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Applauding the Entrepreneurial Spirit: Florida Welcomes Veteran-Owned Small Businesses

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I. INTRODUCTION

Perhaps the most fiscally and politically complex challenge facing our nation is the state of our economy. The problem of unemployment has been of particular concern to our nation’s leaders and to families from every corner of the country. The long-term unemployed, in particular, have faced the question of how they are supposed to move forward when finding gainful employment seems so daunting. This problem is particularly acute among the men and women who have served our country in the various branches of the armed services. Those servicemembers who have been disabled as a result of their time in the military face additional hurdles that may seem insurmountable. Disabilities extend far beyond the physical wounds of war. A trend towards wider recognition of the disabling psychological effects of war and military service has developed. Outreach efforts concerning Posttraumatic Stress Disorder (PTSD) in particular have encouraged those dealing with the illness to get help and have provided education for the public at large about the condition. While the problems facing our economy, and veterans in particular, are significant, a great deal of effort and ingenuity has been expended towards developing innovative solutions. Much is known about the benefits available to veterans in terms of health care, pensions, etc. However, benefits available to veterans who undertake entrepreneurial endeavors are lesser known. Those very benefits allow veteran-owned small

* Nova Southeastern University, Shepard Broad Law Center, J.D., magna cum laude, 2012; University of Phoenix, B.S., magna cum laude, 2009. This article is dedicated to the soldiers of the United States Armed Forces and their supporting friends and families. Their spirit is as strong as the love, support, and faith observed by their families both in times of war, and in peace. Let us never forget just how much it means to serve this country, the duties we owe to those that rise to the challenge, and the honor displayed by the men and women who defend freedom with their lives.

** Nova Southeastern University, Shepard Broad Law Center, J.D. Candidate, 2014; Florida International University, M.S., 2005; Florida International University, B.S., 2003. This article is dedicated to my mother, Pura, for her love and patience and for teaching me the importance of never giving up; to my father, Angel, for his selflessness and valuable advice; and to Raul, for his unconditional love and support and for reminding me to laugh a little bit every day and to always keep fighting.

businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSB) to offer yet another contribution to the country they have long served. Now out of uniform, and in the role of entrepreneurs, veterans can become job creators and improve their circumstances, that of others, and their communities. The federal government and the State of Florida have offered assistance to small businesses which qualify as VOSB and SDVOSB.¹

On October 20, 2004, President George W. Bush signed Executive Order 13,360.² The Order was entitled “Providing Opportunities for Service-Disabled Veteran Businesses To Increase Their Federal Contracting and Subcontracting.”³ A clear policy statement and directive were contained in the order:

America honors the extraordinary service rendered to the United States by veterans with disabilities incurred or aggravated in the line of duty during active service with the armed forces. Heads of agencies shall provide the opportunity for service-disabled veteran businesses to significantly increase the Federal contracting and subcontracting of such businesses.⁴

The Order charges agency heads with developing strategic plans which include, among other things, “encouraging and facilitating participation by service-disabled veteran businesses in competitions for award of agency contracts.”⁵

President Obama and his Administration have continued the work of aiding veterans and linking that assistance with entrepreneurial efforts that benefit local communities and the economy as a whole.⁶ The Administration notes that they “have been committed to upholding [the] sacred trust with America’s veterans and wounded warriors. Putting Americans, especially our veterans, back to work is job one.”⁷ President Obama has integrated entrepreneurship training and established the “National Veterans Entrepre-

1. *See infra* Part III for a discussion of VOSB and SDVOSB.

2. Exec. Order No. 13,360, 69 Fed. Reg. 62,549, 62,549, 62,551 (Oct. 26, 2004).

3. *Id.* at 62,549.

4. *Id.*

5. *Id.*

6. THE WHITE HOUSE, OBAMA ADMINISTRATION RECORD FOR VETERANS AND WOUNDED WARRIORS, http://www.whitehouse.gov/sites/default/files/docs/veterans_and_wounded_warriors_record_0.pdf.

7. *Id.*

neurship Training program within the Small Business Administration [(SBA)].”⁸ The SBA has highlighted that:

In Fiscal Year 2011, over 190,000 veterans received small business counseling or training through SBA and its resource partners. In addition, since 2009, SBA has doubled the number of SBA Veteran Business Outreach Centers nationwide. Over the past three years, SBA has also expanded the Entrepreneurship Bootcamp for Veterans with Disabilities to eight top U.S. business schools nationwide.⁹

Additionally, President Obama has increased veterans’ “access to capital and government contracts.”¹⁰ Of particular significance is that fact that “[b]etween 2009 and 2011, over \$3 billion through over 12,000 [SBA] loans went to small businesses owned by veterans and service-disabled veterans.”¹¹ The SBA has “worked with both contracting officers and veteran-owned businesses to deliver the highest-ever percentage of federal contracts to service-disabled veteran-owned . . . businesses in 2010, totaling \$10.4 billion.”¹²

In 2008, the Florida Legislature passed House Bill 687, entitled the “Florida Service-Disabled Veteran Business Enterprise Opportunity Act.”¹³ Similar to President Bush’s Executive order, the Act was intended to provide a “selection preference in state contracting for certified service-disabled veteran business enterprises.”¹⁴ The Legislature made it clear that their intent was to

rectify the economic disadvantage of service-disabled veterans, who are statistically the least likely to be self-employed when compared to the veteran population as a whole and who have made extraordinary sacrifices on behalf of the nation, the state, and the

8. *Id.*

9. *Id.*

10. *Id.*

11. THE WHITE HOUSE, *supra* note 6.

12. Marie Johns, *More Resources for America’s Veteran-Entrepreneurs and Small Business Owners*, THE WHITE HOUSE BLOG (Nov. 8, 2011, 11:29 AM), <http://www.whitehouse.gov/blog/2011/11/08/more-resources-america-s-veteran-entrepreneurs-and-small-business-owners-0>.

13. Florida Service-Disabled Veteran Business Enterprise Opportunity Act, Ch. 2008-155, § 1, 2008 Fla. Laws 1932, 1933 (codified at FLA. STAT. § 295.187 (2008)).

14. *Compare id.*, with Exec. Order No. 13,360, 69 Fed. Reg. 62,549, 62,549 (Oct. 26, 2004).

public, by providing opportunities for service-disabled veteran business enterprises.¹⁵

The federal government and the State of Florida are both making strides at encouraging our veterans to transition to the role of entrepreneur and it is not surprising to see why. The numbers are staggering. President Obama's Interagency Task Force on Veterans Small Business Development explained that

over one million service men and women are returning over the next five years Providing this growing number of veterans with the tools to transition back to civilian life—including assistance to start and grow a small business—is a moral responsibility. . . . [Additionally,] unemployment rates are as high as 11.1% for returning male veterans and 14.7% for returning women veterans.¹⁶

The Task Force succinctly and insightfully makes the connection between honoring the service of veterans and working towards addressing our economic woes.¹⁷ The report notes “veterans own about 2.4 million businesses or 9% of all of America's businesses. These businesses generate about \$1.2 trillion in receipts and employ nearly 6 million Americans.”¹⁸ Additionally, Ret. Army Colonel Jill Chambers who is the chairman and CEO of This Able Vet, notes that “[v]eteran-owned business[es] are twice as likely to succeed as businesses owned by non-veterans, according to studies ‘It's indicative of solid military training that can transition into the civilian workforce and be successful and productive.’”¹⁹

The goal of this article is to explore the benefits available to veterans in support of their entrepreneurial efforts. In order to provide veterans with enough information to get them started on the road to classification as a VOSB or SDVOSB with the goal of preference in government contracting in mind, we will begin with a discussion of the definition of disability and the

15. Ch. 2008-155, § 1, 2008 Fla. Laws at 1933.

16. INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT, REPORT TO THE PRESIDENT: EMPOWERING VETERANS THROUGH ENTREPRENEURSHIP 1 (2011), available at http://www.sba.gov/sites/default/files/FY2012-Final_Veterans_TF_Report_to_President.pdf.

17. See *id.* “America has both an unquestioned responsibility and a compelling incentive to empower veterans through entrepreneurship, enabling them to become successful small business owners.” *Id.*

18. *Id.*

19. Michelle Lodge, *SBA Helps Veteran-Owned Businesses*, CNBC (Nov. 11, 2010, 12:17 PM), http://www.cnbc.com/id/40131100?SBA_Helps_VeteranOwned_Businesses.

role of PTSD.²⁰ Then, we will discuss the requirements for classification as a VOSB or SDVOSB and the benefits available for each.²¹ We then explore the verification process and the potential pitfalls throughout that very critical phase.²² Next, we discuss the benefits that the State of Florida offers to veterans and the requirements for creating a business entity in Florida.²³ Additionally, we address the definition of a “small business concern” and engage in an analysis of the critical components of that definition.²⁴ Lastly, another issue for veterans to consider is the voluntary and involuntary transfer of shares once their enterprise is up and running, and how those transfers can impact their status as a VOSB or SDVOSB.²⁵

II. DEFINING DISABILITY AND THE POST-TRAUMATIC STRESS DISORDER CONNECTION

The focus of this article is on the benefits available to VOSB and SDVOSB in support of their entrepreneurial efforts. A logical starting point is a discussion of the myriad of ways that disability is defined. Additionally, the link between disability and PTSD merits exploration.

Title 38, section 101 of the United States Code defines “veteran” as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”²⁶ A “disabled veteran” is defined as “a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) . . . or . . . a person who was discharged or released from active duty because of a service-connected disability.”²⁷ A “special disabled veteran” is defined as:

(A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) . . . for a disability (i) rated at 30% or more, or (ii) rated at 10 or 20% in the case of a veteran who has been determined under section 3106 of this title to have a serious employment handicap; or

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20. See discussion *infra* Part II.
 21. See discussion *infra* Part III.
 22. See discussion *infra* Part IV.
 23. See discussion *infra* Parts V.–VI.
 24. See discussion *infra* Part VII.
 25. See discussion *infra* Part VIII.
 26. 38 U.S.C. § 101(2) (2006).
 27. *Id.* § 4211(3).

(B) a person who was discharged or released from active duty because of service-connected disability.²⁸

Another important distinction is between what is *service-connected* and what is *non-service-connected*. “[S]ervice-connected’ means, with respect to disability or death, that such disability was incurred or aggravated . . . in line of duty in the active military, naval, or air service.”²⁹ “[N]on-service-connected’ means . . . that such disability was *not* incurred or aggravated . . . in line of duty in the active military, naval, or air service.”³⁰

The Diagnostic and Statistical Manual of Mental Disorders explains that:

[t]he essential feature of [PTSD] is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.³¹

Additionally, “[t]he person’s response . . . must involve intense fear, helplessness, or horror.”³² Also, “[t]he full symptom picture . . . must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.”³³ It does not require a stretch of the imagination to arrive at the conclusion that many of our men and women in uniform are engaged in yet another battle with PTSD on the home front. The National Center for PTSD is under the auspices of the Department of Veterans Affairs (VA).³⁴ The Center offers the following statistics regarding the prevalence of PTSD in the military:

Experts think PTSD occurs:

28. *Id.* § 4211(1). An explanation of disability ratings is a complex endeavor and outside the scope of this article.

29. *Id.* § 101(16).

30. *Id.* § 101(17) (emphasis added).

31. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed., text rev. 2000).

32. *Id.*

33. *Id.*

34. See *How Common Is PTSD?*, U.S. DEPARTMENT VETERANS AFFS. (July 5, 2007), <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp>.

- In about 11–20% of Veterans of the Iraq and Afghanistan wars . . . or in 11–20 Veterans out of 100.
- In as many as 10% of Gulf War (Desert Storm) Veterans, or in 10 Veterans out of 100.
- In about 30% of Vietnam Veterans, or about 30 out of 100 Vietnam Veterans.³⁵

The way in which the VA is addressing the epidemic of returning veterans with PTSD was illustrated in a recent case decided by the United States Court of Appeals for the Federal Circuit.³⁶ In *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*,³⁷ the issue involved an amendment to the rule governing “claims for service-connected disability benefits for [PTSD].”³⁸ The Secretary proposed a rule, which the court upheld, that “creat[ed] an additional situation where a veteran could establish PTSD service-connection without supporting evidence regarding the claimed in-service stressor.”³⁹ Prior to this rule being proposed, “a finding of PTSD service-connection require[d] three components: ‘medical evidence diagnosing the condition in accordance with [38 U.S.C. § 501(a)]; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred.’”⁴⁰ The proposed rule that was codified and upheld by this court states:

If a stressor claimed by a veteran is related to the veteran’s fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of [PTSD] and that the veteran’s symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veter-

35. *Id.*

36. *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 669 F.3d 1341, 1343 (Fed. Cir. 2012).

37. 669 F.3d 1341 (Fed. Cir. 2012).

38. *Id.* at 1343.

39. *Id.* at 1343–44.

40. *Id.* at 1343 (quoting 38 C.F.R. § 3.304(f) (2012)).

an's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.⁴¹

III. BENEFITS AVAILABLE TO VETERAN-OWNED SMALL BUSINESSES AND SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESSES

In addition to the benefits that most people are aware of, such as health care, veterans who decide to venture out as entrepreneurs may do so with the help of the VA. "Public Law (P.L.) 109-461 entitled 'Veterans Benefits, Health Care, and Information Technology Act of 2006' provides VA with unique authority for contracting with SDVOSB and VOSB."⁴² The goal of the legislation was to increase the contracting opportunities for VOSBs and SDVOSBs.⁴³ Title 38, Section 8127 of the United States Code states that a "small business concern may be awarded a contract . . . only if the small business concern and the veteran owner . . . are listed in the database of veteran-owned businesses maintained by the Secretary."⁴⁴ Additionally, "[i]n maintaining the database, the Secretary shall . . . [verify] that each small business concern listed in the database is owned and controlled by veterans [and] [i]n the case of a veteran who indicates a service-connected disability, verifi[y] . . . the service-disabled status of [each] veteran."⁴⁵ Now that we know that VOSBs and SDVOSBs have increased contracting opportunities with the federal government, it is important to define exactly what constitutes a VOSB and SDVOSB. Making sure that a business qualifies under either definition is the first step in a long road to benefiting from the assistance.

The first key definition is that of a *veteran-owned small business concern*. A VOSB concern is

41. *Id.* at 1344 (quoting 38 C.F.R. § 3.304(f)(3)). The National Organization of Veterans' Advocates asserted that

the new VA rule: (1) conflicts with statutes and regulations that require the VA to consider all medical evidence on a case-by-case basis, including evidence from private physicians, and that require the VA to give the veteran the benefit of the doubt when considering all evidence in the record; (2) improperly includes language that is not required in the DSM-IV; and (3) should be set aside as arbitrary and capricious on grounds that none of the VA's proffered explanations provides a rational basis for excluding private doctors' opinions.

Nat'l Org. of Veterans' Advocates, Inc., 669 F.3d at 1345.

42. *Veteran-Owned Small Business Verification Program*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/verification.asp> (last updated Dec. 19, 2012); *see* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §1, 120 Stat. 3403, 3403.

43. 38 U.S.C. § 8127(a)(1) (2006 & Supp. IV).

44. *Id.* § 8127(e).

45. *Id.* § 8127(f)(4).

a small business concern that is not less than 51% owned by one or more veterans, or in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more veterans; the management and daily business operations of which are controlled by one or more veterans and qualifies as “small” for Federal business size standard purposes.⁴⁶

The second key definition is that of a *service-disabled veteran-owned small business concern*. A SDVOSB concern is

a business not less than 51% of which is owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more service-disabled veterans; the management and daily business operations of which are controlled by one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, a spouse or permanent caregiver of such veteran. In addition, some businesses may be owned and operated by an eligible surviving spouse. Reservists or members of the National Guard disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualify.⁴⁷

It is interesting to note the role of surviving spouses in this context. A *surviving spouse* is

any individual identified as such by VA’s Veterans Benefits Administration and listed in its database of veterans and family members. . . . [T]he following conditions must apply: (1) If the death of the veteran causes the small business concern to be less than 51% owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall . . . be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a service-disabled veteran-owned small business.⁴⁸

In essence, the surviving spouse steps into the shoes of the service-disabled veteran.⁴⁹ Now that we have set out the definitions of VOSB and SDVOSB,

46. 38 C.F.R. § 74.1 (2012).

47. *Id.*

48. *Id.*

49. *See* 48 C.F.R. § 802.101(1). But in order to qualify as an eligible surviving spouse, the veteran to whom the spouse is married must meet certain conditions. *See id.* § 802.101(3). “The veteran must have had a 100% service-connected disability rating or the veteran died as

the next step is to explore the complex verification process required in order for the business to be listed in the database maintained by the VA.

IV. THE VERIFICATION PROCESS

Before any contracts may be awarded, the VOSB or SDVOSB must complete the verification process.⁵⁰ The first step is that “[r]egistered businesses, or businesses wishing to register in the Vendor Information Pages (VIP) database for the purpose of securing opportunities in the Veterans First Contracting Program, must fill out an electronic Verification application”⁵¹ There are several core requirements in order for a VOSB or SDVOSB to become verified.⁵² The requirements are:

- (1) The Veteran owner(s) have direct and unconditional ownership of at least 51% of the small business (38 C.F.R. § 74.3) and have total unconditional control (full decision making authority) (38 C.F.R. § 74.4(g));
- (2) The Veteran manages the company on both a strategic policy and a day-to-day basis (38 C.F.R. § 74.4);
- (3) The Veteran holds the highest officer position (38 C.F.R. § 74.4(c)(2));
- (4) The Veteran should be the highest compensated employee unless there is a logical explanation otherwise, submitted by the Veteran as to how taking a lower salary than other employee(s) helps the business (38 C.F.R. § 74.4(g)(3)); and
- (5) The Veteran has the managerial experience of the extent and complexity needed to manage the company.⁵³

Veterans are not alone in this process. Help is available in the form of the “Verification Counseling Program,” which “was developed to provide

a direct result of a service-connected disability.” *Id.* Without these requirements, the spouse does not qualify and cannot step into the shoes of her decedent spouse. *See id.*

50. *Veteran-Owned Small Business Verification Program*, *supra* note 42.

51. *Veteran Business Status Verification Instructions*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/verificationInstructions.asp> (last updated Dec. 19, 2012).

52. *See Verification Self Assessment Tool*, U.S. DEPARTMENT OF VETERANS AFF., https://www.research.net/s/Verification_Assessment_Tool (last visited Apr. 21, 2013).

53. *Id.*

training and assistance to Verification Assistance partners, who in turn provide Verification counseling to applicants.”⁵⁴ Among the services provided by the Verification Counseling Program are: One-on-one verification assistance to the applicant in helping to understand regulation 38 C.F.R. § 74, “[r]eview of a firm’s business model,” providing insight “to applicants regarding the interpretation of [the] regulation,” and helping and “[a]ssist[ing] the [v]eteran with questions on how to use the Self Assessment Tool.”⁵⁵

The VA notes that the “[a]pplicant bears the burden of proof of adequately establishing its claimed status.”⁵⁶ There are several steps in the verification process.⁵⁷ The most essential are as follows:

(1) The Veteran applies to have a company verified by entering ownership information into VIP and sign[ing] VA Form 0877 electronically in the VIP registration section. . . . (2) Once all the owners have completed their electronic signatures, VA confirms the Veteran status of each Veteran owner (3) After an Applicant’s Veteran status is confirmed, the documents that were submitted are reviewed to ascertain if they are correct and viable for examination. When that has been determined, the examination begins and the 90 day clock for Verification begins. . . . (4) The Evaluation stage is completed by a Federal employee. . . . (5) The final stage of the process is the Determination stage. In this stage, the Federal employee determines if the application is approved or denied and the appropriate letter is issued. This letter is scanned and sent via VIP profile If the application is approved, the logo is turned on and the company will then appear in VIP.⁵⁸

The VA has also identified common pitfalls during the verification process in an effort to help future applicants avoid the same issues.⁵⁹ Among those pitfalls are that “100% of [o]wners have not completed the VA Form 0877 electronic signature.”⁶⁰ Also, applicants sometimes fail to “upload all required documents to their VIP profile” and do not provide all the necessary

54. *Verification Assistance Program*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/vap.asp> (last updated Mar. 8, 2013).

55. *Verification Counseling Program*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/vapVCP.asp> (last updated Mar. 26, 2013).

56. U.S. DEP’T OF VETERANS AFFAIRS, VA VETERAN-OWNED VERIFICATION PROGRAM—INITIAL APPLICATION GUIDE 1 (2012), *available at* www.va.gov/osdbu/docs/vapInitialVerificationApplicationGuide.pdf.

57. *Id.* at 2.

58. *Id.* at 2–3.

59. *Id.* at 7.

60. *Id.*

documentation.⁶¹ Additionally, it is sometimes determined that “[n]on-[v]eterans appear to control the company.”⁶² Problems involving “unusual ownership or management structure” and “affiliation issues” may also be present.⁶³ As described, despite the complex nature of the process, the VA has several mechanisms in place to assist veterans in navigating the process and reaching a successful outcome.⁶⁴ It appears clear that those veterans who choose to avail themselves of the assistance are far more likely to be successful than those who might elect not to do so.

V. HOW DOES FLORIDA HELP VETERANS WITH THEIR ENTREPRENEURIAL EFFORTS?

Florida provides benefits to VOSBs and SDVOSBs.⁶⁵ Former Governor Charlie Crist signed the Florida Service-Disabled Veteran Business Enterprise Opportunity Act into law in June 2008.⁶⁶ The Act created “a preference in state contracting for businesses owned by service-disabled veterans. [The Department of Management Services Office of Supplier Diversity] provides business development and certification for minority- and women-owned businesses.”⁶⁷ The first service-disabled veteran-owned business was certified the same week the legislation was signed.⁶⁸ American Building Inspectors Corporation is owned by a veteran of Operation Desert Storm/Desert Shield and the wars in Afghanistan and Iraq.⁶⁹ The program has been a great success and Florida now ranks third for greatest number of veteran-owned businesses.⁷⁰ Additionally, the “[United States Small Business Administration] Office of Advocacy report[s] that Florida has 176,727 veteran-owned businesses which produce revenue of \$61.9 billion. These veteran-owned employers provide jobs for 310,154 people with an annual payroll of \$10.6

61. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 56, at 7.

62. *Id.* at 8.

63. *Id.*

64. *See id.*

65. *See* Florida Service-Disabled Veteran Business Enterprise Opportunity Act, Ch. 2008-155, § 1, 2008 Fla. Laws 1932, 1933, 1935 (codified at FLA. STAT. § 295.187 (2008)).

66. *Id.* at 1936.

67. Press Release, Fla. Dep’t of Mgmt. Servs. Office of Supplier Diversity, First Certified Service-Disabled Veteran-Owned Business (Nov. 17, 2008) (on file with *Nova Law Review*).

68. *Id.*

69. *Id.*

70. Press Release, Fla. Dep’t of Econ. Opportunity, Florida Ranks Third for Greatest Number of Veteran-Owned Businesses (Nov. 11, 2012), <http://www.floridajobs.org/news-center/news-feed/2012/11/12/florida-ranks-third-for-greatest-number-of-veteran-owned-businesses>.

billion.”⁷¹ While the first Florida business to be certified was a building inspection company, a recent service-disabled veteran-owned small business to be certified in Florida is CLI Solutions which is a “national defense intelligence company” that plans to create “up to 40 jobs and \$3.4 million in capital investment” in Florida.⁷² CLI Solutions “specializ[es] in linguistic services, human terrain analysis, cultural awareness and language training, strategic communications, intelligence analytical support, operations, and program management.”⁷³

With the passage of the Florida Veteran Business Enterprise Opportunity Act, the Florida Legislature set out

to rectify the economic disadvantage of service-disabled veterans, who are statistically the least likely to be self-employed when compared to the veteran population as a whole and who have made extraordinary sacrifices on behalf of the nation, the state, and the public, by providing opportunities for service-disabled veteran business enterprises.⁷⁴

Section 295.187 of the *Florida Statutes* defines a “[v]eteran business enterprise” as an enterprise that:

1. Employs 200 or fewer permanent full-time employees; 2. [t]ogether with its affiliates has a net worth of \$5 million or less or, if a sole proprietorship, has a net worth of \$5 million or less including both personal and business investments; 3. [i]s organized to engage in commercial transactions; 4. [i]s domiciled in this state; 5. [i]s at least 51% owned by one or more wartime veterans or service-disabled veterans; and 6. [t]he management and daily business operations of which are controlled by one or more wartime veterans or service-disabled veterans or, for a service-disabled veteran having a permanent and total disability, by the spouse or permanent caregiver of the veteran.⁷⁵

71. *Id.*

72. Press Release, Fla. Dep’t of Mgmt. Servs. Office of Supplier Diversity, *supra* note 67; Press Release, Governor of Fla., Gov. Scott Announces CLI Solutions to Expand Operations at Tampa Headquarters (Dec. 14, 2012), <http://www.flgov.com/2012/12/14/gov-scott-announces-cli-solutions-to-expand-operations-at-tampa-headquarters/>.

73. Press Release, Governor of Fla., *supra* note 72.

74. FLA. STAT. § 295.187(2) (2012).

75. *Id.* § 295.187(3)(c).

Although there are differences between the federal and state definitions, they are largely the same.⁷⁶ However, the requirements for certification are different.⁷⁷ The state statute requires that the application for certification,

at a minimum, include: 1. The name of the business enterprise applying for certification and the name of the veteran submitting the application on behalf of the business enterprise. 2. The names of all owners of the business enterprise, including owners who are wartime veterans, service-disabled veterans, and owners who are not a wartime veteran or a service-disabled veteran, and the percentage of ownership interest held by each owner. 3. The names of all persons involved in both the management and daily operations of the business, including the spouse or permanent caregiver of a veteran who has a permanent and total disability. 4. The service-connected disability rating of all persons listed [above] . . . with supporting documentation from the [VA] or the . . . Department of Defense. 5. Documentation of the wartime service of all persons listed [above] . . . 6. The number of permanent full-time employees. 7. The location of the business headquarters. 8. The total net worth of the business enterprise and its affiliates. In the case of a sole proprietorship, the net worth includes personal and business investments.⁷⁸

VI. THE BASICS OF STARTING A BUSINESS IN FLORIDA

Starting a business typically begins with a good idea and a plan. Once that stage in the process is over, the hard work begins and several complex legal issues may present themselves. While all of the legal complexities involved in the formation of a business entity are outside the scope of this article, a brief discussion of the various forms of business entities available in Florida, and the basic requirements for each, is important for veterans who are considering starting a business and are hoping to avail themselves of the assistance that is offered by both the federal government and the State of Florida.

76. Compare 38 C.F.R. § 74.1 (2012), with FLA. STAT. § 295.187(3)(c).

77. Compare FLA. STAT. § 295.187(5)(a), with *Veteran Business Status Verification Instructions*, *supra* note 51.

78. FLA. STAT. § 295.187(5)(a).

A. Corporations

Chapter 607 of the *Florida Statutes* governs corporations.⁷⁹ It is important to set out a few definitions before delving into the requirements for incorporation and similar concepts. Section 607.01401 of the *Florida Statutes* defines numerous terms that are involved in the formation of a corporation.⁸⁰ A *corporation* is defined as “a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this act.”⁸¹ An *employee* “includes an officer but not a director. A *director* may accept duties that make him or her also an employee.”⁸² *Principal office* “means the office (in or out of this state) where the principal executive offices of a domestic or foreign corporation are located as designated in the articles of incorporation or other initial filing until an annual report has been filed, and thereafter as designated in the annual report.”⁸³ *Secretary* is defined as “the corporate officer to whom the board of directors has delegated responsibility under [section] 607.08401 for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.”⁸⁴ A *shareholder* or *stockholder* “means one who is a holder of record of shares in a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.”⁸⁵ *Shares* are defined as “the units into which the proprietary interests in a corporation are divided.”⁸⁶ Finally, a *voting group*

means all shares of one or more classes or series that under the articles of incorporation or this act are entitled to vote and be counted together collectively on a matter at the meeting of shareholders. All shares entitled by the articles of incorporation or this act to vote generally on the matter are for that purpose a single voting group.⁸⁷

A corporation is born “when the articles of incorporation are filed or on a date specified in the articles of incorporation, if such date is within 5 busi-

79. See generally *id.* ch. 607.

80. See *id.* § 607.01401.

81. *Id.* § 607.01401(5).

82. *Id.* § 607.01401(10) (emphasis added).

83. FLA. STAT. § 607.01401(20).

84. *Id.* § 607.01401(23).

85. *Id.* § 607.01401(24).

86. *Id.* § 607.01401(25).

87. *Id.* § 607.01401(31).

ness days prior to the date of filing.”⁸⁸ Additionally, “[t]he Department of State’s filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation.”⁸⁹ The articles of incorporation must include certain basic information such as:

(a) A corporate name for the corporation . . . ; (b) [t]he street address of the initial principal office and, if different, the mailing address of the corporation; (c) [t]he number of shares the corporation is authorized to issue; (d) [i]f any preemptive rights are to be granted to shareholders, the provision therefor; (e) [t]he street address of the corporation’s initial registered office and the name of its initial registered agent at that office together with a written acceptance . . . ; and (f) [t]he name and address of each incorporator.⁹⁰

In addition to articles of incorporation, the other fundamental document required for a corporation is the bylaws. Section 607.0206 of the *Florida Statutes* addresses bylaws and states that “[t]he incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation unless that power is reserved to the shareholders by the articles of incorporation.”⁹¹ Additionally, “[t]he bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.”⁹² The fundamentals that no corporation in Florida can do without are articles of incorporation and bylaws. Another form of business entity that a veteran may wish to consider is the limited liability company (LLC).

B. *Limited Liability Companies*

The terminology used in, and requirements of, an LLC are slightly different.⁹³ Definitions are also important in the context of LLCs. An *authorized representative*

means one or more persons acting to form a limited liability company by executing and filing the articles of organization of such limited liability company . . . and authorized by a member of such

88. FLA. STAT. § 607.0203(1).

89. *Id.* § 607.0203(2).

90. *Id.* § 607.0202(1).

91. *Id.* § 607.0206(1).

92. *Id.* § 607.0206(2).

93. *Compare* FLA. STAT. § 607.01401(10), (23)–(24), (31), *with id.* § 608.402(3), (18).

limited liability company, which authorized representative may, but need not be, a member of the limited liability company that the authorized representative forms.⁹⁴

A *manager* is defined as “a person who is appointed or elected to manage a manager-managed company and, unless otherwise provided in the articles of organization or operating agreement, a manager may be, but need not be, a member of the limited liability company.”⁹⁵ There are two types of LLCs.⁹⁶ Some LLCs are manager-managed.⁹⁷ Others are member-managed.⁹⁸ A *manager-managed* LLC is “a limited liability company that is designated to be managed by one or more managers.”⁹⁹ A *member-managed* LLC is an LLC that is managed by members.¹⁰⁰ The operating agreement is one of the fundamental documents for an LLC.¹⁰¹ An *operating agreement* is defined as “written or oral provisions that are adopted for the management and regulation of the affairs of the [LLC] and that set forth the relationships of the members, managers, or managing members and the [LLC]. The term includes amendments to the operating agreement.”¹⁰² Finally, a *membership interest* is defined as “a member’s share of the profits and the losses of the [LLC], the right to receive distributions of the [LLC’s] assets, voting rights, management rights, or any other rights under this chapter or the articles of organization.”¹⁰³

Akin to the articles of incorporation in the LLC context are the articles of organization.¹⁰⁴ Section 608.407 of the *Florida Statutes* requires that the articles of organization include:

(a) The name of the [LLC] (b) The mailing address and the street address of the principal office of the [LLC]. (c) The name and street address of its initial registered agent for service of process in the state. . . . (d) Any other matters that the members elect to include in the articles of organization.¹⁰⁵

94. FLA. STAT. § 608.402(3).

95. *Id.* § 608.402(18).

96. *See id.* § 608.402(19), (22).

97. *Id.* § 608.402(19).

98. *Id.* § 608.402(22).

99. FLA. STAT. § 608.402(19).

100. *See id.* § 608.402(22).

101. *See id.* § 608.402(24).

102. *Id.*

103. *Id.* § 608.402(23).

104. *Compare* FLA. STAT. § 607.01401(1), *with id.* § 608.402(2).

105. FLA. STAT. § 608.407(1).

Finally, “[t]he articles of organization may also, but need not, identify one or more persons authorized to serve as a manager or managing member and may describe any limitations upon the authority of a manager or managing member.”¹⁰⁶ Next, a veteran may wish to form a general partnership or a limited partnership.

C. *Limited Partnerships and General Partnerships*

Chapter 620 of the *Florida Statutes* governs partnerships in Florida.¹⁰⁷ The decision to organize as a general partnership or a limited partnership involves many complex considerations that are unique to each business entity. Limited partnerships are comprised of general partners and limited partners.¹⁰⁸ Section 620.1104 of the *Florida Statutes* describes the “[n]ature, purpose, and duration” of a limited partnership.¹⁰⁹ Specifically, “[a] limited partnership is an entity distinct from its partners.”¹¹⁰ This fact is one of the reasons that a business owner may find the partnership form to be appealing.

Section 620.8202 of the *Florida Statutes* addresses the formation of a partnership.¹¹¹ A partnership is formed by the “association of two or more persons to carry on as coowners a business for profit . . . whether or not the persons intend to form a partnership.”¹¹² Deciding whether a partnership is formed is often a source of debate.¹¹³ Among the factors to be considered are:

- (a) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not, by itself, establish a partnership, even if the coowners share profits made by the use of the property.
- (b) The sharing of gross returns does not, by itself, establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
- (c) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment: 1. Of a debt by installments or otherwise; 2. [f]or services as an independent contractor or of wages or other compensation to an employee; 3. [o]f

106. *Id.* § 608.407(6).

107. *Id.* ch. 620.

108. *Id.* § 620.1102(12).

109. *Id.* § 620.1104.

110. FLA. STAT. § 620.1104(1).

111. *Id.* § 620.8202.

112. *Id.* § 620.8202(1).

113. See Elizabeth R. Darby, *Relations Between Attorneys: When Does a Partnership Exist?*, 18 J. LEGAL PROF. 319, 319 (1993).

rent; 4. [o]f an annuity or other retirement benefit to a beneficiary, representative, or designee of a deceased or retired partner; 5. [o]f interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or 6. [f]or the sale of the goodwill of a business or other property by installments or otherwise.¹¹⁴

The *partnership agreement* is the central document in this form of business entity and “governs relations among the partners and between the partners and the partnership.”¹¹⁵ Interestingly, “[t]o the extent the partnership agreement does not otherwise provide, this act governs relations among the partners and between the partners and the partnership.”¹¹⁶ There are limits upon a partnership agreement.¹¹⁷

A partnership agreement may not: (a) Vary a limited partnership’s power . . . to sue, be sued, and defend in its own name; (b) Vary the law applicable to a limited partnership . . . ; (c) Eliminate the duty of loyalty of a general partner . . . ; (d) Unreasonably reduce the duty of care of a general partner . . . ; (e) Eliminate the obligation of good faith and fair dealing¹¹⁸

As mentioned previously, the decision to organize as a particular form of business entity is a very complex decision that involves considerations of day-to-day operations, management, control, taxation, etc.¹¹⁹

VII. DEFINING SMALL BUSINESS CONCERN

According to 48 C.F.R. § 2.101, a “[s]mall business concern means a concern . . . that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 C.F.R. part 121.”¹²⁰ In order to help understand what this means, we will break the sentence down into four parts. The first portion will deal with defining *small*

114. FLA. STAT. § 620.8202(3)(a)–(c).

115. *Id.* § 620.1110(1).

116. *Id.*

117. *See id.* § 620.1110(2).

118. *Id.* § 620.1110(2)(a), (b), (e), (f), (g).

119. A veteran may be well-advised to seek the assistance of counsel when deciding how to organize their business in Florida.

120. 48 C.F.R. § 2.101(b) (2012) (emphasis added).

business concern. The second portion will explain what it means to be *independently owned and operated*. The third portion will explain the concept of *dominance*. And lastly, we will explain the size qualifications for a small business.

A. Defining “Concern”

Title 48 offers very little insight as to what is meant by a *small business concern*.¹²¹ Although defining *small business concern* as a “concern,” the VA does offer some guidance by cross referencing 13 C.F.R. § 121 to help us in gaining an understanding of what is meant by “concern.”¹²² There, the SBA defines a concern as “a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.”¹²³ Additionally, the SBA explains that “[a] business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative.”¹²⁴ Special rules apply to joint ventures, limiting participation by foreign business entities to a maximum interest of 49%.¹²⁵

Although each state has its own rules and regulations for creating the entities described above, for this article, we are only discussing those business concerns as they are defined by Florida law. Business entity is a term of art that is used in Florida law.¹²⁶

B. Defining “Independently Owned and Operated”

As noted earlier, a veteran or service-disabled veteran must own 51% of the small business concern in order for the business entity to be considered a VOSB or SDVOSB.¹²⁷ If at any time after being verified, a transfer of an interest results in the majority ownership becoming anything less than 51%, then the business loses its veteran-owned status.¹²⁸ For corporations, veterans must independently own 51% of all issued stocks in order to qualify for

121. *See id.*

122. *See id.*; *see also* 13 C.F.R. § 121.105(a)(1) (2013).

123. 13 C.F.R. § 121.105(a)(1) (2013).

124. *Id.* § 121.105(b).

125. *Id.*

126. *See* FLA. STAT. § 607.1108(1) (2012).

127. 38 C.F.R. § 74.1 (2012); *see supra* notes 46–47 and accompanying text.

128. *See* 38 C.F.R. § 74.3(e)(1), (4).

the benefits extended to a VOSB.¹²⁹ A complete listing of issued stocks of Florida corporations can be found on either the articles of incorporation or the latest annual report, made available as a public record by the State of Florida.¹³⁰

The Center for Veterans Enterprise (CVE) has incorporated the 51% ownership requirements and included it as part of the meaning of *independently owned and operated*.¹³¹ As mentioned earlier, the CVE requires veterans to “have direct and unconditional ownership of at least 51% of the small business” concern.¹³² The veteran must manage the company, having sole control of its decision-making, “hold[ing] the highest officer position,” and, with but a few exceptions, have the highest compensation.¹³³ Lastly, the manager must have the “managerial experience [to] the extent . . . [necessary] to manage the company.”¹³⁴

“Ownership must be direct.”¹³⁵ In other words, the veteran must own the share, not a business entity that is a VOSB or a SDVOSB.¹³⁶ Nor can a trust own the share, generally speaking.¹³⁷

[O]wnership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a veteran or service-disabled veteran where the trust is revocable, and the veteran or service-disabled veteran is the grantor, a trustee, and the sole current beneficiary of the trust.

....

. . . Ownership by one or more veterans or service-disabled veterans must be *unconditional* ownership. Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing owner-

129. *See id.* §§ 74.1, 74.3(b)(3). The same applies to SDVOSB concerns. *See id.* § 74.1 (defining SDVOSB).

130. FLA. DEP’T OF STATE, DIV. OF CORPS., <http://www.sunbiz.org> (last visited Apr. 21, 2013).

131. 48 C.F.R. § 2.101 (2012); *Verification Self Assessment Tool*, *supra* note 52.

132. *Verification Self Assessment Tool*, *supra* note 52.

133. *Id.*

134. *Id.*

135. 38 C.F.R. § 74.3(a) (2012).

136. *See id.*

137. *Id.*

ship benefits to go to another—other than after death or incapacity.¹³⁸

Therefore any “arrangements causing or potentially causing ownership benefits to go to another—other than after death or incapacity” may disqualify the share.¹³⁹ The CVE has made it clear that the benefit of the share should go to the veteran or service-disabled veteran.¹⁴⁰ Restrictions on alienation may harm the price of the share, but a stock option or agreement between veteran and/or service-disabled veteran shareholders may protect the VOSB and SDVOSB.¹⁴¹ But, any unexercised stock options or agreements held by non-veteran shareholders shall be considered as having already been exercised.¹⁴²

Dividend distribution requires very strict guidelines such that 51% of the benefit belongs to the veteran or service-disabled veteran shareholders.¹⁴³

One or more veterans or service-disabled veterans must be entitled to receive:

- (1) At least 51% of the annual distribution of profits paid to the owners of a corporate, partnership, or LLC applicant or participant;
- (2) At least 51% of the net profits earned by a joint venture in which the applicant or participant is the lead concern;
- (3) 100% of the value of each share of stock owned by them in the event that the stock is sold; and
- (4) At least 51% of the retained earnings of the concern and 100% of the unencumbered value of each share of stock owned in the event of dissolution of the corporation, partnership, or LLC.

138. *Id.* § 74.3(a)–(b) (emphasis added).

139. *Id.* § 74.3(b).

140. *See* 38 C.F.R. § 74.3(b).

141. *See id.* § 74.3(c).

142. *Id.* “[A]ny unexercised stock options or similar agreements—including rights to convert non-voting stock or debentures into voting stock—held by non-veterans will be treated as exercised.” *Id.*

143. *Id.* § 74.3(d).

(5) An eligible individual's ability to share in the profits of the concern should be commensurate with the extent of his/her ownership interest in that concern.¹⁴⁴

The CVE has indicated that change of ownership restrictions exist in all cases except death or incapacity agreement options.¹⁴⁵ Every time a change of ownership in any of the existing shares occurs, a new application must be submitted to the CVE to determine if the VOSB or SDVOSB retains its status.¹⁴⁶ If a shareholder agreement, marital agreement—premarital, divorce decree, or postnuptial agreements included—or other contract such as a buy-sell agreement is created such that the contract “substitute[s] one veteran owner for another [such veterans] shall submit a proposed novation agreement and supporting documentation . . . to the contracting officer¹⁴⁷ prior to the substitution or change of ownership for approval” is permitted.¹⁴⁸ In the event of a “death or incapacity due to a serious, long-term illness or injury of an eligible [shareholder], prior approval is not required, but the concern must file a new application with contracting officer and CVE within 60 days of the change.”¹⁴⁹ CVE verification is required each and every time a concern's shareholder transfers ownership to a new owner and before the award of any new contracts.¹⁵⁰

Mere ownership is not enough.¹⁵¹ Control must be retained by the owner of the share.¹⁵² Such control does not simply mean the right to legally own or take profits derived from dividends of a stock.¹⁵³

(a) Control means both the day-to-day management and long-term decision-making authority for the VOSB. Many persons share control of a concern, including each of those occupying the following positions: Officer, director, general partner, managing partner, managing member, and manager. In addition, key em-

144. 38 C.F.R. § 74.3(d).

145. *Id.* § 74.3(e)(1)–(3).

146. *Id.* § 74.3(e)(1).

147. Contracting officer is the person responsible for determining which business entity is to be awarded a government contract. *See id.* § 74.3(e). Because verification is required before each time a contract is applied for by a VOSB and/or SDVOSB, the contracting officer needs to be aware of the “[c]ontinued eligibility” of the VOSB and/or SDVOSB. *See id.* § 74.3(e)(4).

148. 38 C.F.R. § 74.3(e)(2).

149. *Id.* § 74.3(e)(3).

150. *Id.* § 74.3(e)(4).

151. *See id.* § 74.4(b).

152. *Id.*

153. *See* 38 C.F.R. § 74.4(b).

employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. CVE will consider the control potential of such key employees on a case-by-case basis.

(b) Control is not the same as ownership, although both may reside in the same person. CVE regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or participant's management and daily business operations must be conducted by one or more veterans or service-disabled veterans. Individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A veteran need not have the technical expertise or possess a required license to be found to control an applicant or participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-veteran having an equity interest in the applicant or participant firm, the non-veteran may be found to control the firm.¹⁵⁴

C. *Understanding the Concept of "Dominance" and "Qualified Small Business"*

Eligibility is limited to "small businesses" and the VA has defined the test for determining if a business concern is a small business based on its dominance over the marketplace.¹⁵⁵ The VA explains that

[s]uch a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.¹⁵⁶

154. *Id.* § 74.4(a)–(b).

155. 48 C.F.R. § 2.101.

156. *Id.*; *see also* 15 U.S.C. § 632 (2006 & Supp. IV); 48 C.F.R. § 19.102.

And although the VA provides this definition, it cross references 15 U.S.C. § 632 for purposes of defining dominance, allowing the SBA to determine what constitutes a small business concern based on each industry.¹⁵⁷ Once the SBA does this, it *qualifies* those small business concerns once it has cross-referenced the business's application with the standards it has created for each industry.¹⁵⁸

But the SBA cannot arbitrarily or capriciously assign numbers and figures to decide what constitutes a small business concern; it must carefully consider all the appropriate factors including those enumerated.¹⁵⁹ This is especially true if what might constitute as small in one region is not necessarily small in another due to both geographical and financial considerations.¹⁶⁰ The esteemed Judge Gesell explains:

The Act does not specify that dominance is to be measured on a national scale and SBA may not limit its inquiry to promulgation of uniform national standards merely for convenience or because this approach may appear appropriate in the vast majority of cases. When most of the firms in an industry are regarded as being confined to a regional market by geographical and financial considerations, the small-business size standard cannot be one that gives a dominant firm in a regional market the preferred status of a small business.¹⁶¹

Even though the SBA may be required to evaluate a rational argument for a regional variation on its size standard when *qualifying* a business on a case-by-case basis, it still provides standards that essentially create a presumption of a small business.¹⁶² Appealing an SBA determination of one's business as not being a *small business concern* in reliance on the "alternative

157. 48 C.F.R. § 2.101; *see* 15 U.S.C. § 632.

158. *See* 15 U.S.C. § 632; 48 C.F.R. § 2.101.

159. *See* Cal. Dredging Co. v. Sanders, 657 F. Supp. 38, 41 (D.D.C. 1986).

160. *Id.*

161. *Id.* (holding that a "size standard on a regional basis" should be considered as a "viable alternative to a nationwide size standard" and that "failure to do so . . . without rational explanation is arbitrary and an error of law").

162. *See* 13 C.F.R. § 121.201 (2013). The SBA appears unfazed by *California Dredging Co.*, describing its size standards by industry in absolute terms. *Compare* Cal. Dredging Co., 657 F. Supp. at 41, *with* 13 C.F.R. § 121.201.

The size standards described in this section apply to all SBA programs unless otherwise specified in this part. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.

13 C.F.R. § 121.201.

to . . . nationwide size standard” defined in *California Dredging Co. v. Sanders*,¹⁶³ should not be taken to the administrative courts.¹⁶⁴ There, the administrative court made it clear that it lacks jurisdiction to determine the constitutionality of SBA standards as the proper venue for such a case is the federal district courts.¹⁶⁵ Therefore, if a VOSB or a SDVOSB wishes to show that it should be qualified as a small business concern when the applicant concern/business entity is larger than the SBA allows, then the burden falls on them to disprove the SBA in federal district court by applying either the regional standard test or providing other factors that may persuade the federal district court judge of its small business concern status.¹⁶⁶

VIII. VOLUNTARY AND INVOLUNTARY TRANSFERS OF SHARES

In the event that a veteran shareholder voluntarily transfers stocks by any means to a non-veteran, the business may lose its VOSB status unless after the transfer, veteran shareholders still own 51% of the issued stocks and the transfer of ownership was done in accordance to CVE and contract officer requirements.¹⁶⁷ Any number of veterans may own these shares, so long as at least 51% is owned by veterans or service-disabled veterans.¹⁶⁸ The right of a voluntary transfer of shares may be limited by a contract such as a shareholder agreement, a premarital agreement, or a postnuptial agreement, but it may not affect the veteran’s or service-disabled veteran’s benefits of owning shares.¹⁶⁹

Involuntary transfers become slightly more complicated. Involuntary transfers occur when a shareholder must relinquish control of the shares in a corporation due to certain events.¹⁷⁰ Events such as death or divorce may require that the shareholder relinquish control, even if he or she does not want to.¹⁷¹ The intestate death of a veteran shareholder—which means with-

163. 657 F. Supp 38, 41 (D.D.C. 1986).

164. Terra Excavating, Inc., SBA No. SIZ-4785, 2006 WL 1668353, at *3 (May 19, 2006).

165. *Id.* (noting that although the federal district courts hold jurisdiction, a proper showing of facts must be demonstrated as to why an alternative to the SBA’s guidelines must properly demonstrate a dilemma not dissimilar to that in *California Dredging Co.*).

166. *See id.* at *3–4.

167. *See* 38 C.F.R. § 74.1(3) (2012).

168. *Id.*

169. *See id.* § 74.3(b).

170. *See, e.g., id.* § 74.3(e)(3).

171. *Id.*

out a valid and enforceable will—may result in such a transfer.¹⁷² Also, the divorce of a veteran shareholder, where the divorce decree requires transfer of the shares to a non-veteran divorcee spouse, can also cause potential conflicts.¹⁷³ Both of these scenarios are the most likely to lead to litigation. To properly protect the VOSB and SDVOSB, agreements that limit transfers of shares should strongly be considered when forming the business entity.

A. *Documents Limiting Transfers of Shares*

There are several documents that can limit the transfer of shares. For the purposes of this article, we shall only discuss three. The shareholder agreement, the premarital and postnuptial agreements, and lastly, the will, are documents that will likely be used commonly among veterans that own shares in a VOSB or SDVOSB. The importance of 51% ownership cannot be stressed enough. Less than 51% ownership is always fatal to the VOSB and SDVOSB, and may terminate any and all chances of gaining the contractual benefit.¹⁷⁴ Therefore, each shall be discussed in detail for the purpose of clarifying issues that may arise either in business formation or in the everyday lives of veteran shareholders.

1. Shareholder Agreements Between Shareholders of Corporations

Florida law specifically recognizes a shareholder's right to enter into a shareholders agreement with any other shareholder(s) of the same corporation.¹⁷⁵

A shareholders agreement typically grants rights to those shareholders who are party to the agreement that are above and beyond the rights that are inherent in the shares that they own, and is intended to ensure that those shareholders obtain the benefits of the

172. *See, e.g.*, *Panzirer v. Deco Purchasing & Distrib. Co.*, 448 So. 2d 1197, 1199–1201 (Fla. 5th Dist. Ct. App. 1984) (showing how the absence of a will can result in a personal representative filing suit against a surviving spouse over ownership of shares, even if the shares were given as a gift inter vivos or delivered as part of a joint account).

173. *See, e.g.*, *Steritech Grp., Inc., v. MacKenzie*, 970 So. 2d 895, 897 (Fla. 5th Dist. Ct. App. 2007) (showing how a divorce can result in an involuntary transfer of shares and how a shareholder agreement that is referenced on the face of a stock so transferred can bind both spouses to the shareholder agreement).

174. 38 C.F.R. § 74.3.

175. FLA. STAT. §§ 607.0731(1), .0732(1) (2012).

additional rights that they bargained for when making their investments.¹⁷⁶

And although the language of one of the two Florida statutes that reference a shareholders agreement says “[t]wo or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose,” the use of the word “may” indicates that the agreement can, and often does, include specifically enforceable additional terms.¹⁷⁷ Such additional terms can restrict alienation,¹⁷⁸ putting subsequent purchasers on notice if the stock certificates indicate conspicuously either on their face or on the back of the certificate that the stockholder is bound to an existing shareholder agreement.¹⁷⁹ Customarily, such stocks merely mention that the bearer is bound by a shareholder agreement with the actual agreement being recorded in the corporation’s articles of incorporation or bylaws by the secretary.¹⁸⁰

For these reasons, it is strongly recommended that the incorporators or subscribers for shares,¹⁸¹ or all of the shareholders of a VOSB or SDVOSB, come together and create, approve, and record in the bylaws or articles of incorporation a binding shareholder agreement offering the right of first refusal¹⁸² to other qualified veterans. Several measures can be taken. For ex-

176. Corp. Law Comm. of the Ass’n of the Bar of the City of N.Y., *The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions*, 65 BUS. LAW. 1153, 1155 (2009).

177. FLA. STAT. § 607.0731(1)–(2); *see id.* § 607.0732(1).

178. *See* FLA. STAT. §§ 607.0731(3), .0732(1)(h) (“An agreement among the shareholders of a corporation . . . is effective among the shareholders and the corporation . . . if it . . . [o]therwise governs . . . the relationship between the shareholders . . . and is not contrary to public policy.”). Like New York and Delaware, general restrictions against alienation will likely be seen by Florida’s courts as contrary to public policy. Corp. Law Comm. of the Ass’n of the Bar of the City of N.Y., *supra* note 176, at 1174.

179. FLA. STAT. §§ 607.0731(3), .0732(1)(h).

180. *See id.* §§ 607.01401(23), .0732(2)(a)1; *see also id.* § 607.0732(2)(a)1 (“An agreement [set forth] by this section shall be . . . approved by all persons who are shareholders at the time [of] the agreement . . .”). It is important to note that if more than 100 shareholders exist at the time the shareholder agreement is made, the agreement cannot restrict anything besides voting rights. *See id.* §§ 607.0731(1), .0732(1). *Compare id.* § 607.0732 (applying restrictions only to “this section”), *with* FLA. STAT. § 607.0731 (applying no such restriction). Also, if the “shares of the corporation are listed on a national securities exchange or regularly quoted in a market maintained by one or more members of a national or affiliated securities association,” then the “agreement [shall] cease[] to be effective” and the “board of directors may . . . adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.” *Id.* § 607.0732(4).

181. *Id.* § 607.0732(7).

182. *See id.* § 607.0732(2)(a)1. The right of first refusal is often used in property law to indicate the right of a named person to purchase property before it is offered for sale by its

ample, a right of first refusal where the corporation has the right to acquire the shares based on whatever good faith offer is presented to the veteran would allow the corporation to buy back its interests.¹⁸³ Another way, a better way, is for a current shareholder to offer a right of first refusal to all existing qualifying veteran shareholders of the corporation, thereby allowing the corporation to retain its VOSB or SDVOSB status.¹⁸⁴ Remember, a restriction on alienation requiring the selling shareholder to sell or transfer the share only to a known and verified qualified veteran shareholder will not be

current owner to a willing buyer. *See* Corp. Law Comm. of the Ass'n of the Bar of the City of N.Y., *supra* note 176, at 1178. For securities law, the New York Bar provides us with a clear definition. *See id.*

A *right of first refusal* (a "ROFR") requires a shareholder that desires to sell its shares to present an offer made by a potential purchaser that it proposes to accept to the other shareholders and/or the corporation, who then have an opportunity to purchase the shares at the same price and terms. In contrast, a *right of first offer* (a "ROFO") requires the selling shareholder to first solicit offers from the other shareholders and/or the corporation, and if the selling shareholder prefers to seek higher offers from third parties, it may do so, but it may not sell the shares to a third party at a lower price or on other terms that are less favorable to the selling shareholder than those offered by the other shareholders and/or the corporation.

Id. A ROFR is more likely to be allowed by the CVE when getting verified because it is beneficial to the veteran as it puts the onus of pricing on the third party purchaser.

183. *See, e.g.,* Steinberg v. Sachs, 837 So. 2d 503, 505 (Fla. 3d Dist. Ct. App. 2003) ("[A] right of first refusal is a right to elect to take specified property at the same price and on the same terms and conditions as those continued in good faith offer by a third person if the owner manifests a willingness to accept the offer." (quoting Coastal Bay Golf Club, Inc. v. Holbein, 231 So. 2d 854, 857 (Fla. 3d Dist. Ct. App. 1970))).

That right is clearly an executory right. By its very nature then, a right of first refusal would never contain specific terms such as price because the terms are always dictated by the third party whose offer the holder of the right of first refusal is bound to match in all essential details.

Id. (citing *Holbein*, 231 So. 2d at 857). But beware the percentage. If a corporation buys back its shares, existing shareholders run the risk of losing their VOSB and SDVOSB status if the final percentage of veteran or service-disabled veteran ownership falls below 51% of the outstanding shares. 38 C.F.R. § 74.1 (2012).

184. *See id.* (defining ownership interest in a SDVOSB as "a business not less than 51% of which is owned by one or more service-disabled veterans" and the ownership interest in a VOSB as "a small business concern that is not less than 51% owned by one or more veterans."). It is strongly urged that when drafting the shareholder agreement, all interested parties consult an attorney as failure to properly word a shareholder agreement can lead to the unenforceability of notice requirements and possibly a flawed right of first refusal. *See* Burns v. Barfield, 732 So. 2d 1202, 1204-05 (Fla. 4th Dist. Ct. App. 1999). Also, keep in mind that stock options held by another veteran or service-disabled veteran are protected so long as they are agreements between qualifying shareholders. "In determining unconditional ownership, CVE will disregard any unexercised stock options or similar agreements held by veterans or service-disabled veterans." 38 C.F.R. § 74.3(c).

allowed.¹⁸⁵ The veteran and service-disabled veteran should feel comfortable in knowing that he or she has the right to sell her shares too.¹⁸⁶

If a corporation would like to buy back its shares under a right of first refusal, Florida law does allow the intended and named VOSB or SDVOSB third-party beneficiary the right to file a claim for breach of contract against the selling shareholder, the buying shareholder, or both.¹⁸⁷ The fact that the buyer takes the stock certificate subject to the agreement puts the buyer on notice of the specifically enforceable agreement.¹⁸⁸ And because preparing such an agreement in this way would designate the VOSB or SDVOSB as a named and intended third party beneficiary, both the *contract breaching buyer* and the *noticed seller* may be required to either rescind or pay damages as defined in the shareholder agreement.¹⁸⁹ Inconsistencies between the shareholder agreement and the bargained for exchange between the seller and the buyer will likely be controlled by the shareholder agreement because the buyer takes in the stock's purchase agreement *subject to* the noticed shareholder agreement.¹⁹⁰

185. See Corp. Law Comm. of the Ass'n of the Bar of the City of N.Y., *supra* note 176, at 1176; see also 38 C.F.R. § 74.3(b).

186. See 38 C.F.R. § 74.3(b).

187. See *Harrington v. Batchelor*, 781 So. 2d 1133, 1135 (Fla. 3d Dist. Ct. App. 2001) (holding that where no shareholder agreement exists, a shareholder lacks standing and damages sustained may only be claimed by the corporation, but where there is "a contractual duty, between the wrongdoer and the shareholder," a "party to a contract may sue for its breach"). When we combine the idea that a contractual duty allows one shareholder to sue another shareholder where both are bound by an existing shareholder agreement, *id.*, with the principle that a named intended third party beneficiary may file a claim to specifically enforce the terms of an agreement, *Fla. Power & Light Co. v. Road Rock, Inc.*, 920 So. 2d 201, 203 (Fla. 4th Dist. Ct. App. 2006), both a named and intended third party beneficiary corporation and a shareholder baring a stock certificate which conspicuously display the existence of a shareholder agreement, may specifically enforce that shareholder agreement against the bearer of any other stock certificate which also conspicuously displays the existence of the same shareholder agreement, as long as the shareholder agreement itself meets the requirements of sections 607.0731 and .0732 of the *Florida Statutes*.

"A third party is an intended beneficiary, and thus able to sue on a contract, only if the parties to the contract intended to primarily and directly benefit the third party." "[I]n order to find the requisite intent, it must be shown that *both* contracting parties intended to benefit the third party. It is insufficient to show that only one party unilaterally intended to benefit the third party." "Florida law looks to the 'nature or terms of the contract' to find the parties' clear or manifest intent that it 'be for the benefit of a third party.'" Furthermore, Florida law holds that "the language used in a contract is the best evidence of the intent and meaning of the parties."

Road Rock, Inc., 920 So. 2d at 203 (alteration in original) (citations omitted).

188. FLA. STAT. §§ 607.0731(2)–(3), .0732(3) (2012).

189. See *id.*

190. See *id.* § 607.0731(3); *Baker v. Maytag*, 207 So. 2d 300, 303 (Fla. 3d Dist. Ct. App. 1968).

2. Premarital and Postmarital Agreements

Marriage and the dissolution of the marriage may cause a conflict with the VOSB and SDVOSB status of a small business concern.¹⁹¹ Therefore, in order to protect the contractual rights of these entities, a brief discussion on pre-nuptial and post-nuptial agreements is in order. After all, the last thing a shareholder wants is to have his or her shares devalued because the small business concern no longer qualifies to receive a preference on government contracts due to the termination of its VOSB and SDVOSB status. Additionally, because Florida is an equitable distribution state, absent an agreement, the courts may decide to divide shares in the corporation, transferring shares owned by a qualifying veteran or service-disabled veteran to a non-qualifying veteran or non-veteran spouse in the event of a marital dissolution. Prudence dictates that the right to contract be executed by a veteran or service-disabled veteran spouse upon the creation, or the receipt of, shares in a VOSB or SDVOSB.

Although Florida now recognizes the right of a wife to enter into a binding contract with her husband, this was not always the case.¹⁹² In 1903, Justice Hocker explained, “[a]t the common law a man and wife could make no contract with each other, and their contracts are nullities.”¹⁹³ Post-nuptial agreements were recognized only in rare circumstances, and only to the extent that equity demanded.¹⁹⁴ But Florida’s legislature grew to understand the importance of a woman’s right to contract with her husband and, as of 1970, a wife has every enforceable right to contract with her husband as a husband has to enter into a binding contract with his wife.¹⁹⁵

In order for a post-nuptial agreement to be enforceable, “there must be an agreement that shows there was a meeting of the minds that is supported

“When an agreement is evidenced by two or more writings, the writings must be construed together. This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together. Where a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other. But where a variety of instruments form one transaction, the law will not give effect to any one instrument unless the whole transaction is completed.”

Baker, 207 So. 2d at 303 (quoting 7 FLA. JUR. *Contracts* § 78, at 144–45 (1956)).

191. See 38 C.F.R. § 74.1.

192. Compare *Fritz v. Fernandez*, 34 So. 315, 319 (Fla. 1903), with FLA. STAT. § 708.09.

193. *Fritz*, 34 So. at 319.

194. *Id.*

195. See FLA. STAT. § 708.09; Act effective Oct. 1, 1970, ch. 70-4, § 3, 1970 Fla. Laws 66, 68 (codified at FLA. STAT. § 708.09 (1970)).

by consideration.”¹⁹⁶ And unless the agreement is read into the record officially before the court, the agreement should be evidenced by a writing or it may run afoul of the writing requirements created at common law.¹⁹⁷ Also, “a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.”¹⁹⁸ Florida’s courts further explain that

agreements entered into between the parties, acting without counsel and without full and fair disclosure of the parties’ assets, should be viewed with skepticism. This is all the more true when the parties enter[ed] into an oral settlement agreement years before the divorce, and later reconcile[d] after agreeing to its terms.¹⁹⁹

Therefore, if any of these mental states exist by the challenging spouse, a presumption exists that the agreement was not entered into voluntarily and is therefore voidable by the challenging spouse.²⁰⁰ In order to defeat this presumption, a showing of “either (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement . . . or (b) a general and approximate knowledge by the challenging spouse of the character and [the] extent of the marital property sufficient to obtain a value by reasonable means.”²⁰¹

Many of these same terms and conditions are thoroughly detailed and codified for premarital agreements.²⁰² “A premarital agreement must be in

196. 25A FLA. JUR. 2D *Family Law* § 612, at 148 (2010) (citing *Morange v. Morange*, 722 So. 2d 918, 920 (Fla. 2d Dist. Ct. App. 1998); *Loss v. Loss*, 608 So. 2d 39, 41–42 (Fla. 4th Dist. Ct. App. 1992) (per curiam); *Hieber v. Hieber*, 151 So. 2d 646, 649 (Fla. 3d Dist. Ct. App. 1963)); see also *Morange*, 722 So. 2d at 920 (“[T]o be judicially enforceable, a [post-nuptial] settlement agreement must be sufficiently specific and mutually agreeable regarding every essential element. The party seeking enforcement of the settlement has the burden of establishing a meeting of the minds or mutual reciprocal assent to a certain proposition by competent substantial evidence.”).

197. See *Morange*, 722 So. 2d at 920 (citing *Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr., Inc.*, 704 So. 2d 669, 673 (Fla. 1st Dist. Ct. App. 1997)); see also *Loss*, 608 So. 2d at 41–42.

198. *Matos v. Matos*, 932 So. 2d 316, 320 (Fla. 4th Dist. Ct. App. 2006) (citing *Casto v. Casto*, 508 So. 2d 330, 333 (Fla. 1987)) (“[T]he challenging spouse may have the agreement set aside by establishing ‘that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties.’”).

199. *Id.*

200. See *Macar v. Macar*, 803 So. 2d 707, 710–11 (Fla. 2001) (quoting *Casto*, 508 So. 2d at 333).

201. *Id.* at 711 (quoting *Casto*, 508 So. 2d at 333).

202. Compare, e.g., FLA. STAT. § 61.079(7)(a)2 (2012), with *Matos*, 932 So. 2d at 320 (citing *Casto*, 508 So. 2d at 333).

writing and signed by both parties. It is enforceable without consideration other than the marriage itself.”²⁰³

(a) Parties to a premarital agreement may contract with respect to:
 1. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located; 2. The right to buy, sell, use, transfer, exchange, . . . assign . . . property; [and] 3. The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event²⁰⁴

Additional consideration beyond the marriage itself is not necessary and “[a] premarital agreement becomes effective upon marriage of the parties.”²⁰⁵ Lastly,

[a] premarital agreement is not enforceable . . . if the party against whom enforcement is sought proves that: 1. The party did not execute the agreement voluntarily; 2. The agreement was the product of fraud, duress, coercion, or overreaching; or 3. The agreement was unconscionable when it was executed and, before execution of the agreement, that party: a. Was not provided a fair and reasonable disclosure of the property . . . of the other party; b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property . . . of the other party beyond the disclosure provided; and c. Did not have, or reasonably could not have had, an adequate knowledge of the property . . . of the other party.²⁰⁶

For the above reasons, a spousal agreement—whether signed before or during the marriage—should be drafted by attorneys representing both parties after all parties offer full and fair disclosure regarding not only the VOSB and the SDVOSB share value, but all other assets held at the time by both spouses. A full and accurate statement on the financial health of the VOSB/SDVOSB as of the date of the agreement should be provided to both parties, and, in the event that either spouse does not understand the financial statements, their attorneys should take the time to explain these statements to their respective spousal clients. Each spouse should sign the document in the presence of their respective attorneys, and not in the presence of the other, to avoid even the appearance of fraud, deceit, duress, coercion, misrepresenta-

203. FLA. STAT. § 61.079(3).

204. *Id.* § 61.079(4)(a)1–3.

205. *Id.* § 61.079(5).

206. *Id.* § 61.079(7)(a).

tion, or overreaching. Both parties should also agree upon a right of first refusal being offered to existing veteran or service-disabled shareholders in order to protect the VOSB and SDVOSB status of the business. Normally, valuation of the shares is important and should be as close to fair market value at the time of the transfer of the shares as possible, thereby avoiding the appearance of unconscionability. Failure to have a valuation agreement that both spouses can agree to at the time of the marital agreement, where the purchaser is the veteran spouse and/or existing veteran/service-disabled veteran, may lead to further litigation during a divorce. The goal should be to keep the veteran's benefits as protected as possible. The benefits of the VOSB and SDVOSB are intended for the veteran, not the divorced spouse.²⁰⁷

An important note, although Florida has not directly decided this issue: If the shareholder agreement and a premarital/postnuptial agreement are to be drafted together as one in the same—an idea the authors strongly discourage—the parties should take great care to ensure that all the elements of both (a) the premarital/postnuptial agreement, and (b) the shareholder agreement are met as defined at common law and in sections 61.079 and 607.0732 of the *Florida Statutes* respectively.²⁰⁸

207. See 38 C.F.R. § 74.1 (2012) (including the definition of surviving spouse but not including the definition of divorced spouse); 48 C.F.R. § 802.101 (including the definition of surviving spouse but not including the definition of divorced spouse).

208. FLA. STAT. §§ 61.079, 607.0732; *Morange v. Morange*, 722 So. 2d 918, 920 (Fla. 2d Dist. Ct. App. 1998) (citing *Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr., Inc.*, 704 So. 2d 669, 673 (Fla. 1st Dist. Ct. App. 1997)); see, e.g., *Darr v. Marine Elecs. Solutions, Inc.*, 96 So. 3d 527, 533–34 (La. Ct. App.), *cert denied*, 98 So. 3d 860 (La. 2012) (holding by a Louisiana appellate court with roots in civilian law interpreting a matter of Florida law by claimants within Louisiana's jurisdiction); see also *supra* Parts III, IV, and accompanying text.

Under Florida law, a shareholders' agreement is "a written agreement that is signed by all persons who are shareholders at the time of the agreement and such written agreement is made known to the corporation." Implicit in this statute is the requirement that the persons signing the agreement are signing the agreement "as shareholders" of the corporation. . . . [P]laintiff [has the] burden of proving that plaintiff and [the defendant spouse] signed the [marriage settlement agreement (MSA)] "as shareholders" of the corporations. . . . [If] they signed the MSA in their individual capacities as part of settling various matters involved in their divorce proceeding, . . . mere knowledge of the existence of the MSA by plaintiff and [the defendant spouse], without more, does not transform the MSA into a shareholders' agreement.

Darr, 96 So. 3d at 533–34 (citation omitted). Although two separate agreements should be drafted in order to ensure that each element is met, the agreements should reference the other and incorporate the content of the other in order to protect the integrity of both agreements. Great care should be taken to ensure that neither agreement contradicts the other and that the language is clear and unambiguous.

3. Wills, Intestacy, and Share Transfers upon Death

Both VOSB and SDVOSB security interests may be transferred upon death to either named beneficiaries in a will—known as devisees—or heirs to inherit through Florida’s intestacy laws if the estate is resolved in Florida.²⁰⁹ If the decedent veteran owned a security interest in a VOSB, then the qualification of the VOSB may terminate if a subsequent titleholder is *not* a qualifying veteran.²¹⁰ This includes unqualified non-veteran personal representatives, devisees, and/or any heirs at law, including some spouses.²¹¹

In Florida, as with many states, when a person dies intestate—that is without a valid will—their property is delivered to the decedent’s heirs by the personal representative as required by state law.²¹² A personal representative is a middle man who administers the estate of the decedent.²¹³ In essence, he or she takes possession in trust of the decedent’s real or personal property only to transfer legal title of the decedent’s property to the heirs of the deceased.²¹⁴ Intestate personal property to be so distributed includes any security ownership interest of business entities registered in Florida.²¹⁵ When a person dies testate, that is, with a valid will, the personal representative must deliver the ownership interest to the named beneficiary, or, if no beneficiary is named, to the testator’s heirs, unless a beneficiary of the residuary is named in the will.²¹⁶

We choose to reference the personal representative because when he or she takes possession of the stock from the decedent, he or she becomes the legal owner of the stock until it is delivered to the beneficiary heir or devisee.²¹⁷ When this happens, ownership may fall beneath 51%, and therefore, result in the failure of the business entity to qualify as a VOSB.²¹⁸ One way to avoid this problem is to have the personal representative be a *qualifying*

209. FLA. STAT. § 731.201(11), (20); *id.* §§ 732.101, .605.

210. *See* 38 C.F.R. § 74.3(e)(1), (4).

211. *See id.* § 74.1.

212. FLA. STAT. §§ 731.201(28), 732.101–.103, 733.602.

213. *Id.* § 731.201(28) (referring to personal representatives as having alternative names in case law such as “an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor”); *see also id.* § 733.301.

214. *Campbell v. Owen*, 132 So. 2d 212, 215 (Fla. 2d Dist. Ct. App. 1961) (quoting *Whitfield v. Whitfield*, 172 So. 711, 712 (Fla. 1937) (per curiam)); *see also* FLA. STAT. § 731.201(28).

215. FLA. STAT. §§ 731.201(32), 732.605(1).

216. *See id.* §§ 731.201(2), (11), (28), 732.101(1).

217. *Campbell*, 132 So. 2d at 215 (quoting *Whitfield*, 172 So. at 712) (“[A]n administrator stands in the position of a trustee holding the estate in trust for the heirs, distributees and creditors . . .”).

218. *See* 38 C.F.R. § 74.3(b)(1)–(3) (2012).

veteran by either expressly naming a personal representative that qualifies or by directing the court, through the will, to appoint a qualifying veteran as the personal representative.²¹⁹ And although “the probate court has the inherent authority to consider a person’s character, ability, and experience to serve as personal representative,”²²⁰ naming a qualified veteran or directing the court to choose a qualified veteran may be the best and most prudent advice we can give.

In Florida, a validly executed will requires a testator—the person whose property is being devised in the will—or a person directed by the testator in the presence of the testator, to sign at the end of the writing—Florida interprets this to mean the logical end, not necessarily the bottom of the document—before two witnesses who must sign in the presence of the testator and the presence of each other.²²¹ For a will to be valid, the testator must be of sound mind and must be either 18 years old or an emancipated minor.²²²

IX. CONCLUSION

In closing, becoming a VOSB or SDVOSB can become rather complicated. To ensure that your business is protected, it is strongly advised that those interested in creating a business concern with these benefits seek out the assistance of counsel to aid in the formation of their business and the verification process of the VOSB and SDVOSB. After honorably serving our country, our nation owes veterans and their families a great deal. Congress has decided to create laws that give preference in contracts to veterans.²²³ These contractual benefits can make for excellent business opportunities for shareholders. Our hope is that veterans will avail themselves of these benefits in Florida, as there can be few things more appealing to Floridians than welcoming veterans with an entrepreneurial spirit.

219. *See id.* § 74.3(e)(1).

220. *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1133 (Fla. 5th Dist. Ct. App. 2003).

221. FLA. STAT. § 732.502; *Bradley ex rel. Bradley v. Bradley*, 371 So. 2d 168, 170 (Fla. 3d Dist. Ct. App. 1979).

222. FLA. STAT. § 732.501.

223. *See, e.g.*, 38 U.S.C. § 8127 (2006 & Supp. IV).