Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #198

Date: 18-Apr-12

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: **Baskies & Nash on Aronson II: Florida 3rd DCA Withdraws a Controversial Homestead Decision and Substitutes a New/Better Ruling**

"For the third time in less than 5 years, the 3rd District Court of Appeals in Florida (covering Miami-Dade County) issued a retraction of a potentially ground-breaking and rule-changing homestead decision. In this latest decision, the court withdrew a highly criticized ruling that appeared to permit a husband's revocable trust to make an otherwise restricted devise of homestead, without the existence of a valid nuptial agreement or homestead waiver.

Instead, in withdrawing the prior opinion and issuing a new opinion in its place finding the constitutional homestead devise restrictions to apply regarding this revocable trust disposition, the 3rd DCA has clarified an otherwise murky situation for any Florida homestead transferred to a revocable trust."

Now, **Jeff Baskies** and **Charlie Nash** provide **LISI** members with their analysis of the case they refer to as "Aronson II."

Jeffrey A. Baskies is an honors graduate of Trinity College and Harvard Law School. Jeff 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 has been 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 (including listing as one of the "Top 100" attorneys in Florida – 2009, 2010 and 2011) and in other similar publications. He can be reached at www.katzbaskies.com.

Charles Ian Nash is a Fellow and Regent of The American College of Trust and Estate College and a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar. He practices law with the Brevard County law firm of **Nash & Kromash, LLP**. Charlie is a Florida Bar Board Certified Wills, Trusts and Estate Lawyer.

Here is their commentary:

EXECUTIVE SUMMARY:

For the third time in less than 5 years, the Florida 3rd District Court of Appeal (covering Miami-Dade County) issued a retraction of a potentially ground-breaking and rule-changing homestead decision.

First, 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.

Next, in 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 revocable trust constituted a waiver of his post death homestead rights due to his transfer of "all hereditaments" in the "form" warranty deed. That ruling was subsequently withdrawn after significant criticism.

Now, in the latest decision in a very long-running Florida probate litigation, Aronson v. Aronson, (this current line of cases being called "Aronson II" as a prior ruling – "Aronson I" – held that a deed signed by the husband individually was a nullity as it was executed after the husband had already transferred title to his revocable trust) the 3rd DCA on February 1, 2012, withdrew its October 2010 ruling.

Had the original ruling in Aronson II stood, then the post-death consequences of any transfer of a homestead to a revocable trust would again be up for controversy. Fortunately, the 3rd DCA in its substituted decision in Aronson II seems to have reached the correct result regarding

the constitutional devise restrictions.

FACTS:

In July of 1996, while a resident of Massachusetts, Hillard Aronson created a revocable trust and conveyed property (including his Key Biscayne condo) to the trust. Hilliard died on November 10, 2011, survived by his wife, Doreen Aronson, and his two sons from a prior marriage, James and Jonathan Aronson. Under the trust, James and Jonathan became trustees on their father's death. Hillard's revocable trust left a life estate in his assets to Doreen, and upon her death the balance of the trust assets were to be distributed equally to James and Jonathan. The trust also included a 5 or 5 power permitting the wife to withdraw annually portions of the principal of the trust. As so often happens, the step sons and step mother wound up in protracted probate litigation which has lasted over 5 years.

First, Doreen claimed in Aronson I that she received all of the interest in the condo by virtue of a quitclaim deed to her signed by her husband. As noted, the decision in Aronson I found that a deed from the husband, individually, was void as he did not own the property – his trust did. Aronson I cleared up any concerns regarding whether or not a grantor of a revocable trust could convey, whether by gift or sale, trust property in his individual capacity with a bright line rule that in fact he cannot.

Next, after losing that round, Doreen began exercising her annual withdrawal powers over 5% of the property. Further she demanded reimbursement of certain expenses she paid for the property (including payment on the mortgage) which she claimed were properly expenses of the trust, not her expenses.

The sons countered with a plan to sell the condo as trustees of the trust which led Doreen to sue for her homestead protection (arguing it was her homestead so they couldn't sell it) and for reimbursement of her expenses.

The trial court found that the condo was Doreen's homestead so it could not be sold without her consent, ordered the trust to reimburse her for the mortgage amount she'd paid (almost $130,000), and ordered another $136,000 to her for repairs and improvements she paid while she occupied the condo (although did not reimburse her for taxes or

maintenance charges which were the life tenant's obligation). The court also found that the trustee had to issue her a deed for 5% of the property for each year she exercised her withdrawal power.

The 3rd DCA in Aronson II (in October 2010) affirmed virtually all of the trial court rulings, but added that the widow should also have been awarded prejudgment interest.

Absent a valid marital agreement, the devise in the husband's trust appeared invalid and all the other aspects of the decision seemed to make no sense, but apparently the arguments originally made in Aronson II all related to the homestead rights of Doreen, assuming she did receive a valid life estate and the other trust provisions were valid.

After consultation with homestead strategists, the attorneys for the sons filed a motion for rehearing and argued that the entire basis of the decision was founded on a mistake. The sons argued the property was the deceased father's homestead and the devise via his trust of a life estate to his wife was invalid (see In re Finch holding that a devise of a life estate is constitutionally impermissible). Thus at the moment of death, title to the property devolved by statute (FS 732.401) as a life estate to the wife and remainder to the sons ABSENT all the other trust provisions (i.e. the 5 or 5 power could not apply to the homestead).

And on February 1, 2012, after due consideration of the motion for rehearing, the 3rd DCA reversed the rulings under review and confirmed that the purported devise in the husband's revocable trust was invalid. Therefore, "in a twinkle of an eye, as it were" title passed as a statutory life estate and remainder. Thus, the court voided the balance of the provisions of the revocable trust as they might apply to the homestead. From that moment on, the court held, "the trustee had no power or authority with respect to the former marital home."

COMMENT:

The 3rd DCA clearly made the correct decision on rehearing. What is hard to understand is how the court ignored the provisions of FS 732.4015. FS 732.4015 provides as follow:

> (1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be

devised to the owner's spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(1) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.

(2) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

Even more surprising is that the provisions of FS 732.4015(2) are a codification of an earlier decision of the Florida 3rd District Court of Appeal in In re Estate of Johnson, 397 So.2d 970 (Fla. 4th DCA 1981).

What Aronson does not address is the situation in which homestead is owned by (or devised to) the Revocable Trust of an individual who is not survived by a spouse or by a minor child. In that event, if the trust agreement provides that the assets comprising the Revocable Trust (obviously now irrevocable), are to be distributed to one or more heirs of the decedent, such as the decedent's adult grandchildren, does the Trustee have the inherent power to sell the homestead?

Remember that if the same homestead was being devised to heirs pursuant to the decedent's Will, the personal representative would not have the power to sell the homestead absent a specific direction in the decedent's Will to do so. Would your answer be different if there was a specific provision authorizing the Trustee to sell the homestead? Several trial court judges have ruled in unreported cases that absent a specific direction in a trust agreement, the Trustee of what was a revocable trust does not have the power to sell homestead real property that would otherwise be distributed to heirs of the deceased grantor. Hopefully, the Florida Legislature will put some certainty in the Florida Trust Code on this issue.

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

Jeff Baskies

Charlie Nash

TECHNICAL EDITOR: DUNCAN OSBORNE

CITE AS:

LISI Asset Protection Planning Newsletter #198 (April 18, 2012) at http://www.leimbergservices.com

CITES:

Chames v. Demayo, 972 So. 2d 850 (Fla. 2007); Habeeb v. Linder (withdrawn on May 17, 2011); 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); In re Estate of Johnson, 397 So.2d 970 (Fla. 4th DCA 1981); Florida Statute §732.401; Florida Statute §732.4015.