

Keeping and/or Advising Your Migratory Clients: Clients Moving to/from Florida (or Separate Property States) or a Community Property State

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- International taxation
- Charitable planning

Jason E. Havens is the founding Florida member of Howard Mobley & Havens, PLLC and concentrates his practice in the areas of estate planning, trust and estate administration, and related business matters.

Jason was appointed as a Fellow of the American Bar Foundation (limited to one-third of one percent of the lawyers in the United States). He has been selected for inclusion in multiple editions of various Marquis Who's Who® publications including Who's Who in America® and Who's Who in American Law® in the fields of estate planning, probate, and estate taxation. He was appointed by Governor John Ellis ("Jeb") Bush to the board of directors of The Able Trust, a unique public/private charitable organization created in 1990 by the Florida Legislature to assist disabled Floridians in obtaining employment.

Jason provides complex estate and charitable gift planning for affluent individuals and families. He also advises local, regional, and a number of national charitable organizations. In addition, Jason represents fiduciaries and beneficiaries with regard to trust and estate administration and litigation issues.

Jason regularly publishes articles and commentary on estate and charitable gift planning in national and local publications including Probate & Property, the Journal of Practical Estate Planning, and the Planned Giving Design Center. He also lectures at various programs on estate planning, including the 37th annual Heckerling Institute on Estate Planning and the 24th annual Southern California Tax & Estate Planning Forum. Jason also created Legal Research for Estate Planners (LREP) (<http://www.jasonhavens.net>), a personal website that has consistently been recognized as one of the premier sites on estate planning.

Education

- B.A., *magna cum laude*, David Lipscomb University, 1996
- J.D., University of Tennessee, 1999
- L.L.M. in Estate Planning, University of Miami, 2000
- L.L.M. in International Taxation, Regent University, 2003

Professional Activities

- Fellow, American Bar Foundation
- American Bar Association: Section of Real Property, Probate and Trust Law: Editor, "Technology: Probate," Probate & Property; Chair, Charitable Planning Committee
- The Florida Bar: Real Property, Probate & Trust Law Section: Co-Chair of Education Subcommittee, Charitable Organizations & Philanthropic Planning Committee
- Christian Legal Society: Vice President, Gift, Estate & Trust Planning Section
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Professional Associations:

Fellow and Alaska Chair of the American College of Trust and Estate Counsel (ACTEC)

Chair of the Estate Planning and Probate Section of the Alaska State Bar Association
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Publications:

2003 Alaska Trust Bill Substantially Revises and Improves Creditor Protection Trusts
and Estates Magazine (August, 2003)

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Planning Magazine (February, 2001)

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Shaftel and Greer, Estate Planning Magazine (March, 1999)

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Part One: Separate Property

- A. Generally similar rules due to common law ties and enactment of uniform laws (e.g., Uniform Probate Code, Uniform Trust Code, etc.)**
 - “Devil” in the details
 - Desirable and often necessary to involve out-of-state professional(s)
- B. Planning can still focus on TN team**
- C. Case study: FL**



I. Florida: Why Not?!

- A. Substantial number of Southeastern clients with real property in Florida and/or desire to retire in Florida
- B. To resist is futile!
- C. Why not “go with the flow”/accommodate or at least seek to know how to serve those clients well -- and continue serving them?



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II. Summary of Florida's Advantages

- A. Low/no taxes with new real property (ad valorem) property tax reduction -- 5-year roll-back -- and elimination of intangible tax
- B. Abundant exemptions from creditors' claims (see, e.g., FLA. STAT. ch. 222 or Jay Adkisson's site: <http://assetprotectionbook.com/florida.htm>)
- C. Relatively advanced legislation (especially in this area) and judiciary



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III. Some Useful Tips on Estate Planning and Related Florida Issues

A. Florida domicile

1. Useful checklists for clients, e.g., Jeff Baskies' version on Leimberg Information Services, Inc. (LISI) (7/11/2007 LISI Estate Planning Newsletter)
2. File affirmative declarations, e.g., declaration of domicile, homestead filings (property tax **AND** circuit court declaration), etc.



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III. Some Useful Tips on Estate Planning and Related Florida Issues (cont'd)

B. Homestead

1. Constitutional and statutory protection
2. Declare homestead status via filings (property tax **AND** circuit court declaration, although strong presumption even if absent -- even for a boat!
3. Resources online
 - Florida Bar Journal articles (<http://www.floridabar.org>)
 - LISI newsletters (above)



III. Some Useful Tips on Estate Planning and Related Florida Issues (cont'd)

C. Wills, trusts & administration

1. Can devise homestead if no (or no minor) children, etc., and can waive homestead rights as well
2. Rather expansive elective share, but contingent trusts permitted to satisfy
3. Revocable trusts must be executed in same manner as wills. FLA. STAT. ss. 736.0403(2)(b) & 737.111.



III. Some Useful Tips on Estate Planning and Related Florida Issues (cont'd)

C. Wills, trusts & administration

4. Essentially same rule against perpetuities as Tennessee (now): 360 years. FLA STAT. 689.225.
5. Presumptively reasonable fixed fee statutes for fiduciaries and their attorneys, although hourly used
6. Only relatives, spouses of relatives, and/or Florida residents (or trust cos.) can serve as personal representative -- controversial. FLA. STAT. s. 733.304.



III. Some Useful Tips on Estate Planning and Related Florida Issues (cont'd)

C. Wills, trusts & administration

7. Two types of probate/estate administration in Florida: (a) summary (< \$75K exclusive of exempt property, such as homestead) or (b) formal admin.

8. Other exemptions from probate creditors' claims, e.g., furniture, family automobiles, family allowance, etc., but must generally petition/file to obtain. See FLA. STAT. ss. 732.402-403.

9. In terrorem/"no contest" clauses prohibited



IV. UPL in Florida: Avoid Implementing the Above Alone!

A. Appropriate options to continue to serve your client with FL assets and/or domicile

1. Refer Florida portion of matter to other counsel
2. Associate co-counsel

B. Approach with caution, though: Florida Bar and courts actually consider estate/trust planning and administration as practicing law!



IV. UPL in Florida: Avoid Implementing the Above Alone! (cont'd)

C. Unauthorized practice of law = 3d degree felony in Florida (as of 2004). FLA. STAT. s. 454.23.

D. However, even if client wants to become resident of Florida, can associate co-counsel and continue to serve client -- along with other advisors on the “team”



V. Conclusion of Part One

A. Enjoy the Sunshine State's benefits with your clients – even Spring Training!

B. Help clients to identify FL issues

C. Refer clients or co-counsel

- Maintain client relationship if possible and current planning team
- Prudently navigate FL issues
- Deduct trips to meet in Florida!



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Part Two: Community Property

A. Very different rules due to civil law ties (traced primarily to Spain's influence via TX)

- Generally always necessary to involve out-of-state professional(s)

B. Nine community property states in the US: AZ, CA, ID, LA, NV, NM, TX, WA & WI (with AK as opt-in community property state)

C. Case study: AK



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I. Alaska: Another New Frontier

A. Ability to opt into community property treatment
(see <http://shaftellaw.com/article3.html>;
<http://shaftellaw.com/article4.html>)

B. Uncertain if Internal Revenue Service (IRS) will accept AK community property to achieve full basis adjustment

1. Lack of definitive authority (e.g., Rev. Rul. or case law)
2. Downside risk is partial disallowance of excess depreciation allowance or exclusion of capital gain if IRS challenge successful



II. Fundamentals of Community Property

- A. Legal difference: Titling does NOT indicate ownership in community property state as between husband and wife -- only management control**
- B. Can selectively opt out of community property treatment by agreement of spouses**



III. Basic Tax Consequences of Community Property

- A. Generally automatic full basis adjustment for community property. Internal Revenue Code (IRC) s. 1014(b)(6).
- B. Typically easier planning because no need to segregate assets to ensure use of exemptions and optimal basis treatment



IV. Some Useful Tips on Estate Planning for Community Property

- A. If client migrating from community property to separate property (TN) state, important to SEGREGATE community property assets and NOT COMMINGLE with subsequently acquired property**
- B. Uniform Disposition of Community Property Rights at Death Act (also generally the common law in separate property states)**



V. Conclusion of Part Two

- A. Opportunity to optimize basis with community property assets**
- B. Help clients to identify community property issues and segregate those assets**
- C. Co-counsel with community property professional(s)**



Thank you for your time and attention, as well as the invitation to come and discuss these issues and perspectives with you. I hope that my presentation helps you in some small way to serve your clients well. Please contact me if you have questions or a situation that you would like to discuss.



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