife remains their community property within the trust and that separate property transferred to the trust by either spouse remains that spouse's separate . This provision is both important and complex.

When one spouse dies, the cost basis of community property (both the deceased spouse's half and the surviving spouse's half) is increased (stepped up) to the value of the asset at the first spouse to die's death. Joint tenancy assets only receive a basis stepup when one spouse dies on that spouse's half of the asset. Some estate planning attorneys help the client to transmute (change the character of) joint tenancy assets to community property. This may be done by an assignment separate from the revocable trust, or through language in the Trust itself, or by deeding real estate first from joint tenancy to community property and second from community property to the trust.

Some attorneys have both spouses sign an agreement changing the character of all their assets to community property. If effective, this means that a spouse owning separate property has gifted half of it to his or her spouse. One problem with this approach is that it fails to give each spouse a separate lawyer who can explain the pros and cons of this change. Specifically, if the spouses later divorce, the one who made the gift may claim that he or she thought that the couple was qualifying for a tax benefit (double step-up) and that no one adequately explained the economic consequences of the change on divorce.

Changing joint tenancy to community property may be less problematic. Both spouses typically already own a half interest in the joint tenancy property, so converting it to community property, which is another form of 50/50 ownership, would not amount to a gift.

Sometimes one spouse has acquired a property as separate property and prior to signing the estate plan, he or she has deeded the property to community property. Sometimes, the spouses have acquired property as community property and prior to signing the estate plan, it was deeded to one spouse as his or her separate property. These and other more complex situations may warrant a post-marital agreement to define the character of all assets with each spouse represented by a separate attorney.