

I'VE MOVED TO FLORIDA! NOW WHAT?!



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FLORIDA'S LAW FIRM FOR BUSINESS

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South Florida Luxury Condos Being Scooped Up By Relocating New Yorkers Looking To Save On Taxes



WEALTH

Tax collectors chase rich New Yorkers moving to low-tax states. Auditors inspect cell records, even your dog's vet bills

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Out-of-State Buyers Flock to Miami - WSJ

REAL ESTATE

Out-of-State Buyers Flock to Miami

Residents of high-tax cities are increasingly drawn to South Florida after last year's tax law capped deductions

By Laura Kusisto, Arian Campo-Flores and Jimmy Vielkind

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A growing list of public officials in high-tax states are expressing alarm that big earners are bolting to low-tax states as new data suggests some home buyers are moving in response to the year-old

Roadmap

- Domicile vs. Residency
- Homestead
- Wills and Revocable Trusts
- Irrevocable Trusts
- Community Property Trusts



Domicile v. Residency

- There is a difference!
- • A person can have only one domicile, but he/she may have a number of different residences or be a resident of a number of different states.
- It is domicile that defines which state has the jurisdiction to impose its law regarding income and death taxation, devolution of property, execution of wills and administration of estates, and other legal matters
- Some states impose tax on an individual who is a “statutory resident” of that state based on state income tax laws, regardless of an individual’s intent and actual change of domicile



Domicile v. Residency Cont'd

- Although the state statutes vary in their definition of “resident,” most of the states rely on one or more of the following factors, either individually or in combination with one another, in determining whether a taxpayer is a resident of the state:
 - (1) domicile in the state;
 - (2) presence in the state for other than a temporary or transitory purpose;
 - (3) presence in the state for a specified period; and
 - (4) maintenance of a permanent place of abode in the state
- Residents are taxed on 100% of worldwide income
- Non-residents are taxed only on the income earned in the jurisdiction

Domicile v. Residency Cont'd

Two Part Determination:

- Domicile (subjective)
- Statutory Resident (objective)

Primary Domicile Factors

- Home – size, value, nature and use
- Active business involvement
- Near & Dear Items: Pets, jewelry, art, photos
- Time Spent

Domicile v. Residency Cont'd

- Additional Domicile Factors:

- ✓ Homestead and Parking exemptions
- ✓ New Will or Codicil stating new domicile
- ✓ Mailing address for bills, financial records, etc.
- ✓ Membership in social, fraternal, religious, and charitable organizations/clubs
- ✓ Safe deposit box
- ✓ Vehicle registrations
- ✓ Driver's License

Domicile v. Residency Cont'd

- In the former state of domicile, client should:
 - ✓ Have their name removed from the voting rolls.
 - ✓ Surrender driver's license.
 - ✓ Pay any taxes due as a non-resident and file only those tax returns that are required for non-residents in the former state of domicile.
 - ✓ Mark last resident return "FINAL" using new address.
 - ✓ Close brokerage and bank accounts and any safe deposit box in the state.
 - ✓ Change club, church, and social memberships to "non-resident" status
 - ✓ Relinquish any local tax exemptions



Homestead

- Types of Homestead
 - Property Tax Benefits
 - Save Our Homes Cap (3%)
 - Up to \$50,000 exemption assessment
 - Creditor Protection
 - Devise Restrictions



Updating Wills and Revocable Trusts

Florida Homestead Law

- Descent and devise restrictions
- Article X, §4(c) of the Constitution imposes restrictions on the devise of real property that is defined as exempt from force sale under subsection 4(a).
- (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 is no minor child...

Spouse but No Minor Child, Devise Only To Spouse

- The spouse may waive this requirement through a valid nuptial agreement.
- Note the waiver by the spouse must be a knowing and intelligent waiver.
- **WARNING:** If the spouse is not aware that title vests in him or her by operation of law on the death of the decedent, waiver may not be valid. *Rutherford v. Gascon*, 679 So.2d 329 (Fla. 2d DCA 1996).
- Restriction imposed even if couple is separated.

Minor Child, No Devise Permitted

- Does not matter if there is a spouse
- The minor child need not be a child of the present marriage.
- There is no exception to this rule!
- While there is no exception, there may be a way “around” the rule!
- Irrevocable Homestead Trust! See Fl. Stat. 732.4017
- Purpose of an Irrevocable Homestead Trust is to avoid devise restrictions while maintaining creditor protection and property tax benefits while there is a minor child living



Updating Wills and Revocable Trusts Cont'd

- Florida Homestead Law
 - Descent and devise restrictions
- Appointment of Personal Representatives
 - Fl. Stat. 733.304 – Nonresidents
- Guardianship Appointments
- PR and Trustee Commissions
 - Fl. Stat. 733.617 – Compensation of PR
 - Fl. Stat. 736.0708 – Compensation of Trustee
- Situs and Governing law of Revocable Trusts
- Rule Against Perpetuities – 1,000 years!
- No-contest clauses unenforceable – Fl. Stat. 736.1108
- Ancillary Documents – Durable Power of Attorney, Health Care Surrogate Designation and Living Will

Irrevocable Trusts

- Situs and Governing Law
- State income taxation of trusts
 - Florida does not impose fiduciary income tax
 - Some states tax trusts based on where the grantor was domiciled and some tax trusts based on where the trustees or beneficiaries are located or where the trust is administered
 - Some states have throwback rules
- Decanting – Fl. Stat. 736.04117; Phipps Case (1940)
- Non-judicial modification – Fl. Stat. 736.0412
- Modification to Achieve Settlor’s Tax Objectives - Fl. Stat. 736.0416
- Combination and Division of Trusts - Fl. Stat. 736.0417
- Directed Trusts – Florida Uniform Directed Trust Act.
 - Fl. Stat. 736.1401 – 736.1416

Should We Consider Community Property Trusts?

- Florida is not a Community Property State
- More and more of our new Florida Residents are moving here from Community Property Jurisdictions (most notably, California)
- Income Tax Planning has become a priority for most Estate Planning Clients



What is Community Property?

- Marital Property System governing ownership of assets between a Married Couple (1) during the marriage, (2) at death, and (3) in a divorce
- Each Spouse owns an undivided $\frac{1}{2}$ interest in community property
- Each Spouse may devise $\frac{1}{2}$ of the community property at death
- Generally, all property acquired during marriage (other than gifts or inheritances) deemed to be community property

com·mu·ni·ty pro·per·ty

kə'myo̅onədē 'präpərdē/ ◀▶

noun

noun: **community property**; plural noun: **community properties**

property owned jointly by a married couple.

Community Property States v. Common Law States

- Community Property States – Each Spouse has a vested interested in assets at the time community property is acquired, regardless of whether title is in one spouse's name
 -
- Common Law States (also known as Separate Property States) (FL)– Title is determinative of ownership; if property is titled in one spouse's name, presumed to be that spouse's property
- In Community Property States, presumption that property is owned by both Spouses; burden of proof is on the Party asserting that an asset is separate property
- Requirement in all CP States that couple is married
- Opt-In States: Alaska, Tennessee, South Dakota, Kentucky, and now Florida!

Uniqueness of Community Property

- Federal Income Tax Treatment
 - Full Step-Up in Basis (IRC 1014(b)(6))
- ➤ Effect on Gifting
 - No Gift Splitting Required – if community property is gifted, both spouses are deemed to be the donor of 1/2 of that property
 - Be careful gifting to a trust in which a spouse is a beneficiary (SLAT)
 - If spouses must act jointly to revoke the trust, there may be a completed gift upon creation because trust can only be revoked with consent of a person with a substantial adverse interest
- Disposition at Death
 - Determined by Statute; Not Title
 - Generally, 1/2 vested in Surviving Spouse
- Creditor Claims
 - Most community property states allow a creditor of one spouse to reach all community property
 - However, in Florida an obligation incurred by only spouse may be satisfied from that spouse's one-half share of a community property trust

IRC § 1014(b)(6)

For purposes of IRC § 1014(a), property acquired or passing from the decedent includes “property which represents the ***surviving spouse’s one-half share*** of community property held by the decedent and the surviving spouse under the ***community property laws of any State***, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent’s gross estate.”

Original Policy Behind IRC § 1014(b)(6)

- At the time of enactment, most Marital Property was earned and held by Husband
- Common Law State – All of the property received a step-up at H's death
- Community Property State – Only 1/2 of the property received a step-up at H's death
- *Willging v. U.S.*
 - “Section 1014(b)(6) was designed to equalize the incidence of taxation between community property and common law states.”
 - Section 1014(b)(6) was not designed “to provide a special benefit to community property taxpayers.”

Treatment of Community Property in Florida

- Florida recognizes that a change in domicile from a Community Property State should not affect the character of the Community Property brought into our State
- Similar position to most Common Law States



Florida Uniform Act - Applicability

- Fl. Stat. § 732.217 – Florida Uniform Disposition of Community Property Rights at Death Act - Act applies to all Real and Personal Property which is traceable from Community Property
- Personal Property (regardless of location) which: (1) was acquired as and remained Community Property; (2) was acquired with the rents, issues or income of Community Property; or (3) is traceable to Community Property
- Real Property (located in Florida) which: (1) was acquired with the rents, issues or income of Community Property; or (2) is traceable to Community Property
- Important Exception – *Does not apply to Tenancy by the Entireties real property*

Basis Step-Up For Community Property Trusts

- Alaska (1998), Tennessee (2010), South Dakota (2016), and Kentucky (2020) have opt-in Community Property Trust statutes
- The step-up in basis applies to the full extent of the community property assets and not just to the first dying spouse's interest in community property, regardless of whether only one-half of the value of the CP assets are included in the first deceased spouse's gross estate for Federal estate tax purposes
- On the other hand, assets owned jointly by spouses in a manner other than as CP (i.e., tenancy by the entirety, JTWRORS or tenants in common) will receive a step-up in basis only to the extent of the first dying spouse's interest on his or her death (i.e., 50%)

Benefits of Community Property Trusts

- Better clarity regarding full step-up in basis
- Provide Florida residents with same benefits as Community Property state residents
- Eliminate the need for tracing of property
- Evidence of Couples' intent for classification of property
- Will not create issues with existing Florida laws



Fla. Stat. § 736.1503

- Four “Requirements for Community Property Trust”:
- Expressly declares that it is a Community Property Trust
 - Qualified Trustee acting
 - Signed by both Spouses with formalities required by Ch. 736
 - Disclaimer language in capital letters at beginning of trust agreement

Requirements



Fla. Stat. § 736.151

- “Homestead property”:
 - Property transferred to or acquired by a CP Trust may continue to or initially qualify as the Settlor Spouses’ homestead (provided it would qualify as homestead if titled in their names)
 - Settlor spouses deemed to have beneficial title in equity to the homestead property held in the CP trust for all purposes
 - Florida Constitution requires that the first dying spouse can only devise homestead to the surviving spouse.
 - However, there is no language regarding waiver of homestead rights in the Act, so a spouse wishing to do so must rely on on Fla. Stat. 732.7025 (spousal waiver by homestead deed), or must execute an agreement to waive homestead right

Who Could Benefit?

➤ Many Florida Residents (and some Non-Residents) would be good candidates for Community Property Trust planning:

- Long-term, stable marriage
- Couple has highly appreciated property which could benefit from full basis step-up
- Couple has rental or investment real estate that Surviving Spouse has no interest in managing
- No present or foreseeable creditor concerns
- Moved to Florida with Community Property from another State or Country
- Estate Tax Planning with Credit Shelter Trusts are still viable



THANK YOU!



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