Schneider Smeltz Spieth Bell LLP

PROBATE LAW JOURNAL OF OHIO

MARCH/APRIL 2023 | VOLUME 33 | ISSUE 4

SO YOUR CLIENT BECOMES A SNOWBIRD: COMMON PITFALLS AND TRAPS IN THEIR ESTATE PLANNING

By Justin L. Stark, Esq.

Schneider Smeltz Spieth Bell LLP
Cleveland, Ohio
Licensed in Ohio, Florida, and Pennsylvania

Partially based on presentation by the author to the EPPTL Section of the Cleveland Metro Bar Assn.

Like the arctic terns, which migrate almost 56,000 miles from pole to pole every year, many residents of northern states similarly flock to southern locales during the winter months to escape the winter doldrums. But without properly considering the legal implications of their migratory lifestyle, these so-called "snowbirds" often run into estate planning pitfalls and traps, which can be easily avoided through thoughtful planning and possibly work with lawyers licensed in those warmer climates. This article, specifically focusing on Ohio snowbirds, expounds on some of these common legal issues and their solutions.

RECOGNITION AND ACCEPTANCE OF OHIO ESTATE PLANNING DOCUMENTS IN OTHER STATES

One of the most important legal issues Ohio snowbirds face when spending significant amounts of time in other states is the recognition and acceptance of their Ohio estate planning documents. Although documents governed under one state's laws *should* be valid in other states under the Full Faith and Credit Clause of the U.S. Constitution, certain states, including our very own and Florida, have enacted more stringent requirements to protect the estate planning intentions and heirs of their residents.[1] Additionally, there is a practicality issue, as financial institutions, doctors, and other professionals located in other states are accustomed to reviewing financial powers of attorney and health care directives, respectively, governed by and modeled after the statutory forms of their state. Although snowbirds' Ohio estate planning documents should travel along with all other luggage to their warmer winter residence and be honored upon their arrival, a better approach is to engage local counsel in the other state to ensure compliance of the documents or to execute certain estate planning documents governed under the other state's laws.

LEGAL RECOGNITION AND ACCEPTANCE

In order to "make uniform the law among the various jurisdictions with respect to decedents and certain others," the Uniform Law Commission adopted the Uniform Probate Code and the Uniform Power of Attorney Act, both which have been adopted in full or in part by many states.[2] Some of the most important provisions of these model rules provide that a will or power of attorney is valid if its execution complies with the law at the time of execution "of the place where the will is executed. . ."[3] or "of the jurisdiction that determines the meaning and effect of the power of attorney. . ."[4]

Many states have statutes parallel to these provisions—colloquially labeled "borrowing statutes,"—recognizing *most* wills and powers of attorney, provided they are properly executed in compliance with the laws of the state or country where such documents were executed. Some states, however, including Ohio[5], [6] and Florida,[7] refine or limit this general recognition of wills executed in accordance with the laws of another state. For example, in specific response to Nevada's recent law authorizing the electronic execution of a will, Ohio passed the "Brucken patch" to its borrowing statute, which requires a testator's physical presence in the jurisdiction under which the will is governed at the time of signing for the will to be validly admitted to probate in Ohio.[8] As another example, Florida refuses to recognize holographic (hand-written) or noncupative (oral) wills.[9]

PRACTICAL RECOGNITION AND ACCEPTANCE

In addition to needing to determine whether a snowbird's estate planning documents will be valid in the warmer locale, estate planners also need to contend with familiarity and practicality issues. For example, a validly executed Ohio financial power of attorney submitted to a bank or financial institution located in another state, particularly one like Florida which requires the initialing of "superpowers" or "hot powers" for special powers,[10] may be questioned or belatedly accepted given the institution's potential unfamiliarity with Ohio law and execution requirements. That institution could ask for an affidavit of the agent attesting to the validity of the Ohio financial power of attorney or a letter from an Ohio attorney to that effect, thereby taking additional time and costing additional funds for recognition. Although most states statutorily require the acceptance of validly executed financial powers of attorney from other states[11] and authorize an agent or attorney-in-fact to institute litigation to have the financial power of attorney honored,[12] snowbirds may have to determine whether the time and cost to have their Ohio financial power of attorney honored is preferable to executing a new financial power of attorney governed under the laws of the new state.

Similarly, certain states, including Florida, impose strict signing formalities for wills and other testamentary documents. [13] These formalities are frequently met by having a client sign the document in the presence of two witnesses, accompanied by a self-proving affidavit also signed by the client, witnesses, and a notary, all in the presence of each other. If a self-proving affidavit to a will is not executed, however, Florida courts may admit it, but only if the will's validity is attested to the court by the witnesses, or if neither is available, the nominated personal representative or a person having no interest in the estate. Beyond the obvious time and cost issues of these additional hurdles,

there can be issues to find someone to attest to the testamentary document sometime after execution.

The medical field presents a unique challenge given the often-urgent nature of interpreting health care directives in emergency situations. Because these documents articulate a client's intent on matters of extreme importance, such as the designation and order of health care agents, health care agent contact information, authorization to release health care information, end-of-life care wishes, and organ donation provisions, it is concerning that such directions may not be immediately followed if a provider has unfamiliarity with foreign forms. Further, waiting for an affidavit or attorney letter may have detrimental consequences for the snowbird's healthcare.

PROPOSED SOLUTION FOR BETTER RECOGNITION AND ACCEPTANCE

When snowbirds begin acquiring accounts at new financial institutions, health care providers, and/or property in another state, it is beneficial to review their current estate planning documents to determine whether those documents comply with or parallel the law of the other jurisdiction, or account for newly-acquired property in the other state. Involving local counsel licensed in the other jurisdiction can help provide invaluable advice and the appropriate legal documents, all while working alongside the client's Ohio attorney to ensure the substantive provisions of the two sets of documents are mirrored to avoid any conflict or confusion.

ACQUISITION OF PROPERTY IN OTHER STATES

When snowbirds spend significant or repeated periods of time in another state, they may obtain property in that state, resulting in them unknowingly subjecting their estate to ancillary probate and/or state estate or inheritance tax.[14] Ultimately ancillary probate may be avoided through the appropriate titling of these assets, but the assets may still be subject to state estate or inheritance taxes.

ANCILLARY ADMINISTRATION

Generally, individually-owned real property or tangible personal property situated in a jurisdiction is subject to probate in that jurisdiction upon the owner's death.[15] In contrast, individually-owned intangible property is generally subject to probate in the jurisdiction of the owner's domicile upon their death.[16] Accordingly, snowbirds, even if not planning to change their domicile, may subject their estates to an ancillary probate administration in the non-domicile jurisdiction by owning property in that jurisdiction, including furnishing a rented apartment or purchasing real property. Although certain clients may not be concerned about avoiding probate and some of these warmer locales have relatively efficient probate systems, the ancillary probate process nonetheless adds a layer of additional costs and complexity at a client's death.

While the untimely acquisition and incorrect titling of an asset in another state can make a snowbird's estate plan less efficient, the ancillary probate process, particularly if an estate is being or was administered in the snowbird's domicile, can be managed. For example, Florida has multiple options for ancillary administration when an exemplified copy of the probate record from the domiciliary administration is available, or if the subject assets are below statutory thresholds. These options include (1) formal ancillary administration, with the appointment of a personal representative, providing

notice to creditors, and many of the other typical probate steps;[17] (2) the admission of a foreign will if the subject asset is real property located in Florida and if the domiciliary estate was already closed or if the decedent died two years prior to the Florida probate filings;[18] (3) a "short form" ancillary administration when the decedent had a will, the value of the subject assets totals less than $50,000, and notice to creditors is published without any resulting claims;[19] and (4) summary administration for estates with the total value of the subject assets less than $75,000 or if the decedent died two years prior to probate filings, although because no notice to creditors is necessary, the beneficiaries become personally liable, pro rata, for claims against the estate to the extent of the property received.[20]

Probate avoidance strategies can help snowbirds avoid the ancillary administration process. For real property, these strategies include the following: (1) titling property jointly with rights of survivorship between co-tenants, or in certain states, as tenants-by-the-entireties between spouses;[21] (2) adding a transfer on death designation to the property, which is allowed in certain states (not Florida);[22] (3) re-deeding the property via Lady Bird Deed, also known as an enhanced life estate deed, a method by which the owner deeds the property to themself for their lifetime with the remainder passing to beneficiaries at their death;[23] and (4) re-deeding the property to a trust or to a corporate entity such as an LLC so that the property is owned by an entity rather than an individual. As to tangible personal property, because a transfer on death designation for tangible personal property is currently not an option, titling property jointly or assigning tangible personal property into a trust are the common approaches to avoid probate of tangible personal property at an owner's death. All of these probate avoidance strategies, however, raise questions about creditor protection, transfer taxes, and other issues that are best answered with local counsel involvement.

STATE ESTATE OR INHERITANCE TAXES

Although both Ohio and Florida abolished their estate taxes, eighteen states[24] maintain a state estate or inheritance tax, which generally applies to property located in the state, including the real property and tangible personal property that snowbirds commonly acquire.[25] These taxes are typically imposed on the transfers of property to recipients who are not the surviving spouse[26] or charitable organizations,[27] but in most other respects are drastically different from the federal estate tax system. For example, certain states provide an amount exempt from tax; other states impose a tax on the entire amount if the estate exceeds the exemption; and a small number of states impose tax on the entire amount without an exemption.[28] If a snowbird could be subject to state estate or inheritance tax, estate planners should review the tax apportionment clauses of the client's estate planning documents to determine the appropriate payer of tax, particularly if the snowbird is below the federal estate tax exemption, and consider whether property may pass to the beneficiaries without estate or inheritance clearance from the state taxing authority.

CONCLUSION: PRACTICAL AND ETHICAL BENEFITS OF ENGAGING LOCAL COUNSEL

As clients turn into snowbirds, many practical issues arise in their estate planning, some of which we Ohio lawyers are simply unaware. Consulting with local coun-

sel can help estate planners better advise their snowbird clients, including by preparing state-specific legal documents, advising on proper titling of real property, real estate transfer tax, ancillary probate, and state estate or inheritance tax, and highlighting other state-specific issues. Beyond the practical benefits, the partnership with local counsel can help avoid any appearance of the unauthorized practice of law. To maintain continuity of counsel, it is better to begin reviewing a snowbird's estate plan with the involvement of local counsel before the snowbird shifts their domicile to the sunnier state and becomes a "sunbird."

ENDNOTES:

[1]U.S. Const. Art. IV, § 1; R.C. 2107.18; Fla. Stat. Ann. § 732.502.

[2]Unif. Probate Code § 1-101(5) (2019); U.P.O.A.A. (2006).

[3]Unif. Probate Code § 2-506 (2019).

[4]Unif. Power of Attorney Act § 106(c)(1) (2006).

[5]R.C. 2107.18

[6]R.C. 1337.26; Fla. Stat. Ann. § 709.2106.

[7]Fla. Stat. Ann. § 732.502.

[8]R.C. 2107.18.

[9]Fla. Stat. Ann. § 732.502.

[10]Fla. Stat. Ann. § 709.2202.

[11]R.C. 1337.26; Fla. Stat. Ann. § 709.2106.

[12]Fla. Stat. Ann. § 709.2116.

[13]Fla. Stat. Ann. § 732.502; Fla. Stat. Ann. § 736.0403; Fla. Stat. Ann. § 733.201.

[14]The author does not address state income taxation issues for part-time residents of other states in this article.

[15]R.C. 2129.04; R.C. 2107.11, Fla. Stat. Ann. § 734.102; Fla. Stat. Ann. § 733.101.

[16]R.C. 2107.11; Fla. Stat. Ann. § 733.101.

[17]Fla. Stat. Ann. § 734.102; Fla. Prob. R. 5.470.

[18]Fla. Stat. Ann. § 734.104.

[19]Fla. Stat. Ann. § 734.1025; Fla. Prob. R. 5.475.

[20]Fla. Stat. Ann. § 735.201; Fla. Prob. R. 5.530.

[21]R.C. 5302.20; Fla. Stat. Ann. § 689.11.

[22]R.C. 5302.23.

[23]R.C. 5731.06; *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727 (Fla. 1969).

[24] *https://www.actec.org/resources/state-death-tax-chart/*.

[25]72 Pa. Cons. Stat. Ann. § 9107.

[26]72 Pa. Cons. Stat. Ann. § 9116(a)(1.1).

[27]72 Pa. Cons. Stat. Ann. § 9111.

[28]72 Pa. Cons. Stat. Ann. § 9116.