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Updating Your Estate Plan: What Michigan Residents Need to Know When Moving to Florida

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Whether you've recently moved to Florida or are a "snowbird" with Florida residency, there are important reasons to consider updating your estate plan.

Wills and Trusts

Florida restricts those who may serve as Personal Representative (PR) under a will. The PR must be (1) a descendant or ancestor of the decedent, (2) a spouse, brother, sister, uncle, aunt, nephew or niece of the decedent, (3) the spouse, descendant or ancestor of any such person, or (4) a Florida resident. If the desired PR is an entity, the entity must be authorized to conduct business in Florida. Michigan has no such restrictions.

Unlike Michigan, Florida also does not recognize “no contest” clauses in trusts or wills, which state that a person who disputes or challenges the estate plan will receive nothing. Such clauses in a Florida document will be ineffective. Similarly, any unwitnessed testamentary documents that are in the decedent's own handwriting (a "holographic will") will not be recognized, even if validly executed in another state where they are accepted, like Michigan.

Finally, in Florida, any gift of a residence contained in a trust or a will may be subject to Homestead laws. Florida's Homestead provisions are contained in the Florida Constitution, and they are designed to protect a decedent's surviving spouse and surviving children, especially minor children. Unfortunately, this complex set of laws will sometimes defeat an otherwise valid disposition of real property contained in a decedent's trust or will. These unintended results can be devastating for families. There are also important state income tax considerations and important considerations regarding the formalities of how wills and trusts are executed. All should be discussed with your estate planning attorney, with a particular emphasis on ensuring that any disposition of real property does not run afoul of the Homestead laws.

Durable Power of Attorney

The Durable Power of Attorney (DPA) appoints an individual to act as agent on behalf of the principal

for his or her financial matters. In Michigan, the DPA can be “springing” (effective only upon incapacity). In Florida, all DPAs are effective upon signing. While Florida will honor a DPA executed in another state, Florida law will still apply to the agent's actions in Florida and the agent's actions will generally be limited by the more restrictive of the DPA or Florida law.

"Blanket" language allowing the agent to perform all acts that the principal could do if able is not effective in Florida. Instead, the agent may only exercise those powers that are both specified in the DPA and consistent with Florida law. Unlike in Michigan, some "super powers" (e.g. the power to change the principal’s estate plan or make gifts of the principal's assets) require additional signatures or initials to be effective, and must not be prohibited by any other of the principal's estate planning documents. Florida has additional requirements for real estate transactions under a DPA, so a DPA that does not comply may be limited to banking and other non-real estate transactions.

Living Will and Designation of Patient Advocate/Health Care Surrogate

The Living Will sets forth the patient’s wishes for end of life decisions including providing, withholding or withdrawing life-sustaining treatment. The Patient Advocate (in Michigan) or the Health Care Surrogate (in Florida) is an agent authorized to make such decisions, as well as more routine medical decisions, if the patient is unable to participate in his or her own medical treatment. Incapacity for non "life or death" decisions must be certified by two doctors in Michigan but only by one doctor in Florida. Both states will recognize directives properly executed in another state.

Florida also allows a patient to authorize the Health Care Surrogate (HCS) to participate in the patient’s medical decisions prior to the incapacity of the patient. This may be limited to receiving information about the patient or may extend to decision-making abilities; however, if the patient elects this option and still has capacity, the patient can always overrule the HCS in any dispute and must be kept informed regarding any decisions made by the HCS.

Many clients wish to have their end of life decisions encompass conditions of severe cognitive decline like dementia and Alzheimer's. While included by statute in Florida, this category of end-stage condition is often not a part of Living Wills in Michigan, and Michigan does not have a separate Living Will statute apart from the Patient Advocate Statute. If inclusion of this category is important to you, your documents may need to be updated.

Finally, in Florida, parents may name an HCS to act in their absence on behalf of their minor children, including those in gestation.

As noted at the beginning, whether you are planning to fully relocate to Florida or if you have been wintering in Florida for decades and just now find yourself establishing residency, there are important distinctions between the laws of Michigan and Florida that could impact your estate plan.

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