

## My Old Kentucky Home or the Sunshine State? Residency and Estate Planning Issues for Kentucky "Snowbirds" in Florida



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**M**any Kentuckians own property in Florida and ultimately retire there – often retaining a summer residence in Kentucky. This article reviews Florida's tax advantages, how Kentuckians may establish a Florida tax residency, and differences between Kentucky and Florida law with implications for the estate plans of "snowbirds" who later establish Florida domicile.

### Florida's Tax Advantages

**No State or Municipal Income Taxes.** Florida is one of only seven states in the United States that imposes no personal income tax – and it is the only "non-tax" state in the southeastern United States.<sup>2</sup> Because Florida's income tax prohibition is set forth in the Florida Constitution,<sup>3</sup> implementing a state income tax would require a Constitutional amendment – which seems unlikely absent a most unusual turn of events. In contrast, Kentucky's marginal state income tax rate is 6%.<sup>4</sup> Thus, establishing Florida domicile essentially provides an automatic 6% pay raise.

Also, under Florida's Constitution, municipalities generally cannot levy personal income taxes. For residents of some Kentucky cities, for example Louisville and Lexington, this additional income tax break further increases the economic benefit of establishing Florida domicile.

**Property Tax Advantages.** Florida

also has a long history of providing property tax relief for resident homeowners. As early as 1934 the Florida Constitution was amended to provide an exemption from property tax on one's homestead. This exemption now ranges from \$50,000 to an unlimited amount in the case of a fully disabled veteran.<sup>5</sup>

However, the much more important property tax benefit given to Florida residents is what is commonly known as the "Save Our Homes" homestead provision, under which the assessed value of a Florida homestead for property tax purposes may only be increased in any year by the lesser of (i) 3% from the homestead's prior year tax assessment, or (ii) the percentage change in the consumer price index – notwithstanding the actual increase in the market value of the home.<sup>6</sup> The "Save Our Homes" provision proved to be a huge benefit to many Kentuckians who had filed for homestead status prior to the housing boom of several years ago – when the tax assessments of many non-residents nearly doubled. Also, with the present drop in housing values, it is an opportune time for the Kentucky "snowbird" to lock in his or her Florida property tax assessment base by filing for homestead status.

**No Estate or Inheritance Taxes.** In contrast to Kentucky's inheritance tax, Florida presently has no estate or inheritance tax.<sup>7</sup>

**Intangible Taxes.** Both Kentucky and Florida have repealed their tax on intangible personal property.<sup>8</sup>

### Florida Protection From Creditors

**Homestead.** A unique provision of the Florida Constitution provides that one's homestead property is exempt from capture by creditors – except in very limited circumstances – such as for the payment of taxes/assessments and mortgages. Also, a Florida homestead devised to one's "heirs," as defined under Florida intestacy law, generally remains exempt from the decedent's general creditors.<sup>9</sup>

However, it is important to note that not all Florida property automatically qualifies for homestead protection.

First, the person's state of primary legal residence must be Florida and the home in question must be the person's primary residence in Florida.<sup>10</sup>

Second, the Constitutional protection is limited to one-half of an acre of property, if the home is located within a municipality, or is expanded to 160 acres if the home is located outside a municipality.<sup>11</sup> The scope of what constitutes homestead property is rather expansive, and Florida courts have even granted homestead status to houseboats and motor homes.<sup>12</sup> Nevertheless, if a partnership, corporation or similar legal entity owns the property, then homestead status is not available, even if the resident is a sole shareholder and resides upon the property.<sup>13</sup>

Third, the owner generally must have resided in the Florida homestead long enough (generally up to 1,215 days) to be eligible for the maximum creditor protected status under the 2005 Federal Bankruptcy Act.<sup>14</sup> However, in some circumstances there may be no waiting period to obtain complete creditor protected status if the homestead is jointly owned by spouses, as noted below.

**Joint Property Owned by Spouses.** Florida property owned jointly by spouses, whether real or personal (including investment accounts), generally is presumed to be owned by the spouses as tenants by the entirety.<sup>15</sup> Importantly, such tenancy by the entirety property cannot be captured by the general creditors of just the husband or the wife. This is the case

whether the creditors be tort creditors, contractual creditors or otherwise (excluding the IRS). For creditors to collect against such property, both the husband and the wife must be indebted to, or at fault with respect to, the creditor.<sup>16</sup> Additionally, and very importantly, if just one of the spouses is the debtor but the homestead is owned by both spouses as tenants by the entireties, then the homestead is not subject to the requirements of (i.e. a 1,215 day waiting period), and the lesser protections (i.e. a \$125,000 exempt limitation) afforded by, the 2005 Federal Bankruptcy Act.<sup>17</sup>

### Establishing Florida Domicile

Obtaining the tax and asset protection benefits of Florida residency<sup>18</sup> is fairly straightforward for a person whose only home is in Florida. However, the matter becomes complicated and calls for careful attention when a person maintains homes in both Florida and Kentucky.

The primary concern for the individual in this situation is to take all steps possible to avoid any claim by the Kentucky Department of Revenue that one's income and/or estate continue to remain subject to taxation in Kentucky because of residency. For Kentucky state tax purposes, having Florida as one's primary residence is essentially a matter of qualifying as a non-resident of Kentucky under Kentucky's non-residency tax law.

For income tax purposes, Kentucky generally applies a "day-counting" test to determine non-resident income tax status, with persons living in Kentucky for more than 183 days in a calendar year deemed Kentucky residents for that year.<sup>19</sup> However, even if a would-be Florida resident apparently avoids Kentucky residency under the "183 day test," it is prudent – particularly for the wealthy client – to also ensure qualification as a Kentucky non-resident under the "subjective factors" or domicile test in another state. Specifically, 103 KAR 17.010, Sec. 2 requires that in addition to compliance with the 183 day test, the purported Kentucky non-resident "shall submit proof [of]...bona

fide intention to reside permanently elsewhere." This Regulation further provides that "persons residing in Kentucky and living part of the year in other states will be considered residents of Kentucky unless it can be shown that abode in another state is of permanent nature, and that less than 183 days were spent in Kentucky." Although apparently not strictly applied in practice by the Department of Revenue, to the authors' knowledge, the plain language of this Regulation requires that both the 183 day test and another state domicile test be met. This situation should be of significant concern for wealthy clients, particularly since a number of cash-strapped states now expressly back-stop the standard 183 day test by applying a strict domicile test to their sub-183 day seasonal residents.<sup>20</sup>

Kentucky's inheritance tax is somewhat more complex than its income tax, and Florida residency planning will be particularly useful for persons intending to benefit "Class B" or "Class C" beneficiaries through their estate plans.<sup>21</sup>

Kentucky's inheritance tax applies to real and personal property within Kentucky's jurisdiction that belongs to "inhabitants" of Kentucky.<sup>22</sup> It also applies to intangible property with a business situs in Kentucky that belongs

to "nonresidents."<sup>23</sup> In addition, it applies to real property in Kentucky and tangible personal property with a situs in Kentucky that is not taxable elsewhere that belongs to persons who are not Kentucky "inhabitants."<sup>24</sup>

Actions which are useful to demonstrate a "permanent abode" or "inhabitant" status in Florida for tax residency status include:

**Obtain a Florida Driver's License.** A person should obtain a Florida driver's license. Florida law currently requires that new residents obtain a driver's license within 30 days of establishing Florida residency.<sup>25</sup>

**Register to Vote.** A person should register to vote in Florida and concurrently send a letter to the County Clerk in the former Kentucky county of residence requesting removal from that county's election roster. Registering to vote in Florida may be accomplished at the same time the driver's license is acquired.

**Apply for the Homestead Exemption.** If real estate is owned, a Homestead Exemption application should be filed with the county Property Appraiser's office.<sup>26</sup> To file a Homestead Exemption all that is required is proof of one's ownership of a Florida residence (such as a Deed or tax bill),<sup>27</sup> a Florida driver's license, a

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Florida automobile registration and a Florida voter registration card. To qualify for the Homestead Exemption, all of these documents must be dated on or before December 31<sup>st</sup> of the year before which the Homestead Exemption is desired. The deadline for actually filing the application is March 1<sup>st</sup> of the following year. If the deadline is missed, appeal can be made to the Value Adjustment Board, stating a just reason for failing to make a timely application for the homestead exemption.

#### File a Declaration of Domicile.

Another document which is important to file to prove Florida residency is the Declaration of Domicile.<sup>28</sup> By this instrument a person swears that he or she is a primary resident of Florida and recites his or her Florida address and the former address of primary residency in the state of origin. The Declaration is then recorded with the Clerk of Court for the county of residence. It is advisable to send a copy of the filed Declaration of Domicile to the Kentucky Department of Revenue with a written explanation of the new residency status. This should be done concurrently with the taxpayer's filing of his or her final Kentucky resident income tax return. The main purpose of the Declaration of Domicile is to evidence one's current intent to be a Florida resident – especially from the perspective of a Kentucky tax auditor.

Update the Estate Plan for Compliance with Florida Law. Another important step to evidence intent to establish Florida residency, as well as to protect the integrity of one's estate plan, is to have the estate plan updated for compliance with Florida law and to reflect Florida as the state of primary residence. Some of the significant differences between Kentucky and Florida probate and trust statutes are discussed in greater detail below.

Focus Activities and Affiliations in Florida. Additionally, it is prudent to restructure one's activities, relationships and affairs to comport with a bona fide Florida residence. This would include relocating one's primary social and religious affiliations, safe deposit box, bank accounts, billing addresses, heirlooms,

etc., to Florida.

Obtain a Written Non-Resident Tax Opinion from Tax Counsel. When one's wealth is large enough to make avoiding Kentucky state tax a substantial concern and a Kentucky home will be retained, one measure to consider is to obtain a written tax opinion of non-residency status from a qualified Kentucky tax attorney or CPA. Such an opinion not only provides clear present and future tax guidance to the client, but also may re-direct any Kentucky tax liability if the client is improperly advised.

#### **Florida Estate Planning Considerations**

If a Kentuckian executes a Will or revocable trust that was valid in Kentucky at the time of execution, and subsequently moves to Florida, the Will or trust remains valid in Florida after the person becomes a Florida resident.<sup>29</sup> However, as discussed below, even though the Will or trust itself is valid, this does not mean that all of the terms of the Will or trust are valid under Florida law. Adjustments to estate planning documents often are required to ensure the new Florida resident's written testamentary directives are valid. Also, if a Florida resident owns real estate outside of Florida, consideration should be given to transferring such real estate to the revocable trust (or to joint name with survivorship or an LLC/partnership) to avoid the need for ancillary probate administration in Kentucky or elsewhere, and to possibly reduce or eliminate Kentucky inheritance tax that might otherwise be due.

Some of the more common provisions at issue with a non-Florida Will, revocable trust and other estate planning documents and issues are discussed below.

Executor Provisions. Florida law generally limits who may serve as a personal representative to (i) a Florida resident, (ii) a close relative, or (iii) a Florida bank or trust company.<sup>30</sup> Stated another way, a close friend who is not a resident of Florida cannot be the personal representative of a Florida estate. Thus, a person who relocates to Florida may bring with him or her a valid Will – but an invalid personal representative

designation.

Penalty Provisions. Under Florida law, a penalty or “in terrorem” clause is unenforceable in the Will or revocable trust of a Florida resident and will not be honored by a Florida court.<sup>31</sup>

Guardianship Provisions. Florida law generally limits who may be a guardian for a minor child to either a Florida resident or a close relative of the child.<sup>32</sup> Unfortunately, this means that a close and trusted friend who does not live in Florida cannot be the guardian for a Florida minor.

Homestead Issues. Florida law has traditionally been very protective of the homestead in a number of ways –



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including keeping the homestead “in the family.” Under Florida law, the homestead (whether or not homestead property tax status is in place), if not jointly owned by spouses with right of survivorship, may only be bequeathed to the surviving spouse.<sup>33</sup> Any other bequest of the homestead is invalid. Moreover, if the decedent has one or more minor children, then even a bequest of the homestead to the surviving spouse is invalid. Instead, in both situations the surviving spouse, by statute, becomes the owner of a life estate in the homestead and the decedent’s children become the owners of the remainder interest in the homestead.<sup>34</sup> Alternatively, the surviving spouse may elect, within six months after the deceased spouse’s death, to take a 50 percent tenant-in-common interest in the homestead in lieu of the life estate.<sup>35</sup>

In any event, the Florida homestead statute can create a difficult split ownership arrangement. For example, upon a future sale of the homestead all owners (the spouse and the children) must

consent to the sale and are entitled to receive an appropriate share of the sale proceeds. For many, this potential split ownership arrangement is unacceptable. Fortunately, this situation can often be averted with a waiver of homestead rights while both spouses are living.<sup>36</sup> However, many estate plans that are not updated by Florida counsel simply miss this opportunity – such as when the homestead is owned by just one spouse for estate balancing purposes – and the post-death split ownership arrangement occurs all too frequently.

The Durable General Power of Attorney. As noted above, some estate planning instruments prepared in other states can remain valid after the client moves to Florida. However, this often is not the case with a Durable General Power of Attorney. Florida does not provide explicit reciprocity with regard to Durable General Powers of Attorney and Florida’s power of attorney statute has specific wording and execution requirements that many other states do not have. Thus, a Durable General Power of Attorney executed under the laws of another state may not be valid in Florida.<sup>37</sup>

The Advance Directive for Health Care/Living Will. As with a Will or revocable trust, Florida recognizes as valid an Advance Directive executed by a person who was a resident of another state who later relocates to Florida.<sup>38</sup> Nevertheless, because Florida’s Advance Directive statutes utilize specific legal and medical terminology, it is advisable for the new Florida resident to have an Advance Directive that parallels the format and terminology to which the medical personnel in Florida are accustomed and understand.<sup>39</sup>

Spousal Inheritance Rights. Florida provides a comprehensive and very specific set of rules and benefits for the surviving spouse of a person who dies while a Florida resident.<sup>40</sup> A surviving spouse has two main rights in Florida.

First, if the surviving spouse was not a joint owner (with right of survivorship) of the homestead, then he or she is automatically vested with a life estate in the homestead.<sup>41</sup> Alternatively, the

surviving spouse may elect, within six months after the deceased spouse’s death, to decline the life estate and instead take a 50 percent tenant-in-common interest in the homestead.<sup>42</sup> In either situation, this means that the surviving spouse has the right to possess and occupy the homestead for the remainder of his or her life – subject to payment of the expenses and debts associated with his or her share of the homestead. Also, as noted above, in the case of a sale of the homestead the surviving spouse is entitled to receive a share of the sales proceeds equivalent to the fair value of his or her interest, and the balance of the proceeds is payable to the children of the deceased spouse.

Second, a surviving spouse is entitled to an “Elective Share” of the deceased spouse’s “Elective Estate.” Generally speaking, the Elective Estate includes almost every asset that the deceased spouse owned (whether in the probate or non-probate estates). The “Elective Share” is an amount equal to 30 percent of the Elective Estate.<sup>43</sup> To claim the Elective Share the surviving spouse must affirmatively follow the required statutory timeframe and procedure, or risk forfeiture of the Elective Share.

Waiver of Spousal Inheritance Rights. Florida permits the waiver of spousal inheritance rights, either before or after marriage.<sup>44</sup> Such a waiver can be implemented with respect to certain property only or, alternatively, with respect to the entire estate. Importantly, certain matters (such as child guardianship and child support) cannot be legally bound by either a premarital or a postmarital agreement. Strict rules apply to implement valid and enforceable premarital and postmarital agreements, and thus marital agreements should only be entered into with the assistance of qualified Florida counsel.

Unlicensed Practice of Law Concern. Although it may seem beneficial for a client’s long-term Kentucky lawyer to prepare or update the estate plan once the client’s establishes Florida residency, this is not advisable. As noted above, Florida has a number of probate,



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trust and other legal rules that the Kentucky lawyer likely will not be familiar with – and the failure to comport with those rules may severely harm the client’s economic well-being or testamentary intent. Moreover, the provision of “Florida specific” legal advice and the preparation of Florida estate planning documents by a person not licensed to practice law in Florida generally is deemed to constitute the unauthorized practice of law<sup>45</sup> – which is a felony offense in the third degree.<sup>46</sup> In such a situation, the Kentucky lawyer is well-advised to have Florida counsel retained to handle the client’s estate planning updates and advice.

### Conclusion

Florida’s popularity as a vacation and retirement destination for Kentuckians shows every sign of continuing in the decades ahead, and Kentucky attorneys are well-advised to familiarize themselves with the differences between Kentucky and Florida law that most commonly will affect their clients who seasonally or permanently reside in Florida. Working in cooperation with Florida counsel, Kentucky attorneys can help ensure that clients transitioning to Florida will capture all of the tax, creditor protection and estate planning benefits from a Sunshine State residency while avoiding serious and expensive cross-jurisdictional pitfalls caused by insufficient advice and planning. ☺

### ENDNOTES

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2. The others are Alaska, Nevada, South Dakota, Texas, Washington

- and Wyoming. The majority of Florida’s revenue is raised by sales taxes (49.0 percent) and property taxes (36.8 percent).
3. Florida Constitution, Art. VII, Sec. 5
4. KRS 141.020.
5. Florida Constitution, Art. VII, Sec. 6.
6. Florida Constitution, Art. VII, Sec. 4(d). By comparison, the annual increase in valuation for non-homestead property (including property owned by non-residents) was not limited in past years, but was recently capped at 10 percent annually. See Florida Constitution, Art. VII, Sec. 4(g).
7. See KRS 140.070; KRS 140.080. Florida does provide for a “pick-up” estate tax. See, e.g., F.S., Chapter 198. However, the Economic Growth and Tax Relief Reconciliation Act of 2001 phased out the credit for state death taxes paid (which results in a dollar-for-dollar reduction in the federal estate tax liability) between 2002 and 2005, thereafter switching to a deduction for state death taxes paid. 26 U.S.C. § 2058. Because Florida law only tracks the federal estate tax credit or “pick-up” tax regime (a regime that is inactive in 2010) a Florida estate presently pays no death tax to Florida.
8. Kentucky Legislature 2005 Session, House Bill 272. Florida’s repeal was effective January 1, 2007.
9. Florida Constitution, Art. X, Sec. 4(b).
10. Florida Constitution, Art. X, Sec. 4.
11. Property exceeding the stated parameters generally is unprotected and has produced interesting results in litigation as to the proper division of the homestead portion of the property from the non-homestead portion. See, e.g., Englander v. Mills, 95 F.3d 1028 (11th Cir. 1996).
12. Miami County Day School v. Bakst, 641 So.2d 467 (Fla. 3rd D.C.A. 1994); In re Yettaw, 316 B.R. 560 (Bankr. M.D. Fla. 2004).
13. See, e.g., Prewitt Management Cor-

- poration v. Nikolitis, 795 So.2d 1001 (Fla. 4th D.C.A. 2001).
14. Under the 2005 Bankruptcy Act, this time period is at least 730 days, and can be as long as 1,215 days. See, e.g., 11 U.S.C. § 522(b)(3)(A); 11 U.S.C. § 522 (p)(1).
15. See, e.g., American Central Insurance Co. of St. Louis, Mo. v. Whitlock, 165 So. 380 (1936) and Beal Bank, SSB v. Almand and Associates, 780 So.2d 45 (Fla. 2001).
16. In re Davis, 403 B.R. 914 (Bankr. M.D. Fla. 2009).
17. See, e.g., In re Buonopane, 359 B.R. 346 (Bankr. M.D. Fla. 2007).
18. Technically, “domicile,” but “residency” is sometimes used in this article for convenience.
19. KRS 141.010(17); KRS 141.010(18); Instructions to Form 740-NP (2009). See also 103 KAR 17.010, Sec. 2 (referencing both the “less than 183 days” requirement and less quantitative measures, such as qualifying in the other state as a resident citizen, and showing the abode in the other state is of a permanent nature).
20. See, e.g., Publication 88 (12/09) General Tax Information for New York State Nonresidents and Part-Year Residents, New York State Department of Taxation and Finance.
21. See, e.g., KRS 140.070(2)-(3). Class B beneficiaries include (but are not limited to) nephews, nieces, children-in-law, aunts and uncles, and great-grandchildren. Class C beneficiaries include more remote beneficiaries, such as friends or domestic partners.
22. KRS 140.010.
23. Id.
24. Id.
25. F.S. 322.031(1). Importantly, a person with a driver’s license from another state may obtain a Florida license without a written or road test – only a vision test is required.
26. One can fail to have filed for the Homestead Exemption but still

- have the property considered homestead for purposes of creditor protection and for descent and devise limitations.
27. If the residence is held in a trust, the Property Appraiser's office will require a copy of the trust.
  28. F.S. 222.17.
  29. See, e.g., F.S. 732.502.
  30. F.S. 733.302, F.S. 733.304.
  31. F.S. 732.517 (Will); F.S. 736.1108 (revocable trust).
  32. F.S. 744.309; F.S. 744.312.
  33. F.S. 732.401; F.S. 732.4015.
  34. *Id.*
  35. F.S. 732.401(2).
  36. F.S. 732.702; Hartwell v. Blasingame, 584 So. 2d 6 (Fla. 1991); F.S. 732.702; Myers v. Lehrer, 671 So. 2d 864, 866 (Fla. 4th DCA 1996).
  37. F.S. 709.08; see by contrast KRS 386.093 (which does not expressly require the same execution formalities).
  38. F.S. 765.112.
  39. See, e.g., F.S. 765.203; F.S. 765.303.
  40. F.S. Chapter 732.
  41. F.S. 732.4015 and F.S. 732.401.
  42. F.S. 732.401(2).
  43. In contrast, Kentucky allows the surviving spouse up to one-half of the decedent's real and personal property, KRS 392.020, but does not define by statute a broad elective estate that can include assets of the non-probate estate.
  44. See, e.g., F.S. 61.079 (prenuptial agreements); Casto v. Casto, 508 So.2d 330 (Fla. 1987)(postnuptial agreements); and F.S. 732.702 (waiver before or after marriage of spousal inheritance rights).
  45. See, e.g., The Fla. Bar re: Advisory Opinion Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992); The Supreme Court of Florida has created the Unlicensed Practice of Law (UPL) program. Complaints under the UPL program are investigated by the Florida Bar, See, e.g., [www.floridabar.org](http://www.floridabar.org) (last visited October 6, 2010).
  46. F.S. 454.23.

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