

The Snowbird's Plight: Migratory Minnesotans Must Beware Where They Land

The prospect of flocking to Florida in retirement appeals to many a snowbound

Minnesotan, but a careful eye to the tax, estate, and residency laws is in order to ensure a financially healthy retirement.

by William S. Forsberg

Retiring to the sun belt of Florida has always been an alluring proposition for Minnesotans. The warm weather and sandy beaches alone are enough to attract many a Minnesota snowbird. If you couple the beautiful weather with the fact that Florida has no individual income tax and has a favorable estate tax structure, it is no wonder that many Minnesotans have chosen Florida as their state to retire. Some snowbirds remain Minnesota residents and head down to Florida for up to six months during the cold Minnesota winters. A growing number of Minnesotans, however, are taking the "big leap" and becoming full-time Florida residents. This was the focus of a recent Minneapolis *Star Tribune* article titled "Naples, Fla: Minnesota Down Under, Snowbird colony lures state politicians"¹. For various reasons, many who opt for Florida residency decide to keep their Minnesota cabin or Minnesota home and retain control and ownership of their Minnesota businesses. But caution here is in order: taking up Florida residency while keeping the Minnesota home or cabin and retaining ownership of a Minnesota business could be hazardous to a Minnesota snowbird's financial health.

The first question for the snowbird to address is that of residency. While a person can have more than one residence, for example, a condominium or vacation home in Florida and a primary residence in Minnesota, one can be domiciled in only one place. The snowbird must be domiciled in Florida in order to incur the burden - and obtain the advantage - of Florida's tax, property and probate laws.² Changing one's domicile to Florida is a question

of "intent," and intent is ascertained and determined by the individual's actions. For purposes of this article, the terms "residency" or "resident" will be used where domicile is meant.

Making out and filing a Florida Declaration of Domicile, obtaining a Florida driver's license, spending six months in Florida or registering to vote there, filing federal tax returns at the Atlanta IRS office serving Florida, and filing for Florida homestead status are among the actions that could show intent to establish residency in Florida. Other actions, including executing a will, trust, or other document citing Florida as the individual's state of residency and identifying Florida law as controlling also evidence Florida residency, as do many relatively innocuous acts such as joining a Florida church or taking out a Florida safety deposit box. Additional steps, including renunciation of one's Minnesota residency, may also be necessary. Once the question of residency is settled, the more complicated - and arguably more interesting - issues of taxation, wills, and estate planning come to the fore. The remainder of this article will discuss these issues as they pertain to the Minnesota snowbird's decision to make Florida his permanent home.

Tax Issues

Before venturing south to sunny Florida, the Minnesota snowbird should educate herself about some of the taxes that are imposed on Florida residents. Some are similar to taxes imposed on Minnesota residents, but others are unique to Florida residents. Most people know that Florida does not have an individual income tax, but most Minnesotans do not know that Florida imposes an intangible personal property tax. Some of the Florida taxes that might take a bite out of a Minnesota snowbird's wallet include the following:

Income Tax. Under Florida's constitution there is no Florida individual income tax.³ This is clearly one of the big drawing cards for Minnesota snowbirds. Florida does have a corporate income tax, as does Minnesota, but Florida's highest marginal corporate income tax rate is lower at 5.5 percent than is Minnesota's at 9.8 percent.

Intangible Personal Property Tax. Unlike Minnesota, Florida has an intangible personal property tax.⁴ Florida's intangible tax is a tax imposed on the value of certain assets owned by an individual, a trust, an estate, a partnership or a corporation on January 1 of each year. The intangible tax rate is \$1.00 of tax per \$1,000 of fair market value of intangible assets. The first \$250,000 (or \$500,000 for a married couple) is exempt from the intangible tax. An individual's intangible tax is calculated as follows: the total fair market value of one's intangible assets is multiplied by .001, and the product is reduced by \$250 (\$500, if one is married and files a joint return). As of January 1, 2004, no intangible tax return is required to be filed (or intangible tax paid) if the final intangible tax liability is \$60 or less. Some

assets, *e.g.*, real estate and U.S. Treasury obligations, are exempt from the intangible tax. However, most marketable securities and closely held corporate stock is subject to the tax. Therefore, someone who owns stock in a closely held business located in Minnesota should consult a tax advisor familiar with the Florida intangible tax laws before changing residency to the state of Florida. Otherwise, she could be unnecessarily paying a Florida intangible tax even if the business had a loss year and no dividend or other distributions were made.

Sales and Use Tax. Florida collects a tax on the sale of all tangible personal property, with certain exceptions. The tax rate is 6 percent of the purchase price. Florida also collects a tax on the sale or use of many services within the state or out of state for use in Florida. The tax rate is equal to 6 percent of the cost of the service. Florida also allows each county to impose a "discretionary sales surtax." The surtax varies from county to county, so before moving to Florida the snowbird should determine if the expected county of residence has a surtax.

Real Estate Taxes. Like Minnesota, Florida imposes and collects taxes on the value of real estate owned. Real estate taxes are imposed by each county and municipality in Florida. In general, Florida's real estate taxes tend to be less than those imposed in Minnesota on comparable values.

Documentary Stamps. In a pattern similar to Minnesota's system, each Florida county requires that "documentary stamps" be affixed to all conveyance and mortgage deeds. In most Florida counties, the cost of the stamps for the conveyance deed is equal to .70 percent of the consideration given for the sale of any real estate, and the cost of the stamps for the mortgage deed is equal to .35 percent of the face amount of the mortgage. Florida also imposes a nonrecurring intangible tax on the recording of a mortgage deed, equal to .2 percent of the face amount of the mortgage. Generally speaking, it costs more in Florida than in Minnesota to convey and mortgage real estate.

Tourism Development Tax. Florida is the "sunshine" state and a large part of its state and local revenue comes from tourism, including rents from rooms, apartments, and condominiums. Because Florida has no income tax, Florida counties are allowed to impose a tourism development tax to raise needed revenue. The tax is equal to a maximum of 3 percent of the rentals charged for the occupancy of most accommodations (such as hotels, motels and apartments) for a term of six months or less. There are exemptions and the tax varies from one Florida county to another.

Transient Rentals Tax. In addition to the tourism development tax, Florida imposes a transient rentals tax. The tax is equal to 6 percent of the rentals charged for the occupancy of most accommodations (such as hotels, motels

and apartments) for a term of six months or less.

Estate Tax. Currently, Florida still has an estate tax. Like Minnesota's, Florida's estate tax is a so-called "pick-up" tax. Under this system, the state picks up all or a portion of the federal tax credit allowed for state death taxes. However, under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) the federal tax credit for state death tax is gradually being eliminated and will be completely gone in 2005. This will result in a loss of revenue to the state of Florida and may prompt the enactment of a new separate Florida estate tax. However, given Florida's constitutional limitations, this is unlikely. Minnesota has not adopted EGTRRA so it will continue to collect the pick-up estate tax under the federal rules that existed before the enactment of EGTRRA.

Gift Tax. Like Minnesota, Florida does not have a gift tax on lifetime transfers.

Generation Skipping Transfer Tax. Unlike Minnesota, which has no separate state generation-skipping tax ("GST tax"), Florida piggybacks on the federal generation-skipping transfer tax system and imposes a pick-up GST tax - equal to the federal credit for such GST taxes under IRC§2604 - on transfers by an individual to persons who are two or more generations below the transferring individual. Like the Florida estate tax, the Florida GST tax pick-up credit is eliminated after December 31, 2004.

Will and Estate Planning Issues

A move to Florida by a Minnesota snowbird requires advanced planning. This is especially true if the Minnesota snowbird retains ownership of Minnesota real estate or a closely held business interest located in Minnesota after changing residency to Florida. Below are some of the key will and estate planning concerns that a Minnesota snowbird should consider before making the move to Florida.

Wills. Both Minnesota and Florida have choice of law provisions relating to the validity of wills executed in other states.⁶ Therefore, if an individual's will was properly executed in Minnesota it will be valid and recognized in Florida. Similarly, a properly executed Florida will is valid in Minnesota. This should be no excuse, however, for failing to change your Minnesota estate planning documents to Florida estate planning documents. As will be discussed below, adverse tax and non-tax consequences could result if a change is not made.

Personal Representative and Trustee. If the snowbird's Minnesota will names a bank or trust company not licensed in Florida as personal representative or trustee, that bank or trust company will not automatically

qualify to act in Florida. To do so it must have fiduciary powers in Florida. Also, if the will names a nonresident individual as personal representative, he will not be allowed to qualify in Florida unless, under Florida law, he is related to the decedent.⁷ Finally, if an individual's revocable trust names an individual trustee who is not living in or near the state of Florida, it may be impractical for them to continue to serve and carry out their responsibilities.

Devise of Homestead. Florida's residential homestead laws are more restrictive than those in Minnesota. Certain transfers of a Florida resident's home by will or trust are not permitted. For example, the homestead cannot be transferred by will or by revocable trust if the decedent is survived by a spouse or minor child.⁸ By Florida statute, if the decedent is survived by a spouse and lineal descendants, the surviving spouse is *required* to take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death, *per stirpes*.⁹ There is an exception to this rule if the property is held by husband and wife as "tenants by the entirety."

Tenancy by the Entireties. Unlike Minnesota, Florida permits husband and wife to hold real and personal property as "tenants by the entirety." A tenancy by the entirety may exist only between husband and wife and in many ways works like a Minnesota joint tenancy with right of survivorship.¹⁰ However, unlike a joint tenancy with right of survivorship, unless there is a contrary expression of intent, a tenancy by the entirety *automatically* arises for property acquired by husband and wife by gift, purchase, or descent. Unlike joint tenancy with right of survivorship, however, it is not necessary that the instrument of conveyance or transfer specify an estate or tenancy by the entirety, or state that the parties are husband and wife, or even refer to their marital status. In Florida, intent to hold the property as a tenancy by the entirety is presumed.¹¹ Further, neither spouse can unilaterally forfeit, sell, encumber, lease, partition, sever or otherwise alienate any interest they have in property held in tenancy by the entirety without the consent of the other spouse.¹² Further, a Florida estate by the entirety is beyond the reach of creditors to the extent that it cannot be seized and sold upon execution for the separate debts of either husband or wife, and a judgment against one spouse does not become a lien upon it.¹³ The property is not divisible by one spouse alone and is therefore beyond the reach of one spouse's creditors.¹⁴

State Estate Tax. Most attorneys and many clients are aware of the significant changes that were made to the federal estate tax laws in 2001 by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Many states, like Florida, passed laws that tied or "coupled" their state estate tax exemption to the federal exemption. However, Minnesota, and some other states, did not and are said to be "decoupled" from EGTRRA. Two significant changes in the estate tax law made by

EGTRRA that were adopted by Florida but not by Minnesota were: 1) the significant phase-in increase in the federal estate tax exemption and the eventual elimination of the estate tax in 2010; and, 2) the phase-out of the state estate tax credit in 2005. In 2004, under Florida law and pursuant to EGTRRA, an estate with assets valued at death of less than \$1.5 million is exempt from federal *and Florida* estate taxes. However, for budgetary reasons, Minnesota chose not to adopt EGTRRA and kept the threshold for exemption at \$850,000. EGTRRA also phased out the state estate tax credit¹⁵ which was an amount calculated under federal law but picked up by some states (including Minnesota and Florida) as their separate state estate tax. For those states like Florida that adopted EGTRRA, the state estate tax credit is completely phased out for decedents dying after December 31, 2004. This fact has undoubtedly already caused a loss in Florida's tax revenue. Those states like Minnesota that did not adopt EGTRRA will continue to calculate their state estate tax under those tax laws in existence prior to EGTRRA. One significant estate planning issue that arises from the states' varying responses to EGTRRA and the "coupling" and "decoupling" issue is the so-called state "death tax trap." Because most states' estate tax laws, like Minnesota's, capture a proportionate amount of estate tax from nonresident decedents who owned instate real property, a nonresident decedent's estate may pay more nonresident state estate tax than it would pay on the same real property if it were located in the decedent's state of domicile. This could occur if the state, like Minnesota, did not adopt EGTRRA and retained the pre- EGTRRA estate tax system with lower exemption thresholds. This "death tax trap" scenario was the focus of a recent article in *The Florida Bar Journal*.¹⁶ The article suggested that the client make an *inter vivos* transfer of ownership and title in the real property located out of state to a new or existing legal entity such as a limited liability company (LLC) or a limited partnership (LP), presumably with control remaining with the client. This transfer would convert an interest in real estate - which is subject to estate tax in the nonresident state - to an intangible asset (*i.e.*, an LLC membership interest or LP interest) which is not subject to estate tax in the nonresident state. Therefore, the Minnesota snowbird who makes the wholesale move to Florida but retains his or her lake cabin, vacation home, or other real estate (held for personal use or for business), should consider transferring his Minnesota real estate to an LLC or LP to avoid the Minnesota estate tax.

FLITE Trust. If an individual's assets are substantial and he or she becomes a Florida resident, then he or she may be subject to the Florida intangible tax, which can be substantial. But it can also easily be avoided. For example, an individual with taxable assets valued at \$100 million would be subject to a Florida intangible tax equal to roughly \$100,000. The major taxable asset could be the individual's interest in a closely held business located in Minnesota. To avoid the Florida intangible tax, the individual may want to consider transferring his or her taxable assets on or before January 1st of each year to a "FLITE Trust". A FLITE Trust is an irrevocable trust wherein

the grantor retains a right to distributions of income and principal and is structured so that any transfer avoids federal gift tax. The FLITE Trust is a "grantor trust" for income tax purposes so all FLITE Trust income is taxed to the grantor as if no transfer had occurred.¹⁷

Total Return Unitrust. Unlike Minnesota, Florida allows a nonjudicial conversion of an irrevocable "income trust"¹⁸ to a noncharitable unitrust, also known as a total return trust. The total return trust concept may allow a trustee to distribute more trust assets to a trust income beneficiary than would be otherwise allowed under a traditional "trust accounting income" definition.¹⁹ In contrast, Minnesota has an "equitable adjustment" trust apportionment rule that allows a trustee to adjust between trust income and principal under certain conditions after taking into consideration certain enumerated factors.²⁰

Trusts for Animals. Unlike Minnesota, Florida allows for the creation of a trust to provide for the care of animals. The animal must be alive when the trust is created by the settlor and it terminates upon the death of the animal or the death of the last surviving animal if the trust was created to provide for the care of more than one animal.²¹

Actions Against Trustees. Florida law provides that an action against a trustee for breach of trust is barred for any beneficiary who has received a trust disclosure document unless a proceeding to assert a claim is commenced within six months after receipt of a trust disclosure document. A "trust disclosure document" means a trust accounting or other written report by the trustee. ²²

Elective Share. Both Minnesota and Florida have elective share statutes. These statutes protect a surviving spouse from being disinherited by a deceased spouse. If a surviving spouse has not otherwise waived the right to do so, one may elect to receive a statutory share of the decedent's assets. Generally, an election is made if the surviving spouse would receive more than under the decedent's will. The assets from which the elective share is taken, called the "augmented estate," may include assets held in a revocable trust or joint account in addition to the decedent's probate assets. A statutory percentage is applied to the augmented estate to determine the elective share amount. Other complicated adjustments are then made. Unlike Minnesota, Florida simply pegs its elective share percentage at 30 percent regardless of the length of the marriage. Apparently, the policy under Florida law is that a recently married spouse simply has a right to more of the decedent's estate. Given this fact, it would behoove the more propertied spouse who is contemplating both a move to Florida and marriage to consider a premarital agreement to address this issue.

Irrevocable Trust. Unlike Minnesota, Florida law allows an irrevocable trust

to be amended, modified, or terminated after the death of the settlor without a court hearing upon the unanimous agreement of the trustee and all beneficiaries of the trust. The trust is then binding on unborn and unascertained and minor beneficiaries.²³

Rule Against Perpetuities. Unless a state has no rule against perpetuities, a trust must terminate at some point in time after creation. This is the so-called rule against perpetuities. Minnesota and Florida have rules against perpetuities. However, Minnesota's default time limit is 90 years after the creation of the trust. Florida's default time limit was changed in 2000 to 360 years.

Trust Execution. There is no formal statutory rule in Minnesota for the execution of a trust. However, in Florida the testamentary aspects of a trust are invalid unless the trust is executed by the grantor with the formalities required for the execution of will, (*i.e.*, the document must be in writing, signed by the grantor, and witnessed by two persons).²⁴

Personal Representative Fees. A personal representative in Florida is compensated by commission based on the "compensable value" of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during administration.²⁵ In Florida a commission is presumed to be reasonable compensation to the personal representative based on rates identified in the statute. For example, fees of 3 percent of the first \$1 million, 2.5 percent for all above \$1 million and not exceeding \$5 million, 2 percent for all above \$5 million and not exceeding \$10 million, and 1.5 percent for all above \$10 million are deemed reasonable.²⁶

Representing a Personal Representative. Again, unlike Minnesota, Florida provides that attorneys for the personal representative of an estate are entitled to reasonable compensation payable from estate assets and that attorneys' fees are presumed reasonable if based on statutory rates starting at \$1,500 for estates valued at \$40,000 or less and topping out at a rate of 1 percent of valuation for all estates valued above \$10 million. In addition to Florida's statutory fees, the Florida attorney is allowed fees for "extraordinary services," which may include, among other things, representation in a will contest or in a tax audit.²⁷

Health Care Advance Directive. Both Florida and Minnesota have laws that allow one person, called the principal, to give another person, called an agent or proxy or surrogate, the power to make health care decisions for the principal under certain conditions. Florida's is called a Health Care Advance Directive.²⁸ In Florida, principals are presumed to be capable of making health care decisions for themselves unless they are individually determined to be "incapacitated." Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from the

person's mental retardation.²⁹ In Florida, "incapacity" is defined to mean "the patient is physically or mentally unable to communicate a willful and knowing health care decision".³⁰

Power of Attorney. Both Florida and Minnesota have power of attorney statutes that allow one person, a principal, to give another person, an attorney-in-fact, the power to enter into certain financial transactions in the principal's stead. Both states also have "durable" power of attorney statutes that allow the attorney-in-fact to act in the event of the principal's "incapacity³¹ or incompetence"³². Again, there are nuances in each state's statute that should be reviewed carefully. For example, in 2002 Florida's durable power of attorney statute was amended to allow for a "springing power of attorney." A springing durable power of attorney is a durable power of attorney that is not immediately exercisable but takes effect only when the principal "lacks capacity to manage property."³³ The term "manage property" means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.³⁴ Minnesota has no such provision.

Conclusion

There are many reasons to make the move to Florida. The lure of the warm weather alone is enough. However, before a Minnesota snowbird heads south and decides to take up full time residency in the state of Florida, he should carefully review with appropriate counsel the many changes that may have to be made to his estate plan. Otherwise the snowbird might unnecessarily find herself paying more taxes, or worse, effecting a transfer of property to her heirs in a way or manner that is contrary to her wishes.

NOTES

1 Dane Smith, "naples, fla: minnesota down under, Snowbird colony lures state politicians" Minneapolis Star Tribune, February 21, 2004.

2 See Fla. Stat. §222.17, "Manifesting and evidencing domicile in Florida."

3 See Constitution of the State of Florida, Article VII, Section 5.

4 See Fla. Stat., Chapter 199.

5 See irc §2604(c), which eliminates irc §2604 in its entirety after December 31, 2004.

6 See Minn. Stat. §524.2-506. See also Fla. Stat. §732.502(c)(2).

7 See Fla. Stat. §733.304. "Nonresidents".

8 See Fla. Stat. §732.4015. "Devise of homestead."

9 See Fla. Stat. §732.401. "Descent of homestead."

10 See *Beal Bank, sb v. Almand and Associates*, 780 So. 2d 45 (Fla. 2001).

11 *Id.*

12 See *Stanley v. Powers*, 123 Fla. 359, 166 So. 843 (1936).

13 See *Winters v. Parks*, 91 So. 2d 649 (Fla. 1956).

14 See *Beal Bank*, supra, n 10.

- 15 See irc §2011, which completely phases out the state estate tax credit for decedents dying after December 31, 2004.
- 16 Robert M. Arlen and David Pratt, "The New York (and Other States) Death Tax Trap," Florida Bar Journal, October 2003.
- 17 See irc §§671, et seq.
- 18 See Fla. Stat. 738.1041(1)(b). An "income trust" means a trust which directs or permits the trustee to distribute the net income of the trust to one or more persons.
- 19 See Fla. Stat. §738.1041, "Total return unitrust."
- 20 See Minn. Stat. §501B.705, "Trustee's power to adjust."
- 21 See Fla. Stat. §737.116
- 22 See Fla. Stat. §737.307
- 23 See Fla. Stat. §737.4032.
- 24 See Fla. Stat. §737.111(1).
- 25 See Fla. Stat. §733.617(1).
- 26 See Fla. Sta. §733.617(2)
- 27 See Fla. Stat. §733.6171
- 28 See Fla. Stat. Chapter 765.
- 29 See Fla. Stat. §765.204
- 30 See Fla. Stat. §765.101(8)
- 31 See Fla. Stat. §709.08
- 32 Cf. Minn. Stat. §523.07.
- 33 See Fla. Stat. §709.08(1)
- 34 See Fla. Stat. §744.102(10)