

Considerations for Using a Homestead Trust

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DISCLAIMER

This information is intended for teaching purposes only.

Inter Vivos Transfer of Homestead Property

- Fla. Stat. §732.4017
- Fla. Stat. §733.707(3)(e)



Types of Homestead

Devise Restrictions – Art. X, §4 (c) Fla. Const.

Creditor Protection – Art. X, §4 (a) Fla. Const.

Tax Benefits – Art. VII, §§4 & 6, Fla. Const.



Irrevocable Homestead Trust



- **Avoiding Devise Restrictions**
- **Maintaining Creditor Protection**
 - Ownership Interest Requirement
 - Any beneficial interest in land
 - *Remainder Interest* – Creditors of Decedent
 - *Remainder Interest* – Creditors of Remainderman
 - Ownership through revocable trust = qualifying beneficial interest
 - Support for application of homestead to irrevocable trust
 - Cutler v. Cutler, 994 So.2d 341 (Fla. 3d DCA 2008)
 - Stone v. Stone, 157 So.3d 295 (Fla. 4th DCA 2014)



- **Maintaining Tax Benefits**

- Beneficial ownership through a trust qualifies as “equitable title”
- Conveyance to trust not a change of ownership triggering reassessment
- Application of tax benefits to homestead in irrevocable trust

Drafting the Irrevocable Homestead Trust



Purpose of Trust

Avoid devise restrictions while maintaining creditor protection and tax benefits of homestead property while there is a minor child living



Revocability

Statement that trust is irrevocable and that grantor retains no right to alter or amend it



Funding

Options



Lifetime Limited Power of Appointment (“LPOA”)



Trust Term

Drafting the Irrevocable Homestead Trust

continued



Beneficiaries During Grantor's Life

Statute has no limitations on who may be a beneficiary

Prudent to limit class of beneficiaries to identifiable and expressly exclude creators of grantor



Benefits of Beneficiaries During Grantor's Life

Grantor – Could have income benefits, but not principal

Others – Mandatory or discretionary distributions of income and/or principal



Death of Grantor Before End of Trust Term

“Equitable Title”

Beneficiary's consent to sell

Drafting the Irrevocable Homestead Trust

continued



Trustee Selection

Grantor should retain no power to amend trust
Removal or replacement



Limitations to Avoid Exposure

Grantor should retain no power to amend trust
Avoid testamentary general or limited POA

Additional Considerations



- **Federal Tax**

- Irrevocable homestead trust does not offer tax benefits
- Estate Tax
- Gift Tax
- Income Tax

- **Acceleration/Due on Sale Clause**

- Mortgages generally contain an acceleration clause
- Lenders are prohibited from calling the loan due
- Garn-St Germain Act (Federal Act) – 12 U.S.C. 1701j-3(d)

- **Future Transactions with Homestead**

- Challenges

Additional Considerations

continued



- **Florida Documentary Stamp Tax – Fla. Stat. §201.02**
 - Fl. Admin Code §12B-4.013(28)
 - Department of Revenue
 - TAA 2004(b4)-011 (Dec. 2, 2004)
 - TAA 12B4-001 (Mar. 6, 2012)
 - TAA 2003 (B4)-002
 - Analysis of Application to Homestead Trust
 - If DOR disagreed what would be the result?



- **Self-Settled Trusts**

- Florida has a strong public policy against protection of assets placed in trust where grantor is creator and beneficiary of the trust
- In re Brown, 303 F.3d 1261 (11th Cir. 2002)
- Questions

- **Common Law and/or Statutory Powers to Revoke/Amend**

- Will common law power and/or statutory powers to remove trust by agreement among grantor and beneficiaries be considered a retained grantor power?

Additional Considerations

continued



- **Married Couple with Minor Children**

- Using trust gives up tenants by the entirety ownership
- May not qualify as QTIP trust so marital deduction may not be available
- Traditional irrevocable homestead trust
- Inter vivos QTIP Homestead Trust (completed gift + marital deduction)
- Spousal Lifetime Access Trust (completed gift – no marital deduction)
- Inter vivos Irrevocable Florida Community Property Homestead Trust

Additional Resources

Florida Homestead: The Legal Chameleon That Grew Into a Dragon ~ Bruce Stone

New Florida Homestead Laws Add Flexibility in Estate Planning ~ Jeff Baskies

Estate Planning & Asset Protection in Florida ~ Barry A. Nelson

Protecting and Preserving the Save Our Homes Cap ~ Richard S. Franklin, Roi E. Baugher III

Practice Under Florida Probate Code, Chapter 19, Homestead and Exempt Personal Property ~Tae Kelley
Bronner, Rohan Kelley

Estate and Related Issues in the Estate Administration Process ~ Michael A Sneeringer, 37-APR
ProbProp22

RPPTL Legislative Position Requests Form and White Paper for §732.4017

The Florida Senate Bill Analysis and Fiscal Impact Statement, CS/SB 1557 (March 29, 2010) at page 11

Questions?

Contact Us

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