**Barbara Cunningham**

**Subject:** FW: Jeff Baskies: 3rd DCA Withdraws Habeeb Opinion, What Now? Steve Leimberg's Asset Protection Planning Newsletter

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**From:** stevesletters@leimbergservices.com [mailto:stevesletters@leimbergservices.com]
**Sent:** Tuesday, May 24, 2011 10:58 PM
**To:** Jeff Baskies
**Subject:** Jeff Baskies: 3rd DCA Withdraws Habeeb Opinion, What Now? Steve Leimberg's Asset Protection Planning Newsletter

**Steve Leimberg's Asset Protection Planning Email Newsletter -**
**Archive Message #175**

**Date:** 24-May-11

**From:** Steve Leimberg's Asset Protection Planning Newsletter

**Subject:** **Jeff Baskies: 3rd DCA Withdraws Habeeb Opinion, What Now?**

In **LISI** Asset Protection Planning Newsletter #170, frequent **LISI** commentator **Jeff Baskies** reviewed the February 9, 2011 Florida homestead decision from the 3rd District Court of Appeals in Habeeb v. Linder. In that case, the court essentially held that a spousal joinder in a warranty deed to the other spouse may be deemed a waiver of the joining spouse's homestead rights, leaving the other spouse to potentially disinherit the joining spouse in the future.

In Jeff's commentary, he noted this was the second time in less than 5 years that the 3rd District Court of Appeals in Florida issued a potentially ground-breaking and rule-changing homestead decision. Indeed, if the Habeeb case was broadly applied, post-nuptial waivers of homestead rights might have been assumed in virtually all intra-spousal transfers via warranty deed.

Well, as they did the last time around, the 3rd

District Court of Appeals once again made an abrupt about-face. To bring us up to date on this recent development, Jeff provides **LISI** members with an updated commentary, noting how the withdrawal of the Habeeb ruling still leaves many issues potentially unanswered.

**Jeffrey A. Baskies** is an honors graduate of Trinity College and Harvard Law School. He 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. In total, Jeff has more than 100 published articles. He has been a frequent LISI contributor, and his articles have also been published in Trusts & Estates, Estate Planning, Probate Practice Reporter, 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, in Florida SuperLawyers (Top 100 in Florida) and in other similar publications. He can be reached at www.katzbaskies.com.

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 was potentially 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 have impacted title to property in many cases.

Our prior commentary asked: What will be the fate of Habeeb, and what does it mean to planners and probate lawyers?

It turns out Habeeb's fate was to be withdrawn, and it may not be cited as authority even in the 3rd DCA where it was issued. But what does that mean? Well, as one of the litigants' counselors wrote to me: "It's as if it never happened."

## FACTS:

The facts of the Habeeb case are outlined in detail in Asset Protection Planning Newsletter #170.

The new development, however, is that on May 17, in a sua sponte Order, the 3rd District Court of Appeals withdrew the Habeeb decision via this order:

> Upon the Court's own motion, and upon consideration of a settlement of this appeal before the issuance of a final opinion, the non-final opinion issued February 9, 2011, 36 Fla. L. Weekly D300, is hereby withdrawn.

The withdrawal apparently means the Habeeb case cannot be cited as precedent. One wonders if the withdrawal may actually be an indication (or precedential/evidence?) that the decision was not correctly decided in the first place?

## COMMENT:

Is Habeeb really dead? The 3rd DCA's withdrawal of the Habeeb opinion should put

Florida homestead jurisprudence back where it was before the opinion came out.

But can it? How can the decision be ignored and how can its withdrawal (without a contrary opinion) be determinative in the future?

Are other lawyers lying in wait for future litigants with similar facts; waiting for the opportunity to present a similar case to another trial/appellate court? Should estate planners and lawyers to estate and trusts administrators assume all homestead transfers via warranty deed are targets for such future litigation? Or can we infer that the 3rd DCA changed its mind because it felt Habeeb was wrongly decided and proceed on that basis?

Unfortunately, by withdrawing the opinion but not issuing a contrary opinion, it would seem the 3rd DCA has left the door open and the questions unanswered.

As was pointed out in Asset Protection Planning Newsletter #170, the Habeeb ruling appeared to be very fact-intensive in the first place. And we noted the decision was opening the door to new litigation anyway.

But the withdrawal of the original opinion without the issuance of a new opinion seems likely to invite more suits on precisely the issue of: can future post-death homestead rights be waived just by signing a deed to your spouse or her revocable trust?

The good news is that by withdrawing its own order, the 3rd DCA's February opinion can't be cited for the proposition it stood for and cannot be used as precedent. And the withdrawal likely bolsters the arguments presented in the original LISI commentary as to why the ruling should have been narrowly relied upon anyway.

For those who believe the court in Habeeb reached the correct decision, the withdrawal is bad news. Once again, there is no assured, easy way for clients to avoid the Florida homestead devise restrictions simply by having both spouses join in a deed. Signing a deed is certainly easier than creating and funding an irrevocable trust or entering into a full-blown post-nuptial agreement. However, with Habeeb withdrawn, it would seem a very risky proposition for a planner to suggest a client try this technique. Indeed, while it is questionable if Habeeb ever provided a valuable tool to planners, it now seems clear that it cannot be relied upon.

For those who believe the Habeeb opinion incorrectly applied Florida homestead law, the good news is by withdrawing it, the decision cannot be cited as precedent anywhere in the state, not even in the 3rd DCA.

Unfortunately, as fact patterns similar to Habeeb will likely be plentiful (presumptively there are many cases where deeds are prepared transferring homesteads – or interests therein- to separate names or revocable trusts), planners and administrators have to wonder if and when there will be new cases making similar arguments.

As a result of this uncertainty, it is not clear how much we can now read into the Habeeb decision or its being withdrawn.

As I argued in my prior commentary on Habeeb, and as the attorney who argued the case before the 3rd DCA stressed, the decision of the 3rd DCA seemed 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. The Habeeb case and others that might seek to follow in its footsteps would seem to ignore this hugely important state public policy.

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).

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 have been misplaced.

A clear analogy can be made to Chames v. Demayo. In that case, the 3rd DCA 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, a waiver of homestead in a valid nuptial agreement (and hopefully with both parties represented by competent counsel), is clearly valid. 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. However, the same expectation is not true of a person 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. To protect the sanctity of such waivers, it would seem the mere signing of a deed with magic language that virtually nobody understands (I admit I had to "google" hereditaments) should not be deemed a valid waiver.

The author hopes Habeeb won't be repeated in a series of future cases in multiple districts in Florida, but such seems an obvious fate. Ultimately, it seems likely this is not the end of Habeeb (although this may be the last ruling in this particular case), and planners and administrators have likely not heard the last word on the subject of waiver of homestead rights by deed.

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

*Jeff Baskies*

**TECHNICAL EDITOR:**
**DUNCAN OSBORNE**

## CITE AS:

**LISI** Asset Protection Planning Newsletter #175 (May 24, 2011) at http://www.leimbergservices.com 

## 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)

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