Avoiding Disaster in the Sunshine State – Tricks, Traps, and Nuances that Make Florida Planning Interesting and Unique

presented to

All Children's Hospital

15th Annual Estate, Tax, Legal & Financial Planning Seminar

February 13, 2013

By Alan S. Gassman, Esquire
agassman@gassmanpa.com
Copyright © 2013

"My parents didn't want to move to Florida, but they turned sixty and that's the law." - Jerry Seinfeld

"Please Officer, don't take me in, or my old lady will kick my ________. I was only supposed to go down to Buckhead to get the newspaper, and the next thing I knew I was on I-75 heading for Florida!" - Jimmy Buffett

(See Jimmy Buffett and former governor and U.S. Senator Bob Graham at the last page of this outline with another notable quote).

TABLE OF CONTENTS

INTRODUCTION 1
2013 FLORIDA COMPLIANCE CALENDAR 2
A VERY TREACHEROUS NEW DURABLE POWER OF ATTORNEY ACT 3
- 6 Catastrophes That Can Happen 4
- Health Care Powers of Attorney Witness and Notarization Requirements 5
- Escrowed Durable Power of Attorney Form Language 25

FLORIDA TAX LAW 33
- No Individual, Partnership, S Corporation, or Trust Income Taxes or Tax Returns! 33
- No Inheritance or Estate Taxes 33
- C Corporation and Business Taxes 34
- Tangible Taxes 34
- Unemployment Tax 34
- Workers' Compensation 34
- Sales Tax on the Sale of Tangible Assets and Rentals 34
- Sales Tax on Rent 36
- Documentary Stamp Tax on Real Estate Transfers 38
- Converting Co-Ownership to LLC or other Entity Ownership 40
- Documentary Stamp Tax Imposed Upon an Issuance of Debt 41
- Documentary Stamp Tax Imposed Upon Issuance of Stock Certificates 41

- One Time Intangible Tax Imposed Upon Issuing Real Estate Mortgages 41
- Why Many Loan Closings Are Performed on Boats and Airplanes 42
- Real Estate Taxes 42

LEGAL INTEREST RATES, USURY LIMITS, AND SELF-CANCELLING INSTALLMENT NOTE THOUGHTS 44

CREDITOR PROTECTION 46
- Homestead Creditor Protection 47
- Homestead Protection Even Trumps the Florida Fraudulent Transfer Statute 47
- Honing in on Homestead: Will a Leasehold Interest Qualify for Creditor Protection? 48
- Homestead Disposition Prohibitions Surprise Many 50
- Child's Homestead Irrevocable Trust 51
- Comparison of Methods to Purchase Homes for the Children 52
- Tenancy by the Entireties 52
- Direct Transfers from One Spouse to Tenancy By the Entireties 55
- Tenancy by the Entireties Article 57
- Other Unlimited Creditor Exemptions 67
- Private Annuity Planning 69
- Protecting Qualified Personal Residence Trust Rights 69
- QPRT Trust Planning Demonstration Chart 71
- A Look at 529 College Plans 72
- 529 Questions About 529 Plans 73
- What You Need to Know About Transfers to Minors Act Accounts 75
- Charging Order Protection 78

FLORIDA LIABILITY PLANNING 82
- Vehicle Liability 82
- Using LLCs to Avoid Liability 82
- 8 Common LLC Planning Errors 83
- Maintain Corporate Identity Memo to Clients 87
- Limited Liability Entities 91
- About Florida Limited Liability Entities 91
- Canadians Investing in Florida LLCs 91
- The Liability and Casualty Insurance Crisis Continues 91
- Umbrella Liability Insurance Coverage Letters 95
- Landlord's Insulation from Potential Liability 99
- Boat Liability 100
- A Pirate's Life for Me 100
- Medical Malpractice 102
- Going Bare 103
- Speaking of Physician Liability- Strict Physician Anti-Referral Rules 107
- Other Causes of Liability and Potential Financial Devastation 111
- Corporate Firewall Protection 114
- The Manager or Officers May Still Be Sued 114

Excerpt from *Creditor Protection for Florida Physicians* 115

The Ten Most Common Mistakes Estate Planners Make with Respect to Asset Protection 124

FLORIDA TAX LAW

No Individual, Partnership, S Corporation, or Trust Income Taxes or Tax Returns!

Florida has no individual, partnership, S corporation, or trust income taxes, but does impose sales tax on sales and rentals of many items, a 5% income tax on C corporation income, documentary stamp taxes on real estate transfers and mortgages, and intangible taxes on borrowing.

Florida's Constitution prohibits a state income tax and would be very difficult to amend.

Florida had an intangibles tax which was based upon the value of stocks, mutual funds and bonds other than Florida municipal bonds. This tax was reduced to $1.50 per $1,000 of value of non-exempt intangible assets in 1999, and was eliminated beginning in 2007.

Because there are no individual income taxes or S corporation taxes, Florida imposes a number of other taxes and charges which many people from other states are not accustomed to seeing, and a number of planning considerations and tax uncertainties are discussed below.

The Florida Department of Revenue is said by many to have aggressive and inflexible auditors and revenue agents, while the advisory staff in Tallahassee is said to be much more reasonable and informative. Taxpayer advisory opinions cost nothing to request, so oftentimes it is better to ask permission than forgiveness when contemplating state tax associated conduct.

No Inheritance or Estate Taxes.

Previously, Florida had a "pickup tax" that was imposed upon estates of Florida residents. This tax was coined a "pickup tax" because Florida essentially "picked up" all, or a portion of, the amount of the credit for state death taxes allowed on the federal estate tax return. On December 31, 2004, the federal law changed to make the federal credit a deduction for state estate taxes, which eliminated Florida's pickup tax. Although the tax was eliminated, estates are still required to file an Affidavit of No Florida Estate Tax Due with the state of Florida, regardless of whether the estate is required to file a Form 706 or 706NA Federal Estate Tax Return. The probate estates of decedents required to file the Federal Estate Tax Return cannot be closed, according to most probate judges, unless or until a Closing Letter is received from the Internal Revenue Service. Where there are modest estate tax returns to facilitate allowing a surviving spouse to have portability of unused estate tax exemption, it may be necessary to keep the probate estate open until a clearance letter is received from the Internal Revenue Service. This will be a further burden of filing an estate tax return for a modest estate. Hopefully a probate judge will permit the closure of an estate before a clearance letter is received, where the estate tax return was filed voluntarily and not by reason of being required by the Internal Revenue Service.

C Corporation and Business Taxes

Florida imposes a 5.5% income tax on the net income of C corporations, making S corporations and partnerships more attractive comparably than C corporations for business and investment activities in Florida. C corporations that zero out income each year by paying compensation to officers and directors will pay no tax in Florida unless deductions for compensation or other expenses are disallowed. A Florida limited liability company that elects to be treated as a C corporation for Federal income tax purposes will be subject to Florida income tax accordingly.

Tangible Taxes

Businesses pay a tangible personal property tax based on the value of their physical non-real estate assets. The millage, or rate of taxation, is set by the Board of County Commissioners, School Board, City Council and governing bodies of other independent special taxing districts and authorities. The millage is set by calculating a rate per $1,000 valuation that will produce the county's budget needs from ad valorem taxes. One mill represents $1 of tax on each $1,000 of taxable valuation. The tax rates typically range from approximately 15 to 20 mills (15-20% of the value of physical business assets).

Unemployment Tax

Renamed the "Reemployment Tax" in the 2012 legislative session, Florida's unemployment tax requires employers to pay a tax based on wages of their employees as part of efforts to help Florida's job seekers get reemployed. The rate for initial employers is 2.7% of payroll for the first 10 quarters (based on the employees' annual salary up to $8,000). After that, the rate is recalculated based on the employer's history, with a maximum rate of $432 a year per employee.

Workers' Compensation

In addition to the above taxes, Florida employers who employ four or more part or full time employees are also required to obtain workers' compensation coverage. The rates vary and are dependent on the business's industry classification, its history of workers' compensation claims, salaries paid to employees, and other factors. Chapter 440, F.S., establishes workers' compensation coverage requirements for employers. If an employer is unable to obtain coverage through the private insurance market, the employer can contact the Florida Workers' Compensation Joint Underwriting Association at (941) 378-7400.

Sales Tax on the Sale of Tangible Assets and Rentals

A 6% general sales tax applies statewide. In addition, most counties in Florida apply a discretionary sales surtax on top of that. County surtax rates currently range from .5% to 1.5%, but 40 out of 67 Florida counties have a 1% addition and a consequent 7% sales tax. Below is a chart from the Florida Department of Revenue with each county's total sales tax rate.

Discretionary Sales Surtax Rates for 2012

COUNTY	TOTAL SURTAX RATE		EFFECTIVE DATE	EXPIRATION DATE
Alachua	None			
Baker	1%		Jan 1, 1994	None
Bay	.5%		Jan 1, 2011	Dec 2020
Bradford	1%		Mar 1, 1993	None
Brevard	None			
Broward	None			
Calhoun	**1.5%**	**(1%)**	**Jan 1, 2009**	**None**
		(.5%)	**Jan 1, 2009**	**Dec 2018**
Charlotte	1%		Jan 1, 2009	Dec 2014
Citrus	None			
Clay	1%		Feb 1, 1990	Dec 2019
Collier	None			
Columbia	1%		Aug 1, 1994	None
Dade	See Miami-Dade for rates.			
De Soto	1%		Jan 1, 1988	None
Dixie	1%		Apr 1, 1990	Dec 2029
Duval	**1%**	**(.5%)**	**Jan 1, 1989**	**None**
		(.5%)	**Jan 1, 2001**	**Dec 2030**
Escambia	**1.5%**	**(1%)**	**Jun 1, 1992**	**Dec 2017**
		(.5%)	**Jan 1, 1998**	**Dec 2017**
Flagler	**1%**	**(.5%)**	**Jan 1, 2003**	**Dec 2012 ←**
		(.5%)	**Jan 1, 2003**	**Dec 2012 ←**
Franklin	1%		Jan 1, 2008	None
Gadsden	**1.5%**	**(1%)**	**Jan 1, 1996**	**None**
		(.5%)	**Jan 1, 2009**	**Dec 2038**
Gilchrist	1%		Oct 1, 1992	None
Glades	1%		Feb 1, 1992	Dec 2021
Gulf	1%		Jan 1, 2010	None
Hamilton	1%		Jul 1, 1990	Dec 2019
Hardee	1%		Jan 1, 1998	None
Hendry	1%		Jan 1, 1988	None
Hernando	.5%		Jan 1, 2005	Dec 2014
Highlands	1%		Nov 1, 1989	Oct 2019
Hillsborough	**1%**	**(.5%)**	**Dec 1, 1996**	**Nov 2026**
		(.5%)	**Oct 1, 2001**	**None**
Holmes	1%		Oct 1, 1995	Dec 2018
Indian River	1%		Jun 1, 1989	Dec 2019
Jackson	**1.5%**	**(1%)**	**Jun 1, 1995**	**Dec 2025**
		(.5%)	**Jul 1, 1996**	**Dec 2015**
Jefferson	1%		Jun 1, 1988	None
Lafayette	1%		Sep 1, 1991	None

COUNTY	TOTAL SURTAX RATE		EFFECTIVE DATE	EXPIRATION DATE
Lake	1%		Jan 1, 1988	Dec 2017
Lee	None			
Leon	**1.5%**	**(1%)**	**Dec 1, 1989**	**Dec 2019**
		(.5%)	**Jan 1, 2003**	**Dec 2012 ←**
Levy	1%		Oct 1, 1992	None
Liberty	**1.5%**	**(1%)**	**Nov 1, 1992**	**None**
		(.5%)	**Jan 1, 2012**	**Dec 2020**
Madison	**1.5%**	**(1%)**	**Aug 1, 1989**	**None**
		(.5%)	**Jan 1, 2007**	**None**
Manatee	.5%		Jan 1, 2003	Dec 2017
Marion	None			
Martin	None			
Miami-Dade	**1%**	**(.5%)**	**Jan 1, 1992**	**None**
		(.5%)	**Jan 1, 2003**	**None**
Monroe	**1.5%**	**(1%)**	**Nov 1, 1989**	**Dec 2018**
		(.5%)	**Jan 1, 1996**	**Dec 2015**
Nassau	1%		Mar 1, 1996	None
Okaloosa	None			
Okeechobee	1%		Oct 1, 1995	None
Orange	.5%		Jan 1, 2003	Dec 2015
Osceola	1%		Sep 1, 1990	Aug 2025
Palm Beach	None			
Pasco	1%		Jan 1, 2005	Dec 2014
Pinellas	1%		Feb 1, 1990	Dec 2019
Polk	**1%**	**(.5%)**	**Jan 1, 2004**	**Dec 2018**
		(.5%)	**Jan 1, 2005**	**Dec 2019**
Putnam	1%		Jan 1, 2003	Dec 2017
St. Johns	None			
St. Lucie	.5%		Jul 1, 1996	Dec 2026
Santa Rosa	.5%		Oct 1, 1998	Dec 2018
Sarasota	1%		Sep 1, 1989	Dec 2024
Seminole	None			
Sumter	1%		Jan 1, 1993	None
Suwannee	1%		Jan 1, 1988	None
Taylor	1%		Aug 1, 1989	Dec 2029
Union	1%		Feb 1, 1993	None
Volusia	.5%		Jan 1, 2002	Dec 2016
Wakulla	1%		Jan 1, 1988	Dec 2017
Walton	1%		Feb 1, 1995	None
Washington	1%		Nov 1, 1993	None

Each county that has a surtax levy that is new, revised, or extended is indicated in bold. Any county that has a surtax that expires in 2012 is also in bold and has an ← beside the expiration date.

This sales tax does not apply to the "isolated sale" of business assets where no business broker is involved with the sale, under the exceptions in rule 12A-1.037 of the Florida Administrative Code which states that "[t]he sale of business assets in conjunction with the sale of the business... other than inventory and aircraft, boats, mobile homes and motor vehicles, qualifies as an isolated sale provided the sale and the transfer of the assets of the business is completed within thirty (30) days from the date of the agreement for the sale of the business." The rule also states that if there is a business broker, agent or auctioneer involved with the sale, the exception above does not apply on the theory that the sale is not isolated, so sellers of businesses should be made

aware of this issue. This tax would not apply when the stock of a company is sold as opposed to an asset sale. Florida also does not have a Bulk Sales Act.

Florida has an annual "back to school" three-day sales tax holiday each year in August where no sales tax is collected on clothing, footwear and certain accessories ($75 and under per item) as well as school supplies that are $15 and under per item.

Sales Tax On Rent

The sales tax also applies to rent, even when paid between related entities, and the Florida Department of Revenue has been known to take the position that rent will be considered as paid in almost any instance where monies pass directly or indirectly between related entities with a lessor/lessee relationship. Also, if the "tenant" pays mortgage payments on behalf of the real estate entity, the Department will take the position that this is rent according to Technical Assistance Advisement 10A-026. This has been known to occur even when the operating entity makes distributions to its shareholders and the shareholders separately make contributions to the capital of the real estate company, although there are older Technical Assistance Advisements which would indicate that this does not necessarily need to be the case. Technical Assistance Advisement 07A-011, for instance, points out that the Department has previously recognized that there may be situations wherein "income" or "profit" flowing between related entities would not be "rental consideration."

Because the statute of limitations on sales tax never runs unless and until a sales tax return has been filed, many taxpayers pay a small amount of rent or lease a small part of the property to another user and pay sales tax and file returns.

Many taxpayers will not be able to deduct interest and depreciation from rental activity that would otherwise be available because of the passive activity loss rules. IRC § 469(c)(7) may nevertheless permit these deductions where a "tenant entity" and the real estate owner entity have generally identical ownership, and the real estate is used in the tenant's trade or business.

IRC § 469(c) directs that activities may be treated as a single activity if they constitute an appropriate economic unit for the measurement of gain or loss for purposes of § 469. If the rental activity can be grouped to the taxpayer's trade or business activity, they can avoid the passive loss rules which limit deductibility.

Treas. Reg. § 1.469-4(c)(2) lists five nonexclusive factors which are to be given the greatest weight in determining whether activities constitute an appropriate economic unit: (i) Similarities and differences in types of trades or businesses; (ii) The extent of common control; (iii) The extent of common ownership; (iv) Geographical location; and (v) Interdependencies between or among the activities.

Section 1.469-4(d)(1)(i) further provides that even where a rental activity and a trade or business activity constitute an appropriate economic unit, they may be grouped together only if one of the following three elements are met: (A) The rental activity is insubstantial in relation to the trade

or business activity; (B) The trade or business activity is insubstantial in relation to the rental activity; or (C) Each owner of the trade or business activity has the same proportionate ownership in the rental activity, in which case the portion of the rental activity that involves the rental of items of property for use in the trade or business activity may be grouped with the trade or business activity.

The author is not sure why the word "insubstantial" is contained in the regulation, or what it is intended to mean. The Treasury Regulations do not define the term "insubstantial" and there is very little case law addressing this issue. In *Candelaria v. United States*, 518 F.Supp.2d 852 (W.D. Tex. 2007), the court attempted to craft a definition of this term and found that in determining insubstantiality, the analysis should focus on "pertinent factors" including the following: the relationship of income between the rental activity and business activity (using the 80/20 rule); whether the entities work together as a single business unit rather than two distinct entities; and whether the rental activity was created solely for the other business entity's benefit.

Florida imposes sales tax on residential rentals, referred to as "transient accommodations," unless there is a bona fide written lease for a period of longer than 6 months. Florida Administrative Code Rule 12A-1.061 provides that in order to be considered a lease for a period longer than six months, a written lease agreement effective the first day of a month must run through the first day of the seventh consecutive month, and a lease starting at any other day in the month must be in effect until the day after the corresponding day of the seventh month. For example, a lease agreement effective July 1st must be effective through January 1st, and a lease effective July 28th must be effective through January 29th. For a written lease to be considered "bona fide" it cannot contain a provision allowing the lessee to cancel the lease at any time without penalty or a provision that would allow the lessee to avoid full payment of the stated amount of the rent. Any lease for one or more years must be in writing with two witnesses to each signature in order to be enforceable.

Years ago, there was a loophole that provided that no sales tax would be due on the mortgage payments made by the tenant if the tenant was a guarantor of the mortgage debt. This loophole was legislated out of the law several years ago, but some practitioners and taxpayers are not aware that they have significant exposure for sales tax on ongoing rent payments.

The sale of a motor vehicle, airplane, boat, or other titled transportation vehicle occasions the requirement to pay a 7% sales tax, and the Florida Department of Revenue has been known to actively track physical airplanes and boats to check to see whether sales tax was paid when they were acquired by out of state companies or other entities that Floridians are sometimes erroneously advised to set up and maintain to attempt to avoid these taxes.

Sales tax is also due when a vehicle, boat, or airplane is transferred to or from a wholly owned or brother/sister company or other limited liability entity, partnership or corporation, even where there is no consideration. In these types of transfers, consideration is presumed according to Fla. Admin. Code Rule 12A-1.007(25)(d).

Rule 12A-1.007(25)(b)(2) indicates that the transfer of title as a gift into a revocable or irrevocable trust is also not taxable. The pertinent language is as follows:

> The transfer of title as a gift into a revocable or irrevocable trust is not taxable. A transfer subject to a lien(s) will not qualify as a gift when any outstanding lien(s) is assumed by the trust.

As discussed in the Trust Section of this article, many planners now use irrevocable trusts to limit liability for investment properties and activities while avoiding sales taxes on transfers to the trust entity, documentary stamp taxes on conveyances of real estate, and the extra premiums or lower liability insurance coverages offered for corporate owned real estate by many insurance carriers in Florida.

Documentary Stamp Tax on Real Estate Transfers

In addition, many Floridians are surprised to learn that they have to pay a 7/10 of 1% documentary stamp tax on the transfer of real estate. This tax does not apply to gifts of real estate, but if real estate is gifted subject to a mortgage, the amount owed on the mortgage will be deemed consideration, subject to the 7/10 of 1% tax.

Documentary stamp tax is also not applicable in a bankruptcy proceeding, so it is not unusual to find borrowers and lenders going to legal counsel to obtain a "pre-packaged bankruptcy" arrangement, when property is given to a lender as a "deed in lieu of foreclosure." This process can also enable the debtor to avoid taxable income from the discharge of indebtedness under Internal Revenue Code Section 108.

The Department of Revenue regularly checks deeds that have been recorded where documentary stamp tax has not been paid, particularly where there is a mortgage on the property that has been ignored in the determination of documentary stamp tax amount and reporting.

Typically the Department of Revenue will accept the tax assessor value of the property to determine the documentary stamp tax where that is greater than the mortgage balance. Before the 2007-2008 real estate crisis, tax assessor values were commonly 75-80% of the "real fair market value" of real estate, but at the present time we most commonly find that the tax assessor "just value" is at or within 5% of the correct market value.

Many married couples are surprised to learn that they have to pay a documentary stamp tax when property is transferred from one spouse to the other (or other spouse's trust), or from joint names to an individual name. This is because the "shift in mortgage responsibility" is considered taxable. For example, a married couple with joint ownership of a property subject to a $200,000 mortgage would pay documentary stamp tax based upon $100,000 if the property were transferred from both spouses to one spouse. The author does not know whether this tax could be avoided by stating in the deed or by separate agreement that the conveying spouse will remain wholly or equally liable on the underlying indebtedness. The Department of Revenue routinely

reviews deeds and sends notices of tax, interest and penalties due when real estate is conveyed subject to a mortgage and no documentary stamp tax is paid.

When unencumbered real estate is transferred to a company owned solely and in the same percentages as the real estate transferor or transferors, documentary stamp tax will not be imposed based upon the rationale that there is not consideration for the transfer. This is the result of the Florida 2nd District Court of Appeal decision of *Kuro Inc. v. State Dept. of Revenue*, 713 So. 2d 1021 (Fla. 2d DCA 1998), which was affirmed by the Florida Supreme Court in *Crescent Miami Center, LLC v. Florida Dept. of Revenue*, 903 So. 2d 913 (Fla. 2005).

After the *Kuro* and *Crescent Miami Center* opinions were released, many planners avoided documentary stamp tax by first having clients convey property to identically owned LLCs and then transferring ownership in the LLC to an arms-length purchaser or other parties. The step transaction doctrine has never been applied in a Florida tax case, and apparently does not apply in Florida taxation matters.

To partly close this loophole, the Florida Legislature passed Florida Statute Section 201.0201 in 2009, which provides that the transfer of an LLC interest that corresponds to real estate transferred to the LLC within three (3) years will be considered to be a documentary stamp taxable sale, unless the transfer is within an exception.

The exceptions include: (1) the transfer of an LLC interest to a trust that is disregarded for federal income tax purposes; and (2) a gift transfer of the LLC interest where there is no consideration.

Documentary stamp tax will, however, be due on a transfer of real estate that is encumbered by debt. Florida Statute Section 201.0201 specifically limited the effect of *Kuro* and *Crescent Miami Center* to transfers of unencumbered property so that a taxable sale is considered to have occurred to the extent of indebtedness when an exception would otherwise apply.

Florida Statute Section 201.0201 states:

(1) The Legislature finds that the Florida Supreme Court opinion in Crescent Miami Center, LLC v. Florida Department of Revenue, 903 So. 2d 913 (Fla. 2005), interprets s. 201.02 in a manner that permits tax avoidance inconsistent with the intent of the Legislature at the time the statute was amended in 1990.

(2) The Legislature finds that the opinion of the District Court of Appeal for the Third District of Florida in Crescent Miami Center, LLC v. Florida Department of Revenue, 857 So. 2d 904 (Fla. 3d D.C.A. 2003), interprets s. 201.02 in a manner that prevents tax avoidance consistent with the intent of the Legislature at the time the statute was amended in 1990.

(3) The Legislature recognizes that the Supreme Court's opinion in Crescent is limited to the facts of the case and accepts the court's interpretation of s. 201.02 that no consideration exists

when owners of real property unencumbered by a mortgage convey an interest in such property to an artificial entity whose ownership is identical to the ownership of the real property before conveyance. The Legislature expressly rejects any application of the court's interpretation where the facts are not comparable to the facts in Crescent. However, because the Supreme Court's interpretation, combined with other settled law regarding the application of s. 201.02, allows for the tax-free transfer of ownership interests in real property from one owner to another through the use of artificial entities, it is the Legislature's intent by this act to impose the documentary stamp tax when the beneficial ownership of real property is transferred to a new owner or owners by the use of techniques that apply the Supreme Court's decision in Crescent in combination with transfers of ownership of, or distributions from, artificial entities.

Converting Co-Ownerships to LLC or other Entity Ownership.

The Florida conversion statute permits a general partnership to convert into a limited liability company, limited liability partnership, limited partnership, or limited liability limited partnership without the need to retitle the real estate by deed, although the articles of conversion are typically recorded in the court house records, and oftentimes a warranty deed from the name of the former entity to the name of the new entity will be prepared and recorded in order to avoid having confusion on the public records. Typically we use warranty deeds instead of quit claim deeds because most title insurance policies will benefit a subsequent owner who acquires title by warranty deed, but not if subsequent title is acquired by quit claim deed.

Where partners own real estate directly or under a general partnership, the entity can be converted into a limited liability company without the payment of documentary stamp tax. Co-owners of real estate who consider themselves to be partners in a partnership may therefore be able to convert the individual co-ownership into a limited liability company ownership without paying documentary stamp tax, although Department of Revenue personnel can be expected to ask for copies of previously filed partnership income tax returns (Form 1065) and of a written general partnership agreement, although these do not seem to be necessary. Co-owners of property who engage in a reasonable level of business activity can be considered to be partners. Florida courts have routinely held that in order to form a partnership, there must be a contribution by both parties "to the labor or capital of the enterprise, . . . a mutuality of interest in both profits and losses, and an agree[ment] to share in the assets and liabilities of the business." *Williams v. Obstfeld*, 314 F. 3d 1270, 1275 (11th Cir. 2002), quoting *Dreyfuss v. Dreyfuss*, 701 So. 2d 437, 439 (Fla. DCA 1997); *see Jackson-Shaw Co. V. Jacksonville Aviation Authority*, 510 F.Supp.2d 691, 727 (M.D. Fla. 2007).

Sometimes the transfer will be to the Trustee of a land trust owned by the successor entity so that there can be confidentiality in the public records with respect to the successor ownership and less chance of a Department of Revenue review of the matter from a stamp tax standpoint. Transfers of real estate to a revocable trust or a typical land trust owned by the transferor will not trigger documentary stamp tax, but if the land trust is owned by another entity stamp taxes may be triggered based on whether a transfer to the owner entity would have triggered the tax.

Documentary Stamp Tax Imposed Upon an Issuance of Debt.

Florida also has a documentary stamp tax on the issuance of indebtedness, which is based on $0.35 per $100 of debt, but the stamp tax on debt not secured by a mortgage is capped at $2,450, so there is no documentary stamp tax on SUCH debt exceeding $1,285,710. The tax is payable by any of the parties to a taxable transaction.

A promissory note issued in Florida cannot be enforced in court unless or until the documentary stamp tax has been paid, but late payment of the tax will be permitted.

Documentary Stamp Tax Imposed Upon Issuance of Stock Certificates.

Florida no longer imposes a documentary stamp tax on the issuance of stock. These laws were repealed.

One Time Intangible Tax Imposed Upon Issuing Real Estate Mortgages.

Where the debt is secured by a mortgage on Florida real estate, there is no way to avoid this tax, and an additional 2/10 of 1% state intangible tax is also charged on the mortgage itself, bringing the cost of mortgage borrowing to 55/100 of 1% for the first $2,450 of mortgage debt, and 2/10 of 1% for amounts exceeding that. The tax is not imposed on security interests granted in entities that own real estate, as discussed below.
As a result of the above, the total taxes imposed on mortgage borrowing are based upon .55% of the amount loaned.

One way to avoid Florida intangible taxes imposed upon borrowing is by placing real estate under a Land Trust, LLC or other entity, and having a promissory note and a pledge or security agreement arrangement executed and delivered outside of Florida without a mortgage being placed on the property. While the lender cannot be assured that the borrowing entity cannot mortgage the property to give a superior lien to another lender, a security interest or pledge arrangement will give a family member full and complete LEGAL rights to any and all proceeds from a sale or encumbrance of the property, and if the property is the primary or designated secondary residence of the borrower, interest can be deductible under Internal Revenue Code § 163 as qualified residence interest.

Under Internal Revenue Code Section 163, qualified residence interest, which includes both interest on acquisition indebtedness and home-equity indebtedness, can be deductible if secured by a qualified (primary or designated secondary) residence. A secured debt is defined in Treas. Reg. § 1.163-10T as "a debt that is on the security of any instrument (such as a mortgage, deed of trust, or land contract) that makes the interest of the debtor in the qualified residence specific security for the payment of the debt." Therefore, a note secured by a valid pledge or lien upon ownership of a land trust or other "income tax disregarded entity" would be deductible, provided that the land securing it qualifies as a primary or secondary residence under the statute.

Section 163 provides that acquisition indebtedness is any indebtedness that is incurred in acquiring, constructing, or substantially improving a qualified residence and is secured by the residence, but this Section limits the amount of acquisition indebtedness to $1 million ($500,000 for a married individual filing a separate return). Qualified residence interest also includes home-equity indebtedness, which is indebtedness other than acquisition indebtedness, but this amount is limited to $100,000. The general view is that these deductions are in the aggregate, so interest on any amount of mortgage debt over the $1 million threshold will not be deductible if the debt is on a single loan. However, in 2009 Chief Counsel Memorandum 200940030, the IRS seemed to expand this view by allowing the home-equity deduction ($100,000) in addition to the $1 million cap in a single loan.

It is also important to note that a "qualified residence" is the taxpayer's principal residence and one other dwelling the taxpayer uses as a residence during the year, which means that interest can be deductible on two residences. For example, interest is deductible on a mortgage secured by a taxpayer's principal residence and a vacation home that a taxpayer uses as a personal residence for a certain amount of time during the year.

Some lenders have been willing to accept unrecorded mortgages as stand by collateral for promissory notes, whereby the lender receives the signed mortgage document and has the right to record it if and when circumstances reflected in a Loan Agreement occur. Typically, the tax is due at the time of recording but Florida Administrative Code Rule 12.C-2.005 provides that if "there is no written instrument, or if the written instrument is not presented for recordation, the nonrecurring tax of two mills is due and payable within 30 days following the creation of the obligation."

Why Many Loan Closings Are Performed on Boats and Airplanes

Where there is not a mortgage on Florida real estate, the documentary stamp tax can be avoided by having the promissory note signed and delivered to the lender outside of Florida. Often times large transactions are conducted on boats or airplanes outside of the territorial waters, or in the Atlanta airport. Sometimes clients will simply appoint agents to sign a promissory note on their behalf, and lenders will appoint agents to receive the promissory note outside of Florida.

Borrowers in the Tampa Bay area can use the service "Traxair," which has locations at Albert Whitted Airport in St. Petersburg and Orlando Executive Airport. Their website is www.traxair.com and the St. Petersburg phone number is 727-755-1FLY. This company offers "document signing" flights for approximately $228.

Real Estate Taxes

Land owners are taxed annually based upon city and county taxes of approximately 2% of "tax assessed value" each year. Tax assessed value typically ranges from being based upon 75-90% of the actual "just market value" of a particular property. This tax is divided between the state, the county, and any applicable city where the property is located. Each person is allowed to declare one residence to be his or her homestead for property tax reduction purposes, if he or she

truly resides there.

The homestead tax exemption allows $50,000 of value to not be taxed, and thus saves approximately $1000 a year in taxes. Additional small exemptions are available for widows or widowers, the disabled, disabled veterans who are 65 and older, low-income seniors who are 65 and older, and deployed members of the military.

More importantly, "exempt homestead" property has the benefit of a cap on increased value, which cannot exceed the lesser of 3% of the prior year's value or the increase in the consumer price index each year. And when values go down, the value resets at the lower amount. When property values go up, people who have owned homes in Florida for many years pay much less in property taxes than their neighbors. In addition, in order to protect older citizens who want to downsize their homes without paying more property tax than they have been, an amendment to the Florida Constitution passed in 2008 permits the lower value tax base to be "ported" to a subsequent home if certain rules are followed.

Ownership for purposes of the homestead property tax exemptions can include direct personal ownership, ownership under a revocable trust, and beneficial ownership under a lease for 98 years or longer. For example, property subject to a 99 year lease that has 52 years left to run will qualify for the homestead tax exemption.

Qualified Personal Residence Trust planning can be handled without loss of homestead exemption advantages, if during the retained use term and thereafter the Grantor has continued exclusive use rights, and after the retained use term, if the Grantor enters into a 98 year or longer lease with the QPRT, under which fair market value can be paid. Proper trust language providing residency and use rights under a trust can qualify for continuation or initiation of homestead tax status, and after the retained use term the Grantor can enter into an arms length lease that qualifies as a 98 year or longer lease, which may be terminable upon agreed events, to qualify for homestead exemption status under the Florida constitution and Florida Statute § 196.041. County property appraisers are generally willing to review submitted documents and offer comment or confirmation that the homestead exemption will continue before implementation. Other unique and potentially treacherous homestead related Florida laws are discussed below.

LEGAL INTEREST RATES, USURY LIMITS, AND SELF-CANCELLING INSTALLMENT NOTE THOUGHTS

Most loans made in Florida cannot bear interest above 18%, although certain loans exceeding $500,000 may bear an interest rate of up to 25% per annum. The law does not distinguish between corporations and individuals. Banking institutions are subject to other rules, however.

This caused many self cancelling installment note arrangements to violate usury laws when the interest rates where much higher than they are now, and if and when interest rates increase, this concern will again affect many self cancelling installment note structures.

By way of background, self-cancelling installment notes are often used for federal estate tax planning purposes, whereby a higher interest rate must be used, in exchange for which, the note can be forgiven upon death, if entered into when the lender has better than a 50% chance of living at least 12 months at the time the loan was entered into. If the lender lives for at least 18 months, then there is an irrevocable presumption that the 50% probability test in the preceding sentence was met. The note must be set to balloon before the lender's life expectancy, as of the date the loan is made. Because of the possibility that the seller may die during the course of the term, the note must bear interest at above the otherwise applicable federal rate or have an increase in principal to take into account the "risk premium" that the lender deserves.

Most of the recognized software programs for interest rate calculations show one interest rate to apply if the note is amortized with equal annual payments of principal and interest, and a higher rate to apply to an interest-only note with a 100% balloon upon maturity. The interest rate is lower with the amortizing note because less principal is owed and thus less forgiveness will occur on death during the term.

The interest rate for self-cancelling installment notes is based on the 7520 rates at the time the note is made. For example, an 85 year old lender in November 2012, where the 7520 rate is 1% with a life expectancy under Mortality Table 2000CM is 6.22 years, could sell assets in exchange for a 6 year note and the interest rate for an interest only note would be 13.683% while the interest rate for an amortizing note would only be 11.4546%.

During periods when the 7520 rate is higher, in some situations only an amortizing note could be used because the interest rate on a interest only self-canceling installment note would be too high.

As an alternative to the interest rates described above, it is possible to increase the principal of the note as the premium given to the lender in exchange for entering into the sale transaction.

According to one software program, a November 2012 self-cancelling installment note for the 85 year old mentioned above, a 1% interest rate could be used if the principal was increased by 38.7905% (a $1,000,000 note would instead be a $1,387,905 note) for an amortizing note, or by 212.5823% for an interest only note under the above example.

In situations where the 7520 rate is higher, this would avoid all usury concerns, but if the health of the lender improves dramatically, repayment of the note at the end of the term would cause his or her estate to actually grow instead of getting smaller, although it might be possible to swap the note for a lower principal/higher interest note if this is not part of a "step transaction" to pay the note off early.

See the article entitled "Interesting Interest Questions: Interest Rates for Intra-Family Transactions" by the Author and Floridians Jerry Hesch, and Christopher Denicolo, which was published in the 2011 BNA Tax Management Estates, Gifts, and Trusts Journal (Vol. 36, No. 2).