INSIDE THE MINDS

# Estate Planning Client Strategies

*Leading Lawyers on Navigating Recent Legislation and Understanding Its Impact on Estate Plans*

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# Florida Estate Planning: Understanding the Nuances

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## Introduction

The law firm of Williams Parker Harrison Dietz & Getzen (Williams Parker), founded in 1925 in Sarasota, Florida, is celebrating its ninety-first year of existence. We both have spent our entire legal careers at Williams Parker practicing trusts and estates law in southwest Florida. We both selected the practice of trusts and estates law because of the satisfaction we found in helping clients craft customized estate plans designed to accomplish the clients' myriad (and often competing) objectives in establishing their estate planning legacies.

Part of what makes estate planning in Florida interesting is that Florida is a popular destination for retirees, soon-to-be retirees, and others seeking the state's favorable weather and tax regimes. Thus, a Florida estate planning attorney's clients often domicile in Florida after living, working, and becoming established in other places in the country and the world. Such new Florida domiciliary clients often retain connections to the places of prior residence. Additionally, they often arrive after their estate planning matters were previously reviewed, analyzed, and documented when living and working elsewhere. However, it is critical that a new Florida domiciliary have his or her existing estate plan reviewed by a Florida estate planning attorney because the nuances of Florida law are impactful and can cause unexpected consequences to an estate plan prepared under another state's laws. Moreover, the nuances of Florida law and the federal tax laws that apply to Florida estate planning clients change over time. Thus, a Florida estate planning attorney must be uniquely attuned to issues facing those who have recently relocated to Florida, to how Florida law intertwines and interacts with the client's remaining connections to other places, and to the ever changing body of Florida law and the federal income and transfer tax systems.

## Trust and Estates Law in Florida versus Other States

Trusts and estates law in Florida, on its face, may seem standard when compared with the laws of other states across the country. However, in many important ways, Florida trusts and estates law has particularities that make it unique. As a result, when one changes his or her domicile to the state of Florida, it is essential that such individual's estate planning

documents be reviewed by a Florida attorney to ensure that the documents conform to Florida law and procedure and thereby have the ultimate outcome intended by the client.

*Revocable Trusts*

As an example, we notice it is somewhat distinctive to Florida that a revocable trust is commonly used as part of a standard estate plan. Clients who move to Florida from another part of the country often are not familiar with the concept of a revocable trust and historically may have used only a last will and testament to document their testamentary intentions. In Florida, it is common to utilize a revocable trust in conjunction with a last will and testament. In such a situation, the client still creates a last will and testament that names the personal representative, specifies the powers of the personal representative, distributes tangible personal property, and apportions tax liability among the beneficiaries.

However, when a revocable trust is utilized, the dispositive plan in the will is quite simple: the residue of the estate simply "pours over" (is devised) to the revocable trust to be governed by the terms thereunder. Unlike a last will and testament, a revocable trust also is effective during the lifetime of the grantor. Thus, rather than nominating a personal representative, a revocable trust appoints a trustee, with a succession of trustees to serve in the event the serving trustee can no longer act. Additionally, the powers and responsibilities of the trustee are defined within the revocable trust both as to the trustee's administration and disposition of the trust assets during the grantor's lifetime—much like the effect of a durable power of attorney authorizing an agent to act on behalf of the principal as to individually titled assets—and upon the grantor's death—much like the power of an executor over the assets of a probate estate.

During the lifetime of a grantor, a revocable trust is revocable and amendable in the same manner as a last will and testament, so long as the grantor has the capacity to make the change, and, like a last will and testament, a revocable trust created by a single grantor becomes irrevocable upon the grantor's death. It should be noted that a "joint revocable trust" can be created in Florida with a single instrument created by two grantors. However, joint revocable trusts are not as commonly used in Florida as

single grantor revocable trusts for various reasons. Such reasons may include possible complications in asset titling and additional trust administration procedures necessary to manage the trust estate. After the death of one grantor, a joint revocable trust may become irrevocable or continue to be amendable by the surviving grantor, in such manner as is set forth in the trust instrument.

Whether in the form of a joint revocable trust or a single grantor revocable trust, revocable trusts are an important component of a standard Florida estate plan. In Florida, the grantor and trustee of a revocable trust can rely on the revocable trust instrument for the duties and responsibilities of administering the revocable trust, and a vast body of law regarding the creation, execution, and administration of revocable trusts as is set forth in Chapter 736[1] of the Florida Statutes and case law. The existence of a well-established body of law regarding, and the common use of, revocable trusts in Florida bolster the benefits of including revocable trusts within Florida estate plans.

We also notice that clients who are new to Florida may believe that the benefits of a revocable trust are limited to those clients who may have significant assets, complex assets, or intricate estate tax planning needs. However, the benefits of a revocable trust being used in a Florida estate plan are not limited to only those with high net worth or complex assets. For instance, a revocable trust can allow a client's testamentary dispositive provisions to remain private after his or her death—as opposed to a last will and testament, which is to be filed with the clerk of court after a decedent's death and thereby becomes a public record. The additional privacy from the use of a revocable trust results because a revocable trust is not filed with the clerk of court after the grantor's death; rather, only a Notice of Trust acknowledging the existence of the revocable trust is filed therewith.

If properly funded during the grantor's lifetime, the assets of the revocable trust are not required to be administered through the probate process after the grantor's death. The successor trustee identified in the revocable trust is able to assume control of the trust assets upon the conditions set forth in the instrument without court procedure. This provides much quicker access

[1] §§736.0101 *et seq.*, Fla. Stat.

to the trust assets, which is often important for paying the administrative expenses following a grantor's death. Additionally, during any period of the grantor's incapacity, the trustee of a revocable trust may find administrative ease in managing the assets of the trust estate for the benefit of the grantor, as compared to an agent appointed pursuant to a durable power of attorney administering the assets individually owned by the grantor. Such administrative ease may result because the trust instrument can provide highly customized and specific instructions to the trustee as to how best to administer the assets of the revocable trust estate for the grantor's benefit during such period of incapacity. We find this customization and particularity of language in a trust instrument is keenly important when the grantor may have business interests as assets of the trust. Durable powers of attorney, on the other hand, can be more challenging to tailor specifically to the client's particular wishes as to asset administration and maintenance.

There are many other benefits to the use of a revocable trust in a Florida estate plan—both during the lifetime and after the death of the grantor. However, at times, we work with clients who prefer not to use a revocable trust to avoid the extra cost and complexity of having an additional document as part of the estate plan. We will often discuss with such a client that the incremental additional costs of including a revocable trust in a Florida estate plan are often far less than the additional costs that may result from administering an estate plan solely through a last will and testament and the probate administration process.

*Florida Homestead*

As another example of the nuances of Florida trust and estate law, Florida homestead property law is unique. Although Florida law provides for many varied rules and regulations related to Florida homestead, this chapter focuses only on the impact of Florida law governing "protected homestead" for purposes of descent and devise of such protected Florida homestead property through the estate planning process. "Protected homestead" is defined as property described in Section 4(a)(1), Article X of the State Constitution on which at the death of the owner, the exemption inures to the owner's surviving spouse or heirs under Section 4(b), Article X of the State

Constitution.[2] In general, this means that Florida homestead (for descent and devise purposes) is the residential real property that a Florida domiciliary owns and uses as his or her primary residence that, subject to a few exceptions, is protected from creditor claims during the life of the owner (hereinafter, "homestead"). In Florida estate planning, Florida homestead law is highly protective and highly restrictive and cannot be overlooked. As this body of law is unique to Florida, clients who are new to Florida are often surprised to learn that Florida law may override a testamentary devise of what is now their homestead because such devise was not in conformity with the Florida homestead law as a permissible devise.

For instance, absent a valid marital agreement waiving homestead rights, it is not possible to devise one's homestead property away from a surviving spouse. After the death of a spouse, a common estate plan—which may direct the homestead to fund a credit shelter trust or marital trust—will violate Florida law and, therefore, be deemed a failed devise. A statutory outcome will then result, and Florida law will direct the disposition of such homestead in accordance with state law, rather than as set forth in the estate planning document.

For example, if the estate planning document's devise of one's homestead to a credit shelter trust fails by operation of law, a possible statutory outcome includes the surviving spouse receiving a life estate in the property and the lineal descendants of the deceased spouse receiving a vested remainder interest in such property.[3] In such a scenario, if the lineal descendants of the deceased spouse are not also the lineal descendants of the surviving spouse, such a statutory outcome may be incredibly disruptive to an estate plan. Additionally, even if the lineal descendants are common to the deceased spouse and the surviving spouse, the surviving spouse may not want to have a bifurcated ownership of his or her primary residence with his or her children.

Alternatively, if a decedent is not survived by a spouse and is survived by minor children, Florida homestead law may prohibit such minor child's

[2] Art. X, § 4(a)(1), Fla. Const.; Art. X, § 4(b), Fla. Const.; *see* § 731.201(33), Fla. Stat. (2015).
[3] *See, generally,* §§ 732.401 to 732.4015, Fla. Stat. (2015).

inherited interest in the homestead from being held by the trustee of a trust otherwise created for such child's benefit pursuant to the estate plan. Rather, Florida law may require a court-appointed guardian to control the child's inherited homestead interest until he or she reaches the age of majority. The classification of a Florida domiciliary's primary residence as the decedent's homestead for descent and devise purposes may be different than whether such property would be classified to be Florida homestead for creditor protection or ad valorem tax purposes.

When someone moves to Florida, it is imperative that he or she consult with a Florida estate planning attorney to review the titling and devise of his or her homestead to ensure his or her testamentary intentions are both permissible and provided for in conformance with Florida homestead law.

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