

Estate Planning

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Change of Domicile Traps

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In the past few years, the migration to Florida has accelerated, particularly among those with high net worths. Florida has a long history of attracting new residents with the allure of no income taxes, no estate taxes, and favorable asset protection laws. While the benefits of living in Florida are well known, this article will discuss a few lesser-known traps posed by a move to Florida.

Trap 1. Property Tax Surprise

Most people are familiar with the property tax break on a Florida resident's primary residence, known as "homestead." The homestead exemption benefit is two-fold: (1) generally, there is a \$50,000 reduction in the "assessed value" of your home for property tax purposes, and (2) perhaps more importantly, the "Save Our Homes Cap", which limits annual increases on the



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assessed value of your home to the lesser of 3% or the change in the Consumer Price Index.

In some cases, applying for the homestead exemption can lead to an



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unexpected increase in your property tax bill. Another tax benefit caps the increase in property taxes on *non-homestead* real estate at 10% of the assessed value per year. However, when you apply for the homestead exemption, your home's assessed value for the initial year will be increased to its "appraised value"—i.e., the home's value without the benefit of the 10% cap—thereby giving up the accrued 10% cap benefit built up over the years of ownership prior to filing for homestead. Given the incredible appreciation in real estate prices, the loss of the 10% cap to obtain the homestead exemption cap can be substantial. As a result, some clients are delaying homestead applications to defer this reset; however, delaying a homestead application could impact your domicile case.

This property tax trap caught the attention of the *Palm Beach Post*. On August 4, 2023, *The Post* ran an article entitled "Why one woman's nightmarish tax bill doubled overnight and can she do anything about it?" The article details how a new Florida resident's application for homestead triggered a loss of her 10% cap, resulting in her property taxes increasing from approximately \$24,000 to over \$51,000. The lesson of the article is that proper planning must be undertaken before transferring Florida real estate or even applying for homestead.

Trap 2. Inability to Give Away Your Homestead

Once again, the Florida homestead is in the spotlight for another trap. Homestead laws have numerous positive features, including strong asset protection against creditors (and in some cases, people move to Florida specifically for this reason). One of the policies behind the homestead asset protection benefit is to protect surviving spouses and minor children from being thrown out of their home by a creditor of the decedent. To further the foregoing policy, it can come as a surprise to many that they cannot freely give away their homestead on death if they are survived by a spouse or minor children. While it is possible to plan around these rules by either owning the homestead with your spouse as tenants by the entirety or using a homestead waiver in a marital agreement, a waiver is not possible if you have a minor child.

In many cases, especially with new Florida residents who have not updated their estate planning documents, the existing estate plan gives the residence to a trust for the benefit of the surviving spouse, but this bequest will fail. In addition, if the homestead is owned in one spouse's name alone or in a revocable trust, it must be specifically devised outright to the surviving spouse. It is extremely important to check how your homestead is owned and disposed of under your estate plan.

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CTA

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Each Beneficial Owner and Company Applicant must report his or her full legal name, date of birth, current address, and unique identifying number from an acceptable identification document or FinCEN identifier.⁹ Each Reporting Company must report its full legal name, any trade name or “doing business as” name, its current address, the state or foreign jurisdiction of formation, the state or jurisdiction where it first registers (for foreign companies), and its Taxpayer Identification Number (TIN), including an Employer Identification Number (EIN), or a

tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.¹⁰

Owners and officers of closely held entities are now burdened with the responsibility of filing reports with FinCEN or with the added cost of paying a third party to do so. As a result, the estate planning objectives achieved by using a closely held entity should be weighed against the inconvenience and potential added cost of reporting under the CTA, as well as the harsh penalties imposed by the CTA for reporting violations.

In some instances, the advantages of using a closely held entity will still outweigh the burden of the reporting requirements.

All existing entities should be evaluated to determine whether continued administration is desirable. If an entity still serves a vital role in your wealth planning, then an initial report for that entity must be filed with FinCEN by January 1, 2025. Additionally, updated reports must be filed if there are any changes in entity ownership or control.

A trust may also achieve one’s estate planning objectives without falling subject to the CTA’s reporting requirements. If opting for a trust to avoid reporting, care must be taken when funding the trust to ensure that it does not become a Beneficial Owner of a Reporting Company. A review of the assets held in any existing

trusts should be conducted to determine whether they are Beneficial Owners subject to the CTA.

Although the CTA aims to thwart financial criminals, its requirements affect countless individuals who are using closely held entities for legal purposes. Sadly, the actions of a few have once again ruined it for the many.

- 1 31 U.S.C. §5336(h)(3)
- 2 31 U.S.C. §5336(a)(11)(A)
- 3 31 U.S.C. §5336(a)(11)(B)
- 4 31 U.S.C. §5336(a)(3)
- 5 31 C.F.R. §1010.380(d)(2)(ii)(C)
- 6 31 C.F.R. §1010.380(e)
- 7 31 C.F.R. §1010.380(a)(1)(iii)
- 8 31 C.F.R. §1010.380(a)(1)
- 9 31 U.S.C. §5336(b)(2)(A)
- 10 31 C.F.R. §1010.380(b)(1)(i)

Trustee

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A trustee may have to coordinate with each of these parties.

Failing to meet these administrative obligations or doing them late can have adverse consequences.

Crucial Decisions You’ll Have to Make

- A trustee may need to make numerous decisions that cover a wide range of scenarios. Here are some examples of decisions a trustee may have to deal with.
- How to align investment and distribution decisions with the grantor’s intent and beneficiary needs
- When to make distributions, to whom, and for how much
- When to buy, sell, and hold the trust’s various assets
- Will you be compensated for

your role

- How to develop and manage your relationship with the trust beneficiary/beneficiaries
- How to educate beneficiaries about the trust

Partnering with Professionals

While trustees cannot delegate their fiduciary responsibilities, they can outsource many of the role’s more administrative functions by hiring professional advisors to manage investments, handle taxes and bookkeeping, and advise on legal questions in accordance with the trust or state law.

You’ll need to understand how to identify people your family can trust, what your role will be in relation to these professionals, and how to continually assess whether they’re serving your family with integrity. Considering where your strengths, weaknesses, and

interests lie is an important part of choosing where to focus your efforts and what tasks to outsource.

Legal Risks to Consider

As a fiduciary, you are held to a higher standard and must legally and ethically act in the best interest of the beneficiaries and comes with potential legal risk if a trustee does not act in a prudent manner. Beneficiaries have the right to bring litigation if you have violated the terms of the trust or harmed them in any way.

That said, there are steps you can take to reduce your liability. You may want to consider insurance, as well as using certain legal tools such as receipt and release forms, consent forms, and settlement agreements.

What other risks should you consider? If there is a prickly dynamic among beneficiaries and

trustees, this could create additional risk. The size and type of assets owned by the trust may impact the trustee’s investment decisions. If there is a family business owned by the trust, there are many considerations a trustee will have to undertake, such as voting for company board and management positions, dividend policies and sales and acquisitions. In that circumstance, as a trustee, you may have to weigh what is best for the beneficiary and a family company.

Final Thoughts

Being named a trustee can initially seem like an overwhelming and intimidating responsibility. However, as you educate yourself about the process, you’ll be setting yourself up for success if you choose to accept this important role.

Domicile

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Trap 3. It’s More Difficult to Avoid Will Contests

Florida is the only state that does not permit some form of no-contest clause in a will. A no-contest clause typically provides that a beneficiary who contests

an estate plan will lose his or her interest in the estate. No-contest clauses, therefore, make contesting an estate plan more difficult. If clients are genuinely concerned about will contests, they may be surprised to learn that their existing no-contest clauses may no longer be valid upon becoming a Florida resident. Techniques can

be used to make it more difficult or unattractive to contest, such as a series of wills, charging a beneficiary’s share with legal fees resulting from the beneficiary’s contest, or attempting to adopt another state’s law, but they may not be effective and are largely untested.

Florida law and taxes are

extremely attractive and one of the reasons people continue to relocate here. However, Florida has a strong independent streak, which is often reflected in its laws. These unique features can be traps to overcome for the uninitiated. With proper planning, these issues can often be addressed and finessed.