

Assisting the Snowbird Client - A Primer for New York Attorneys

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The Florida Homestead Protection

**Article X, Section 4 of the Florida Constitution –
Creditors cannot force the sale of your homestead to satisfy a judgment.**

- Homestead - one's permanent residence

Fla. Stat. §196.031

- 1. Up to ½ acre in the city or 160 acres in the country**
- 2. Must permanently reside on property as of January 1**
- 3. No other residency-based exemption in another county, state or country per “family unit” (spouses)**



The Florida Homestead Protection

- 1. Creditor Protection (i.e., protection from forced sale)**
- 2. Descent and Distribution Rules**
- 3. 3% Tax Increase max**



The Florida Homestead Protection

Unlimited creditor protection for homestead improvements and property

Exceptions to Protection From Forced Sale

1. **Property Taxes** - State of Florida and municipalities may force sale to collect past due property taxes
2. **Banks** - Parties to whom property was specifically pledged as collateral for a mortgage
3. **Mechanic's Liens** - Contractors who are owed money for work performed in repairing or improving property
4. **Pre-Existing Liens** - Any creditor with a lien that pre-dates the establishment of homestead.



The Florida Homestead Protection

Property Tax Benefits

- **\$50,000 exemption**
- **Additional \$50,000 Senior Exemption**
- **Annual Property Tax Increase Limited to 3%**
- **Rental destroys protection**
- **No Medicaid estate recovery**



The Florida Homestead Protection

Descent and Distribution Issues

- **Life estate for surviving spouse with a vested remainder to the descendants in being at the time of decedent's death**
- **Requires knowing and voluntary waiver**
- **2nd marriage issue**



The Florida Homestead Protection

Probate Issues

1. Summary Administration
 - More than 2 years after death, or
 - Less than \$75,000
2. Full Administration
 - Publication Required – 90 days
3. Ancillary Administration



When is a “Determination of Homestead” Needed/ Useful

- A determination of homestead is needed to allow a property that was the decedent’s homestead to pass free and clear to the decedent’s heirs exempt from the claims of creditors
- The determination acts akin to a deed and vests the interest in the property in the heirs



The Florida Homestead Protection

Can a revocable trust hold an interest in homestead property w/o destroying protection?

- **Bonsonetto says no (271 B.R. 403 (Bankr. M.D. Fla. 2001))**
- **No Florida law cited**
- **Not followed in subsequent cases**



The Florida Homestead Protection

Alexander case says yes

- Chapter 7, 2006 Bankr. LEXIS 1459, Case No. 05-12271-8W7
- Cites *Callava v. Feinberg*, 864 So.2d 429 (Fla. 3d DCA 2004)
- Cites *Bessemer Props., Inc. v. Gamble*, 27 So.2d 832 (Fla. 1946)



The Florida Homestead Protection

Can an irrevocable trust hold an interest in homestead property w/o destroying protection?

- **Yes - Possible**
- **Draft language preserving homestead protection**
- **Retain “beneficial title in equity to real property”**



Primary Residence in Different States

Glenbrair Co. v. Lipsman, 5 N.Y.3d 388 (Oct. 20, 2005)

- Florida offers the special homestead exemption and New York offers the rent stabilization code
- Each of two spouses can claim such separate “primary” residences
 - H in Florida due to emphysema
 - W in NY (at least 183 days, bank accounts, family possessions, voting)



Medicaid Levels of Care

Home Care in Florida

- 8 – 10 hours per week
- Assisted Living Facilities
- Wait List/optional service
- Transition Program
- Institutional Care Program (ICP) Benefits



Medicaid Asset and Income Limits

- **Assets**
 - **Single Individual - \$2,000**
 - **Community Spouse - \$120,900**
- **Income**
 - **Single Individual - \$2,205 (Miller Trust)**
 - **Community Spouse - \$2,003 - \$3,023**
- **Community Budgeting**
 - **New York – non-chronic budgeting for 6 months**
 - **Florida – only month of admission to NH**



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
- Must include language in POA
 - Consider adding to NY POAs



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. 4D06-1770, May 2, 2007).



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)
- Remains an effective planning tool
- No spousal income diversion
- Date of Refusal is Critical



Power of Attorney Provisions

1. **New POA Statute – October 1, 2011**
2. **Super Powers require initials**
3. **Miller Trust provision**
4. **Personal Care Contract provision**
5. **2 Witnesses + Notary**
6. **NY POA SGR lacking 2 witness requirement**
7. **Possible to combine with health care designation**
8. **Statute allows copies of POA = originals. But you MUST have original for real property transactions because the clerk's office will not record a copy of the POA.**



Spousal Planning- Qualifying SNT

- 1. Can satisfy elective share**
- 2. 30% Elective Share in Florida**
- 3. Similar to NY Elective Share Trust (eliminated in 1992)**
- 4. Common tool for Medicaid spousal planning used in LWT / Reverse pourover from RLT**
- 5. NYSBA Proposal**



Ladybird Deed

- **Enhanced Life Estate**
- **Fee Simple Interest Retained by Grantor**
- **Full right to sell, convey, assign, mortgage**
- **Remainder Person(s)**
- **Avoids probate**
- **Be Careful – Not for New York Medicaid**
- **Life estate – no value unless sold**
- **Transfer of life estate = no penalty**



Personal Care Contracts

- 1. Frequently used in Florida**
- 2. Lump sum contracts work**
- 3. Home Care – ALF - NH**
- 4. Out of State Children**
- 5. Proposed Legislation to Reduce Effectiveness of PSKs**



Guardianship Distinctions

Florida

1. **Examining Committee and Court-Appointed Attorney in every case**
2. **Professional Guardians**
3. **Office of Public Guardian**
4. **8 hour education requirement**



Guardianship Distinctions

(cont.)

5. **5. Ancillary Guardianship**

6. **6. Automatically suspends POA until petition dismissed/withdrawn or court orders agent to act.**

Exceptions:

- It is the principal's parent, spouse, child, or grandchild
- Only if pursuant to further order of the court

7. **Florida does NOT participate in the Uniform Guardianship Jurisdiction and Protective Proceedings Act.**



DRA Implementation

1. New York

- 06 OMM/ADM-5 effective August 1, 2006

2. Florida Rules

- Rule Change to Administrative Code 65A-1.712
- Effective Date – November 1, 2007
- 2nd Rule – Effective December 24, 2009



DRA Implementation

1. Lookback

- No 60 Month Lookback Specified in first 2 Rules
- Phasing In began in June 2013

2. Penalty Period

- Institutional level care def. being used
- 2 Medicaid Applications Required (Special Review)
- Partial Return of Funds Allowed
- HCBS Waiver Issue – “Enrolled”



DRA Implementation (cont.)

1. **Home Equity Cap - \$560,000**
2. **Promissory Notes**
 - Used to be available resource
 - Medicaid Manual Revised January 2010
3. **Annuities – no requirement to name state if IRA funds**
4. **Life Estate Provisions**
 - Allows temporary absences during 1st year



Other Florida Medicaid Distinctions

1. Burial Funds - \$2,500 in addition to Prepaid Contract
2. Personal Needs Allowance - \$105
3. Regional Rate - \$8,662 statewide
 - As of September 1, 2016
4. Lookback Period – 5 years
 - Statements - 6 months? 3 months?
 - Provided all asset transfers disclosed



Estate Tax Distinctions

1. Federal Estate Tax

- Exemption - \$5,490,000

2. New York

- Exemption - \$5,250,000 as of
April 1, 2017

3. Florida

- No Estate Tax!



Estate Accounting

- Florida is a mandatory accounting state, so you must file an accounting to close out the estate.
- New York is voluntary, therefore, no obligation on part of the executor/trustee to file an accounting unless compelled to do so (i.e., by a beneficiary or the court).



Considering Florida Residency?

1. 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

2. Disadvantages

- Sale of New York home accelerates capital gains tax



Change in Domicile from New York to Florida

- **Benefits:**
 - More options to avoid probate by proper homestead planning-ladybird 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
 - Not stuck on staples and will ceremony formalities of execution
 - Downside: Proper drafting is paramount, with proper page breaks and initials and dates on every page



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 NY's, Chapter 709; no more springing POAs, Fla. Stat. § 709.2108(2)



Improper Client Gift to the Drafting Lawyer

- F.S. 732.806 codifying ethics Rule 4-1.8(c)
- Improper client gift to the drafting lawyer or a person related to the drafting lawyer are an automatic basis for voiding that part of the will or other written instrument
- Exceptions:
 - Gifts to a lawyer if the lawyer is related to the person making the gift
 - A written instrument appointing a lawyer as a fiduciary
 - Title to a property acquired for value from a person who receives the property in violation of the restrictions on gifts.



Improper Client Gift to the Drafting Lawyer (cont.)

- The right way - the transaction meets general standards of fairness and the lawyer does not prepare the instrument bestowing the gift
- Client is advised by independent counsel



Naming drafting lawyer as PR or Trustee

- Must obtain the client's "informed consent" to such appointment.
- Informed consent must be in writing, and should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position



How to Establish Florida Domicile

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



How to Establish Florida Domicile (cont.)

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



How to Establish Florida Domicile (cont.)

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



How to Establish Florida Domicile (cont.)

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



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



Snowbird Scenarios

- Woman in Florida NH wanted to relocate to Somers NH 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 NY (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 NY. Her homestead was in Florida and she went into NH without the intent of making NY her domicile. We got her NY Medicaid, and preserved the home in Florida.

Snowbird Scenarios (cont.)

- A single client has dementia. He has \$450,000 of countable resources. His son lives in Broome County, and his daughter lives in Florida. NY- Advise son about gift note planning preserving about ½ of the \$450,000. FL- Dad can buy a \$450,000 house in Florida, and have a lady bird deed. He can then successfully apply for Medicaid with an intent to return home. Since 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.



Thank You!

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