Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #170

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From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: **Jeff Baskies on Habeeb v. Linder-Florida's 3rd DCA Throws Homestead Jurisprudence for a Loop: Can Signing a Deed Constitute a Homestead Waiver?**

For the second time in less than 5 years, the 3rd District Court of Appeals in Florida has issued a potentially ground-breaking and rule-changing homestead decision. As **Jeff Baskies** notes in his commentary, if this ruling is broadly applied, post-nuptial waivers of homestead rights might be assumed in virtually all intra-spousal transfers via warranty deed.

As Jeff points out, the ruling appears to be very fact-intensive, and as such may be narrowly construed and applied. Ultimately, if this ruling is broadly applied, it may impact every advisor working with married couples owning a Florida homestead.

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Before we get to Jeff's analysis of Habeeb v. Linder, members should note that **LISI** has posted another podcast by **Bob Keebler**. The topic of Bob's latest podcast is "GRATs and the $5 M Gift Tax Exemption." Members may click the following link to access Bob's latest podcast: GRATs and the $5 M Gift Tax Exemption.

Now, here is Jeff's commentary:

EXECUTIVE SUMMARY:

On February 9, 2011, a three-judge panel of the 3rd DCA issued a ruling in Habeeb v. Linder holding that a husband's joinder in a warranty deed of homestead property to his wife's name constituted a waiver of his post death homestead rights due to his transfer of "all hereditaments" to his wife. This is an important decision for many reasons (not the least of which being the extremely high regard held for the attorneys/firms for both litigants), and it may impact title to property in many cases.

Similarly, in 2007, the 3rd DCA's decision in Chames v. Demayo (holding that a waiver of the homestead creditor protection in an attorney's fee contract was valid) shook the homestead world, until it was overturned, first en banc by the 3rd DCA and then by the Florida Supreme Court. Interestingly, the en banc opinion of the 3rd DCA overturned the original opinion and "got it right" according to the Florida Supreme Court.

What will be the fate of Habeeb, and what does it mean to planners and probate lawyers?

FACTS:

Mitchell and Virginia Habeeb were married form approximately 1958 until Virginia's death in 2008. In 1973, they took title to a condo on Key Biscayne as tenants by the entireties. In 1979, they executed a warranty deed conveying title to Virginia individually.

The deed did not contain an explicit waiver of homestead rights (as the 3rd DCA points out) but it did contain the sweeping warranty language of the old Ramco Form 01, where the grantor "grants, bargains, sells, aliens, remises, releases, conveys and confirms to the grantee all that certain land as well as all the tenements, hereditaments and appurtenances thereto in fee simple forever". (emphasis added)

In 2006, Virginia executed a will devising a life estate in the condo to her husband, Mitchell, with the remainder interest in the condo to her sister, Betty. The residue passed to Mitchell.

They continuously lived in the condo as their homestead until Virginia's death in November 2008. Virginia was survived by both her husband, Mitchell, and her sister, Betty, but had no minor children at the time of her death.

Subsequently in January 2009, Mitchell died. He was survived by 6 nephews,

including Richard Habeeb, the personal representative of his estate and appellant in the case.

Next, Betty died in July 2010, survived by her daughter, Catherine Linder, the personal representative of Virginia's estate and the appellee in the case.

COMMENT:

The Arguments Presented by the Parties

Mitchell's estate challenged the devise of the homestead property in Virginia's will. The position taken was that Virginia's devise of only a life estate interest in the property to Mitchell was invalid and as a result, title vested outright in Mitchell on Virginia's death. Absent a valid waiver of Mitchell's homestead rights, a devise of less than a fee simple interest would be invalid under In re Estate of Finch. And if there was an invalid devise of the homestead, then since she had no descendants, the homestead would have passed outright to Mitchell by virtue of FS 732.401(1).

However, Virginia's estate argued that Mitchell did in fact validly waive his homestead rights, and thus Virginia's devise of only a life estate to Mitchell was valid. If there was a valid waiver, then this argument seems correct, given that Virginia was not survived by minor children. Therefore, the estate argued, the life estate terminated on Mitchell's death and the remainder beneficiary (Betty) took fee simple title at that time. Thus the beneficiaries of Betty's estate are now the owners of the homestead.

Therefore, obviously, the pivotal issue of the case was whether joining in the deed to Virginia constituted a valid homestead waiver by Mitchell.

FS 732.702 defines by statute the requirements for a waiver of homestead rights, and the estate argued that the execution of the deed did not meet the statutory requirements on two grounds: failure to give adequate financial disclosure and failure to adequately waive homestead rights.

The Ruling

Saying it was addressing an issue of apparent first impression, the 3rd DCA analyzed the issue of whether the execution of this warranty deed was a transfer or waiver of homestead rights.

The court cited to Art. X, Sec 4(c) which permits husbands and wives to alienate their homestead property by mortgage, sale or gift, and that the

execution of the 1979 deed was a transfer and waiver of the husband's homestead rights to the wife.

In support of this holding, the court cited to the inclusion of the term "hereditaments" in the deed, and concluded the term encompassed Mitchell's homestead rights in the property if he survived Virginia. Citing to Fla Jur, the court said the term "hereditaments" includes "anything capable of being inherited, whether it is corporeal, incorporeal, real, personal, or mixed."

Thus, the 3rd DCA held that under all the circumstances of this case, including the inclusion of the term hereditaments in the deed, the joinder of Mitchell in the deed affected a transfer and waiver of Mitchell's homestead rights to Virginia.

The "Good News"

There is some apparent good news, depending on your point of view.

For those who believe the court in Habeeb reached the correct decision, the good news is that there may be a relatively easy way for clients to avoid the Florida homestead devise restrictions simply by having both spouses join in a deed. Doing such is certainly easier than creating and funding an irrevocable trust or a full-blown post-nuptial agreement. Moreover, if Habeeb is properly decided then it provides a valuable tool to planners.

For those who believe the Habeeb opinion incorrectly applied Florida homestead law, the good news is the Habeeb decision seems to be extremely fact-intensive. As a result many cases will likely be easily distinguishable. For example, the Habeeb opinion relies heavily – if not exclusively – on the inclusion of the term "hereditaments" in the deed. Thus, many cases should be easily distinguishable from Habeeb if the term "hereditaments" (or a very close synonym) is not included. Also, the 3rd DCA had to reach certain opinions about the adequacy of financial disclosure, the intent of Mitchell to waive his rights and other issues which all appear to have been very fact-specific to the Habeeb case.

Thus while fact patterns similar to Habeeb will likely be plentiful (presumptively there are many cases where deeds are prepared transferring homesteads – or interests therein [e.g. one half to each spouse]- to separate names or revocable trusts), it is not clear how broadly the ruling would or should be applied. Indeed, by way of full disclosure, the author represents clients in a fairly similar case in another District in Florida, but that deed did

not include the term "hereditaments" and that case has other factual dissimilarities which should make that case distinguishable from the Habeeb holding.

Might Habeeb be Ignored in Other Districts?

The Habeeb decision throws many estate plans and many probates into confusion. Many practitioners argue that Habeeb should be limited in its application, but who knows its borders?

Moreover, while the author understands there will be no further appeal of Habeeb, it seems possible – if not likely - other Districts in Florida might ignore the Habeeb ruling in a future case, setting up the issue for multiple appeals and a great deal of confusion. Perhaps the risk of this result is heightened in light of the 3rd DCA's recent history in respect to homestead jurisprudence. Thus, practitioners in other districts might try cases seeking to reach contrary conclusions even on the same or similar facts.

That result may be possible - if not indeed likely - because the decision of the 3rd DCA in Habeeb seems to ignore one key element of homestead jurisprudence: the state's public policy of protecting homesteads is so vital that homestead waivers should never be "gotchas" – they should only be knowingly, intelligently and voluntarily made. When discussing the reasons why homestead waivers are okay in mortgages (where anyone signing a mortgage knows there is a risk of forfeiture of the underlying homestead property in case on nonpayment) but not in general contracts, the Florida Supreme Court in Chames v. Demayo stated:

Requiring that a waiver of the homestead exemption be made in the context of a mortgage assures that the waiver is made knowingly, intelligently, and voluntarily.

The Supreme Court of Florida takes the homestead protections of the constitution very seriously and has repeatedly ruled in matters to expand the broad public policy that the homestead provisions are meant to protect: i.e., to protect citizens from their creditors and to protect surviving spouses and minor children from potentially being "thrown out of their homesteads" upon a spouse's or parent's death.

The Florida Supreme Court has a long history of expansively protecting homesteads for owners (applying the exemption from creditors during life) and their families (applying the "inurement" clause for the protection from creditors

and the devise restrictions).

Indeed, as expressed by the Supreme Court in its opinion on the 3rd DCA's Chames V. Demayo case, Florida jurisprudence holds that homestead waivers shouldn't be taken lightly and should only be permitted when made with full knowledge and understanding of the parties. In that decision, the Florida Supreme Court said:

The homestead provision has been characterized as "our legal chameleon." Our constitution protects Florida homesteads in three distinct ways. First, …(it) provides homesteads with an exemption from taxes. Second, the homestead provision protects the homestead from forced sale by creditors. Third, the homestead provision delineates the restrictions a homestead owner faces when attempting to alienate or devise the homestead property. We also have explained the reason behind the exemption: "The public policy furthered by a homestead exemption is to 'promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.'" McKean v. Warburton, 919 So.2d 341, 344 (Fla.2005) (quoting Pub. Health & Trust v. Lopez, 531 So.2d 946, 948 (Fla.1988)).

This public policy of promoting stability and welfare by liberally applying the homestead provisions of the Florida constitution is hard to reconcile with the holding in Habeeb. In light of that important public policy behind the homestead laws, how does Habeeb help further the state's interest if it permits spouses to be thrown out of their homes simply as a result of joining in deeds? Perhaps the facts in Habeeb (where the court concluded the deed was tantamount to a nuptial agreement and the client was fully aware of all his rights, was represented, had full financial disclosure and waived his rights knowingly and without duress) explain the result.

While it is true that some deed signings are overseen by lawyers, that does not mean they reach the level of clarity or understanding of a formal postnuptial agreement waiving homestead rights. The potential for "gotcha" results allowing surviving spouses to be thrown out on the streets is real and the 3rd DCA's dismissal of such may be misplaced.

A clear analogy can be made to Chames v. Demayo. In that case, the court found that a waiver of homestead rights in a mortgage is clearly valid as those signing mortgages know they may forfeit their homes, but general business

contracts should not be so protected as innocent consumers are not likely to recognize the consequences of signing such waivers.

Similarly, when entering a valid nuptial agreement (and hopefully with both parties represented by competent counsel), a party is sure to recognize that marital rights are being altered and should expect that there is a reasonable chance that in singing such a document post-death rights including homestead rights might be altered. The same expectation is not true of a person signing a deed. There are many reasons a deed may have been signed.

Moreover, signing a deed to one's wife doesn't necessarily mean one expects to give up one's homestead rights. Again, the fact-intensive nature of this holding showed that in this case maybe Mitchell did know what he was doing and maybe he did intend to waive his homestead rights, but in most cases, it seems impossible to guess what the spouse was thinking on signing a deed.

While it is clear Florida law allows waivers by spouses of their homestead rights (City National Bank of Florida v. Tescher), such waivers should only be enforced where they are knowing and fully understood. Rutherford v. Gascon held that a waiver of homestead rights had to be knowing and voluntary and in that case merely listing the homestead in a probate pleading did not complete a waiver. To protect the sanctity of such waivers, it would seem the mere signing of a deed with magic language that nobody understands (the court couldn't even properly spell hereditaments throughout the opinion) should not be deemed a valid waiver.

Moreover, FS 732.702 seems to require something more than signing a deed to constitute a valid postnuptial waiver. That section doesn't seem to allow for a mistake or a "gotcha". Moreover, if the statute doesn't already require a clear and knowing waiver, then the Florida Bar should consider a bill to require such and modify the result of Habeeb to ensure other spouses are not deemed to have waived homestead rights by joining in a deed.

The Bad News

Habeeb may wreak havoc with ongoing probates. In light of the case, what's a probate lawyer to do? Assume you are presented with a husband who died a Florida resident with a funded Florida revocable trust including the homestead. Also assume the trust plan has a standard credit shelter/marital trust plan by formula for his surviving wife. Assume the house in question was or becomes before his death their homestead. And assume they never signed a nuptial

agreement.

What if you believe the wife had no intention whatsoever to waive Florida homestead rights in the conveyance to the husband's trust? Maybe she did it while they lived out of state and before they even moved to Florida. But assume she joined in a full warranty deed.

How does a Florida probate lawyer advise the trustee of that revocable trust? Or how does a Florida probate lawyer advise the Personal Representative acting under a Will if the facts were the same but the estate plan was done by will and not a revocable trust?

While homestead determinations are going to be required, what position do we tell the fiduciary to take? Do we tell clients that Habeeb seems fact-intensive (or perhaps even wrong)? Do we tell clients to ask a court to have a determination that title vests as a life estate to wife and vested remainder to the descendants, as FS 733.401 provides? Or do we seek an order passing title to the credit shelter trust?

What if we transfer title to the credit shelter trust and subsequently Habeeb is overturned? What happens then? Do we have to go back, re-open a probate and get a new court order on homestead status? Would that later order over-turn the prior? Would there be a cloud on the title? And who will pay for that subsequent proceeding? The clients are not likely to pay to reopen a case.

These issues are unresolved and open. They make dealing with Habeeb particularly tricky. Therefore attorneys representing Florida clients in the planning stages and those involved in administrations of Florida estates and trusts need to be aware of the Habeeb case and to consider its reach and its impact. And Florida practitioners need to discuss how to deal with Habeeb and if future cases or even statutory reforms are needed.

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

Jeff Baskies

Technical Editor – Duncan Osborne

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CITES:

Habeeb v. Linder, 3D10-1532 (Fla. 3d DCA Feb. 9, 2011; Chames v. Demayo, 972 So. 2d 850 (Fla. 2007); In re Estate of Finch, 401 So.2d 1308 (Fla. 1981); City National Bank of Florida v. Tescher, 578 So.2d 701 (Fla. 1991); Rutherford v. Gascon, 679 So.2d 329 (Fla. 2d DCA 1996)