SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

NEW YORK – FLORIDA SNOWBIRDS
Estate Planning & Elder Law Considerations

FACULTY:

Joanne Fanizza, Esq.
Howard S. Krooks, JD, CELA, CAP

Program Coordinators:

Marianne Rantala, Esq. and Ashley Valla, Esq.

November 8, 2021
Suffolk County Bar Association, New York

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NEW YORK - FLORIDA SNOWBIRDS ESTATE PLANNING AND ELDER LAW CONSIDERATIONS

1:00 p.m. **Welcome and Introductions: - Marianne Rantala**

1:05 - 1:35 p.m. **Joanne Fanizza, Esq.**

- Florida Homestead
- Ladybird Deed
- Selling Real Estate in Other Jurisdictions
- Uniform Jurisdiction
- Advance Directives
- Florida Probate Process
    - Change in Domicile

1:35 – 2:05 p.m. **Howard S. Krooks, JD, CELA, CAP**

- Florida/NY Medicaid Update
- Qualified Income Trust
- Spousal Refusal
- Personal Care Contracts
- Guardianship Distinctions
- Domicile and State Tax
    - DRA

2:05 p.m. **Q & A**

JOANNE FANIZZA, ESQ.

Joanne Fanizza is licensed to practice law in Florida, New York and the District of Columbia. Her earliest bar admission was in Florida in 1988, where she began practicing plaintiff's personal injury litigation and media law in association with a boutique PI firm in Fort Lauderdale headed by the then-president of The Florida Bar.

Joanne then started her own practice in 1995, where she transitioned her practice to estate planning and administration, real estate, small business and civil litigation. In 2007, Joanne moved back to Long Island, her roots, then opened an office on Long Island. She maintains an office in Fort Lauderdale; however, the Melville office is her primary office. She visits and works out of the Fort Lauderdale office several times a year (in non-pandemic years).

Joanne has a Bachelor's Degree in Political Science (with a sub-specialty in Sovietology) from the University of Florida (June 1981), and a Juris Doctor degree from the University of Florida College of Law (December 1987). She was admitted to The Florida Bar in 1988, the District of Columbia Bar in 2006, and the New York Bar in 2007. She is also admitted to practice in various federal courts, including the U.S. District Courts for the Southern and Middle Districts of Florida and the Eastern District of New York. She is admitted to the 11th U.S. Circuit Court of Appeals, and has appeared before the 2nd U.S. Circuit Court of Appeals in New York *pro hac vice*. She is also admitted to practice before the U.S. Supreme Court and has filed one jurisdictional brief in the high court.

Joanne taught Florida probate administration in New York to dual-admitted lawyers such as herself on behalf of The Florida Bar in November 2019, with our beloved colleague Bruce Steiner, who is also dual-admitted. That CLE presented many of the same issues we will be discussing today.

Joanne has written extensively on various estate planning and administration matters, including an article published in the New York State Bar Association's Elder Law and Special Needs Journal in Winter 2016 ("Should They Go or Should They Stay? Issue-Spotting for the New York Lawyer Whose Clients May be Considering a Change in Domicile to Florida"). In addition, she has published articles entitled "Seniors, You Can Maintain Control After Control Slips Away with the Right Plan",

"The ABC's of Medicaid For the Elderly", "Should You Trust the Living Trust?" and "Busting the Biggest Medicaid Myth -- Transferring Assets", to name a few.

She has been quoted by the New York Times, Fox Business online, Forbes and Retire Life, on topics such as the risks in avoiding probate, "budget" estate planning, advanced directives and other topics of interest to Seniors. She has also been a Guest Speaker on topics pertaining to her practice for the Nassau County Bar Association, and other organizations both in New York and Florida. She is listed in *Who's Who in America*, *Who's Who in the South and Southwest*, *Who's Who of American Women* and *Who's Who in American Law.*

Joanne is a member of the American Bar Association, the New York State Bar Association, the Federal Bar Association, the Broward County Bar Association, the Nassau County Bar Association and the Suffolk County Bar Association. She has received numerous *pro bono* awards, including being named the Broward County Volunteer Lawyer of the Year, and received The Florida Bar President's Pro Bono Service Award in 2005. She also was named Pro Bono Lawyer of the Month by the Nassau County Bar Association in December 2015, and continues to serve in NCBA's Pro Bono Law Clinic.

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Practice Areas
- Private Client, Trusts and Estates

Education
- University of Pennsylvania Law School, J.D., 1989
- SUNY–Albany, B.S., 1986

Bar Admissions
- Florida
- New York

Court Admissions
- Supreme Court of Florida

Affiliations

National Academy of Elder Law Attorneys (NAELA), Past President

New York State Bar Association Elder Law and Special Needs Section, Past Chair

New York Chapter of NAELA, Past President

Florida Bar Elder Law Section, Chair-Elect, 2021-2022

Awards & Honors
- Florida Super Lawyer
- New York Super Lawyer
- Florida Trend's Legal Elite
- Top 25 Westchester County Attorney
- AV Preeminent Peer Review Rating from Martindale-Hubbell
- 2006 Outstanding Achievement Award, New York Chapter of NAELA
- 2010 Outstanding Member Award, Florida Bar Elder Law Section

Howard S. Krooks, CELA, CAP

Member

Boca Raton

hkrooks@cozen.com | (561) 245-6107

Howard's practice is devoted to elder law and trust and estate matters, including representing seniors and people with special needs and their families in connection with asset preservation planning, supplemental needs trusts, Medicaid, Medicare, planning for disability, guardianship, wills, trusts, and health care planning with advance directives.

Howard is certified as an elder law attorney by the National Elder Law Foundation and currently serves on the Executive Council of the Florida Bar Elder Law Section as the chair-elect and the board of trustees of the NAELA Foundation. Howard received the 2006 Outstanding Achievement Award from the New York Chapter of NAELA for serving as co-chair of a Special Committee on Medicaid Legislation formed by the NYSBA Elder Law Section to oppose New York Governor George Pataki's budget bills containing numerous restrictive Medicaid eligibility provisions that, if enacted, would severely impact the frail elderly and disabled populations. He was named Member of the Year in 2010 by the Florida Bar Elder Law Section for his work in obtaining Medicaid approval for the use of promissory notes in Medicaid planning in Florida. He also was recognized for serving as co-chair of the NYSBA Elder Law Section Compact Working Group, which received national attention for developing alternative methods of financing long-term care. Additionally, Howard served as chair of a Special Committee created by the NYSBA Elder Law Section to address the Statewide Commission on Fiduciary Appointments formed by Chief Justice Judith Kaye. Howard received an award for spearheading the effort on behalf of NAELA seeking the enactment of the Special Needs Trust Fairness Act, which was signed into law by President Obama on December 13, 2016.

Howard has consistently been selected as a Florida Super Lawyer and a New York Super Lawyer, named to Florida Trend's Legal Elite, a Top 25 Westchester County Attorney, and is AV Preeminent rated by Martindale-Hubbell.

Howard is a frequent lecturer and has addressed many organizations, including Barron's, NAELA, Stetson Special Needs Conference, ALI-ABA, WealthCounsel, ElderCounsel, the National Guardianship Association, various bar associations and attorney organizations, estate planning organizations, Berkeley College, the United Federation of Teachers, the New York State United Teachers, and the New York State Civil Service Employees' Association. He has been quoted in *The Wall Street Journal*, *The New York Times*, *Kiplinger's*, *USA Today*, *The New York Post*, N*ewsday*, *The Journal News*, and the *Boca Raton News*. Howard has appeared on PBS, the CBS Early Morning Show, and local elder law-focused television programs. Howard has written extensively on the topic of elder including "Creative Advocacy in Guardianship Settings: Medicaid and Estate Planning Including Transfer of Assets, Supplemental Needs Trusts and Protection of Disabled Family Members," included in Guardianship Practice in New York State and "Long-Term Care Insurance in New York," included in Estate Planning and Will Drafting in New York, both published by the New York State Bar Association.

Howard is a founding principal of ElderCounsel LLC, the premier elder law and special needs planning document drafting solution for attorneys.

Howard earned his bachelor's degree in accounting from SUNY Albany and his law degree from the University of Pennsylvania Law School.

Howard Krooks
hkrooks@cozen.com
P: (561) 245-6107

COZEN O'CONNOR

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Joanne Fanizza, Esq.
Law Offices of Joanne Fanizza, P.A.
Melville, NY and Fort Lauderdale, FL

Howard Krooks, Esq.
Elder Law Associates, P.A.
Boca Raton, FL
Of Counsel, Amoruso & Amoruso, LLP
Rye Brook, NY

Florida Homestead: A minefield

Florida's unusual homestead laws are perhaps the most difficult to understand, and the area in which many attorneys commit malpractice – both those admitted to The Florida Bar and those not but who nevertheless insist on advising clients on Florida legal issues. Keep in mind that Florida is considered a debtor's state that will not allow your home to be taken away – so long as you pay the mortgage, taxes and association maintenance fees. If you do, then you and certain of your heirs will enjoy the benefits of that property, even if you don't want them to.

There are **three types of homestead protections in Florida**, one of which affects estate planning. The others affect taxation of homesteaded property (off-the-top exemption of $25,000 value from real property taxes, plus some additional exemptions, if qualified) and valuation of homesteaded property (annual caps on increases in valuation).

Florida Homestead (cont'd)

Article X, Section 4, Florida Constitution:

"(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement, or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

"(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located with a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

"(2) personal property to the value of one thousand dollars.

"(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

"(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may be deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law."

Florida Homestead (cont'd)

A. What does this mean?

1. Homestead is **exempt from claims of creditors**, except taxes, assessments "obligations contracted for the purchase" (mortgages), improvements or repairs (mechanic's liens)

2. This also **includes personal property** up to $1,000.00

3. Benefits inure to surviving spouse or heirs of owner. **"Lineal descendants"** has been interpreted broadly for homestead succession.

4. Domiciliaries MUST declare the property as their homestead in order to avail themselves of these benefits (which also include a cap on taxes, availability of certain exemptions from real property taxes)

   a. This is generally done by March 1 of each year

   b. Declarations are automatically renewed annually (notice is sent)

Florida Homestead (cont'd)

B. Tax exemptions on homestead property are found in **Article VII, Section 6 of the Florida Constitution**, which sets forth the types of exemptions and amounts. Subsection (a): "Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon..."

1. Subsection (a): $25,000.00 for homesteaders, whether title is legal or equitable, held by the entireties, jointly, in common, condo or coop

2. Subsection (d): Counties and municipalities may grant additional exemptions for seniors 65 years old or more whose annual income does not exceed $20,000.00:

   a. (1) Up to an additional $50,000.00 exemption; OR

   b. (2) Seniors who own homestead for 25+ years, an exemption equal to the assessed value IF the value is no more than $250,000.00 as assessed in the first year the owner applies.

3. Subsection (e): (1) Disabled veterans 65+ years old, partially or totally disabled combat-related, honorable discharge, a percentage discount equal to the percent of permanent disability as determined by the VA. (2) This benefit inures to the surviving spouse if spouse continues to hold legal or equitable title upon death of the vet until s/he remarries or sells/transfers the property. All or part of this may be transferred to the surviving spouse's new homestead if not remarried.

Florida Homestead (cont'd)

4. Subsection (f): The Legislature is empowered to provided additional ad valorem tax relief up to the full value of the homestead to: (1) surviving spouse of a veteran who died from service-connected causes while on active duty; (2) surviving spouse of a first responder who died in the line of duty; and (3) a first responder totally and permanently disable from injuries sustained in the line of duty. Definition of "first responder": LEO, correctional officer, firefighters, EMT, paramedic.

C. Third benefit of homesteading property is a 3% cap on the increase of valuation each year for ad valorem tax purposes.

D. Homestead rights can be waived

1. In a prenuptial or postnuptial agreement

2. By deed pursuant to Fla. Stat. § 732.7025 with proper language on face of deed

E. Homestead rights can be created and removed from community property pursuant to Fla. Stat. § 732.225.

Florida Homestead (cont'd)

F. Medicaid trusts can hold homestead property:" Title can also be held, for example, in a trust "where the person's possessory right in such real property is based upon an instrument granting to him or her a beneficial interest for life, such interest being hereby declared to be 'equitable title to real estate,' as that term is employed in" Article VII, Section 6 of the Florida Constitution. Fla. Stat. § 196.031(1)(a). **This is the language that should be in any Medicaid trust of a person who may ultimately become a Florida domiciliary and own property there through the trust.**

G. You cannot claim Florida homestead if you claim New York homestead (or homestead in any other state). Fla. Stat. § 196.031(5)**. Do not try to claim homestead in New York and Florida; you are violating the law and local tax assessors aggressively police these matters.**

H. You cannot maintain a Florida homestead if you rent out the property. Fla. Stat. § 196.061(1). **If your client returns to New York, especially for medical care, and they rent out their Florida property, they will lose the homestead protections and exemptions.**

Florida Homestead (cont'd)

Practice tips:

1. Will drafting and homestead:

a. NEVER call for the homestead (or Florida property, in case your New York client later makes Florida his/her domicile and declares the Florida property as homestead) to be sold. That invalidates the protection from creditors heirs are entitled to receive. *Estate of Price v. West Florida Hospital, 513 So.2d 767 (Fla. 1st DCA 1987)*

b. If there is a possibility your clients will make Florida their domiciliary, be very careful about the will clauses that might address that property; they may be unenforceable if the property ultimately becomes the client's homestead. For example, if your client is survived by a spouse and/or minor child, any testamentary clause that attempts to force a sale of the property, or devise it to someone else, will be modified by the Florida courts.

2. Deed transfers:

Unless you are licensed to practice law in Florida, please do not attempt to draft a Florida deed transferring homestead property, property that might become homestead in the future, or any other type of Florida property. Not only is it a third degree felony for practicing Florida law without a Florida license (see Fla. Stat. § 454.23), but it is legal malpractice if you get it wrong. It's not worth the small fee you would earn for a deed.

II. REAL PROPERTY CONSIDERATIONS

A. Execution of deeds

Florida has very clear requirements for the proper execution of deeds that are much different from New York. They are designed to avoid fraud, and they succeed greatly in doing so. (Requirements of witnesses, color of ink, pagination, etc.) Recording clerks are required to take your papers and record them, so long as they meet basic requisites (color of ink and notarization, except for promissory notes); they do NOT pass judgment on whether your documents meet any legal tests. They leave that to the malpractice carriers. So if you prepared a deed for a Florida property that was accepted and recorded by a clerk, do not think that you did the job right. I cannot tell you how many times I have found completely invalid deeds recorded by New York lawyers who simply committed malpractice. Those problems rear their ugly heads later on, when the chain of title is broken and their clients have difficulty conveying the property. For the requisites of Florida deeds, see Chapter 689, Florida Statutes.

Practice tip: If you are a New York lawyer who prepares a Florida deed, watch out! You have likely committed malpractice. Worse, you have committed a third degree felony by practicing Florida law without a license. Fla. Stat. § 454.23. Why take a chance on such a small fee? Please retain Florida-licensed counsel!

Real Property Considerations (cont'd)

B. Life Estate and Enhanced Life Estate (Lady Bird) Deeds

The **life estate deed** is a useful tool in estate planning when the conditions are right for the client. A life estate deed allows the Grantor to convey his/her interest in property while maintaining a life interest in the property, giving the Grantor exclusive use, right and possession in the land until death – and also the obligation to maintain it; upon death, the property automatically transfers to the "remaindermen", bypassing probate.

Florida is among several jurisdictions in the U.S. that recognizes the **enhanced life estate, or "lady bird deed",** a deed that is, essentially, a revocable life estate deed. *Oglesby v. Lee,* 73 Fla. 39 (Fla. 1917). It allows a Grantor to convey his/her interest in the property to remaindermen, maintain a life estate interest *and* maintain control over the status of the property in the future. This is extremely helpful in the event the Grantor is concerned about their future relationship with the remaindermen, or wishes to change remaindermen, or even the status of title in the property in the future.

III. FLORIDA ADVANCE DIRECTIVES

Health care proxies, living wills, durable powers of attorney, DNRs and anatomical gifting are found in Title XLIV of the Florida Statutes, the Civil Rights Statutes. They all play a part in Florida estate planning. The state has a more relaxed attitude toward the drafting of these documents, so long as they substantially meet statutory requirements and are executed properly. (See, e.g., Fla. Stat. §§ 765.203, .2038, .303)

A. Health care proxy/living will/medical power of attorney

Advanced directives can be merged for simplification (e.g., health care proxy, living will and medical power of attorney), Chapter 765, Parts I, II and III.

B. Powers of Attorney

New requirements make them more complicated than in years past, adding some NY-like clauses, such as gifting, Chapter 709, Fla. Stat. §§ 709.2101 *et seq*., as well as specific authority that requires separate signed enumerations. Fla. Stat. § 709.2202.

Florida Advance Directives (cont'd)

C. DNRs

Do Not Rescuscitate Orders are executed under the "informed consent" provision of the Health Care Advance Directives Section of the Civil Rights Law, Fla. Stat. § 765.101(11), and may be executed by health care proxies or agents pursuant to a power of attorney. DNRs require very specific execution, including color of paper.

Florida's attitude toward "Do Not Resuscitate" documents is more stringent than New York's, erring on the side of life. The form itself must be on bright lemon-yellow paper and signed by a doctor, and any failure to execute it properly will consider it void. If emergency personnel are called to a location where the victim has a DNR, they likely will still attempt to revive the victim, on the thinking that the victim likely changed his/her mind by calling for help.

D. Anatomical gifts

A series of statutes governs anatomical gifting in Part V of the Civil Rights Statutes, from who may make them, who may receive them, purposes for making, the manner, registry, special statutes for eye banks and corneal removal, anti-discrimination measures, etc. Fla. Stat. § 765.510 *et seq.*

E. Absence of advance directives

Florida has established a heirarchy of decision-makers for the individual who does not have written advance directives, or for directives that no longer function. Fla. Stat. § 765.401 *et seq.*

IV. FLORIDA ESTATE ADMINISTRATION

In many ways, Florida is more protective of its seniors than other states, which protections are reflected in the Florida Probate Code.

A. Will formalities

Florida recognizes and allows for the probate of a will executed under another state's laws so long as it meets that state's laws at the time of execution. Fla. Stat. § 732.502(2). It does not recognize holographic (handwritten or self-made) or nuncupative (oral) wills. *Id.* But it also does not consider a self-made will to fall under the ban if it is prepared with the formalities of execution required by Florida law.

In terrorem clauses are unenforceable . Fla. Stat. § 732.517 (and for trusts, too, Fla. Stat. § 736.1108). The thought is to not prohibit legitimate litigation regarding wills. If a party brings a frivolous case, there are ways in which the judge can punish that person – and they do. E.g., Fla. Stat. § 57.105.

Separate writings allowed to dispose of personal property, Fla. Stat. § 732.515.

Not stuck on staples and formalities of execution. Proper drafting is paramount, with proper page breaks and initials and dates on every page.

Florida Estate Administration (cont'd)

B. The administration of estates

If your decedent's estate does not require probate, you still must deposit the original will and a certified copy of the death certificate with the county clerk, Fla. Stat. § 732.901, and if the Decedent had a trust, you must file a notice of trust and death certificate, Fla. Stat. § 736.05055.

The probate process itself is called Administration, there is no differentiation between the testate or intestate administration of estates and only one type of Letters. However, the process itself has a beginning, a middle and an end – and all must be followed. All court cases of every type are efiled in Florida through the Florida portal, since April 2014.

The fiduciary is called a Personal Representative, not Executor or Administrator. P.R.s generally must be Florida residents unless they are related to the decedent by consanguinity, or the spouse of a person related by consanguinity. Fla. Stat. § 733.304. Often the probate judges will require a bond for an out-of-state P.R. even if the will calls for no bond.

Like New York, probate begins with a Petition for Administration by an interested person, who also provides an Oath showing they are qualified to serve. The will and death certificate must be filed, together with Consents if available. If all interested parties consent, then a Notice of Administration does not have to be published and served. If they don't, then once the P.R. is appointed, a Notice of Administration must be published and served on (a) spouse; (b) beneficiaries; (c) trustees; and (d) persons entitled to exempt property. Fla. Stat. § 733.212.

Florida Estate Administration (cont'd)

Creditors claims are handled very differently and strictly: Fla. Stat. §§ 733.2121, 733.710, .701, .702, .704: Once letters issue, the P.R. must publish a Notice to Creditors in a court-approved local publication. For known creditors, the P.R. should serve a copy of the notice by certified mail, which cuts off the creditor's rights to claim against the estate after 30 days. For all decedents 55 years of age and older, Florida Medicaid must receive proper notice.

Unknown (to the P.R.) creditors have 3 months from first date of publication to make a claim against the estate – or be forever barred. **Unless**... the creditor should have been known to the P.R., in which case the creditor has two years from decedent's date of death to make a claim. The P.R. has strong obligations to find the decedents creditors: Under Fla. Stat. § 733.2121(3)(a), the personal representative "shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the notice [to creditors] on those creditors. Impractical and extended searches are not required." A "diligent search" has been defined to include an extremely careful review of the decedent's checkbooks for at least one year prior to the date of death in order to determine if the checkbook reveals any "trends" of payments to any individual or entity that may not be revealed by any other paperwork such as a loan, promissory note, or other documents evidencing a debt. *Strulowitz v. Cadle Company II, Inc.,* 839 So.2d 876 (Fla. 4th DCA 2003). In all cases, all creditors' claims are cut off two years from decedent's date of death without exception.

Florida Estate Administration (cont'd)

The **Inventory** is due 60 days after Letters of Administration issue. Fla. Stat. § 733.604 and 199.062(4); Rules 5.330(a) and 5.340, Fla.R.Prob. An Affidavit of No Florida Estate Tax Due, the DR-312, is also due, and a Statement Regarding Creditors is due after the creditors' claims period expires. If the estate is taxable, then the DR-312 will so note, the 706 should be filed and the IRS closing letter should be filed.

Once the assets are marshaled and the above procedures are complete, the P.R. can endeavor to make distributions. The P.R. has the option to prepare a formal (filed) or informal accounting (shared with distributees), or if the distributees all waive an accounting, it will not be required. Receipts and Releases are necessary from distributees, and Consents to Discharge the P.R., too. If they refuse to sign off, the P.R. can ask the court to allow discharge without consents.

The last petition to be filed is a **Petition for Discharge**. Most of the probate courts have closing checklists, to be sure everything was done properly. When approved, an Order of Discharge is entered by the Court. Fla. Stat. §§ 733.901, 198.23, 198.26, Rules 5.330(g), 5.400, 5.401, Fla.R.Prob.

Estates are required to be closed within one year of issuance of Letters. Obviously, not every estate can be closed in that time frame, so the P.R. can petition for an extension of time for good cause shown. They are almost always granted.

Florida Estate Administration (cont'd)

C. Ancillary estates

Florida's ancillary probate process is a full administration, but it is easier to get into court. The Florida-admitted attorney will require authenticated copies of various documents from your New York file. Fla. Stat. § 734.102, Rules 5.020(b), 5.470(a), Fla.R.Prob. The Ancillary P.R. still must go through the entire probate process before the Florida property can transfer.

D. Small Estates

Florida has two small estate proceedings, **summary administration** (Fla. Stat. § 735.201-.2063) and **disposition of personal property without administration** (Fla. Stat. § 735.301-.304). For the former, the value of the estate, not including exempt property, must be less than $75,000.00, or the decedent died more than two years prior (the magical creditors claims cut-off). This still requires an administration procedure that follows most of the steps, including notice to interested persons, notice to creditors (if before they are cut off), etc.

Florida Estate Administration (cont'd)

The **Disposition of Personal Property Without Administration** is a super-simplified procedure designed to get small amounts of money or valued goods into the hands of distributees: Exempt personal property, property exempt from the claims of creditors under the Florida Constitution, and nonexempt personal property "the value of which does not exceed the sum or $10,000 and the amount of preferred funeral expenses and reasonable and necessary medical expenses of the last 60 days of illness, provided the decedent has been deceased for more than 1 year" and no other administration is pending. This formula to calculate whether an estate qualifies can be confusing.

Practice tip: It is easy to commit malpractice in Florida regarding will drafting and probate if you are not familiar with the intricacies of Florida law. If you are foolish enough to try to probate an estate in Florida, be advised that judges are proactive and will file a complaint with proper authorities against an offending attorney. The unlicensed practice of law has been criminalized in Florida. The courts also will not hesitate to sanction an attorney who does not meet the time and substantive filing requirements.

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I. FLORIDA HOMESTEAD: A minefield

Florida's unusual homestead laws are perhaps the most difficult to understand, and the area in which many attorneys commit malpractice – both those admitted to The Florida Bar and those not but who nevertheless insist on advising clients on Florida legal issues. Keep in mind that Florida is considered a debtor's state that will not allow your home to be taken away – so long as you pay the mortgage, taxes and association maintenance fees. If you do, then you and certain of your heirs will enjoy the benefits of that property, even if you don't want them to.

There are three types of homestead protections in Florida, one of which affects estate planning. The others affect taxation of homesteaded property (off-the-top exemption of $25,000 value from real property taxes, plus some additional exemptions, if qualified) and valuation of homesteaded property (annual caps on increases in valuation).

The most important homestead protection for estate planning purposes is found in Article X, § 4 of the Florida Constitution, which gives homeowners who declare homestead (you must apply) protection from the claims of creditors, including from forced sale, Medicaid liens and all other creditors except the lender who financed the loan to purchase the property, taxing authorities, and materialmen.

A. Article X, Section 4, Florida Constitution:

> "(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement, or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> > "(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located with a municipality, to the extent of

one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

"(2) personal property to the value of one thousand dollars.

"(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

"(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may be deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law."

1. Homestead is exempt from claims of creditors, except taxes, assessments "obligations contracted for the purchase" (mortgages), improvements or repairs (mechanic's liens)

2. This also includes personal property up to $1,000.00

3. Benefits inure to surviving spouse or heirs of owner. "Lineal descendants" has been interpreted broadly for homestead succession.

4. Domiciliaries MUST declare the property as their homestead in order to avail themselves of these benefits (which also include a cap on taxes, availability of certain exemptions from real property taxes)
   a. This is generally done by March 1 of each year
   b. Declarations are automatically renewed annually (notice is sent)

B. Tax exemptions on homestead property are found in Article VII, Section 6 of the Florida Constitution, which sets forth the types of exemptions and amounts. Subsection (a): "Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon..."

1. Subsection (a): $25,000.00 for homesteaders, whether title is legal or equitable, held by the entireties, jointly, in common, condo or coop

2. Subsection (d): Counties and municipalities may grant additional exemptions for seniors 65 years old or more whose annual income does not exceed $20,000.00:
   a. (1) Up to an additional $50,000.00 exemption; OR

b. (2) Seniors who own homestead for 25+ years, an exemption equal to the assessed value IF the value is no more than $250,000.00 as assessed in the first year the owner applies.

3. Subsection (e): (1) Disabled veterans 65+ years old, partially or totally disabled combat-related, honorable discharge, a percentage discount equal to the percent of permanent disability as determined by the VA. (2) This benefit inures to the surviving spouse if spouse continues to hold legal or equitable title upon death of the vet until s/he remarries or sells/transfers the property. All or part of this may be transferred to the surviving spouse's new homestead if not remarried.

4. Subsection (f): The Legislature is empowered to provided additional ad valorem tax relief up to the full value of the homestead to: (1) surviving spouse of a veteran who died from service-connected causes while on active duty; (2) surviving spouse of a first responder who died in the line of duty; and (3) a first responder totally and permanently disable from injuries sustained in the line of duty. Definition of "first responder": LEO, correctional officer, firefighters, EMT, paramedic.

C. Third benefit of homesteading property is a 3% cap on the increase of valuation each year for ad valorem tax purposes.

D. Homestead rights can be waived
1. In a prenuptial or postnuptial agreement
2. By deed pursuant to Fla. Stat. § 732.7025 with proper language on face of deed

E. Homestead rights can be created and removed from community property pursuant to Fla. Stat. § 732.225.

F. Medicaid trusts can hold homestead property:" Title can also be held, for example, in a trust "where the person's possessory right in such real property is based upon an instrument granting to him or her a beneficial interest for life, such interest being hereby declared to be 'equitable title to real estate,' as that term is employed in" Article VII, Section 6 of the Florida Constitution. Fla. Stat. § 196.031(1)(a). **This is the language that should be in any Medicaid trust of a person who may ultimately become a Florida domiciliary and own property there through the trust.**

G. You cannot claim Florida homestead if you claim New York homestead (or homestead in any other state). Fla. Stat. § 196.031(5). **Do not try to claim homestead in New York and Florida; you are violating the law and local tax**

assessors aggressively police these matters.

H. You cannot maintain a Florida homestead if you rent out the property. Fla. Stat. § 196.061(1). **If your client returns to New York, especially for medical care, and they rent out their Florida property, they will lose the homestead protections and exemptions.**

Practice tips:

1. Will drafting and homestead:
   a. NEVER call for the homestead (or Florida property, in case your New York client later makes Florida his/her domicile and declares the Florida property as homestead) to be sold. That invalidates the protection from creditors heirs are entitled to receive. *Estate of Price v. West Florida Hospital,* 513 So.2d 767 (Fla. 1st DCA 1987)
   b. If there is a possibility your clients will make Florida their domiciliary, be very careful about the will clauses that might address that property; they may be unenforceable if the property ultimately becomes the client's homestead. For example, if your client is survived by a spouse and/or minor child, any testamentary clause that attempts to force a sale of the property, or devise it to someone else, will be modified by the Florida courts.

2. Deed transfers:
   Unless you are licensed to practice law in Florida, please do not attempt to draft a Florida deed transferring homestead property, property that might become homestead in the future, or any other type of Florida property. Not only is it a third degree felony for practicing Florida law without a Florida license (see Fla. Stat. § 454.23), but it is legal malpractice if you get it wrong. It's not worth the small fee you would earn for a deed.

II. REAL PROPERTY CONSIDERATIONS

A. Execution of deeds

Florida has very clear requirements for the proper execution of deeds that are much different from New York. They are designed to avoid fraud, and they succeed greatly in doing so. (Requirements of witnesses, color of ink, pagination, etc.) Recording clerks are required to take your papers and record them, so long as they meet basic requisites (color of ink and notarization, except for promissory notes); they do NOT pass judgment on whether your documents meet any legal tests. They leave that to the malpractice carriers. So if you prepared a deed for a Florida property that was accepted and recorded by a clerk, do not think that you did the job right. I cannot tell you how many times I have found completely invalid deeds recorded by New York lawyers who simply committed malpractice. Those problems rear their ugly heads later on, when the chain of title is broken and

their clients have difficulty conveying the property. For the requisites of Florida deeds, see Chapter 689, Florida Statutes.

Practice tip: If you are a New York lawyer who prepares a Florida deed, watch out! You have likely committed malpractice. Worse, you have committed a third degree felony by practicing Florida law without a license. Fla. Stat. § 454.23. Why take a chance on such a small fee? Please retain Florida-licensed counsel!

B. Life Estate and Enhanced Life Estate (Lady Bird) Deeds

The life estate deed is a useful tool in estate planning when the conditions are right for the client. A life estate deed allows the Grantor to convey his/her interest in property while maintaining a life interest in the property, giving the Grantor exclusive use, right and possession in the land until death; upon death, the property automatically transfers to the "remaindermen", bypassing probate.

Florida is among several jurisdictions in the U.S. that recognizes the enhanced life estate, or "lady bird deed", a deed that is, essentially, a revocable life estate deed. *Oglesby v. Lee,* 73 Fla. 39 (Fla. 1917) It allows a Grantor to convey his/her interest in the property to remaindermen, maintain a life estate interest and maintain control over the status of the property in the future. This is extremely helpful in the event the Grantor is concerned about their future relationship with the remaindermen, or wishes to change remaindermen, or even the status of title in the property in the future.

III. FLORIDA ADVANCE DIRECTIVES

Health care proxies, living wills, durable powers of attorney, DNRs and anatomical gifting are found in Tiutle XLIV of the Florida Statutes, the Civil Rights Statutes. They all play a part in Florida estate planning. The state has a more relaxed attitude toward the drafting of these documents, so long as they substantially meet statutory requirements and are executed properly. (See, e.g., Fla. Stat. § 765.203, .2038, .303)

A. Health care proxy/living will/medical power of attorney

Advanced directives can be merged for simplification (e.g., health care proxy, living will and medical power of attorney), Chapter 765, Parts I, II and III.

B. Powers of Attorney

New requirements make them more complicated than in years past, adding some NY-like clauses, such as gifting, Chapter 709, Fla. Stat. §§ 709.2101 *et seq.*, as well as specific authority that requires separate signed enumerations. Fla. Stat. § 709.2202.

C. DNRs

Do Not Rescuscitate Orders are executed under the "informed consent" provision of the Health Care Advance Directives Section of the Civil Rights Law, Fla. Stat. § 765.101(11), and may be executed by health care proxies or agents pursuant to a power of attorney. DNRs require very specific execution, including color of paper.

Florida's attitude toward "Do Not Resuscitate" documents is more stringent than New York's, erring on the side of life. The form itself must be on bright lemon-yellow paper and signed by a doctor, and any failure to execute it properly will consider it void. If emergency personnel are called to a location where the victim has a DNR, they likely will still attempt to revive the victim, on the thinking that the victim likely changed his/her mind by calling for help.

D. Anatomical gifts

A series of statutes governs anatomical gifting in Part V of the Civil Rights Statutes, from who may make them, who may receive them, purposes for making, the manner, registry, special statutes for eye banks and corneal removal, anti-discrimination measures, etc. Fla. Stat. § 765.510 *et seq.*

E. Absence of advance directives

Florida has established a heirarchy of decision-makers for the individual who does not have written advance directives, or for directives that no longer function. Fla. Stat. § 765.401 *et seq.*

IV. FLORIDA ESTATE ADMINISTRATION

In many ways, Florida is more protective of its seniors than other states, which protections are reflected in the Florida Probate Code.

A. Will formalities

Florida recognizes and allows for the probate of a will executed under another state's laws so long as it meets that state's laws at the time of execution. Fla. Stat. § 732.502(2). It does **not** recognize holographic (handwritten or self-made) or nuncupative (oral) wills. *Id.* But it also does not consider a self-made will to fall under the ban **if** it is prepared with the formalities of execution required by Florida law.

In terrorem clauses are unenforceable, Fla. Stat. § 732.517 (and for trusts, too, Fla. Stat. § 736.1108). The thought is to not prohibit legitimate litigation regarding wills. If a party brings a frivolous case, there are ways in which the judge can punish that person – and they do. E.g.,

Fla. Stat. § 57.105.

Separate writings allowed to dispose of personal property, Fla. Stat. § 732.515.

Not stuck on staples and formalities of execution. Proper drafting is paramount, with proper page breaks and initials and dates on every page.

B. The administration of estates

If your decedent's estate does not require probate, you still must deposit the original will and a certified copy of the death certificate with the county clerk, Fla. Stat. § 732.901, and if the Decedent had a trust, you must file a notice of trust and death certificate, Fla. Stat. § 736.05055.

The probate process itself is called Administration, there is no differentiation between the testate or intestate administration of estates. However, the process itself has a beginning, a middle and an end – and all must be followed. **All court cases of every type are efiled in Florida through the Florida portal, since April 2014.**

The fiduciary is called a Personal Representative, not Executor or Administrator. P.R.s generally must be Florida residents unless they are related to the decedent by consanguinity, or the spouse of a person related by consanguinity. Fla. Stat. § 733.304. Often the probate judges will require a bond for an out-of-state P.R. even if the will calls for no bond.

Like New York, probate begins with a Petition for Administration by an interested person, who also provides an Oath showing they are qualified to serve. The will and death certificate must be filed, together with Consents if available. If all interested parties consent, then a Notice of Administration does not have to be published and served. If they don't, then once the P.R. is appointed, a Notice of Administration must be published and served on (a) spouse; (b) beneficiaries; (c) trustees; and (d) persons entitled to exempt property. Fla. Stat. § 733.212.

Creditors claims are handled very differently and strictly: Fla. Stat. § 733.2121, 733.710, .701, .702, .704: Once letters issue, the P.R. must publish a Notice to Creditors in a court-approved local publication. For known creditors, the P.R. should serve a copy of the notice by certified mail, which cuts off the creditor's rights to claim against the estate after 30 days. For all decedents 55 years of age and older, Florida Medicaid must receive proper notice.

For unknown creditors, they have 3 months from first date of publication to make a claim against the estate – or be forever barred. **Unless...** the creditor should have been known to the P.R., in which case the creditor has two years from decedent's date of death to make a claim. The P.R. has strong obligations to find the decedents creditors: Under Fla. Stat. § 733.2121(3)(a), the personal representative "shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the notice [to creditors] on those

creditors. Impractical and extended searches are not required." A "diligent search" has been defined to include an extremely careful review of the decedent's checkbooks for at least one year prior to the date of death in order to determine if the checkbook reveals any "trends" of payments to any individual or entity that may not be revealed by any other paperwork such as a loan, promissory note, or other documents evidencing a debt. *Strulowitz v. Cadle Company II, Inc.,* 839 So.2d 876 (Fla. 4th DCA 2003). **In all cases, all creditors' claims are cut off two years from decedent's date of death without exception.**

The Inventory is due 60 days after Letters of Administration issue. Fla. Stat. § 733.604 and 199.062(4); Rules 5.330(a) and 5.340, Fla.R.Prob. An Affidavit of No Florida Estate Tax Due, the DR-312, is also due, and a Statement Regarding Creditors is due after the creditors' claims period expires. If the estate is taxable, then the DR-312 will so note, the 706 should be filed and the IRS closing letter should be filed.

Once the assets are marshaled and the above procedures are complete, the P.R. can endeavor to make distributions. The P.R. has the option to prepare a formal (filed) or informal accounting (shared with distributees), or if the distributees all waive an accounting, it will not be required. Receipts and Releases are necessary from distributees, and Consents to Discharge the P.R., too. If they refuse to sign off, the P.R. can ask the court to allow discharge without consents.

The last petition to be filed is a Petition for Discharge. Most of the probate courts have closing checklists, to be sure everything was done properly. When approved, an Order of Discharge is entered by the Court. Fla. Stat. § 733.901, 198.23, 198.26, Rules 5.330(g), 5.400, 5.401, Fla..R.Prob.

Estates are required to be closed within one year of issuance of Letters. Obviously, not every estate can be closed in that time frame, so the P.R. can petition for an extension of time for good cause shown. They are almost always granted.

C. Ancillary estates

Florida's ancillary probate process is a full administration, but it is easier to get into court. The Florida-admitted attorney will require authenticated copies of various documents from your New York file. Fla.Stat. § 734.102, Rules 5.020(b), 5.470(a), Fla.R.Prob. The Ancillary P.R. still must go through the entire probate process before the Florida property can transfer.

D. Small Estates

Florida has two small estate proceedings, summary administration (Fla. Stat. § 735.201-.2063) and disposition of personal property without administration (Fla. Stat. § 735.301-.304). For the former, the value of the estate, not including exempt property, must be less than $75,000.00, or the decedent died more than two years prior (the magical creditors claims cut-off). This still requires an administration procedure that follows most of the steps, including notice to

interested persons, notice to creditors (if before they are cut off), etc. The Disposition of Personal Property Without Administration is a super-simplified procedure designed to get small amounts of money or valued goods into the hands of distributees: Exempt personal property, property exempt from the claims of creditors under the Florida Constitution, and nonexempt personal property "the value of which does not exceed the sum or $10,000 and the amount of preferred funeral expenses and reasonable and necessary medical expenses of the last 60 days of illness, provided the decedent has been deceased for more than 1 year" and no other administration is pending. This formula to calculate whether an estate qualifies can be confusing.

Practice tip: It is easy to commit malpractice in Florida regarding will drafting and probate if you are not familiar with the intricacies of Florida law. If you are foolish enough to try to probate an estate in Florida, be advised that judges are proactive and *will* file a complaint with proper authorities against an offending attorney. The unlicensed practice of law has been criminalized in Florida. The courts also will not hesitate to sanction an attorney who does not meet the time and substantive filing requirements.###

New York-Florida Snowbirds: Estate Planning & Elder Law Considerations

SUFFOLK ACADEMY OF LAW

NOV. 8, 2021

1-2:15 P.M.

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New York-Florida Medicaid Update

Medicaid Levels of Care

- **Home Care in Florida – Wait List/Optional Service 4-8 Hours Per Day on Average**
  - **Fair Hearing May Increase Hours**
  - **Assisted Living Facilities – Wait List/Optional Service**
  - **Transition Program – 60 Days**
  - **Institutional Care Program (ICP) Benefits**

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Medicaid Asset and Income Limits

- **Assets**
  - **Single Individual** - $2,000
  - **Community Spouse** - $130,380 (2021)
- **Income**
  - **Single Individual** - $2,382 (Miller Trust) (2021)
  - **Community Spouse** - $2,178 - $3,260/Month (2021) (Based on Shelter/Utility Costs)
- **Community Budgeting**
  - **New York** – Non-chronic Budgeting for 6 Months
  - **Florida** – Only Month of Admission to NH

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Florida Medicaid Distinctions

- **Home Equity Cap –** $603,000 (2021)
- **Promissory Notes**
  - **Used to Be Available Resource**
  - **Medicaid Manual Revised January 2010**
- **Annuities** – No Requirement to Name State if IRA Funds

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Florida Medicaid Distinctions

- **Burial Funds –** $2,500 in addition to Prepaid Contract
- **Personal Needs Allowance –** $105
- **Regional Rate –** $9,703 Statewide (2021)
  - **As of July 1, 2021**
- **Lookback Period** – 5 years
  - **Statements –** 6 Months? 3 Months?
  - **Provided All Asset Transfers Disclosed**

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Pooled Supplemental Needs Trusts

- **Frequently Used in Florida**
- **No Transfer Penalty for Transfers Made by Individuals Age 65 and Over –** Even for Nursing Home Medicaid
- **Payback Required –** May Not Be an Option for Everyone
- **Spring 2021 Update –** Change to ESS Manual Would Penalize Transfers to Pooled Trusts for Individuals 65 and Over

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Spousal Planning – Qualifying SNT

- **Can Satisfy Elective Share**
- **30% Elective Share in Florida**
- **Similar to N.Y. Elective Share Trust –** Eliminated in 1992
- **Common Tool for Medicaid Spousal Planning Used in LWT or Reverse Pour-over from RLT**
- **NYSBA Proposal**

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Florida Medicaid Asset Protection Trusts

- **Homestead Provisions**
- **Do Not Use Power to Substitute**
- **Corresponding Cites to –**
  - **No Power to Invade Principal**
  - **No Power to Allocate Between Income and Principal, and**
  - **No Power to Elect Unitrust**

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Qualified Income Trust

Qualified Income Trust

Miller Trust (1396p(d)(4)(B))

- **Exceed Income Cap = Medicaid Denial**
- **Qualified Income Trust**
  - **Income Collected by Trustee of Trust and Paid to Nursing Home as NAMI/Patient Responsibility**
- **May Be Established by Applicant, Spouse or POA/Guardian**
- **Must Include Language in POA**
  - **Consider Adding to New York POAs**

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Qualified Income Trust

A Florida appeals court finds that an applicant is eligible for Medicaid even though she failed to open an income trust account *because her case specialist did not inform her of the need for one.*

Forman v. State **(Fla. App. Ct., 4th Dist., No. 4 D06-1770, May 2, 2007)**

Spousal Refusal

Spousal Refusal

- In Florida Administrative Code Since 1997
- No Recovery Suits to Date
- *Feldman* case (1st DCA, Fla. – 12.14.05)(Case No. 1D04-4914)
  - Date of Refusal is Critical!
- Remains an Effective Planning Tool
- No Spousal Income Diversion Allowed in Florida When Spousal Refusal Used
  - Contrast with New York, Where Income Diversion Is Allowed Even Where Spousal Refusal Filed

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Personal Care Contracts

Personal Care Contracts

- **Frequently Used in Florida**
- **Lump-Sum Contracts Work**
- **Home Care – ALF – NH**
- **Out-of-State Children**
- **Proposed Legislation to Reduce Effectiveness of Personal Care Contracts**
- **Comparison to New York**

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Guardianship Distinctions

Guardianship Distinctions

Florida

- **Examining Committee and Court-Appointed Attorney in every case**
- **Professional Guardians**
- **Office of Public Guardian**
- **8-hour education requirement**

Guardianship Distinctions (cont.)

- **Ancillary Guardianship**
- **Automatically Suspends POA Until Petition Dismissed/Withdrawn or Court Orders Agent to Act**
  - **Exceptions:**
    - **Does Not Include Principal's Parent, Spouse, Child or Grandchild**
    - **Only If Pursuant to Further Order of the Court**
- **Florida does <u>NOT</u> participate in the Uniform Guardianship Jurisdiction and Protective Proceedings Act.**

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Domicile and State Tax

Considering Florida Residency?

- **Advantages**
  - **No State/City Income Tax**
  - **No Estate Tax**
  - **Intangibles Tax Eliminated**
  - **Roth IRA Conversions After Relocate**
  - **Constitutionally Mandated Homestead Protection**
  - **Bar on Estate Creditors' Claims 2 Years After Death**
- **Disadvantages**
  - **Sale of New York Home Accelerates Capital Gains Tax**

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Estate Tax Distinctions

- **Federal Estate Tax**
  - **Exemption –** $11,700,000 (2021)
- **New York**
  - **Exemption –** $5,930,000 (2021)
- **Florida**
  - **No Estate Tax!**

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Change in Domicile from New York to Florida

Benefits

- **More Options to Avoid Probate by Proper Homestead Planning – Lady Bird Deed or Revocable Trust**
  - **Downside –** You still must file will, notice of trust and death certificate upon death even if no probate. (Fla. Stat. §§ 732.901, 736.05055)
- ***In terrorem* clauses are unenforceable (Fla. Stat. §§ 732.517, 736.1108)**
  - **Downside** – Full-Blown Will Contests
- **Separate writings allowed to dispose of personal property (Fla. Stat. § 732.515)**
  - **Downside** – Possible Problem with Fraud or Forgery
- **No formal will ceremony formalities of execution**
  - **Downside** – Proper drafting is paramount, with proper page breaks and initials and dates on every page; More Estate Litigation

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Change in Domicile from New York to Florida (cont.)

- **Advance Directives Can Be Merged for Simplification**
  - **Chapter 765, Parts I, II, and III; However, DNRs Require Very Specific Execution, Including Yellow Paper**
- **DPOAs Are Not as Complicated as New York's**
  - **Chapter 709**
  - **No More Springing POAs (Fla. Stat. §709.2108(2))**

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Appointing a Personal Representative in Florida

Fla. Stat. 733.302

- **Any person who is *sui juris* and a resident of Florida at the time of the decedent's death may be appointed as personal representative.**

Fla. Stat. 733.303

- **Persons are not qualified to act as personal representative if the person: is a convicted felon; is mentally or physically unable to perform the duties; or is under the age of 18.**

Fla. Stat. 733.304

- **A nonresident of Florida may not act as personal representative, unless the person is: a legally adopted child or adoptive parent of the decedent; related by lineal consanguinity to the decedent; a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or the spouse of a person otherwise qualified under this section.**

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How to Establish Florida Domicile

- **Execute a Declaration of Domicile and file in the Records Office in the county where your Florida residence is located.**
- **Register to vote in the State of Florida.**
- **Change the owner's registration for automobiles and/or boats to Florida.**
- **Obtain a Florida Driver's License.**
- **File for Florida Homestead Exemption on your principal residence.**

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How to Establish Florida Domicile (cont.)

- **File Income Tax Returns with the IRS in Atlanta, Ga.**
- **Use your Florida address in all documents and records.**
- **When traveling, use your Florida address as the residence when registering at hotels, motels, etc.**
- **Spend as much time as possible in Florida.**

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How to Establish Florida Domicile (cont.)

- **Change your homeowner's insurance policy to show your Florida residence as your principal address.**
- **Most or all of your bank accounts and safe deposit box should be relocated to Florida.**
- **All bills should be sent to your Florida address.**

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How to Establish Florida Domicile (cont.)

- **To the extent possible, resign from local clubs and organizations or obtain non-resident membership, and join Florida clubs and organizations.**
- **To the extent possible, transact business in Florida.**
- **Execute a Last Will and Testament declaring Florida as your residence.**

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In the Matter of the Petition of Thomas Campaniello

- **Florida Driver License, Florida Vehicle Registration, Florida Voter Registration, Social Security Check Issued to Florida Address**
- **He had homes in both New York and Florida as well as businesses.**
- **He flew to Florida on Thursdays or Fridays and returned to New York on Mondays or Tuesdays –** Therefore, spending about half the year in Florida and half the year in New York.
- **His family and wife remained in New York.**
- **A change of domicile is a question of fact rather than law** – The court found that he *did not prove, by clear and convincing evidence,* that he gave up his New York City domicile and acquired a domicile in Florida.

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Snowbird Scenarios

- **Woman lived in Florida; NH wanted to relocate to Somers, N.Y. to be near her daughter.**
  - **We first were able to qualify her for Medicaid in Florida, and then we were able to get her on Medicaid in N.Y.**
  - **Medicaid is non-transferable, so really important to work with someone that knows the laws in both states.**
- **Woman living in her vacation home (used to be her primary residence) in upstate N.Y. Her homestead was in Florida and she went to N.Y. without the intent of making N.Y. her domicile, but fell ill while in N.Y.**
- **We got her N.Y. Medicaid, and preserved the home in Florida.**

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Snowbird Scenarios (cont.)

- **A single client has dementia.**
- **He has $450,000 of countable resources.**
- **His son lives in Suffolk County, and his daughter lives in Florida.**
- **N.Y.** – Advise son about gift/note planning preserving about ½ of the $450,000.
- **Fla.** – Dad can buy a $450,000 house in Florida, and have a Lady Bird deed.
  - Because the house is exempt in Florida, he is not only immediately Medicaid eligible, but upon his death, the house will immediately transfer to the two children, clear of any Medicaid claims – successfully preserving the entire $450,000.
- **He can then successfully apply for Medicaid with an intent to return home.**

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You May Need to Update Your Will When You Move

- **When moving to Florida or making your Florida real estate your primary residence, some estate planning documents, especially wills, may no longer be valid.**
- **Although most states grant reciprocity to out-of-state wills validly executed in the home state when signed, obstacles and unintended consequences may arise.**
- **Common issues your out-of-state will may face in Florida include:**
  - **Will is not self-proved due to difficulties locating witnesses.**
  - **Personal Representatives are disqualified under Florida law.**
  - **Revocable Living Trusts ignore Florida's homestead laws.**

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You May Need to Update Your Will When You Move (cont.)

- **It is essential to ensure that your existing will and estate planning documents from another state comply with Florida law.**
  - **i.e., Insufficient Durable Powers of Attorney**
  - **Banks, financial institutions and health care providers may not honor out-of-state documents, regardless of the law.**

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Keeping Track of Time Spent at Multiple Residences

Smartphone apps, such as Taxbird, are designed for snowbirds with multiple homes in different states.

- **Tracks what state the user is in;**
- **Determines how long the user spends in a particular state;**
- **Notifies user when a state residency threshold is approaching.**

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Manifesting and Evidencing Domiciliary Intent In Florida

Florida Statute §222.17

- **Declaration of Domicile –** A person can show intent to maintain a Florida residence as a permanent home by filing a sworn Declaration of Domicile with the Clerk of the Circuit Court/County Property Appraiser.

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Manifesting and Evidencing Domiciliary in Florida – Sample Declaration

I,(NAME), was formerly a legal resident of (CITY, STATE), and I resided at (STREET ADDRESS), however, I have changed my Domicile to and have been a bona fide resident of the State of Florida since the ____ day of _____,2019.

I now reside at (STREET ADDRESS, CITY, COUNTY), Florida, and this statement is to be taken as my declaration of actual legal residence and permanent domicile in this State and County to the exclusion of all others, and I will comply with all requirements of legal residents of Florida.

I understand that as a legal resident of Florida: I must purchase Florida license plates for motor vehicles, if any, owned by me, and/or my spouse; if I vote, I must vote in the precinct of my legal domicile and that my estate will be probated in the Florida Courts.

I was born in the U.S.A.: Yes____ No___ Place of birth: _____

Naturalized citizen - Where:_____ Date: _____ No._____

Lawful Permanent Resident: Date: _____ No. _____

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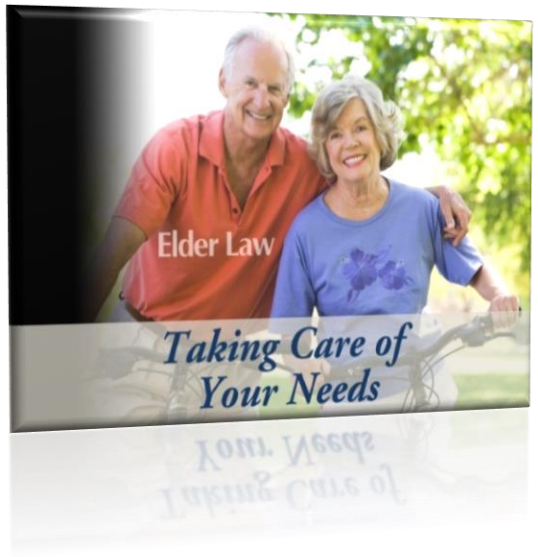
Questions?



Thank You!

Howard S. Krooks, CELA, CAP
Member, Cozen O'Connor

7284 West Palmetto Park Road, Suite 101
Boca Raton, FL 33433
(561) 750-3850
www.elderlaw.cozen.com
Offices in Boca Raton, West Palm Beach, New York

COZEN O'CONNOR

SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)

Feel Free to Join Us at Our Weekly Recovery Meeting