Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #144

Date: 28-Jul-09
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: **Recent Rulings Involving Florida's "Save Our Homes" Cap & Homestead Tax Benefits**

LISI has recently provided members with important commentary on Florida's homestead exemption. In **Asset Protection Planning Newsletter #140** members learned how Florida's homestead classifications can have a direct impact on how a client's estate plan is drafted. In addition, **Asset Protection Planning Newsletter #143** described reporting of changes in direct or indirect ownership of non-homestead Florida real estate.

Now, **Jeff Baskies** provides **LISI** members with commentary on two recent rulings involving Florida's homestead real property tax benefits, and the impact on the so-called "Save Our Homes" cap.

Jeffrey A. Baskies is a Florida Bar certified expert in Wills, Trusts and Estates law who practices at Katz Baskies LLC, a Boca Raton, FL, boutique trusts & estates, tax & business law firm. Jeff has been a frequent LISI contributor. In addition, his articles have been published in Trusts & Estates, Estate Planning, Probate and Property, the Florida Bar Journal, Lawyers Weekly USA and other journals. He's been frequently quoted as an expert estate planner in the Wall Street Journal, the New York Times, the Boston Globe, Forbes Magazine and other news publications. Jeff is listed in Best Lawyers in America, in the Worth magazine list of the Top 100 attorneys, in Florida Trend's Legal Elite and in other similar publications.

EXECUTIVE SUMMARY:

Two recent rulings regarding Florida's "Save Our Homes" ("SOH") cap should interest planners with clients now residing in Florida or considering moving to Florida. The rulings impact the constitutionally enacted and then statutorily supplemented SOH provisions that cap the annual increase in property tax values on homesteads of Florida residents at 3% per year (or possibly a lesser CPI figure, but we will refer to it as the 3% cap).

First, on July 8, 2009, the 1st DCA ruled against challengers to the constitutionality of the SOH cap. While a further appeal is possible, the logic and the language of the ruling indicate that the SOH benefits are likely here to stay.

Second, on June 4, 2009, the Florida Supreme Court refused to accept jurisdiction in a case from the 3rd DCA favorably ruling on the ability to plan with long-term (99 year) leases for homestead tax benefits. This is especially important for clients who create QPRTs with Florida homesteads or with vacation homes that later become Florida homesteads because the clients moved to Florida during the QPRT term.

FACTS:

In 1992, the Florida voters passed Article VII, Sec. 4(d) of the Florida Constitution which creates the SOH benefit. Several statutes flesh it out, notably: F.S. 193.155, 196.031 and 196.041.

Essentially, since January 1, 1994, Florida residents have enjoyed a property tax benefit which capped the amount the value of their property could increase per year at 3%. This benefit is only enjoyed by residents and is only available on their principal residence. It has been reported that at least at one point the SOH cap protected over $80 billion in property value from tax.

Tweaks to the SOH rules have even broadened its benefits including a new "portability" which allows residents to move from one homestead to another and port their exemption (essentially grandfather their tax benefits) to their new residence (subject to a $500,000 cap). See **Estate Planning Newsletter #1244** ("Florida Takes Another Step to Encourage Change of Domicile: State Continues Trend to Favor Residents").

Constitutionality of SOH

This prosperity has not come without controversy. Several challenges have been filed to the constitutionality of the provision which clearly benefits residents over non-residents, and favors long-term residents over recent residents. A challenge was even heard before it was voted on in 1992.

None of the challenges have succeeded to date and the July 8 opinion in *Lanning v. Pilcher* makes the chances of a successful challenge seem even more remote.

In *Lanning v. Pilcher*, the Court heard arguments under several constitutional law theories challenging the validity of the SOH cap. And noting the arguments and the "well settled" law supporting SOH, the court summarized the case as follows:

> The plaintiffs argue that Section 4(c) violates their rights under various provisions of the United States Constitution, principally the Equal Protection Clause, the Privileges and Immunities Clause, and the Commerce Clause. The defendants argue in their answer brief that the trial court decided the case correctly on the merits. Some of them have also filed a cross-appeal to present an alternative claim that the trial court lacked jurisdiction to consider the plaintiffs' challenge. The argument on the cross-appeal is that the plaintiffs were required by law to assert their claim within sixty days of the date of their property assessments. We affirm the order on the appeal and the cross-appeal and offer very little comment, as all of the issues in this case are controlled by well- reasoned precedent.

Ultimately, the 1st DCA relied on *Nordlinger v. Hahn* (505 US 1, 1992)

and its own decision in *Reinish v. Clark* (765 So. 2d 197, FLA 1st DCA 2000) in finding the SOH protections do not violate any constitutionally protected rights. The court noted that Florida residents owning vacation homes are as adversely impacted by SOH as non-residents.

While the opinion in *Lanning v. Pilcher* does not delve deeply into constitutional law dogma (in fact, I didn't see the terms "rational basis" or "legitimate state interest" used at all), perhaps the decision's directness and simplicity will eliminate future challenges. Again, this decision may be appealed, but the language and the logic of the decision indicate it may be unlikely to be overturned.

Preserving SOH – QPRTs And 99-Year Leases

Another challenge for planners has been preserving the SOH benefits for as long as possible for our clients. Changes in title, transfers to trusts, adding joint tenants and advanced planning with vehicles like QPRTs have all lead to certain planning challenges.

One important challenge for planners has been the issue of retaining SOH benefits during the term of a QPRT and after the term. Fortunately several cases (*Robins v. Wellbaum* and *Nolte v. White*) clearly held that the beneficial interest retained in a QPRT during the initial term is sufficient for the term-holder to keep the SOH benefits. The rulings hinged on the fact that the same person was entitled to claim the SOH benefits before and after the transfer to the QPRT, i.e. the grantor/term-holder.

The argument for retained SOH benefits during the term of QPRTs is derived from Section 193.155(3), F.S. which states that property assessed under the SOH provisions shall be assessed to just value as of January 1 of the year following a change of ownership; however, a "change of ownership" is defined to exclude any transfer of legal title or beneficial title if "... subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled ..." Thus, in a typical QPRT scenario, the grantor/term-holder will be entitled to the SOH benefits before and after funding the QPRT, so there should be no SOH revaluation on funding one.

After those victories, the next issue became how to save the SOH benefits on the expiration of the QPRT term when the grantor/term-holder's right to use the property expired. That's where the 98+ year lease technique developed. It derives from these statutes:

Section 196.031(1)(a), F.S. which states, in relevant part:

> Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence ... is entitled to an exemption from all taxation ...on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution.

Section 196.041(1), F.S. which states, in relevant part:

> [L]essees owning the leasehold interest in a bona fide lease having an original term of 98 years or more in a residential parcel or in a condominium parcel . . . shall be deemed to have legal or beneficial and equitable title to said property.

The 99 year lease technique in conjunction with an expiring QPRT generally works as follows: the client enters into a 99 year lease prior to the expiration of the QPRT term and records that lease.

Based on the provisions of Section 196.041, F.S., the grantor of the QPRT remains the beneficial owner of the homestead even after the term ends and thus the client/grantor maintains the SOH benefits. For purposes of minimizing any gift tax exposure on the QPRT, typically the lease is made effective the day before (or near in time) to the expiration of the QPRT term, but it is essential that it be effective prior to the QPRT term ending, so there is never a change of owner triggering SOH revaluation.

As a result of the lease, the argument goes, the same person (the grantor) has the requisite beneficial interest in the property to qualify for homestead and SOH benefits after the QPRT term ends as had a right to them before the QPRT termination. Thus while legal title might pass to the children (or trusts for them) when the QPRT term ends, beneficial ownership remains the same.

Therefore, the termination of the QPRT and transfer of legal title should not be a revaluation event because the same person (the grantor) has the beneficial rights both before and after the expiration date, as is required by Section 193.155, F.S.

A 99 year lease case was challenged by the Monroe County (for Key West) property appraiser - *Higgs v. Warwick.* In November 2008, the 3rd DCA held that the 99 year lease was sufficient for a client to retain the SOH benefits.

The property appraiser appealed to the FL Supreme Court and on June 4, 2009, the Florida Supreme Court declined to exercise jurisdiction, denied a Petition for Review and ordered no Motion for Rehearing would be entertained, presumptively ending the Monroe County Property Appraiser's fight to revalue the homestead.

COMMENT:

The ability to use 99 year leases seems to be approved, and clients with QPRT planning needs should consider this technique. Moreover, planners creating QPRTs now for Florida homesteads (probably even if not a homestead at the time of funding) should consider including in the QPRT a continuing trust at the expiration of the term which is taxed as a "grantor trust."

The reason is so that the grantor can rent the property under a 99 year lease, and avoid the creation of taxable income. As a result, this would

possibly further leverage the estate planning benefits of the QPRT technique.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jeff Baskies

DUNCAN OSBORNE – TECHNICAL EDITOR

CITE AS:

LISI Asset Protection Newsletter #144 (July 28, 2009) at http://www.leimbergservices.com/ Reproduction in Any Form or Forwarding to Any Person Prohibited – Without Express Permission

CITES:

Higgs v. Warrick, 994 So.2d 492 (3rd DCA Nov. 2008) (the author was co-counsel with his former partner, Jack Pelzer, in this case and its appeals); "The SOH amendment survived several constitutional challenges on its way to the ballot. See *Fla. League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992); *In re Advisory Opinion to the Atty General—Homestead Valuation Limitation*, 581 So. 2d 586 (Fla. 1991)." See "Protecting and Preserving the Save Our Homes Cap" by Richard S. Franklin and Roi E. Baugher III, Florida Bar Journal (October 2003); see *Robbins v. Wellbaum*, 664 So.2d 1 (Fla. 3d DCA 1995). See also *Nolte v. White*, 784 So. 2d 493 (Fla. 4th D.C.A. 2001) (adopted the Robbins rationale), rev. den., 805 So. 2d 808 (Fla. 2001). These cases essentially overrule a prior attorney general opinion that denied the homestead exemption to property held in a QPRT: AGO 1994-50 (June 2, 1994). In Information Bulletin DAV-96-003, the Florida Department of Revenue indicated that the Robbins decision left the area of law relating to this issue unsettled and that individuals seeking a homestead exemption through a QPRT should reapply for the exemption to preserve the issue.