Sunshine State Strategies: What Out-of-State Attorneys Must Know About Florida Elder Law, Estate Planning, Probate, and Long-Term Care Planning

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This Estate Planning article provides a guide for out-of-state attorneys on Florida-specific elder law and estate planning issues, highlighting critical statutory nuances, homestead protections, fiduciary roles, probate procedures, and planning strategies and emphasizes the importance of coordination with local counsel to avoid potential traps for the unwary.

Navigating the nuances of elder law, estate planning, special needs planning, probate and long-term care planning in Florida can be a daunting task for attorneys licensed outside the state working with clients who have a nexus to Florida. With its unique statutory frameworks, homestead protections, Medicaid eligibility rules, and probate procedures, Florida presents a distinct legal landscape that demands careful attention—especially for practitioners assisting clients who plan to reside, retire, or own property in the Sunshine State.

This article highlights the most critical issues that out-of-state attorneys must understand when advising clients with Florida ties. From trust funding and ancillary probate to drafting core estate planning documents and advance directives, supported decision-making, fraud and exploitation issues and Medicaid crisis and long-term care planning, the stakes are high and the details matter.

Whether you are coordinating with Florida counsel or just looking to gain a better understanding of cross-jurisdictional matters, being well-versed in Florida's state-specific intricacies is essential to delivering sound legal guidance and avoiding costly missteps.

Drawing on professional experience, real-world planning scenarios and recent legislative developments, this article offers practical insights and strategic considerations to help out-of-state attorneys become familiar with Florida's elder law and estate planning terrain.

Whether you're advising snowbird clients, handling probate for Florida property, drafting legal documents or planning for long-term care, this article will equip you with the foundational knowledge needed to better serve your clients effectively. Practitioners should recognize that this article is by no means a comprehensive treatment of the issues discussed. Rather, it is a first step to understanding many of the issues that must be addressed when dealing with Florida based planning. A deeper dive into some of these issues may be warranted for specific planning scenarios.

ESTATE PLANNING IN FLORIDA

This article will explore the core estate planning documents typically used in a client's basic estate plan. These will include the often relied upon revocable trust, last will and testament, and applicable Florida advance directives. The primary focus is on the non-taxable estate planning client.

Advance Directives

The power of attorney.

Florida last overhauled its power of attorney statute effective October 1, 2011 in the Florida Power of Attorney Act, which is codified in Chapter 709, Part II, Florida Statutes. Some of the major components of the statute include the following:

1. **Execution Requirements:** A Florida power of attorney (POA), to be valid, must be signed by the principal in the presence of two subscribing witnesses and acknowledged before a notary public.[1]
2. **Durability:** A Florida power of attorney must expressly state that it is durable to remain effective after the principal's incapacity.[2]
3. **Elimination of Springing Powers of Attorney:** All Florida powers of attorney executed on or after October 1, 2011 are presumed to be effective immediately upon execution, and springing powers of attorney (those that become effective upon incapacity) are not permitted if executed on or after October 1, 2011 (with limited exceptions for military POAs).
4. **Certain Powers Requiring Separate Enumeration:** "Superpowers," as they are known in Florida, refer to the enumeration of certain powers with significant estate-planning impact and require specific, separately initialed authorization by the principal, including among many others:
   - Making gifts
   - Creating, amending, or revoking trusts

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- Changing beneficiary designations
- Waiving survivorship rights
- Creating or changing joint ownership

6. **Third Party Reliance:** Third parties (such as banks and financial institutions) are generally permitted to rely on a properly executed power of attorney and are given statutory protections when acting in good faith. The Act also sets out when refusal to accept a POA is permitted and when it is not.
7. **Original Power of Attorney Not Required:** Except as otherwise provided in the power of attorney document, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original under Florida law.[3] This provision has largely eliminated, with only an occasional violation by a third party, any of the issues that arise when the original document is unable to be located.
8. **Financial Institutions Forms of Powers of Attorney Not Required:** Florida law provides that a third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented, such as the financial institution's own form.[4]

Treatment of out-of-state powers of attorney in Florida.

What if your client already has advance directives in your home state 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 Florida has statutes which acknowledge that an out-of-state document is to be honored in-state as long as it was validly executed in the home state,[5] there are practical reasons for advising your clients to have advance directives signed in both states. The primary 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 have all been there; ready to take the gloves off because we know the law, but our clients are not much interested in litigating against a bank or a health care provider to have their legal documents honored. This is one of those cases where it simply is 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.

> Section 736.0602 establishes a fundamental premise of Florida trust law: the power to amend or revoke a revocable trust is a grantor power, not a trustee power—even when the grantor and trustee are the same individual.

The power of attorney executed by the out-of-state client may present a number of issues, particularly if it is to be used in a Florida real estate transaction. While some states require two witnesses on the power of attorney document itself, bringing this in line with Florida's requirement that powers of attorney be witnessed by two individuals and a notary,[6] some states require only one witness, and still others do not require any witnesses and only require notarization. Any deficiency in Florida's two witness and notarization requirements will very likely eliminate the possibility of using the power of attorney for real estate transactions, possibly the most common reason the power of attorney is used here – to buy or sell Florida real estate.

This is the case although Florida's power of attorney statute recognizes the validity of out of state powers of attorney, provided they comply with the laws of the foreign jurisdiction. The problem is rooted in Florida Statutes §689.01, which requires there be two witnesses on a deed to validly convey real property in Florida. In addition, Florida Statutes §695.03 requires the grantor's signature to be notarized in order to be recorded. As a result, Florida title companies will insist that the power of attorney document be signed with the same formality as a deed (two witnesses and a notary) to validly convey Florida real property, notwithstanding the power of attorney statute's apparent acceptance of a foreign state's less stringent execution formalities.

This issue may resolve after five years from the date of recording of the Florida deed signed by the owner of the property under Florida Statutes §95.231(1), which states that if a deed has been recorded for five years or more, and there is no fraud, adverse possession, or pending litigation, then the absence of witnesses is effectively cured. The deed is treated as valid despite the initial defect in execution. Additionally, if the deed was executed by someone in a representative capacity (e.g., attorney-in-fact, trustee, manager, member, president), the timeline extends to seven years, as outlined in Florida Statutes §694.08(1). Notwithstanding these curative provisions, a best practice for out-of-state practitioners would be to assure that the power of attorney contains two witnesses and a notary to avoid any issues.

Preserving the incapacitated grantor's powers - Why a power of attorney must work alongside the successor trustee under Florida law.

Florida estate planning often relies on a familiar structure: a revocable trust naming the grantor as initial trustee, paired with a successor trustee to step in upon incapacity. While this design ensures continuity of trust administration, it does not preserve the grantor's ability—through a surrogate decision-maker—to amend, revoke, or otherwise reshape the trust once incapacity occurs. Florida Statutes §736.0602, read in conjunction with Chapter 709, makes clear that these functions require separate and deliberate planning, and that a successor trustee alone cannot fill this role.

Grantor Powers vs. Trustee Powers Under § 736.0602: Section 736.0602 establishes a fundamental premise of Florida trust law: the power to amend or revoke a revocable trust is a grantor power, not a trustee power—even when the grantor and trustee are the same individual. A grantor's power to amend or revoke a revocable trust does not automatically vest in the successor trustee.

Indeed, § 736.0602(5) expressly provides that a grantor's powers of revocation, amendment, or distribution of trust property *may be exercised by an agent under a power of attorney only if the requirements of Chapter 709 are satisfied.* By negative implication, no other fiduciary— including a successor trustee—may exercise those powers absent compliance with statutory authorization.

This distinction is critical. A successor trustee who succeeds to the office of trustee may only administer the trust *as written.* The successor trustee does not become the grantor, does not inherit the grantor's retained ownership rights, and cannot unilaterally revise the trust's dispositive scheme or revoke it in response to changed circumstances.

Why the Appointment of a Successor Trustee Alone May Not be Enough: Naming a successor trustee solves only one problem: administrative incapacity. It ensures that bills can be paid, investments managed, and existing distribution provisions carried out when the grantor-trustee becomes incapacitated.

What it does *not* solve is decision-making incapacity at the ownership level. Without POA-based authority that complies with §§ 736.0602 and 709.2202:

- A revocable trust may become *functionally irrevocable* upon incapacity.
- Outdated or defective dispositive provisions cannot be corrected.
- Tax planning opportunities requiring amendment or partial revocation are lost.
- Changed family circumstances (death, disability, estrangement) cannot be addressed. In short, the plan continues to operate—but it cannot evolve.

This result is the direct consequence of Florida's statutory decision to protect the settlor's intent by requiring explicit delegation of amendment and revocation powers.

The Role of the Power of Attorney Under Chapter 709 in Resolving this Dilemma: Chapter 709, Florida Statutes supplies the only statutory mechanism by which an incapacitated grantor's powers may be exercised by another person without judicial intervention. But that authority must be expressly stated. Section 709.2202 requires that powers affecting estate planning documents—including the revocation or amendment of a trust—be expressly and separately enumerated in the power of attorney.

> The power of attorney must expressly authorize the agent to amend or revoke the trust or direct trust distributions, in compliance with § 709.2202.

Section 736.0602(5) incorporates that requirement by reference. As a result, two conditions must be met before an agent may act on behalf of an incapacitated settlor:

1. The trust must permit the grantor's agent to exercise settlor powers (by acknowledging the possibility and deferring to Chapter 709); and
2. The power of attorney must expressly authorize the agent to amend or revoke the trust or direct trust distributions, in compliance with § 709.2202.

To be clear, neither document alone is sufficient. Trust language cannot enlarge POA authority, and POA language cannot override the trust. The statutory scheme requires synchronized coordination between the trust and the power of attorney.

Why We Often Need Both a Successor Trustee and a POA Agent: Some practitioners may consider Florida's approach duplicative. Rather than redundancy, Florida law envisions complementary fiduciary roles:

- The successor trustee ensures uninterrupted administration of the trust *as written.*
- The agent under a properly drafted power of attorney preserves the grantor's ability—through agency rather than guardianship—to revise, revoke, or redirect the trust during incapacity.

These roles address different risks. The successor trustee maintains operational stability. The POA agent preserves strategic flexibility.

A trust plan that relies solely on a successor trustee prioritizes continuity but sacrifices adaptability. A plan that includes both allows the estate plan to remain *alive*—capable of responding to tax law changes, family developments, and drafting corrections even after the settlor loses capacity.

Intentional Design vs. Inadvertent Outcome: Certainly, there are circumstances where planners may intentionally choose to forgo POA-based amendment authority—such as when asset-protection planning is paramount or where elder-abuse concerns dominate. But, given Florida's statutory framework discussed above, those outcomes must reflect affirmative intent on the part of the drafting attorney.

The health care surrogate.

The primary statute governing the designation of a health care surrogate is Florida Statutes §765.202. This statute sets out the requirements for creating a valid health care surrogate document, including execution formalities, witness requirements, alternate surrogates, immediate authority options, and limitations.

Out-of-state practitioners should be aware that:

1. Two witnesses must sign the health care surrogate document and, although notarization is not required it is often used in these documents.[7]
2. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name.[8]
3. The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate. At least one person who acts as a witness shall be neither the principal's spouse nor blood relative.[9]

4. An alternate surrogate may be named under the statute[10] and it is worth noting that nothing in the Florida health care surrogate statute precludes the appointment of multiple agents. Practitioners should note that other jurisdictions, such as New York, do restrict the appointment of a health care decisionmaker to only one acting proxy (as the defined term is used in New York).[11] And, while Florida statutes permit the appointment of multiple agents, practitioners should be mindful that multiple agents can cause delay and conflict in the decision making for an important and urgent medical decision.
5. In Florida, a health care surrogate appointment can become effective immediately upon execution or only upon incapacity, depending on the language specified in the document. While often designed to trigger upon a doctor's determination of incapacity, the principal can authorize the agent to act immediately to access information or make decisions. The principal may stipulate that the surrogate's authority is effective immediately upon signing.[12] This allows the agent to access medical records and assist with decisions right away, which is useful for elderly individuals. If not stated otherwise, the designation generally becomes effective only when a doctor determines the patient lacks the capacity to make informed health care decisions. If the appointment is effective immediately, the principal's own decisions still take precedence over the surrogate's, provided the principal has the capacity to communicate them. The aspect of decision making is authorized by Florida Statutes §765.202, allowing for flexibility as to when the authority begins.
6. If no appointed surrogate or alternate is "able, willing or reasonably available" to act,[13] the statute provides for a health care facility (i.e., hospital, nursing home) to honor the wishes of a hierarchy of individuals who may act on behalf of the patient in such circumstances, confusing the discussion by calling this individual a "proxy."[14]
7. Under §765.401 (Part IV) of this statute, a proxy is appointed *only* when: a) no advance directive exists, or, as in the §765.202(4) scenario, the designated surrogate or alternate cannot serve, and b) the patient is incapacitated. Under §765.401(1), the health care facility must look for a proxy using this statutory priority list:
   1. Judicially appointed guardian (if one already exists; court appointment is *not* required to make a decision).
   2. Spouse.
   3. Adult child (or majority of children if more than one is available).
   4. Parent.
   5. Adult sibling (or majority if more than one).
   6. Adult relative who has shown care, concern, and maintained regular contact with the patient.
   7. Close friend of the patient.
   8. Licensed clinical social worker, selected by the facility's bioethics committee, if no other suitable person is found. The facility must document efforts to locate someone in the higher-priority classes before moving down the list.
9. It is important to note that while Florida does not have statutory forms of the health care surrogate (or living will), there are suggested or model forms one can access in §765.203 (health care surrogate model form) or §765.303 (living will model form). Neither of these forms are statutorily required however, and as long as the specified requirements of the statute are met, whatever form a practitioner uses, no health care provider should insist on the use of the suggested model form.
10. The responsibilities and duties of the appointed surrogate are set forth in Florida Statutes §765.205.

Living wills.

Florida law provides two key statutes governing living wills: Florida Statutes §765.302 (Procedure for Making a Living Will), which outlines who may execute a living will, witness requirements, and physician notification provisions. Then, as discussed above, Florida Statutes §765.303 (Suggested Form of a Living Will) provides a model living will format that is not required. It merely provides the legally recognized model form for a living will and confirms that the failure to name a surrogate does not invalidate the document.

Here are the key points about the Florida statutory living will:

1. It provides for an individual to make a declaration expressing the principal's wishes regarding the withholding or withdrawal of life-prolonging procedures if they have:
   - a terminal condition,
   - an end-stage condition, or
   - a persistent vegetative state.15
4. A living will must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal. Here (as is the case with a health care surrogate) there is no statutory requirement for the living will to be notarized, however many practitioners add a notary block to their documents. If the principal is physically unable to sign the living will, one of the witnesses must subscribe the principal's signature in the principal's presence and at the principal's direction.[16]
5. It is the responsibility of the principal to provide for notification to their primary physician that the living will has been made. In the event the principal is physically or mentally incapacitated at the time the principal is admitted to a health care facility, any other person may notify the physician or health care facility of the existence of the living will. A primary physician or health care facility which is so notified shall promptly make the living will or a copy thereof a part of the principal's medical records.[17]

6. A living will, executed pursuant to this section, establishes a rebuttable presumption of clear and convincing evidence of the principal's wishes.[18]

Preneed guardian document.

Florida Statute §744.3045 (Preneed Guardian) is the controlling statute that authorizes a competent adult to name a "preneed guardian" through a written declaration, to take effect if the declarant is later adjudicated incapacitated.

Here are the key requirements of the preneed guardian statute:

1. A competent adult may name a preneed guardian in a written, signed and witnessed declaration (signed by the declarant and by 2 witnesses – no notarization required by statute).[19]
2. The declaration may be filed with the clerk of court and must be produced if an incapacity petition is filed.
3. Producing the declaration creates a rebuttable presumption that the nominated guardian is entitled to serve, although the court may refuse if the nominee is determined to be unqualified.
4. Within 20 days after assumption of duties as guardian, a preneed guardian shall petition for confirmation of appointment. If the court finds the preneed guardian to be qualified to serve as guardian pursuant to §§744.309 and 744.312, appointment of the guardian must be confirmed.

Supported decision making.

Supported Decision Making has only been around in the United States for the last 11 years, having been enacted in Texas (the first state to recognize this concept) in 2015. Currently, there are about 23 states and the District of Columbia that have such statutes in place.

Florida formally recognized Supported Decision-Making agreements in its power of attorney statute (Fla. Stat. Ann. § 709.2209) on June 14, 2024, which:

- Defines Supported Decision-Making agreements as instruments allowing a supporter to receive information and communicate on behalf of the principal, *without* authority to bind the principal.
- Specifies that Supported Decision-Making agreements are not durable powers of attorney and cannot include durability language.
- Limits the scope of authority to:
- Obtaining protected information (HIPAA, FERPA, etc.).
- Assisting in communication with third parties.
- Validating communications made with supporter assistance as the principal's own.

As of July 1, 2024 (the effective date of the statutory change discussed above), guardianship courts in Florida must consider Supported Decision Making as a lesser restrictive alternative before imposing guardianship. This mandate applies to both guardianship and guardian advocacy proceedings. Thus, guardianship petitions must address Supported Decision Making, specify whether the alleged incapacitated person already uses Supported Decision Making or other supports, and explain why those supports are insufficient to avoid the appointment of a guardian under Chapter 744, Florida's guardianship statute. As a result, adjudications of incapacity evaluate whether a person can exercise rights with appropriate assistance, not only independently.

Therefore, practitioners involved in Florida guardianship proceedings must

- Document all existing Supported Decision-Making supports (family, caregivers, advocates, paid supports), and
- Request examining committee members to facilitate communication between supporters and the alleged incapacitated person as this is now expressly authorized by statute.20

Health insurance portability and accountability act document (HIPPA).

Practitioners may assume that federal HIPAA documents should present no issues in terms of being recognized in Florida, particularly since they are rooted in federal law. However, some states, and Florida is one of them, impose more stringent privacy protections, disclosure and reporting requirements and deadlines when compared to its federal counterpart. Because of these enhanced protections, a federal HIPAA release may not always be sufficient for all purposes in Florida.

> Florida law is frequently more protective than the federal HIPAA law, and therefore controls in any situation where it is more stringent.

For example, Florida law *mandates* disclosures in situations where the federal HIPAA law merely *permits* disclosure (e.g., gunshot wounds, certain burns), meaning Florida law preempts HIPAA and requires action where federal law would consider such action optional.[21] Also, where the federal HIPAA law allows providers 30 days to provide access to medical records, Florida law may require access within 14 days, which is a more stringent standard that overrides HIPAA's baseline.[22] Finally, Florida's health privacy statutes - including those applying to mental health, sensitive data, and mandatory reporting - add further obligations beyond HIPAA.

These examples demonstrate that Florida law is frequently more protective than the federal HIPAA law, and therefore controls in any situation where it is more stringent. In this regard, a slightly different HIPAA document reflecting these differences may be in order. Thus, while a federal HIPAA release is legally valid, it may not be fully comprehensive for all situations under Florida law.

The Last Will and Testament

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 an out of state attorney prepares a will for a client while witnessing formalities; otherwise, it is disregarded. Similarly, handwritten notes, marginal changes, or informal "updates" to an existing will are ineffective unless executed as a formal codicil.

This rule frequently affects:

- Clients relocating to Florida from states that permit holographic or oral wills
- Snowbirds and foreign nationals
- Deathbed or emergency handwritten documents
- Clients who believe handwritten changes modify a prior will

The issue is particularly consequential when Florida real property is involved, as Florida courts will not give effect to holographic or oral wills purporting to dispose of Florida-sitused assets.

Out-of-state practitioners should not rely on holographic or oral wills for clients with Florida connections and should strongly consider re-execution under Florida law to avoid unintended intestacy or litigation.

In terrorem clauses are not enforceable in Florida.

Practitioners accustomed to drafting estate planning documents in jurisdictions that enforce "no contest" or *in terrorem* clauses must take special care when working with Florida-based clients or Florida-sitused assets. Florida has taken a clear and longstanding statutory position that *in terrorem* clauses are unenforceable in both wills and trusts.

Florida law expressly renders unenforceable any provision that penalizes a beneficiary or other interested person for contesting an estate planning instrument or initiating related proceedings.

With respect to wills, Florida Statutes §732.517 provides:

> A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable.

Similarly, with respect to trusts, Florida Statutes §736.1108 states:

> A provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable.[27]

These statutes leave little room for judicial discretion. Florida courts do not balance probable cause, good faith, or the merits of the contest, as is done in some other jurisdictions. If a provision is punitive in nature and triggered by a contest or related proceeding, it is simply unenforceable as a matter of law.

> Florida has taken a clear and longstanding statutory position that in terrorem clauses are unenforceable in both wills and trusts.

Although Florida statutes clearly preclude enforcement, some Florida practitioners still encounter or use *in terrorem*-style language in wills and trusts, most often for one of the following reasons:

1. **Client Expectations Based on Other States' Law -** Clients who have relocated to Florida or who have received prior estate planning advice in states that enforce *in terrorem* clauses (such as New York[28] or California) often request the inclusion of such provisions. In those cases, Florida attorneys typically explain that the clause will not be enforced and recommend alternative planning techniques, but some practitioners will include it.
2. **Deterrent or Psychological Effect** - Even though unenforceable, some practitioners believe that the mere presence of a no-contest clause may have a limited deterrent effect on unsophisticated beneficiaries who are unaware of Florida's statutory prohibition. This approach is controversial and increasingly disfavored, as it may create false expectations and ethical concerns if not carefully explained to the client.
3. **Legacy or Imported Documents** - *In terrorem* clauses frequently appear in documents drafted outside Florida and later "Florida-ized" without fully revising the substantive provisions. Practitioners reviewing such documents should flag these clauses as legally ineffective under Florida law.

Based upon the above discussion, if the client is a Florida resident and the lawyer is not admitted in Florida, drafting the will could expose the lawyer to UPL allegations and malpractice liability. Even if the will is technically valid under Florida law, using an attorney unfamiliar with Florida-specific rules (e.g., homestead restrictions, elective share, personal representative qualifications) can lead to costly probate disputes.

For these reasons, best practices suggest that an out-of-state attorney engage a Florida-licensed attorney for drafting or reviewing the will. This ensures compliance with Florida law and avoids UPL issues. If the client insists on using their long-time out-of-state lawyer, that lawyer should collaborate with Florida counsel to ensure the document meets all statutory requirements and addresses Florida-specific estate planning concerns.

The Revocable Trust

Revocable trusts are frequently used in Florida and are considered a core document for many estate planning clients. They are popular because they avoid the time consuming, public, and sometimes costly probate process (although trust administrations also incur legal and other costs associated with the proper administration of trust assets upon the death of the grantor). They are also popular because they allow for the management of assets during the grantor's incapacity by way of successor trustee provisions (in a more efficient and seamless way than the durable power of attorney covering individually titled, non-trust assets) and provide a mechanism for smooth asset distribution to beneficiaries after death without court involvement.

One particular probate rule that prompts Floridians to use a revocable trust-based plan is the publication requirement for notifying creditors in a Florida probate. Florida Statutes §733.2121 requires publication of a "Notice to Creditors" in a local newspaper. Creditors have three months from the date of the first publication to file a claim, or 30 days from the date they receive direct written notice, whichever is later.[29] This assures that if a creditor receives direct notice just before the expiration of the three-month time frame, they still have 30 days from the date notice was received.

> Florida has adopted a version of the Uniform Directed Trust Act, allowing Investment Advisors, Distribution Advisors and Trust Protectors with defined powers.

As many who practice in this area are aware, revocable trusts, in addition to those mentioned above, offer these additional benefits:

- Ensures privacy – Unlike wills that go through probate, trusts are private documents, so the details of one's assets and their distribution are not made public.
- Enables seamless asset transfer – A trustee can manage and distribute assets to beneficiaries according to the trust's instructions after the grantor's death, often more efficiently and more quickly than a will undergoing the probate process. In some cases, it may be necessary to obtain court approval for the sale of real property, whereas real property inside a revocable trust can be drafted to allow the trustee to sell or otherwise convey the real property in accordance with the grantor's wishes and immediately after death, without court approval and without delay due to the creditor period and the need to obtain a court order.
- Can avoid the need for ancillary probate – especially helpful is the use of a revocable trust to hold real property in multiple jurisdictions, thus avoiding probate in both jurisdictions. Otherwise, with a will-based plan, two probate matters would need to be opened, one in the primary state, and one in the ancillary jurisdiction where property is held, thus causing multiple probate filings and possibly multiple court approvals to convey real property.

For all the reasons cited above, revocable trusts are often utilized as a core estate planning document in Florida. Yet, there are many traps for the unwary when using revocable (or irrevocable) trusts. Here are some Florida-specific aspects of revocable and irrevocable trusts to consider:

Florida's trust code is highly statutory and partly mandatory.

Florida has adopted a comprehensive Florida Trust Code (Chapter 736) whereby certain trustee duties, notice rights, and enforcement rules cannot be waived, even with sophisticated drafting. This makes Florida trust drafting more statute-driven than in some other jurisdictions, and particularly those jurisdictions operating under common law.

Revocable trusts are treated as will substitutes for many purposes.

Florida treats revocable trusts as the functional equivalent of wills in several critical respects:

- Revocable trust assets are included in the elective estate
- Revocable trusts are subject to creditor claims at death
- In terrorem clauses in trusts are unenforceable, just as in wills

Out-of-state attorneys sometimes assume that revocable trusts materially shield assets from spousal rights or post-death creditors; in Florida, they generally do not.

Homestead and trusts require Florida-specific drafting.

Florida's homestead protections intersect with trusts in ways that are different from most other jurisdictions nationally. While the homestead may be held in a "properly drafted" revocable trust without losing constitutional homestead protections (i.e., creditor protection, the homestead tax exemption, and compliance with devise restrictions), improper (or no trust language at all) can jeopardize these important homestead benefits. The same is true for irrevocable trusts, where failure to properly preserve the homestead with added homestead equitable interest language can result in a forfeiture of homestead protection. Thus, homestead planning is one of the clearest examples of where "generic" or templated forms fail in Florida.[30]

The Florida Homestead is addressed in-depth later in this article.

Florida does not enforce no-contest clauses in trusts.

Just as with wills and discussed earlier in this article, in terrorem clauses in trusts are unenforceable under Florida law. This applies to revocable trusts, irrevocable trusts, trust amendments and restatements. Out-of-state practitioners frequently include these clauses since they are permitted in many other jurisdictions, not realizing they have no legal effect in Florida.

Spendthrift and discretionary trusts are codified.

Florida has a statutory framework for creditor protection trusts that differs from many states.

Notable Florida features include:

- Spendthrift clauses must restrain both voluntary and involuntary transfers (this is a distinctive Florida drafting requirement and explains why generalized or partial spendthrift language used in other states may fail under Florida law).31
- Discretionary distribution standards provide an additional layer of creditor protection (Florida is notable in that discretionary trust protection is statutorily distinct from spendthrift protection, and practitioners frequently rely on *both* for layered creditor resistance).32
- Certain creditors (e.g., child support) have statutory exceptions.33

Florida practitioners tend to draft with precise statutory alignment with the above-described provisions as opposed to generalized asset protection language.

Self-settled asset protection trusts are largely prohibited in Florida.

Unlike a growing number of states, Florida does not recognize domestic asset protection trusts (DAPTs) for self-settled irrevocable trusts.[34] As a result, self-settled irrevocable trusts generally *do not* protect assets from the settlor's creditors under Florida law. A Domestic Asset Protection Trust (as recognized in states like Delaware, Nevada, or South Dakota) requires all three of the following statutory features: 1) the trust is irrevocable, 2) the settlor may remain a discretionary beneficiary, and 3) the settlor's creditors are barred (subject to limited statutory exceptions). Florida law fails the third element by statute.

Under Florida Statutes §736.0505(1)(b), if *any* amount may be distributed to or for the settlor's benefit, that amount is reachable by the settlor's creditors, even if the trust is irrevocable and discretionary, and even if the trust contains a spendthrift clause. This is of course the opposite of a DAPT statute.

Nevertheless, some high-net-worth Florida residents are advised to establish DAPTs in states such as Delaware or Nevada. These strategies do not rely on Florida law; they rely instead on jurisdictional complexity—out-of-state trustees, situs selection, and choice-of-law clauses—combined with the hope that any future creditor dispute is litigated in a DAPT-friendly forum rather than a Florida court. In practical terms, such planning assumes that enforcement will be difficult, delayed, or economically unattractive, not that Florida would uphold the trust if directly asked to do so.

Nonjudicial settlement agreements are commonly used.

Out-of-state practitioners may be surprised by how frequently Florida trusts are administered, interpreted, and modified without court involvement. Florida law expressly authorizes nonjudicial settlement agreements, which are widely used in practice to modify trust administrative provisions, resolve ambiguities and adjust trustee powers.

Under the Florida Trust Code, interested persons may enter into binding nonjudicial settlement agreements concerning trust matters. Section 736.0111(2), Florida Statutes, provides that, except in limited circumstances, "interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust." This authorization is not merely theoretical; it is a core feature of everyday trust administration practice in Florida.

The statute expressly identifies categories of issues that may be resolved nonjudicially. Most notably, nonjudicial settlement agreements (NJSA) may be used to resolve ambiguities through the interpretation or construction of trust terms, eliminating the need for judicial construction proceedings in many cases.[35] The statute also authorizes the use of NJSAs to modify administrative provisions and adjust trustee authority, including directing a trustee to refrain from a particular act or granting the trustee any necessary or desirable power[36]

> Regardless of the decedent's estate plan, a surviving spouse of a person who dies domiciled in Florida is entitled to claim an elective share equal to 30% of the decedent's elective estate.

These provisions explain why Florida trustees and beneficiaries routinely rely on NJSAs to address administrative and operational issues that, in other jurisdictions, might require petitions for instructions or formal trust modification proceedings. Florida law expressly contemplates matters such as approval of trustee accountings, changes in trustee compensation or office, transfers of the principal place of administration, and determinations of trustee liability may be resolved by agreement rather than litigation.[37]

Equally important for out-of-state counsel is the statute's treatment of court involvement. Florida's framework does not require judicial approval of a nonjudicial settlement agreement as a condition of validity. Instead, an NJSA is effective so long as its terms are consistent with those that a court could properly approve and do not violate mandatory provisions of the Florida Trust Code.[38] Judicial review is available only as an optional safeguard; any interested person may request a court to approve or disapprove an agreement, but court involvement is not the default.[39]

For practitioners from jurisdictions where trust administration is more court-centric, this statutory scheme can feel unfamiliar. In Florida, however, the expectation is often the opposite: nonjudicial resolution is the norm, and court involvement functions as a backstop rather than a prerequisite. Understanding the central role of nonjudicial settlement agreements is therefore essential for any out-of-state attorney advising fiduciaries or beneficiaries of Florida trusts, coordinating with Florida counsel, or drafting instruments intended to be administered under Florida law.

Directed trusts are statutorily recognized.

Florida has adopted a version of the Uniform Directed Trust Act, allowing Investment Advisors, Distribution Advisors and Trust Protectors with defined powers. The Florida Uniform Directed Trust Act ("FUDTA") is codified at Florida Statutes §§736.1401–736.1416 (Part XIV of the Florida Trust Code). Out-of-state practitioners advising clients with Florida-situs trusts, Florida trustees, or Florida governing law must understand where Florida draws the line between permissible "trust protector" powers and statutory "powers of direction", because that line determines fiduciary status, liability exposure, and trustee protections.

Florida Looks to Function, Not Labels: Florida law does not rely on titles such as "trust protector," "advisor," or "committee." Instead, courts and statutes focus on what the power actually does. If a person other than the trustee is given authority that displaces the trustee's discretion, Florida will treat that person as holding a "power of direction," regardless of the name used.

This functional approach is critical for out-of-state drafters who may be accustomed to jurisdictions where labels or disclaimers carry more weight.

What Is a "Power of Direction" in Florida? Under Florida Statutes §736.0103(16), a power of direction exists when a person is authorized to direct, approve, or disapprove the trustee's exercise or non-exercise of powers that would otherwise be within the trustee's discretion—most notably:

- investment decisions,
- management or administration of trust property, or
- distributions.

As a practical matter, if the trustee must comply with the direction of another, and is reduced to an implementing role only, the other party holds a power of direction.

Once that line is crossed, Part XIV applies automatically.

Consequence of Holding a Power of Direction: Fiduciary Status by Statute: If a person holds a power of direction under Part XIV:

- That person is a "trust director" for statutory purposes.
- Florida Statutes §736.1408 provides that a trust director has fiduciary duties comparable to a trustee with respect to that power.
- The trust instrument may modify the standard of care or liability only to the extent a trustee's duties can be modified, but it cannot eliminate fiduciary status altogether.

Accordingly, a Florida trust cannot make a trust director "non-fiduciary" with respect to powers of direction, no matter how clearly the document says so.

Not Every "Trust Protector" Power Is a Power of Direction: Importantly, Florida law does not say that every trust protector must be a fiduciary. FUDTA applies only to powers of direction. Powers that are commonly (and permissibly) drafted outside Part XIV include:

- removal and replacement of trustees or advisors,
- consent or veto rights (where the trustee still decides whether to act),
- powers to interpret ambiguities or fill drafting gaps,
- administrative or tax-driven amendment powers, and
- changes to situs or governing law.

When these powers do not substitute the protector's judgment for the trustee's, fiduciary status is governed by traditional principles and drafting—not by Part XIV.

Trustee Protections in FUDTA: In exchange for imposing fiduciary status on trust directors, FUDTA provides significant protections for directed trustees, including:

- no liability for reasonably complying with a direction,
- no duty to monitor, second-guess, warn, inform, or advise regarding directed acts, and
- liability only for willful misconduct in following a direction.

Florida Case Law Confirms Enforceability of Robust Protector Powers: Florida courts have long enforced trust protector provisions. In *Minassian v. Rachins*,[40] the Fourth District Court of Appeal upheld substantive trust modifications made by a trust protector during active litigation, emphasizing the settlor's right to delegate interpretive and corrective authority to the trust protector and outside the court system. This is a significant Florida case affirming that a trust protector can amend a trust, even if it affects litigation, if the trust is ambiguous and the amendment effectuates the settlor's intent. It also upheld a wife's discretion to spend trust assets against the objection of children of the now deceased father.

While *Minassian* predates FUDTA, it remains important because it confirms Florida's willingness to honor private ordering and enforce protector powers according to settlor intent, particularly where those powers are not classic trustee functions.

The Lady Bird Deed

As of early 2026, approximately 33 U.S. states and the District of Columbia authorize some form of Transfer on Death (TOD) deed, allowing real estate to transfer directly to beneficiaries upon death without probate. New York joined this list of states that offer TOD deeds on July 19, 2024.[41] These TOD laws vary significantly, and there are also 5 states, Florida among them, that use "Enhanced Life Estate" or "Lady Bird Deeds."[42]

There are some important differences between TOD deeds and Enhanced Life Estate Deeds, including the following:

1. A TOD Deed must be signed directly by the property owner, whereas a lady bird deed typically may be signed by an agent under a power of attorney for the principal. This means that where a property owner becomes incapacitated in a TOD deed jurisdiction, no further changes to the deed may be made without guardianship, but it is possible to make changes to an enhanced life estate deed in a lady bird deed jurisdiction.
2. Enhanced life estate deeds allow more flexibility in naming beneficiaries than TOD Deeds. For example, TOD deeds often require equal, direct distributions to named beneficiaries. This means that unequal distributions may not be allowed under a TOD deed. Also, a TOD deed may not allow for a predeceased beneficiary's share to go to that predeceased individual's descendants, instead requiring that this share go to the remaining beneficiaries named in the deed. This may not be consistent with a per stirpes distribution scheme commonly desired by parents when planning for predeceased children. This is far more restrictive than the enhanced life estate deed, which typically allows such flexibility when naming contingent beneficiaries.
3. The enhanced life estate deed splits the property into a life estate (for the grantor) and a remainder interest (for the beneficiaries), with the added power to divest the remainder interest without consent of the remaindermen.
4. While generally allowing the retention of homestead exemptions, enhanced life estate deeds in Florida are subject to constraints regarding spousal rights under Florida Constitution Art. X, Sec. 4(c) and Florida Statutes §732.401.

Interestingly, there is no specific statute that directly governs enhanced life estate or lady bird deeds in Florida. Instead, these deeds are recognized and enforceable based on common law principles and title insurance practices, not statutory law. Attorney's Title Fund Services, LLC (otherwise known as "The

Fund") is Florida's title insurance authority,[43] which explicitly states: "[t]here is no law in Florida governing Lady Bird Deeds, so attorneys need to be cautious."

Here's how these deeds are supported in Florida:

- Title Note 6.10 from The Fund treats enhanced life estate deeds as creating a vested remainder subject to divestment, which is a valid conveyance under Florida real property law. Florida Title Standard 6.10 (often referenced alongside 6.11 in Fund notes)44 concerns the marketability of title involving enhanced life estate deeds. It establishes that a life tenant with full powers to convey can transfer or mortgage property without the remainderman's consent or joinder, generally affirming these deeds as valid, standard practice for avoiding probate.
- Florida courts have upheld the validity of enhanced life estate deeds in various probate and title contexts, though no single statute codifies them.[45]
- The Florida Bar and Florida elder law practitioners widely accept their use, especially for probate avoidance and Medicaid planning.

There are many benefits to using enhanced life estate deeds. These include:

1. **Probate Avoidance:** The most frequently cited benefit is that the property automatically transfers to named beneficiaries upon the owner's death, bypassing probate entirely. This saves time, legal fees, and court involvement.
2. **Full Control During Lifetime:** Unlike traditional life estate deeds, where consent of the remainder beneficiary is needed to convey, the grantor retains full ownership rights (in fee simple) when using an enhanced life estate deed. The grantor can sell, mortgage, lease, or revoke the deed without beneficiary consent.
3. **Medicaid Planning:** Enhanced life estate deeds are not considered a transfer for Medicaid eligibility purposes (in Florida)[46] and can facilitate avoiding estate recovery after death. This makes them a commonly used strategic tool for preserving assets while qualifying for long-term care benefits. Beware however that if Medicaid is applied for outside of Florida, property held by way of an enhanced life estate deed may not be recognized by a non-lady bird deed jurisdiction. This means that the property will be countable as an asset for non-Florida Medicaid eligibility purposes and must be dealt with accordingly as a countable asset (unless it can be proved to be the applicant's exempt primary residence under interstate residence rules, intent to return home, etc.). Furthermore, the probate avoidance aspect of the enhanced life estate deed may not be honored by the out of state Medicaid program, which may seek estate recovery of the home notwithstanding Florida's recognition of this aspect of the enhanced life estate deed. While one may argue that Florida law applies to the conveyance of real property within the state, if Medicaid is applied for out of state whose estate recovery rules follow an expanded interpretation of recoverable property, this may create legal issues upon the death of the grantor of such deeds.
4. **Homestead Protection:** The use of an enhanced life estate deed does not affect Florida's homestead exemption, allowing the grantor continued protection from creditors and property tax benefits.
5. **Tax Advantages:** No document stamp taxes are due upon creation of an enhanced life estate deed[47] and beneficiaries receive a basis step-up when the grantor dies, thus reducing capital gains taxes if they sell the property after inheriting it.
6. **Simplicity and Cost-Effectiveness:** Enhanced life estate deeds are relatively inexpensive to draft as compared to setting up a trust.

Out-of-state practitioners should be aware that while there are many advantages of using enhanced life estate deeds, it is best to work with a Florida practitioner well-versed in their use to be certain that client objectives are realized without any unintended consequences. As a result of having its roots in common law and not statutory authority, there are many traps for the unwary for those who choose to use enhanced life estate deeds.

Some of the limitations of using enhanced life estate deeds include:

1. **Title and Financing Issues:** Some lenders and title companies misunderstand enhanced life estate deeds, which can complicate refinancing or title insurance. In practice, some clients have had to temporarily revoke the deed to complete a refinance. For lenders, the issue is whether the value of the property is less than the outstanding mortgage upon the death of the grantor, thus leaving a viable claim only against those who have signed the loan documents, and not the remainder beneficiary named in the deed, who are neither borrowers or guarantors of the loan.
2. **Creditor Exposure:** While homestead properties are protected from creditor claims, non-homestead properties conveyed via enhanced life estate deed are still subject to creditor claims during the owner's lifetime.
3. **Beneficiary Predeceases Owner:** If a named beneficiary dies before the grantor, it can create uncertainty around the intended recipient of the remainder interest, unless the deed includes survivorship or contingent beneficiary language. Complex distribution goals of a grantor involving multiple beneficiaries and contingent beneficiaries likely are better served through the use of a trust in lieu of an enhanced life estate deed.
4. **Homestead Exemption Transfer:** Beneficiaries named on the enhanced life estate deed must be aware that they must qualify independently for the homestead exemption after inheriting the property, as the exemption does not automatically transfer.
5. **Legal Complexity:** The deed must be carefully drafted with precise legal language, including enhanced

life estate provisions and a full legal description. Errors can invalidate the deed or cause disputes.

6. **Insurability Issue:** Adding beneficiaries as additional insureds to a homeowner's policy when using an enhanced life estate deed is critical to ensure coverage continues immediately after the grantor's death. Without this, insurance companies may deny claims for damages occurring post-death because the owner of record has changed, leaving beneficiaries with uninsured, damaged property. The insurance company may argue that because the beneficiary is not a named insured, they have no coverage, even if they are now the legal owner. Thus, the beneficiary should be listed as an additional insured or loss payee on the policy.

Due to the legal complexities involved when using enhanced life estate deeds, it is best to cover estate and long term care planning issues with client correspondence outlining the pros and cons of this approach and inviting discussion of any questions or concerns the client may have. And, as an out of state practitioner, always use a Florida attorney for deed preparation and planning whether for probate avoidance, long term care planning, estate planning, or homestead planning given the many moving parts, legal issues and complexities of Florida law in this regard.

The Elective Share in Florida

Florida's elective share is governed by §§ 732.201-732.2155, Florida Statutes, including provisions defining the elective estate, incorporating testamentary substitutes and homestead, authorizing elective share trusts, and allocating contribution among recipients. Florida's elective share law reflects a strong public policy that marriage is an economic partnership and that a surviving spouse may not be disinherited. Regardless of the decedent's estate plan, a surviving spouse of a person who dies domiciled in Florida is entitled to claim an elective share[48] equal to 30% of the decedent's elective estate.[49] The focus, therefore, is not merely on the probate estate but on the broader concept of the "elective estate."

The elective share operates as a floor, not a ceiling. If the surviving spouse already receives property equal to or greater than 30% of the elective estate, no additional payment is required. If not, the statute mandates reallocation from other beneficiaries and recipients to satisfy the shortfall.[50]

The elective estate.

Florida's elective share statutory scheme was substantially revised in 1999 to prevent circumvention of the elective share through non-probate transfers. As a result, § 732.2035 Florida Statutes defines the elective estate to include both probate assets and a wide range of testamentary substitutes.

Thus, the elective estate includes, among other items:

- The decedent's probate estate
- The decedent's interest in protected homestead property
- Pay-on-death (POD), transfer-on-death (TOD), and "in trust for" accounts
- Jointly held property, including tenancy by the entirety (with only one-half included when held with the surviving spouse)
- Revocable trust assets
- Certain irrevocable transfers where the decedent retained possession, enjoyment, or control

These non-probate assets are commonly referred to as "testamentary substitutes" because although they pass outside of probate, they are treated as testamentary in nature for elective share purposes.

Section 732.2055 Florida Statutes governs valuation of the elective estate. Once the gross elective estate is determined, the court compares that amount to the value of property already passing to or for the benefit of the surviving spouse. If there is a deficiency, the elective share must be funded from other sources as discussed below.

Section 732.2075, Florida Statutes governs the sources from which the elective share is payable and provides for abatement and contribution among recipients of elective estate property. The statute spreads the burden among beneficiaries and direct recipients in proportion to the value they received.

The elective share trust.

One interesting way to satisfy the elective share in Florida is through an Elective Share Trust. Section 732.2025(2) Florida Statutes defines an elective share trust as a trust under which:

- The surviving spouse is entitled for life to all income, payable at least annually
- The spouse has the right to require the trustee to make the trust property productive or to convert it within a reasonable period of time
- No person other than the spouse may receive distributions of income or principal during the spouse's lifetime

This structure allows the decedent to provide for the surviving spouse other than through an outright distribution of a percentage of the elective estate, and specify remainder beneficiaries while still satisfying the statutory minimum for the spouse.

Section 732.2095 Florida Statutes governs valuation of property used to satisfy the elective share, including interests in trusts. The value attributed to the elective share trust is based on statutory requirements, not merely on income payments received. For example, if the surviving spouse has an interest in a trust, or portion of a trust, which meets the requirements of an elective share trust, the value of the spouse's interest is recalculated as a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows:

1. One hundred percent of the trust is attributed to the surviving spouse if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment (both terms as defined in the statute).
2. Eighty percent if the trust instrument includes a qualifying invasion power but no qualifying power of appointment.
3. Fifty percent in all other cases.[51]

Funding an elective share trust under Florida Statutes § 732.2095.

Florida Statutes § 732.2095 not only determines how much of a trust is *included* in the elective estate, but also has a direct and often overlooked impact on how much must actually be contributed to a trust intended to satisfy the elective share. When a trust is structured to function as an elective-share funding mechanism, the statutory inclusion percentages effectively operate as a funding "multiplier."

Florida probate proceedings are in rem, meaning jurisdiction attaches to the property itself.

Assume a Florida decedent with a surviving spouse who has not waived elective share rights, and assume the elective share equals 30% of the elective estate. Further assume the planner intends the trust alone to fully satisfy a $600,000 elective-share obligation based upon a $2,000,000 elective estate.

If the trust instrument includes both a qualifying invasion power and a qualifying power of appointment, 100% of the trust is included in the elective estate. In that case, each dollar contributed to the trust is fully recognized for elective-estate purposes, and the trust need only be funded with $600,000 to fully satisfy the elective share.

If the trust includes a qualifying invasion power but no qualifying power of appointment, only 80% of the trust is included in the elective estate. Because each dollar of trust funding is discounted to 80% for elective-share purposes, the trust must be funded more heavily. To satisfy a $600,000 elective-share obligation under this structure, the trust must be funded with $750,000 ($750,000 X 80% = $600,000).

In all other cases, where the trust includes neither a qualifying invasion power nor a qualifying power of appointment, only 50% of the trust is included in the elective estate. As a result, only half of each dollar contributed counts toward satisfaction of the elective share, requiring trust funding of $1,200,000 to satisfy the same $600,000 obligation.

Accordingly, when a trust is intended to serve as an elective-share satisfaction vehicle rather than merely an includible asset, Florida Statutes § 732.2095 materially affects minimum funding levels. Drafting provisions that reduce inclusion percentages may limit elective-estate exposure, but they do so at the cost of significantly increased capitalization requirements—a tradeoff planners should evaluate explicitly when advising married clients with Florida connections.

Collecting the elective share.

When testamentary substitutes are included in the elective estate, direct recipients of those assets may be required to contribute toward the elective share deficiency. Section 732.2085 Florida Statutes imposes liability on recipients of elective estate property, including trustees and beneficiaries of non-probate transfers.

The personal representative is tasked with collecting contributions under § 732.2145 and in accordance with a court order of contribution, ensuring that the elective share is fully satisfied even when assets pass outside probate.

A personal representative who has the duty of enforcing contribution may be relieved of that duty by an order of the court finding that it is impracticable to enforce contribution in view of the improbability of obtaining a judgment or the improbability of collection under any judgment that might be obtained, or otherwise.[52] The personal representative is not going to be liable for failure to attempt collection if the attempt would have been economically impracticable.

Treatment of homestead for elective share purposes.

Homestead occupies a unique position in Florida law, both in terms of its constitutional and statutory protections for devise and descent, protection against creditors, taxes and for elective share purposes. The decedent's interest in protected homestead property is included in the elective estate under § 732.2035(2) Florida Statutes. However, homestead retains its constitutional protections and descent rules.

In practice, this means that although the Homestead is counted in determining the size of the elective estate, the surviving spouse's homestead rights are not replaced or eliminated by the elective share. Instead, homestead often counts toward satisfaction of the elective share, reducing or eliminating any deficiency without requiring liquidation or contribution from other assets.

Here an example showing exactly how homestead is included in the elective estate calculation under § 732.2035(2), Florida Statutes, and how it affects the final elective share result. This example illustrates what is included, what is credited, and what assets are *not* disturbed, because that is where practitioners often get tripped up. Note that inclusion of the Homestead in the calculation will not affect the devise and descent rules that otherwise apply to the Florida Homestead.

Assume that a Florida decedent is survived by spouse and adult children from a prior marriage. The surviving spouse timely elects the elective share[53] and has not previously waived her elective share (for example in a pre- or post-nuptial agreement). The decedent held the assets shown in Exhibit 1 at death.

The first step is to determine the elective estate in accordance with Florida Statutes §732.2035. Assets that must be included in the elective estate are a) the probate estate[54] valued at $100,000, b) the Homestead[55] valued at $600,000, c) the revocable trust assets[56] valued at $900,000, and d) the Individual Retirement Account[57] valued at $400,000, for a total elective estate of $2,000,000.

The next step is to calculate the elective share amount, which is 30% of the elective estate, or $600,000 ($2,000,000 X .30 = $600,000). So, the statutory entitlement to the surviving spouse is $600,000.[58]

Next, we must determine what the spouse has already received. In this case, under Florida Homestead law (note, this is not under the elective share law but under the Florida constitution), because the decedent is survived by a spouse and descendants, the surviving spouse either receives a life estate in the Homestead, or she can elect a one-half interest in the Homestead as a tenant in

Exhibit 1: Assests at Death		
Asset	**Value**	**Notes**
Florida Homestead (primary residence)	$600,000	Titled solely in decedent's name
Revocable Trust (Non-Homestead Assets)	$900,000	Passes to children
Probate Checking Account	$100,000	Personal representative controls
IRA (child named as beneficiary)	$400,000	Testamentary substitute

common, which in this case would be $300,000 (50% of $600,000). We will assume that the surviving spouse elects the one-half interest valued at $300,000.

At this point, it is important to note how the Homestead is *counted* in the elective estate calculation and *credited* toward its satisfaction, but not taken away or liquidated. Thus, the Homestead was not sold and the surviving spouse did not lose her Homestead rights. While it was valued at $600,000 as part of the calculation of the elective estate, only $300,000 was credited toward the surviving spouse's previously received assets, resulting in a deficiency of $300,000 that must now be addressed. Further, the children of the decedent also received a $300,000 interest in the Homestead immediately (rather than as a vested remainder interest if the spouse had elected a life estate).

The remaining $300,000 that must be provided to the surviving spouse is satisfied by looking at the remaining elective share assets. We will assume the probate estate was fully exhausted by expenses of administration and creditor claims and therefore is unavailable to satisfy the elective share. Under Florida Statutes § 732.2075 and § 732.2085, the shortfall is paid proportionally by direct recipients of elective-estate property (trust beneficiaries, IRA beneficiaries, probate estate, etc.). With the probate estate checking account fully exhausted, we must allocate proportionally the remaining two assets consisting of the revocable trust and the IRA account. The total of the two assets is $1,300,000 ($900,000 revocable trust assets + $400,000 IRA assets = $1,300,000). Therefore, 69% must come from the revocable trust (or $207,000), and 31% must come from the IRA (or $123,000).

Effect of the election on other interests.

Section 732.2105 Florida Statutes provides that once the elective share is satisfied, the remaining estate assets are distributed as though the surviving spouse had predeceased the decedent, unless otherwise provided. This prevents double recovery while preserving the statutory minimum.

Florida's elective share law is among the most comprehensive in the country. By incorporating testamentary substitutes, authorizing elective share trusts, and integrating homestead into the calculation, the statute ensures that the surviving spouse receives a meaningful share of the marital estate while still allowing flexibility in estate planning for other beneficiaries.

For out of state practitioners, careful attention must be paid not only to probate assets, but to all forms of ownership and control existing at death. Failure to account for testamentary substitutes, trust structures, or homestead treatment can lead to unexpected reallocation and litigation long after the estate plan was thought complete.

PROBATE IN FLORIDA

Florida probate is procedurally robust, constitutionally unique, and attorney-centric. Counsel advising Florida-based clients, or non-Florida clients owning Florida assets, must account for the following core principles to avoid invalid planning, failed administrations, or fiduciary exposure.

Florida Probate Counsel Is Usually Mandatory

In most areas of the law, individuals have a fundamental right to represent themselves in court. However, Florida probate law is a notable exception when a person is appointed as a guardian or personal representative of an estate. The Florida Probate Rules explicitly limit a layperson's ability to appear pro se in this capacity.

Florida Probate Rule 5.030(a) provides:

> Every guardian and every personal representative, unless the personal representative remains the sole interested person, shall be represented by an attorney admitted to practice in Florida.

An "interested person" is defined as:

> Any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.[59]

When an estate has multiple beneficiaries, the personal representative is not the sole interested person. As a result, the personal representative may not represent themself in the probate proceeding and must be represented by a Florida-licensed attorney.

Even when the personal representative is also the sole beneficiary, self-representation is still prohibited if any creditor files a claim against the estate. A creditor qualifies as an "interested person" under Florida law, and the presence of a creditor immediately eliminates the personal representative's ability to proceed without counsel.

Given these rules, in the vast majority of Florida probate cases, a layperson will not be permitted to represent themselves as a personal representative. Out-of-state attorneys cannot appear or manage probate filings without local counsel. Accordingly, even in the rare situation where self-representation may be technically allowed, consulting with an experienced Florida probate attorney is a prudent and highly advisable course of action.

Who May Serve as Personal Representative Is Statutorily Restricted

As discussed in greater detail above, Florida limits who may serve as personal representative if they are not a Florida resident. A non-resident may serve only if they are closely related to the decedent (e.g., spouse, lineal descendant, sibling, aunt/uncle, niece/nephew) or a Florida resident.[60] Otherwise, friends, professional fiduciaries, and many trusted advisors are disqualified, even if named in the will. This frequently invalidates estate plans drafted outside Florida.

Ancillary Probate Is Required for Florida Real Estate

Florida does not recognize out-of-state probate orders to transfer title to Florida real property. If a non-Florida decedent owned Florida real estate in their individual name, an ancillary probate proceeding must be opened in the Florida county where the property is located—even if a primary probate is pending elsewhere. Title cannot pass without Florida court authority, once again demonstrating the need for Florida counsel.[61] These provisions, which are evident throughout Florida's probate statute, reflect an "identity crisis" that some have questioned. Yet, this approach recognizes a long history of out of staters availing themselves of the many attributes of the sunshine state, and reserving such legal matters for counsel of good standing and formally admitted to practice law in the state.

A recurring question in multistate estate administration is whether a Florida probate court may transfer a proceeding to the decedent's domiciliary jurisdiction when the decedent was not a Florida resident. The answer, as clarified in a recent practitioner-focused analysis by Juan C. Antúnez, is **no**—at least with respect to Florida real property.

As Juan C. Antúnez explains,[62] Florida probate proceedings are **in rem**, meaning jurisdiction attaches to the property itself. Under Florida Statutes §731.105 and §731.1055, Florida real property owned by a nonresident decedent is governed by Florida law, and Florida courts retain authority over that property.

The practical result is that multiple probate proceedings are not only permissible but expected. A nonresident decedent may have:

- a domiciliary proceeding in the state or country of residence; and
- a separate ancillary administration in Florida for Florida real estate.

Because probate jurisdiction over real property is situs-based, a Florida court cannot transfer or defer that proceeding to another jurisdiction. Florida law allows transfer only to correct venue within Florida—not to another state or country.

> In the vast majority of Florida probate cases, a layperson will snot be permitted to represent themselves as a personal representative.

Antúnez's key doctrinal point is the distinction between in rem jurisdiction (which may exist concurrently in multiple jurisdictions) and in personam jurisdiction (which is typically exclusive). Each state must exercise its own authority over property within its borders, and that authority cannot be exported.

The practice implication of this is that when a nonresident dies owning Florida real estate, ancillary administration in Florida is not optional—it is required. The proper approach is not consolidation, but coordination across jurisdictions.

Florida's Homestead Law Overrides Wills and Trust Expectations

Florida's constitutional homestead protections are among the strongest in the country and frequently override testamentary intent. If the decedent was survived by a spouse or minor child, the homestead cannot be freely devised, regardless of what the will states. The homestead in such instances must pass to the spouse (if no minor children exist) or if minor children exist, it follows specific legal descent in the form of a life estate for the spouse and the remainder to the children. A spouse may waive homestead rights via a properly executed deed[63] or agreement or waiver made knowingly and voluntarily. homestead property is also largely exempt from creditor claims, but must usually be adjudicated as homestead property in the probate proceeding to clear title. Out-of-state planning that ignores Florida homestead law often fails.[64]

Creditor Claims Are Governed by Rigid Deadlines

Florida uses the following system for satisfying creditor claims, with some of the shortest creditor deadlines in the United States. Generally, creditors must file claims within three months of the first publication of Notice to Creditors, or 30 days after formal service if the creditor is known.[65] Failure to strictly comply with notice and service requirements as discussed above can potentially extend creditor exposure and create personal representative liability. A court may extend these filing deadlines for fraud, estoppel, or insufficient notice.[66] The practical effect of this rule is that a claim not timely filed is barred forever and will not bind the estate, the personal representative or beneficiaries.

A separate two-year absolute bar applies under Florida Statutes §733.710 for all creditor claims, meaning that no probate creditor claim may be enforced if filed after two years from the decedent's death, even where no notice to creditors was published or formal notice served.

Types of Probate Matters in Florida

Florida offers multiple probate proceedings governed by the Florida Probate Code as set forth in Chapters 731-735 of the Florida Statutes. The type of probate matter depends primarily on the size and character of the estate, whether the decedent dies with or without a will, and whether special circumstances apply.

Formal administration.

Formal administration is governed by Florida Statutes §§733.101-733.901 and is the default and most comprehensive probate proceeding in Florida. This type of administration is required unless a summary administration or disposition without administration applies. Formal administration is used when any of the following conditions exist: 1) the estate exceeds $75,000 of non-exempt property, or 2) the decedent died less than two years ago, or 3) the estate does not otherwise qualify for summary administration.

Formal estate administration in Florida is characterized by full court-supervised administration, the appointment of a personal representative, mandatory notice to creditors, and the filing of an inventory within 60 days of the Letters of Administration,[67] an accounting of all transactions of the estate during its administration (unless the beneficiaries sign a written waiver of this requirement),[68] and closing pleadings seeking formal discharge of the personal representative.[69]

Summary administration.

Summary Administration in Florida is governed by Chapter 735, Part I, Florida Statutes and provides a streamlined probate proceeding for smaller or older estates. **Prior to July 1, 2026**, an estate qualifies for Summary Administration if either of the following is true:

- The value of the probate estate does not exceed $75,000 (excluding exempt property), or
- The decedent has been dead for more than two years.70

Transition to Expanded Summary Administration Threshold: Effective July 1, 2026, Florida significantly expanded access to summary administration by doubling the eligibility cap from $75,000 to $150,000.

Beginning July 1, 2026, § 735.201(2), Florida Statutes, was amended to provide that summary administration is available when:

> the value of the entire estate subject to administration in this state, less the value of property exempt from the claims of creditors, does not exceed $150,000, or the decedent has been dead for more than two years.

This replaces the longstanding $75,000 ceiling that had remained unchanged for decades.

The legislation also increases several related small-estate thresholds (including disposition without administration and small-account affidavits), reflecting recommendations of the Florida Supreme Court Workgroup on Uncontested Probate Proceedings, which sought to modernize probate administration in light of rising asset values and court congestion.

Transition and Practice Implications: Estates commenced before July 1, 2026 remain subject to the $75,000 cap unless they independently qualify under the two-year-since-death rule. Practitioners advising estates with values between $75,000 and $150,000 should consider whether filing can be deferred until the effective date to take advantage of summary administration's reduced cost and procedural burden.

Out-of-state practitioners should be aware however that under Florida's Summary Administration rules, no personal representative is appointed by the court and there is reduced court supervision over the proceeding. What this means is that the court enters an order of summary administration directing who gets which assets, and the assets are transferred by court order, not by the action of a personal representative.

In formal administration, a personal representative has clear legal powers and duties, including collecting estate assets, paying creditors, giving statutory notice to creditors, defending creditor claims, distributing assets, and owing fiduciary duties to beneficiaries and creditors. None of that exists in summary administration.

In a Summary Administration, you are not operating inside a fiduciary framework with statutory protections. Because there is no personal representative, creditors are not paid by an estate representative, assets are distributed subject to creditor rights, and beneficiaries can later be sued directly by creditors. It is for this reason that summary administration orders often say, "[d]istribution is subject to the rights of creditors." It is important to know that Summary Administration does *not* "cut off" creditors the way formal administration can. Until two years after death have passed, creditor exposure remains very real in a Summary Administration.

Disposition of personal property without administration.

Disposition of Personal Property without Administration is governed by Chapter 735, Part II, Florida Statutes. This is another type of Florida proceeding that is not a full probate, but it is a statutorily authorized probate alternative for very small estates.

This proceeding is only allowed only when the decedent owned no real property, and the estate consists solely of:

- Exempt personal property,[71] or
- Non-exempt personal property which does not exceed the sum of the amount of preferred funeral expenses and reasonable and necessary medical and hospital expenses of the last 60 days of the last illness.[72]

Similar to the Summary Administration process discussed above, in a Disposition of Personal Property Without Administration proceeding, no personal representative is appointed, there is no creditor administration process, and it is designed primarily to reimburse funeral or medical expenses made by another individual on behalf of the decedent. If the non-exempt property exceeds the value of the funeral and medical expenses, this will not be a viable approach to the administration of a decedent's estate.

Ancillary administration.

Ancillary Administration proceedings in Florida are governed by Chapter 734, Florida Statutes and is a probate proceeding designed for non-Florida decedents who own property located in Florida. This is a probate proceeding that out-of-state practitioners should not only become aware of, but one which will be used frequently for clients who own Florida based real property.

Ancillary Administration proceedings should be commenced when:

- A decedent was domiciled outside Florida, and
- The decedent owned Florida real estate or other Florida-sitused probate assets73

The Ancillary Administration is conducted in addition to (and not in lieu of) the primary probate in the home state. And, while this proceeding is limited to Florida assets, it may be conducted either as a formal or summary proceeding depending on asset value.

Probate of wills without administration.

Probate of Wills Without Administration is governed by Florida Statutes Chapter 733 and Florida Probate Rule 5.210. The probate of a will without administration is one of the most underutilized procedural tools in Florida probate practice. This streamlined mechanism allows a will to be admitted to probate without the appointment of a personal representative and without opening a full estate administration. When used correctly, it can efficiently accomplish critical legal objectives while avoiding unnecessary cost, delay, and exposure.

The purpose and rationale for this procedure is that under Florida law, a will generally has no legal effect until it is admitted to probate. Section 733.103, Florida Statutes, makes clear that probate is a prerequisite to establishing title or rights under a will, and that once admitted, the probate is conclusive as to due execution and validity absent revocation proceedings.

Rule 5.210 provides a narrowly tailored path to probate when no estate administration is required—that is, when there are no assets subject to administration in Florida. The rule expressly requires the petitioner to affirm that fact in the verified petition.

This procedure reflects a policy judgment that probate should be available in a variety of circumstances to validate testamentary intent even when there are no assets and nothing to administer.

Situations where Probate Without Administration is particularly useful and where practitioners most commonly employ Rule 5.210 are found in several recurring scenarios:

- **Testamentary Powers of Appointment:** Where a decedent's will purports to exercise a power of appointment under a trust or other instrument, the exercise is ineffective unless the will is admitted to probate. Florida Probate Rule 5.210 and its Committee Notes recognize this principle by addressing circumstances in which a will's provisions—such as the exercise of a testamentary power of appointment—have no operative effect absent probate of the will.
- **Nomination of Fiduciaries:** A will may nominate fiduciaries—such as successor trustees or guardians—even where most or all assets pass outside of probate. However, those nominations generally do not take legal effect unless the will is admitted to probate. In limited circumstances, including probate without administration, the will may be admitted for the narrow purpose of recognizing such nominations.
- **Out-of-state or Prior Administration:** When an estate has been fully administered in another jurisdiction, but Florida probate is required solely to recognize the will, Rule 5.210 provides a mechanism to avoid duplicative administration while still establishing the will's legal effect in Florida.

For example, where a decedent was domiciled in another state (such as New York), and the domiciliary probate proceeding has been fully administered, a separate issue may arise if the decedent's will exercises a testamentary power of appointment over a Florida trust. Under Florida law, that exercise has no operative effect unless the will is admitted to probate in Florida. As a result, the trustees and beneficiaries of the Florida trust cannot give legal effect to the purported exercise of the power based solely on the foreign probate proceeding.

In this circumstance, probate without administration provides a targeted solution. The will may be admitted to probate in Florida for the limited purpose of validating the exercise of the testamentary power of appointment, without requiring a full administration. This approach recognizes that there are no Florida probate assets to marshal and no need to appoint a Florida personal representative, while ensuring that the will is legally effective to control the disposition of the Florida trust property.

- **Homestead or Exempt Property Planning:** Even where the only Florida property is exempt from administration (such as homestead) or has already been distributed, a limited probate proceeding may still be necessary to resolve title issues or confirm the effectiveness of the dispositive plan. In these circumstances, probate without administration under Rule 5.210 allows the will to be admitted for a specific, non-administrative purpose without opening a full proceeding.

Importantly, admission of a will under Rule 5.210 does **not** eliminate the risk of a will contest. Challenges to the validity of the will proceed under the same framework applicable to revocation of probate, whereby an interested person may seek to set aside the order admitting the will. Practitioners should therefore consider whether use of this streamlined procedure may, in a contentious family context, effectively invite or accelerate litigation over the will's validity.

All the above leads to the inevitable conclusion that Florida probate is neither a "plug and play" nor a portable probate jurisdiction where an out-of-state executor has already been appointed. Estate plans and probate strategies that work elsewhere often fail outright in Florida due to residency restrictions, homestead laws, mandatory counsel requirements, and rigid creditor statutes. Early coordination with Florida-licensed probate counsel is essential whenever a client owns Florida real estate, claims Florida domicile, or names non-resident fiduciaries.

LONG-TERM CARE PLANNING IN FLORIDA

Long-Term Care Planning for Spouse

The qualifying supplemental needs trust.

Florida is an elective share state with the elective share being an amount equal to 30% of the elective estate.[74] In Florida, one can satisfy the elective share by creating in their last will and testament a qualifying supplemental needs trust ("QSNT") for the benefit of the surviving spouse. Since 1999, the property that is included in the elective estate is augmented for elective share purposes, as set forth in Florida Statutes §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 ($18,000 pursuant to Florida Statutes §732.403). 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 $20,000 as of the date of death and two 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.[75]

Under Florida law, the income and principal of the QSNT 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.[76] Thus, this would include the decedent's parents and brothers and sisters, nieces and nephews, as well as children and grandchildren of the decedent *and* the decedent's surviving spouse.

Florida law also requires court approval for the creation of a QSNT in satisfaction of the elective share if the aggregate value of all property in the trust is $100,000 or more. While this will require some additional legal fees that might have otherwise been avoided through the use of a non-SNT trust, the dual benefits of a qualifying supplemental needs trust satisfying the elective share and having QSNT assets not countable for Medicaid eligibility purposes of the surviving spouse 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 during lifetime along with the benefits of satisfaction of the elective share and asset preservation in the face of the need by the surviving spouse for long term care and government benefits eligibility. The trust, established solely in the name of the well spouse, typically owns all of the marital assets. The trust includes a provision for the calculation of the elective share amount and directs that the elective share amount will be distributed to the decedent's estate. The reason for this reverse pour-over into the deceased spouse's estate is rooted in Federal law. Under 42 USC §1396p(d)(2) and (h)(1), if a trust is created using assets of the Medicaid applicant or their spouse, and the trust is not created by will, then the assets in the trust may be considered available resources for Medicaid eligibility purposes.[77] This means if the well spouse creates a supplemental needs trust for the ill spouse using a revocable trust, Medicaid may treat it as if the ill spouse created the trust themselves. This would disqualify the ill spouse from Medicaid, because the assets would be deemed available to them.

To avoid this, the trust must be created by will—making it a testamentary trust so that it qualifies as a third-party SNT and the assets are not counted against the surviving spouse's Medicaid eligibility.

Once the elective share amount is distributed to the decedent's estate, the decedent's last will and testament would then create a QSNT for the benefit of the surviving spouse in full satisfaction of the elective share under Florida law. Because the QSNT is created under the will of the now deceased spouse, the client avoids the imposition of Medicaid transfer penalties, and the assets in the QSNT are not countable for purposes of determining the surviving spouse's Medicaid eligibility. The remaining assets in the revocable trust (probably 70% of the marital estate, assuming a 30% elective share amount) will pass outright to designated beneficiaries other than the surviving spouse, usually the children. The non-QSNT assets are not subject to probate, and because the transfer was precipitated by death, there is no transfer penalty applicable to the 70% of assets going to the children. Provided that the minimum amount required to fund the QSNT is mandated under the terms of the revocable trust and will (30% under current Florida law), any other allocation of assets can be provided for (i.e., 40% of assets to the QSNT, and 60% of assets outright to the kids, 55% of assets to the QSNT, and 45% outright to the kids, or even 100% of assets can be directed into the QSNT). 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 portion going outright to the children, while allowing for the elective share or higher amount to be set aside to be used to supplement the surviving spouse's needs while in receipt of Medicaid.

This approach can also be used even though it is unclear which spouse, if any, will become ill and possibly require Medicaid to pay for long term care costs. 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 in the amount of the elective share when each one dies, by moving substantially all assets into the well spouse's name when one of the spouses becomes ill, then $120,000 (30% of $400,000) 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 protected and therefore available to pay for supplemental costs to the extent not covered by a government program such as Medicaid.

In states that do not allow satisfaction of the elective share amount through a qualifying supplemental needs trust, the surviving spouse either would have to spend down the elective share amount or could engage in Medicaid planning to protect only a portion of that amount.

Spousal refusal.

In all states, one must address the issue of a Community Spouse[78] owning resources that exceed the Community Spouse Resource Allowance. Florida (and New York) follow federal law and allow the use of spousal refusal by the Community Spouse, thereby allowing the institutionalized spouse to qualify for Medicaid notwithstanding that the Community Spouse possesses resources in excess of the Community Spouse Resource Allowance.[79]

As the Community Spouse Resource Allowance in Florida is $162,660 in 2026, any assets owned by the community spouse in excess of this amount will be countable resources rendering the institutionalized spouse ineligible for Medicaid benefits. While planning in some states favors annuity planning or promissory note/gift and loan planning to address excess community spouse resources, Florida, similar to New York, permits the use of spousal refusal as a means of rendering community spouse assets non-countable for purposes of determining the institutionalized spouse's Medicaid eligibility.

The starting point for this discussion under Florida Medicaid rules[80] is that the assets of both spouses (even if they are separated) are considered when determining an individual's Medicaid eligibility. The portion deemed "available" is the amount remaining after the community spouse's asset allowance is subtracted from the couple's total included assets.

If, after declaring and verifying their assets, the community spouse refuses to make them available to the spouse applying for Medicaid ICP benefits, the individual applying for Medicaid may assign his rights of support to the state and still obtain ICP benefits.[81] The Assignment of Support Rights allows the state to pursue recovery from the community spouse for assets in excess of the Community Spouse Resource Allowance.[82] When all conditions of ESS Manual §1640.0314.04 are satisfied, the assets which the community spouse refuses to make available to the institutionalized spouse will no longer be countable as resources for purposes of determining the institutionalized spouse's Medicaid eligibility. These conditions include:

- The institutionalized spouse is not eligible due to the community spouse's assets and the community spouse refuses to use assets for institutionalized spouse;
- The institutionalized spouse signs and files the Assignment of Support Rights form (CF-ES Form 2504);
- The institutionalized spouse would be eligible if only those assets to which they have access were counted; and
- The institutionalized spouse has no other means to pay for nursing home care.

In Florida, if the community spouse refuses to make their assets available to the institutionalized spouse, they are not entitled to a community spouse income allowance.[83]

Also, if spouses have been separated and the community spouse cannot be located, the Florida Medicaid agency (Florida Department of Children and Families) will treat the applicant as an individual and not a married applicant for eligibility purposes.

It is important to obtain a signed spousal refusal document that coincides with or precedes the month for which eligibility is being sought. If it is dated subsequent to the targeted month of eligibility, then it will not be honored for any month prior to the month in which it was executed.

Also, it is important that any spousal transfers designed to bring the institutionalized spouse's resources below the Medicaid resource allowance of $2,000 occur prior to the signing or submission of the spousal refusal document to Medicaid. In one recent Florida case, Florida's 1st District Court of Appeals considered the ability of an ill spouse to transfer some assets to the community spouse subsequent to the community spouse exercising his right of spousal refusal. In *Feldman v. Department of Children and Families*,[84] the Court determined that Medicaid eligibility was properly denied where the community spouse refused to make assets available for the institutionalized spouse's care and then, after this refusal, the community spouse became the recipient of additional assets of the institutionalized spouse.

On February 4, 2004, Mrs. Feldman signed an assignment of support rights and her husband signed a spousal refusal. On March 11, 2004, Mrs. Feldman transferred $227,000 (most likely after discovered assets) to her husband and applied for Medicaid on that date seeking retroactive benefits. On March 19, 2004, Mrs. Feldman signed a second assignment of support rights and Mr. Feldman signed another spousal refusal form. These new forms were submitted to the Department of Children and Families with a notice that the new forms were being submitted and the old forms were being withdrawn. On these facts, the 1st District Court of Appeals upheld the determination at Fair Hearing of the Department of Children and Families that retroactive benefits could not be obtained due to excess resources of the institutionalized spouse.

Mrs. Feldman argued that Florida's Medicaid policy manual permits transfers to a spouse after the spouse signs a notice of spousal refusal, meaning her transfer should have been allowed without penalty. The Florida First District Court of Appeal affirmed the denial of Medicaid eligibility. The court took the view that the federal statute allowing interspousal transfers[85] was limited by the Community Spouse Resource Allowance (CSRA) rules under 42 USC §1396r-5. Recall that under §1396r-5, when attribution of resources is made at the time of initial eligibility determination, all the resources held by either the institutionalized spouse, community spouse or both, shall be considered to be available to the institutionalized spouse.[86] The court reasoned that allowing unrestricted interspousal transfers after a filing for Medicaid eligibility and spousal refusal would undermine the CSRA framework, which exists to balance spousal protections via a CSRA while preventing Medicaid abuse through unlimited spousal transfers. Therefore, the transfer was treated as an improper attempt to qualify for Medicaid by sheltering assets.

This case is very likely limited to its facts in a case that wreaks of "bad facts make bad law," but nevertheless should serve as a warning to complete all spousal transfers before the spousal refusal document is signed and before the application for Medicaid is submitted.

Long term care planning for individuals.

Medicaid eligibility and planning tools vary from state to state, so out-of-state practitioners must be aware that whatever strategies may have been implemented in the state of origin likely will not work in Florida (or any other state for that matter). While eligibility is rooted in Federal law, there is some latitude in each state's implementation of the Medicaid program to deviate from Federal law through to waiver process. This, coupled with variations within each state by counties charged with implementing the program at the county level on behalf of the state results in a mosaic of rules and planning tools that will work in any one state. While in many states, the so-called reverse rule of halves approach is used whereby a person renders themself "otherwise eligible" under post-Deficit Reduction Act of 2005 requirements through a "gift and return" strategy, there are planning tools are more frequently utilized in Florida to establish eligibility. Following are a few of these strategies and the applicable rules set forth in the Economic Self-Sufficiency Manual that may be implemented for preserving assets while allowing a person to obtain Medicaid eligibility.

1. Income Producing Real Estate: In Florida, Medicaid applicants must meet strict income and asset limits to qualify for long-term care benefits. However, when it comes to assets, Florida law allows for a powerful planning tool: income-producing real estate. Under Rule 1640.0548 of the Florida Department of Children and Families (DCF) Program Policy Manual, real estate that generates income consistent with its fair market value is excluded from the asset test. This means that even if the property is worth more than the $2,000 asset limit, it can be retained without disqualifying the applicant from Medicaid.

This planning requires assistance from an experienced elder law attorney, who will help the applicant convert countable assets into income-producing property—typically rental real estate. The property must generate income that aligns with its market value. If it does, it is considered exempt from Medicaid's asset limits. If it does not, then the asset is countable. The rental income received is then used to pay for nursing home or assisted living care, reducing Medicaid's financial burden. Estate recovery is avoided by using an enhanced life estate deed in the name of the applicant, payable on death to the heirs. Since Florida uses a narrow definition of estate for estate recovery purposes, this asset is not subject to estate recovery.

The attorney will need to help clients navigate how best to manage the property once owned. One approach is to self-manage and is typically chosen where a real estate agent or someone with real estate management experience is a family member. Another approach, and the one more commonly used by families, is to use a management company that can offer turnkey services to simplify this strategy. The management company helps clients purchase suitable real estate, manage tenants and property operations, ensure compliance with Medicaid rules, and provide monthly rental income to the client, which is then used toward care costs.

This strategy must be executed under the guidance of a qualified elder law attorney to avoid penalties or disqualification. This strategy may not be suitable for all clients. Managing real estate may not be preferred by all applicants, especially those with limited capacity or urgent care needs. Of course, if there is a suitable agent under a power of attorney, that is a workable solution. If the strategy is not properly implemented, Medicaid imposes a five-year look-back period on asset transfers and improper transfers or undervalued sales can trigger penalties. There is also a requirement that the property must be rented at all times, so with limited exceptions, the departure of a tenant for an extended period will cause the property to lose its categorization as income producing property.

2. Personal Care Contracts: Personal Care Contracts are widely recognized and used in Florida. Florida Medicaid allows the use of such contracts whether an individual is residing in a nursing home, assisted living facility or the community, and allows for payment of compensation under the contract to be made in one lump sum, thereby accelerating Medicaid eligibility as compared to the "pay as you go" approach.

In *Thomas v. Florida Department of Children & Families*,[87] the Florida Fourth District Court of Appeal held that a properly structured personal services (personal care) contract between an elderly Medicaid applicant and a family member is not a disqualifying transfer for Medicaid eligibility purposes when the payment reflects fair market value for future services and the agreement is legally enforceable.

The applicant, Minerva Thomas, entered into a written lifetime contract with her daughter shortly before entering a skilled nursing facility, paying a lump sum based on actuarial life expectancy in exchange for ongoing care coordination, supervision, and advocacy services. The Florida Department of Children and Families treated the payment as an impermissible transfer and denied Medicaid benefits. The appellate court reversed, concluding that the payment constituted compensation for services, not a gift.

Contrary to New York, which does not permit personal care contracts in the institutional care setting,[88] the Court's opinion in the *Thomas* case may be used to advance the argument that nursing homes alone cannot provide the necessary care to an individual without additional community supports, including family members who can legitimately be paid for providing such services.

Furthering this analysis, Florida is a §1634 state that follows federal law regarding personal care contracts, meaning SSI financial eligibility determinations generally drive Medicaid eligibility, and Social Security transfer of asset analyses are communicated to DCF. Thus, the SSI rules pertaining to care contracts will be applied in cases where the applicant is seeking Florida Medicaid eligibility. Further evidence that care contracts will be honored for purposes of Florida Medicaid eligibility appears in a Regional Chief Counsel decision issued on May 21, 2014 involving a Florida personal care contract used in connection with an individual's application for Medicaid.[89] In this decision the care contract was upheld by the Social Security Administration

As a result, out of state practitioners may rely on the enforceability of personal care contracts if they are:

- in writing and executed by the care provider and care recipient
- limited to future services (and not payment for past services rendered prior to the execution of the contract);
- based on reasonable, market-supported compensation tied to life expectancy; and
- clearly set forth the services to be provided and are enforceable as to both parties to the agreement.

3. Partial Return of Funds: A partial return of funds is permitted in Florida after an asset transfer has been made, resulting in a reduction of the applicable penalty period.

Under §1640.0620 (Adjustments to Penalty Period (MSSI)) of the Economic Self-Sufficiency Medicaid Manual, if all transferred assets or income are returned to the individual, the penalty period is eliminated. Eligibility is then evaluated with the returned assets included as though the individual had never transferred the asset or income. Returned assets or income are counted as available according to standard policy when determining eligibility for retroactive months. If the transferred asset or income is returned to the individual in part, the eligibility specialist is directed to (1) reduce the uncompensated value accordingly, (2) refigure the period of ineligibility, (3) evaluate the returned asset according to normal asset rules, and (4) count the returned asset as if it had been available in retroactive months.

4. Promissory Note Planning: The use of promissory notes in Medicaid planning will not be treated as a transfer for less than fair market value (i.e., subjected to a penalty period) provided the note meets all the requirements specified under federal law as enacted by the Deficit Reduction Act of 2005. Florida's requirements for a valid promissory note are contained in the ESS Manual §1640.0708. Thus, valid notes for Medicaid planning must constitute a bona fide, enforceable loan that is actuarially sound, requires fully amortized equal payments, prohibits cancellation at death, and does not extend beyond the lender's life expectancy. Any deviation causes the unpaid balance to be treated as a transfer for less than fair market value, triggering a Medicaid penalty.

In Florida practice, promissory notes are used sparingly—primarily in crisis planning to rebalance countable assets or to fund care during a transfer penalty period. Promissory notes may be used by some practitioners in a spousal planning context where a client wishes to avoid a demand for recovery against the refusing spouse if a spousal refusal approach were to be used. Instead, the promissory note is issued by the community spouse at the time of application to reduce community spouse resources, thus bringing that amount to less than the community spouse resource allowance (maximum CSRA amount in Florida is $162,660 in 2026), and provide a mechanism for the community spouse to be able to rely on the future receipt of note payments as a source of income on which she may live.

5. Income Cap State: Some states are known as "spenddown states" where, regardless of the amount of income a person receives (up to the Medicaid reimbursement amount), the excess income will not be an impediment to establishing one's own Medicaid eligibility and may be spent down on the cost of care, then Medicaid will pay the rest. Florida is an income cap state whereby excess income in excess of the income cap will disqualify an applicant for Medicaid.

The Qualified Income Trust: A Qualified Income Trust (QIT)—also known as a "Miller Trust"—is a trust required under Florida law for individuals whose income exceeds the Medicaid eligibility cap but who otherwise meet the criteria for long-term care Medicaid. Florida is an "income cap" state, meaning that if an applicant's gross monthly income surpasses the threshold (currently around $2,982 for individuals and $5,964 for married couples in 2026), they are ineligible for Medicaid unless the excess income is redirected into a QIT each and every month.[90]

The QIT must be irrevocable and funded exclusively with income—not assets. Common sources of income include Social Security, pensions, and other recurring income payments. Once deposited into the trust, the income is no longer counted toward Medicaid eligibility, allowing the applicant to qualify for benefits. The trust must be properly administered each month, with detailed records and bank statements showing the funding and disbursements. Failure to follow these procedures can result in disqualification from Medicaid. Therefore, ongoing monitoring of this process is crucial to avoid the applicant exceeding income in any particular month and therefore becoming ineligible for ongoing Medicaid benefits. Late funding of a QIT, although the QIT was established in the month of eligibility, will not suffice to establish an individual's Medicaid eligibility for that month. The QIT must be established *and* funded each and every month for which eligibility is desired.

Florida's Department of Children and Families (DCF) enforces strict documentation standards in the administration of QITs. DCF has been reported by Florida practitioners as rejecting a proper QIT funding when only the statement showing the transfer from a non-QIT account is provided – DCF may reject account statements that do not explicitly reference the QIT by name, even if the account numbers match. Practitioners have reported that only direct bank statements from the QIT account are accepted as proof of funding—not transfers shown on other accounts used to fund the QIT. An extreme case involved a QIT statement that only had the words "Qualified Income Trust" on the statement, and it did not refer to the "[Name of Applicant]" Qualified Income Trust.

6. Transfers to Pooled Special Needs Trusts for Individuals Aged 65 and Over: A pooled special needs trust (so-called OBRA '93 (d)(4)(C) trusts) qualifies for an SSI/Medicaid applicant *trust exception* from the transfer of resource penalty period rules and the resource countability rules if each sub account is truly for the sole benefit of an individual who is "disabled" as defined in 42 U.S.C. §1382c(a)(3). If the person isn't disabled, the exception doesn't apply to that sub account. The Social Security Administration or Medicaid will then evaluate the account under the regular trust resource rules and in that case will likely be counted as a resource for SSI and Medicaid purposes.

In some states, a transfer to a pooled special needs trust by an individual aged 65 or over will create a penalty period for Medicaid eligibility, while in other states a transfer to a pooled special needs trust will *not* create a penalty period for Medicaid eligibility even if the individual is 65 or over. Practitioners should become familiar with the backdrop for this legal landscape as it pertains to the use of pooled special needs trusts in long-term care planning. These include:

- Statute - Medicaid trust exception for pooled trusts found at 42 U.S.C. §1396p(d)(4)(C) requires accounts be established "solely for the benefit of individuals who are disabled." The Social Security Administration (SSA) uses this standard particularly when deciding SSI resource exclusions for self-settled trusts.
- Program Operations Manual System (POMS - SSA policy) - SI 01120.203(D) addresses the pooled trust exception, disability and sole-benefit requirements, and what to do if the requirements are not met, and SI 01120.200 discusses how trusts are counted when no exception applies.
- ESS Manual Section 1640.0576 (MSSI, SFP)

The Center for Medicare and Medicaid Services ("CMS"), the federal agency responsible for administering the Medicare and Medicaid programs, has clarified that:

- Transfers into pooled trusts by individuals aged 65 or older are considered disqualifying transfers under Medicaid rules **unless exempted by state-specific provisions.**
- These transfers are treated as gifts for less than fair market value, potentially triggering a penalty period of Medicaid ineligibility.
- States are expected to align their regulations with this CMS guidance. For example, MassHealth (Massachusetts Medicaid) revised its rules to enforce penalties on such transfers starting March 1, 2024.

Thus, while federal statutory and regulatory guidance sets the baseline for this discussion, state Medicaid agencies retain discretion in interpreting and applying these rules. Thus we are left with the fact that some states may allow pooled trust funding after age 64 with no penalty if the trust meets all other requirements and others, like Massachusetts, explicitly impose penalties for such transfers.

Florida is a state where pooled special needs trust planning by individuals over 64 will not result in a penalty period. This can be a valuable planning tool for disabled individuals who can then significantly enhance the quality of their lives even though they are disabled and receiving government benefits. Funds from such a trust can be used to cover a wide range of expenses not otherwise paid by a government benefits program. These expenses may include: medical and dental services not covered (i.e., eyeglasses, hearing aids, prosthetics); assistive technology and mobility aids (i.e., electric wheelchairs); internet and cell phone services, transportation (i.e., taxis, ride services, vehicle modifications); home modifications for accessibility, social and recreational activities (i.e., vacations, hobbies, outings); pet care expenses; caregiver services and private case management; personal items like clothing, furniture, and nonprescription medications; education and vocational training; hair and nail care; and telephone and television services, to name a few.

Although some sections of the ESS Medicaid Manual were changed in early 2001 to indicate that a penalty period will now be imposed for transfers of assets into a pooled trust special needs trust account (and therefore a person cannot use a Pooled Trust if over age 64), the Joint Public Policy Task Force (a joint venture between the Florida Bar Elder Law Section and the Academy of Florida Elder Law Attorneys) indicated in an Elder Law Section Update[91] that it has written assurances from the Department of Children and Families that there is no change in the treatment of the use of Pooled Special Needs Trusts for those over age 64 notwithstanding the ESS Manual language suggesting otherwise. It is clear from these communications that the portion of the Manual prohibiting the use of pooled trusts for individuals over 64 is not to be relied upon by DCF case workers. The Task Force previously decided not to bring litigation on this issue and continues to maintain that such litigation is unnecessary because DCF has stated it will not enforce the change.

There has been at least one recent Department of Children and Families office that has raised the issue of the use of a Pooled Special Needs trust for an individual over the age of 64. The Joint Public Policy Task Force has been monitoring this concern for several years now. If a practitioner experiences any difficulty (i.e., imposition of a penalty period for funding a pooled trust subaccount on behalf of a person aged 65 or over) on the use of a Pooled Special Needs Trust solely because the beneficiary is over the age of 64, please reach out to this author or anyone on the Elder Law Section Executive Team (www.ElderSection.org) and let them know.

An additional component of using pooled trust accounts for individuals of any age is that one must prove one's own disability for the transfer to be considered exempt from the transfer penalty rules for Medicaid eligibility purposes. While receipt of SSI or SSDI benefits is prima facie proof of one's disabled status, barring either of those determinations having been made by the Social Security Administration, your client will need to request a disability determination by the Department of Children and Families Medical Review Team for a beneficiary of any age to use a Pooled Trust.

7. Resource Allowance: While many states establish a resource allowance at the federally mandated $2,000 asset limit for individuals (Florida being one of them) and $3,000 for a married couple,[92] for the Institutional Care Program, Home and Community Based Services, Hospice, and the Working People with Disabilities programs, some states have higher limits due to waivers being issued by the Center for Medicare and Medicaid Services. For example, in New York the resource allowance for an individual is $33,038 as of January 1, 2026. However, in Pennsylvania the resource allowance for an individual is based upon one's income level: if an individual applying for benefits in 2026 has more than $2,982 of gross monthly income, then the resource limit for countable (non-exempt) resources is $2,400. If the same applicant has gross income of $2,981 or less, then the person's resource limit is $8,000.

8. The Florida Homestead - Medicaid Considerations: To be excluded, a home must be the person's principal place of residence (if not, a caseworker will include the property as an asset unless an exception applies), and the home must be under the home equity interest standard unless there is an exception that applies. Pursuant to Appendix A-9 of the ESS Manual, the home equity interest level is set at $752,000 as of January 1, 2026 and is adjusted annually in accordance with federal law.[93]

DCF in Florida will presume that home ownership exists if a Medicaid applicant's name is shown as owner on an assessment notice, recent tax bill, current mortgage statement, deed, or report from title search.

An individual can acquire an ownership interest in a home through various actions, including paying a mortgage or construction of home additions or improvements, even if another person holds sole legal title. The individual Medicaid applicant may allege ownership if they have contributed to the equity or value of the home (this must supported through the submission of relevant documents proving the applicant's use of funds and may include a written agreement between the individual and the homeowner having legal title indicating this mutual understanding).[94]

If an individual shares the ownership interest in a home with other persons, the home is nevertheless excluded.[95]

Individuals with a home equity interest greater than the standard set forth in Appendix A-9 of the ESS Manual are ineligible for nursing facility or other Long Term Care services, unless one of the following relatives of the institutionalized individual is residing in the home:

- Spouse;
- Child under age 21; or
- Blind or disabled child, regardless of age or marital status.

The verification of home equity can be obtained from a real estate broker, mortgage broker, property appraiser or builder, which must include:

- The current market value,
- The name of the person providing the estimate, and
- Contact information of the business or agency for whom the person providing the estimate works.

The home equity provision may be waived when denial of long-term care services would result in demonstrated hardship to the institutionalized individual. ESS Manual §1640.0307.05 delineates the parameters for undue hardship and indicates this would apply if the Medicaid applicant would be deprived of medical care to such an extent that their life or health would be endangered or that the individual would be deprived of food, clothing, shelter or other necessities of life if determined ineligible for Medicaid LTC services. Endangerment exists when the deprivation of long-term medical care will cause acute symptoms of such severity that will result in the serious jeopardy to the health of the individual or serious impairment of bodily functions or dysfunction to a body organ or part. All of this must be documented by a medical doctor. Further, in Florida, a nursing facility may request an undue hardship waiver on an individual's behalf with their, or a designated representative's, consent.

9. Shared Ownership of Real Property: In Florida, if a Medicaid applicant cannot sell their real property situated in Florida without the consent of a co-owner who refuses to sell, the property is not considered a countable resource for Medicaid eligibility purposes.[96]

10. Enhanced Life Estate or Lady bird Deeds: Under Florida Medicaid rules, enhanced life estate deeds (lady bird deeds) are considered the same as 100% outright ownership (thus, such real estate owned in this manner is counted the same as other real property an individual may own and may only be excluded if it qualifies as the individual's Homestead and an Intent to Return Home is filed along with the Medicaid Application).

However, enhanced life estate deeds cause eligibility issues in other states particularly where the other state does not recognize enhanced life estate deeds. Practitioners must not assume that if a state where enhanced life estate deeds are recognized and frequently used for probate avoidance and Medicaid eligibility, they can similarly be used in another jurisdiction.

11. The Medicaid Asset Protection Trust: Practitioners familiar with Medicaid planning in other jurisdictions often assume that a Medicaid Asset Protection Trust (MAPT) operates uniformly across states. Florida is a notable exception. While federal Medicaid law supplies the outer framework, Florida's constitutional protections, Trust Code provisions, Medicaid eligibility structure, and administrative practices produce outcomes that differ significantly from many Uniform Trust Code or "spend-down" states. The following Florida-specific considerations are essential for any out-of-state attorney advising on—or reviewing—MAPT planning for Florida residents.

Considered an advance planning tool, the Medicaid Asset Protection Trust is used in Florida to protect assets when an individual is healthy (or can privately pay for care through the five-year lookback period) and wishes to be in a position to meet Medicaid's stringent resource limit of $2,000 once the applicable five-year lookback period has expired. Here are some issues out-of-state practitioners should be aware of regarding Florida Medicaid Asset Protection Trusts.

Florida's Unique Treatment of Homestead and Its Interaction with MAPTs: Florida's constitutional homestead protection is among the strongest in the country, shielding a primary residence from most creditor claims without a dollar cap. However, Medicaid does not track Florida's constitutional homestead rules. Instead, Medicaid applies federal eligibility limits that impose a home equity cap unless a qualifying occupant (spouse, minor child, or disabled child) resides in the home. As a result, a residence that is fully protected from creditors under Florida law may still jeopardize Medicaid eligibility if equity exceeds the federal cap. For this reason, with a Florida home equity cap of $752,000 in 2026, one may still choose to place an otherwise protected home (from a creditor standpoint) into a MAPT, particularly if the home's value places it at or near the home equity cap. Not only does this remove the value of the home from being considered by the Medicaid agency at the time of application, it also permits the sale of the home without the net sales proceeds then becoming a countable resource for Medicaid eligibility purposes.

Florida Is an "Income Cap" State—MAPTs Do Not Solve Income Problems: Florida Medicaid long-term care eligibility is constrained by a strict income cap, rather than a spend-down model. Applicants whose income exceeds the cap must use a Qualified Income Trust (QIT) to qualify. MAPTs play no role in income qualification. This distinction is critical, as practitioners from spend-down states may mistakenly view MAPTs as solving both asset and income issues. In Florida, they solve only the asset side of the equation.

Accordingly, MAPTs in Florida are almost always paired with separate income planning tools, and drafting must anticipate parallel trust structures rather than a single comprehensive vehicle.

Florida's Five-Year Look-Back Is Transfer-Specific, Not Trust-Specific: While the federal five-year look-back period is familiar to most practitioners, Florida's application of the look-back to multiple transfers into MAPTs must be addressed; each individual asset transfer to an irrevocable trust triggers its own look-back period. The execution date of the trust is irrelevant; what matters is the date each asset is transferred. Staggered funding can therefore result in multiple overlapping penalty periods, extending Medicaid ineligibility far beyond what clients may anticipate.

For Florida clients, timing coordination is as important as trust design. Out-of-state practitioners accustomed to "fund-later" planning may inadvertently create prolonged penalty exposure if timing rules are not considered.

Florida's Self-Settled Trust Creditor Rules Shape MAPT Drafting: Under Federal law, principal distributions to the settlor in a Medicaid Asset Protection Trust are forbidden under any circumstances. The controlling federal law is contained in 42 USC § 1396p(d). Specifically, the prohibition comes from the "any circumstances" test in 42 USC § 1396p(d)(3)(B)(i).

The operative statutory language provides:

> If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus... shall be considered resources available to the individual.

Thus, under § 1396p(d), if principal *could* be paid to the settlor under any circumstances, and regardless of trustee discretion, settlor intent or trust purpose, distributions standards, spendthrift clauses, or the likelihood that a principal payment *would* be made, the trust corpus is treated as an available Medicaid resource.

A typical Medicaid Asset Protection Trust in Florida is therefore drafted as an irrevocable, self-settled trust with no circumstance permitting principal distributions to the settlor and often allowing income-only distributions to the settlor. Income is treated differently under many state Medicaid methodologies, but principal distributions are fatal under § 1396p(d)(3)(B) if payable to the settlor.

In addition to §1396p(d), which provides the "any circumstances" test to determining if assets are countable for Medicaid purposes, under § 736.0505 Florida Statutes, Florida allows creditors of a settlor to reach any portion of a trust that is distributable to the settlor. This rule applies even to irrevocable trusts. As a result, Florida MAPTs are typically drafted to allow the settlor to retain an income interest but no access to principal, since retained principal access would render the trust assets reachable by creditors and potentially countable for Medicaid.

While similar principles exist elsewhere, Florida's statutory clarity on self-settled trusts makes income-only retention the dominant design choice, and deviations can have cascading asset-protection and Medicaid consequences.

There is even an argument that if such trusts are implemented to protect assets, a grantor may choose not to retain an income interest either because doing so will render such retained income interest countable for Medicaid purposes should the grantor later apply for and receive Medicaid benefits.

Beware of Florida's Interpretation that the Power to Substitute Assets of Equivalent Value and the Power to Borrow May Render Trust Corpus a Countable Resource: In many jurisdictions outside of Florida, practitioners use the power to substitute assets of equivalent value or the power to borrow trust assets to achieve grantor trust status for a MAPT. Out-of-state practitioners may be surprised to learn that in Florida, there are two Medicaid Fair Hearing decisions that upheld the administrative law judge's conclusion that a grantor's inclusion of the power to substitute assets under Section 675(4)(C) of the Internal Revenue Code and the power to borrow from trust corpus under Section 675(2) renders MAPT assets countable for Medicaid eligibility purposes.

In the first decision,[97] a MAPT was established on March 3, 2001 with $278,116.43. The trust authorized the grantor the power to substitute assets of equivalent value.

The Department of Children and Families argued that according to the trust's grantor retained powers section, the grantor may reacquire trust corpus by substituting assets of equivalent value. And, although DCF acknowledged this provision was included for income tax purposes, the agency argued that because the grantor "has the authority to revoke or direct use of the trust, the corpus of the trust is considered a resource." On this basis, DCF determined that the petitioner had more than $2,000 in assets.

The primary reasoning for this conclusion was that under Florida Administrative Code 65A-1.702 and 42 USC §1396p(d)(3), funds transferred into a trust shall be considered available resources or income to the individual "if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual."

The petitioner's attorney argued that petitioner was not a beneficiary of the trust and had no control over trust assets. Petitioner's counsel countered that to substitute assets of equivalent value, the substitution must be dollar for dollar, and since the petitioner had no assets, no substitution was possible. This argument highlights the fact that this power is essentially similar to an option to purchase the assets of the trust at their then fair market value, and since the Medicaid applicant had no assets, the option could never be exercised. In the eyes of the administrative law judge, this argument failed and the trust assets were deemed countable for purposes of determining the grantor's eligibility for Medicaid.

In the second Fair Hearing decision, an application for Institutional Care benefits was made on November 13, 2000, seeking eligibility for October 2000 and ongoing.[98] In this case, the petitioner's spouse created an irrevocable trust on September 26, 2000. In this trust, the grantor retained the power to substitute assets of equivalent value and included a provision permitting the grantor to borrow from the trust corpus. The trust specifically included language stating that these "provisions are included in order to have this Trust treated as a grantor trust for income tax purposes." The assets of the trust consisted of various stocks, a boat, an insurance policy and a Merrill Lynch account totaling about $1,543,000.

On October 30, 2000, the trustees of the trust executed a promissory note in exchange for the assets that were placed into the trust by the community spouse and provided for monthly payments of $9,001.47 each month to the community spouse. Because the trust issued a note for the assets placed into the trust by the community spouse, and the institutionalized spouse had no access to the principal of the trust, the note was not deemed to be a countable resource to the community spouse that would affect the institutionalized spouse's Medicaid eligibility (because the note produced income consistent with its value). However, the administrative law judge in this Fair Hearing decision was persuaded by DCF's argument that the grantor's right to borrow assets from the trust gave the grantor unlimited access to the trust corpus, and therefore all trust assets were countable for purposes of determining the Medicaid eligibility of the institutionalized spouse.

In traditional estate planning, practitioners routinely rely on certain "defective" administrative powers of the grantor under Subpart E of the Internal Revenue Code to intentionally trigger grantor trust status, thereby causing the grantor to be treated as the owner of the trust for income tax purposes while preserving transfer tax advantages. Two of the most frequently used powers arise under IRC Section 675.

First, the power to substitute assets of equivalent value, commonly referred to as the "swap power," is explicitly recognized under IRC Section 675(4)(C), which treats the grantor as the owner of a trust for income tax purposes where a power exists to "reacquire the trust corpus by substituting other property of an equivalent value," provided the power is exercisable in a nonfiduciary capacity. This power is widely used because it reliably produces grantor trust status without, standing alone, causing estate inclusion, and it provides substantial tax planning flexibility—most notably, the ability to manage basis by exchanging assets between the grantor and the trust.

Second, grantor trust status may be achieved through a power to borrow without adequate interest or security under IRC Section 675(2), which applies where the grantor (or a nonadverse party) can access trust corpus or income on favorable terms. These borrowing powers are attractive from a tax perspective because they reflect a level of dominion and control sufficient to justify taxing the trust's income to the grantor, even if the powers are never exercised. Note the similarity between the power to substitute assets of equivalent value and the power to borrow without adequate security. A power to borrow from the trust without adequate security can be seen as a power to substitute the assets of the trust for another asset of equivalent value (namely, an unsecured promissory note bearing adequate interest).

Notwithstanding their widespread use in tax planning, Florida Medicaid practitioners generally avoid both the substitution power and the unsecured borrowing power in the context of Medicaid Asset Protection Trusts. As reflected in the Fair Hearing decisions discussed above, Florida's eligibility analysis looks beyond formal ownership and focuses instead on whether the applicant has retained meaningful access to or control over trust assets. A retained right to reacquire trust property—even for equivalent value—or to access trust corpus through borrowing may be viewed as evidence that the settlor has not fully relinquished control, thereby risking classification of the trust assets as countable resources for Medicaid purposes. In this respect, the very features that make Section 675(2) and Section 675(4)(C) effective grantor trust triggers for income tax purposes render them problematic in the Medicaid context.

Florida practitioners have increasingly turned to alternative methods of achieving grantor trust status that do not vest problematic powers in the grantor. One such approach is to grant a trust protector or other nonadverse party—rather than the grantor—the power to modify beneficial interests by adding charitable beneficiaries. This approach invokes IRC Section 674(a), which generally treats a trust as a grantor trust where a nonadverse party holds a power to affect the beneficial enjoyment of trust income or principal without the consent of an adverse party. Properly structured, the ability of a nonadverse party to add charitable beneficiaries can trigger grantor trust status without giving the grantor any direct or indirect control over trust assets.

From a Medicaid planning perspective, this approach offers a critical advantage: it preserves grantor trust treatment for income tax purposes while avoiding the appearance of retained dominion that has proven fatal in recent Florida fair hearing decisions. Accordingly, the preferred drafting convention in Florida

MAPTs is to eliminate grantor-retained administrative powers that resemble ownership and instead rely on powers held by independent parties—such as trust protectors—to achieve the desired income tax result without jeopardizing Medicaid eligibility.

Medicaid Estate Recovery and MAPTs in Florida: Florida participates in the federal Medicaid Estate Recovery Program pursuant to §409.9101, Florida Statutes, commonly referred to as the Medicaid Estate Recovery Act. Under this statute, the Agency for Health Care Administration (AHCA) is authorized to recover the cost of Medicaid benefits paid on behalf of a recipient from the estate of a deceased Medicaid recipient, provided the recipient received Medicaid benefits on or after age 55.

Importantly, Florida's estate recovery statute is limited to the probate estate. Section 409.9101 Florida Statutes expressly provides that estate recovery is accomplished through the filing of a statement of claim in a probate proceeding, and the Agency becomes an "interested person" in that probate estate to the same extent as other estate creditors. Recovery is carried out in accordance with Part VII of Chapter 733 Florida Statutes, governing creditor claims in probate administration proceedings.

Florida did not adopt an expanded definition of "estate" for Medicaid recovery purposes. Unlike some states that permit recovery against non-probate assets (such as revocable trusts, joint property, or life estates by statute), Florida's estate recovery authority remains tied to what passes through the decedent's probate estate, subject to statutory exemptions and defenses.

Even where a probate estate exists, recovery under Florida Statutes § 409.9101 is not absolute. Florida law prohibits estate recovery if the Medicaid recipient is survived by:

- A surviving spouse;
- A child under the age of 21; or
- A child who is blind or permanently and totally disabled under Title XIX standards.

In addition, the statute prohibits enforcement of a Medicaid claim against property that is exempt from the claims of creditors under Florida law, including constitutionally protected homestead. The statute also authorizes AHCA to waive recovery where enforcement would create an undue hardship for qualified heirs, although hardship is narrowly defined and does not arise merely because recovery defeats an expected inheritance.

Interaction Between Estate Recovery and MAPTs: A Medicaid Asset Protection Trust is typically structured as an irrevocable trust, funded during the settlor's lifetime, with the settlor retaining no beneficial interest and no incidents of ownership sufficient to cause the trust assets to be includable in the settlor's probate estate at death.

Because Florida Medicaid estate recovery under Florida Statutes §409.9101 is limited to recovery "from the estate of a deceased Medicaid recipient" and is enforced through the probate creditor-claims process, assets held in a properly drafted and funded MAPT are generally outside the reach of Florida's estate recovery program. Assets titled in the name of an irrevocable trust do not pass through probate and therefore are not subject to claims filed under Chapter 733.

This point is often misunderstood by out-of-state practitioners familiar with jurisdictions that permit expanded recovery against non-probate transfers. Florida has not statutorily extended AHCA's recovery authority to assets held in irrevocable trusts solely by virtue of their use in Medicaid planning.

Administrative Scrutiny by Florida DCF Is Trust-Specific: Florida's Department of Children and Families (DCF) applies formal trust review guidelines when evaluating Medicaid applications involving trusts. Trust instruments are reviewed by eligibility specialists and legal counsel, not merely accepted at face value. Florida MAPTs must therefore be drafted with administrative defensibility in mind, not just statutory compliance. Boilerplate irrevocable trust forms from other jurisdictions frequently fail Florida's review process.

For Florida residents, MAPTs are as much about preserving assets as they are about navigating the fault lines between federal Medicaid rules and Florida-specific property, trust, and constitutional law. Out-of-state practitioners should treat Florida MAPT planning as its own discipline and collaborate closely with Florida counsel to avoid results that are technically compliant—but practically disastrous.

Long-Term Care – Primary Levels of Care under Florida Medicaid

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. Rendering long-term care planning advice is a lot easier when a client is deciding between two facilities or two counties located within the same state, since the Medicaid eligibility rules are statewide, and the only concern is local variances between counties. However, many complex issues arise when a client is deciding whether to receive long-term care in one of two states, as is often the case considering that clients often wish to relocate to be near family who may reside in another state. Here are some tips regarding Florida's Medicaid program that will help out of state practitioners educate their clients in deciding where to receive long term care services:

Home Care Services: The rules regarding eligibility for home care services vary from state to state as this level of care is an optional service each state provides pursuant to a waiver from the Federal government so no two state home care programs are exactly alike. Some states are more generous than others have more restrictive rules. Florida's home and community-based program, which includes personal care aides, is inconsistently funded by the Florida legislature and as a result there is a wait list. Even if one qualifies for services (meaning their name was called off the wait list), the initial authorization for services may be less than the number of hours the individual needs. In such cases, advocacy through attendance at a Medicaid Fair Hearing to increase the number of hours initially authorized by Medicaid can prove instrumental. In summary, Florida does have a home and community-based home care program and through effective advocacy it is possible to minimize the time spent on the wait list and secure home care aides for a client, even if it may only cover a portion of the care an individual requires.

Assisted Living Facilities: Coverage for assisted living facilities by Medicaid also is an optional service provided by state Medicaid programs and therefore vary from state to state. In Florida, the Medicaid program covers only the medical cost of an assisted living facility (not room and board, which is not considered a medical expense). There are many facilities throughout the state that participate in this program. However, as in the case of home and community-based services, the assisted living facility program is inconsistently funded by the Florida legislature, and this can result in long wait lists before one can expect to receive services.

The costs associated with placement in the assisted living facility while a person waits for their name to be called off the wait list must be paid privately. Once approved, the medical portion that Medicaid does pay is based upon an individual's needs and facility rates, with a set cap of around $1,400-$1,600 per month. The individual's income makes up the rest of the payment to the assisted living facility, and if there is still a shortfall to the facility, there is a third component (which can be subject to limited negotiation) that other family members, such as children, will be asked to pay (this component is called a "share of cost").

Nursing Home Care: Nursing home care is a mandatory service under the Medicaid program, so one can access this level of care in Florida without funding or wait list issues, as is often the case with assisted living and home care services. Recall, however, that if a person's income exceeds the income cap applicable at the time of application, the applicant may be required to establish a qualified income trust as Florida is an income cap state and not a spenddown state for income.

Additional Florida Medicaid Programs and Coverage Categories

While the three levels of care discussed above—home care, assisted living, and nursing home care—represent the most common long-term care settings, practitioners should be aware that Florida's Medicaid program includes a broader range of coverage categories and services. These include, among others:

- **PACE (Program of All-Inclusive Care for the Elderly) -** A capitated managed care model combining medical care, social services, and long-term care for individuals who qualify for nursing home-level care but can remain safely in the community.
- **Medicaid Managed Medical Assistance (MMA) -** Provides acute medical coverage (physicians, hospitals, prescriptions), which may operate alongside long-term care benefits but is not itself a long-term care program.
- **Institutional Care Program (ICP) -** Florida's core nursing home Medicaid program, often referenced separately because it is the primary pathway for facility-based long-term care.
- **Home and Community-Based Services (HCBS) Waivers beyond standard personal care -** These may include specialized services such as adult day care, respite care, and case management, depending on eligibility and program availability.
- **Programs for Disabled or Medically Needy Individuals -** Certain individuals who do not qualify for long-term care Medicaid may still qualify for limited Medicaid benefits under medically needy or disability-based programs, which may assist with healthcare costs but do not provide full long-term care coverage.

The key takeaway for practitioners is that Florida Medicaid is not a single program, but rather a collection of programs and coverage pathways, each with distinct eligibility criteria, services, and funding limitations. Accordingly, when advising clients—particularly those considering relocation from another state—it is critical to distinguish between (i) programs that provide long-term care services, and (ii) those that provide only medical coverage or limited support services, as the availability and scope of benefits can differ significantly.

PROTECTION OF VULNERABLE ADULTS IN FLORIDA

Florida's Exploitation Statute, found within Chapter 825 of the Florida Statutes, provides powerful criminal and civil protections for elderly persons and disabled adults who may be vulnerable to financial manipulation, intimidation, or abuse. The law recognizes that aging, disability, and dependency can make individuals more susceptible to exploitation by caregivers, relatives, agents under powers of attorney, or other persons in positions of trust. Chapter 825 provides legal definitions for these offenses, sets specific penalties ranging from third-degree to first-degree felonies, and allows courts to issue injunctions to protect vulnerable adults' assets

At the heart of these provisions is Florida Statutes §825.103, which defines exploitation as knowingly obtaining or using (or attempting to obtain or use) an elderly or disabled adult's funds, assets, or property through deception, intimidation, or abuse of a position of trust with the intent to permanently or temporarily deprive the victim of their property or to benefit someone other than the victim.

Exploitation under Chapter 825 is treated seriously: all forms of elder abuse, including exploitation, are classified as felonies. The law presumes exploitation occurs if an individual aged 65 or older transfers assets valued at over $10,000 to a non-relative known for less than two years without receiving equivalent value.

Florida law goes further by creating a direct civil remedy to prevent exploitation before significant harm occurs. Section 825.1035 establishes a cause of action for an injunction for protection against exploitation of a vulnerable adult, allowing the vulnerable adult, a guardian, an agent under a durable power of attorney, or other qualified individuals to seek immediate court protection. Importantly, a petition can be filed even if exploitation has not yet occurred, so long as there is imminent danger. This statute provides an immediate, fast-acting civil remedy to freeze assets and stop abuse without having to wait for a criminal investigation or a formal guardianship proceeding. If there is an immediate and present danger of financial exploitation, a judge can grant a temporary injunction *ex parte* (i.e., without the accused person being present or notified beforehand).

The injunction statute provides broad relief, enabling courts to freeze bank accounts, freeze credit lines, prevent further transfers, and order the respondent to avoid contact with the vulnerable adult. It also allows a court to direct financial institutions to allow critical, pre-approved living expenses to be paid despite the asset freeze. The process is accessible and does not require legal representation, and residency is not a prerequisite for filing. Court clerks are legally required to provide simplified forms, complete them in a private space, and provide certified copies to the petitioner free of charge.

Together, Florida Statutes §§ 825.103 and 825.1035 reflect Florida's strong public policy of safeguarding elderly persons and disabled adults from financial and personal harm. By criminalizing exploitative conduct and offering swift civil protection, Florida provides one of the nation's more robust legal frameworks for preventing and remedying exploitation of vulnerable adults.

In addition to the Exploitation Statute, the "Stop the Scammers" Bill (Senate Bill 106) is a major piece of legislation passed by the Florida Legislature to protect vulnerable and elderly adults from anonymous internet criminals. Sponsored by Senator Jonathan Martin and Representative Kevin Steele, the law addresses a critical legal loophole by establishing tools to freeze transactions and serve legal papers to online fraudsters whose real names and locations are unknown. The "Stop the Scammers" Bill was signed into law by Governor Ron DeSantis on June 20, 2025 and the legislation officially took effect across the state on July 1, 2025.

The key provisions of the legislation include:

1. **Targeting "Unascertainable" Respondents:** Historically, victims could not easily get a protective injunction if they did not know the scammer's real identity. The bill defines an "unascertainable respondent" as an unknown person or entity operating behind an email address, social media account, or electronic program to exploit a vulnerable adult.
2. **Substitution of Digital Service of Process:** The law allows the petitioner to bypass traditional in-person legal service when dealing with an anonymous online scammer. If a detailed court affidavit outlines why the fraudster's identity is unknown, the court can authorize substitute service through the exact digital medium used to perpetrate the scam—including Facebook Messenger, dating applications, or email.
3. **Immediate 30-Day Mandatory Asset Freezes:** Once the substitute digital service is executed on the unknown scammer, the law requires that any disputed bank transfer, property movement, or fund disbursement be frozen and held for a minimum of 30 days before any assets can be distributed. This critical window gives family members, financial institutions, and law enforcement time to investigate and trace the stolen funds.
4. **Empowers "Trusted Contacts" and Family:** The bill allows family members, caretakers, or designated "trusted contacts" to petition the court directly for an emergency exploitation injunction on behalf of the senior or vulnerable adult. This bypasses long delays in instances where a victim may be actively being misled or suffering from cognitive decline.

ESTATE TAX PLANNING CONCERNS

Many states impose their own state estate tax or inheritance tax in addition to the federal estate tax. As of 2026, twelve states and the District of Columbia impose their own estate tax on the transfer of assets at death: Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, and Washington. In addition, the following states impose their own inheritance tax assets received by beneficiaries: Iowa, Kentucky, Maryland, Nebraska, New Jersey, and Pennsylvania. These taxes are based on the decedent's state of residence or where property is located, and rates generally depend on the beneficiary's relationship to the deceased, with close relatives often exempt. Out-of-state practitioners will need to take into account the implications of these state specific taxes when considering Florida planning because some state estate taxes may still be due particularly where real or tangible personal property remains owned in the state of origin.

New York is one of the states that imposes its own separate estate tax in addition to the federal estate tax. In 2026, the federal estate tax exemption amount is $15,000,000 (or double that amount for married couples). The New York state exemption amount is only $7,350,000, which means that many New Yorkers can expect to pay a state estate tax, even though no federal estate tax is due.

It is important to note that if an estate exceeds this $7,350,000 threshold by more than 5%, the tax applies to the entire estate. So, there is both a threshold and a "cliff" in New York. If an estate is valued at $7.35 million or less in 2026, no New York State estate tax is owed. If the estate value is between $7.35 million and $7,717,500 (105% of the threshold), tax is only paid on the amount exceeding $7.35 million. If the total estate exceeds $7,717,500 (more than 105%), the tax is applied to the entire estate.

This is true even if so called "A-B Trust" planning is done, which will only have the effect of deferring and possibly eliminating the federal estate tax. Estate taxes will however be due on the death of the first spouse to the state of New York to the extent the decedent's estate exceeded $7,350,000. Unlike federal law, New York State does not allow the surviving spouse to use the unused exemption of the first spouse to die. New York imposes a progressive estate tax that starts at 3.06% and can go as high as 16% for larger estates. This tax is in addition to any federal tax that may be due, and is imposed on a resident of New York state at the time of death, or a resident or citizen of the U.S. at the time of death but not a resident of New York state, whose estate includes real or tangible personal property in the state of New York.

As Florida does not have a state estate tax (or income tax for that matter), an individual choosing between New York and Florida residency will need to take into account the size of their estate, and the estate tax implications of that decision.

Below are some ways in which an individual can establish Florida residency in order to take advantage of the estate tax issues discussed above.

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 they say it is. Given that Florida has no state income tax and no estate tax, it has become an obvious choice for people to relocate to particularly from high income tax states and states that have separate state estate taxes that do not track the federal exemption amount. It is strongly recommended that clients who desire to establish a new domicile in Florida take as many of the following actions as possible:

- Execute a Declaration of Domicile and file it in the records office in the county where the client's Florida residence is located.
- Register to vote in the state of Florida.
- Change the owner's registration for automobiles and boats to Florida.
- Obtain a Florida driver's license.
- File for Florida Homestead Exemption on the client's principal residence.
- File Income and Gift Tax Returns with the Internal Revenue Service showing the Florida address.
- Use the Florida address in all documents and records.
- When traveling use the Florida address the residence when registering at hotels, motels, etc.
- Change the homeowner's insurance policy to show the Florida residence as the client's principal address.
- Most or all of the client's bank accounts and safe deposit box(es) should be relocated to Florida.
- All bills should be sent to the Florida address.
- To the extent possible, resign from local clubs and organizations or obtain non-resident membership, and join Florida based clubs and organizations.
- To the extent possible, transact business from Florida.
- Execute a last will and testament in Florida.
- Spend as much time as possible in Florida.

For many individuals relocating from high-tax states such as New York, establishing Florida residency is a strategic decision with significant tax and legal implications. However, the process can become complicated when a person continues to maintain meaningful ties to their former home state. New York, in particular, is known for aggressively auditing residency changes, and its standards for determining domicile focus less on where a person *claims* to live and more on the totality of their conduct.

A central issue stems from the fact that a declaration of domicile or the acquisition of a Florida homestead exemption, while important, is not enough on its own. States like New York evaluate a wide range of objective factors—including the taxpayer's use of the former residence, the location of family members, business interests, social and community connections, and even where one keeps cherished personal items—to assess whether a true change of domicile has occurred. Continued ownership and substantial use of a New York residence, for example, often becomes a major point of contention. If a taxpayer retains a large, furnished home in New York but resides most of the year in Florida, auditors may conclude that the New York residence still represents the individual's "home base."

Another common challenge involves the so-called "statutory residency" test. Even if an individual successfully changes their domicile to Florida, New York may still treat them as a resident for income tax purposes if they both (1) maintain a permanent place of abode in New York and (2) spend more than 183 days there during the year. This rule frequently catches individuals off guard, especially those who travel back and forth for work, medical appointments, family obligations, or seasonal events. In these cases, even a well-documented Florida domicile may not prevent New York from asserting residency under statutory rules.

Lifestyle patterns can also undermine a person's residency position. Maintaining significant business operations in New York, continuing to use medical professionals there, voting or serving on boards in New York organizations, or keeping valuable possessions such as artwork or jewelry in the state can all signal ongoing connections. These factors are weighed cumulatively, and no single detail—positive or negative—is dispositive. Instead, auditors assess whether the overall picture reflects a genuine intent to make Florida the individual's primary and permanent home.

A recent tax court decision highlights this issue. In *In re Hoff and Ocorr-Hoff,*[99] the New York Tax Appeals Tribunal held that John J. Hoff and Kathleen Ocorr-Hoff failed to prove by clear and convincing evidence that they changed their domicile from New York to Florida for the 2018 and 2019 tax years. For 2018, they filed an income tax return reporting their Florida address, asserting that they were part-year residents of New York and had moved out of New York on October 29, 2018. For 2019, the Hoffs reported that they were nonresidents of New York. In 2020, the New York Division of Taxation audited their 2018 and 2019 returns and issued a notice of deficiency for $59,648.00, plus penalties and interest based on its determination that they remained domiciled in New York in 2018 and 2019. Although the couple undertook several *formal* steps toward establishing Florida residency—such as registering to vote, obtaining Florida driver's licenses, filing declarations of domicile, and updating estate-planning documents—New York determined these acts were insufficient when weighed against their continued, substantial ties to New York.

Under N.Y. Tax Law §605(b), a person is a New York resident for tax purposes if they are domiciled in New York (unless they do not have a permanent place of abode in New York, they do have a permanent place of abode elsewhere, and they spend 30 days or less in New York). However, if the person does have a permanent place of abode in New York and spends more than 183 days of the year there, regardless of their domicile they will be considered by the state of New York as a resident for tax purposes.

The Tribunal emphasized "substance over form," finding that the couple spent more time in New York than in Florida, maintained significant business connections in New York (including Mr. Hoff's ownership and active involvement in a New York business), and kept their New York home as a substantial residence that continued to function as their primary base. They also maintained family ties, social connections, and "near and dear" personal items in New York.

Time-of-presence records further supported New York's position. Phone and other location data showed that in both years the Hoffs spent more days in New York than in Florida, undermining claims that their Florida property had become their true home.

Ultimately, the Tribunal upheld the assessment of New York personal income tax, concluding that the Hoffs had not abandoned their New York domicile, and their formal gestures toward Florida residency did not outweigh the ongoing primary connections to New York. The decision reinforces New York's stringent domicile standards and its skepticism toward formalities that are contradicted by lifestyle patterns.

For individuals seeking to solidify their Florida residency, understanding how northern states scrutinize these ties is essential. Proactive planning—such as limiting days spent in the former state, documenting time spent in Florida, updating key personal and professional relationships, and aligning financial and legal affairs with the new domicile—can help minimize the risk of a residency dispute and support a clearer, more defensible transition.

THE FLORIDA HOMESTEAD

Another advantage of declaring Florida domicile is the Florida Homestead protection. Homestead property under Florida law refers to real property up to 160 contiguous acres outside a municipality, or up to one half an acre of contiguous land within a municipality, all of which is owned by a natural person, along with improvements thereon.

Unlimited Protection from Forced Sale to Satisfy Creditor Claims

There are numerous benefits of declaring the Florida home to be "Homestead" property, meaning that it constitutes one's primary residence. First, there is an unlimited protection from a forced sale to satisfy creditor claims.[100] This is true even if one sells their home, but intends to use the proceeds to purchase another Homestead within a reasonable time from the first sale. There are four exceptions to the creditor protection rule stated above:

1. The state of Florida and its counties and municipalities may force a sale to collect past due property taxes;
2. Parties to whom the property was specifically pledged as collateral for a mortgage.
3. Contractors who are owed money for work performed in repairing or improving the property; and
4. Any creditor with a lien that pre-dates the establishment of Homestead.

Homestead Tax Protections

Second, Article VII, Section 6 of the Florida Constitution establishes the state's homestead tax exemption, reducing the taxable value of a primary residence by up to $50,000. This exemption is structured so that the first $25,000 applies to all property taxes, while the second $25,000 applies only to non-school taxes.[101] To qualify, the property must be the owner's permanent residence, and only one exemption is permitted per individual or family unit. For qualifying properties, there is a reduction in the ad valorem property tax equal to the first $50,000 of the value of the home. Thus, a home worth $500,000 is taxed as if it is only worth $450,000.

In addition, there is a senior property tax reduction in the ad valorem property tax equal to another $50,000 of the value of the home in certain counties and municipalities that offer this exemption provided that one's income does not exceed $38,686 (2026 amount - adjusted for inflation each year), thus resulting in a potential total $100,000 reduction in the value of the home for property tax assessment purposes for certain seniors.[102] Under Florida Statutes Section 196.075(2)(b), Florida local governments may completely eliminate city or county ad valorem taxes for residents aged 65 or older as of January 1 who have maintained 25 years of permanent residency. To qualify for the exemption, the property's fair market value must be under $250,000 in the initial application year, and the household adjusted gross income must not exceed the current statutory cap of $38,686

The homestead exemption also caps the rate at which property taxes can be increased each year. Known as the "Save Our Homes" Amendment to the Florida Constitution, this limits the amount an assessed value may increase to no more than 3% in any one year.

Restrictions on Devise and Alienation of Homestead Property

In addition to its tax benefits, Florida homestead property is subject to significant constitutional restrictions on how it may be transferred at death and during lifetime. These restrictions arise from Article X, Section 4(c) of the Florida Constitution and frequently override an owner's estate planning documents.

Most notably, homestead property **cannot be freely devised** if the owner is survived by a spouse or a minor child. In such cases, any attempt to transfer the homestead by will or trust in a manner inconsistent with the Constitution will be ineffective. Specifically:

- If the owner is survived by a minor child, the homestead may not be devised at all, regardless of intent.
- If the owner is survived by a spouse but no minor child, the homestead may be devised only to the spouse.

If these constitutional rules are violated, Florida law substitutes a statutory scheme for disposition—typically granting the surviving spouse a life estate (or an elective one-half interest) with remainder to the owner's descendants.

Separately, Article X also restricts lifetime transfers. If the owner is married, the homestead cannot be sold, gifted, or mortgaged without the joinder of the spouse, even if the spouse holds no title interest.

These constitutional limitations underscore a critical planning point: homestead property in Florida is not subject to ordinary testamentary freedom, and careful coordination with both constitutional and statutory requirements is essential to avoid unintended results.

Is Homestead Ownership Through Revocable and Irrevocable Trusts Permissible Without Destroying the Homestead Exemption?

To answer this question, the threshold issue is whether Homestead Property owned inside a trust is deemed to be "owned by a natural person." Article X, section 4(a) of the Florida Constitution exempts from forced sale a homestead "owned by a natural person." On its face, that language appears incompatible with trust ownership, since a trust is not itself a natural person. This textual tension has produced decades of litigation and inconsistent early authority, particularly where legal title is vested in a trustee rather than the individual occupant. The modern Florida cases, however, overwhelmingly focus not on legal title, but on whether the resident retains a sufficient beneficial ownership interest to satisfy the constitutional purpose of homestead protection.

The principal authority cited *against* homestead protection for trust-owned residences is *In re Bosonetto.*[103] There, a federal bankruptcy court held that property titled in a trust could not qualify for constitutional homestead protection because the trust was not a "natural person" within the meaning of Article X, Section 4.[104] The court held that if a debtor transfers their home into a revocable trust, they no longer hold the legal or equitable title required to claim the Florida constitutional homestead exemption against creditors. While the decision focused on bankruptcy protection, it highlighted a major risk of using revocable trusts for asset protection purposes. The decision caused significant concern among Florida planners, particularly because it suggested that even revocable trust planning—a staple of Florida estate planning—might forfeit one of the state's most valuable constitutional protections.

Similarly, courts have occasionally denied homestead protection where a trust failed to confer a *meaningful* possessory or beneficial interest on the resident. For example, in *Elmowitz v. Estate of Zimmerman,*[105] the court focused on the absence of a qualifying ownership interest in the beneficiary, illustrating that not all trust arrangements automatically preserve homestead status. These cases are frequently invoked by opponents of trust-based homestead planning to argue that trust ownership severs the constitutionally required nexus between the homestead and a natural person.

Yet, the 2001 *Bosonetto* decision has been criticized by later cases and is generally considered an outlier. Several subsequent Middle District Bankruptcy Court opinions[106] refused to follow *Bosonetto*, ruling that a homestead held in a revocable trust *remains* protected.

Despite *Bosonetto*, modern legal consensus in Florida indicates that property held in a revocable trust is usually treated as owned by the grantor for homestead exemption purposes because the grantor can revoke the trust at any time. However, to ensure protection, attorneys often include specific language in trust documents that grant the grantor a possessory interest in the property.

Modern Florida Authority Supporting Revocable Trust Ownership

In addition to the *Alexander* and *Edwards* opinions noted above, Florida appellate courts have squarely rejected the reasoning of *Bosonetto* and similar formalistic approaches. The leading case is *Engelke v. Estate of Engelke,*[107] in which the Fourth District Court of Appeal held that a residence titled in a revocable trust retained its homestead character. The court emphasized that the settlor retained the unfettered right to revoke the trust and reclaim legal title at any time, rendering the trust functionally indistinguishable from individual ownership for homestead purposes. The same analysis applies to a partial interest in the homestead, right of possession or beneficial interest.[108]

Together with the Florida appellate court ruling in *Engelke v. Estate of Engelke*, *Alexander* and *Edwards* firmly established that property titled to a **revocable living trust** preserves its character as a constitutionally protected homestead under the Florida Constitution. They verified that a debtor holding a beneficial interest in a revocable trust remains a "natural person" eligible for the homestead exemption.

Extension to Irrevocable Trusts

While revocable trusts now enjoy strong doctrinal support, irrevocable trusts present a more nuanced question. Traditionally, an irrevocable transfer was viewed as inconsistent with homestead because it divested the transferor of legal ownership. However, Florida courts and commentators increasingly recognize that an irrevocable trust may preserve homestead protection where the grantor retains a life estate or equivalent beneficial interest, such as the exclusive right to use and occupy the residence as a permanent home.

In particular, in *Cutler v. Cutler,*[109] the Florida Third District Court of Appeal issued its landmark decision establishing that a decedent's homestead property placed into an irrevocable trust retains its constitutional protection from forced sale by creditors.

Cutler is frequently cited for two propositions:

- Homestead can remain protected even when placed into an irrevocable trust, if the decedent retained sufficient ownership attributes.
- But that protection is not absolute in the probate context—a carefully drafted will can subject otherwise protected homestead to estate expenses.110

In short, *Cutler* underscores the tension between constitutional homestead protections and testamentary intent, and highlights the need for careful coordination between trust funding, homestead planning, and will drafting.

Notably, in *Stone v. Stone*,[111] the court reaffirmed that lifetime transfers of homestead—including transfers to irrevocable trusts—are permissible and that the homestead analysis for creditor protection and devise restrictions turns on the same ownership concepts.

The *Stone* decision is considered a landmark Florida estate planning and real estate case. It established that spouses can unintentionally waive their constitutional homestead inheritance and devise rights if they join in executing a deed that conveys the marital property, even if the deed contains no express waiver language. Because *Stone* created uncertainty regarding unintentional waivers, the Florida legislature later enacted safe-harbor statutes (like Fla. Stat. §732.7025) to provide clearer parameters for waivers by deed.[112]

Collectively, these cases establish that beneficial ownership and possessory rights, not merely "nominal" title in the name of an irrevocable trust, control the homestead analysis. Accordingly, a properly drafted revocable trust almost uniformly preserves homestead status, and a carefully structured irrevocable trust may do so as well—provided the drafting reflects the occupant's continued ownership in substance, not merely in form.

LLC Ownership and Loss of Homestead Status

Florida's homestead protections generally require that the property be owned—at least in substance—by a natural person, not a separate legal entity. Accordingly, transferring a residence to a single-member LLC will typically destroy homestead status because the LLC, even if wholly owned by the individual, is treated as a distinct legal owner rather than the individual homeowner. This entity-based ownership structure contrasts sharply with trust planning, which as discussed above courts have consistently recognized that homestead protections may be preserved if the settlor retains a sufficient beneficial or possessory interest in the property.

By comparison, an LLC does not permit the same equitable ownership framework because the member holds an interest in the entity—not in the real property itself. As a result, practitioners should assume that titling homestead property in an LLC—regardless of whether it is single-member—will generally result in the loss of homestead protections, absent highly unusual structuring that preserves a direct beneficial ownership interest in the individual.

CONCLUSION

There are obviously many considerations when advising the Florida client regarding elder law, estate planning, special needs planning, probate and long-term care planning. The items discussed here represent only a handful of the issues that can arise in these situations. The best course of action for out-of-state practitioners with clients having a nexus to Florida would be to consult with or co-counsel with a Florida elder law or estate planning attorney to address these issues.

End Notes

1 Fla. Stat. Ann. § 709.2105. Powers of attorney executed before October 1, 2011 remain valid if properly executed under prior law. Fla. Stat. Ann. § 709.2106(2).

2 Fla. Stat. Ann. § 709.2104, which states that "except as otherwise provided under this part, a power of attorney is durable if it contains the words: 'This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes,' or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity."

3 Fla. Stat. Ann. § 2106(5).

4 Fla. Stat. Ann. § 2120(2).

5 Fla. Stat. Ann. § 765.112 governs health care advance directives and explicitly states that an advance directive completed in another state, in accordance with that state's laws, can be honored in Florida. Fla. Stat. Ann. § 709.2106(3) governs powers of attorney and states that a power of attorney executed in another state is valid in Florida, "if, when the power of attorney was executed, the execution complied with the law of that state."

6 See Fla. Stat. Ann. § 709.2105(2).

7 Fla. Stat. Ann. § 765.202(1).

8 Fla. Stat. Ann. § 765.202(1).

9 Fla. Stat. Ann. § 765.202(2).

10 Fla. Stat. Ann. § 765.202(3).

11 N.Y. Pub. Health Law §2981.

12 Fla. Stat. Ann. § 765.202(6).

13 Fla. Stat. Ann. § 765.202(4).

14 Fla. Stat. Ann. § 765.202(4).

15 Fla. Stat. Ann. § 765.302(1)

16 Fla. Stat. Ann. § 765.302(1).

17 Fla. Stat. Ann. §765.302(2).

18 Fla. Stat. Ann. § 765.302(3).

19 Fla. Stat. Ann. § 744.3045(1) and (2).

20 Key provisions in Chapter 744 and related statutes that were changed or added to incorporate supported decision-making include: consideration of alternatives to guardianship language was updated in Fla. Stat. Ann. § 744.1012 to strongly emphasize that alternatives to guardianship must be considered before a guardian is appointed; under §744.331 and §744.464, the court is now required, when determining incapacity and examining if a guardian is needed, to consider whether the person can manage their affairs with "appropriate assistance"; under §744.3201, the requirements for guardianship petitions were updated to require that the petitioner describe any efforts to use, or the reasons for not using, less restrictive alternatives, including supported decision-making agreements; and although not in Chapter 744, Florida Statutes §1003.5716 mandates that for students with disabilities, IEP teams must discuss the availability of supported decision-making agreements as a less restrictive alternative to guardianship before the age of majority.

21 Fla. Stat. Ann. §790.24 (gunshot wounds and violent injury reporting requirements) and Fla. Stat. Ann. §877.155 (second- and third-degree burns caused by violence).

22 Florida law requires health care practitioners to provide medical records within 14 days under Florida Administrative Code 64B8-10.003. Licensed facilities are required to provide records in a "timely manner" under Florida Statutes §395.3025, with the federal HIPAA 30-day deadline serving as the controlling outside date for Florida hospitals and other Florida institutional providers.

23 Fla. Stat. Ann. §733.302.

24 Fla. Stat. Ann. §733.304.

25 Fla. Stat. Ann. §733.305.

26 Fla. Stat. Ann. § 732.502(2).

27 Section 736.1108 applies to trusts created on or after October 1, 1993, and expressly treats revocable trusts as "created" when the power of revocation terminates, typically at the settlor's death.

28 Note, however, that a recent Court of Appeals case from New York, *Carlson v. Colangelo*, 44 NY3d 116 (2025), addressed in terrorem (no-contest) clauses in trust agreements. The court affirmed and clarified

that in terrorem clauses in trust agreements, like those in wills, are enforceable but not favored, and must be strictly construed.

[29] Fla. Stat. Ann. §733.702.

[30] A properly drafted revocable trust in the Florida homestead context refers to a revocable trust that expressly preserves the grantor's beneficial and possessory ownership of the residence. To preserve Florida's homestead exemption when a residence is titled in a trust, the trust (or the deed funding the trust) must grant the Florida resident-occupant a present possessory interest and a beneficial interest for life in the residence. This requirement comes directly from §196.041, Florida Statutes, which provides that a person qualifies for the homestead exemption if their possessory right is based on an instrument granting a "beneficial interest for life," which is deemed equitable title to real property for homestead purposes. Absent this Florida-specific language, courts or property appraisers may conclude that the settlor lacks the required beneficial interest, resulting in the loss of homestead creditor protection, homestead tax exemption, or compliance with Florida's constitutional homestead devise restrictions.

[31] Fla. Stat. Ann. §736.0502(1) – which provides that "[a] spendthrift provision is valid only if the provision restrains both voluntary and involuntary transfer of a beneficiary's interest." See also Fla. Stat. Ann. § 736.0502(3), which confirms that a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary.

[32] Fla. Stat. Ann. §736.0504(1) provides that a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if the discretion is expressed in the form of a standard (including HEMS) or if the trustee has abused that discretion, unless the trust expressly provides otherwise. See also Fla. Stat. Ann. § 736.0504(2), which clarifies that creditors generally cannot reach discretionary trust interests before distribution, reinforcing protection independent of spendthrift status.

[33] Fla. Stat. Ann. §736.0503(2) creates express exceptions to spendthrift protection for a) a beneficiary's child, spouse, or former spouse with a judgment or court order for support or maintenance, and b) certain claims by the State of Florida or the United States. Fla. Stat. Ann. §736.0503(1) confirms that spendthrift protection is not absolute and is subject to these enumerated statutory carve-outs.

[34] Fla. Stat. Ann. §736.0505(1)(b) provides "With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit." This provision applies regardless of the presence of a spendthrift clause, and it is fundamentally inconsistent with DAPT treatment.

[35] Fla. Stat. Ann. §736.0111(4)(a).

[36] Fla. Stat. Ann. §736.0111(4)(c).

[37] Fla. Stat. Ann. §736.0111(4)(b)–(f).

[38] Fla. Stat. Ann. §736.0111(3).

[39] Fla. Stat. Ann. §736.0111(5).

[40] 152 So. 3d 719 (Fla. 4th DCA 2014)

[41] The Consolidated Laws of New York, Chapter 50 Real Estate, Article 12 Registering Title to Real Property, §424 Transfer on Death Deed.

[42] In addition to Florida, Michigan, Texas, Vermont and West Virginia offer enhanced life estate or ladybird deeds (note that these terms are used interchangeably throughout this article).

[43] In Florida real estate, "The Fund" primarily refers to Attorneys' Title Fund Services, LLC, a member-owned organization providing title insurance, underwriting, and closing resources to attorney members. It acts as a major title underwriter and educator for attorneys involved in real estate transactions, enhancing title search accuracy and closing safety.

[44] These notes are essential for Florida title agents, providing guidance on how to handle title objections and underwrite policies when Lady Bird Deeds are in the chain of title.

[45] The seminal case supporting the validity of Lady Bird Deeds is *Oglesby v. Lee*, 73 So. 840 (Fla. 1917), which established the legal basis for a life tenant to reserve the power to convey, sell, or mortgage property without the joinder of the remainderman, effectively creating the "enhanced" aspect of the deed. See also *Green v. Barrow*, 8 So.2d 283 (Fla. 1942), upholding a conveyance from husband to his surviving spouse with the ability of the surviving spouse to convey the property during her lifetime, thus thwarting the claims by the husband's siblings that the property was conveyed in error by the surviving spouse to a third party during the surviving spouse's lifetime.

[46] ESS Manual §1640.0613.01.

[47] Letter of Technical Advice No. 00B4-024 Dated May 12, 2000.

[48] Fla. Stat. Ann. §732.201.

[49] Fla. Stat. Ann. §732.2065.

[50] Fla. Stat. Ann. §732.201.

[51] Fla. Stat. Ann. §732.2095(d).

[52] Fla. Stat. Ann. §732.2145(3).

[53] The election must be filed on or before the earlier of: (1) Six (6) months after service of the Notice of Administration on the surviving spouse, or (2) Two (2) years after the decedent's date of death. This rule is set forth expressly in Fla. Stat. Ann. §732.2135(1): "Except as provided in subsection (2), the election must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse ... or the date that is 2 years after the date of the decedent's death." For good cause shown, the court may extend the time for making the election upon the filing of a petition by the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse. If the court grants the petition for an extension, the election must be filed within the time allowed by the court in the order granting extension. A petition for an extension of the time for making the election or for approval to make the election shall toll the time for making the election. Fla. Stat. Ann. §732.2135(2) & (4).

[54] Fla. Stat. Ann. § 732.2035(1).

[55] Fla. Stat. Ann. § 732.2035(2).

[56] Fla. Stat. Ann. § 732.2035(5).

[57] Fla. Stat. Ann. § 732.2035(6). Note - Although IRAs are not expressly named in § 732.2035, they are included in the elective estate under subsection (6) because the decedent retained possession and control of the account during life and the transfer occurred at death by beneficiary designation.

[58] Fla. Stat. Ann. §732.2065.

[59] Fla. Stat. Ann. §731.201(23).

[60] Fla. Stat. Ann. §733.304.

[61] Fla. Stat. Ann. §734.302.

[62] Antúnez, "If a Non-Resident Dies With Real Estate in Florida, Can Your Probate Judge Transfer Your Probate Proceeding Out of Florida?", Florida Probate & Trust Litigation Blog (Sept. 2, 2025).

[63] Fla. Stat. Ann. §732.7025, Waiver of homestead rights through deed - stating that a spouse may waive his or her rights as a surviving spouse with respect to the devise restrictions under Section 4(c) of Article X. of the State Constitution if the following or substantially similar language is included in the deed: "By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."

[64] Fla. Stat. Ann. §732.4015 and Article X. Section 4(c) of the Florida Constitution.

[65] Fla. Stat. Ann. §733.702(1).

[66] Fla. Stat. Ann. §733.702(3).

[67] Fla. Stat. Ann. §733.604 and Florida Probate Rule 5.340.

[68] See Florida Probate Rule 5.180.

[69] Fla. Stat. Ann. §733.901.

[70] Fla. Stat. Ann. §735.201-§735.203.

[71] Fla. Stat. Ann. §732.402. This section provides defines "exempt property," allowing a surviving spouse or children to claim specific assets from a deceased Florida resident's estate, free from creditor claims (except perfected security interests). It covers up to $20,000 in household furniture/appliances, two motor vehicles, qualified tuition programs, and specific death benefits under Fla. Stat. Ann. §112.1915.

[72] Fla. Stat. Ann. §§735.301–735.304

[73] Fla. Stat. Ann. §§734.101-734.106.

[74] Fla. Stat. Ann. §733.2065.

[75] Fla. Stat. Ann. §732.402.

[76] Fla. Stat. Ann. §732.22025(8)(a)

[77] 42 USC §1396p(d)(2)(A) provides: (2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will: (i) The individual, (ii) The individual's spouse, (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

[78] Under federal Medicaid law, 42 USC §1396r-5, a community spouse is the healthy, non-institutionalized spouse of a Medicaid applicant or recipient who lives in a private residence rather than a medical facility.

[79] Federal rules created under the Medicare Catastrophic Coverage Act of 1988 require all states to protect a specific amount of the couple's combined countable assets solely for the Community Spouse. In Florida, the maximum community spouse resource allowance is $162,660. Each state has flexibility to establish the community spouse resource allowance with a minimum of $32,532 and a maximum of $162,660 (2026 figures that are adjusted annually).

[80] ESS Manual §1640.0314.01.

[81] See ESS Manual §1640.0314.03 and §1640.0314.04.

[82] See ESS Manual §1640.0314.03.

[83] Note that this is the opposite of the New York rule which specifically permits a community spouse to seek and obtain the Community Spouse Monthly Income Allowance even where spousal refusal has been filed.

[84] Fla. App. Ct., 1st Dist., Case No. 1D04-4914, December 14, 2005.

[85] 42 USC §1396p(c)(2)(B)(i).

[86] 42 USC §1395r-5(c)(2)(A). Under §1396r-5, the "snapshot" of marital resources is taken as of the first date of continuous institutionalization, not the date of Medicaid application. This often leads to the m misunderstanding that: "Only after applying do transfers become restricted." But legally, The CSRA calculation is tied to institutionalization, not filing. The transfer penalties under §1396p(c) apply to transfers within the look-back period, regardless of application status. So while states do not *enforce* the CSRA until eligibility is determined, the transfer-penalty statute applies continuously and retroactively to all transfers made within the look-back window.

[87] 707 So. 2d 954 (Fla. 4th DCA 1998).

[88] In General Information Systems Memorandum 07 MA/019 dated September 24, 2007, the New York State Department of Health indicated that "A personal service contract that does not provide for the return of any prepaid monies if the caregiver becomes unable to fulfill his/her duties under the contract, or if the A/R dies before his/her calculated life expectancy, must be treated as a transfer of assets for less than fair market value. If there are no such legally enforceable provisions, there is no guarantee that FMV will be received for the prepaid monies. If a personal service contract stipulates that services will be delivered on an "as needed" basis, a determination cannot be made that FMV will be received in the form of services provided through the contract. A transfer of assets penalty must be calculated for an otherwise eligible individual. The GIS Memorandum goes on to state, "No credit is allowed for services that are provided as part of the Medicaid nursing home rate."

[89] SSA POMS PS 01820.011 FL (PS 14-102).

[90] Note that some practitioners recommend placing all of an applicant's income into the Qualified Income Trust each month to avoid the potential for errors in funding that may occur due to the use of gross income (and not net income) by Medicaid, as well as future increases that may cause the excess income figure previously relied upon to be inadequate to sufficiently fund the trust.

[91] Florida Bar Elder Law Section Update email sent to members of the Elder Law Section on October 6, 2025.

[92] See ESS Manual §1640.0205.

[93] See ESS Manual §1640.0307.01.

[94] See ESS Manual §1640.0307.02.

[95] See ESS Manual §1640.0307.03.

[96] See ESS Manual §1640.0305.02.

[97] State of Florida, Department of Children and Families, Office of Appeal Hearings, Fair Hearing Decision dated November 15, 2001 (Appeal No. 01F-4177)(Case No. 1147878561).

[98] State of Florida, Department of Children and Families, Office of Appeal Hearings, Fair Hearing Decision dated July 2, 2001 (Appeal No. 01F-1543)(Case No. 1140425226).

[99] DTA No. 850209 (N.Y. Tax App. Trib. Oct. 9, 2025).

[100] See Florida Constitution, Article X, Section 4(a) – (b).

[101] In June 2026, the Florida Legislature approved CS/HJR 1 F, "Save Our Homes from Excessive Property Taxes," a proposed constitutional amendment that—if ratified by at least 60% of voters in the November 3, 2026 general election—would substantially restructure Florida's ad valorem tax system. The amendment would increase the homestead exemption for non school levies from the current $50,000 two tier structure to $150,000 effective January 1, 2027, and to $250,000 in 2028, with inflation adjustments thereafter and accompanying limits on local government taxation.The proposal effectively supplants, rather than merely expands, the existing Article VII, § 6 framework by replacing the current two tier ($25,000/$25,000) structure with a substantially larger exemption applicable primarily to non school taxes, while preserving the exclusion for school levies. The amendment does not alter the "Save Our Homes" assessment limitation in Article VII, § 4(c), which caps annual increases in homestead assessed value at 3% (or CPI); instead, the enlarged exemption would apply to already capped assessed values, amplifying benefits for long term homesteaders with depressed assessments. Likewise, portability under Article VII, § 4(d) remains intact, as it depends on the differential between just value and assessed value; however, its practical economic value may be reduced where the increased exemption fully shelters post transfer assessed value.In addition, the proposal reduces the non homestead assessment cap from 10% to 5%, imposes limitations on the permissible uses of local ad valorem revenues, and includes transitional eligibility restrictions for new residents, collectively reflecting a continued expansion of homestead based preferential treatment within Florida's constitutional tax structure.

[102] Fla. Stat. Ann. §196.075.

[103] 271 B.R. 403 (Bankr. M.D. Fla. 2001).

[104] "SECTION 4. Homestead; exemptions. (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 within 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 by 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."

[105] 647 So. 2d 1064 (Fla. 3d DCA 1994).

[106] See *In re Alexander*, 346 B.R. 546 (Bankr. M.D. Fla. 2006); *In re Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006).

[107] 921 So. 2d 693 (Fla. 4th DCA 2006).

[108] See *Bessemer Props. v. Gamble*, 158 Fla. 38, 27 So.2d 832, 833 (stating that "a one-half interest, the right of possession, or any beneficial interest in land gave the claimant a right to exempt it as his homestead") See also *Cain v. Cain* 158 Fla. 38, 27 So.2d 832, 833 (1946) (stating that "a one-half interest, the right of possession, or any beneficial interest in land gave the claimant a right to exempt it as his homestead"). See also *Cain v. Cain*, 549 So.2d 1161 (Fla. 4th DCA 1989), where the court recognized that a husband's undivided one-half interest in the former marital residence could constitute his homestead for purposes of the constitutional exemption from forced sale.

[109] 994 So. 2d 341 (Fla. 3d DCA 2008) (en banc).

[110] In *Cutler*, The decedent transferred her residence (homestead) to a trust while retaining a life estate and full beneficial control, then specifically devised that homestead in her will. She also directed that estate debts be paid from both the homestead and a non-homestead parcel. The Third District Court of Appeal held: (1) Homestead status was preserved even though legal title was held in a trust at death. (2) However, the constitutional protection from creditors did not necessarily inure to the devisee where the decedent's testamentary intent required the homestead to bear estate expenses.While Florida homestead is generally protected from creditors and that protection typically inures to heirs under Article X, § 4(b) of the Florida Constitution, the testator's express testamentary direction can require homestead property to be used to satisfy estate obligations, particularly administrative expenses, in a freely devisable homestead context.The case also confirms that homestead protection does not depend on fee simple title—a beneficial interest, such as a retained life estate in a trust, can be sufficient to preserve homestead status.

[111] 157 So. 3d 295 (Fla. 4th DCA 2014).

[112] In *Stone*, The husband and wife owned marital homestead property as tenants by the entireties. They executed a series of deeds splitting the property into tenancies in common and then transferring their separate halves into their own Qualified Personal Residence Trusts (QPRTs). Both spouses joined in the execution of these deeds.The deeds included conveyance language transferring the property "together with all the tenements, hereditaments [property that can be inherited], and appurtenances". The Fourth District Court of Appeal (4th DCA) held that the wife's execution of the deeds constituted a valid waiver of her constitutional homestead rights. The court found that the specific deed language—particularly the conveyance of hereditaments—was legally sufficient to release her inheritance rights, even without the word "waiver" being present. Key takeaways from Stone are: (i) Waiver by Deed - Joining in a deed to transfer homestead property can legally waive a surviving spouse's right to inherit or control the devise of that property. (ii) The Equivalent of Predeceasing - Once a spouse validly waives homestead rights, it is treated as the legal equivalent of them predeceasing the property owner. This allows the owner-spouse to devise or transfer the property without constitutional restriction.