Many Massachusetts, Rhode Island, and other New England attorneys find their older clients heading south to Florida for the winter. While Florida offers retirees warm weather, golf and beaches, it also presents the opportunity to significantly reduce one’s overall tax burden. There is currently no state income tax or state estate tax in Florida, and its real estate tax laws favor residents over nonresidents. In many instances, the tax savings alone for a Massachusetts or Rhode Island client that moves to Florida will cover the expense of living in the Sunshine State, so long as domicile is established and appropriate estate planning is implemented. If a Massachusetts or Rhode Island attorney is advising a client with interests in both New England and Florida, it is important for him or her to understand the difference and interplay of the law in all applicable jurisdictions. Because most Florida retirees maintain some connection to New England (and one day may return due to the death of a spouse or declining health), problems can arise if all states’ laws are not considered when preparing an estate plan.

The purpose of this article is to provide a summary of the important distinctions between Massachusetts, Rhode Island, and Florida in the areas of tax, creditor protection, Medicaid, and incapacity, as well as the planning techniques available to structure one’s estate plan to optimize those differences. In addition, the article concludes with a brief ethical discussion of Florida’s strong stance against the unlicensed practice of law.
Establishing Florida Domicile

As will be covered in more detail below, in order to take advantage of Florida’s favorable tax laws, one must become an actual Florida resident, instead of merely a Massachusetts or Rhode Island resident spending time in Florida. In Massachusetts, Rhode Island and Florida, the standard used to determine if an individual has established domicile is whether he or she (1) is physically present in the given state and (2) intends to make that state his or her permanent residence. The first, and more straightforward prong of the two-part test, physical presence, is fulfilled when one purchases a home (or rents an apartment) in the new state and spends time during the year living in that residence. The second prong of the two-part test, the intent to be a resident, involves weighing those factors indicative of the intent to be a resident of the new state against those showing an intent to remain a resident of the former state.

In Deblois v. Clark, the Rhode Island Supreme Court applied the domicile analysis to a married couple that had relinquished their Rhode Island residency in favor of Florida. While the couple purchased a home in Vero Beach, Florida, they also retained a condominium in Warren, Rhode Island, and spent time throughout the year at both homes. After they had filed income tax returns for three years as Florida residents, the Rhode Island Division of Taxation challenged the couple’s purported residency. The matter was first heard before a Rhode Island District Court judge, who determined that the couple had failed to establish “clear and convincing evidence” of an intent to become Florida residents.

1 See, e.g. Warren v. Warren, 75 So. 35, 40 (Fla. 1917); Feehan v. Treffy, 129 N.E. 292 (Mass. 1921); McCarthy v. McCarthy, 122 A. 529, 531 (R.I. 1923).
3 Id. at 731.
On appeal, the Rhode Island Supreme Court first determined that the “clear and convincing evidence” threshold was incorrectly applied by the District Court, noting that the applicable burden of proof in general tax cases is merely a “preponderance of the evidence.” Having established the appropriate evidentiary standard, the Court next applied the two-prong test to the facts before it. While on one hand the couple continued to have connections to Rhode Island, including ownership of a condominium, association with the business community, and visits with family members on holidays and special occasions, the Court noted that the domicile test does not require a complete severance of one’s ties to his or her former residence. Instead, after reviewing all of the relevant evidence, the Court concluded that the couple had established both a subjective and objective intent to become Florida residents. The Court stressed that the couple spent the majority of each year in Florida, the value of the couple’s real property and personal possessions in Florida was greater than those in Rhode Island, and that the couple had filed a Florida homestead, obtained Florida driver’s licenses, changed their voter registration to Florida, executed Florida last will and testaments, opened Florida bank accounts, joined Florida civic, social, and religious groups, and become active in Florida politics. While the Rhode Island Division of Taxation raised the additional concern that one of the couple’s reasons for changing residency to Florida was avoidance of Rhode Island taxation, the Court pointed out that “Although a motive to avoid taxes without additional evidence to establish domicile may militate against finding a change in

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4 Id. at 732.
5 Id. at 734-737.
domicile, a person may move to a new state for tax reasons and have a bona fide intention to establish domicile in that state. 6

As the DeBlois case illustrates, there is no hard and fast rule for establishing domicile (such as the common misconception that being physically present in Florida for “six months and a day” will satisfy the test). Instead, courts will review all of the relevant facts and circumstances when a question of one’s residency arises. If an individual intends to become a Florida resident, and wants to minimize any potential issues from such a change, his or her attorney should provide a checklist of steps to follow. These steps include, but are not limited to, filing a homestead exemption, changing the primary address for credit cards and bills, changing voter registration, changing title to automobiles, obtaining a Florida driver’s license, executing Florida estate planning documents, opening Florida bank and financial accounts, filing income tax returns as a Florida resident, acquiring Florida burial plots, consulting with a Florida physician, joining Florida social and religious organizations (and changing membership status with non-Florida social and religious organizations to non-resident), becoming active in Florida politics, and opening a Florida safety deposit box. In addition, one should file a Florida Declaration of Domicile with the Clerk of the Circuit Court for the county of residence in Florida. This filing, authorized under the Florida Statutes, allows one to place in the public record a sworn statement that he or she resides in Florida and intends to make Florida his or her permanent residence, and serves as further evidence in support of a genuine change of domicile. 7

Homestead Law Comparison

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6 Id. at 735.
7 FLA. STAT. § 222.17 (2012).
One of the major benefits of changing one’s domicile to Florida is its favorable homestead laws. Florida offers not only a homestead for creditor protection, but also a separate homestead for protection from significant yearly increases in the property tax assessment of one’s principal residence.

In Rhode Island, a home owned by an individual (including life tenants and trust beneficiaries) is exempt from attachment if the individual “occupies or intends to occupy the home as his or her principal residence.” The Rhode Island homestead for creditor protection is automatic, and unlike many other states, does not require a document to be filed in order to assert the right. The Rhode Island creditor protection homestead shields the first five hundred thousand dollars ($500,000) of equity in the property. Exceptions to the creditor protection afforded by the homestead include, but are not limited to, mortgages obtained for the purchase of the real property and tax liens and assessments.8

Massachusetts, in comparison, has both an automatic and declared homestead for creditor protection. The automatic creditor protection homestead insulates only one hundred twenty-five thousand dollars ($125,000) of equity, whereas the declared homestead is equal to Rhode Island’s automatic protection of five hundred thousand dollars ($500,000).9 This distinction between automatic and declared homesteads in New England is important, as one of the two homesteads in Florida (the property tax homestead) must be declared. A Massachusetts resident changing domicile to Florida is more likely to be attuned to the need to file a homestead for their new residence than a Rhode Islander who has never faced this issue.

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9 MASS GEN. LAWS ch. 188 (2012).
The first of the two Florida homesteads, the one for creditor protection, is set forth in the Florida Constitution. Like the Rhode Island homestead, the Florida creditor protection homestead is automatic. However, unlike both the Massachusetts and Rhode Island homestead, the limit of protection provided is not a specific value, but instead a total acreage of land. Up to one-half (1/2) an acre of land can be protected by the homestead if the land is located within a municipality, while up to one hundred sixty (160) acres of land can be protected by the homestead if the land is located outside a municipality.10 Because the Florida homestead system is based on size, not value, the creditor protection homestead can be used to shelter significant assets from attachment and seizure. For example, a $2 million homesteaded residence in either Massachusetts or Rhode Island would only be afforded protection of up to five hundred thousand dollars ($500,000) in equity, whereas the same property homesteaded in Florida would be fully protected (so long as it is within the acreage limit).

One particularly noteworthy issue regarding the Florida creditor protection homestead is whether it continues to apply if the homestead property is transferred to a revocable trust. As part of many estate plans in both Massachusetts and Rhode Island, all real estate is transferred to a trust to avoid probate proceedings upon the client’s death. However, while the Massachusetts and Rhode Island homestead statutes include interests held in trust, the homestead law in Florida related to trusts is far less clear.11 In 2001, Florida attorneys were surprised by a Bankruptcy Court ruling, In re Bosonetto, in which it was held that a trust beneficiary could not claim homestead protection for her home that had been transferred by her to her own revocable trust. The Florida Constitution

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states that the homestead is available only to “property owned by a natural person.” Applying a strict interpretation of this language, the Court in Bosonetto held that the creditor protection homestead did not extend to an interest in a revocable trust, as a trust is an entity and not an individual.\textsuperscript{12}

Subsequently, despite the Bankruptcy Court’s reasoning in Bosonetto, the Florida Court of Appeal adopted a contrary position when faced with the same issue of whether property held in a revocable trust was insulated by the creditor protection homestead. In Engelke v. Estate of Engelke, the Court stated that “because the [grantor] retained all control over his homestead during his lifetime, conveying no vested property interest in the homestead to the trust, we hold the homestead protections attached to the residence.”\textsuperscript{13} Other decisions have also largely rejected the Bosonetto ruling, but many Florida practitioners are still wary to transfer homestead property to a revocable trust.\textsuperscript{14} If a client (such as a physician or businessperson) has strong concerns about creditor liability, it is advisable to leave the homestead property outside of a trust or other entity. While this approach may seem out of sync with typical estate planning for probate avoidance in New England, it is important for Massachusetts and Rhode Island practitioners to remember that the legal expense of a probate proceeding for a piece of Florida real estate may be greatly outweighed by the liability risks from the loss of creditor protection for that same property.

The second, and in many ways more well known, type of homestead in Florida affords protection from sharp property tax increases on the homesteaded real estate.

\textsuperscript{12} 271 B.R. 403, 407 (Bankr. M.D. Fla. 2001).
\textsuperscript{13} 921 So.2d 693, 694 (Fla.App. 4 Dist. 2006).
Available to Florida residents only, this property tax homestead is yet another reason a New Englander may wish to change domicile. Under the Save Our Homes Amendment to the Florida Constitution, any yearly increase in the assessed value of one’s principal residence is limited to the lesser of (1) three percent (3%) of the prior year’s assessment or (2) the yearly percent change in the Consumer Price Index for all urban consumers. In order to activate the property tax homestead, an application must be filed with the County Property Appraiser by the Florida resident for his or her principal residence.\textsuperscript{15} In addition, unlike the uncertainty surrounding the creditor protection homestead in Florida, a principal residence transferred to trust (either revocable or irrevocable) can still receive the property tax homestead so long as the resident explicitly retains in the trust document the right to occupy the property and to claim the property tax homestead.

State Income and Estate Tax System Comparison

To compare the Massachusetts and Rhode Island state income and state estate tax systems to that of Florida is a fairly straightforward task. In short, both Massachusetts and Rhode Island currently have both a state income and state estate tax, whereas Florida has neither. More specifically, for 2014, the Massachusetts state income tax rate is five and 25/100 percent (5.25%), and the Rhode Island state income tax rate is a range of between three and 75/100 percent (3.75%) to five and 99/100 percent (5.99%).\textsuperscript{16} The Massachusetts state estate tax is applied to all estates in excess of one million dollars ($1,000,000), while the Rhode Island state estate tax is applied to all estates in excess of nine hundred twenty-one thousand six hundred and fifty-five dollars ($921,655).\textsuperscript{17} In comparison, not only does Florida currently have neither a state income or state estate tax.

\textsuperscript{15} Art. VII, § 4, Fla. Const.
tax, but the likelihood of either tax being imposed in the near future is highly unlikely, as Florida’s taxing ability is tempered by its state constitution.  

State Income Tax Planning

The Rhode Island income tax is imposed on all Rhode Island income in a given year. For a nonresident, the income tax is applied only to income derived from Rhode Island sources. Rhode Island sources include income generated by Rhode Island real estate, a Rhode Island business, or Rhode Island gambling activities. As such, if an individual retires to Florida and properly establishes Florida domicile, he or she will completely avoid any Rhode Island state income tax whatsoever, so long as his or her income is attributable only to non-Rhode Island sources (such as social security and investment vehicles). The same set of principles is applicable under the Massachusetts income tax system. The avoidance of state income tax, to be frank, is without a doubt a primary motivation for many New England retirees who become Florida residents (either by making an existing vacation home their new principal residence, or buying a new home altogether). As was discussed by the Rhode Island Supreme Court in the DeBlois decision, the intent to avoid taxes does not alone mitigate the validity of one’s change of residency to Florida.

State Estate Tax Planning

The elimination of the Massachusetts and Rhode Island estate tax for many individuals leaving New England and establishing residency in Florida often requires an

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17 MASS GEN. LAWS ch. 65 (2012); R.I. GEN. LAWS § 44-22 (2012).
21 MASS GEN. LAWS ch. 62 (2012).
22 DeBlois at 735.
additional level of planning. A nonresident is still subject to the either the Massachusetts or Rhode Island estate tax if he or she owns any real estate or tangible property at the time of his or her death that is situated in the given New England state.23 As a result, if a Florida resident passes away still owning real estate in either Massachusetts or Rhode Island, his or her estate will be subject to the state estate tax of that jurisdiction.

One approach to eliminate this issue is to convert the Florida resident’s New England real estate into a Florida business entity, by creating a Florida limited liability company or other entity that then owns the New England real estate. The result of this ownership arrangement is that at the time of death, the individual is deemed to own an interest in a Florida business (a non-Massachusetts/Rhode Island asset), and thereby avoids being subject to the Massachusetts or Rhode Island estate tax which would have otherwise been applied to the real estate. When using this approach, it is strongly preferable to use a multimember business structure, to counter an argument by a taxing authority that the business is nothing more than a pass-through entity.

An alternative technique is available to married couples, and can be accomplished without the additional expense of forming a Florida business entity. If a couple has or creates a Florida marital-credit shelter (or A-B) revocable trust, the Massachusetts or Rhode Island real estate should be transferred to that trust. Upon the death of the first spouse, the New England real estate should be included amongst the assets used to fund the credit-shelter (or family) trust, to which the first spouse’s lifetime estate tax exemption is then applied (currently $1,000,000 in Massachusetts and $921,655 in Rhode Island). The New England real estate then remains in the credit-shelter trust during the

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surviving spouse’s life, and is not in turn included in the surviving spouse’s taxable estate at the time of his or her death.24

Medicaid Planning

In Massachusetts and Rhode Island, the most common and effective means to protect one’s assets from having to be spent on nursing home care is to establish a qualifying irrevocable Medicaid trust. Any assets transferred to this type of trust should not be counted by either MassHealth or the Rhode Island Department of Human Services when calculating the resources available to pay for the nursing home. By creating this type of trust, individuals are able to protect their real estate and savings for future generations, while at the same time qualifying for Medicaid long-term care benefits.

While the trust is irrevocable, the grantor (i.e. creator) of a properly structured trust can serve as the trustee, receive the trust income, reside on any trust real estate, and change the ultimate trust beneficiaries through a special power of appointment included in the trust document.25 In order for an asset to be protected, it must be transferred to the irrevocable Medicaid trust five years prior to the individual’s application for Medicaid long-term care benefits.26

In comparison, the Florida homestead, unlike the homestead in Massachusetts and Rhode Island, protects an individual’s real estate in the event that they need nursing home care.27 As a result, Florida estate planning attorneys often do not advise clients to create an irrevocable Medicaid trust for homesteaded real estate. While that may be sound

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26 130 CMR 520.023; RI DHS Reg. 0356.50.10.
advice for a purely Florida client, many New Englanders change their domicile to Florida upon retirement, but retain some connections to the Bay State or Ocean State (even if they do not still own real estate in Massachusetts or Rhode Island). Estate planning practitioners often find that although an individual or couple has changed residency to Florida, once their health begins to deteriorate, they return to New England to be closer to family. At that point, if they had been advised by a Florida attorney that their Florida property was not a countable resource for Medicaid qualification purposes, they will learn that both Massachusetts and Rhode Island do not recognize this same protection.

For individuals who either intend or have the potential to return to New England if they ever need significant healthcare, the best practice is to establish a Florida irrevocable Medicaid trust for their Florida homestead real estate. This trust must be carefully drafted to meet the requirements for the Medicaid and trust laws in both Florida and Massachusetts or Rhode Island, as well as the Florida property tax homestead requirements for trusts discussed above. When drafting this type of multi-purpose trust, included amongst the non-typical irrevocable Medicaid trust provisions are the Florida property tax homestead provision, Florida specific spendthrift provision, Florida rule against perpetuities provision, and the Florida requirement that trusts be executed in the presence of two witnesses and a notary (similar to the requirement for last will and testaments in both Massachusetts and Rhode Island).

Durable Power of Attorney Comparison

Another significant, and less thought about, distinction of Florida law concerns durable power of attorneys. A durable power of attorney is a document that allows an
individual (the “principal”) to appoint an agent (the “attorney-in-fact”) to act on his or her behalf, regardless of any subsequent disability or incapacity of the principal.\textsuperscript{28}

Recently, Florida enacted a new durable power of attorney statute, which went into effect on October 1, 2011.\textsuperscript{29} With the implementation of the new statute, the requirements for a valid durable power of attorney in Florida are far more stringent than those in either Massachusetts or Rhode Island. The purpose of the Florida statute is to better define the scope of an agent’s power, and to curb abuses by agents. While a valid Massachusetts or Rhode Island durable power of attorney should be recognized in Florida, because of the many differences between the documents used in each state, it is advisable for a New Englander spending time in Florida (regardless of his or her state of residence) to execute either a Florida durable power of attorney, or in the alternative, a Massachusetts or Rhode Island durable power of attorney with similar provisions to the Florida version.

One difference between the respective statutes of each state is that under the Florida statute, so-called “blanket powers” are no longer effective. Most durable power of attorneys contain such powers, which authorize the agent to act broadly and to take any action that the principal could take if he or she was personally present.\textsuperscript{30} These open-ended grants of power are now invalid in Florida, and instead, the agent is only authorized to take those actions which are specifically outlined in the document (as well


\textsuperscript{29} FLA. STAT. § 709.2106 (2012).

as any additional actions reasonably necessary to give effect those specific grants). In addition, a Florida durable power of attorney must be signed in the presence of two witnesses and a notary, as opposed to the practice in Massachusetts and Rhode Island of signing a power of attorney in the presence of a notary only.

Another distinction is that a “springing” power of attorney is no longer recognized in Florida. In both Massachusetts and Rhode Island, durable power of attorney can be drafted to be either effective immediately at the time it is signed, or activated at the time the principal becomes incapacitated. In other words, the agent of a springing power of attorney can only act once the principal is disabled. In Florida, as a result of the new statute, only immediate power of attorneys are permitted, and existing Florida springing power of attorneys are now deemed void.

Finally, one other important change in Florida is that certain powers (known as “super powers”) require the principal’s signature or initial next to the enumeration of the given power in the document (as opposed to a single signature on the last page). Again, as a result of concerns over elder abuse and tampering with established estate plans by agents, the powers that require a specific signature or initial include the powers to alter the principal’s estate plan, make gifts, change beneficiary designations or other documents effective at death, and to manage retirement plans.

As many attorneys have experienced, when a Massachusetts or Rhode Island document is scrutinized by an out-of-state individual or entity, issues often arise over

31 FLA. STAT. § 709.2201 (2012).
32 FLA. STAT. § 709.2105 (2012).
34 FLA. STAT. § 709.2108 (2012).
35 FLA. STAT. § 709.2202 (2012).
whether the document in truly valid under the stated governing law. The Florida durable
power of attorney statute allows a third party to request an opinion of counsel regarding
the validity of a presented document, and the cost to obtain that opinion is to be borne by
the principal. To curb this potential issue, it is advisable for practitioners to review their
durable power of attorney template with an eye toward whether it will create an issue for
the client in states such as Florida with much more stringent requirements for such
documents.

Ethical Issues

Unfortunately, the unlicensed practice of law is a far too often occurrence by New
England attorneys representing their multistate clients. The Florida Bar takes the
unauthorized practice of law extremely seriously, and may seek civil injunctive relief, a
criminal contempt charge, a monetary penalty, and/or the payment of costs for litigating a
claim against a violating attorney. In State of Florida v. Sperry, the Florida Supreme
Court set out the standard for reviewing an allegation of the unlicensed practice of law:

It is safe to follow the rule that if the giving of such advice and performance of
such services affect important rights of a person under the law, and if the
reasonable protection of the rights and property of those advised and served
requires that the persons giving such advice possess legal skill and a knowledge
of the law greater than that possessed by the average citizen, then the giving of
such advice and the performance of such services by one for another as a course
of conduct constitute the practice of law

In the estate planning realm, a common example of the unlicensed practice of law
is the preparation of a Florida deed for a Massachusetts or Rhode Island estate plan. Even
such ancillary acts are a violation of the Bar Rules.

36 FLA. STAT. § 709.2106 (2012).
37 140 So.2d 587, 591 (Fla. 1962).
Conclusion

As this article has discussed, when a client has interests in New England and Florida, their estate plan should in turn take into account the law of all applicable states (regardless of the individual’s actual domicile). Too often issues arise when a New England practitioner does not consider the effect Florida’s laws will have on a client and his or her estate plan (or likewise, when a Florida practitioner does not consider Massachusetts or Rhode Island law). In order to properly advise a client, a Massachusetts or Rhode Island practitioner needs to at a minimum be aware of the potential problems and pitfalls presented by Florida law, and know when to retain Florida counsel to assist with a matter to both properly advise the client, and avoid any inkling of the unlicensed practice of law.

Sidebar (for State Estate Tax Planning Section)

Decedent with Total Gross Estate = $1,500,000
MA Real Estate ($600,000)
FL Real Estate ($600,000)
Intangible Property ($300,000)

MA Resident with No Additional Estate Planning, MA Estate Tax = $38,640
FL Resident with No Additional Estate Planning, MA Estate Tax = $25,760
FL Resident with Additional Estate Planning, MA Estate Tax = $0.00

Boston     Braintree     Mansfield     Providence     Naples