PROBLEMS IN PARADISE - HOMESTEAD TITLED TO YOUR TRUST AND LAPSED DEVICES

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Recently, I've been involved in a case that has two major issues pertaining to real property and its distribution to the beneficiaries of a trust. One party says they are in control of a piece of property and that a specifically devised portion of property is also theirs. As you can imagine, the other side is saying that the same property can be sold because they are the owner and the bequest made in their trust some 20 years earlier goes to the residual clause of their trust.

The facts of this case are that Mom and Dad as grantors created a trust instrument 20 years ago. The trust provides the standard terms and conditions giving the grantors the right to sell and convey property. It also has a typical residual clause splitting all of the assets at the death of the last grantor to die among the three children. It further contains a specific bequest of Mom and Dad's homestead to a third party for life provided the third party outlives both Mom and Dad. Unfortunately, Mom dies two years following the creation of the trust. The twist to this story is that the trust is written in such a way where at the death of the first grantor, the trust becomes irrevocable. This simple term changes the trust as it applies to the homestead property and management of the trust's assets.

At the time of preparing the trust, Mom and Dad made the ultimate mistake by re-titling their homestead property from themselves to the trustee of their trust. When Mom died, and the trust became irrevocable, it meant Mom and Dad had conveyed their property away from themselves to an entity and not a human being. Remember that the Trustee of a trust is not a human being, but an entity. As a result, the deed titling the homestead from Mom and Dad as owners to their trust was now invalid – in essence it could not be sold or insured by a title company making it unmarketable.

But it gets worse; remember that Mom and Dad had the trust state that the homestead property would go to a third party for their life if the third party outlived both of them. The idea being the third party would have a place to live should Mom and Dad die prematurely. The trust went on to state that if that were to happen and then the third-party dies, the property would go to one of the children to the exclusion of the other two.

The third party did not outlive both grantors which gave one of the children the inspiration to say the homestead belonged to them or at least they should move up the chain in the life estate transfer to being next in line. What was missing in the trust was a lapse clause providing a remedy should these series of events occur.

Fortunately, a solution lies in Florida's legislature who in the 1960's wrote a simple statute providing for those situations when a bequest fails. The statute states in pertinent part that failed bequests become part of the residue of an estate unless a contrary intent is expressed. Thus, had the bequest read to third-party for life with a vested remainder to one of the children, then in such event the child would have a solid argument for ownership. However, it failed to

state anything like that which lessened the impact of the argument. Because Dad was still alive, the fulfillment of the condition where both Mom and Dad needed to be dead prevented any transfer of the property to anyone.

The statute, (Section 732.604, Fla. Stat.) dealing with failed devices now comes into play pushing the homestead property to the residual paragraph where all three children will share in the proceeds from the eventual sale of the homestead property. Of course, this means that Dad will have to die for that to happen

In the mean time can Dad as the surviving Grantor and remaining Trustee sell the property if he so desires? The answer is a yes and a no. To sell the property Dad has to obtain the consent from the children because they are qualified beneficiaries. The children became qualified beneficiaries when the trust became irrevocable at Mom's death which has the effect of placing the children in control of what Dad does with the property of the trust. If Dad wants to re-gift the homestead property to another child outright, he must get the approval of the surviving children which is unlikely to happen.

This mess could have been avoided by remembering the following message to be learned from this case: 1) make certain your joint trust instrument does not arbitrarily become irrevocable at the death of the first of you, things change and the survivor needs flexibility; 2) never re-title your homestead property from Mom and Dad's name into a trust, especially when it has the possibility of becoming irrevocable; and, 3) make certain that any bequest to a person or entity has a remedy should the bequest fail, do not depend on the statutes to fulfill your wishes at death.

So what became of this case? Because the property was homestead property titled into a trust which became irrevocable, the deed to the property became invalid and reverted back to Mom and Dad's deed 20 years earlier. The property is now in Mom & Dad's name which means it will pass according to Dad's Will given he is the surviving parent. Because Dad has no Will, the property will pass via Florida's intestate statutes. The final result being all three children will share equally in the proceeds from the eventual sale of the property.

If you are contemplating having a trust prepared make certain you talk to an attorney about where and to whom you want your property to go too. It may be the best investment you make to prevent a long-term fight among your children.