# Move to Florida, Home in Florida, or Snowbird: Planning You Should Know


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A KEY ESTATE PLANNING GUIDE

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**Our 2022-2023 Florida Advisor Calendar Checklist giving dates for entity maintenance, 529 plan entry, tax return, property tax deadlines, and other important dates that all successful Floridians and their advisors should know about is as follows:**

| Compliance Event | Date/Deadline |
|---|---|
| Hurricane Season | June 1 – November 30, 2023 |
| Fantasy Fest in Key West | October 2023 |
| Tom Petty's Birthday | October 20, 1950 |
| Release date of Jimmy Buffet's Album "A1A" (Required listening for anyone who goes to the Florida Keys) | December 1, 1974 |
| First Day of Hanukkah<br>(Time to buy a gift for your Jewish tax lawyer) | December 7 – December 15, 2023 |
| Deadline for early payment of Property Taxes with a discount (check your county tax appraiser's website for the exact deadline) | 4% - November 30<br>3% - December 31<br>2% - January following year<br>1% - February 28 following year |
| Property Tax Deadline | Typically, March 31, but check with your tax appraiser's website to be sure |
| TRIM Notice – Right to contest an appraisal | Varies – See your tax appraiser's website immediately after you receive your notice |
| Vehicle Tax Renewal | Annual on the owner's birthday |
| Open Enrollment for HMOs | Varies – Check with your employer's human resource department |
| Filing period for annual reports of Corporations, LLC, LLP, LP and non-profits | Annually by May 1st |
| Gasparilla Pirate Festival in Tampa | January 2024 |
| Deadline for purchasing a Florida 529 Prepaid College Plan at the previous year's prices | February 1 – April 30, 2023 |
| Homestead Application Deadline | March 2, 2022 – March 1, 2023 |
| Bike Week in Daytona | March 3-12, 2023 |
| Spring Break | March 20, 2023 – March 24, 2023 |
| Florida Corporate Income Tax Due | March 15 – April 1, 2023 |

# FLORIDA AIRPORT GUIDE

# BECOMING A FLORIDIAN

- Domicile is based on intention - what state does the person actually call “home.”

- For most Floridians, Florida is the only place they live, whether they have lived here for years, or moved here from another state. The moment they arrive with all of their belongings in the moving van they are Floridians.

- The question is less clear for those who have homes or otherwise spend many weeks both in Florida and in other jurisdictions and who may wish to claim income taxes, inheritance taxes, estate taxes, and other bounties that apply to their residences.

- While many northern states take the position that a person has not really left until they have just about completely deserted the state, Florida law recognizes the residency of someone who moves here and intends to make Florida their primary place of abode.

# BECOMING A FLORIDIAN (Continued)

There are many steps that can be taken to help prove that Florida is an individual's primary residence, including:

1. Have a great moving in party and invite your tax advisors – open bar preferred;
2. File for the Florida homestead property tax exemption
3. Execute a new Florida Will and restate or amend trust documents;
4. Refer to Florida residence in all estate planning documents;
5. Register to vote in Florida, and then actually vote;
6. File a federal income tax return with the IRS at the location applicable to Florida residents (Austin, TX if no payment is enclosed, or Charlotte, NC if payment is enclosed);
7. Change the address on your passport;
8. Obtain a Florida's driver's license and license plates;
9. Open a Florida bank account;
10. Send announcement cards and let everyone know that you moved to Florida;
11. Have your car insurance; homeowner's insurance, and other coverages show that you are a Florida resident;
12. Have your church, synagogue, and similar affiliations in Florida; and
13. Make sure that everyone sends all of your mail and other items to Florida, for at least most of the year.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

An out-of-state lawyer can practice occasionally in Florida, when the lawyer:

a. Does not have an office or purport to have an office in Florida.

b. Does not advertise for clients in Florida

c. Services clients who have sought the lawyer out from Florida or were clients of the lawyer before moving to Florida.

d. See next page.

# UNAUTHORIZED PRACTICE OF LAW – CAN YOU ADVISE FLORIDIANS IN THE FIRST PLACE?

Most lawyers licensed outside of Florida can perform services that either:

(a) "arise out of or are reasonably related to the lawyer's practice in the jurisdiction in which the lawyer is admitted to practice" or
(b) "are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice"

As long as the non-Florida lawyer does not:

(1) establish an office or other regular presence in Florida for the practice of law,
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice in Florida, or
(3) appear in court or before an administrative agency unless authorized to do so by the applicable tribunal.

In addition, non-Florida lawyers may provide legal services on a temporary basis in Florida in association with a Florida admitted-lawyer who actively participates.

# What Happens if An Out of State Domiciliary Dies Owning Real Estate in Florida?

- A probate proceeding will be necessary in Florida to cause the property to pass to the non-domiciliary decedent's heirs.

- Florida law permits a probate proceeding to be commenced in any county in the State where the decedent owned property if the decedent was not domiciled. Depending on the value of the property subject to the Florida probate administration, the Florida probate proceeding generally can be one of the two types of procedures:

  (1) A Summary Administration, which is available if the decedent has been deceased for more than two (2) years or if the value of all assets subject to the proceeding that are not exempt from the decedent's creditors (such as homestead) is less than $75,000; or

  (2) A Formal Administration, which provides for the appointment of a Personal Representative and requires that certain formalities are satisfied as part of the probate proceeding.

  A summary administration does **NOT** appoint a Personal Representative.

# What the Heck is an Ancillary Probate?

- Estates of non-Florida domiciliaries who own property in Florida may consider opening an ancillary probate proceeding, which is available where a probate proceeding is already opened in the domiciliary state.

- For example, if the decedent dies as a resident of New Jersey and a probate proceeding is opened for her estate in New Jersey, and the decedent owns property in Florida in her name individually, then an ancillary probate proceeding can be opened in Florida to probate the Florida real estate.

- An ancillary probate proceeding is a more streamlined proceeding that allows for the probate of the decedent's Florida property without the necessity of complying with certain requirements that would otherwise apply under a domiciliary probate.

- An ancillary probate may be a formal probate administration or a summary administration.

# What is Required for an Ancillary Probate Proceeding?

- In order to commence an ancillary probate in Florida, the following documents and information is required:

  (1) The name of the decedent, the date of death and a copy of the death certificate to start the paperwork. We also will need the address of the Florida property that is subject to probate.

  (2) Original or certified death certificate to be filed with the Clerk. If the death certificate was issued by the State of Florida, it must be the "short form" version that does not show the cause of death.

  (3) Certified or authenticated copies of the documents that have been filed in the probate proceeding in another state. Specifically, original certified or authenticated copies of the petition commencing the administration and the documents that appoint the domiciliary personal representative are required.

# What is Required for an Ancillary Probate Proceeding? (continued)

(4) The original Will to be deposited with the Clerk, along with any Codicils. If the original Will is not available, then certified or authenticated copies will be sufficient.

(5) The Personal Representative's / Petitioner's home address, mailing address, phone number, date of birth and social security number.

(6) The names, addresses and dates of birth (if minors) of all beneficiaries and interested persons. This will include any of the decedent's children that may have predeceased them.

(7) A copy of the Living Trust, if one exists.

(8) A list of any known creditors including their name, address, amount of debt and account number.

# What is Required for an Ancillary Probate Proceeding? (continued)

(9) A list of all assets and how they are titled. This includes vehicles (year, make, model, VIN #), the addresses of all properties owned, bank accounts and all other financial accounts. It would be helpful to receive the first page of account statements, but at a minimum, we will need the dollar amount and account number.

(10) A copy of the paid funeral bill.

(11) The location of domicile of the decedent.

# How to Avoid Florida Probate Proceeding

- Use a Living Trust Agreement to own the property so that the assets can pass outside of probate.

- Place the property into a limited liability company or other entity. Ownership in the entity is considered to be personal property that passes pursuant to the laws of the individual's domicile, and a Florida probate would not be necessary to pass ownership of the property upon the decedent's death.

- Use life estate or lady bird deeds. These types of deeds generally provide for the decedent to retain the lifetime right to reside o the property, and provide for the remainder interest in the property to pass to the intended beneficiaries as set forth in the deed.

# QUALIFICATION TO SERVE AS PERSONAL REPRESENTATIVE

A personal representative appointed by a Court to administer an estate may be a licensed trust company, a Florida resident, or a nonresident relative of the decedent. Nonresident relatives can include: (1) A legally adopted child or adoptive parent of the decedent; (2) A person related by lineal consanguinity to the decedent; (3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or (4) The spouse of a person otherwise qualified. Pursuant to Florida Statute Section 733.302, any person who is sui juris and a resident in Florida at the time of death is qualified to act as a personal representative. Exceptions to this general statement include people convicted of a felony, a minor, a mentally or physically incapacitated individual, and an out-of-state resident not related to the decedent.

The same limitations apply to who can be appointed as a guardian for an incapacitated Floridian, but no such limitations apply to living trusts or financial or health care powers of attorney. Clients will therefore often create a simple “pour-over” Will with a Florida resident, relative, or trust company to act as personal representative, with all estate assets to pass to the trustee or trustees of a revocable trust who may be non-Florida residents and can receive the estate assets and facilitate administration, division, and distribution without court oversight.

# LADY BIRD DEEDS

"Lady Bird Deeds" are also known as "Contingent Remainder Deeds" and involve the Grantor retaining the right to reside on the subject real estate for his or her lifetime, and also the power of the Grantor to revoke the conveyance of the remainder interest by subsequent deed.

Lady Bird Deeds are recognized in Florida, and can be a useful tool to avoid probate upon the death of a single individual. These types of deeds are also widely used in elder law planning and Medicaid eligibility.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

1. Florida has no individual, Trust or S corporation income tax or tax filing requirements.
2. Florida C corporations pay an income tax based upon approximately 5.5% of taxable income, which is deductible on the corporate return so that the total tax rate is approximately 25.895%.
3. Florida does impose unemployment taxes and Worker's Compensation insurance requirements, but not on income that passes by K-1 ownership to a working shareholder or partner.
4. Florida imposes a sales tax on any commercial rental, and also on any residential rental that is for more than six months based upon 5.5% at the state level and between one-half percent (0.5%) and two percent (2%) at the county level. For most counties this totals approximately 6.5%.
5. Florida is not a community property state. The only community property owned by a Florida couple will be community property that they brought with them from a community property state, or property that might be designated as community property by use of an Alaska, Tennessee, Kentucky, or Florida Community Property Trust.

# FLORIDA TAX LAW

- No Individual, Partnership, S Corporation, or Trust Income Taxes – or Tax Returns! Move to Florida and have your S-corporation here, but manage your companies that operate elsewhere.
- No Inheritance or Estate Taxes
- C Corporation 5.5% Income Tax (79% of 5.5% is 4.345%. 4.345% + 21% is 25.345%.)
- Tangible Taxes
- Unemployment Tax
- Workers' Compensation
- Sales taxes (most counties add 1%)
- Sales tax compulsory on the transfer of a car or boat to a company.
- Property taxes

# FLORIDA TAX LAW (continued)

- Sales Tax on Rent – 5.8% by state and 1% by most counties – 63% of 6.8% is 4.284% effective cost for high bracket tenant.

  Consider saving 20% under 199A x 37% is 7.4%. 7.4% - 3.5% = 3.9%.

  - 3.8% tax issue.
  - Does the client have to pay rent? Can he pay minimal rent and file a sales tax return?
  - Passive loss issue.
  - Treasury Regulation Section 1.469-4(c)(2)- exception for commonly held entities. See *Williams v. C.I.R.,* 109 T.C.M. (CCH) 1398 (T.C. 2015).

- Sales Tax on the Sale of Tangible Assets and Rentals
  - Isolated sale exception- Business broker involvement can cause a sales tax to apply when businesses are sold.

# DOCUMENTARY STAMP TAXES

- Documentary Stamp Tax on Deeds – 7/10 of 1% of consideration paid in all counties except Miami-Dade (.6% in Miami-Dade, plus a .45% surtax on transfers that are not single-family residences)
    - Applies to real property transfers, with certain exceptions, and also various traps
- Documentary Stamp Tax applicable to notes/mortgages:
    - Promissory notes and other written obligations to pay money, or assignments of salaries, wages, or other compensation where there is no mortgage (taxed at .35%; taxation is limited for these to $2,450)
    - Signing notes outside of Florida territorial waters (more than 9 miles out) can be popular and tax-deductible.
    - Documentary stamp taxes on mortgages are taxed at .35% (stamp taxation of mortgages has no limit); and mortgages on Florida real property are also subject to a non-recurring intangible tax of .2% of the amount of the underlying debt that is attributable to the Florida property.
    - Only applies to documents executed and delivered in Florida
    - Trap 1 – deed from joint to one spouse will trigger tax equal to ½ of the mortgage balance times .007.
    - Trap 2 – deed subject to mortgage exceeding the value of the property may be taxed based on the mortgage balance.

# How to Avoid Documentary Sales Tax When Client Borrows Money

Option 1: Using Agents

Step 1 - Mail promissory note to an agent for the borrower
Step 2 - Agent for the borrower signs the note on behalf of the borrower outside of Florida
Step 3 - Agent for the borrower delivers note to an agent for the lender outside of Florida
Step 4 - Agent for the lender signs the note and mails it back to Florida
Step 5 - This avoids the documentary stamp tax, unless there is a mortgage on real estate

Option 2: Airport Charter Service

The St. Petersburg Airport has a charter service. For $260, a pilot will fly you 10 miles out over non-territorial waters and attest to you signing the note outside of territorial waters.

# How to Avoid Documentary Sales Tax When Client Borrows Money

For a family loan against house or building w/ no mortgage:

- Put the property in a land trust ("Illinois land trust")
- Give the lender a security interest
- File UCC Financing Statement

Additionally:

- If you file a "Statement of Authority," the trustee of the land trust won't be able to convey title without consent of the lender

- Stays off public record except for "…before this property can be sold, (Lender) has to approve it."
- Creditor protection

# DOCUMENTARY STAMP TAXES

- Documentary Stamp Tax rates:

| Start date | End date | Tax rate | Ratio |
|---|---|---|---|
| January 1, 1931 | June 30, 1957 | .1% | 1.001 |
| July 1, 1957 | June 30, 1963 | .2% | 1.002 |
| July 1, 1963 | September 30, 1979 | .3% | 1.003 |
| October 1, 1979 | June 30, 1981 | .4% | 1.004 |
| July 1, 1981 | June 30, 1985 | .45% | 1.0045 |
| July 1, 1985 | June 30, 1987 | .5% | 1.005 |
| July 1, 1987 | May 31, 1991 | .55% | 1.0055 |
| June 1, 1991 | July 31, 1992 | .6% | 1.006 |
| August 1, 1992 | present | .7% | 1.007 |

- In order to calculate how much a person paid in documentary stamp taxes:
  - Find the rate of the stamp tax using the table above for when the deed was transferred (i.e. in July 1991, .6%)
  - Divide the amount paid in total by the ratio of the corresponding tax rate ($100,600 / 1.006 = $100,000)
  - Subtract the resulting number (the interest) from the original value (the interest plus taxes) for the amount paid in documentary stamp taxes for the transfer of interest in real property ($100,600 - $100,000 = $600)

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

6. Florida has unlimited creditor protection for annuity contracts, the cash value of permanent life insurance contracts, IRAs, pension accounts, 529 plans, and also homestead that qualifies within the acreage limitations (up to half-an-acre within the city limits and up to 160 acres outside of the city limits).

   - A last-minute transfer into homestead to avoid creditors cannot be set aside because the Florida Constitution trumps the Four-Year Florida Fraudulent Transfer Statute. Welcome OJ Simpson.
   - The 2005 Bankruptcy Act responded to the above by providing that anything over $125,000 (as indexed for CPI each 3 years since 2005)($189,050 for 2023) put into the homestead within the ten years before filing bankruptcy for the purpose of avoiding a creditor can be set aside in bankruptcy, and also requiring that Florida law will not apply in bankruptcy unless the debtor has lived in Florida for 730 consecutive days (if he or she moves here), and that to be protected the homestead has to be owned 1,215 days (notwithstanding that the property was not the homestead of the debtor for the entire 1,215 days).
   - Moral of the story – high risk individuals who plan to live in Florida may want to purchase a future homestead and hold it as tenants by the entireties until they move to Florida. They can rent it out as an Airbnb or otherwise use or lease it until then.

| CREDITOR EXEMPT ASSETS | ASSETS THAT ARE DIFFICULT FOR A CREDITOR TO OBTAIN | ASSETS EXPOSED TO CREDITORS |
|---|---|---|
| Homestead<br>*-Up to half acre if within city limits.*<br>*-May be immune from fraudulent transfer statute.* | Limited partnership and similar entity interests. | Individual money and brokerage accounts. |
| IRA<br>*-Includes ROTH, Rollover, and Voluntary IRAs, but possibly not inherited IRAs.* | Foreign trusts and companies. | Joint assets where both spouses owe money. |
| Permanent Life Insurance<br>*-Must be owned by insured.* | Note – foreign entities are very rarely recommended and must be reported to IRS – | Personal physical assets, including car, except for $4,000 exemption ($1,000 if homestead exemption is claimed in bankruptcy). |
| 401(k)<br>*-Maximize these!* | Foreign bank accounts. | One-half of any joint assets not TBE where one spouse owes money. |
| Tenancy by the Entireties (joint where only one spouse is obligated)<br>*- Must be properly and specially titled – joint with right of survivorship may not qualify.* | <u>Vocabulary:</u><br>**EXEMPT ASSET** – An asset that a creditor cannot reach by reason of Florida law – protects Florida residents.<br>**CHARGING ORDER PROTECTION –** The creditor of a partner in a limited partnership, limited liability limited partnership, or properly drafted LLC can only receive distributions as and when they would be paid to the partner.<br>**FRAUDULENT TRANSFER** – Defined as a transfer made for the purpose of avoiding a creditor. Florida has a 4 year reach back statute on fraudulent transfers. A fraudulent transfer into the homestead may not be set aside unless the debtor is in bankruptcy. It takes 3 creditors of a debtor who has 12 or more creditors to force a bankruptcy.<br>Upon filing a Chapter 7 Bankruptcy, an individual debtor may be able to cancel all debts owed and keep exempt assets, subject to certain exemptions.<br>Annuities and life insurance policies are not always good investments, and can be subject to sales charges and administrative fees.<br>There is a lot more to know- but this chart may be a good first step. | |
| 529 College Savings Plans | | |
| Annuity Contracts | | |
| Wages of Head-of-Household | | |
| Wage Accounts (for 6 months) | | |
| Up to $4,000 of personal assets – or possibly less in bankruptcy. | | |
| | | |
| | | |

# HOMESTEAD CREDITOR PROTECTION

- In Florida, there is unlimited protection for homestead property and improvements thereon of up to one half-acre in the city or 160 acres in the county, provided the owner is an individual (or perhaps a revocable trust) who resides legally and permanently on the property and is a U.S. citizen or Green Card holder.

  See *Davis v. Davis* Fla. 1st DCA 2003 case that decided that acreage in the county could be used for business without loss of homestead exemption, and Bankruptcy Court case of *In re Radtke, 2006, which held otherwise, and observed that the Florida Supreme Court has not opined on this issue.*

- The person must be a permanent resident of Florida and intend to make the property his or her permanent residence.

- Need not qualify for real estate homestead tax exemption to have the benefit of Constitutional creditor protection.

- Florida homestead protection "trumps" fraudulent transfer statutes (*Havoco of America, Ltd. v. Hill)*

- Beware of bankruptcy law limitations and the ten-year fraudulent transfer look-back period, and the other bankruptcy rules described on the next slide.

- It is optional to file an Affidavit of Homestead under Florida Statutes which is an evidentiary instrument.

# WHAT ELSE CAN YOU HAVE ON YOUR CREDITOR-PROTECTED HOMESTEAD BESIDES YOUR HOME?

**Over Half An Acre Within City Limits – Separate Ownership**

Outside City Limits:

- Property *can* qualify for homestead exemption even where the property for residency of the debtor is used for substantial and independent business activities.
- Many cases are favorable to debtors – including mobile home parks on the property, warehouses, and rental units. But not all cases have the same favorable results.

Inside City Limits:

- The law is not as flexible for debtors with dual-purpose homestead properties that are within city limits, and can be very fact-specific.
- A 2007 Bankruptcy Court opinion issued by Judge Isicoff found that while the constitution protects homestead, it limits the protection to the "residence of the owner or his family" and this protection would only apply to structures in which a member of the family resides.
    - Must own the property 1,215 days.
    - Must reside on the property 730 days.
    - Can convert one homestead into another under these rules.

# NOT TO BE CONFUSED

| | STATE HOMESTEAD TAX EXEMPTION | | STATE CREDITOR EXEMPTION |
|---|---|---|---|
| 1 | **WHAT IS IT?**<br>Saves approximately $1,000 of taxes (2% of $50,000), plus the 3% cap on future increases applies. | 1 | **PROVIDES PROTECTION FROM CREDITORS** |
| 2 | **HOW TO QUALIFY?**<br>Normally, one or more individuals reside on the property and call it their homestead. There is no size limit. | 2 | **MUST BE RESIDENTIAL HOMESTEAD PROPERTY WHERE THE OWNER LIVES AS PRIMARY RESIDENCE.**<br>The law only protects up to half an acre if within city limits, and up to 160-acres if outside of city limits (or if was outside of city limits and was annexed while primary residence). |
| 3. | **REGISTRATION REQUIREMENTS.**<br>**Must reside on the property when the bell strikes January 1st (have to move in before New Years).<br>**Must register with Property Appraiser Office by March 1st of the following year.<br>**Homestead tax status begins the January 1st after the move-in, if the March 1st registration deadline is met. | 3 | **NO REGISTRATION REQUIREMENTS AND NO DEADLINES FOR MOVING IN – PROTECTED FROM THE MOMENT OWNED (EXCEPT AS TO A JUDGMENT AGAINST THE PROPERTY THAT EXISTED BEFORE IT WAS "HOMESTEADED.")** |

# BUYING THE HOUSE OR CONDO NEXT DOOR?

- An adjoining vacant lot may not be considered homestead where it has not been used or considered by logistics and fencing, etc., to be part of the homestead estate. This was the result in *In re: Estate of Ritter*, 407, So. 2d 386 (Fla. Dist. Ct. App. 3d Dist. 1981) where the property in question was never jointly fenced with the residents and was merely a separate, empty lot which served, at best, as an excess side yard to the residence.

- When clients buy adjoining homes, they will be well-advised to make sure that there are no fences between the homes and to build pathways, integrated use, and coordinated appearance from the road and otherwise to promote the concept that the two separate houses are a single homestead. The second house may be referred to as a storage/exercise/guest house.

# The 30-Day Rental exception for florida's homestead tax law

- The homestead owner can rent out a home for up to thirty days each calendar year without losing the homestead exemption under Florida Statute Section 196.061, which was enacted effective July 1, 2013.

- The question of whether to convert a primary or vacation home into rental property in order to be able to deduct the real estate taxes without the $13,850 for a single person, or $27,700 for a married couple, itemized deduction limitation, or the $10,000 limitation on property taxes enacted under the Tax Reform Act of 2017 will cause many Florida homeowners to convert houses to rental status.

# BANKRUPTCY LAW LIMITATIONS / LOOKBACK PERIOD

- Remember the 2005 Bankruptcy Act 1,215 day ownership rule and 730 day occupancy rule – homestead is only protected in bankruptcy for up to $189,050 per debtor if it has not been owned for 1,215 days and occupied for 720 days before filing.

- Also, there is a 10 year look back on fraudulent transfers into a homestead once the debtor is in bankruptcy. Stay out of bankruptcy by having at least 12 creditors.  If the debtor has 12 creditors it takes 3 of them to force the debtor into bankruptcy.

# Bifani Case Expands Definition of Ill Gotten Gains That May Not be Protected If Transferred to Homestead

**Way Down Upon the Bifani River: Setting Aside Fraudulent Transfer into Florida Homesteads- By: Alan S. Gassman, Travis Arango, and Dena Daniels**

**Debtor's Transferee Who Received Pre Bankruptcy Fraudulent Transfer Ends Up All Wet**

Footnote from Editor--The Suwannee River is a 246 mile blackwater river that can take you much of the way from the Tampa Bankruptcy Court to the 11th Circuit Court of Appeal in Atlanta, which is where this case went before the debtor's raft sank. Made famous by Stephen Foster's song, The Old Folks at Home (Foster never saw the river but read about it), Mr. Gassman owns two lots on this river that he bought in 2007 and would gladly sell for half of what he paid, and no extra charge for the alligators who live there. See Way Down Upon The Suwannee River Far Away, LLC on the Sunbiz Website, and also Hey Santa Fey (river), LLC and Withlacoochiecoochicoo, LLC., which own his other failed river investments.

This article is dedicated to the memory of Joan Rivers, who performed in Tampa Bay shortly before her death at age 81 with great energy and physical strength, like many of us who love what we do and intend to die in the saddle.

The Florida Supreme Court, in *Havoco of America, Ltd. v. Hill,* 790 So.2 d 1018 (Fla. 2001), held that the homestead protection afforded under the Florida Constitution trumps the Florida Fraudulent Transfer Statute, and therefore a debtor subject to an impending or actual judgment can use monies to purchase or pay down the mortgage on a homestead owned by the transferor, with the creditor having no remedy against the homestead unless or until the debtor files for bankruptcy by reason of the provisions of the 2005 Bankruptcy Reform Act "Mansion Law".

But what if the debtor, knowing that he or she may be going into bankruptcy, gives the monies to a close friend who puts them into a homestead and then intends to hunker down and remain judgment proof, and outside of bankruptcy, so that the creditor is not able to recover the funds? And the debtor is able to live with the close friend and enjoy the benefit of the home. Will this boat float?

This exact factual pattern has occurred more than once, leading the courts to look for a way to reach the home equity and prevent this type of conduct, as opposed to waiting for Congress to endorse an appropriate remedy by amending the Bankruptcy Code.

Judge Michael Williamson, a very able and well-respected bankruptcy judge of the Middle District Bankruptcy Court sitting in Tampa, came to the conclusion in 2013 that a fraudulent transfer, directly or indirectly, to the debtor's cohabiting and apparent significant other before filing bankruptcy rose (like a river) to the level of being considered as secretion of "ill-gotten gains" under the Florida case law, saying specifically that:

> **Here, LaMarca's Sarasota house was acquired with ill-gotten proceeds. LaMarca used the nearly $670,000 from the sale of the Golden Eagle Road property to purchase her Sarasota house. It would be inequitable and unjust to allow the Debtor (Bifani to fraudulently transfer property to LaMarca to keep it from his creditors. [**In re Bifani, 493 B.R. 866, 871 (Bankr. M.D. Fla. 2013)]

# Bifani Case Expands Definition of Ill Gotten Gains That May Not be Protected If Transferred to Homestead

The Federal District Court sitting in Tampa found that the decision did not hold water, and overturned it, but the Eleventh Circuit Court of Appeal agreed with the judge, finding that:

> **Under Florida law, homestead property purchased with funds obtained by fraud is not exempted from equitable liens. *See Havoco,* 790 So.2d at 1028. The facts of this case do not fall within *Havoco* 's exception because the funds used to purchase the Sarasota property were obtained through Bifani's fraudulent transfers.....That the fraud occurred in a bankruptcy proceeding rather than a criminal offense is irrelevant.**

It is almost certain that the U.S. Supreme Court will not have any interest in hearing this case, and the Florida Supreme Court will not have jurisdiction because bankruptcy court cases pass to the federal system, and not under the state system. The Eleventh Circuit Court of Appeals could have requested guidance from the Florida Supreme Court by certifying the issue as a question of importance but apparently chose not to do so. Floridians and their advisors will now most likely need to wait a number of years before similar factual patterns occur in Circuit Courts and become subject to Circuit Court decisions that are appealed to District Courts of Appeals, and then eventually to the Florida Supreme Court.

A prominent bankruptcy attorney has had this to say about the case:

> **If you think it through, the whole idea of getting around the federal Bankruptcy law by doing something through an apparent straw man that you cannot do directly, you can certainly conclude that at least the spirit of the 2005 Bankruptcy Act was violated. That doesn't really shock me. If you're going to try to take advantage of the Florida homestead law, you need to follow the centuries old method of buying your own house, and if this is a fraudulent transfer you also have to stay out of bankruptcy for 10 years thereafter. It's not escaping taxes or domestic relations liability, it's not money you stole from somebody else, but a well respected bankruptcy judge, with affirmation from the highest federal court overseeing Florida federal courts have found that it is the equivalent of transferring ill-gotten gains into homestead. Debtors and advisors are going to have to stick with the patterns that worked, at least for the foreseeable future. It could be a decade or more before the Florida Supreme Court or the U.S. Supreme Court ever look at this.** In re Bifani, 580 F. App'x 740, 747 (11th Cir. 2014)

Judge Williamson had this to say after the 11th Circuit Court of Appeals opinion was published:

> **While *Havoco* attracts the most attention in allowing a fraudulent conversion of non-exempt property into a homestead, what is often overlooked is that *Havoco* itself recognizes the *Fishbein* exception, 619 So. 2d 267 (Fla. 1993), which allows the imposition of an equitable lien where there are two frauds: (1) the permitted fraudulent conversion into the homestead, and (2) the initial wrongful conduct that taints the proceeds as being ill-gotten, e.g. the funds were stolen or obtained through fraud. The 11th Circuit in *Bifani* simply confirms what has long been the law in this area.**

While this case may be criticized by some as being judicial legislation, and may add to the longstanding misconception among some courts and advisors that a fraudulent transfer somehow constitutes fraud and is therefore bad or per se illegal, it also shows that conventional knowledge will sometimes be turned on its ear, without warning, and that clients and advisors should not rely upon any one creditor protection technique, or any particularly creative or aggressive one, when multiple techniques are available. Also, as we all know, hogs are often slaughtered.

In *Havoco,* the Florida Supreme Court found that an intentionally fraudulent transfer into homestead would not be set aside because the protection of homestead under the Florida Constitution trumps the Florida Fraudulent Transfer Statute. In *Fishbein*, however, the Florida Supreme Court found that when ill-gotten monies are transferred into homestead, the transfer can be set aside. In *Bifani,* the 11th Circuit agreed with Judge Williamson that a fraudulent transfer made by someone contemplating bankruptcy will be considered as ill-gotten gains for purposes of recapturing the transfer from the homestead of the transferee that was funded thereby.

# PROTECTING THE PROCEEDS FROM THE SALE OF A HOMESTEAD FROM CREDITORS

- FROM HOMESTEAD SALE DIRECTLY INTO A NEW REPLACEMENT HOMESTEAD – Florida law will allow the proceeds of a sale of homestead to be held in a specially labeled account, and then invested in a new homestead within a reasonable period of time with continued protection.

- FROM HOMESTEAD TO OTHER EXEMPT ASSETS – Unfortunately, homestead is the one exempt asset that cannot be transferred into another type of exempt asset due to an error by the Florida Supreme Court.

- However, it is permissible to borrow on a protected homestead and transfer the proceeds to another exempt asset without this being considered to be a fraudulent transfer.

# UNIQUE Aspects of HOMESTEAD Planning

- Separate homesteads for separated spouses (but for tax exemption purposes, counties will require separate income tax returns, and that each spouse is separately supporting himself or herself).

- Mobile homes, houseboats, and other unique structures may qualify for the homestead exemption if permanently affixed to the land.

- Placing part ownership of homestead in the name of someone who occupies it should prevent a forced sale, as long as the co-owner resides there.

- Please note that a contractor providing labor or materials to improve or repair a homestead may file a lien against the homestead and enforce the lien by filing a lawsuit within one year of the lien being filed, and prevailing in the lawsuit. Many Florida homeowners end up in litigation with their contractors – **homestead owner beware!**

# REAL ESTATE AD VALOREM TAXES

- Annual ad valorem tax rate is just under 2% of “appraised value”, with a $50,000 exemption (a proposal to raise this exemption is on the ballot for November) for homestead and a 3% or CPI (whichever is lower) annual cap on increases.
    - Portability of the 3% or CPI cap is allowed.
    - Many issues can arise on homestead exemption planning with trusts and joint non-spouse owners and in other situations.
- To qualify for tax homestead exemption, the client must own the property and reside on it at 12:00 am January 1, and a special homestead exemption application must be filed with the county property appraiser on or before March 1.
- Many counties require the actual homeowners to physically appear to sign the registration materials under penalty of perjury – do not commit a felony by taking homestead exemption in two states at the same time.

# PORTABILITY OF THE HOMESTEAD TAX EXEMPTION

Homestead property owners are able to transfer their Save Our Homes benefit, up to $500,000, to a new homestead within the two years of giving up their previous homestead. This is called portability. When a homestead having the 3% cap advantage is sold, then the owner has until the second tax year following the year of sale to declare a homestead that will receive the differential advantage.

# HOMESTEAD TAX PROTECTION AND PLANNING

- For some clients it is important to make sure that the Homestead tax exemption (up to $50,000) and the 3% cap per year or the Consumer Price Index, whichever is less, on valuation increases for property tax purposes will be available.

- It is possible for the homestead to be owned by an irrevocable trust for the beneficial interest of one party while receiving the homestead exemption attributable to the home being resided upon by another party who signs a ninety-nine (99) year lease on the property.

# Pinellas County Property Appraiser Portability Example

## Former Homestead

| | |
|---|---|
| Just Value/Market Value | $162,000 |
| Assessed Value | $104,000 |
| Taxable Value | $ 54,000 |
| Taxes (Avg 20 mills and $50,000 homestead exemption) | $1,175* |

*Cap Value $58,000*
*($162,000 - $104,000)*

## Formula:

**Save Our Homes (SOH) Cap Value** = Just/Market Value - Assessed Value

**Taxable Value** = Assessed Value - 50,000*

**Taxes** = Taxable Value x Millage rate (for this example we use 20 mills)

*The additional $25,000 exemption is applied to the assessed value between $50,000 and $75,000. It does not apply to school taxes, so those taxes ($25,000 x .007009 = $175) would be added back in to the final tax amount.

## UPSIZING
## to a home with a Just Value of $300,000

| | | | |
|---|---|---|---|
| $300,000 - ($162,000 - $104,000) | = | $242,000 | (New Assessed Value) |
| $242,000 - $50,000 Exemption* | = | $192,000 | (Taxable Value) |
| Taxes (Avg 20 Mills) | = | $ 4,015* | |

*Cap Value $58,000*
*(previous home's just value - previous home's assessed value)*

## If you move to a higher valued home:
(Keep the Value of the Cap)

**New Assessed Value** =
(Just Value of new home - Save Our Homes Benefit of old home) - $50,000

**New Taxable Value** = New Assessed Value - Exemption

**New Estimated Taxes** = (New Taxable Value x Millage Rate) + School Taxes*

## DOWNSIZING
## to a home with a Just Value of $125,000

| | | | |
|---|---|---|---|
| (125,000 / $162,000) x Old Assessed Value | | = | $ 80,247 |
| $80,247 - $50,000 Exemption* | Taxable Value | = | $ 30,247 |
| Taxes (Avg 20 mills) | | = | $ 780* |

*Cap Value $44,753* *($125,000 - $80,247)*

## If you move to a lower valued home:
(Take Cap Percentage)

**New Assessed Value** =
(Just Value of New Home / Just Value of Old Home) x Assessed Value of Old Home

**New Taxable Value** =
(New Assessed Value - Exemptions)

**New Estimated Taxes** =
(New Taxable Value x Millage Rate) + School Taxes*

# THREE WAYS TO GET THE HOMESTEAD TAX EXEMPTION WITHOUT OWNING THE HOUSE

1. Resident is the beneficiary of a trust that provides her with the right to reside on the trust property as if it were homestead.

2. Resident has use under a 98-year – or longer – lease.

   NOTE: A leasehold estate may qualify for homestead creditor protection.

3. Resident has a life estate in the homestead.

- Send the draft document to property appraiser/lawyer thereof to confirm whether it will qualify for the exemption
- Must only qualify on January 1st and the exemption will apply for the rest of the year

# Make Sure To Have Appropriate Language In Your Trust That Will Own Homestead Property

The following language applies to a Trust where the Grantor is the beneficiary and the homestead is owned by the Trust:

Homestead Real Property. I reserve the right to reside on any real property placed in this Trust as my permanent residence during my lifetime. In doing so, I intend to retain the requisite beneficial interest and possessory right in and to such property to comply with Florida Statutes Section 196.041, as amended, so that my retained beneficial interest and possessory interest shall constitute, in all respects, "equitable title" as that term is used in Section 6, Article VII of the Constitution of the State of Florida and applicable statutes. Such use, possession and enjoyment shall be without rent or other financial obligation. Notwithstanding anything herein to the contrary, my interest in any such "homestead" property shall be deemed an interest in real property, not personalty. If the homestead laws of the State of Florida apply, or appear to apply, to cause a disposition of such property in a manner not contemplated under my estate plan, then the Trustee shall have discretion to take such actions as are deemed appropriate by the Trustee in order to compensate for such deviation from my estate plan. With reference to any real estate held under this trust arrangement, I shall be considered the named insured on any liability, casualty, or other insurance policy relating to such real property, as appropriate to facilitate coverage that would typically apply for an owner entity. The preceding sentence has been provided based upon announcements by some insurance carriers in Florida that this type of provision is required to facilitate appropriate coverage.

# Make Sure To Have Appropriate Language In Your Trust That Will Own Homestead Property

The following language (or something similar) will need to be included in any Trust Agreement that is contemplated to own the homestead property of a beneficiary of the Trust:

> Notwithstanding anything to the contrary in paragraphs (1) and (2) above, as to any real estate owned under this Trust which is held in a county in Florida where the Primary Beneficiary resides, and any replacement real estate thereto the Primary Beneficiary shall have all rights of occupancy, use, and possession of such real estate as would apply to the owner of a life estate, as Homestead real estate, and thus shall have all equitable rights to use of such real estate consistent with Section 6, Article VII, of the Florida Constitution and Florida Statute 196.041(2), and as required by any applicable County Property Appraiser to qualify for homestead tax exemption and applicable increase caps and portability unless said Primary Beneficiary elects to the contrary by a written instrument executed.

# HOMESTEAD DISPOSITION/DEVISE LIMITATIONS

- The Florida Constitution prevents a married homeowner from transferring or mortgaging the homestead property without the consent of the owner's spouse, or an appropriate waiver. Consider using an LLC to avoid such requirements.

- The Florida Constitution restricts the devise of the homestead on death if the owner is survived by a spouse or minor child, except that homestead may be devised to the owner's spouse if there is no minor child, or may be owned jointly with right of survivorship with a spouse.

- However, the Florida Constitution does not address how homestead property descends upon the death of the owner of the homestead. The descent of homestead property is controlled by Fla. Stat. 732.401, which now gives the surviving spouse a choice (effective October 1, 2010):

  - a life estate (the right to live there for life) with remainder interest owned by the decedent's descendants; or

  - a 50% tenant in common interest between the spouse and decedent's descendants.

# Spousal Homestead Waivers Through Deed

Section 732.7025, Florida Statutes

Under this new provision a spouse may waive the his/her right to inherit homestead property through the execution of a deed, which would otherwise prevent the devising spouse from devising the homestead property to someone other than the spouse.

This statute requires the following language or substantially similar language to be included in the deed:

> By joining this Deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property devised in this Deed to someone other than me.

This statutory waiver codifies case law which allowed attempts to waive spousal interests in the homestead valid. This waiver language is not a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Additionally, the language is not a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

# OTHER UNIQUE HOMESTEAD STRATEGIES

- Separate homesteads for separated spouses (but for tax exemption purposes, counties will require separate income tax returns, and that each spouse is separately supporting himself or herself).

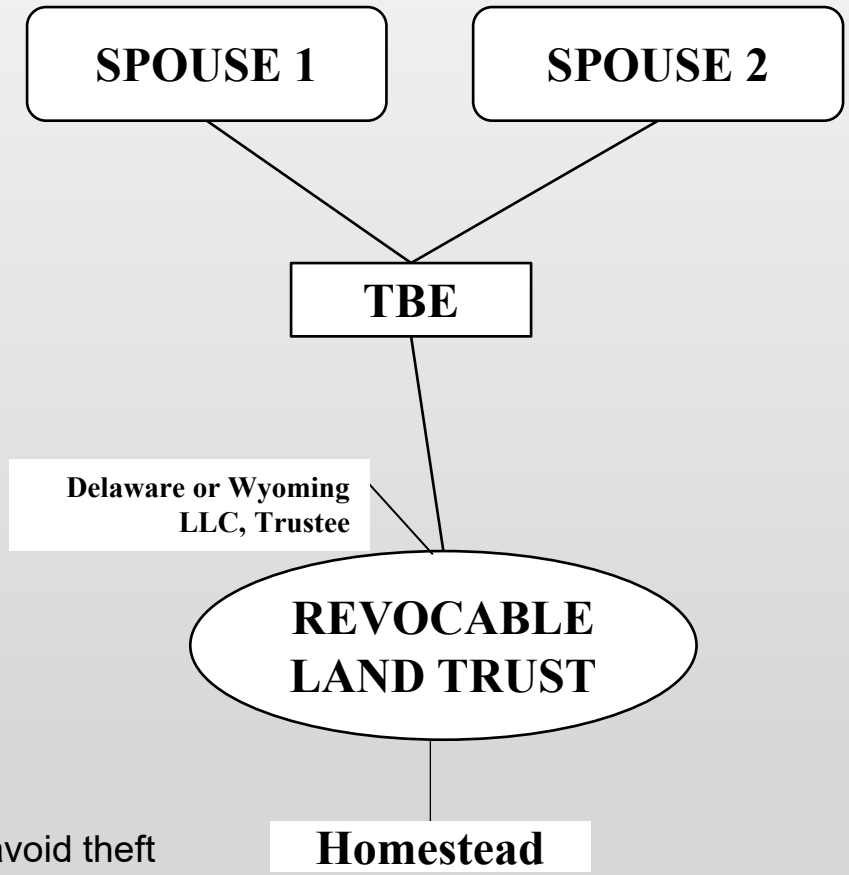
- Mobile homes, houseboats, and other unique homesteads.

- Placing homestead in the name of another.

- Remember the 2005 Bankruptcy Act 1,215 day ownership rule and 730 day occupancy rule – homestead is only protected in bankruptcy for up to $160,375 per debtor if it has not been owned for 1,215 days and occupied for 720 days before filing. (See subsequent slide.)

  Also, there is a 10 year look back on fraudulent transfers into a homestead once the debtor is in bankruptcy. Stay out of bankruptcy by having at least 12 creditors. If the debtor has 12 creditors it takes 3 of them to force the debtor into bankruptcy.

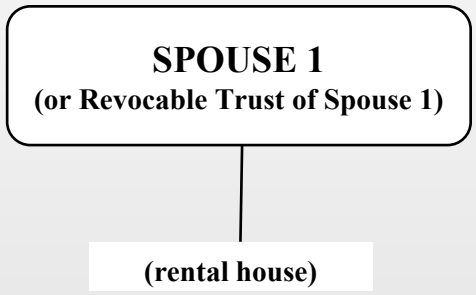
# Homestead Confidentiality



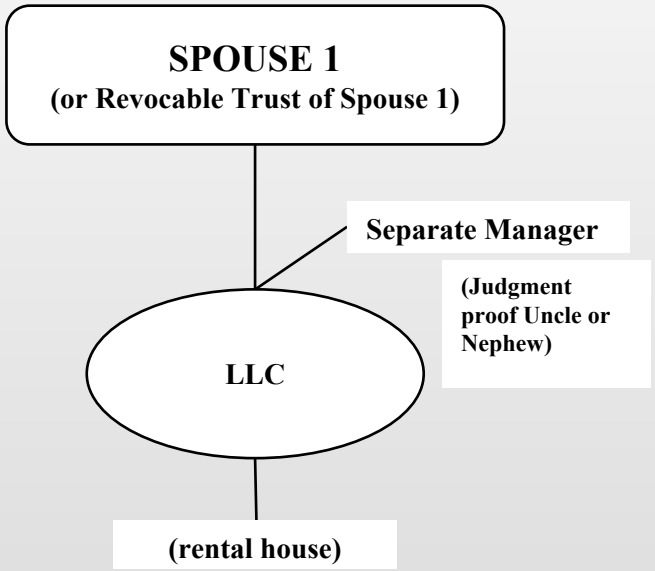

- "Statement of Authority" to avoid theft
- Use SunBiz.org

# Confidential Rental House Ownership Strategies

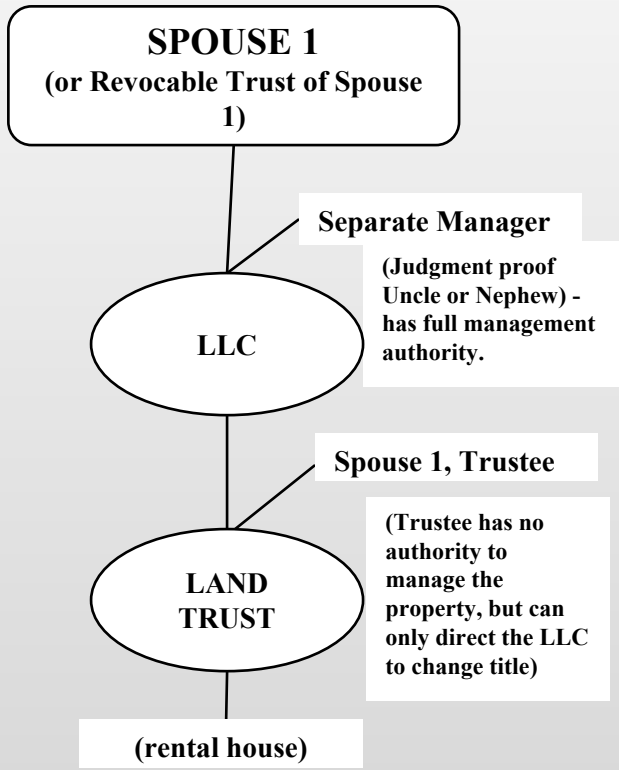
***Rental houses - limiting liability while also qualifying for appropriate insurances.**




- Spouse 1 or Revocable Trust of Spouse 1 owns rental house.
- House can cause creditor problems.

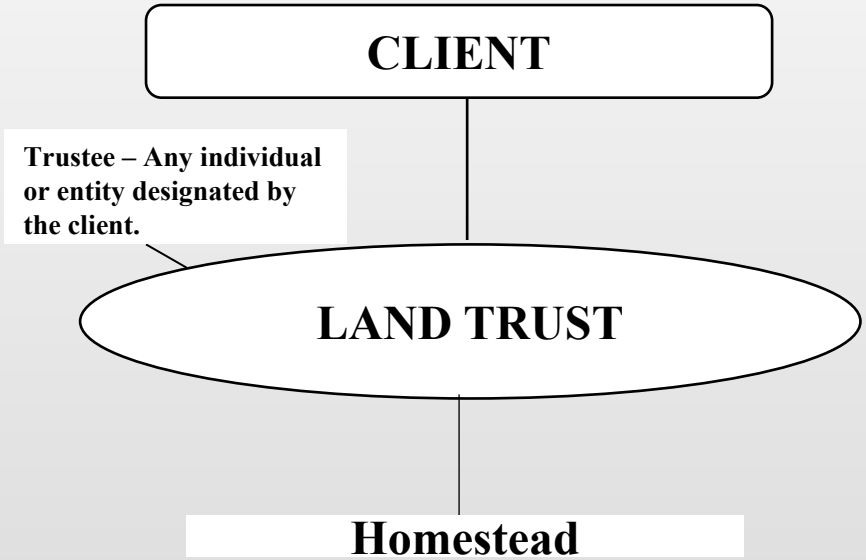



- Should limit liability but good luck getting insurance.




- Some insurance carriers will like this better.

# Land Trust




Beneficial interest can be held by the client or by an entity owned by the client. Additionally, the beneficiary can have the ability to revoke the trust.

Florida law allows real estate to be held under a land trust (also referred to as an “Illinois Land Trust”), in which the beneficial interests are considered to be personal property.

The land trust can provide for flexibility, and it can also provide for confidentiality if an entity (such as a Colorado LLC) is named as Trustee of the Trust.

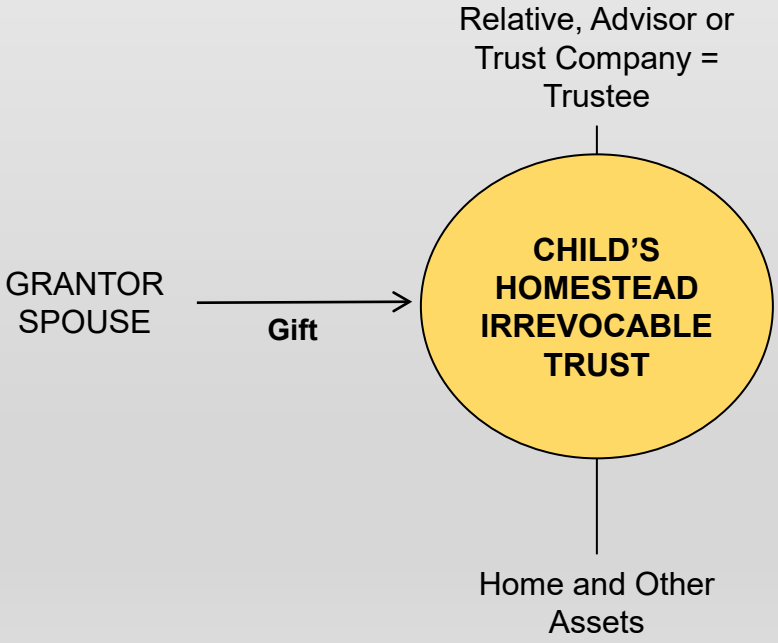
# Land Trust - Continued

Under Florida law, business entities can be converted into a land trust, and a land trust can be converted into a separate business entity. However, any such conversion is treated as a conveyance of any real property held under the entity or land trust for the purposes of Florida documentary stamp tax law.

As stated above, land trusts can be used to avoid documentary stamp taxes where a security interest on a beneficial interest in the land trust is given in lieu of a mortgage on the underlying real estate.

# CHILD'S HOMESTEAD IRREVOCABLE TRUST

- Can own a home used by a child to benefit the spouse and descendants
- Can qualify for the State Homestead Exemption and 3% cap
- Can be considered as owned by the Child for income tax purposes under Internal Revenue Code Section 678 to qualify for the $250,000 income tax exemption on sale
- Can be controlled by the Trustee and used for the benefit of various family members
- Will insulate family members from liabilities associated with ownership of the home




Trust assets can be applied for the health, education, maintenance and support of the Trustee-Spouse and children.

One or more children may reside in the house to qualify for the Florida Tax Homestead Exemption.

For income tax purposes, the Trust can be considered as owned by the child who lives in the house so that the house can be sold income tax free to the extent of up to $250,000 in appreciation.

The Trust will not be subject to creditor claims of any family member unless (1) the transfer to the Trust by the Grantor Spouse is a "fraudulent transfer," or (2) the child has a right to withdraw more than the gift tax exclusion amount in any calendar year.

NOTE – The Trust must be appropriately drafted, funded, and administered to achieve the above results.

# COMPARISON OF METHODS TO PURCHASE HOMES FOR THE CHILDREN

| | $250,000 Exemption on Sale of Home | $50,000 Homestead Exemption and 3% Per Year Cap on Valuation | Divorce | Control | Notes |
|---|---|---|---|---|---|
| Father and Mother loan money to the child. Child purchases and owns home. | Child gets income tax exemption. | Child gets homestead exemption and cap. | Loan will be repaid to parents. Equity may be subject to claim by spouse if this is not waived by Prenuptial Agreement. | Child controls the house. However, we may be able to call the Note to force a sale. | Note: Child gets equity above Note. |
| Father and Mother own the home and the child lives in the house. | No. | Generally no. However, it may be possible to obtain these with a 99-year lease. | Better protected. | Father and Mother control. | |
| Via Child Funded Homestead Bypass Trust. | Child gets income tax exemption. | Child gets homestead exemption and cap. | Better protected. | Friend, relative, advisor or trust company would be Trustee of the Trust and would retain control. | Note: Creditors may be able to get into the Trust. It may be possible for Trustee to transfer the house to the child's individual name in the event of a Creditor issue. |
| Direct Client Funded Homestead Bypass Trust. | No | Child gets homestead exemption and cap. | Better protected. | Mother would be Trustee of the Trust and would retain control. | Note: The $250,000 exemption is lost, but no creditor of the child should be able to get the assets. |
| One-half purchased by child and one-half owned by Father and Mother. | One-half. | One-half. | One-half, better protected. | Each controls one-half. | |

# THE 10% CAP TRAP – NON-HOMESTEAD PROPERTY TAX ASSESSOR ANNUAL LIMITATION ON INCREASING VALUE.

- The Florida Constitution was amended in 2008 to provide non-homestead property owners with protection against substantial increases in their annual property tax assessments.
- The Florida Constitution now prohibits the assessment of certain non-homestead property from increasing by more than 10% per year, except for School Board taxes – in most counties the total tax is approximately 2% of tax assessor value, with the schoolboard taxes constituting approximately 1/3 of that (2/3% schoolboard and 1 1/3% other taxes – it is the 1 1/3% portion that is capped at 10% per year in value increases.
- The two statutes that effectuate the amendment are F.S. 193.1554 (applying to non-homestead residential property) and 193.1555 (applying to other certain residential and nonresidential real property).
- The cap does not apply to agricultural or conservation property or other certain real estate that qualifies for favorable ad valorem tax treatment.

# UNDERSTANDING THE "NONHOMESTEAD RESIDENTIAL PROPERTY" AND "COMMERCIAL" PROPERTY ASSESSMENT LIMITATION STATUTES

**F.S. 193.1554 "Assessment of non-homestead residential property"**

- "Non-homestead residential property" is defined under F.S. 193.1554 to mean any residential property that contains nine or fewer dwelling units, including vacant property zoned and platted for residential use, and that does not receive the Florida Homestead Exemption

**F.S. 193.1555 "Assessment of certain residential and nonresidential real property"**

- "Certain residential property" means residential property with more than nine units; that is non-homesteaded residential property not assessed under F.S. 193.1554
- "Nonresidential real property" is defined under F.S. 193.1555 to mean real property that is not:
  - Agricultural land or land used exclusively for noncommercial recreational purposes
  - Conservation land
  - Tangible personal property held for sale as stock in trade
  - Livestock
  - Property receiving the homestead exemption
  - Residential real property which contains nine dwelling units or fewer.

# COMMERCIAL PROPERTY INCLUDES NON-HOMESTEAD RESIDENTIAL PROPERTY WHICH CONTAINS 10 OR MORE DWELLING UNITS

- 10 or more unit Non-homestead Residential Property = Commercial Property

- Notwithstanding the names “Residential” and “Commercial,” F.S. 193.1555 (applying to commercial property) includes non-homestead residential real property which contains 10 or more dwelling units

# THE 10% CAP TRAP – NON-HOMESTEAD PROPERTY TAX ASSESSOR ANNUAL LIMITATION ON INCREASING VALUE.

- Non-homestead residential property is afforded greater protection from a potential forfeiture of the 10% cap than is commercial property.
- Certain actions by the non-homestead landowner will result in a loss of the 10% cap on assessment such as:
    - Changes in ownership or control
    - Application for the homestead exemption
    - Splitting or combining property during the previous year
    - Improvements to commercial property that increase the value by 25% or more
- The two most common “cap traps” are changes of ownership or control and qualifying improvements.

# THE 10% CAP TRAP – CHANGES OF OWNERSHIP

- A change of ownership or control is defined as “any sale, foreclosure, transfer of legal title or beneficial title in equity to any person, or the cumulative transfer of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value.”
- F.S. 193.1554, relating to non-homestead residential property, excludes the following from being treated as a change of ownership:
    - Transfer of title to correct an error
    - Transfers between legal and equitable title
    - Transfers between married spouses
    - The cumulative transfer of more than 50 percent of the ownership of publicly traded companies if the transfer of the shares occurs through the buying and selling of shares on a public exchange.

# CHANGES OF OWNERSHIP, ADDITIONS, AND IMPROVEMENTS

| Changes that will trigger loss of cap for non-homestead residential property | Changes that will trigger loss of cap for commercial property |
|---|---|
| Sale or Foreclosure | Sale or Foreclosure |
| Transfers to/from an LLC or other entity | Transfers to/from an LLC or other entity |
| A transfer of more than 50% of the entity which owns the property | A transfer of more than 50% of the entity which owns the property |
| | Adding an improvement to the property which increases the value by 25% or more |
| | Transfers between spouses |

*Although improvements to non-homestead residential property will not trigger a loss of the cap, F.S. 193.1554 provides that the improvements (not the entire property) will be assessed at just value on January 1 following substantial completion of the improvements.

# ASSET PROTECTION CHECKLIST – Page 1

| | PROTECTED OWNERSHIP CATEGORIES | NOTES | | LIABILITY INSULATION | NOTES |
|---|---|---|---|---|---|
| 1 | Assets exempt by Florida Constitution, Statute, Common Law or Federal Law. (*Note: The above exceptions do not apply to the IRS, FTC, SEC, or other "Super Creditors", such as the Department of Justice when pursuing RICO perpetrators.)* | | 1 | Make sure housekeeper, in-laws, and all others are covered if they drive your cares or reside in your residence. | |
| 1(a) | Homestead. | | 2 | Car ownership, and which parent signed to be responsible for the driving of a minor. | |
| 1(b) | Tenancy by the entireties. | | 3 | Car driving by children, spouses, employees and others. | |
| 1(c) | Pension and IRA. | | 4 | Firewall protection provided by LLC's, companies and various partnerships (LLP's, LP's and LLLP's). | |
| 1(d) | Life insurance policies. | | 5 | Triple Net Lease language to protect landlord – must give tenant total control of property. | |
| 1(e) | Annuities | | 6 | Managers may get sued. | |
| 1(f) | 529 Plans | | 7 | Delegate to management company. | |
| 1(g) | Disability and Social Security Benefits | | 8 | Guests may sign releases. | |
| 1(h) | Others | | 9 | Independent contractor arrangements. | |
| 2 | Charging Order Protection. | | 10 | Bartenders for personal parties. | |
| 3 | Property owned by others. | | 11 | No guests on wave runners. | |
| 4 | Property sold for Note or annuity payment rights. | | 12 | No alcohol served to anyone under the age of 21. | |
| 5 | Third Party Settled Trusts. | | 13 | Appropriate underlying and umbrella liability insurance – for each property, car, 4-wheeler, etc. But beware of exceptions and illegal situations that will not be covered. | |
| 6 | Self-Settled Trusts in Asset Protection Trust jurisdiction. | | | | |
| 7 | Foreign assets, entities and accounts in jurisdictions that do not recognize U.S. judgments. | | | | |
| | **BUSINESS AND INVESTMENT CONSIDERATIONS** | | | **OTHER CONSIDERATIONS** | |
| 1 | Liability and casualty insurance review, with personal use interaction and business umbrella to be considered. | | 1 | Income and estate tax avoidance – buy a felony to avoid paying IRS taxes or to conspire to help someone avoid such payment – same applies as to debt owed directly to the FDIC and certain other governmental creditors. | |
| 2 | Friendly lenders. | | 2 | Marriage and divorce – ex-spouse cannot invade TBE assets held with new spouse or invade new spouse's interest in a homestead or TBE homestead. | |

# ASSET PROTECTION CHECKLIST – Page 2

| | BUSINESS AND INVESTMENT CONSIDERATIONS | NOTES | | OTHER CONSIDERATIONS | NOTES |
|---|---|---|---|---|---|
| 3 | Separate activities and exposures. | | 3 | Impact on an estate plan. | |
| 4 | Leasing arrangements with landlord rent right secured by UCC-1 on tenant's property. | | 4 | Federal and state criminal law. | |
| 5 | Car use. | | 5 | Exposure of the advisor. | |
| 6 | Car ownership. | | 6 | Exemptions that apply on death – do not make life insurance or annuities payable to an estate or to a trust that provides that estate obligations must be paid. | |
| 7 | Delegate to offshore employees. | | 7 | Client guarantee. | |
| 8 | Employee causes of action – make sure they have Workers' Compensation. | | 8 | Confidentiality – use an anonymously owned LLC from Wyoming, Delaware or Colorado to serve as manager of operational LLC's and Trustee of Homestead Land Trust, and file Certificates of Authority in each county where real estate is located. | |
| 9 | Separate intellectual property rights. | | 9 | Equity Stripping – debt secured by a mortgage or lien on valuable assets at risk may be payable to arm's-length lenders or related party lenders under a number of various arrangements. | |
| 10 | Alcohol at events. | | 10 | Make your children self-supporting. | |
| 11 | Using independent contractors. | | 11 | Get divorced soon, or not at all. | |
| 12 | Client/Patient/Supplier Arbitration Agreements. | | | | |
| 13 | Consider New Parent F Reorganization to separate assets within a company without triggering capital gains. | | | | |
| 14 | Consider factoring accounts receivable to a related company that may be held for descendants. | | | | |
| 15 | Trusteed or Partnership/LLC based Buy/Sell Life Insurance Arrangement. | | | | |
| 16 | Consider leasing use of equipment on a triple net basis – be sure all activities are insured. | | | | |
| 17 | Pension contributions. | | | | |

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

7. Limited liability companies and limited partnerships – the sole remedy of a debtor who owns an ownership interest in a multiple member LLC or a limited partnership will be a charging order.

   Many Florida based insurance carriers charge significantly more to insure residential property held under an LLC than when held under an individual's name or a Trust.

   Sometimes we form an LLC which owns a Trust, which owns the property and the insurance rates will be the same as if the Trustee of the Trust owns the property – yes, this makes no sense.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

8. Most wealthy Floridians have separate Trusts for each spouse "because that is the way it has always been done."

Some Floridians wish to emulate community property Joint Trusts in an attempt to receive an income tax step-up on the first death by using a JEST Trust. Many couples prefer a JEST Trust that locks assets up on the first death to protect the surviving spouse and common descendants from an inheritance and management standpoint, realizing that this will not qualify as a tenancy by the entireties' asset.

Other clients prefer to sign a MARITAL ASSET PROTECTION SYSTEM ("MAPS") agreement so that the surviving spouse is required to place a certain percentage of the net worth and possibly a percentage of future savings into an Asset Protection Trust formed in a APT jurisdiction for the future welfare of the surviving spouse and descendants.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

9. Florida recognizes tenancy by the entireties and provides complete creditor protection where the judgment is only against one spouse or the other. The creditor (other than the IRS, the SEC, the FTC or the Department of Justice) cannot reach the tenancy by the entireties property, with the possible exception of if there is joint debt other than on the homestead and the debtor spouse goes into bankruptcy.

   - A joint account with right of survivorship or joint assets owned with right of survivorship may not qualify as tenants by the entireties assets, if not properly titled.
   - Married couples who live in states that do not recognize tenants by the entireties may nevertheless have tenants by the entireties' protection in Florida real estate if they file bankruptcy because the federal bankruptcy law recognizes tenancy by the entireties as a creditor protected asset, and that the law of the situs of real estate will apply when real estate is owned.
   - Property deeded to "Mary Smith and John Smith, a married couple" or "John Smith and Mary Smith, husband and wife" is considered to be owned as tenants by the entireties if the deed goes to a married couple using the above verbiage. Delaware has a statutory tenancy by the entireties trust that may allow someone who has not yet moved to Florida to have tenancy by the entireties ownership of non real estate assets before they move to Florida.
   - It is easy to make a joint bank account **not** qualify as a tenancy by the entireties account.

# TENANCY BY THE ENTIRETIES

- Tenancy by the entireties("TBE") "immunity" dates back to the English common law and the time when a married woman could not hold property individually. TBE was a form of property whereby a husband and wife could hold property as an indivisible unit.

- An ownership interest in TBE property is non-severable without consent of both spouses, except in limited situations. **The property is not divisible on behalf of one spouse alone, and therefore cannot be reached to satisfy the obligations of only one spouse.** However, creditors owed monies by both the husband and the wife can attach the TBE property.

- States other than Florida which recognize TBE, at least to some extent, include Arkansas, Delaware, Michigan, Pennsylvania, Rhode Island, Washington, D.C., Missouri, Tennessee, Hawaii, and Vermont. Where one spouse lives in Florida and another spouse lives in one of the other states that recognize TBE property, most likely the creditor protection will apply for the Florida resident spouse. The treatment of the other spouse will be subject to the law of where the other spouse resides.

# Definition Of Tenancy by the Entireties

Joint tenancy with right of survivorship is not enough because the law requires that "the 6 unities" exist. The 6 unities may be summarized as follows:

1. Unity of possession - Both spouses have joint ownership and control - it may be acceptable that a deposit agreement allows either spouse to withdraw independently of the other on the theory that the power to withdraw is an expression of an authority of agency given by each spouse to the other.

2. Unity of interest - Each spouse has the same interest in the account - it is not a problem if one spouse deposits all or most of the funds into the account as long as each spouse has the same interest immediately after the deposit.

3. Unity of time - The interests of both spouses in the asset must originate simultaneously in the same instrument, such as on the signature card. **Do not try to convert an individual account into a tenancy by the entireties account. Instead, transfer assets from the individual account to a new tenancy by the entireties account.**

# Definition of Tenancy by the Entireties

4. Unity of title - Both spouses must have ownership under the same title.

5. Survivorship - On the death of one spouse, the other spouse becomes the sole owner of the entireties property. A general power of appointment given to one spouse over joint assets may vitiate tenancy by the entireties status.

6. Unity of marriage - Of course, the owners must be legally married under Florida law.

   Non-residents who own property in Florida can also claim the tenancy by the entireties immunity. In Re Cauley, 374 B.R. 311, 316 (Bankr. M.D. Fla. 2007).

# SPECIAL TENANCY BY THE ENTIRETIES ISSUES

- Joint Accounts. Not with USAA, Strong Mutual funds and many others. You must read the account agreement to be sure. Better to set up a TBE LLC to own accounts.
- Stock Certificates and Shareholder Agreements.
- Tax Reporting and Tax Refunds.
- Tangible Personal Property.
- Automobiles and Other Registered Vehicles.
- Real Estate Owned Outside of Florida.

# DIRECT TRANSFERS FROM ONE SPOUSE TO TENANCY BY THE ENTIRETIES

- Is a straw man needed?
- The author has done significant reading and research with respect to this issue, and has concluded that one spouse can transfer virtually any kind of asset into tenancy by the entireties
- Case law confirms that one spouse is a separate entity from a TBE, and can, therefore, transfer property to the marital unit without the use of a strawman, as explicitly held in the 1939 Florida Supreme Court decision of *Johnson v. Landefeld*, 138 Fla. 511 (Fla. 1939).
- Florida case law may not allow one spouse to add another spouse to an existing bank account or stock certificate. However, that is different than one spouse making a distinct transfer from himself or herself to facilitate the creation and funding of a new TBE account, stock certificate, or other asset.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

10. Florida has a 30% elective share that can be satisfied by leaving 37.5% of the "elective share estate" into a Trust that pays the spouse income as amounts reasonably needed for health, education, and maintenance. Attila the Hun can be the Trustee.

    The Florida Statutes provide a presumption that a law firm or lawyer can charge on a percentage basis to facilitate for probate administration, preparing a Form 706, and that the personal representative of an estate can charge a percentage for personal representative services.

    The Florida Statutes also provide that the Trustee of a Revocable Trust may charge 75% of the rate that would apply to a Probate administration. By analogy, law firms sometimes charge 75% of what a Probate charge would be for administrating a Revocable Trust.

    At least one jury trial determined that a law firm breached its duty to a family by failing to plan to reduce or avoid significant percentage fees, but the percentage fee practices continue.

    Most non-wealthy couples who establish Revocable Trusts hold them jointly, and then it may be possible for a Joint Trust to qualify as a tenant by the entireties asset if properly drafted.

    Most Joint Trusts seen by the author are not properly drafted for this.

# Florida's Elective Share

- The surviving spouse of a Florida decedent is entitled to an elective share, which is approximately 30% of the decedent's "elective estate", which is defined in Florida Statute Section 732.2035.

- The surviving spouse must make the elective share election before the earlier of: (i) a date that is 6 months after the date of service of a copy of the Notice of Administration on the surviving spouse; or (ii) the date that is 2 years after the decedent's death. This time period may be extended for good cause shown to the court, and may also be extended during any proceeding that has been filed with the court for an approval of the surviving spouse's guardian or attorney-in-fact to make the election on behalf of the surviving spouse.

- Note, the personal representative of the surviving spouse is not entitled to make the election on his behalf, which means that the surviving spouse's heirs are not entitled to make an election on behalf of the deceased's surviving spouse.

- Changes were made to the elective share law in 2017 (which in most cases apply with respect to decedents who die on or after July 1, 2017), some of which are enumerated on the following slide:

# Florida's Elective Share

1. Homestead property is expressly included in a decedent's elective estate unless the surviving spouse has waived his homestead rights (under prior law, homestead property was specifically excluded from the elective estate). This means that the homestead property is not only considered in calculating the amount of the elective share, but also applies towards satisfying elective share rights. Additionally, if the surviving spouse receives the life estate or an undivided one-half (1/2) interest in the homestead, then the homestead is valued at one-half (1/2) of its value on the decedent's death.

2. The surviving spouse is now afforded the ability to file for an extension of the deadline to file the elective share election during the period up to 40 days following the original filing deadline.

3. In order for an elective share trust to qualify under the Florida statutes (see the following slide), the surviving spouse must be given the rights to make the property productive. Florida Statute Section 738.606 has been revised to automatically have such clause apply if it is omitted under the trust document.

4. The probate court has the discretion to award attorney's fees and costs with respect to a dispute over the entitlement or amount to an elective share, property interests included in the elective estate, value of such property interests, or the satisfaction of the elective share. This section applies to all elective share proceedings commenced on or after July 1, 2017, without regard to the date of the decedent's death.

5. Under prior law, the surviving spouse was not entitled to receive interest with respect to any delayed distribution or elective share payments, which effectively encouraged the state to delay the payout of the elective share. Florida Statute Section 732.2145 has been amended to afford the surviving spouse the ability to receive interest at the statutory rate on any portion of the elective share that has not been satisfied within 2 years of the decedent's death, regardless of whether the court order requiring payment of elective share amounts has been entered.

# ELECTIVE SHARE AVOIDANCE TECHNIQUES

- As stated above, Florida Statute Section 732.2065 provides that the elective share is equal to 30% of the elective estate. The alternative to this is to fund 37.5% of the elective estate into a trust, pursuant to Florida Statute Section 732.2095, which states that assets that go into a special "elective share trust" meeting certain qualifications will be valued at 80% of their value for the purposes of satisfying the elective share.

- The trust will provide for the spouse to receive income plus principal as needed for health, education and maintenance, but only after taking into account other resources available to the spouse. The testator's children could be trustees of the trust and receive reasonable attorneys' fees.

- Many Floridians opt to give the spouse significant monies during the marriage in exchange for a waiver of elective share and homestead inheritance rights.

- Another strategy to avoid or reduce the elective share is for the client to make a completed gift to an irrevocable trust for the benefit of his or her children, or other desired beneficiaries with the client as a discretionary beneficiary of the trust, if the transfer to the trust is made within at least one year before the client's death, and the approval of a beneficiary other than the client must be received before there can be any distribution to the client.

# ELECTIVE SHARE AVOIDANCE TECHNIQUES

- Florida Statute Section 732.2055 describes how assets funding the elective share are valued. Interestingly, this Section does not reduce the value of any IRAs or other types of qualified retirement plans or annuities by buildup income tax associated therewith. Accordingly, a client who wants to reduce the impact of the elective share upon her death can leave the spouse an IRA or qualified plan which will be subject to income tax upon distributions to the surviving spouse.

- Another exclusion to the elective share is are any assets that were held in a trust as of the decedent's death (regardless if such trust was revocable or irrevocable) if:

(a) The property was an asset of the trust at all times between October 1, 1999 and the date of the decedent's death;

(b) The decedent was not married to the decedent's surviving spouse when the property was transferred to the trust;

(c) The property was a non-marital asset (as defined under Florida Statute Section 61.075) immediately prior to the decedent's death.

# Family Allowance

**Title XLII Estates and Trusts**

**Chapter 732 Probate Code: Intestate Succession and Wills**

**732.403 Family allowance.**-In addition to protected homestead and statutory entitlements, if the decedent was domiciled in Florida at the time of death, the surviving spouse and the decedent's lineal heirs the decedent was supporting or was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during administration. The court may order this allowance to be paid as a lump sum or in periodic installments. The allowance shall not exceed a total of $18,000. It shall be paid to the surviving spouse, if living, for the use of the spouse and dependent lineal heirs. If the surviving spouse is not living, it shall be paid to the lineal heirs or to the persons having their care and custody. If any lineal heir is not living with the surviving spouse, the allowance may be made partly to the lineal heir or guardian or other person having the heir's care and custody and partly to the surviving spouse, as the needs of the dependent heir and the surviving spouse appear. The family allowance is not chargeable against any benefit or share otherwise passing to the surviving spouse or to the dependent lineal heirs, unless the will otherwise provides. The death of any person entitled to a family allowance terminates the right to that part of the allowance not paid. For purposes of this section, the term "lineal heir" or "lineal heirs" means lineal ascendants and lineal descendants of the decedent.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

11. Florida has a statute which allows DESIGNATED REPRESENTATIVES to be appointed under a Trust document to waive or receive notice for one or more beneficiaries who will then not have any right to receive notice.

When one beneficiary has a Power of Appointment that can divest other beneficiaries, then, those other beneficiaries are not considered to be "Qualified Beneficiaries" for notice or consent purposes unless the Trustee has the discretion to give distributions to them before the death of the individual who can divest them.

12. Florida has new statues on Spousal Limited Access Trust (SLAT), Community Property Trust, and obtaining orders to confirm automatic homestead on transfer on death.

13. Florida has a documentary stamp tax on promissory notes based upon 35 cents per 100 dollars – maximum $2,450.

# KEY FACTS ABOUT FLORIDA LAWS AND PRACTICES

14. Durable Powers of Attorney signed on or after October 1, 2011 will have no force or effect if:

    a. The exact action to be taken by an Agent is not explicitly set forth in the Power of Attorney document.

    It is not sufficient to provide that "my Agent can take any action that I would be able to take if I were acting."

    b. Seven (7) primary activities cannot be engaged in by the Agent unless the Principal has initialed explicit statements as to what those items are.

    It is not sufficient to only initial once indicating that any two (2) or more of the seven (7) items apply - each item must be separately initialed.

    c. A Post-September 30, 2011 "Springing Power of Attorney" has no force or effect whatsoever.

    A Power of Attorney that says "this Power of Attorney will only be effective in the event of my incapacity" will have no power at all.

    On the other hand, a Power of Attorney that says "I have entrusted the original of this document to ABC Law Firm and no Agent can act unless he or she has the original or a certified copy confirmed to have been delivered by the ABC Law Firm to the Agent because the ABC Law Firm has determined that the Agent should be able to act."

# THE CPA'S CHECKLIST FOR FLORIDA CREDITOR PROTECTION PLANNING AND MAINTENANCE

| | | |
|---|---|---|
| 1. | Do the clients know about tenancy by the entireties protection? | |
| 2. | Are the clients' assets held as tenants by the entireties?<br>a. Were the right boxes checked when they opened an account?<br>b. Do they have out of state real estate that needs to be placed under a Florida LLC?<br>c. How will the client's fund a bypass trust on the 1st death if everything is owned jointly? – Disclaimer planning.<br>d. Are K-1's being issued to both spouses or to the correct spouse or entity? If a husband and wife own S-Corporation stock or a partnership interest as tenants by the entireties is it proper to be issuing separate K-1's to them for 50% each of the interest?<br>Often the CPA's file is the only place to find documentation on how stock and LLC interests are owned.<br>e. How do stock certificates read?<br>f. What names are on contracts?<br>g. Is property held in a state that allows for tenancy by the entireties?<br>h. Have the clients considered a TBE owned LLC or family limited partnership.<br>i. Do their LLC's have proper operative language? | |
| 3. | Is the homestead more than ½ an acre within the city limits or more than 160 acres in the county?<br><br>Homestead is owned as tenants by the entireties as well? | |
| 4. | Do they understand that the cash value of a life insurance policy is only protected when it is owned by the insured individual? | |
| 5. | Is life insurance payable to protective trusts that can benefit the surviving spouse and descendants without being subject to their creditor claims?<br><br>Does the client own life insurance policies on any other person - if so, it will not be creditor protected. | |
| 6. | Is there an inherited IRA - inherited IRAs are not protected from creditors under recent Florida case law. | |

# THE CPA'S CHECKLIST FOR FLORIDA CREDITOR PROTECTION PLANNING AND MAINTENANCE

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|---|---|---|
| 7. | Who is responsible for making sure that LLCs are properly established and maintained? An improperly drafted LLC will not provide a Florida client with charging order protection or tenancy by the entireties status, even if intended to do so. Many lawyer do not know how to do this properly, so how can accountants and clients themselves even attempt this?<br><br>Single member LLC's do not have charging order protection.<br><br>WARNING - It violates the unauthorized practice of law rules to set up LLC's and to provide legal documents for LLC's. This puts the CPA firm at risk for malpractice and licensing purposes. | |
| 8. | Do the clients own assets that may cause liability, such as investment real estate, a business or even a charitable activity? Should these be placed in separate LLCs for liability insurance insulation purposes?<br>a. Some clients think that a flow-through tax entity allows creditor claims to flow through, which is not of the case.<br>b. Many clients think that revocable trusts will shield them from creditor claims. There is a big difference between avoiding probate and avoiding creditors.<br>c. Who is the manager? Exposure of the manager?<br>d. Do insurance carriers on agencies know how assets are owned? | |
| 9. | Are proper formalities being followed so that one company or person is not considered an alter ego of the other for liability insurance insulation purposes.<br>Are financial statements being prepared? For example, many CPA firms prepare a form 1065 for an entity taxes as disregarded simply to help confirm appropriate fiscal conduct and accountability. | |
| 10. | Is the client being realistic about what their risks and exposures are with respect to potential upside down loan situations, guaranties, and real estate debt that may not be renewed. Why do some clients wait until it is too late? A nudge here and there can save significant problems. | |
| 11. | How much should the CPA know? Will communications with the CPA and other parties become discoverable?<br><br>Understand CPA client Florida litigation privilege – copies of letters or information given to third parties will be discoverable. | |

# THE CPA'S CHECKLIST FOR FLORIDA CREDITOR PROTECTION PLANNING AND MAINTENANCE

| | | |
|---|---|---|
| 13. | Is the client being accurate and truthful on financial statements provided to lending institutions? How specific do these statements need to be on issues such as joint assets and changes thereto.<br><br>Proper footnoting is crucial. | |
| 14. | Are insurance agencies and carriers aware of exactly what is being insured? Is the client telling the insurance carrier that the car is personal and not for business, while telling the IRS that the car is 90% business and is owned by a company?<br><br>Can someone working for the CPA firm call the applicable insurance agencies to make sure that everything is coordinated?<br><br>Make sure client understands exclusions, such as animals, pools, civic activities, church or synagogue activities, etc. | |
| 15. | What is the client's cash-burn rate? Are they waiting for the economy to turn around, and what if it does not and when do they run out of cash? | |
| 16. | Schedule an annual review? | |
| 17. | Consider new entities and trusts, including protective trust systems and limited liability entities. Segregate voting from non-voting under entities. | |
| 18. | Annual input from and participation with qualified lawyer. | |
| 19. | Debt at the Debtor's Best Friend<br>a. Is there one creditor who should be ahead of the others?<br>b. Are all loans documented by promissory notes and secured by mortgages and/or security agreements?<br>c. Review various debt-associated strategies, such as cross-collateralization and sale lease backs. | |

# A FEW THINGS ON FLORIDA TRUSTS

# Qualified Beneficiaries Are Entitled To Notice

The new Florida Trust Code makes a distinction between a “beneficiary” and a “qualified beneficiary.”

The term “qualified beneficiary” is limited to (a) living persons and other entities who are either present distributees or permissible present distributees of trust income or principal; (b) individuals and other entities who would become present or present permissible distributees if the interest of the present distributees terminated as of the date that qualified beneficiaries are determined without causing the trust to terminate; (c) or individuals and other entities who would be permissible distributees of income or principal if the trust terminated. Fla Stat. § 736.0103(14)(2009).

The term “beneficiary” refers to any person who has a beneficial interest in a trust regardless of whether the interest is present, future, vested, or contingent. A person does not need to be ascertainable or even born yet to be a beneficiary. The term beneficiary also includes any person who has a power of appointment over trust property, if that power of appointment is exercisable in a capacity other than as trustee. Fla Stat. § 736.0103(4) (2009).

# Disclosure Requirements Regarding Qualified Beneficiaries

The settlor of a trust cannot relieve the trustee from the duty to keep "qualified beneficiaries" of an irrevocable trust reasonably informed of the trust and its administration. This duty does not extend to beneficiaries.

As a general rule, while a trust is revocable only the settlor is entitled to notices, information, accountings, or reports.

The duty to keep qualified beneficiaries of an irrevocable trust reasonably informed requires notification of:

(1) The trustee's acceptance of the trust,

(2) The full name and address of the trustee within 60 days after acceptance,

(3) The existence of the trust,

(4) The identity of the settlor,

(5) The right to request a copy of the trust, and

(6) The right to accountings within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust.

The duties stated above do not apply to the trustee of an irrevocable trust created (or a revocable trust that became irrevocable) before July 1, 2007.

A qualified beneficiary may waive the trustee's duty to account, including a final accounting, and the qualified beneficiary may later withdraw such a waiver. If a qualified beneficiary does withdraw the waiver, the qualified beneficiary is entitled to trust accountings, but only for future accounting periods. Fla. Stat. § 736.0813(2) (2007).

# Representation

Pursuant to the Florida Trust Code, certain individuals or companies may have the authority to "represent" beneficiaries for notice and waiver purposes.

There are four established vehicles by which a "proxy" may receive notice on behalf of a Qualified Beneficiary so that the Qualified Beneficiary does not have the right to receive information about the trust agreement and the inner-workings thereof. A proxy may also be able to execute consents to waive accountings and to permit court orders or agreements to be entered into relating to the trust without the Qualified Beneficiary's knowledge or consent.

The five established vehicles and one other planning idea are as follows:

1. Representation by a parent or legal guardian of a minor.
2. Constructive representation by the holder of a power of appointment who has the power to divest the particular beneficiary, subject to the limitations set forth below.
3. Representation by a Designated Representative pursuant to the statutory rules described below.
4. Representation by a "nominee" or "benevolent beneficiary" who may provide "pass through benefits" to a "non-beneficiary."
5. In addition, it may be possible to not name a particular individual or individuals as beneficiaries, but to give Trust Protector the right to add beneficiaries if and when they deem it appropriate.

# IN TERROREM AND KING SOLOMON CLAUSES

Florida Statute Section 736.1108 provides that in terrorem clauses are unenforceable. Pursuant to this section, trusts created before October 1, 1993 are not subject to this limitation, and a revocable trust is treated as having been created when the right of revocation terminates. Florida Statute Section 736.1108(2) (2007).

Consider having trusts divide into separate trusts for each beneficiary, even if there are outright distributions, so that the share of any challenging beneficiary would likely bear the costs associated with defending an action by such beneficiary.

Why not appoint a King Solomon or King Solomon Committee and provide the person or committee with the power to reapportion benefits between beneficiaries based upon any and every reason that might be deemed appropriate in his or her discretion. A “King Solomon Committee” clause used by the author is as follows on the next slide:

# Creditor's Rights to Reach into Trust to Satisfy Debts

Florida law allows the creditors of a trust settlor to access trust assets that the settlor is a beneficiary of to the extent that a trustee has the discretion to make distributions to the settlor, even if those distributions are limited to what is needed for the settlor's health education, maintenance, and support. As a result of this, many Floridians have been using the laws of APT jurisdictions, such as Nevada, South Dakota, Alaska, and Delaware to form SLATs in order to allow the contributing spouse to be eligible to receive benefits without having the trust assets be reachable by creditors.

This is not only significant for creditor protection purposes, but also for purposes of estate tax planning. If a creditor of the contributing spouse can reach into a trust, then the trust assets will be considered as owned by the contributing spouse for estate tax purposes under the rationale that if a person sets up an irrevocable trust thereby enabling them to accumulate debt and benefit from having the trust pay that debt, then the assets of the trust will be considered as includible in that person's gross estate.

# Exception Creditor Issues

- We must mention one other issue that will be unique to Florida and other states that both (a) have an act such as this one and (b) have an “exception creditor” statute.

- Under Florida Statutes Section 736.0503 (which corresponds to the Uniform Trust Code section 503), the following classes of creditors can reach into an otherwise “creditor-proof” spendthrift trust established by a third party for a beneficiary:

1. A creditor having a claim for child, spousal, or other family support that is not able to satisfy the claim from the personal assets of the settlor.

2. A law firm and other professionals who provide representation of a beneficiary with respect to terms, conditions, and rights that the beneficiary has with respect to such trust.

3. A claim by the state in which the trust is established or by the United States to the extent a law of the state or a federal law so provides.

# Exception Creditor Issues

A possible solution to these concerns would be to provide for the SLAT to actually be two separate trusts from inception.

These trusts could be identical, except that one trust could provide that any distributions to satisfy exception creditors as to both trusts could come from that trust (which could be known as the exception creditor trust or "ECT Trust") and the other trust could provide that the Grantor Spouse would be excluded as a beneficiary completely if and when the ECT Trust would have a net worth of less than a reasonable amount, such as $400,000.

It would therefore seem unlikely, if not impossible, for the non-ECT Trust to have exposure to exception creditor claims.

The SLAT could also divide into three separate trusts upon the death of the Beneficiary Spouse:

1. The ECT Trust
2. A trust that would benefit the Grantor Spouse until such time that the ECT trust reaches a relatively low level, and
3. A separate trust that would not benefit the settlor whatsoever.

# Exception Creditor Issues

- For example, a settlor placing $10,000,000 into a SLAT may be perfectly comfortable only being able to benefit from $5,000,000 worth of assets, and whatever they grow to.

- The ECT trust may be $500,000, the second trust for the benefit of the Grantor Spouse after the death of the Beneficiary Spouse may be $4,500,000 (assuming the Grantor Spouse has held back enough to live on), and the third trust that benefits descendants only may be $5,000,000.

- It would be safest to administer these as three separate stand alone SLATs, and that would not be inconvenient, since the SLATs will not have to file income tax returns if all income deductions are reported on the grantor's income tax return, and the primary asset of the SLAT consists of an LLC owned 10% by the ECT trust, 40% by the non-ECT trust that may benefit the settlor, and 50% by a trust that will not benefit the settlor.

- The draftsmen and client can determine whether the second trust should have the Grantor Spouse as the automatic beneficiary on the death of Beneficiary Spouse, or allow trust protectors to add the Grantor Spouse, and then perhaps only if the settlor's net worth is below a certain level.

# Florida's New SLAT Rules

# The Q-TIP Exception

**FLORIDA TRUST CODE - 736.0505 Creditors' claims against settlor.-**
(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.
(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.
(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.
(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in: 1. Section 2041(b)(2) or s. 2514(e); or 2. Section 2503(b) and, if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in s. 2503(b),of the Internal Revenue Code of 1986, as amended.

(3) **Subject to the provisions of s. 726.105, for purposes of this section, the assets in:**

**(a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and**
**(b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a), shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.**

**See The Florida Bar Journal December, 2010 article –**
***New §Assures Tax/Asset Protection of Inter Vivos QTIP Trusts***

# What is a SLAT?

- SLAT = Spousal Limited Access Trust or Spousal Lifetime Access Trust
- An irrevocable trust established by one spouse for the benefit of the other spouse and descendants under which the beneficiary spouse can receive limited distributions during his or her lifetime.
- The trust will not be subject to creditor claims if appropriately drafted.
- Not subject to estate taxes on death of either spouse.

# Terminology

- Grantor Spouse = The spouse who establishes and funds the SLAT.
- Beneficiary Spouse = The spouse that is a beneficiary of the SLAT during both spouses' lifetimes.

# OVERVIEW

- On May 10th, Governor Ron DeSantis approved a new law limiting claims by creditors against the settlors of certain trusts under special circumstances. The legislation includes a provision amending Florida Statute 736.0505(3) which will make certain Spousal Limited Access Trusts ("SLATs") more attractive to Florida residents who form them after June 30, 2022, by allowing the Grantor Spouse to be a beneficiary of the trust following the death of the Beneficiary Spouse. FL LEGIS 2022-101, 2022 Fla. Sess. Law Serv. Ch. 2022-101 (C.S.S.B. 1502)
- In addition, for Florida trusts created after June 30, 2022 the rule against perpetuities has been increased from 360 to 1,000 years.
- PLR 201633021 which allows for one trust to be considered a grantor as to another trust may be used to sell assets from a 360 year trust to a new 1000 year trust without income tax consequences.

# NEW FLORIDA STATUTE ON SLATs

**Updates to Florida Statute Section 736.0505**

- Tax Section of the Florida Bar organized the effort to update Florida Statute Section 736.0505 to provide that the Grantor Spouse of a SLAT is not considered to be a "settlor" of an irrevocable trust under Florida Law that (1) benefits the Grantor Spouse only after the death of the Beneficiary Spouse; (2) does not benefit the Grantor Spouse at any point during the Beneficiary Spouse's lifetime; and (3) is a "completed gift trust" (i.e., transfers to the trust are considered to be completed gifts for federal gift tax purposes). Instead, the Beneficiary Spouse will be considered as the "settlor" under Florida law (but not under federal tax law!!).

- This change to the statute is similar to what has been codified under Florida Statute Section 736.0505(3) since 2010 (which now will become 736.0505(3)(a)(1) and 736.0505(3)(a)(2), as a result of the new statute) regarding a Lifetime QTIP Trust or Marital Deduction GPOA Trust established for the benefit of the Beneficiary Spouse, in that after the Beneficiary Spouse's death, the Beneficiary Spouse is considered to be the "settlor" for Florida state law purposes and the Grantor Spouse is not considered to be the "settlor".

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**Updates to Florida Statute Section 736.0505**

- This change in legislation means that the Grantor Spouse can be named as a remainder beneficiary after the death of the Beneficiary Spouse and the trust will not be considered as a "self-settled spendthrift trust" that would cause the assets thereof to otherwise be subject to the creditors of the Grantor Spouse under Florida law, and possibly not subject to federal estate tax in the Grantor Spouse's gross estate for federal estate tax purposes.

- It therefore allows the Grantor Spouse to fund a SLAT for the benefit of the Beneficiary Spouse, and provide for the assets to "boomerang" back to benefit the Grantor Spouse after the Beneficiary Spouse's death.

- This will make Florida a more attractive jurisdiction for irrevocable trusts and can give married couples comfort that assets contributed to a SLAT can be held as a safety net for either of them in many situations.

- But be careful NOT to have the Grantor Spouse as a beneficiary of the trust during the Beneficiary Spouse's lifetime at any point. Florida is NOT a domestic asset protection state that allows for creditor protection of a self-settled spendthrift trust!

## FLORIDA TRUST CODE Section 736.0505 Creditors' claims against settlor.

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.
(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.
(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section:

(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.
(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in: (1) Section 2041(b)(2) or 2514(e); or (2) Section 2503(b) and, if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in s. 2503(b),of the Internal Revenue Code of 1986, as amended.

# FLORIDA TRUST CODE Section 736.0505(3) – Where The Magic Happens

(3) Subject to the provisions of s. 726.105, for purposes of this section, the assets in:

(a) 1. A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended; or

2. A trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; or

3. An irrevocable trust not otherwise described in subparagraph 1. or subparagraph 2. in which:

a. The settlor's spouse is a beneficiary as described in s. 736.0103(19)(a) for the lifetime of the settlor's spouse;

b. At no time during the lifetime of the settlor's spouse is the settlor a beneficiary as described in s. 736.0103(19)(a); and

c. Transfers to the trust by the settlor are completed gifts under s. 2511 of the Internal Revenue Code of 1986, as amended; and

(b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a),

shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.

# What does the New Law Do?

This modification to the law effectively allows for a Florida SLAT to convert to a domestic asset protection trust for the benefit of the contributing spouse following the death of the beneficiary spouse.

Florida does not currently have a statute providing for self-settled domestic asset protection trusts, so this legislation will be welcomed with open arms by planners.

# Florida's New SLAT Law – Potential Issues

The key aspects to the analysis in the author's opinion are:

**Compliance with Internal Revenue Code § 2036(a)**

1. Has the Grantor Spouse retained the right to use, possess, or enjoy transferred property under 2036(a) if the Grantor Spouse contributes assets to a trust and expects the trust assets to be accessible? It seems that at a minimum the Grantor Spouse should leave enough assets out so the Grantor Spouse can support himself or herself without the need for an expectation of receiving a benefit to avoid a 2036(a)(1) violation, and even this may not pass muster under IRS scrutiny.

**Exception Creditor Issues**

2. Specific to Florida, even though the Grantor Spouse will not be considered to have contributed to the trust for creditor purposes after the death of the Beneficiary Spouse, exception creditors may be able to reach into the trust and the IRS may take the position that the ability of the Grantor Spouse to run up debt that could be paid for by the trust would be a retained interest.

**The Doctrine of Acts of Independent Significance**

3. While the Florida creditor exception statute is limited to apply to spousal support, child support, property settlement, and expenses incurred by a beneficiary to pursue a trust when the beneficiary has no other assets, the doctrine of acts of independent significance may save the day but has not been specifically tested in this situation.

# Good and Bad News

Good news – cases and revenue rulings support the proposition that the grantor of a creditor-proof trust may be a beneficiary of the trust if the trustee has absolute discretion as to if and when to ever make a distribution without triggering inclusion in the grantor's estate

Bad news – cases and revenue rulings do not discuss or consider §§ 2036(a)(2) or 2038, which could conceivably apply if the grantor is found to have the ability to deplete trust assets for his or her own use

# Good and Bad News

For this reason, as further discussed below, drafters may consider establishing a separate, relatively small exception creditor trust (referred to as an “ECT Trust”) that would pay any and all exception creditors on behalf of any and all trusts, and then having separate SLATs.

One SLAT that could benefit the Grantor Spouse after the Beneficiary Spouse’s death but would remove the Grantor Spouse from being a beneficiary if an exception creditor situation occurred and before the ECT trust is completely spent.

The other SLAT would provide that the Grantor Spouse may not be a beneficiary whatsoever, or may provide that the Grantor Spouse may only be added as a beneficiary in the event of an act of independent significance and even then only if added in the discretion of a trust protector or protectors who have no fiduciary duty to do so.

# Conservative Strategy

A conservatively drafted 2023 SLAT will provide that the contributor cannot become a beneficiary of the SLAT unless at least two or more of the following requirements are met:

1. The Beneficiary Spouse dies during the lifetime of the Grantor Spouse.

2. The Grantor Spouse will not be a beneficiary unless or until Trust Protectors or other individuals or entities who do not have a fiduciary duty to the Grantor Spouse or to add the Grantor Spouse as a beneficiary have done so (and then only after #1 above and possibly #3 below have been satisfied), and

3. An act of independent significance has occurred, such as the Grantor Spouse being financially destitute, which may mean that the Grantor Spouse has a net worth that is significantly lower than what his or her net worth was after the establishment and funding of the SLAT, assuming that the circumstances of the Grantor Spouse were such that it was expected that his or her net worth would not go down precipitously.

# Additional Strategies Worth Considering

It is not uncommon to have Spousal Limited Access Trusts formed in asset protection jurisdictions in a way that may permit the Grantor Spouse to become a beneficiary of the trust.

However, when the Grantor Spouse resides in a non-asset protection trust jurisdiction it is unknown whether creditors may be able to reach into the trust if the Grantor Spouse is a beneficiary.

It is therefore common to provide that the Grantor Spouse will not be a beneficiary of the SLAT unless or until he or she is added as a beneficiary by trust protectors who have no duty to do so.

# Additional Strategies Worth Considering

Additional Safeguards include:

**Consent of Adverse Party**

1. Require that the Grantor Spouse cannot receive any distributions without the consent of another beneficiary who would be indirectly disadvantaged by allowing such a distribution by reason of reduction in what would be available in the trust for the consenting beneficiary.

**Grantor's Beneficiary Status Limited By POA**

2. Not have the Grantor as a beneficiary unless or until a beneficiary exercises a Power of Appointment in favor of the Grantor.

**Grantor's Beneficiary Status Limited By Requirement of Unforeseen Financial Need**

3. Have the trust provide that the Grantor Spouse cannot be added as a beneficiary unless or until he or she has a significant financial need that is not expected at the time that the trust is funded.

# Qualification Requirements for new SLAT Benefit

To qualify under amended Florida Statute 736.0505(3), the trust must be one of the following:

1. A trust described in Section 2523(e) of the Internal Revenue Code (a marital deduction trust providing the donee spouse with a life estate and a general power of appointment);

2. A trust for which the election described in Section 2523(f) of the Internal Revenue Code has been made (a lifetime QTIP trust); or

3. An irrevocable trust not otherwise described in subparagraph 1 or 2 in which:

(a) the settlor's spouse is a qualified beneficiary for the lifetime of the settlor's spouse (i.e. the settlor's spouse must be a distributee or permissible distributee of trust income or principal during his or her lifetime);

(b) at no time during the lifetime of the settlor's spouse is the settlor a qualified beneficiary (i.e. the contributing spouse cannot be a distributee or permissible distributee of trust income or principal during the lifetime of the beneficiary spouse), and

In addition, transfers to the trust by the settlor must be completed gifts under Section 2511 of the Internal Revenue Code.

# Mistakes that will be made

1. The Trust will provide that the Grantor Spouse will be added as a beneficiary in the event of divorce instead of only upon the death of the original Beneficiary Spouse.

   Any situation where the Grantor spouse will become a beneficiary before the death of the original Beneficiary Spouse will not comply with the new Florida Statute and make the new SLAT opportunity unavailable.

# Mistakes that will be made

2. The terms of the SLAT will provide that the Beneficiary Spouse will not be a beneficiary in the event of divorce or certain other events.

The statute requires that the Beneficiary Spouse be a beneficiary "for the lifetime of the [Beneficiary] spouse."

# Mistakes That Will Be Made Cont…

3. A SLAT that provides the trustee with the discretion to reimburse the Grantor Spouse for taxes paid on the trust income may expose all of the trust assets to federal estate tax and the amount that could be reimbursed to creditor claims. This is because the Grantor Spouse cannot be a beneficiary until after the death of the Beneficiary Spouse, and the IRS may consider the Grantor Spouse to be a beneficiary if he or she is able to receive reimbursement for taxes paid on behalf of the trust before the death of the Beneficiary Spouse.

# Mistakes That Will Be Made Cont…

4. Can the presence of Trust Protectors also cause loss of the availability of the new Florida SLAT benefit? What if a Florida SLAT signed and funded after June 30, 2022 complies with the above rules but also provides the Trust Protectors with the authority to take many actions on behalf of the trust, including removing the Beneficiary Spouse from being a beneficiary of the trust?

If the IRS can show that the Trust Protectors are bound by a fiduciary duty to remove the Beneficiary Spouse, then the requirement that the Beneficiary Spouse be a beneficiary during his or her lifetime may not be satisfied. This will be a turn off for many contributors wishing to form a Florida SLAT.

# Mistakes That Will Be Made Cont…

5. Relationship issues - “He unplugs me, he unplugs me not”

With the requirement that the Beneficiary Spouse must be deceased in order for the Grantor Spouse to become a beneficiary, Beneficiary Spouses may wonder whether their plugs will be pulled sooner rather than later so that the Grantor Spouse can become beneficiary of the trust and shack up with their new significant other.

It remains to be seen what other intricacies and confusions may develop or be found to apply with respect to this new statute, which will undoubtedly help many Floridians.

6. Contrary to the Florida Community Property Trust Act, which makes clear that a Florida Community Property Trust need only have a Florida resident as trustee to qualify as a Florida Community Property Trust, the new SLAT legislation does not include such language. It is therefore safest to have the Grantor Spouse be a resident of Florida, have at least one trustee in Florida, and for the trust to be administered in Florida to qualify for this new Florida SLAT benefit.

# Mistakes That Will Be Made Cont…

7. Giving the Grantor Spouse the "right" to receive distributions from the trust that would cause inclusion under IRC Section 2036.

PLR 200944002 provides that "the trustee's discretionary authority to distribute income and/or principal to Grantor, does not, by itself, cause the Trust corpus to be includible in Grantor's gross estate under § 2036."

If the trustee is required to distribute income and/or principal pursuant to the terms of the trust, or the trust provides that distributions are made for "health, education, maintenance and support" then the Grantor Spouse could be considered to have a "right" to receive distributions that would cause inclusion under 2036.

Even a completely discretionary interest could be viewed as a "right" as the Trustee has a fiduciary duty to act in good faith and in the best interest of the beneficiaries.

Any person or entity acting as a Trustee with the authority to make distributions in his or her discretion must do so carefully, and with due regard to the best interests of the beneficiaries of the trust.

# Final SLAT Suggestions

Individuals who are married to spouses who have a short life expectancy may wish to establish these trusts in order to have the equivalent of an asset protection trust without having to go to an APT jurisdiction. Florida SLATs that would otherwise be protected under Florida Statute 736.0505 have a better chance of holding up than an APT jurisdiction sitused trust for Floridians, given that Florida law now expressly condones this and may not condone an APT jurisdiction sitused trust if the circumstances would be such that protecting the trust from creditors would be against the public policy of Florida.