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FLORIDA REAL PROPERTY TITLE TIPS

By Lauren P. Kohl

Every year I receive several calls from Canadians inquiring how they may change the manner in which they hold title to their Florida real property. Some callers have taken title in their names, individually and wish to add a family member. Other callers have taken title as husband and wife and wish to transfer the property to a corporation, limited liability company or trust. My response is always the same; and is that I can assist them in transferring the title to their property. However, often the transfers have tax consequences. Therefore, the time to consider how to take title is prior to entering into a purchase and sale contract.

In Florida it is typical that a REALTOR® prepare the purchase and sale contract on a form approved by the Florida Association of REALTORS® and/or the Florida Bar. There is no requirement that an attorney be involved. But far too often when preparing the Contract, a REALTOR® simply asks a purchaser how to spell their name. The REALTOR® then types the purchaser's name on the form and the title company inserts that same name on the deed at closing. This is because neither REALTORS® nor title companies are authorized to discuss the legal aspects of holding title. An attorney, however, will discuss the various alternatives available for holding title to property, and the pros and cons associated with each alternative as it relates to the tax and estate planning goals of the client.

One of the taxes potentially incurred upon the transfer of an interest in real property is the Documentary Stamp Tax, which is payable to the Florida Department of Revenue. The tax rate for documents that transfer an interest in real property is $.70 per $100 (or portion thereof) of the total consideration paid, or to be paid, for the transfer. If an interest is transferred subject to an existing mortgage but no cash is actually exchanged between the parties the tax will be calculated on the principal balance of the mortgage, encumbering the property transferred. So, for example, if a husband purchases a home in Florida for $400,000.00, titles it in his name only, and obtains financing for $200,000.00 and then later decides to add his wife to the title, he would owe a tax in the amount of $700.00.

Changing the manner in which a person holds title to real property in Florida may also create income tax consequences under the Foreign Investment in Real Property Tax Act (“FIRPTA”). Prior to 1980, when the FIRPTA became law, it was possible for nonresidents to purchase U.S. real property and sell it for a profit without paying tax. Those days are gone. Now a withholding tax equal to 10% of the gross sale price is generally collected at closing, and submitted to the IRS to offset the potential income tax payable on any gain realized on the sale. The amount withheld will be refunded if it exceeds the actual tax liability. But a seller could wait many months to receive this refund.

There are exceptions to the withholding requirement. One example is when the sales price is less than $300,000.00 and the purchaser intends to use the property for more than 50% of the time it is in use. The purchaser must be willing to sign an affidavit to that effect at closing because it is actually the purchaser that is responsible for the tax. Some purchasers are apprehensive about signing such an affidavit.

A seller can also apply for a Withholding Certificate on the basis that the expected U.S. tax liability will be less than 10% of the gross sales price. Attorneys and accountants can assist their clients in applying for a Withholding Certificate.

Another tax that Canadians should consider when purchasing real property in Florida is the estate tax. U.S. estate taxes impose a tax liability on the estates of Canadians who owned real property upon their death. Presently, these rates range from 18% to 45%. An attorney can present a purchaser with options designed to minimize estate taxes. One example may be to hold title to the property in a trust, corporation, or limited liability company. Also, the U.S. Tax Code provides for a limited marital deduction, which is why the costs and benefits of holding title with a spouse should be considered. Estate tax considerations are client specific and therefore are beyond the scope of this article.

It is a great time to purchase real property in Florida. However, I encourage purchasers to look beyond the initial closing and consider the future tax implications associated with the various alternatives to owning property in paradise.

Areas of Practice: Real Estate Closings, Title Insurance, Residential & Commercial Real Estate Closings, Contract Preparation, Deeds & Mortgages, Wills & Trusts