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OWNING REAL ESTATE IN A REVOCABLE LIVING TRUST

By: Dorothy L. Korszen
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Real estate titled in a person's name must go through probate in the state in which the real estate is located. People who own property in several states may avoid numerous probate proceedings by creating Revocable Living Trusts which, among other benefits, allow their heirs to avoid probate to the extent that the trust has been "funded." Real estate is transferred to a trust by preparing and recording a deed transferring the property to the trustees of the trust. Then, after a grantor passes away, the successor trustee of the trust can transfer the property in hopes to avoid probate proceedings in any state where properties are located.

Although a trust may help avoid probate, there are several issues to consider before transferring real estate to your revocable living trust. For example, if you wish to transfer home-stead property to a trust, you should make sure you will continue to receive the \$25,000 exemption from ad-valorem property taxes, and preserve your Save Our Homes (SOH) cap which limits the assessed value of your property. For more information on the SOH cap, please refer to the Farr Newsletter: "Tax Winds Blow Hard-Don't Lose Your Cap!" by Guy S. Emerich, March 2004. With a revocable living trust where the grantor retains the present right to possess and live on the property, the property will retain both the \$25,000 exemption and the SOH cap. Your attorney can review your trust to determine if it is drafted to allow you this right. Either you or your attorney may need to provide the property appraiser with an affidavit stating that you have this right.

Another consideration before transferring property to your trust is whether the property has a mortgage. Virtually all mortgages now include a "due upon sale" clause that allows the lender to call for the outstanding balance of the mortgage to be due upon transfer of the property. However, the Garn-St. Germain Act, 12 U.S.C.A. § 1701j-3, provides that the transfer of residential property containing less than five (5) dwelling units from the owner to the owner's revocable living trust will not trigger the "due on sale" clause. Along the same line, some lenders will not provide financing for property purchased by the trustee of a trust. In those cases, owners may purchase the property in their individual names and then transfer the property to their trust. In Florida, as long as the beneficial ownership of the property remains the same, documentary stamps will not be due upon transfer of the property to your trust.

If asset protection is a concern, you should consult with an attorney before transferring real estate to your trust. "Asset protection" refers to steps taken to insulate assets in the event of litigation or bankruptcy. Revocable living trusts are not created for asset protection purposes. For a more thorough discussion, please refer to the Farr Newsletter: "Asset Protection" by David A. Holmes, April 2004. As a general rule, and for asset protection benefits, owning property as a tenancy by the entirety will help assure that only joint creditors can attach a judgment to your



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property. Accordingly, if asset protection is an issue, you may choose not to transfer your real property to your revocable living trust.

When considering homestead property, there is the additional concern of protection from claims in bankruptcy. In many situations, your homestead will be considered an exempt asset in bankruptcy proceedings. However, in 2001, the Bankruptcy Court for the Middle District of Florida held that real property owned by a trust was not exempt property. In re Bosonetto, 271 B.R. 403 (Bankr. M.D.Fla. 2001). Recently, the very same court declined to follow Bosonetto, instead relying on In re Alexander, 346 B.R. 546 (Bankr. M.D.Fla. 2006), and held that the debtor's interest in the property, even though it was owned by her trust, is an exempt asset. In re Edwards, 356 B.R. 807 (Bankr. M.D.Fla. 2006). However, the Court did not expressly overrule Bosonetto. Therefore, if there is any concern that bankruptcy may become an issue, and you do not wish to be a test case, you should discuss this issue with your attorney before titling your homestead property in your trust.

Couples who have established two trusts for estate tax planning face extra considerations in determining how to title property to their trusts. Non-homestead property can be titled to either trust or partially to each trust, based on how the assets will be allocated to the trusts. However, with respect to the homestead, the Florida constitution limits how homestead property can be devised. Florida courts have held that you cannot circumvent these homestead restrictions on devise and descent by titling property to a trust. Therefore, if a couple elects to transfer homestead property to one of their revocable trust, they will need to execute pre- or post-nuptial agreements. This is not a concern with most joint family trusts.

Holding title to real property in a revocable living trust provides many benefits. Before deciding if these benefits outweigh any potential concerns, you should discuss the pros and cons with your attorney.

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