

Considerations for Using a Homestead Trust

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Types of Homestead

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

- Ownership, residence, size limitation

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

- Ownership, residence, size limitation

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

- Legal or Equitable title & Residence



Inter Vivos Transfer of Homestead Property

- Fla. Stat. §732.4017
 - Includes transfer to trust
 - Not considered a devise provided no power retained to revoke or revest in transferor
 - Interest may revert back to transferor
- Fla. Stat. §733.707(3)(e)
 - Defines revocation





- **Avoiding Devise Restrictions**
 - Fla. Stat. §732.4017
 - Transfer to trust may be considered “not testamentary”
 - Zuckerman v. Alter, 615 So.2d 661 (Fla. 1993)
 - Only one reported case on 732.4017 – Stone v. Stone
 - QPRT gone wrong – court noted “property owners may give away or dispose of homestead property during their lifetimes, including by transfer to a trust”



- **Maintaining Creditor Protection**

- Ownership Interest Requirement
 - Any beneficial interest in land (includes life estate) – Fla. Supreme Court
 - *Remainder Interest* – Creditors of Decedent
 - *Remainder Interest* – Creditors of Remainderman
- Ownership through revocable trust = qualifying beneficial interest
 - Significant case law support
- Support for application of homestead to irrevocable trust
 - Cutler v. Cutler, 994 So.2d 341 (Fla. 3d DCA 2008)
 - Found homestead status remained; withdraw 2007 opinion = Irrevocable Okay
 - Stone v. Stone, 157 So.3d 295 (Fla. 4th DCA 2014)
 - QPRT – Devise and creditor definition is the same



- **Maintaining Creditor Protection upon Transferor's Death**
 - Case law support for transfers of homestead to trusts for benefit of heirs maintaining creditor protection
 - 1 case (Elmowitz) – found property lost homestead protection seemingly based on trust not granting heir an interest in the property
 - Remainderman may be able to keep protection if they lived on property



- **Maintaining Tax Benefits**

- Beneficial ownership thru trust qualifies as “equitable title”
 - Fla. Stat. §196.041(2)
 - No distinction between revocable or irrevocable
- Application of tax benefits to homestead in irrevocable trust
 - Cases involving QPRTs maintaining homestead tax benefits
 - Nolte v. White
 - Robbins v. Welbaum

Additional Considerations



- **Federal Tax**

- FIGHT does not offer tax benefits
- Estate Tax – 1014 basis step up
- Gift Tax – beware of completed gift
- Income Tax – grantor trust

- **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)
 - No distinction between revocable or irrevocable trust

- **Future Transactions with Homestead**

- Challenges – future sales, Trustee approval, division of proceeds, etc.

Additional Considerations

continued



- **Reassessment – Fla. Stat. §193.155**
 - No change of ownership with transfer to FIGHT
 - No change of ownership if “the transfer is between legal and equitable title and no additional person applies for homestead exemption on the property”
 - RPPTL white paper for Fla. Stat. § 732.401 takes position that transfer does not trigger reassessment
 - Death of Transferor –
 - Reassessment if surviving spouse or minor children are beneficiaries?
 - Not new homestead, merely continuation of transferor’s homestead
 - Excluded from “change of ownership” if transferred to a spouse or another dependent upon the transferor. §193.155(3)(a)(2) & (4)

Additional Considerations

continued



- **Florida Documentary Stamp Tax – Fla. Stat. §201.02**
 - 3 Requirements
 - Transfer, Consideration, and Change of Beneficial Interest
 - Change of beneficial interest not a defined term
 - Fl. Admin Code §12B-4.013(28) Illustrations (refers to land trusts)
 - Department of Revenue – what does not constitute a change of ownership
 - TAA 09B4-003 (Apr. 14, 2009) – Transfers to joint trust of encumbered property
 - TAA 2004(b4)-011 (Dec. 2, 2004) – Transfer to QPRT
 - TAA 20B4-003 (Oct. 16, 2020) – Lady bird deed
 - TAA 12B4-001 (Mar. 6, 2012) – Life estate deed with transferor being the remainderman
 - Analysis of Application to FIGHT
 - If DOR disagreed what would be the result?
 - Tax only applicable to % interest being transferred

Additional Considerations

continued



- **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
 - FIGHT is self settled trust due to future reversionary interest
- Fla. Stat. §736.0505
 - Irrevocable = creditor reach only what can be distributed to transferor
- In re Brown, 303 F.3d 1261 (11th Cir. 2002)
 - Creditor could only reach income and not principal of irrevocable trust
- What could a creditor reach from a FIGHT?

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

- Will common law/statutory powers to revoke trust by agreement among grantor and beneficiaries be considered a retained grantor power?
- RPPTL white paper indicates “no” and ability to waive rights

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 FIGHT
- 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

- **Alternatives to FIGHT to Avoid Devise Restriction**

- Tenants by the entirety, joint tenants with rights of survivorship, life estates
- Ownership through LLC
 - Reassessment, Doc stamp tax, Loan acceleration
 - Loss of homestead creditor and tax benefits (consider 99 year lease option)

Drafting the FIGHT



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 – (1) life estate/remainder or (2) fee simple



Lifetime Limited Power of Appointment (“LPOA”)



Trust Term

Drafting the FIGHT

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

Include language to create “Equitable Title” for beneficiaries

Consider requiring Beneficiary's consent to sell

Drafting the FIGHT

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 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 me



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