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TRUSTS & ESTATES

# Advising Clients Who Move To Florida

*A warm reception in the tax arena but lawyers not licensed to practice there face serious consequences.*

**BY DAVID SCOTT SLOAN AND CHRISTOPHER BOYETT**

**THE LURE of year-round warm weather, particularly in light of the snow piles left from the blizzard of 2005, can simply be too much for some New Yorkers to resist. For people who elect to move to Florida, there is also a warm reception in the tax arena. Florida has no state individual income tax, as a large portion of the state's revenues received from individuals are collected through sales taxes, real property taxes and intangibles taxes. Also, the Florida estate tax was eliminated as of Jan. 1, 2005,[1] and, unlike many states, Florida has not enacted a separate, independent state estate tax.**

In counseling clients moving to Florida, lawyers alert them to the steps they need to take to formally leave the state. Consistent with providing full service and the hope of continuing longstanding relationships, attorneys routinely draft amendments to estate planning instruments, reciting Florida as the domicile. There is an abundance of available professional resources setting forth appropriate statutory requirements of such Florida documents. However, without involvement of Florida counsel, such activity is now a felony under Florida law. If a New York attorney is convicted of this "serious crime," it is possible that he or she may risk discipline in New York as well.[2] This article highlights select provisions of Florida law, reviews some of the nuances of those rules and examines the new Florida law that affects out-of-state counsel, so that our ethical and legal obligations can be satisfied while advising clients.

## Intangible Personal Property

While Florida does not impose an income tax, a levy in the form of an intangible personal property tax is exacted upon every Florida resident who owns, manages or controls intangible personal property on Jan. 1 of each year.[3] Certain items of intangible personal property, including money, intangibles held in certain retirement plans and interests in non-publicly traded limited partnerships, are exempt from Florida intangibles tax.[4] Notably, limited liability company membership interests are not exempt from Florida intangibles tax.[5]

The current intangibles tax rate is $1 per $1,000 of intangible assets owned by each Florida resident on Jan. 1 of each year.[6] An exemption, in the amount of $250,000 (or $500,000 for a husband and wife filing jointly) of intangible asset value is available for every natural person.[7]

Intangible personal property that is owned, managed or controlled by the trustee of a trust is exempt from Florida intangibles tax.[8] However, a resident who has a "taxable beneficial interest" in a trust is not exempt from Florida intangibles tax.[9] A resident has a taxable beneficial interest in a trust if he or she has a vested interest in the trust, even if subject to divestment, which includes at least a current right to income and either a power to revoke the trust or a general power of appointment as defined by Section 2041(b)(1) of the Internal Revenue Code of 1986, as amended.[10]

Several techniques have developed to eliminate or minimize the intangibles tax, yet still provide the Florida resident with the beneficial ownership and enjoyment of such assets. One strategy involves transferring the intangible assets to a short-term irrevocable trust known as a Florida Intangibles Tax Trust or FLINT Trust so that the resident does not own or have a taxable beneficial interest in the intangible assets on Jan. 1. The taxpayer must create the FLINT Trust and transfer his or her intangible assets to the trustee of the trust on or before Dec. 31. The trust typically provides that the trustee will return all or substantially all of the assets of the trust to the resident on a specified date after Jan. 1, typically 30 or 45 days, although the trust can continue indefinitely.

The taxpayer should not be the trustee, although a Florida resident can be the trustee. During the term of the trust, the trustee may have discretion to make income and principal distributions to the grantor. If the grantor survives the term of the trust, the trustee is directed to distribute all remaining assets of the trust outright to the grantor or to the grantor's revocable trust. If the grantor dies during the short term of the trust, the trustee is directed to distribute trust assets outright to the grantor's estate or to the grantor's revocable trust. The Florida Department of Revenue expressly recognizes the FLINT Trust as a valid way of eliminating the Florida Intangibles tax, provided that the trust does not direct the form or the type of assets that must be returned to the grantor.[11]

## Homestead Law

Florida's homestead law has some unique wrinkles; it provides a form of asset protec-

**David Scott Sloan** *is a partner and director of Holland & Knight, resident in the Boston and New York offices.* **Christopher Boyett** *is a partner of the firm and is resident in its Miami office.*

tion but also imposes significant transfer restrictions. The Florida Constitution imposes two specific limitations on homestead property: (i) the exemption from claims of creditors; and (ii) the limitation on devise and the restriction on alienation. To determine the impact of the Florida homestead laws, the first inquiry is whether the residence is the person's homestead. If the primary residence is located inside of a municipality, it is limited to a one-half acre of contiguous land and it must be the residence of the owner or his or her family.[12] If the property is located outside of a municipality, the property may be up to 160 acres of contiguous land and improvements.[13] In addition, the Florida Constitution allows an annual homestead property tax exemption and limits the increase in annual property tax assessments.[14]

**Exemption from Claims of Creditors.** Florida's homestead law provides that the homestead shall be exempt from forced sale and no judgment shall be a lien against the homestead (except for the payment of taxes and assessments, purchase obligations, improvement or repair of the homestead or other obligations from the realty).[15] The homestead exemption from creditors inures to the surviving spouse or the heirs of the owner. Florida case law has broadened the definition of heirs to include any family member within the class of persons categorized in the Florida intestacy statute.[16] For example, if the decedent leaves the homestead to his grandson instead of to his son, such property passes to the grandson exempt from the decedent's creditor's claims, as the grandson is considered an heir under Florida's intestacy statute.[17]

**Limitation on Devise and Restriction on Alienation.** The homestead residence is not subject to devise if the owner is survived by a spouse or a minor child.[18] If the owner has no minor child, then the owner may devise the homestead to the owner's spouse.[19]

If the homestead is improperly devised, the homestead passes in the same manner as other intestacy property, provided, however, that if the decedent is survived by a spouse and lineal descendants, the spouse is entitled to a life estate in the homestead and the living lineal descendants are entitled to a vested remainder in the life estate.[20] For example, assume a New York resident buys a vacation home in Boca Raton in his or her individual name and later moves to the Boca Raton home on a permanent basis. If the owner has minor children and a spouse, the owner may not devise the property at death; instead, by statute, the spouse would receive a life estate and the owner's children would receive a vested remainder interest. This result could be unworkable for certain families as it requires the spouse and children to agree in order to sell or encumber the property.

**Homestead Rights Can Be Waived.**[21] If the owner of a homestead in Florida wants to leave the homestead to adult children from a prior marriage, or in trust for the surviving spouse, the owner could enter into an agreement with the spouse to waive his or her homestead rights.

**Property Tax on Homestead.** The Florida Constitution provides that "[e]very person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law."[22] Further, the Florida Constitution provides that any change in the assessed value of the homestead cannot exceed the lower of: (i) 3 percent of the assessed value of the property for the prior year; or (ii) the percentage change in the consumer price index.[23]

In the current real estate market, this limitation is valuable to the client who is migrating to Florida. Consider the out-of-state client who has owned a waterfront home in Florida for the last two years. Since the property does not qualify as homestead as it is owned by a non-Florida resident, the assessed value has increased significantly during that time, which will result in a corresponding increase in real property taxes. This very issue has caused some out-of-state residents to permanently relocate to Florida so that future increases in assessment are limited by the lesser of the consumer price index increase or 3 percent.

## Change of Domicile

Florida's spousal election laws differ considerably from those applicable to New York domiciliaries. Careful consideration should be given to whether certain affirmative waivers are required at the time of a

### Changing Domicile to Florida

The following list, which is not exhaustive, contains several actions a client should take to reflect a change of domicile to Florida:

1. File a Declaration of Domicile with the local Florida court or other governmental agency as required by Florida law. This should be done as soon as possible. A copy of such declaration should also be sent to the appropriate voter registration office in New York;
2. Obtain a Florida driver's license and allow the New York driver's license to expire;
3. Register automobiles in Florida and return New York plates to the Department of Motor Vehicles;
4. Register to vote, and vote, in Florida;
5. File a final New York resident income tax return for the year of departure and, if required, New York non-resident income tax returns for all years thereafter in which there is reportable New York source income;
6. File Florida intangibles personal property tax returns, if necessary;
7. File federal income tax returns from the Florida home;
8. Cancel membership in any organizations in New York, including churches and synagogues, and social organizations, or, at a minimum, request to be listed as a nonresident member;
9. Transfer as many savings and checking accounts as possible to Florida;
10. Consider transferring any New York-based investment accounts to Florida or at a minimum, ensure that the Florida address and telephone number is used for communication;
11. Use the Florida address on all correspondence. Clients should send notification of change of address to all payers of interest and dividends so that Form 1099s will be sent to the Florida address;
12. Obtain a safe deposit box in Florida and cancel any safe deposit boxes in New York;
13. Change the address on all legal documents to reflect the Florida domicile, particularly on passports and credit cards;
14. Establish relationships with professionals in Florida;
15. Establish social and religious affiliations in Florida;
16. Furnish the Florida home as a true home (with the "good furniture") and all the things that make a house a home;
17. Be sure to spend at least six months in Florida. It is important to create evidence of the time spent in Florida for income and estate tax purposes (i.e. credit card receipts, phone bills);
18. Apply for a passport in Florida;
19. Open local charge accounts to establish credit;
20. Divest New York real estate, to the extent feasible; and
21. File a Homestead election for the Florida home.

change of domicile to Florida.

**Document Execution and Effectiveness.** The formalities for executing trust instruments are more rigorous in Florida than in most jurisdictions, and attorneys must be familiar with these rules to best assist clients. Further, in Florida, durable financial powers of attorney cease to be effective if there is a judicial determination of incapacity.[24] This issue makes funding one's revocable trust imperative in Florida, whereas many New York residents often rely on testamentary trusts that are, by definition, not funded during life.

**Steps to Establish a Florida Domicile.** In the eyes of the law, your domicile is your home; it is more than your residence. Domicile is determined both by subjective intent, determined objectively, and by actual residence. No one act is sufficient by itself to establish domicile; one must have the necessary intent and demonstrate residence, which will be determined by a balance of the collective acts taken or not taken.

While the terms "domicile" and "residence" are often used interchangeably, they have a much different meaning in regard to state income (and estate) tax liability. Wealthy clients often have more than one residence, but they can have only one domicile. It is important to recognize that for income (and estate) tax purposes both Florida and New York may each conclude that a client was a domiciliary of their state. Resolving such claims could be very expensive. Thus, clients must do everything possible to reflect a completed change of domicile acceptable to both jurisdictions. (An outline of steps to take to confirm a change of domicile are set forth in the table accompanying this article.)

## Unlicensed Practice of Law

Prior to 2004, the unlicensed practice of law in Florida was a first degree misdemeanor.[25] Recently, the Florida Legislature made the unlicensed practice of law in Florida a felony of the third degree.[26] Certainly, this is problematic to non-Florida attorneys who have clients that have migrated, whether full-time or on a seasonal basis, to Florida, and left them wondering how to ensure that they do not run afoul of these Florida laws. What should the attorney do when a client asks for new Florida documents, or advice about changing domicile, even though the attorney is not licensed in Florida? The assistance that the attorney provides must be done in the manner that does not amount to the unlicensed practice of law in the State of Florida.

The unlicensed practice of law is defined as the practice of law, as prohibited by statute, court rule, and Florida case law.[27] Generally, a person is engaged in the practice of law if he or she gives advice and performs services that affect important legal rights of a person and the provision of that advice requires the person to possess legal skill and a knowledge of the law greater than that possessed by the average citizen.[28]

More than 30 years ago, in *Florida Bar v. Larkin*, the Supreme Court of Florida determined that the preparation of wills and antenuptial agreements by a person not authorized to practice law in the State of Florida constituted the unlicensed practice of law.[29] Notably, in *Larkin*, the court suggested that if the out-of-state attorney had the documents reviewed and approved by a Florida lawyer, the out-of-state attorney would avoid the claim of the unlicensed practice of law. In light of *Larkin*, this approach has been followed by many out-of-state attorneys who have clients with Florida legal needs.

A recent Florida Bar Staff Opinion called into question this practice. The Staff Opinion suggested that Florida attorneys should not communicate with out-of-state attorneys on matters involving Florida law.[30] Under this interpretation, it would be improper for a Florida attorney to review the documents lest he or she be considered as assisting in the unauthorized practice of law.[31] The Division Director for Ethics, UPL, and Professionalism for the Florida Bar has written, and subsequently published, a response which appears to have narrowed the application of the Staff Opinion.[32] Specifically, the Division Director noted that "Florida attorneys are often asked to review estate planning documents drafted by out-of-state attorneys. This review is not improper and is in fact encouraged."[33]

Since the Staff Opinion was subsequently narrowed, it is likely that *Larkin* is still the law in Florida; however, out-of-state practitioners should be conscientious of what constitutes the unlicensed practice of law in the State of Florida and the strict policy of the state regarding the unlicensed practice of law. Clearly, seeking the advice of a Florida attorney who specializes in estate planning will give clients the comfort that they are taking maximum advantage of the benefits of being a Florida resident, and attorneys the comfort that they are providing advice consistent with their ethical and legal obligations.

1. See Section 198.02, Florida Statutes, 2004 (for resident decedents); Section 198.03, Florida Statutes (for non-resident decedents); and Section 198.04, Florida Statutes (for Alien decedents). The Florida estate tax was effectively eliminated as of Jan. 1, 2005, because the credit allowable for any estate, inheritance, legacy or succession taxes actually paid to a state or the District of Columbia was eliminated for estates of decedents dying after Dec. 31, 2004. Section 2011(f) of the Internal Revenue Code of 1986, as amended.

2. New York Judiciary Law §90(4)(f) provides that an attorney convicted of a "serious crime," whether by a plea of guilty or nolo contendere or from a verdict after trial, or otherwise, must be suspended upon the Appellate Division's receipt of the record of such conviction until a final order is made, but that, upon good cause shown, the Appellate Division may, on the application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interest of justice. New York Judiciary Law §90(4)(d) defines "serious crime" as any criminal offense denominated a felony under the laws of any state, district or territory, of the U.S. which does not constitute a felony under New York law, and any other crime a necessary element of which, as determined by statutory or common-law definition, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

3. Section 199.052, Florida Statutes.

4. Section 199.185, Florida Statutes.

5. See Technical Assistance Advisement No. 00C2-007 (Dec. 6, 2000), Florida Department of Revenue.

6. Section 199.032, Florida Statutes.

7. Section 12C-2.004(1)(b), Florida Administrative Code.

8. Section 199.183(4), Florida Statutes.

9. Id.

10. Section 199.023(7), Florida Statutes.

11. Rule 12C-2.0063(7), Florida Administrative Code.

12. Article X, §4, Florida Constitution.

13. Id.

14. Article VII, §§4 and 6, Florida Constitution; see also Section 193.155, Florida Statutes.

15. See Article X, §4, Florida Constitution.

16. *Snyder v. Davis*, 699 So.2d 999, 1005 (Fla. 1997).

17. See *Traeger v. Credit First National Association, Etc.*, 864 So.2d 1188 ((Fla. Dist. Ct. App. 5th Dist. 2004).

18. Section 732.4015, Florida Statutes.

19. Id.

20. Section 732.401, Florida Statutes.

21. See Section 732.702, Florida Statutes. Notably, if the waiver is executed after the marriage occurs, each spouse is required to make full disclosure to the other spouse of his or her assets. Id.

22. Article VII, §6, Florida Constitution. Article VII, subsection 6(d), Florida Constitution, authorizes an increase of the homestead exemption to $25,000 for 1982 and subsequent years.

23. Article VII, subsection 4(c), Florida Constitution; see also Section 193.155, Florida Statutes.

24. See Section 709.08(3)(b), Florida Statutes.

25. Section 454.23, Florida Statutes (2003).

26. Section 454.23, Florida Statutes (2004).

27. Rule 10-2.1(a), Rules Regulating the Florida Bar.

28. *Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962).

29. *Florida Bar v. Larkin*, 298 So.2d 371 (Fla. 1974).

30. Florida Bar Staff Opinion 24894 (Sept. 3, 2003).

31. The Florida bar prohibits a Florida lawyer from assisting a person who is not a member of the Florida bar in the performance of an activity that constitutes the unlicensed practice of law. Rule 4-5.5, Rules Regulating the Florida Bar.

32. Letter from Mary Ellen Bateman to Louis B. Guttmann III, Chair, Real Property, Probate & Trust Law Section, May 25, 2004.

33. Id.

## Private Wealth Overview

Change - in tax laws, market conditions, family business situations - represents one of the most significant wealth management challenges for individuals, families, family businesses, nonprofit organizations, and fiduciaries. You need legal representation as committed to planning and protecting your financial interests as you are - lawyers who are highly qualified and highly responsive to change, both positive and negative. We show clients how to advance and protect their financial goals through strategic planning.

## Holland & Knight's Private Wealth Services Lawyers

The Holland & Knight Private Wealth Services Group is the largest, most experienced group of trusts and estates lawyers in the U.S. We are nationally recognized in fields as diverse as estate, gift and generation-skipping transfer tax planning, probate litigation, IRS litigation, life insurance planning, business succession planning, asset protection, international taxation, charitable organizations and matrimonial law.

As a client, you benefit from the collective experience of this highly regarded, highly motivated group. You also benefit if your business or distribution of assets raise questions requiring representation in other jurisdictions or areas of the law.

**David Scott Sloan** counsels clients and their families in estate planning matters. This often includes designing plans that utilize sophisticated gift-giving techniques designed to minimize overall family transfer taxes. Some of the strategies include establishing specialized entities including irrevocable trusts, family limited partnerships, LLCs and S corporations. Mr. Sloan has extensive experience in advising executives of public companies, owners of family businesses, accountants, attorneys and physicians. Mr. Sloan also serves as Trustee of many trusts and chairs the Firm's Investment Committee.

Mr. Sloan is a member of the firm's Board of Directors. He chairs the Strategic Planning Committee and is the Deputy Section Leader of the firm's Private Wealth Services Section.

Mr. Sloan is admitted to the bar in both Massachusetts and New York, and is admitted to practice before the United States Tax Court. Mr. Sloan is a Fellow in the American College of Trust and Estate Counsel (ACTEC).

Mr. Sloan has published numerous articles and has been quoted in several publications including Fortune Magazine, The Wall Street Journal, Business Week, Inc. Magazine, Financial Planning Magazine, The Boston Business Journal, and Private Wealth Management. His opinions have been sought out on a variety of current tax issues, many of which have aired on television and radio.

Mr. Sloan earned his B.S. degree in 1982 from Binghamton University (State University of New York). He earned his J.D. degree from Albany Law School of Union University in 1985 and an LL.M. in Taxation from Boston University in 1987.

**Contact: david.sloan@hklaw.com; (617) 573-5803.**

**Christopher Boyett** is the South Florida team leader of the firm's Private Wealth Services Section. He represents clients throughout Florida in estate planning and administration matters, and has extensive experience in trusts and estates litigation.

Mr. Boyett is admitted to practice law in Florida. He is active in the Real Property, Probate and Trust Law Section of The Florida Bar and serves as Vice-Chair of the Trust Law Committee, as Vice-Chair of the Probate Rules Committee, as Liaison to the Rules of Judicial Administration Committee, as member of the Executive Council of the Section, and as a member of the Probate Forms Committee. He is also a Fellow of the American Bar Foundation. Mr. Boyett is an Adjunct Professor at the University of Miami School of Law, Graduate Program in Taxation. In addition, he was listed in The Best Lawyers in America (2003-2004), Florida Legal Elite by Florida Trend, and the Best Lawyers in South Florida by the South Florida Legal Guide.

In the community, Mr. Boyett is active in, among other things, the Heritage Society of Miami Children's Hospital Foundation and as Vice-President of Westminster Christian School Foundation. He has appeared on CNN as a guest speaker to discuss estate planning issues.

Mr. Boyett attended the University of Florida where he received his B.S. degree in business administration, with honors, in 1988, his M.B.A. degree in finance in 1988, and his J.D., with honors, in 1991. Mr. Boyett also received his LL.M. in taxation from New York University School of Law in 1993.

**Contact: chris.boyett@hklaw.com; (305) 789-7790.**