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Should They Stay or Should They Go?

A Primer for New York Attorneys Advising Their Florida Snowbird Clients

By Howard S. Krooks

Although the numbers fluctuate from year to year, Florida remains a popular destination for Northeasterners to vacation and in many cases to own a second home. This is particularly true for New Yorkers, who have claimed Southeast Florida as the “6th Borough.” The so-called New York-Florida connection raises a variety of legal issues that can be complex for the New York practitioner advising the Florida snowbird. I have practiced in New York since 1990 and in Florida since 2005, so these issues arise frequently in my New York- and Florida-based elder law and special needs planning practices. This article will inform the New York attorney about some of the most important aspects of Florida law that must be considered when counseling clients with a nexus to Florida. Understanding these rules will help New York practitioners counsel Florida snowbird clients who are deciding whether to remain a New York resident or become a Florida resident, and to identify when it is appropriate to bring a Florida attorney into the planning process.

Advance Directives

Your client already has advance directives in New York and wants to know if she needs to execute the same documents in Florida. While it is tempting to hang your hat on the full faith and credit doctrine, and the fact that both New York and Florida have statutes which acknowledge that an out-of-state document is to be honored in-state as long as it was validly executed in the other state, there are practical reasons for advising your clients to have advance directives signed in both states. The foremost reason is that an out-of-state document gives health care providers and financial institutions a “reason” to decline to honor the advance directives, notwithstanding full faith and credit. We’ve all been there; ready to take the gloves off because we know the law, but our clients aren’t much interested in litigating against a bank or a health care provider in order to have their legal documents honored. This is one of those cases where it is simply more practical, and far less expensive, to have advance directives in both states signed, so that



when your client is in Florida, her agents can present the Florida documents that will be easily recognized and are more likely to be honored by third parties.

The power of attorney executed by the New York client may present a number of issues if it is to be used in a Florida transaction. While New York's power of attorney statute was modified as of September 1, 2009, to require two witnesses in the Statutory Gifts Rider, many New York powers

of attorney will not satisfy this two-witness requirement, precluding the use of the power of attorney for real estate transactions, possibly the most common reason the power of attorney is used – to buy or sell Florida real estate. Further, many New York practitioners may be unaware that to convey real property in Florida, the county property appraisers' offices require the original power of attorney to accompany the deed for recording purposes. A copy of the power of attorney will not suffice. This is a fact that will not become apparent until the property appraiser returns the deed as unrecordable due to the lack of the original power of attorney. If the grantor is incapacitated when the deed is prepared, and there is no original power of attorney, the only alternative will be to advise your client to bring a guardianship petition, even if the sole purpose in doing so is to accomplish the deed transfer.

The Last Will and Testament

We attorneys are often asked whether a last will and testament signed in one jurisdiction will be honored if the testator dies in and requires probate in another jurisdiction. Generally, if the will is valid in the jurisdiction in which it was signed it will be honored in the foreign jurisdiction to which the decedent relocated prior to his death. What if a New York attorney prepares a will for a client while he is in New York but the client owns a home or spends a great deal of time in Florida? Or, suppose you have represented a client for many years, and now he is relocating to Florida. He has a longstanding relationship with you and doesn't really know any attorneys in Florida, so he asks you to prepare his will. Should you? This can be a thorny question since you may feel compelled to help your longstanding client, but unless you are also admitted in Florida, you have an unauthorized practice of law (UPL) issue to deal with. In addition to the UPL issue, there is the potential for malpractice claims any time the New York practitioner drafts a will for a Florida resident. Here are a couple of things the New York practitioner may not be aware of.

Limited Persons May Serve as Personal Representative Under Florida Law

Florida has special requirements for a person to serve as personal representative (Florida's term for the executor of the will). In order for an estate to go through the probate process in Florida, the personal representative must meet

stringent requirements. Failure to do so will result in that individual being disqualified from serving as personal representative of the estate, in some cases giving rise to extensive and costly litigation.

Consider a woman who resided in Westchester County, who owned a home in Florida, and who died in Florida in 2004. "Jane Doe" had a multimillion-dollar estate, and she had her New York attorney prepare her will pursuant to which she attempted to appoint four individuals to serve as her personal representatives. In her will she named her son, her accountant (a Florida resident) and two of her friends, both of whom were New York residents. When the estate was admitted to probate in Florida, the probate court appointed the son and the accountant as co-personal representatives, but refused to appoint the two friends from New York as personal representatives, notwithstanding the express wishes of the decedent that all four individuals serve.

Why? Because under Florida Statutes, only the following individuals may serve as personal representatives: "Any person who is sui juris and is a resident of Florida at the time of death of the person whose estate is to be administered is qualified to act as personal representative in Florida."¹

Furthermore, a person who is not domiciled in the state of Florida cannot qualify 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.²

In addition to the foregoing, certain trust companies and other corporations may serve as personal representative of an estate being administered in Florida.³

What happened to the estate of the Westchester woman who died in Florida? For more than two years after her death, the estate was mired in litigation over, among other things, who should properly serve as personal representatives of the estate. Therefore, New York practitioners need to be aware of the requirements for serving as personal representative in Florida and make efforts to be sure anyone appointed in a will to serve as such satisfies Florida's requirements.

Long-Term Care Planning for Spouses

In Florida, one can satisfy the elective share by creating in his or her last will and testament a qualifying supplemental needs trust (SNT) for the benefit of the surviving spouse. Florida's elective share is an amount equal to 30% of the elective estate.⁴ Since 1999, the property that is included in the elective estate is augmented for elective

share purposes in Florida, as set forth in Florida Statute § 732.2035. The augmented elective estate includes, among other things, assets in the decedent's probate estate, the decedent's ownership interest in "transfer on death," "payable on death" and "in trust for" accounts or accounts co-owned with rights of survivorship. The elective share is in addition to the homestead, exempt property and the family allowance.⁵

Under Florida law, the income and principal of the qualifying supplemental needs trust must be distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are "ineligible" family trustees. Ineligible family trustees include the decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse.⁶ Thus, this would include the decedent's parents and brothers and sisters, nieces and nephews, etc.

Florida law also requires court approval for the creation of such a qualifying supplemental needs trust in satisfaction of the elective share if the aggregate value of

Imagine a married couple whose estate is valued at \$400,000. Whether utilizing the reverse pour-over concept or simply having all of the assets pass through probate, if the spouses execute wills creating a qualifying supplemental needs trust for each other's benefit when they die, then \$120,000 would go into a supplemental needs trust upon the death of the first spouse for the benefit of the surviving spouse. Rather than being forced to spend down these funds on long-term care costs, these funds would remain available to supplement those costs to the extent not covered by a government program such as Medicaid. In New York, which does not presently allow the satisfaction of the elective share by creating an elective share trust, the surviving spouse would either have to spend down the elective share amount or could engage in Medicaid planning to protect a portion of that amount. However, the surviving spouse's ability to engage in Medicaid planning is severely restricted due to the provisions of the Deficit Reduction Act of 2005.

The Elder Law Section of the New York State Bar Association is currently spearheading an effort to pass

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all property in the trust is \$100,000 or more. While this will require some additional legal fees and probate fees that might have otherwise been avoided through the use of a non-SNT trust, the benefits far outweigh these additional costs.

A "reverse pour-over supplemental needs elective share trust" may sound like a mouthful of legalese but this advanced Florida planning strategy provides the client with the benefits of a revocable trust along with the benefits of elective share preservation. The trust typically owns all of the couple's assets. The trust includes a provision for the calculation of the elective share amount and directs that the elective share amount shall pass to the decedent's estate. The decedent's last will and testament would then create the supplemental needs elective share trust. Because the supplemental needs trust is created under the will, the client avoids potential Medicaid transfer penalties. Because the couple's assets are owned by the trust, all of the other assets pass outside of the estate and are not subject to a Florida probate proceeding. The "reverse pour-over supplemental needs elective share trust" provides clients with the best of both worlds, avoiding the delay and expense of probate with respect to the bulk of estate assets while allowing for the elective share to be made available to the surviving spouse free of Medicaid penalties.

legislation that would codify the approach available in Florida. It is an approach that makes sense because it preserves the surviving spouse's right to the elective share amount while also permitting the spouses to engage in some type of planning designed to achieve asset protection in the face of exorbitant long-term care costs. While New York practitioners often draft supplemental needs trusts into their wills, there is no provision of New York law that will allow for the elective share law to be satisfied in this way. Instead, New York's elective share law requires an outright distribution of the elective share amount (33-1/3%). Thus, a couple considering long-term care issues may choose to declare Florida residency in order to take advantage of the above provisions.

Long-Term Care Planning Issues

Helping clients decide where to receive and how to finance long-term care services is one of the most important services elder law attorneys provide. It is a lot easier to render this advice when a client is deciding between two counties located in New York State, where the Medicaid eligibility rules are statewide, even though there are some local variances. Many complex issues arise when a client is deciding to receive long term care either in New York or Florida. Here are some tips that will help



New York practitioners help their clients decide where to receive long term care services:

1. New York has a home care program that in certain cases will allow a person to remain in his or her home and receive 24/7 care. Florida's home care program is limited to about two hours per day, five days per week, and is funded intermittently, meaning that there can be a wait for services.

2. Although more beds have become available in recent years, New York's Assisted Living Program is limited in scope, with half of New York counties not offering any ALP beds. Most assisted living facilities in New York remain a private pay only proposition, unless one is fortunate enough to locate an ALP bed. In Florida, the Medicaid Diversion program covers the medical cost of an assisted living facility when the program is funded. Funding is at the discretion of the legislature and can result in long wait lists for individuals seeking such assistance.

3. Nursing home care is a mandatory service under the Medicaid program, so one can access this level of care in either New York or Florida without funding issues, as is the case at the assisted living and home care levels. However, there are significant differences between the two states from a long-term care planning perspective.

- Personal care contracts are more widely used in Florida than New York. Florida is more liberal than New York in that it permits the use of such contracts in the nursing home context and also permits the use of lump-sum contracts.
- Partial return of funds is permitted in Florida after an asset transfer has been made in order to reduce the applicable penalty period. While some New York counties permit the use of the partial return approach, many do not, resulting in the need to engage in some type of promissory note planning.
- New York is a spenddown state while Florida is an income cap state. This means that while a New York resident can spend down his or her income, regardless of amount, and when the income is fully spent he or she can qualify for Medicaid, a Florida resident cannot have more than \$2,022 per month in income. If he or she does, then a qualified income trust must be established in order to receive the excess income each month, which is then used towards the cost of long-term care.
- Both states honor spousal refusal in the nursing home context.
- New York's Medicaid resource allowance is currently \$13,800, while Florida's remains at \$2,000.
- New York has fully implemented a 60-month lookback period for all transfers, while Florida is still at 36 months for non-trust transfers; Florida's phase-in period starts January 2013 and goes through December 2014.

What Are the Advantages of Establishing Florida Residency?

For clients considering establishing Florida residency, there are many advantages to doing so:

- Florida has no state income tax, whereas New York has a state income tax equal to about 8% for an individual in the highest tax bracket. Even considering individuals in retirement with lesser earnings, New York State taxes income over \$20,000 at about 7%.
- One planning strategy to consider would be to advise a client to declare Florida residency before taking major withdrawals from traditional IRAs or participating in a Roth conversion to avoid the state income tax component of such a transaction.
- Florida has no estate tax, whereas New York imposes a state estate tax beginning with estates valued over \$1 million.
- The Florida Intangibles Tax has been *eliminated* as of January 1, 2007. Previously, Florida imposed a tax at the rate of \$.50 for every \$1,000 worth of intangible assets owned (less an exemption amount of \$250,000 per person or \$500,000 per couple) on intangible property (stocks, bonds, mutual funds, etc.).
- The homestead is constitutionally and statutorily protected from creditors, regardless of amount.

How to Establish Florida Residency

An individual can have several residences, but only one domicile. Domicile refers to one's principal place of residence and, once established, domicile will continue until changed. To change a domicile, one must move to another location with the intention to make the new location the place of domicile. The best proof of a person's domicile is where he or she says it is. However, courts and taxing authorities often look at objective factors in analyzing proof of intent. I strongly recommend that my clients who desire to establish a new domicile in Florida take as many of the following actions as possible:

1. Execute a Declaration of Domicile and file it in the records office in the county where the client's 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 the client's principal residence.
6. File income (and gift) tax returns with the Internal Revenue Service Center in Atlanta, Georgia.
7. Use the Florida address in all documents and records.

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8. When traveling, use the Florida address as the residence when registering at hotels, motels, etc.
9. Change the homeowner's insurance policy to show the Florida residence as the client's principal address.
10. Most or all of the client's bank accounts and safe deposit box(es) should be relocated to Florida.
11. All bills should be sent to the Florida address.
12. To the extent possible, resign from local clubs and organizations or obtain non-resident membership, and join Florida clubs and organizations.
13. To the extent possible, transact business from Florida.
14. Execute a last will and testament declaring Florida as the client's residence.
15. Spend as much time as possible in Florida.

There are many considerations when advising the Florida snowbird client regarding estate and long-term care planning. The items discussed here are only a handful of the issues that can arise in this situation. The best course of action for New York practitioners with Florida snowbird clients would be to consult with or co-counsel with a Florida elder law attorney to address these issues on their clients' behalf. ■

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1. Fla. Stat. § 733.302.
 2. Fla. Stat. § 733.304.
 3. Fla. Stat. § 733.305.
 4. Fla. Stat. § 732.2065.
 5. Exempt property includes, among other things, household furniture, furnishings, and appliances in the decedent's usual place of abode up to a net value of \$10,000 as of the date of death and all automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles. Fla. Stat. § 732.402.
 6. Fla. Stat. § 732.2025(8)(a).