

MUSINGS OF A FLORIDA TRUST AND ESTATE LAWYER

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Florida is unique. Special. Even, at times, unpredictable.
The Everglades skunk ape, the size of Palmetto bugs, unthinkable.
Oh, and our laws ... estate planners worldwide should be cautious.
Homestead, for sure. Elective share, a must. So that's why you call us.
Domicile must-dos. Limits on fiduciary appointments.
Execution requirements. Please come join us.

I. HOMESTEAD - THREE FLAVORS

- A. Three issues:
 - 1. Creditor protection
 - 2. Devise restrictions
 - 3. Favorable ad valorem tax treatment
 - a. Requires application to Property Appraiser
- B. Source of Issues
 - 1. "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. ..." Art X, §4(c), Florida Constitution
- C. Creditor protection
 - 1. During owner's lifetime
 - a. Unlimited in amount
 - b. Few exceptions
 - (1) Mortgages
 - (2) Improvements
 - 2. After owner's death
 - a. Exempt if passes to an 'heir' of the owner
 - (1) By devise or intestacy
 - b. Exemption is lost if direction to sell in estate
 - c. Non-exempt if passes to one other than an heir
 - d. Trusts for heirs?
 - 3. Procedural issues during probate administration
 - a. Sale before expiration of claims period
 - b. Determination of homestead status

- D. Devise restrictions
 - 1. If owner is not survived by a spouse or a minor child
 - a. Devisable
 - 2. If owner is survived by a spouse but not a minor child
 - a. Devisable ONLY to spouse
 - b. If not devised to the spouse, then
 - (1) Descends to descendants, per stirpes
 - (2) Subject to life estate in spouse
 - (a) Spouse has special 50% election
 - 3. If survived by a minor child (whether or not a spouse)
 - a. Not devisable. Period.
 - (1) Descends to descendants, per stirpes
 - (a) Not just the minor child
 - (2) Subject to life estate in spouse
 - (a) Spouse has special 50% election
 - 4. Planning alternative, but at some cost, with irrevocable trust until no minor child
 - 5. Revocable trusts are effectively disregarded for devise restriction purposes
- E. Favorable ad valorem tax treatment
 - 1. Determined as of each January 1
 - 2. Application to county Property Appraiser
 - a. By March 1
 - 3. "Split households" not entitled to exemption
 - 4. Up to \$50,000 of value reduction
 - 5. Save Our Homes
 - a. Beginning the year after obtaining the exemption, the increase in the assessed value is limited to the change in the Consumer Price Index or 3 percent, whichever is lower.
 - b. Portable to a limited extent
- F. Homestead waivers between spouses
 - 1. Why?
 - a. Asset equalization
 - b. Elimination of devise restrictions
 - 2. How?
 - a. Agreement
 - b. Deed
 - (1) 2018 Legislation creating safe harbor
 - (2) "By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."
- G. Owning a Florida homestead in a revocable trust: Don't

II. DOMICILE - WELCOME TO FLORIDA

- A. Subjective intent, demonstrated by objective facts
- B. Consistency
- C. Determining “permanent residence” for favorable *ad valorem* tax treatment
 - 1. Declaration of Domicile
 - 2. Terminate prior domicile
 - 3. Register to vote
 - 4. Get a driver’s license (or Florida Identification Card)
 - 5. Register (some) automobiles
 - 6. Address on federal income tax return
 - 7. “The location where the applicant’s bank statements and checking accounts are registered.”
 - 8. Pay utilities
- D. Number One: Qui transtulit sustinet: He who transplants, sustains

III. ELECTIVE SHARE

- A. Thirty percent of the elective estate
- B. Requires affirmative action by surviving spouse
- C. Elective estate: almost everything, and then some
 - 1. Probate estate
 - 2. Pay on death accounts
 - 3. Joint accounts and other jointly owned property
 - 4. Revocable trusts and other revocable transfers
 - 5. IRAs and other retirement accounts
 - 6. Cash surrender value of life insurance
- D. Satisfaction of the elective share amount
 - 1. Any of the elective estate received by the spouse
 - 2. Life insurance payable to the spouse
 - 3. Elective share trusts
 - a. 50% / 80% / 100%
 - b. Conditional

IV. EXECUTION REQUIREMENTS

- A. Last Will and Testament
 - 1. In writing
 - a. Not (yet) electronic
 - 2. Signed (or acknowledged) by the testator
 - 3. In the presence of at least two attesting witnesses
 - a. Beneficiaries permitted as witnesses

4. The testator must sign the will at the end, or the testator's name must be subscribed at the end of the will by some other person in the testator's presence and at the testator's direction.
 5. The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.
 - a. Florida law provides any person competent to be a witness may act as a witness to a will even if that person is an interested witness.
 6. Self-Proving Affidavit
 - a. When will is executed or at any subsequent time
 - b. Acknowledgment by the testator and the affidavits of the witnesses, made before a notary and evidenced by the notary's certificate attached to or behind the will
 - c. A will executed in another state and made self-proved under the laws of that state shall be considered as self-proved under Florida law.
 7. Not Self-Proven
 - a. Pain in the neck
 - b. Oath of an attesting witness taken before
 - (1) Any circuit judge
 - (2) A commissioner appointed by the court
 - (3) The clerk
 - c. If attesting witnesses cannot be found or they have become incapacitated, oath of the personal representative or of any person having no interest in the estate under the will stating that the person believes the writing exhibited to be the true last will of the decedent
- B. Trust
1. No particular execution requirements for a trust,
 - a. Even oral trusts are permitted in Florida.
 2. But...
 - a. The testamentary aspects of a revocable trust are invalid unless executed with the same formalities as a Will.
 - (1) For all Florida domiciled settlors, regardless of where executed

V. FIDUCIARY APPOINTMENTS

- A. Personal Representative
1. Can't be:
 - a. A felon
 - b. Mentally or physically unable to perform the duties
 - c. Or under the age of 18 years
 2. Bank or trust company
 - a. Must be authorized to do business and qualified to exercise fiduciary powers in Florida

3. Individuals
 - a. Residents of Florida
 - b. Non-Florida residents only if related to the decedent within certain degrees
 - (1) Legally adopted child or adoptive parent of the decedent;
 - (2) 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 under this section
- B. Trustee
 1. Not many limits
 2. No residency/relationship issues
- C. Regulatory issues for attorneys
 1. Written disclosures to clients for fiduciary appointments are now required to ensure the client is properly informed regarding factors such as:
 - a. The role of a fiduciary
 - b. The client's options with respect to appointment
 - c. The potential conflict of the client's attorney serving in dual roles
 - d. Compensation.

VI. DESIGNATED REPRESENTATIVES

- A. A designated representative is a person nominated in the trust instrument who can represent and bind a beneficiary and receive any notice, information, accounting, or report on behalf of the beneficiary.
 1. Age or other limitations permitted
- B. A trust instrument may also designate one or more persons, other than a trustee, to nominate a designated representative.
- C. A trustee cannot also serve in the capacity as designated representative.
- D. A beneficiary cannot serve in the capacity as designated representative for another beneficiary unless
 1. Named by the settlor or
 2. The person is the beneficiary's spouse or a grandparent or descendants of a grandparent of the beneficiary or the beneficiary's spouse
- E. A designated representative who represents a settlor lacking capacity may receive notice and give a binding consent on the settlor's behalf.
- F. If a beneficiary is represented by a designated representative, the trustee is not required to give notice, information, accountings, or reports to that beneficiary.
- G. The designated representative is not liable to the beneficiary for any actions or omissions to act made in good faith.

VII. DECANTING

- A. *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (1940)
- B. Original decanting legislation
 - 1. Requires absolute power
 - 2. New trust can be substantially different
- C. New decanting legislation
 - 1. Absolute power no longer necessary
 - 2. New trust must create substantially similar interests
 - 3. New trust can be supplement needs trust
 - 4. New notice requirements

VIII. FLORIDA FELLOWS INSTITUTE

- A. The Florida Fellows Institute was created by Florida Fellows of the American College of Trust and Estate Counsel (ACTEC) to develop our profession's future leaders through a series of in-depth educational presentations led by outstanding subject matter experts in each field.
- B. Candidates must be nominated by a Fellow of ACTEC and must be in good standing with The Florida Bar.
- C. To be recognized as Graduates of the Institute, students must complete all six days of the program.
- D. <http://www.floridafellowsinstitute.org/>
- E. Unlike serving as personal representatives, non-Florida residents are welcome!

IX. DAYLIGHT SAVINGS TIME

- A. Sunshine Protection Act
- B. Adopt Daylight Saving Time as the year-round standard time

Section 1. (1) This section may be cited as the "Sunshine Protection Act."
(2) If the United States Congress amends 15 U.S.C. s. 260a to authorize states to observe daylight saving time year-round, it is the intent of the Legislature that daylight saving time shall be the year-round standard time of the entire state and all of its political subdivisions.

Section 2. This act shall take effect July 1, 2018