Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #209

Date: 24-Sep-12

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: Jeff Baskies: Please Don't Plan with Your Clients' Florida Homesteads

"The current $5.12 million gift tax exemption is scheduled to sunset on December 31, 2012, a day we are probably all looking forward to being on vacation!! And we all have clients looking for 'easy and painless' solutions (or at least relatively easy and less painful solutions) for ways to use their exemptions before the end of the year. One relatively easy way to help clients use their gift exemptions is to transfer to an irrevocable trust real property that does not produce income, i.e. a primary or vacation home.

This activity has led to numerous phone calls from attorneys and other advisors inside and outside of Florida for help planning transfers of their clients' Florida homesteads to such trusts. Prior to 2011, using Florida homesteads in gift planning was often/generally limited to a small number of families who used QPRTs. However, in the past 12 months, accelerating in the last 6 months, we've seen a significant uptick in discussions of gifting homesteads to irrevocable trusts.

This increase in discussions of using homesteads as planning assets highlights the many risks involved, including potentially the loss of Florida's famous unlimited homestead creditor protection, the loss of Florida's valuable homestead real property tax exemption and the potential inclusion of the home in the estate of the client, due to the planning many are doing to try to retain the property tax benefits.

Please, friends, in most every case, homesteads should only be used in planning as a last resort and even then with great caution, as the state law and federal tax law aspects of the transactions are unclear and potentially in flux. If you can possibly avoid it, please don't transfer your clients' Florida homesteads."

Now, **Jeff Baskies** provides members with some sobering advice concerning the transfer of Florida homesteads.

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 has an emphasis in his practice on issues relating to Florida Homestead law. Jeff 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 (including recently being named the 2013 South Florida Trusts and Estates "Lawyer of the Year" by Best Lawyers), in the Worth magazine list of the Top 100 attorneys in the country (3 times), in Florida Trend's Legal Elite, in Florida SuperLawyers (including listing as one of the "Top 100" attorneys in Florida – 2009-2012) and in other similar publications. Finally, Jeff is the new author of the 2013 edition of West publishing's book, Estate, Gift, Trust, and Fiduciary Tax Returns: Planning and Preparation. He can be reached at www.katzbaskies.com.

Here is his commentary:

EXECUTIVE SUMMARY:

The current $5.12 million gift tax exemption is scheduled to sunset on December 31, 2012 - a day we are probably all looking forward to being on vacation!! And we all have clients looking for "easy and painless" solutions (or at least relatively easy and less painful solutions) for ways to use their exemptions before the end of the year. I'm sure we have all often heard: "I want to use up my exemption, but I don't want to diminish my cash flow, and I don't want to lose control of my investment assets."

In our zeal to help our clients, we look for viable solutions to meet these expectations. One relatively easy way to help clients use their gift exemptions is to transfer to an irrevocable trust real property that does not produce income, i.e. a primary or vacation home. Often, such a gift resonates with clients, as they don't feel any less wealthy after transferring the home, and they typically have neither altered their cash flow nor given up control of their investments. Plus, the clients hopefully appreciate the chance to lock up the $5.12 million gift tax exemption before it goes away.

As a result, we've seen a proliferation of cases where gifts of homes are being made to irrevocable trusts of all shapes and sizes. Usually the trusts will be taxed as grantor trusts since the clients will typically rent the property (annually or as used) from the trust and the grantor trust treatment minimizes income taxes for the family (Rev. Rul. 85-13).

This activity has led to numerous phone calls from attorneys and other advisors inside and outside of Florida for help planning transfers of their clients' Florida homesteads to such trusts. Prior to 2011, using Florida homesteads in gift planning was often limited to a small number of families who used QPRTs. However, in the past 12 months (accelerating in the last 6 months), we've seen a significant uptick in discussions of gifting homesteads to irrevocable trusts.

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Please, friends, in most every case, homesteads should only be used in planning as a last resort and even then with great caution, as the state law and federal tax law aspects of the transactions are unclear and potentially in flux. If you can possibly avoid it, ***please don't transfer your clients' Florida homesteads.***

FACTS:

While there are a variety of laws that affect homesteads, the fundamental law of homestead comes from the Florida Constitution, the key provisions of which are in Article X, Section 4, as follows:

> SECTION 4. Homestead; exemptions.—
>
> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;
>
> (2) personal property to the value of one thousand dollars.
>
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.
>
> (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

As you can see, there are some creditors who are not barred by the homestead provisions (section (a) above), like certain contractors. Further, there are size restrictions on homesteads; the half-

acre restriction in a municipality may cause problems for many wealthier clients. Obviously, in planning for clients with homesteads, you need to be aware of these provisions, and there are many cases that are pertinent, but this article will focus on planning for property that is assumed to qualify as "homestead."

A fundamental step in any homestead discussion involves distinguishing the 3 major categories of homestead law. As the Florida Supreme Court stated in the seminal case of Snyder v. Davis, there are essentially three different kinds of homestead law to distinguish: (i) creditor exemption/protection, (ii) real property tax exemption and (iii) devise restrictions.

Homestead Creditor Protection

Probably most famously, Florida law protects an owner of a homestead from the claims of creditors, regardless of the value of the homestead, subject to certain restrictions, including acreage. The basic rules for protecting homesteads from the claims of creditors are provided in Article X, Section 4 of the Florida Constitution, and Florida Statutes ("F.S.") Chapter 222. Section 4(a) of Article X of the Constitution generally protects homesteads from forced sale by creditors, and section 4(b) provides for the inurement of such protection. There are certain restrictions, e.g., size of the property inside and outside a municipality, and there are certain exceptions, e.g., for property taxes of those who provide services improving or repairing the homestead.

Homestead Real Property Tax Exemption and Related Save Our Homes Cap

Florida provides ad valorem property tax benefits to owners of homesteads. These tax benefits were vitally important for many clients, especially when real estate values were showing double digit annual increases. However, many clients still experience significant property tax benefits.

The basic rules for the homestead ad valorem, real property tax exemption and the related "Save Our Homes" ("SOH") cap on property tax assessments are found in Section 6 of Article VII of the Florida Constitution and F.S. Chapter 196. Under Section 6, a property tax exemption is afforded for residents who own a homestead, with additional exemptions for widows, seniors, disabled persons, and disabled veterans. These provisions are extremely important as Florida has no income tax, and thus property taxes are a primary source of revenue.

Essentially, Florida tax law favors residents with real property tax breaks, the most important of which is the SOH cap. SOH applies a cap of 3% (or CPI, if lower) on annual increases in property values for purposes of ad valorem real property taxes—regardless of market increases in value. In the 1990s and for much of the 2000s, for example, many Florida homeowners saw their property values double or triple while their assessed value for tax purposes crept along at 3% per year. The significant gap between real fair market value and assessed value created a substantial incentive for these clients to maintain the SOH cap. It was reported that the SOH cap shields $400 billion in real property values from taxation.

Estate planners need to be aware of SOH before entering into estate planning with homesteads owned by Florida clients. Any transaction which changes beneficial ownership of the homestead can cause the client to lose the SOH benefits that have accrued, causing a revaluation for tax purposes and a potentially huge increase in property taxes every year thereafter, not to mention immeasurable headaches for the planner who did it. We worked with one firm on a transfer of a property which was benefiting from the SOH cap to the tune of about $150,000/year in reduced property taxes.

While the intricacies of the SOH statutes are not really at issue for purposes of this article, obviously any practitioner working with a Florida client's homestead must consider the impact of SOH changes before transferring a home.

Homestead Restrictions on Devise

Finally, Florida law restricts a homeowner's ability to devise her homestead and to alienate it during lifetime, via certain restrictions on devise provided in Article X, Section 4 of the Florida Constitution, and F.S. Sections 732.401 and 732.4015.

As noted earlier, Article X, Section 4(c) (quoted above) provides the devise restriction as well as the limitation on lifetime alienation. Obviously, the provisions are designed to "protect" surviving spouses and minor children. However, these "protections" have created unsuspecting traps for the unwary practitioner. If a homestead is improperly devised or is not devisable, then 732.401 and 732.4015, FS apply and address what happens to the homestead, i.e. the spouse gets a life estate or 50% tenant in common interest and the descendants get a remainder or the balance of the tenant in common interest.

COMMENT:

Because of the desire of so many clients to use the gift tax exemption but not give up income producing assets, there is an increasing (at least so it seems) desire to fund irrevocable trusts with real estate, including Florida homesteads.

Warning: Before changing title to a client's Florida homestead, please first look for any viable alternative.

Based on experiences in conversations with many attorneys and other advisors both in Florida and outside Florida, there is a surprisingly similar pattern to the homestead gift discussions. They almost always follow one of two patterns.

1. The "I Didn't Know" Pattern:

The first pattern is easy as that one involves an attorney or advisor who didn't even know there were special homestead rules. Often those planners just thought they were looking for a Florida lawyer to prepare a simple deed. That conversation usually leaves the attorney/advisor surprised

at how complex the Florida homestead issues are and almost invariably leads to nothing. Although it is not always clear, I think those attorneys/advisors talk their clients out of it and move on, or they go find a different lawyer who will just prepare the deed and not try to stop them.

2. The "There's Gotta Be a Way" Pattern:

The second pattern, however, is more difficult and interesting. Those calls are typically with lawyers or advisors who know about the homestead issues, but they are not deterred. They want to find nuanced ways to gift the homestead and not have problems. Those calls often go something like this:

- "The client wants to transfer the home into a trust for his wife and kids and keep the SOH benefits, isn't the spousal interest enough to keep the SOH?"

- "The client is unmarried and wants to transfer the home to a trust for his children, can we sign and record a 99 year lease at the time we record the deed to keep the SOH benefits?"

- "This is the only asset the client has to plan with, please help me figure out a way to get it into a trust…."

And the typical response is virtually always the same: *"Can you find anything else to plan with?"*

After a negative response, often something like "this is the only asset the client will consider," the proper advice/response should be something like:

> "I suggest leaving the homestead right where it is. Florida law provides such important and powerful benefits to homestead owners, why risk messing any of that up? Why risk your client losing the unlimited creditor protection? Why risk losing the SOH tax benefits? Why risk an argument that the client's retained lease interest will wind up somehow being devise restricted or worse might cause the homestead to be included in the client's estate. Why risk any/all of that?"

There are a number of big problems with planning with clients' homesteads:

How Do You Convey Title?

The first problem is how to transfer the homestead. If a client is married, remember the spouse must join in the conveyance even if the spouse isn't on title. This is a simple nuisance that is easy enough to plan for, but it is an issue you must be sure you consider. Transfers of homesteads without spousal joinder are unfortunately more common than you'd imagine. After all, only one spouse's name is on title, so unless you are aware of the homestead rules, you wouldn't know that the non-owner spouse must join in the deed.

The consequences of making that mistake are huge. Generally deeds purporting to transfer homestead in which the non-owning spouse fails to join are deemed void (not voidable) - and that will really mess up your gift tax planning.

Can we Save SOH Benefits for Clients with Spouses?

The second problem is how to save the SOH benefits when there is a spouse involved in the planning. For some clients, a transfer to a trust for a spouse will do the trick. Transfers between spouses are exempted from SOH revaluation, and you can give a spouse enough rights in a trust to allow the transfer to continue the SOH benefits. Here is an example of a clause that might be used in a trust:

A. Homestead. If any interest in Grantor's homestead residence is held as a part of the principal of this trust, then Grantor's wife may live in such residence rent free. If Grantor's wife uses said residence as her primary residence, then Grantor intends that her beneficial interest and possessory rights to such residence shall comply with and satisfy the terms of Section 196.041 of the Florida Statutes, such that said beneficial interest and possessory right constitute, in all respects, "equitable title to real estate" as that term is used in Section 6, Article VII of the Constitution of the State of Florida.

However, what happens when the spouse dies and the trust is then only for the children, for example? Well, that would be a SOH revaluation event. And since we don't know when the spouse will die, it seems prudent to plan ahead.

In that case, it is common to suggest the client consider entering into a 99 year lease and recording it currently with the transfer to the trust. That way, the client should be entitled to the SOH benefits under the 99 year lease and the order of death shouldn't matter.

One theoretical unknown is the impact of the transfer to the trust followed by entering into the lease. The only case on point is Higgs v. Warrick, which went all the way to the Florida Supreme court, and fortunately the author was on the winning side. That case dealt with a lease between a client and his QPRT. The ruling supported the position that if the same person was entitled to the SOH benefits before and after the QPRT ended, then there was no revaluation event for SOH purposes. In that case, by entering the lease prior to the QPRT ending, and recording it, the client had the rights to SOH both before and after the QPRT term.

Instead, with this planning, the client has the SOH benefits on day 1, and the spouse has the SOH benefits on day 2 under the new irrevocable trust. That should be an exempted transfer. If the client and trustee enter a 99 year lease on day 3, is that still exempted? Logically, it should work since the benefits under SOH are just passing from the client to spouse and then back to the client and each "change" should be an exempted transfer. However, as noted, the only case on

the subject is not exactly on point. Nevertheless, logically, this should be an exempted transaction and the client should have the SOH benefits for life due to the 99 year lease, even if the spouse died before the client.

In response, some "push the edge" attorneys/advisors have asked: "to avoid the lease now and save the clients from paying rent, can we just put the lease on the property when the spouse dies?" The answer is no, since the spouse's death would be a revaluation event and recording a lease after the spouse's death (even one minute after) would be too late, it seems too risky to plan to record a lease at a later date. However, theoretically, so long as there was a proper 99 year lease in place and recorded before the spouse died, recording the lease later (but before the spouse's death) could work; it just seems likely to be riskier than most clients will want.

Following up, some of those "push the edge" attorneys/advisors have asked: "can we create and record presently a springing lease that comes into effect the day of (or the day before) the spouse's death?" That's a great question and I believe the answer is unknown. Logically, a lease that is recorded along with the deed to the trust that says the lease begins the minute before the spouse dies and then lasts for 99 years should work.

However, it is a very aggressive technique, and it might suffer from the "it's too cute for me" test at a property appraiser's office. To date, I have not seen this springing lease technique supported by a case or even a property appraiser's pronouncement; however, if any planners have used it successfully, I'd like to hear from you. Given the uncertainty, if a planner wants to try this technique, the client should be put on notice of the risks and should assume the risks in case it doesn't work.

How Can We Save SOH Benefits for Clients Without Spouses?

The third problem is how to preserve the SOH benefits on a transfer where there is no spouse. This is a "chicken and egg" issue.

- If the lease is recorded effective immediately after the transfer to the trust, then is the transfer to the trust a SOH revaluation event? Logically the answer is yes because for at least one second, there was a title vested in someone else (the trustee) before the trustee and the client entered into the lease. Theoretically, that could/should be a revaluation event.

- If the lease is entered into before the deed and then the deed is recorded simultaneously with the lease (perhaps the deed is made subject to the lease), arguably the lease was made effective before the deed, and the question is, who are the parties to the lease? Before the transfer of title from the client to the trust the client owns the property. So how can the client enter a lease with herself as tenant and as landlord? Wouldn't the lease be a nullity under the doctrine of merger (thus making the deed

transfer a revaluation event for SOH)? Or how can the client enter into a lease with the trustee when the trustee doesn't have title yet?

We've been advised that some practitioners have contacted various property appraisers about this issue and have been told that you can record the deed and the 99 year lease (with client as tenant and trustee as landlord) simultaneously, and the client won't lose the SOH benefits. However, to date, there have not been any cases or precedential rulings of any sort addressing the proper answer to this conundrum. Perhaps before entering into such a transaction, the attorney/advisor can obtain an opinion giving approval from the property appraiser.

One idea is to create a very short term QPRT (or maybe not a "qualified" PRT, but just a short term irrevocable trust) and enter into the 99 year lease and record it prior to the QPRT term end. That seems to work. The transfer to a QPRT is not a SOH event (there is case law on this point). And if the 99 year lease is entered into between the client and the QPRT trustee and recorded prior to the end of the QPRT term (even if that is only a few months, for example), then the transfer to an on-going irrevocable (grantor) trust for the children at the end of the QPRT term should not be a SOH event due to the recorded lease.

Another alternative might be making the trust revocable at the outset (perhaps with a trustee who isn't the client) and entering into and recording the 99 year lease between the client and the trust. Subsequently, the trust can become irrevocable. Logically this should preserve the SOH benefits also, as the client would be contracting with a trust (not herself) and thus the lease shouldn't be a nullity by the doctrine of merger.

What Are the Estate Tax Inclusion Risks of 99 Year Leases?

The fourth problem is getting comfortable with 99 year leases for estate tax purposes. Not all practitioners agree that entering into a 99 year lease avoids estate inclusion. Some have asserted the IRS may argue the leasehold interest is akin to a fee interest or outright ownership and seek to include the property in the client's estate. In fairness, there is some logic to that argument, and I don't believe there is any precedent barring such.

On the other hand, logically, if there is a lease at fair market value, there should be a viable argument for no inclusion. Some commentators have asserted a sale for adequate and full consideration (even if the taxpayer remains whether paying rent or not) should not cause estate inclusion of the residence.[i]

Moreover, a number of cases and rulings indicate that although subject to close scrutiny, a gift of a residence coupled with a lease-back at fair market rent should not cause estate inclusion under Section 2036.[ii] Also, in the context of expiring QPRTs, there have been a number of rulings supporting the proposition that the residence should not be included in the grantor's estate under Section 2036 so long as the grantor rents the property for full fair market rent. [iii]

However, Section 2036 does cause inclusion of the property in the client's estate if the lease is ever below fair market value. That presents a big concern. There are few appraisers who will be comfortable quoting fair market rent and there are few cases testing what that means to the IRS. So it seems there is a substantial risk involved in entering into a 99 year lease that the IRS will seek to include the property under section 2036, arguing the lease may have been below market.

This risk is exacerbated for planners since it will come down to issues of fact (not legal issues) which are pretty much out of the planner's control. Inclusion could result not from an advisor's legal advice, but simply because a client failed to follow the advice, or failed to obtain an adequate appraisal of fair market rent (or didn't revalue fair market rent as may have been required by the lease). To be blunt, these are issues clients may very easily mess up. But the family may point fingers at the planner anyway.

Therefore, embarking on any planning with a Florida homestead and a 99 year lease has this added estate inclusion risk that even the best planners can't really mitigate by the terms of their documents. One step to help reduce the inclusion risk is getting professional trustees involved; however, that appears to be rarely done.

Some of the fear of inclusion comes from discussions with clients and other planners themselves. Let's face it; some clients (and even some planners) try to be as "cute" as possible. Homestead planning is not a good area of the law to try being cute; it is better for planners and clients to instead be as cautious as possible.

For example, rumors/discussions indicate some planners are using "triple net lease" where the client pays virtually all the expenses on the property directly and pays very little rent. This technique seems needlessly risky. First, there are very few (or no) real comparables for triple net leases in the residential context, so it is almost impossible to assure a client they won't have estate inclusion as it is impossible to advise a client what the fair market rent would be in that circumstance. Second, the less the client's economic situation seems to have changed (e.g. the client used to pay all the expenses directly from a personal account before the gift/transfer and the client still pays them all directly from the same account after the transfer) the less I think the IRS will respect the lease/transfer for gift and estate tax purposes. For those reasons, it seems highly risky to use a triple net lease. Instead, if you are going to use a 99 year lease, direct the client to pay as much rent as possible, not the least possible.

This added "fact based" inclusion risk regarding the way clients handle the leases is a key reason why many Florida advisors suggest not planning with homesteads - if at all possible.

What Happens To The Lease Post-Death?

The fifth problem is what to do with the leases on the client's death. One solution might be to specifically devise any rights or obligations in the lease to the same trust that is the landlord on the lease. That should create a merger of the lease post death.

Another solution, some have argued, is to have the lease end on the first to occur of the client's death or 99 years. Some respected planners have argued this type of lease should work, but this technique has not been tested by a court ruling or even a property appraiser's pronouncement, to my knowledge. While there is logic to support such a lease qualifying to keep the SOH benefits, it seems aggressive. A property appraiser could fairly argue that a lease that terminates on death is by definition not for a term of 98+ years and deny SOH benefits.

Others have not planned for the lease at all and simply assume that post-death the fiduciaries/beneficiaries will simply agree to modify or terminate the lease. Third parties modify leases, so why can't the fiduciaries/beneficiaries? That reliance may be reasonable, but likely cannot be pre-arranged.

Does the 99 Year Lease Itself Create Devise Restricted Homestead?

The sixth problem is if the lease itself creates a devise restricted homestead. A recent case (Geraci v. Sunstar) from the Second District Court of Appeal (it is not yet published as it is not yet final) highlights this argument and risk. The courts in Florida often jumble homestead issues together and look at one type of homestead issue (e.g. creditor protection cases or SOH cases) and use their logic to apply to other types of homestead issues (e.g. creditor protection and/or devise restriction cases). This happens all the time, and "bad" homestead decisions seem to be almost as prevalent as good ones. For example, the 4th DCA itself has overturned 3 of its own homestead decisions in the last 5 years.

Nevertheless, it does seem possible a court could decide an interest in a 99 year lease creates a devise restricted homestead issue. If that happens, it could create a jumbled title mess for any transfers made subject to such leases.

While some highly respected homestead experts are arguing the Geraci decision is not correct and an interest in a 99 year lease can't create a devise restricted homestead interest, the law on homestead is a chameleon and bad decisions do spot its history. If a court decision (now or in the future) does cause the leasehold interest to be devise restricted on death, homestead planning will just be further complicated.

Further, some legislative changes could be made and it is unclear if a statutory change would clarify that 99 year leases are or are not homestead.

Can Creditors Pierce Homesteads that Have Been Transferred?

Finally, depending on the nature of the transfer and the way in which the SOH is supposed to be retained, there is a risk that a court will find that the property or the leasehold interest is not a protected homestead and will open the door to creditors.

Logically, if a client transfers a homestead to an irrevocable trust for her children that has spendthrift and discretionary provisions in it, the creditors of the client shouldn't be able to take

the house (unless there was a fraudulent transfer – which seems unlikely as presumptively the property was protected homestead prior to the transfer) as the client doesn't own the house, a trust does. And the creditors of the children shouldn't be able to touch the house as there is a spendthrift clause and discretionary distributions; although under Florida law there are certain exception creditors, such as spouses and children with support orders, who are favored over spendthrift clauses.

On the other hand, it seems possible that a court may find the 99 year lease really created a self-settled trust, and thus the client's creditors should be able to attach the homestead (or maybe just the leasehold interest). If a court ruled that the 99 year lease created a possessory type interest in the trust, and that the trust thus was a self-settled trust, one would hope that the next ruling would be that the property should be homestead protected for creditor purposes. However, one cannot be assured of that ruling. A court might instead decide it isn't homestead protected any longer due to the trust.

Also, the interest in the lease may not be protected. One could argue it is (see Geraci). But if it is not a protected homestead interest, shouldn't a creditor be able to take over the lease? I'm not sure many creditors will want to move in and pay rent, but a disgruntled creditor might enjoy throwing the client out of the home – even if the creditor had to put in a tenant, perhaps.

None of our clients would find losing their homesteads very palatable if they knew that by simply not doing certain estate planning, their creditors couldn't have touched the house and they'd still be living there comfortably.

This in fact highlights probably the main reason why clients should find alternative assets to plan with. Why risk losing the creditor protection?

Conclusion

If the homestead is so well protected by Florida law (from creditors, from taxes, etc), why mess with it? Even if we planners convince ourselves that a plan/transaction will work, and even if it does work based on the current state of Florida homestead law, the law can change.

If a client loses a homestead, the client will never forgive the planner. If a client loses the SOH benefits, the client will likely never forgive the planner either. And if the property comes back into the client's estate when the client dies, then all of the planning was for naught – and the client's family may not forgive the planner. Any of those results could lead to nasty consequences, including lawsuits, for the planner.

Given such risks, if at all possible, please don't plan with your clients' Florida homesteads.

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

Jeff Baskies

TECHNICAL EDITOR: DUNCAN OSBORNE

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CITES:

"New Florida Homestead Laws Add Flexibility in Estate Planning", Jeffrey A. Baskies, Estate Planning Journal (March 2011); "Florida Homestead Laws Present Malpractice Traps for the Unwary", Jeffrey A. Baskies, Estate Planning Journal (May 2008); "Higgs v. Warrick: Lessees of 99-year Leases Qualify for Homestead and Save Our Homes Tax Exemption Purposes" by Jeffrey A. Baskies and John H. Pelzer, (Nov 2009) the Florida Bar Journal; "Comparing QPRTs to IDGTs: Depressed Property Values and Low Interest Rates Offer Opportunities" by Jeffrey A. Baskies, Justin M. Savioli, and Howard Zaritsky, (Aug 2010) Probate Practice Reporter.

CITATIONS

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[i] Zaritsky, Howard, Tax Planning for Family Wealth Transfers: Analysis with Forms ¶11.08[1].

[ii] . Zaritsky, Howard, Tax Planning for Family Wealth Transfers: Analysis with Forms ¶11.08[2], citing to Estate of Barlow v. Comm'r, 55 TC 666 (1972), acq. 1972-2 CB1; Estate of DuPont v. Comm'r 63 TC 746 (1975) and others.

[iii] See IRS Private Letter Rulings 9827037; 9249014; 9425028; and 9433016; Choate, Natalie, The QPRT Manual, 3.7.01and 4.6.04.