***WHAT EVERY INDIANA ESTATE PLANNER***

***NEEDS TO KNOW ABOUT FLORIDA LAW***

July 14, 2010

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A. Why Become a Florida Resident?

1. No State Income Tax. The prohibition on a state income tax is in Article VII, Section 5 of the Florida Constitution. Revision of the Constitution to impose a state income tax would require a 60% vote.

2. No State Inheritance or Estate Tax. Also in Article VII, Section 5 of the Florida Constitution. A state estate tax is, however, permitted to be imposed if there is a federal estate tax state death tax credit, to the extent of the credit.

3. No More Intangibles Tax. The intangibles tax, which was imposed at that rate of $5 per every $10,000 in value of stocks, bonds, receivables and other similar assets as of the first of every year was repealed as of January 1, 2007.

4. Ad Valorem Tax Breaks. The first $50,000 in appraised value is exempt from assessment (but the exemption is capped at $25,000 for school district levies). Other, smaller exemptions pertain to seniors, veterans and the disabled.

   Annual increases in ad valorem taxes on a Florida resident's homestead are limited by the lesser of 3% or the percentage change in the Consumer Price Index. This is the "Save Our Homes" benefit, which has withstood several Constitutional challenges. Property owned by non-Florida residents is not protected by SOH and can be re-assessed at fair value every year.

   Beginning in 2009, SOH is portable, and some or all of the capped assessment value of the old homestead can be applied to the new homestead. The math and mechanics of portability are as set forth in Florida Statutes Section 193.155(8).

5. Creditor Exemptions. Florida's state law exemptions, most of which are set forth in Chapter 222 of the Florida Statutes, are generally favorable to debtors. For example, IRAs, annuities and 529 plans are all exempt assets. Florida is an "opt out" state, so Florida exemptions would apply in a federal bankruptcy proceeding involving a Florida debtor.

   *Good news*: New Florida Statutes Section 736.0505(3), effective as of July 1, 2010, makes clear inter vivos QTIP trusts that benefit the grantor after the death of the grantor's spouse are not subject to the claims of the grantor's creditors. Note, this also means that the assets in the trust will not be included in the grantor's estate at his or her subsequent death under Code Section 2041.

   *Bad News*: In *Olmstead v. FTC*, Case No. SC08-1009 (Fla. June 24, 2010), the Florida Supreme Court ruled that a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single-member Florida limited liability company to satisfy an outstanding judgment. That is not a terribly surprising result. The Florida Supreme Court arrived at its result by ruling that charging orders do *not* constitute the exclusive remedy for a judgment creditor against a judgment debtor's interest in a single-member LLC. The Florida Supreme Court based its decision on the provisions of the Florida Revised Uniform Partnership Act and the Florida Revised Uniform Limited Partnership Act providing that a charging order is the exclusive remedy. In contrast, the Florida LLC statute does not specifically state that a charging order is an exclusive remedy. This rationale casts the outside creditor-protection features of multiple member LLCs in Florida in doubt.

6. The Weather is Better Here.

B. How to Become a Florida Resident.

1. No Bright Line Test. Florida Statutes Section 222.17 authorizes anyone who has an intent to establish a Florida domicile to file what is known as a "Declaration of Domicile" with the clerk of the circuit court in the county in which person resides. This is only a statement of intent, and not in and of itself dispositive of the issue of residency.

2. Facts and Circumstances. The firm's brochure on Florida residency is attached to these materials. The more steps, the better.

3. Problems up North? Florida is happy to claim another as its own. Indiana may less willingly give up its income tax revenues. The tax issues are usually driven not by Florida law, but by the law of the other state.

C. Florida Homestead.

1. What is Homestead? To generalize, homestead is a Florida resident's primary personal residence. This includes a condominium, a co-op, a mobile home (if affixed to real estate), a boat (if more or less permanently moored to land).

   Homestead is limited to 160 acres of contiguous land outside a municipality, and one-half acre inside a municipality. Improvements and out-buildings are also covered.

2. The Three Faces of Homestead.

   A. Ad Valorem Tax Benefits. See Discussion in A.4 above for the nature of homestead ad valorem tax benefits.

      (1) Filing for Homestead. The owner must apply for the homestead exemption not later than March 1 of the year after the year in which the property was acquired. Procedures vary from county to county. The application for the exemption is mandatory to acquire the ad valorem benefits, even if the property is clearly the taxpayer's homestead. *Zingale v. Powell,* 885 So. 2d 277 (Fla. 2004).

      (2) Effect of Transfers of Interests in Homestead. Transfers of homestead generally cause the SOH "cap" to come off. Under Florida Statutes Section 193.155(3), the following transfers do NOT cause loss of SOH benefits:

         (i) If after the transfer the same person is entitled to the homestead exemption and the new co-owner(s) do not apply for homestead. WARNING: the statute does *not* apply if the effect of the conveyance is to *remove* a person from the deed.

         (ii) If after the transfer the same person is entitled to the homestead exemption and the transfer is between legal and equitable title. Note, this covers a transfer of the homestead to the owner's revocable trust. By case law, this provision

has been interpreted to permit continuing homestead ad valorem tax benefits to property transferred to a QPRT, at least during the fixed term or years. *Robbins v. Welbaum,* 664 So. 2d 1 (Fla. 3rd DCA 1995).

(iii) The transfer is between spouses.

(iv) The transfer is a failed homestead devise (See C.2.C below).

(v) The transfer occurs at death and the property passes to a Florida resident who is legally or naturally dependent on the decedent.

WARNING: a transfer of property subject to a mortgage will trigger Florida documentary stamp tax, which is imposed at the rate of $7 for every $1000 in value of mortgage principal as of the date of the transfer.

(3) Preserving Homestead Benefits After the Expiration of a QPRT Term.

In *Higgs v. Warrick,* 994 So.2d 492 (Fla. 3d DCA 2008), the court concluded that the benefits of the SOH cap were not lost if the grantor of the QPRT and the trustee entered into a 99-year lease prior to the expiration of the QPRT term. The court based its conclusion in part on Florida Statutes Section 196.041(1), which provides that any person who has an interest in a lease having an original term of 98 years or more is deemed to have legal or beneficial use of the property at a level that is sufficient to qualify for SOH benefits. WARNING: the statute requires the lease to be recorded.

(4) Husband Homesteads in Florida, Wife Homesteads in Indiana.

The property tax assessor will cry foul, relying on a rule in Florida's administrative code (FAC) which provides that "No family unit shall be entitled to more than one homestead tax exemption."

You will have a fight with the property assessor on your hands, but it appears that, under Florida law, a husband and wife, who are not

separated in their marital relation, can be considered to have separate residences for purpose of homestead exemption. Section 12D-7.007(7), FAC provides that "a married woman and her husband may establish separate permanent residences without showing 'impelling reasons' or 'just ground' for doing so. If it is determined by the property appraiser that separate permanent residences and separate 'family units' have been established by the husband and wife, and they are otherwise qualified, each may be granted homestead exemption from ad valorem taxation . . . [t]he fact that both residences may be owned by both husband and wife as tenants by the entireties will not defeat the grant of homestead ad valorem tax exemption to the permanent residence of each."

Further, Section 12D-7.012(6)(b), FAC, provides that, with respect to property owned as tenants by the entirety, if husband makes his permanent home thereon, and wife makes her permanent home elsewhere, husband would nonetheless be eligible for the entire $25,000 exemption. This is supported by at least two Attorney General Opinions. *See* Florida A.G.O. 75-146 (May 28, 1975) and Florida A.G.O. 71-269 (September 2, 1971).

The Florida Supreme Court has also held that it is legally possible for a married woman, in good faith, to claim a permanent home in Florida property even though her husband was legally domiciled in Washington, D.C. *see Judd v. Schooley*, 158 So.2d 514 (Florida 1963) and *Ashmore v. Ashmore*, 251 So.2d 17 (Florida 2d DCA 1971).

B. Creditor Protection.

(1) In General. Article X, Section 4 of the Florida Constitution exempts the homestead from forced sale to satisfy the claims of the owner's creditors. There are only three exceptions: (1) payment of taxes (including federal income taxes) and assessments; (2) obligations for the purchase, repair and maintenance of the home (e.g., mortgages, HELOCs and construction liens); and (3) "obligations for the house, field or other labor performed on the property."

(2) Extent of Exemption.

The exemption is unlimited for state law, non-bankruptcy claims. This is true even if the debtor acquired the property with an intent to hinder delay or defraud creditors, so long as the funds used to acquire the homestead were not themselves a product of fraud or egregious conduct. *See Havoco of America, Ltd. vs. Hill,* 790 So. 2d 1018 (Fla. 2001) and its progeny.

For a debtor in bankruptcy, however, the extent of the exemption may be limited by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Bankruptcy Code Section 522(p) states that "a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding that date of the filing of the petition that exceeds in the aggregate $136,875 in value…" The dollar amount is inflation-adjusted.

(3) Tenancy by the Entireties.

Florida homestead titled in the name of "husband and wife" is by statute owned by them as tenants by the entireties. Florida Statutes Section 689.11. An asset owned as tenants by the entireties is not liable for the payment of the debts of only one of the owner-spouses. Property owned as tenants by the entireties is excluded from the federal bankruptcy estate. 11 U.S.C. Sec. 522(b)(3)(B).

(4) Separate Homesteads for Husband and Wife? If Husband and Wife occupy separate homesteads, each homestead is protected. See, e.g., *In re Colwell*, 196 F. 3d 1225 (11th Cir. 1999); *In re Russell*, 60 B.R. 190 (Bankr. M.D. Fla. 1986).

(5) Ownership by Revocable Trust. The Constitutional exemption from forced sale applied only if the homestead is owned by a "natural person." In *Crews v. Bosonetto*, 271 B.R. 403 (M.D. Fla. 2001), the Bankruptcy Court concluded that the exemption from forced sale does not apply if the homestead is owned by the debtor's revocable trust. Two subsequent cases decided in the same court roundly criticized *Bosonetto* and reached the opposite result, i.e., that ownership of the homestead in the name of the debtor's revocable

trust does not forfeit creditor protection. *In re Merry Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006); *In re Mary L. Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006). These cases reasoned that the debtor's equitable ownership when combined with actual use of the property as homestead was enough.

(6) <u>Are Waivers of Homestead Protection Valid</u>? According to the Florida Supreme Court, the only valid waivers of the exemption from forced sale for homestead are those set forth in Article X, Section 4 of the Florida Constitution. A voluntary waiver of the exemption in an unsecured agreement (in this case, to pay attorneys' fees) was unenforceable. *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007). The Court was concerned about unknowing waivers of homestead protection in boilerplate documents.

(7) <u>What Happens to the Exemption When the Owner Dies</u>?

(i) According to Article X, Section 4 of the Florida Constitution, the exemptions "shall inure to the surviving spouse or heirs of the owner." This means that if the homestead passes at the owner's death to his or her spouse or heirs, the homestead is exempt from the *decedent's* creditors. WARNING: That does not mean that the homestead is exempt from the *beneficiaries*' creditors. If the decedent's exemption from creditor claims redounds to the benefit of his or her spouse of heirs, the property is known as "protected homestead."

(ii) If the will directs the personal representative (PR) to sell protected homestead, the creditor exemption is lost. If, absent a direction of sale, the home is sold in the discretion of the PR and the beneficiaries, the exemption is not lost.

(iii) Protected homestead is not considered to be a part of the probate estate, and it is not available to satisfy the claims of the decedent's creditors. Florida Statutes Section 733.607. It is still required to be reported on the estate inventory, but is separately denoted as exempt property. Unless the personal representative avails himself or herself of the statutory provisions in the Florida Probate Code to take possession of the homestead for the limited purpose of preserving,

protecting or insuring it (see Florida Statutes Section 733.608(2)), the PR has no duties as to protected homestead.

(iv) If protected homestead is not subject to the PR's administration, how does title pass to the beneficiaries? It is almost always desirable, but not a legal necessity, to obtain a judicial determination as to whether the decedent's exemption from forced sale inured to the benefit of the decedent's spouse or heirs. A title examiner will be concerned about the possible creditor-exempt nature of the asset as well as the manner in which title passed.

The circuit court for the county in which the property is located has jurisdiction Where there is a probate proceeding, the determination of homestead is a part of the probate proceeding, and the notice procedures of the Florida Probate Code apply. Thus, notice by certified mail or other delivery may suffice. If there is no probate proceeding, a stand-alone declaratory action may be necessary. In that case, the notice procedures of the Florida Probate Code are not sufficient to obtain jurisdiction, and service of process must be made on interested persons. That being said, title companies in Florida do not seem to care about this subtlety.

The court will enter an order determining the property to be, or not to be, protected homestead, and the order will state both that the decedent's creditor exemption inured to the spouse or heirs, and that title passed as directed in the decedent's will. The court's recorded order is a muniment of title.

Thus, title to protected homestead passes without probate, even though the property is titled in the decedent's name alone.

(v) To which "heirs" must the property pass in order to preserve the decedent's creditor exemption? The Florida Supreme Court has defined "heirs" for purposes of constitutional homestead to include "any family member within the class of persons categorized in [the Florida] intestacy statute." *Snyder*

*v. Davis*, 699 So. 2d 999, 1005 (Fla. 1997). Thus, the exemption inures if the homestead passes to anyone who *could* be an heir, even if that person would not take as an intestate heir if the decedent had died intestate.

(vi) What if the protected homestead is devised in trust for heirs? According to *HCA Gulf Coast Hospital v. Estate of Downing,* 594 So. 2d 774 (Fla. 1st DCA 1992), the exemption inures to the benefit of the trust and its beneficiaries. In that case, the homestead was specifically devised to the trustee. On the other hand, where the homestead passes as a part of the residue and is allocated to a trust for heirs pursuant to the personal representative's discretion, the creditor exemption may be lost. *Elmowitz v. Estate of Zimmerman,* 647 So. 2d 1064 (Fla. 3rd DCA 1994).

(vii) Does the exemption inure if title to the homestead passes under the decedent's revocable trust to a spouse or heirs? Yes; see *Engleke v. Engelke,* 921 So. 2d 693 (Fla. 4th DCA 2006).

C. Restrictions on Devise.

(1) In General. Under Article X, Section 4(c) of the Florida Constitution, homestead "shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." Florida Statutes Section 732.4015 is the statutory embodiment of the constitutional provision.

Thus, the homestead cannot be devised if there are *any* minor children, whether or not the decedent is married. If the decedent is married, the homestead can be devised to the surviving spouse, but only if there are no minor children.

The devise must be "to" the surviving spouse, outside of trust, with no strings attached. WARNING: An otherwise permitted devise to the spouse in trust (i.e., a devise in trust for the spouse where there are no minor children) will fail.

Florida Statues Section 732.4015 defines an "owner" of homestead to include the grantor of a revocable trust; further, under the statute a "devise" of homestead includes a disposition under a revocable trust agreement. Thus, the restrictions on devise cannot be thwarted by titling the home in the name of a revocable trust.

(2) <u>What Happens if the Devise Fails</u>? Under Florida Statutes Section 732.401, if the homestead is not devised as required by the Florida Constitution, "it shall descend in the same manner as other intestate property, but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes."

Thus, if the decedent is survived by a spouse and any descendants – *even if none of the decedent's descendants is a minor* – the invalidly devised homestead will pass as described in Section 732.401.

The surviving spouse's life estate is not a good deal for him or her. Under Florida's principal and income legislation, Chapter 738, Florida Statutes, receipts and disbursements in life estate / remaindermen situation are to be charged as for a trust. Thus, virtually all disbursements other than mortgage principal payments are the responsibility of the surviving spouse life tenant. There is no right of partition in Florida for life estate property. In response to the perceived unfairness of this situation, beginning on October 1, 2010, a surviving spouse who receives a constitutional life estate may elect to take an undivided one-half interest in the homestead, with the other interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes. *New* Florida Statutes Section 732.401(2). The election has to be made within six months of the decedent's death. Property owned as tenants in common can be partitioned.

(3) <u>Planning Around the Restrictions on Devise</u>.

(i) Property owned as tenants by the entireties is not subject to devise restrictions. Florida Statutes Section 732.401(2) (until October 1, 2010; thereafter 732.401(5)).

(ii) Florida Statutes Section 732.702(1) provides that a surviving spouse may waive rights to homestead property "before or after marriage, by a written contract, agreement or waiver, signed by the waiving party in the presence of two subscribing witnesses." A waiver must be knowing and intelligent, and a waiver by a spouse who is not aware that title to homestead vests in him or her by operation of law is not a knowing waiver. *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. 2d DCA 1996). Whether a waiver of homestead rights in a premarital agreement signed before the couple becomes Florida residents is effective is a determination of the law governing the agreement. WARNING: while a spouse can waive his or her own homestead rights, he or she cannot waive rights of minor children. Thus, a spousal waiver is not a work-around if there are minor children.

(iii) Will a spouse's disclaimer fix the problem? *New* Florida Statutes Sections 732.401(4) and 732.4015(3), both effective on October 1, 2010, make statutory the generally-accepted results of prior cases.

Under 732.401(4), if the surviving spouse disclaims his or her constitutional life estate in an *invalidly* devised homestead, the disclaimer will be effective as to the life estate, but will not divest the interests of the decedent's descendants as the remaindermen. Thus, even though under Florida's disclaimer statute (Chapter 739, Florida Statutes) the effect of the spouse's disclaimer is to treat him or her as having predeceased the decedent, the only effect of the spouse's disclaimer of the constitutional life estate is to accelerate the interests of the remaindermen.

Section 732.4015(3) makes clear that a spouse's disclaimer of an interest in *validly* devised homestead will be subject to Chapter 739, i.e., this time, the spouse will be treated as having predeceased the decedent.

Recall that homestead owned as tenants by the entireties is not treated as homestead subject to devise restrictions. A surviving spouse can disclaim his or her survivorship interest

in homestead owned as tenants by the entireties so the disclaimed interest (deemed to be a one-half interest) can be used to fund the estate tax exemption trust. Florida Statues Section 739.203.

(iv) The restrictions on devise of homestead only apply to homestead owned by a natural person (or his or her revocable trust). If property used as a homestead is owned by an irrevocable trust, partnership, LLC or corporation the restrictions do not apply (of course, neither does the homestead qualify for the ad valorem or creditor protection benefits available to natural persons). *New* Florida Statutes Section 732.4017, effective beginning October 1, 2010, clarifies existing law to the effect that an irrevocable trust in which the grantor retains a right of reversion after a term of years or upon the occurrence of a determinable event is an irrevocable trust to which the restrictions on devise do not apply. Thus, a single parent who wishes to avoid the homestead devise restrictions can create a trust to provide that the homestead will be held in trust for the benefit of the minor children (in lieu of the guardianship that would otherwise be required in a failed devise context). The trust is structured to give the grantor a beneficial use right in the homestead sufficient to support the ad valorem and creditor protection. The property can revert to the grantor when the youngest child attains age 18.

D. A Miscellany of Florida Quirks.

(1) Restrictions on Who Can Serve as PR.

Florida Statutes Section 733.304 provides that a non-resident of the State of Florida cannot serve as a personal representative unless the person is (1) the decedent's ancestor or descendant; (2) the decedent's spouse; (3) the decedent's brother, sister, uncle, aunt, nephew or niece, or the ancestor or descendant of any such person; or (4) the spouse of a person described in (1) , (2) or (3). Thus, the decedent's northern advisors cannot serve as personal representatives of a Florida decedent's estate.

These restrictions have withstood repeated Constitutional challenges. Note that the restrictions do *not* apply to the appointment of a trustee under a revocable trust.

(2) Required Formalities for Testamentary Trusts.

Florida Statutes Section 736.0403(2)(b) provides that "the testamentary aspects of a revocable trust, executed by settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with formalities required for the execution of a will in this state." To be a validly executed Florida will, the will must be executed by the testator or testatrix in the presence of two witnesses who were present with the testator or testatrix when the will was executed.

A trust that is validly executed by the grantor while not a resident of Florida will be valid in Florida even if it does not comply with the testamentary formalities. However, any amendment to the existing trust that takes place after the grantor becomes a Florida resident must comply with the formalities requirement.

Note that the requirements do not apply to irrevocable trusts. However, any irrevocable trust that has or can be expected to take title to real estate in Florida must be executed in the presence of two witnesses and a notary public. As a matter of good practice, it is a good idea to ensure that an irrevocable trust established by a Florida grantor complies with will formalities.

(3) Northern Documents and Revocable Trusts.

It appears to be common advice for those residing in a state other than Florida to balance a couple's assets by titling the real estate in the name of one of the spouses, and the stocks, bonds and other investment-type assets in the name of the other spouse. As the discussion at part C.2.C above demonstrates, this can be a recipe for disaster if the terms of the real estate owner's revocable trust provide that the assets are to be placed in trust for the benefit of the surviving spouse. The homestead restrictions apply even if, at the time the Florida property was required, the owner was not a Florida resident, but is a Florida resident at the date of the owner's death.

(4) Effectively Waiving Statutory Apportionment.

Florida's estate tax apportionment statute, Section 733.817, is a "modified equitable apportionment" statute. Generally speaking, specific or demonstrative devises do not bear any part of the burden of the estate tax under the statute, but the statute apportions the remaining estate taxes based upon a "you received it, it was taxable, so you pay your proportionate share of the estate tax" basis.

For a person who wants to elect out of the Florida estate tax apportionment, it is important that his or her will (and revocable trust) clearly elect out. Case law has been fairly restrictive in this regard, and insists on a crystal-clear expression of intent. Under Florida Statute Section 733.817(5)(h)4, "a direction in the governing instrument to the effect that all taxes are to be paid from property passing under the government instrument *whether attributable to property passing under the governing instrument or otherwise* shall be effective to direct the payment from property passing under the governing instrument of taxes attributable to property not passing under the governing instrument." Emphasis added. *In re: the Estate of McClaran*, 811 So.2d 799 (Fla. 2nd DCA) 2002, the court determined that a decedent's will did not elect out of statutory apportionment because it did not contain a specific statement that the decedent wanted taxes on property passing outside of the will to be paid from the decedent's estate.

(5) The Non-Waivable Provisions of the Florida Trust Code.

Effective July 1, 2007, the Florida Trust Code (FTC), Florida Statutes Chapter 736, governs the administration and interpretation of Florida trusts.

Florida Statute Section 736.0105(2) lists 23 provisions of the FTC that a trust agreement *cannot* modify. The majority of these non-waivable provisions touch on the relationship between the trustee and the beneficiaries. The provision most frequently attempted to be drafted around by those not in the know is one that purports to waive or restrict the trustee's duty to account to the beneficiaries. Under Florida Statutes Section 736.0105(2)(s) the Florida trust agreement cannot restrict the trustee's accounting duties.

(6) Amending the Irrevocable Trust.

Portions of Part IV of the FTC – specifically Florida Statutes Sections 736.0410 - .0416 – make it surprisingly easy to amend a trust that has become irrevocable by reason of the death of the grantor as long as there is agreement

among the necessary parties. Additionally, Florida Statutes Section 736.0111 allows interested persons to do by contract anything a court could do in the nature of a trust modification. Those availing themselves of these statutes need to be mindful of gift and income tax issues that often arise in the context of a trust modification that alters beneficial interests.

Section 736.04117 is Florida's very good decanting statute. A trustee cannot decant if the trustee's discretion is limited by an ascertainable standard.

E. Dealing With Your Client After He or She Becomes a Florida Resident[1].

(1) The ABC's Of UPL and MJP.

(i) Florida has an interest in preventing individuals who have no training in the law from holding themselves out as lawyers while attempting to represent unsuspecting clients in legal matters. Thus, UPL rules make sense from a consumer protection point of view.

(ii) Florida's UPL provisions apply to lawyers and non-lawyers alike. Rule 10-2.1(c), Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, covers attorneys admitted in other jurisdictions in its definition of the terms "non-lawyer" and "non-attorney." Although the UPL provisions are, in part, designed to prevent individuals who are not attorneys (or attorneys who have been disbarred) from holding themselves out as licensed attorneys, these materials will focus solely on the UPL provisions as they relate to the actions of out-of-state licensed attorneys in Florida.

(iii) Multijurisdictional Practice (MJP) describes the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law. The challenge of regulating MJP is to strike a balance between the interests of allowing the states to protect its citizens and its judicial system and the interests of clients (and especially migrant clients) to retain counsel of their choice in matters that may involve multiple jurisdictions.

(iv) The basic premise of the UPL regulations is that only lawyers licensed in a specific state are authorized to practice law within that state. Florida

[1] Thanks to Keith Kromash, Esq., Melbourne, Florida, for allowing the author to make use of and adapt his materials for this presentation.

defines the practice of law in terms of what it is not - in terms of what constitutes a violation for the unauthorized practice of law. For example, Rule 10-2.1(a), Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, provides that "[t]he unlicensed practice of law shall mean the practice of law, as prohibited by statute, court rule, and case law of the state of Florida." Keep in mind that the UPL rules also prohibit lawyers from *assisting* others in the UPL.

(v) The UPL provisions can subject lawyers to sanctions (via disciplinary proceedings) for practicing law within a state where they are not licensed. In addition, Florida Statutes Section 454.23 provides that the unlicensed practice of law is now a third degree felony. Other sanctions include the denial of fees or the imposition of fines.

(vi) It is easy to see that, as applied to attorneys who are not licensed in Florida, UPL rules make sense because lawyers licensed within Florida should, as a general matter, have more familiarity with our substantive law and rules of procedure than lawyers who are not licensed to practice within Florida. On the other hand, changing technology and demographics, not to mention the changing nature of the practice of law, call into question the UPL rules as applied to attorneys who are not licensed in Florida. In light of the modern estate planning practice (as well as other transactional practices), where clients may reside in multiple jurisdictions, the states' UPL regulations act as a ethical minefield: one wrong step, and the lawyer may be subject to sanctions or even criminal penalties! This is why Florida's recent amendments, discussed below, are a welcome change.

(vii) Although issues involving the UPL affect all transactional lawyers, there are some specific issues that may affect a modern wills, trusts and estates practice. These issues include:

a. Whether a lawyer may give advice concerning the laws of states where he or she is not licensed.

i. For example, may an Indiana lawyer with an Indiana resident client who is a beneficiary of a Florida estate give this client advice regarding the client's interest in Florida estate?

ii. Does the answer to this question depend upon whether the lawyer has either a physical presence or a virtual presence in Florida thereby constituting "the practice of law" in the Florida?

b. Whether a lawyer may negotiate legal matters in other states.

i. For example, may the Indiana lawyer with the Indiana resident client who is a beneficiary of a Florida estate communicate with the Florida lawyer who represents the Personal Representative of the estate in order to negotiate certain aspects of the estate proceedings, such as a surviving spouse's elective share and family allowance rights?

ii. If the Florida lawyer representing the personal representative of the estate communicates with the Indiana lawyer to negotiate aspects of the estate proceedings, has the Florida lawyer assisted in the UPL?

c. Whether a lawyer may prepare estate planning documents for out-of-state clients.

i. For example, may an Indiana lawyer prepare a will intended to comply with Florida law for a client who lives in Indiana but whose primary residence is in Florida.

ii. If a Florida lawyer is retained to review the will for compliance with Florida law, has the Florida lawyer assisted in UPL?

(1) Does the answer to this question depend upon whether the Florida lawyer meets with the client?

(2) What if the Florida lawyer only communicates with the Indiana lawyer?

(3) Is the answer to this question different if the client is not even aware that a Florida lawyer has been retained?

(viii) The following fact patterns illustrate the above issues and will be considered below.

a. **Fact Pattern One:** Larry Lawyer, a lawyer licensed to practice in Indiana, has been Claire Client's lawyer for the last five years. Claire is a resident of Indiana. Claire's husband, David Decedent, a Florida resident, recently died. As of the date of David's death, the divorce of Claire and David was still pending. Thus, as of David's death, Claire and David were still legally married. This marriage was the second for both Claire and David, and both Claire and David have children from prior marriages. David's estate consists of the homestead property (purchased prior to the marriage of Claire and David) that is titled solely in David's name; checking and savings accounts titled solely in David's name; and an ERISA qualified retirement plan that names David's three children as beneficiaries (the beneficiary designation was signed after David and Claire became separated - Claire did not consent to this beneficiary designation). David's Florida will, which was signed after he and Claire became separated, leaves David's entire probate estate to his three children. Claire has asked Larry to advise her as to her rights to David's estate and retirement plan.

b. **Fact Pattern Two:** Carlos Client (Claire's son) is a resident of Florida, but he spends a fair amount of time in Indiana - both to visit his mother and to conduct his profitable import-export business. Carlos retains Larry to prepare his last will and testament, together with a durable power of attorney, a living will declaration and a designation of health care surrogate. Larry prepares the documents, and he has Carlos execute the documents in Larry's Indiana Office.

c. **Fact Pattern Three:** Same as Fact Pattern Two, except that Larry sends the documents to Carlos via email with instructions as to how to execute the documents.

d. **Fact Pattern Four:** Same as Fact Pattern Two, except that Larry calls Allen Attorney, a lawyer licensed to practice in Florida, and he retains Allen to review the documents drafted by Larry. Allen never meets with Carlos, and Carlos is not even aware that Allen reviewed his documents.

e. **Fact Pattern Five:** Same as Fact Pattern Two, except that Allen specifically limits his representation to reviewing the documents for compliance with Florida law, and Carlos is aware that Larry has retained Allen.

(2) Amendments To Model Rules Of Professional Conduct 5.5 and 8.5.

(i) The *Ethics 2000 Commission* was formed in 1997 to review the American Bar Association (ABA) Model Rules of Professional Conduct, including Rules 5.5 and 8.5, and to recommend changes. In 1999, the Ethics 2000 Commission considered four "safe harbors" with respect to Rule 5.5. After public discussion and comments, many of which included proposals to expand the safe harbor provisions, the Ethics 2000 Commission allowed the MJP Commission to take the leading role in making recommendations regarding the proposed amendments to Rules 5.5 and 8.5.

(ii) The *MJP Commission* began its work in the fall of 2001. By delegating the amendments to Rules 5.5 and 8.5 to the MJP Commission, the MJP issues were separated out from the mandate of the Ethics 2000 Commission. Thus, the amendments proposed by the MJP Commission came before the ABA House of Delegates as a completely separate proposal, severed from the Ethics 2000 Commission's proposals. On August 12, 2002, the ABA House of Delegates adopted all nine recommendations contained in the MJP Commission's Final Report.

The work of the MJP Commission was influenced, in part, by the California Supreme Court's decision *Birbrower, Montalbano, Condon & Frank v. Superior Court,* 949 P.2d 1 (Cal. 1998). In this case, the California Supreme Court noted that an out-of-state lawyer could be found to be "virtually present" in California and in violation of the California UPL statute in providing legal advice to a California client, even though the lawyer never physically entered California. The Court also commented that out-of-state lawyers who advise California clients would still run afoul of California's UPL statute even if such out-of-state lawyers associate themselves with California-licensed counsel.

(3) Florida's Amendments to Rule 4-5.5.

(i) After the ABA House of Delegates approved the MJP Commission's Final Report, the Florida Bar appointed a second MJP Commission ("Commission II") to study the Final Report and to recommend changes to Florida's rules. Commission II's Final Report, dated October 24, 2003, was adopted by the Board of Governors of the Florida Bar in December 2003.

(ii) Following the adoption of the final report, on February 9, 2004, The Florida Bar filed a Petition, separate from the Bar's annual rule filing, with the Florida

Supreme Court to amend the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration.

The Bar's petition addressed three areas:

> a. Rule 4-5.5 [UPL & MJP]
>
> b. Rule 3-2.1, Rule 3-4.1, Rule 3-4.6 & Rule 3-7.2 [reciprocal discipline]
>
> c. Rule 1-3.10 & Florida Rule of Judicial Administration 2.061 [pro hac vice].

*In re Amendments to the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration,* 30 Fla. L. Weekly S351 (Fla. May 12, 2005). The Court granted the Florida Bar's Petition on May 12, 2005, including the proposed amendments to Rule 4-5.5. The amendments to Rule 4-5.5, as adopted by the Florida Supreme Court, became effective on January 1, 2006 at 12:01 a.m.

(iii) The first amendment is to the title of the rule which alerts the practitioner that the rule also applies to multijurisdictional practice. The amendments to Subdivision (a) are mainly grammatical. The subdivision keeps intact the general principle that a lawyer cannot practice law in a jurisdiction in which the lawyer is not licensed or otherwise authorized or assist another in doing so. Subdivision (b) keeps intact the general principle that a lawyer admitted in a state other than Florida or in a non-United States jurisdiction cannot establish an office or other regular presence in Florida or hold out to the public that the lawyer is admitted to practice law in Florida. However, the subdivision also recognizes that there may be times when other law, such as a Federal rule or regulation, allows a lawyer to have a regular presence in Florida. *Note that the comments to Subdivision (b) recognize that an attorney's presence may be "regular" even if the lawyer is not physically present in the State of Florida!*

(iv) Subdivision (c) sets forth the so called "safe harbor" provisions which are categories and limitations of temporary practice. The categories are alternatives - if one is satisfied, the lawyer may engage in the activity. The safe harbors:

> a. Subdivision (c)( 1) allows an out-of-state lawyer to come to Florida on a temporary basis if the out-of-state lawyer associates with a member of The Florida Bar who actively participates in the matter.
>
> b. Subdivision (c)(2) permits *pre-pro hac vice* admission activity such as client meetings, witness interviews and depositions. Note, however, that the comment to Subdivision (c)(2) is not as broad as the ABA

comments. The ABA would have extended the authorization to an associated lawyer who does not expect to appear pro hac vice or to subordinate lawyers, whereas the Rule 4-5.5 (c)(2) does not extend this far.

c. Subdivision (c)(3) deals with arbitration, mediation or other ADR matters and permits the out-of-state lawyer to practice in Florida if one of the following two conditions is met: (1) the services have to be performed for a client who resides in or has an office in the lawyer's home state; or (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction where the lawyer is admitted.

d. Subdivision (c)(4) deals with transactional work and permits the out-of-state lawyer to perform transactional work if one of the following two conditions is met: (1) the services are to be performed for a client who resides in or has an office in the lawyer's home state; or (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction where the lawyer is admitted. This provision will have the most applicability to T & E lawyers.

WARNING: Rule 4-5.5, as amended, only permits *temporary* practice in Florida. If the out-of-state lawyer practices on a more permanent basis, the safe harbor provisions of this rule will not apply.

(4) <u>Application Of Rule 4-5.5 To Fact Patterns</u>

(i) *Fact Pattern One- Indiana Atty.; Florida Decedent; Indiana surviving spouse; advice as to surviving spouse's rights to husband's estate under Florida law*

a. If Larry offers advice as to Claire's rights under Florida law to David's estate without communicating with the attorney for the personal representative of David's estate, Larry clearly will not have violated Rule 4-5.5 because he has not "practiced law" in Florida. Of course, as a non-Florida lawyer, Larry may have violated Indiana's equivalent to Florida Rule 4-1.1 (e.g., don't take on matters that you are not qualified to take on) if he is ignorant as to the various intricacies of Florida law regarding probate administration, homestead issues and elective share issues.

b. Rule 4-5.5 (b) states that an out-of-state lawyer shall not establish a regular presence in Florida. Therefore, it certainly can be argued that an

attempt to negotiate a settlement with the Florida attorney for the estate is not a regular presence in the State of Florida. What about filing pleadings, such as an election to take elective share?

c. Of course, if Larry contacts the attorney for the PR via telephone and attempts to negotiate a settlement between Claire and the estate, or if he files pleadings on behalf of Claire, Larry apparently falls within the safe harbor of Rule 4-5.5 (c)(4)(A) because Claire resides in Indiana.

d. A question arises as to whether Larry's representation is regular or on a temporary basis. Rule 4-5.5 now only permits out-of-state lawyers to practice in Florida on a temporary basis. In other words, how many teleconference or filings in Florida would constitute a "regular presence" in Florida?

e. At some point, if Larry's representation of Claire becomes permanent, there may be a violation of Rule 4-5.5. In such a case, Larry would be subject to the disciplinary jurisdiction of both Indiana and Florida pursuant to Rules 3-4.1 and 3-4.6.

(ii) *Fact Pattern Two - Indiana Atty.; Florida client; draft Florida EP docs to be executed in Indiana*

a. No safe harbors apply because Carlos is a Florida resident.

b. If Larry prepares estate planning documents for Carlos that are designed to comply with Florida law, and if Carlos executes the documents in Larry's Indiana office, Larry has not violated Rule 4-5.5 because Larry has not practiced law in Florida. Of course, Indiana's equivalent to Rule 4-1.1 may come into play if Larry lacks the competence to prepare documents designed to comply with Florida law.

(iii) *Fact Pattern Three - Indiana Atty.; Florida client; draft Florida EP docs to be emailed to client*

a. Again, no safe harbors apply.

b. When Larry sends Carlos his documents while Carlos is in Florida, together with instructions as to how to execute these documents, Larry is clearly giving Carlos legal advice. Also, Larry is clearly practicing law in preparing estate planning documents for Carlos. In deciding

whether Larry has violated Rule 4-5.5, the question is whether Larry's act of emailing the documents to Larry is practicing law in the State of Florida.

This is a difficult determination because of the nature of email. That is, how is Larry to know that Carlos will receive the email in Florida? Since email can be accessed anywhere in the world, Carlos could have opened his email in Indiana, Florida or any state in between. The case for a "virtual presence" in the State of Florida is bolstered if instead of email, Larry sent the documents to Carlos via facsimile with full knowledge that the documents were being transmitted to a location in the State of Florida. Even assuming the existence of a virtual presence in the State of Florida, there is also the question as to whether Larry's representation of Carlos in Florida is a regular presence as per Rule 4-5.5(b)(l). If not, there is no violation of Rule 4-5.5.

(iv) *Fact Pattern Four - Indiana Atty.; Florida client; draft Florida EP docs to be reviewed by Fla. Atty.; no relationship between Client and Fla. Atty.*

a. Under the pre-amendment rules, if Larry has Allen review the estate planning documents, but Carlos is not aware that Allen has been retained, there is no attorney-client relationship between Carlos and Allen. As such, Allen (as the Florida lawyer) may be in violation of Rule 4-1.4 (which requires the attorney to keep the client reasonably informed about the state of a matter).

b. Under the post-amendment rules, this action may fall within the safe harbor of Rule 4-5.5(c)(l).

c. The Florida lawyer should keep in mind Rule 4-1.4 and should insist that the Indiana client is aware of his or her role in the review of the estate planning documents. In such a case, in order to be in compliance with Rule 4-5.5(c)(1), it may be appropriate for the Florida lawyer to supervise the execution of the Florida estate planning documents. Moreover, the Florida lawyer should address these issues in an engagement letter.

(v) *Fact Pattern Five - Indiana Atty.; Florida client; draft Florida EP docs to be reviewed by Fla. Atty.; no relationship between Client and Fla. Atty.*

a. If Larry has Allen review the estate planning documents, and if Carlos clearly understands that Allen is being engaged to review the estate planning documents with respect to Florida law, there is an attorney-client relationship between Carlos and Allen.

b. Larry's actions fall within the safe harbor of Rule 4-5.5(c)(l), and Allen has not assisted in UPL or violated any other rule.

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