Estate Planning for Snowbirds and Florida Residents

Whether you are a Florida resident, a Michigan resident considering Florida residency or you just own a Florida vacation home, there are many estate planning issues that can arise from owning property in Florida. This article highlights some important planning techniques you should consider if you own property in Florida.

Homestead and Real Estate Considerations

Florida has very broad creditor protection for Florida residents claiming Florida property as their homestead. Under the Florida Constitution, property which qualifies as homestead is exempt from the levy of creditors, with a few important exceptions: (1) voluntary liens such as mortgages or home equity loans; (2) contractor and mechanic's liens; (3) property taxes, homeowner association dues and special assessments; and (4) Internal Revenue Service tax liens. Note that only Florida residents (i.e. those who have declared Florida to be their domicile) can claim their Florida residence as homestead.

However, even non-homestead Florida property owned by a married couple as tenants by the entireties is protected from creditors. Such property cannot be used to satisfy the judgment of one of the spouse's creditors. Note however that generally the same homestead creditor exceptions apply to non-homestead property, as set out above.

For Florida residents claiming their Florida residence as their homestead, an amount up to $50,000 of the taxable value of the property is exempt from real estate taxes. In addition, an increase in the taxable value of homestead property is capped at the lesser of 3% and the consumer price index each year. For those property owners who are not claiming homestead, the annual cap on an increase in taxable value is 10%, unless there is a change in ownership of the property.

Note that generally an owner may only claim one property as his/her principal residence. In fact, pursuant to a recent amendment to the Michigan General Property Tax Act, a person who claims a substantially similar exemption, deduction or credit on real property in another state and claims the principal residence exemption in Michigan is guilty of a misdemeanor. This means an owner generally cannot claim both a Florida property and Michigan property as principal residences to save on real estate taxes.

There are significant restraints on the transfer of homestead property in Florida. Generally, an owner cannot transfer, devise or mortgage homestead property without the consent of his/her spouse. If an owner is married without minor children, then upon the owner's death the surviving spouse inherits the property unless the right to homestead has been previously waived. If the owner is survived by a spouse and minor children, then the surviving spouse inherits a life estate in the property and the children inherit the remainder. A validly executed homestead waiver is one option to avoid these restrictions on the transfer and devise of homestead property.

Be careful when transferring Florida real estate that is encumbered by a mortgage. In some cases, documentary stamp tax may be due on the transfer, in the amount of $.70 per every $100 of "consideration", i.e. the balance of the mortgage. Documentary stamp tax may also be due on other transfers, so it's important to consult with a Florida real estate lawyer prior to signing a deed.

A variety of mechanisms can be used to title real property for estate planning purposes. Florida recognizes "ladybird" deeds, which permit an owner to retain life estate in the property for the owner's lifetime, and then designate a remainder beneficiary to take the property upon the owner's death. Also, some owners choose to title their property in a living trust, for among other reasons, to avoid probate upon the owner's death.

Income Tax

Michigan has a state income tax on both earned and unearned income (e.g. interest and dividends). Accordingly, if you are a Michigan resident, you will pay Michigan income tax on both types of income. Florida does not have a state income tax. If you are a Florida resident, you will not pay state income tax to Florida.

Durable Power of Attorney

The Durable Power of Attorney (“DPA”) appoints an individual to act as agent on behalf of the principal for his or her financial matters. In Michigan, the DPA can be “springing”, meaning that it only comes into effect upon the incapacity of the principal. In contrast, Florida does not allow for such springing powers, and DPAs in Florida are effective upon signing. However, Florida will honor a DPA properly executed in another state, though Florida law will still apply to the agent's actions in Florida. Accordingly, the agent's actions will generally be limited by the more restrictive of the DPA and Florida law.

Additionally, “blanket” language allowing the agent to perform all acts that the principal could do if able is not effective in Florida. Instead, the agent may only exercise those powers that are both enumerated in the DPA and consistent with Florida law. Some powers may require additional signatures or initials of the agent in order to be effective (e.g. a change to the principal’s estate plan). In addition, such powers must not be prohibited by any other of the principal’s estate planning documents. Florida also has additional requirements for real estate transactions under a DPA, and a DPA that does not comply may be limited to banking and other non-real estate transactions.

While DPAs in Florida may allow less flexibility in drafting, a benefit is that Florida law requires third parties to accept or reject a DPA within a reasonable amount of time, i.e. four business days. With a few exceptions, the third party must give a reason for rejection in writing and may be subject to a court order to mandate the acceptance of the document, in addition to costs and damages, if any. This avoids the problem that Michiganders sometimes have with a third party.

Under Florida law, a third party cannot require additional forms and must accept or reject the DPA as is.

Living Will and Patient Advocate Designation/Health Care Surrogate

The Living Will sets forth the patient's wishes for end of life decisions including providing, withholding or withdrawing life-sustaining procedures. The Patient Advocate, in Michigan, is an agent authorized to make such decisions, as well as more routine medical decisions, if the patient is unable to participate in his or her own medical treatment. In Florida, such authorized agent(s) is referred to as a Health Care Surrogate. In Michigan, the Living Will and Patient Advocate Designation are often combined in one document. Florida's Living Will and Designation of Health Care Surrogate may be combined or in separate documents. Both states will recognize directives properly executed in another state.

Before the agent can act on behalf of the patient for medical care that is not considered to be "life or death", Michigan requires the signature of two physicians certifying that the patient can no longer make his or her own medical decisions; Florida requires the certification of only one physician.

However, notwithstanding the foregoing, Florida allows a patient to authorize the Health Care Surrogate to participate in the patient's medical decisions prior to the incapacity of the patient. This may be limited to receiving information about the patient or may extend to decision making abilities; however, if the patient elects this option and still has capacity, the patient can overrule the Health Care Surrogate in any controversy. The patient must also be kept informed regarding any decisions made by the Health Care Surrogate if the patient is capable of understanding.

Before a Florida Living Will can be implemented, the patient must be suffering from a terminal condition "caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death", an end-stage condition defined as "an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively *severe and permanent deterioration,* and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective" or a persistent vegetative state, defined as a "permanent and irreversible condition of consciousness in which there is the absence of voluntary action or cognitive behavior of any kind [and] an inability to communicate or interact purposefully with the environment." The "severe and permanent deterioration" language encompasses advanced dementia and Alzheimer's. This provision is often not part of Michigan documents, and Michigan does not have a separate and distinct Living Wills statute apart from the Patient Advocate Statute.

In Florida, parents may name a Health Care Surrogate to act in their absence on behalf of their minor children, specifically including a child in gestation.

Last Will and Testament and Trusts

Florida restricts those who may serve as Personal Representative (formerly known as an Executor) under a Will. If the desired Personal Representative is an individual who is not a resident of Florida, he or she must be (1) a descendant or ancestor of the decedent, (2) a spouse, brother, sister, uncle, aunt, nephew or niece of the decedent or (3) the spouse, descendant or ancestor of any such person. If the desired

Personal Representative is an entity, the entity must be authorized to conduct business in Florida. Michigan has no such restrictions.

Florida also does not recognize an unwitnessed Will executed in the decedent's own handwriting (a "Holographic Will"), even if validly executed in a state where such Wills are recognized. Michigan allows Holographic Wills.

In Florida, in both a Trust and a Will, any gift of a residence may be subject to Homestead laws.

Florida also does not recognize "no contest" clauses in Trusts or Wills (clauses stating a person who disputes or challenges the document or Estate Plan receives nothing). Accordingly, such clauses in a Florida document will be ineffective.

What Documents Do I Need?

Having homes in both Michigan and Florida doesn't necessarily mean that you need two sets of estate planning documents. At a minimum, whether you are a Michigan or Florida resident, you should have a Last Will and Testament, a Durable Power of Attorney and a Living Will and Patient Advocate Designation/Health Care Surrogate drafted under the laws of the state of which you are a resident. Some who spend significant time in both Michigan and Florida will choose to have a separate Living Will and Patient Advocate Designation/Health Care Surrogate for each state.

A Trust does not need to be governed by the laws of the state where you are a resident, though more ties to the state that governs your Trust are helpful if there is any controversy in the future. The decision regarding your Trust's governing law should be made with the help of an attorney taking into account income tax and other considerations.

If you choose to have documents for each state, there are important provisions that need to be included to ensure that the documents are given concurrent effect and work together, rather than one set superseding the other. An attorney familiar with the laws of both states should be consulted.

Conclusion

Whether you are a Florida or a Michigan resident, contact Couzens Lansky if you have Florida real estate or estate planning questions. We have two attorneys licensed in both Michigan and Florida to assist you. For Florida real estate questions, please contact Stacey L. DiDomenico. For Florida estate planning questions, please contact Rebecca K. Wrock.