

EXCERPT FROM:

**TRUST AND INCOME TAX PLANNING
FOR THE AFFLUENT
AND SUCCESSFUL; HOW TO KEEP
THEM THAT WAY**

presented to

THE TAMPA BAY CPA GROUP

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II. TILL DEATH DO OUR ASSETS PART? - THE ELECTIVE SHARE AND HOMESTEAD INHERITANCE QUANDRY:

Has or will the spouse sign a Prenuptial Agreement or a waiver of the elective share and/or homestead inheritance rights?

A. Homestead Considerations.

1. Protect the homestead by keeping it mortgaged, or will owning the homestead under an LLC or limited partnership permit avoidance of homestead treatment from the surviving spouses survivorship rights appointing you?
2. Is it possible to receive homestead exemption advantages under state tax law (\$50,000 exclusion and 3% valuation increase cap) while avoiding inheritance rights that would otherwise apply for a surviving spouse and/or a minor child?
3. Place the homestead under an LLC or limited partnership and lease it for 99 years under an agreement that allows either party to terminate the lease upon reasonable circumstances, or required approval?
4. Florida Statute Section 196.041(1) allows Florida homestead exemption and the 3% cap to apply under a 98 plus year lease:

“Vendees in possession of real estate under bona fide contracts to purchase when such instruments, under which they claim title, are recorded in the office of the clerk of the circuit court where said properties lie, and who reside thereon in good faith and make the same their permanent residence; persons residing on real estate by virtue of dower or other estates therein limited in time by deed, will, jointure, or settlement; and lessees owning the leasehold interest in a bona fide lease having an original term of 98 years or more in a residential parcel or in a condominium parcel as defined in chapter 718, or persons holding leases of 50 years or more, existing prior to June 19, 1973, for the purpose of homestead exemptions from ad valorem taxes and no other purpose, shall be deemed to have legal or beneficial and equitable title to said property. In addition, a tenant-stockholder or member of a cooperative apartment corporation who is entitled solely by reason of ownership of stock or membership in the corporation to occupy for dwelling purposes an apartment in a building owned by the corporation, for the purpose of homestead exemption from ad valorem taxes and for no other purpose, is deemed to have beneficial title in equity to said apartment and a proportionate share of the land on which the building is situated.”

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5. Protect the homestead from a creditor standpoint by having the Grantor own less than 100% of the LLC or limited partnership - charging order protection is not nearly as good as homestead creditor protection, but in a creditor calamity situation the home can be distributed to the owners of the LLC or limited partnership pro rata to ownership, and this would not be considered a fraudulent transfer that can be set aside under Florida Statute Section 726 under the *Havoco case*, but the client might have to wait 10 years before being able to discharge a judgment in bankruptcy without risking loss of the home.

B. With Respect to the 30% Elective Share:

1. Florida Statute Section 732.2065 provides that the elective share is equal to 30% of the elective estate. The alternative is to fund 37.5% of the elective estate into a trust, as described below.
2. Satisfy the elective share with assets the spouse does not want in the form of nickels, dimes and quarters that she has to pick up at the LaGuardia Airport at 2pm at the United terminal in the middle of the summer.
3. In recognition that a 37.5% elective share percentage applies in lieu of a 30% elective share ratio if the Trust is as described in Florida Statute Section 732.2095, if my spouse does not accept the generous offer described above (which is worth less than 30% of my gross estate) then an amount equal to 37.5% of the value of my elective share gross estate shall be devised in trust to Atilia the Hun and the most expensive trust company on earth, (do not call them, they will call you), as Trustees, in Siberia, to hold such assets for my said spouse and to provide her with income from the trust and amounts as needed for her health, education and maintenance, and on such spouse's death such assets shall be devised to my beloved children, THING 1 and THING 2, whether then in jail for violet crimes or not.
4. Better to give the spouse 10% now and have him or her waive the elective share right?
5. One strategy to avoid the elective share is for a client to make a completed gift to an irrevocable trust for the benefit of his or her children, or other desired beneficiaries with the client as a discretionary beneficiary of the trust, if the transfer to the trust is made within at least one year before the client's death.

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Florida Statute Section 732.2035(5)(c) provides that property transferred to a trust of which the Grantor is a beneficiary is not included in the Grantor's elective estate if the Grantor's only interests in the property are that:

- i. The property could be distributed to or for the benefit of the Grantor only with the consent of all persons having a beneficial interest in the property; or
- ii. The income or principal of the property could be distributed to or for the benefit of the Grantor only through the exercise or in default of an exercise of a general power of appointment held by any person other than the Grantor; or
- iii. The income or principal of the property is or could be distributed in satisfaction of the Grantor's obligation of support; or
- iv. The Grantor had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the Grantor's death.

Therefore, for example, a father with three (3) sons might establish three (3) separate Irrevocable Trusts (one for each son) in a creditor protection jurisdiction such as Nevada or Alaska. Each separate irrevocable trust can have the applicable son and the Grantor as discretionary beneficiaries, provided that no distributions can be made to the Grantor without the consent of the son. This should prevent the assets of the trust from being included in the Grantor's elective share estate upon his death.

Who would be the beneficiaries of the Trust after the Grantor/Contributor and applicable son have passed away? The Trust can include a provision providing for the son's children to be alternate beneficiaries if the son had not exercised his power of appointment before his death, and then the consent of each of the son's children would be necessary before any distributions from the Trust can be made to the Grantor for his benefit.

If a married individual has all of his or her assets in an offshore Asset Protection Trust and the applicable jurisdiction does not recognize the Elective Share law, how will the surviving spouse be able to recover assets from the Trust as a practical matter, which can be important if the decedent does not have sufficient other assets to satisfy the elective share?

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- C. Pre-Nuptial Agreements - Do Not Start the Third Date Without One.
- D. Speaking of Transfers to Your Spouse - The unlimited marital deduction is not permitted for transfers to or in trust for a surviving spouse who is not a United States citizen. Instead there is a \$139,000 limit on marital deduction gifts given to non-citizens. See IRC 2523(i).

Some transfers to joint ownership or tenancy by the entireties will be considered incomplete transfers, and therefore, not taxable gifts, if the donor spouse has the right to regain sole ownership of the assets by being a signor on the joint account and having the legal ability to withdraw all funds or assets from the account without consent of the non-citizen spouse. Treasury Regulation Section 25.2511-2.

NOTE - Will this regulation be questioned in the future in view of our discussion on incomplete gifts and testamentary powers of appointment that is discussed below. Is the withdrawal ability of the non-citizen spouse enough to make the gift complete? We think not.

- E. If the spouse is not a U.S. citizen and will receive the benefit of a disposition make sure to consider establishing a Qualified Domestic Trust (QDOT).