



# ESTATE PLANNING

— FOR THE —

## Florida Resident

*Fifth Edition*



Thomas N. Silverman, P.A.



## Thomas N. Silverman, P.A.

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**ESTATE  
PLANNING  
FOR THE  
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Resident**

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Estate Planning for the Florida Resident

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No book is solely the product of any one mind. The idea for this book evolved as an outgrowth of an original four (4) page pamphlet written, *circa* 1970, by Ralph C. Richards, Esquire, of the Clearwater, Florida, Bar entitled "What to do with your money when you come to Florida." The author wishes to thank Charles T. Weiss, Esquire, for his valuable contributions to and review of this (fifth) edition of the book. The author also gratefully acknowledges the suggestions and recommendations provided by valued colleagues Richard B. Comiter, Esquire, and Denis Kleinfeld, Esquire and by Samuel B. Silverman, Yale University, Class of 2010.

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## **AUTHOR'S NOTE**

*No American is under a constitutional duty to pay the highest taxes.*

Oliver Wendell Holmes,  
United States Supreme Court Justice

In this spirit and in recognition that the tax laws of this country are vast and complex and that our government makes little effort to advise its population, directly, on the existence and changes of such laws, the Author has endeavored to explain the fundamentals of our present transfer tax system; and, in combination with their Florida counterparts, their effects on Floridians who seek to transfer their property to the natural objects of their bounty during their life as gifts or at death as part of their Estates.

This book has been revised, since its original form in 1985, to reflect changes in Federal, State and Local tax laws as well as Internal Revenue Service Statutes, Regulations and Rulings. Every attempt has been made to provide you, the reader, with the most up-to-date information available on this subject. However, this book is not intended to be legal advice, and, as with all educational summaries, the reader should refrain from taking (individual) action without the counsel and guidance of a knowledgeable professional tax advisor.

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## INTRODUCTION

Many current Florida residents formerly resided in other states. The reasons why these people moved to Florida are varied. Some people cite the weather and others espouse the aesthetics of their particular area or the Florida lifestyle. But, whether people come to Florida to retire on the golf course or to stroll in the sun, they find an Estate Planning environment which has been carefully fashioned to fulfill the needs of most of Florida's population. Florida's rapidly expanding economy offers to its younger residents the opportunity to build and augment their Estates. For older residents, there are liberal laws governing Trusts, Estates and Probate administration. Such laws assist with the transfer of assets from one generation to the next, with a minimum of expense, delay and shrinkage from Court costs, taxes and attorney's fees.

## ESTABLISHING DOMICILE IN FLORIDA

Today's mobile lifestyle and multiple home ownership have caused the question of domicile to become more difficult to determine. For example, if a person winters in Florida, spends the spring in Arizona, then moves on to his or her summer home in Cape Cod and, lastly, spends the fall in New York City attending to business affairs, where is his or her state of domicile?

This question becomes even more important when the time comes to levy death taxes. Each state will make its own separate determination regarding the decedent's domicile. If the evidence is ambiguous, this could result in more than one state claiming the decedent as its domiciliary, with each seeking to impose its own Inheritance Tax on the decedent's entire Estate.

Under Florida Law, for purposes of Estate Taxes, an individual is *presumed* to have died domiciled in Florida if he or she dwelt in the state for any period of twelve (12) consecutive months in the twenty-four (24) months preceding death, notwithstanding whether such person may have traveled outside the state, voted in Florida or was assessed taxes in the State of Florida.

Generally, there are two (2) occasions which prompt an inquiry or investigation by a foreign jurisdiction when a person changes his or her domicile to Florida.

First, a new resident can expect follow-up questions from a former state of domicile when he or she stops filing State Income Tax returns there. The fact that such a last filing is a "final return" should be denoted on the return itself, if such is true.

Accompanying the return should be a copy of the person's Declaration of Non-Domicile filed with his/or her former state of residency and/or a copy of his or her Declaration of Domicile filed in Florida. See Exhibits [I](#), [II](#) and [III](#) of this book for examples.

Second, if a new resident continues to retain significant contacts with his or her former state, which are of a type that could create doubts as to his or her legal domicile, then it is wise to avoid matters which are likely to come to the attention of the taxing authorities of the former state.

Ownership of real estate in the state of former domicile creates the greatest danger. Real estate is a form of property which attracts special attention in various ways including the County Court Clerk who records transfers and potential purchasers, title insurance companies, banks and mortgage companies in the process of checking titles, liens, real property records, taxes, etc.

Furthermore, an Estate Tax is often payable to the former state on the value of real property owned by the decedent and located within that jurisdiction. This is true regardless of whether a

Florida domicile has been validly established. And, during the review period following the decedent's death, the tax department of the former state may decide to claim that the decedent's entire Estate is taxable there.

Consider, for example, a person who owns a home in his/or her former state of domicile, where he or she continues to stay for five (5) months of the year, and where he or she retains affiliations with his or her old church or synagogue, country club, bank and other contacts. These circumstances could cause a serious Estate Tax problem. This client would be well advised to consider transferring ownership of the real estate to another family member or perhaps to a family Trust, partnership, corporation or limited liability company, or to make another similar satisfactory disposition of the property. Then, upon death, there is no transfer of title to such real estate which would prompt an inquiry into the real estate ownership, and the former state's tax department is less likely to become involved.

There are several Estate Planning steps that can be taken to clarify the domicile question and which are recommended for persons changing their domicile to Florida. Some of these factors are set forth as follows:

1. File a Declaration of Non-Domicile with the state and county of former residence. Established procedures may be absent and improvisation required. (See Exhibit [I](#))
2. File a Florida Declaration of Domicile in the Office of the Clerk of the Circuit Court in the Florida county in which you reside. (See Exhibit [II](#)) If a residence is also maintained in another state, a Special Declaration of Domicile should be filed. (See Exhibit [III](#))
3. Declare in your Will that you are a legal resident of the State of Florida, and execute all Estate Planning documents in Florida.
4. Transfer bank accounts, safe deposit boxes and securities to Florida institutions (safe deposit boxes in Florida are not sealed upon death of a lessee or a co-lessee).
5. Register to vote in Florida and actually vote in all elections.
6. Register your boat and/or automobile in Florida, and obtain a Florida Driver License. If a non-driver, obtain a Florida Identification Card.
7. Discard your out-of-state driver's license.
8. File your Federal Income Tax return with the District Director of Internal Revenue Service where prescribed for filing by Florida residents.

9. State that you are a resident of Florida, and use your Florida address in all business transactions.

10. Change social, religious and other national organization memberships to Florida affiliations or branches, and use your Florida address in all correspondence and/or membership data.

11. Own a home or lease an apartment in Florida, move in, and furnish this home or apartment more extensively than any other residence.

12. When traveling out of Florida, register as being from Florida, and give a Florida address or post office box.

13. Obtain a Library Card from the local (Florida) City, or County Public Library.

14. File non-resident State Income Tax returns in the state of former residence if you continue to have local income from sources within that state.

15. Change advisors, such as banker, accountant, lawyer, account executive, financial planner and/or life insurance professional, to those located in Florida rather than in the northern state.

16. Relinquish the return trip portion of any round-trip airline tickets to destinations in your former state of residence.

17. Refrain from referring to any northern residence as your "home" in Estate Planning documents.

18. Reduce charitable contributions to northern organizations in favor of increased donations to Florida charitable entities.

19. Relinquish telephone number listings and all other utility billings in your name in your former state of residence.

20. Apply for Florida Homestead Exemption, if qualified.

21. Keep stays in nursing/retirement homes in other states to a minimum and only if authorized or required by a Florida physician.

22. Move art objects, jewelry, antiques and all other substantial items of personal property to your Florida residence.

23. Consider maintaining a personal log or journal evidencing days spent in Florida, and elsewhere, to validate claims of Florida domicile.

24. Transact business in Florida and render services, where possible, in Florida under written documents requiring same.

25. Do not claim residency in a state other than Florida to receive discounts for goods and/or services.

The timing of any change of domicile to Florida is important, especially for Income Tax purposes in the state of former residence. For example, by establishing Florida domicile prior to January 1st, you will avoid the requirement of filing a resident State Income Tax return in your former state for the upcoming year. And, in some instances, you may be able to avoid State Income Tax on sales of homes and/or businesses by precise timing of your change in domicile to Florida from your former state of residence.

In instances of disputed domicile at death, the State of Florida has enacted a Statute which authorizes the Florida Department of Revenue to litigate, on behalf of the Florida Estate of a deceased person, the question of determination of domicile for Inheritance Tax purposes.

As favorable taxes are often mentioned by persons considering a change of their domicile to Florida, before turning our attention to a discussion of specific Florida Tax Laws, it may be helpful to consider what types of taxes the State of Florida does *not* impose upon its residents.



## FLORIDA TAX LAWS

### Tax Advantages to Florida Domicile

**No State Income Tax.** The State of Florida does not have a personal Income Tax. A prohibition against such a tax was originally drafted into Florida's Constitution in 1885. This prohibition was re-enacted in the 1968 Constitution and remains a part of Florida's present Constitution. In order to enact a personal Income Tax, Florida's Constitution would have to be amended. Such an action would require approval by vote of the citizens of the State of Florida.

**No City Income Tax.** Although various cities (such as those in the northeast) impose Local Income Taxes of their own, Florida municipalities are prohibited from doing so.

**No Florida Gift Tax.** Residents of a number of states (e.g., Connecticut, Tennessee, North Carolina and Louisiana) may pay state as well as Federal Tax on gifts made during their lifetimes. Florida residents pay no State Gift Tax.

**No State Death Tax.** Florida does not have a State Death Tax, and the credit for State Death Taxes it previously received has been abolished.

In contrast to the Florida Estate Tax Law, some states (e.g., Connecticut, Tennessee, Ohio and Pennsylvania) impose a separate tax on a **beneficiary's** right to inherit or receive property. This is sometimes known as an Inheritance Tax and results in the heirs or beneficiaries paying taxes twice, although a deduction for the State Inheritance Tax is allowed in computing the (total) Taxable Estate that will be subject to Federal Estate Taxes. (See Exhibit [IV](#))

For those non-residents who die owning taxable property in Florida, the tax imposed is not unlike that imposed upon the Estate of a Florida resident. Taxable property of a non-resident decedent includes: Florida real property, tangible personal property having an actual situs in Florida, intangible personal property having a business situs in Florida, and securities of a Florida corporation.

When a Florida resident owns property (especially real property) physically located in another state, the use of a Florida partnership, Revocable (Living) Trust, Personal Residence Trust, limited liability company or closely-held Florida corporation to hold such property may avoid such property becoming subject to a State Death Tax and/or Inheritance Tax in that other state, which, as mentioned, would be **in addition to** the Federal Estate Tax.

## **Florida Real Estate Tax**

In Florida, real estate taxes are assessed as of January 1st of each year, but are not payable until the following November 1st. Taxes are assessed on a calendar year basis. Thus, real estate taxes for any year become a technical lien against the real property as of January 1st of that year, but are not payable until the 1st of November when the tax bills are issued. Taxes for any year become delinquent if not paid by April 1st of the succeeding year.

The State of Florida imposes no tax on real estate, but such tax is usually imposed by the county and by the municipality in which the property is located.

Each county has a property appraiser and a tax collector. In previous years, municipalities also had their own tax officials which frequently resulted in confusion on the part of the taxpayer. The Florida Legislature resolved the matter by passing legislation which allows each county appraiser to assess and collect real estate taxes for individual cities as well as for the county. As a result, county taxes and city taxes are now included in one bill, sent by the County Tax Collector.

**Florida Real Estate Homestead Tax Exemption.** In 1934, to assist its residents in their struggle against the hard economic times brought about by the Great Depression, Florida amended its Constitution to provide that the Homesteads of its citizens would be exempt from taxation up to a value of five thousand dollars (\$5,000). This means that Homesteads having a value of five thousand dollars (\$5,000) or less paid no real property taxes at all. Other Homesteads paid tax only on the assessed value in excess of five thousand dollars (\$5,000).

Although the original purpose for the Homestead Exemption has long since disappeared, this particular tax benefit afforded to Florida residents has been expanded and increased. Since 1983, a twenty-five thousand dollars (\$25,000) Exemption has been afforded to all homeowners who are domiciled in Florida as of January 1st of a particular year. (There is no longer a five-year residency requirement for obtaining a full Homestead Tax Exemption.) Additional recent amendments to the Florida Homestead Law provided that the benefits of Homestead Tax Exemption extend to persons occupying property under a contract to purchase if the contract is duly recorded; that a surviving spouse who occupies the Homestead following the death of their spouse may claim the Homestead Tax Exemption; extended the Homestead Tax Exemption to owners of cooperative apartments and those condominium apartment projects built upon land owned in fee by the condominium as well as those projects built upon leaseholds, provided the leasehold has an original term of ninety-eight (98) years or more (an important consideration for those people who plan to buy a condominium apartment in Florida); and provided for continued entitlement to the Homestead Tax Exemption to those individuals who transfer title of their "Homestead" property to a Revocable Trust or Declaration of Trust, in which the transferee enjoys the right to the use and occupancy of the property for their lifetime.

Since 1995, Florida homeowners have also been afforded a three percent (3%) cap on increases in the assessed value of Homestead through the Save Our Homes Constitutional amendment.

Under a new Constitutional amendment passed by Florida voters on January 29, 2008, the Florida Homestead Exemption increased from twenty-five thousand dollars (\$25,000) to fifty thousand dollars (\$50,000) on a Homestead having an assessed value of greater than seventy-five thousand dollars (\$75,000). No additional application for the increased Exemption is necessary if the homeowner was already receiving the prior twenty-five thousand dollar (\$25,000) Exemption. Under the same legislation, homeowners currently receiving Exemption benefits may sell their current Homestead and transfer a portion of the accumulated Save Our Homes tax savings to a new Homestead that also qualifies for Homestead Exemption benefits. If the new Homestead has a higher assessed value than the prior Homestead, the homeowner is entitled to transfer the amount of the accumulated savings to the new home, up to five hundred thousand dollars (\$500,000), thereby lowering the assessed value by the same amount. For example, if the prior Homestead has a just value of five hundred thousand dollars (\$500,000), but because of Save Our Homes, the assessed value is only two hundred thousand dollars (\$200,000), the difference of three hundred thousand dollars (\$300,000) may be applied to reduce the assessed value, of the new Homestead. The amount of the accumulated savings that is eligible for transfer will be a percentage of the tax savings. Using the example above, the ratio of the assessed value to the just value ( $\$200,000 / \$500,000 = 40\%$ ) is the amount that may be applied to the assessed value of the new Homestead ( $40\% \times \$300,000 = \$120,000$ ).

**Florida Tangible Personal Property Tax.** The Florida Legislature has exempted from taxation all household furnishings, wearing apparel, effects of the person actually employed in the use of serving the creature comforts of the owner and *not held* for commercial purposes. Now, a person may own household goods of any value to serve his or her "creature comforts," and these goods will not be subject to taxation.

However, any tangible personal property used for the production of income, such as furniture and furnishings in an office or rental apartment, is taxable. A tax return covering such items must be filed no later than April 1st of each year, and a ten percent (10%) penalty is assessed for failure to file the return.

Motor vehicles, boats, trailers, trailer coaches and mobile homes are subject to an annual license tax but are not subject to ad valorem taxation.

*Note:* Mobile homes without a current license plate *are* subject to tangible personal property tax, while a mobile home permanently affixed to the land on which it is located is presumed to be real estate if the land is also owned by the mobile home owner.

**Florida Intangible Personal Property Tax.** The State of Florida previously imposed a tax on the intangible personal property of every person who was a legal resident of Florida as of

January 1st of every year. "Intangible" property is that which has no value of itself, but represents something of value. For example, stocks, bonds, notes and other accounts receivable were subject to the tax. However, specifically excluded from the tax was money (including cash and certificates of deposit), copyrights and patents, and certain Federal, State and Local government bonds, as well as other items. The Florida Intangible Personal Property Tax was abolished for all years after 2006.

## ESTATE PLANNING IN FLORIDA

Florida has made a special effort to encourage people to relocate here in the latter stages of life by enacting a series of favorable Estate, Trust and Tax laws which allow its residents to pass on as much of their property as possible to heirs and/or family members with a minimum amount of cost and delay.

Much can be accomplished through the use of self-Declarations of Trust, self-proving wills and joint tenancies with right of survivorship. Safe deposit boxes are not sealed in Florida at the death of a joint tenant because Florida has no State Inheritance Tax. Florida recognizes spendthrift trust provisions which protect trust beneficiaries from the claims of creditors. Also, Florida has enacted laws which (i) treat inherited or gifted property as "non-marital assets" in divorce proceedings and (ii) protect retirement plan benefits from claims of creditors. As Florida's population has increased, the number of "second" marriages which occur in the state has also increased, making more important the resolution of legal issues which inevitably arise with multiple marriages and "second" family situations.

In the pages that follow, the laws of Florida which relate to these important subjects have been reduced to their most understandable terms to give the reader a working knowledge of their essential elements.

## THE NECESSITY OF A FLORIDA WILL

It is quite possible that the Will of a current Florida resident was executed in another state. Therefore, the question arises as to whether such Will is valid under Florida Law. Generally, a Will is valid in Florida if it was valid in the state in which it was executed, except for Wills handwritten by the Testator and not attested to by two (2) witnesses. However, there are overriding considerations for having a "Florida" Will.

Witnesses to an out-of-state Will may be extremely difficult to locate following the Testator's death. It may also be inconvenient to have prior witnesses acknowledge or give testimony in order to "prove" the Will. As the Courts require that the Personal Representative or attorney perform a diligent search to locate a witness to the Will, this would involve additional expense in the Probate of the Testator's Estate.

Under Florida's Probate Code, a Florida Will may now be executed before a Notary Public, who acknowledges that the Testator signed the Will before the two (2) witnesses, who themselves acknowledge the Testator's signature and that the Testator was competent at the time of execution of the Will. If the Will is "self-proved," that is, executed before a Notary Public with the foregoing requirements, the Will may be automatically admitted to Probate in Florida without the requirement of locating a witness to obtain his or her Oath as a witness to the Will. However, while the law does not require the witnesses or Notary Public to be uninterested parties (those who do not stand to inherit from the Estate), such laws could change, and the better practice is to have unrelated and uninterested parties act as witnesses and Notary to the execution of a Will. This will lessen the possibility of a Will contest by a disgruntled heir seeking to have the Will set aside.

The Will should recite the person's place of domicile at the time of execution. Accordingly, if the Testator has recently become a resident of Florida, his or her Will can act as additional proof of his or her change of domicile. As previously stated, it is not uncommon to have two (2) states claim that a decedent was domiciled in both for tax purposes. This is especially true where an individual continues to return to his or her former state of domicile during the summer months or continues to own real property or other significant assets located in the other state. The recital as to domicile should refer only to the State of Florida.

In Florida, the position formerly known as executor or executrix and administrator or administratrix, is now referred to as the Personal Representative of the Estate. Under Florida Law, the Personal Representative of the Estate must be either a Florida resident or related to the Testator to a certain degree.

In addition, even though a Will may contain provisions waiving the furnishing of a bond to ensure the faithful performance of the duties of the Personal Representative, it is possible,

especially if the Will was not executed in Florida, that the Probate Court will require the Personal Representative to post a surety bond. This can mean additional expense and inconvenience for the Personal Representative and delay the Probate proceeding.

The terms of a Will can also be used to waive certain duties imposed on Personal Representatives under Florida Law. For example, the Testator may wish to waive the requirement of furnishing bond or the filing of periodic Accountings in the Estate or may wish to authorize the Personal Representative to sell real property without Court approval. Waiver of these requirements, if honored by the Probate Court, can save time and money in the Probate administration.

Finally, there are circumstances which compel a review of an existing Estate Plan, including the making of a new Will or Codicil to an old Will. For example, a change of residence (e.g., from New York to Florida), change in financial resources, retirement, divorce or remarriage, and the birth of children or grandchildren are significant changes in circumstances. A Will should be revised whenever a significant change in circumstances occurs so that it will conform to the person's needs and desires. In light of the recent and continuing changes in the tax laws, including the Economic Growth and Tax Relief Reconciliation Act of 2001, almost every Will signed before 1986 should be reviewed and updated.

**Codicil(s).** A Codicil is a change to a Last Will and Testament. It may only be made by a writing signed with the same formalities as the original Will. Since 1976, all Wills and Codicils require execution before **at least** two (2) witnesses and a Notary Public to be self-proved. No alterations of a Will should be made on the face of the Instrument. To do so may jeopardize the validity and effectiveness of the entire Will and, perhaps, cause the Testator's Estate to pass by intestacy (i.e., without a Will). The assistance of a qualified attorney is recommended in this area.

**Oral Will(s).** Oral Wills are not valid in Florida under any circumstances whatsoever.

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