

The Hargrove Firm Counselor


News and updates for you from Hargrove Firm & NetLaw

Use LinkedIn to make your estate planning service stand out!

Hargrove Firm is accepting its first clients through NetLaw, and we're finding that financial advisors and clients are searching for background information on the attorney assigned to the client's engagement. For this reason, we ask that you update your LinkedIn profile and website—if you haven't already done so and to the

Tips for updating your LinkedIn profile:

Profile Headline	Experience	About
<p>Your headline appears in search results across LinkedIn. Examples of profile headlines include the following:</p> <ul style="list-style-type: none">• Estate Planning Attorney• Elder Care & Estate Planning Lawyer• Trust, Estate & Probate Attorney	<p>Assuming you feel comfortable doing so, you might consider listing your position like you would on a resume, as follows:</p> <ul style="list-style-type: none">• Employer: Hargrove Firm LLP• Position: Of Counsel Attorney	<p>You can also put a brief mention of Hargrove Firm and your experience with estate planning in the optional About section of your profile.</p>



Similarly, if you control content on your website, you might consider adding mentions of estate planning as a practice area.

We believe that making these adjustments can benefit your own marketing efforts as well, especially if you choose to assist your own clients with estate planning using the NetLaw platform.

If you'd like any assistance in updating your profile, please ask. We're available to answer questions at your convenience!

Reminder: Referral Incentives

We're still seeking attorneys in a few key states to grow Hargrove Firm's reach across the entire country. Referrals from our current of counsel relationships go straight to the top of our list; we always welcome your recommendations. We have a specific need for of counsel attorneys in the following states:

Alaska | Delaware | Minnesota | Montana | North Dakota | South Dakota | West Virginia

We offer a \$250 referral incentive, payable to any current of counsel attorney who introduces Hargrove Firm to a qualified lawyer licensed in one or more of the states above who join our of team of counsel attorneys.

Have someone in mind who would be a great fit? Contact Hayley Wells at hwells@hargrovetfirm.com.

Joint Revocable Trusts

Risks of Marital Trust Planning



by Jamie Hargrove

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A married couple may say they want to protect their assets that might otherwise pass to the survivor of them from the risk associated with a subsequent marriage by the survivor. This protection can be accomplished with separate revocable trusts or a joint revocable trust.

A joint revocable trust is not generally recommended for clients that have federal taxable estates and live in "separate property" states vs. community property states.

Community Property States

**Arizona | California | Idaho | Louisiana | Nevada | New Mexico | Texas
| Washington | Wisconsin**

In addition to the community property states listed, Alaska, Kentucky, and Tennessee are elective community property states. This means in these three states, an estate planner can draft estate planning documents that effectively elect to be treated as community property trusts.

While having a single joint trust between a husband and wife might appear to be simpler and more efficient, it actually can create more challenges and complications than with separate living trusts.

Examples of some tax problems or issues with joint revocable trusts:

- **Transfers of assets to the trust may be taxable gifts** that may not qualify for the gift tax marital deduction. This is often addressed by giving each spouse the right to control the assets separately until the first death. But this means that you must track inside the trust the source of the trust funding and keep tracking it. Most people do not do this which leaves both the tax issues open-ended and assets that may be subject to withdrawal rights unclear.
- If the trust, or a portion of the trust, becomes irrevocable at the death of the first spouse, **the surviving spouse may be considered to have made a taxable gift** to the remainder beneficiaries of the irrevocable trust. This can be problematic in the current trust as there is no tracing of assets being contributed by one or the other. So, just as the last point, the trust should provide that each spouse's assets contributed should be separated and maintained within the trust.
- In states that are not community property states or do not have an elective community property statute, **at the death of the first spouse, it is unclear whether one-half the value of the trust is included in that spouse's estate, or the entire trust is included**, leaving in question what assets in the trust will receive a step-up in income tax basis. Again, to be certain what assets are subject to step-up in tax basis at the first spouse's death, the assets placed in the trust should be traced as to their source of the contribution.
- If assets contributed to the trust by each spouse are commingled in a joint trust, **it may not be possible to keep what is intended to be a credit shelter trust from being included in the surviving spouse's estate**. The credit shelter trust has changed significantly since spousal portability came around. It is still a planning technique that can be advantageous for generation-skipping purposes (spousal portability does not carry over GST credits of the first spouse to die) or to make sure the growth of the credit shelter trust is excluded from the second spouse's estate.
- Further, if a gift is considered to have been made by one spouse to the other on the creation and funding of a joint revocable living trust, that **gift may not qualify for the gift tax marital deduction** if (1) the interest is terminable because the donor-spouse will receive an interest in the property if he or she survives the donee-spouse, and (2) the interest does not qualify for the marital deduction election if under the terms of the trust, the donee-spouse is not entitled to receive all the income from the trust and the trustees are authorized to distribute trust principal to the donor-spouse during the donee-spouse's lifetime.
- To avoid the immediate gift upon funding the joint trust problem, **the trust provisions can give each spouse the power to withdraw from the trust** any property which he or she contributed to the trust or property into which the original contribution has been converted, without the consent of the other spouse. Careful records of contributions and what new investments are made with the proceeds of the sale of any of the original trust property must be maintained for this unlimited withdrawal power to succeed in rendering a potential gift incomplete.



- **The death of the first spouse may result in a taxable gift by the surviving spouse.** If a joint revocable living trust provides that upon the death of the first spouse, a portion or all of the trust becomes irrevocable, the surviving spouse could be considered to have made a taxable gift at that time to the beneficiaries of the irrevocable trust. The IRS has ruled that where spouses transferred the property to a joint revocable trust and retained life income interests, with remainder to charity, the gift to the charity was complete at the death of the first spouse when the trust became irrevocable. This issue has also been the subject of cases and rulings, some finding a gift to have been made, others finding no gift, involving joint, mutual, or contractual wills. There are several ways to prevent a completed gift from being made when the trust becomes irrevocable. One way is to provide the surviving spouse with the power to invade the trust after the first spouse's death that is not limited by an ascertainable standard. Another is to provide in the trust that the surviving spouse has the power to appoint the principal of the now irrevocable trust at his or her death. This power would make any potential gift by the surviving spouse incomplete.

The joint revocable trust is often touted as being simpler because you don't have to separate husband and wife's assets and maintain two separate investment accounts. But as you see from the above, having separate trusts may help make the tracing of assets much clearer for the client than dumping all assets into a joint revocable trust.

The implementation of a joint revocable trust can also trigger other issues for the attorneys who create them. For example, consider the question of whom the attorney is representing. If the attorney is representing the husband, maybe he inherited assets and used those inherited assets to help grow his and his wife's estates. In that case, is the attorney going to advise that the client leave all assets in a marital trust? If representing the young wife, however, who may have additional kids after her current husband's death, the attorney may not advocate for a marital trust or make sure it has flexibility for the younger wife and her thereafter life.

You can see in this simple example the issues this type of planning can create. So can a lawyer create marital trust planning without having separate legal counsel for each husband and wife? Yes, but that doesn't mean a lawyer will want to put himself or herself in this position. These issues can be just as present in a separate revocable trust plan as they are with a joint revocable trust. However, with a joint revocable trust there are additional potential conflict issues that may not exist with separate revocable trusts.

Marital trust planning, whether with separate revocable trusts or a joint revocable trust, can provide some benefits and structure for a married couple's estate plan. The planning, however, is complex and involves a host of issues and challenges that must be well thought out while at the same time discussing potential conflicts of interest if the attorney or other advisors are presenting both parties in a joint engagement.

Interested in more advice and articles for attorneys from Jamie Hargrove?

Let us know! Email Tucker Hargrove at thargrove@hargrovefirm.com with your ideas.

Coming Soon: CLE Credit Courses

We're pleased to soon be able to offer continuing education credits through Hargrove Firm. A series of courses, starting with topics related to estate planning basics, will be available to all attorneys affiliated with Hargrove Firm, and they'll be led by the dynamic Look for a registration link by email in the coming weeks!

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